

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2014-1985

GEMMA CASADESUS SMITH, ADMINISTRATRIX OF THE ESTATE OF  
MARK A. SMITH, DECEASED,  
Plaintiff-Appellant

-vs-

S.P. GREENVILLE INN LLC; FRATERNAL ORDER OF EAGLES  
LOCAL AERIE NO. 2436  
Defendant-Appellees.

ON APPEAL FROM THE GEAUGA COUNTY COURT OF APPEALS  
CASE NO. 14G03184

MEMORANDUM OF DEFENDANT-APPELLEE GREENVILLE INN  
IN OPPOSITION TO JURISDICTION

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**STATEMENT OF PUBLIC AND GREAT GENERAL INTERESTS**

This case involves a tragic but relatively straightforward Dram Shop action wherein the appellant alleges Dr. Mark Smith was killed as a result of the intoxication of patron Daniel Neesham who was allegedly served alcohol while in a noticeably intoxicated state by employees or agents of appellees Eagles Lodge and Greenville Inn. Both appellees deny the allegations.

Despite twenty-one depositions, seven hours of video surveillance footage, five experts and physical inspections of appellee establishments Eagles Lodge and Greenville Inn, the appellant fell short of the requisite evidence under well-established and time tested elements necessary to create a genuine issue of material fact. The trial court and the appellate court merely held the appellant to a standard no more rigorous than that of any other litigant under the well established statutory elements of the Dram Shop Act.

There is no inconsistent application of law regarding plaintiff's required elements of proof under R.C. 4399.18(A)(1). Liability under the Dram Shop Act is supposed to be difficult to establish due to the fact that it is a very narrow exception to the general rule that liquor permit holders are not liable for the actions of their patrons. The legislature imposed strict conditions under which liability could be established against liquor permit holders.

So called "circumstantial evidence" turned out to be the appellant's entire evidentiary presentation in the subject case. The appellant confuses the volume of evidence with quality specific to points of law required under the Dram Shop Act. Timing is everything with respect to the service of alcohol to the patron who is alleged to have proximately caused the plaintiff's decedent's death. Despite twenty-one depositions, five experts, and seven hours of video surveillance, the plaintiff could not produce one witness or piece of admissible evidence establishing that Daniel Neesham was served alcohol at the Greenville Inn after he was observed to have been in an intoxicated state.

Finally, there is no statewide call to impose a duty on liquor permit holders to force patrons to surrender car keys, arrange rides or call police when otherwise law abiding patrons refuse the liquor permit holder's commands. There has been no call by the General Assembly for tavern owners to post doormen at all places of egress for purposes of seizing, or sequestering patrons or summoning police for patrons they deem "intoxicated".

As there are no issues of public and great general importance implicated in the Eleventh District Court of Appeals' opinion in this particular matter, this Court should deny jurisdiction over this appeal.

#### **STATEMENT OF THE CASE AND FACTS**

As reflected in the record below, the following facts have been established pursuant to Rule 56(C) pleading.

##### **A. The Greenville Inn**

Located in Chagrin Falls, Ohio, the Greenville Inn had two bartenders working on the night of December 18, 2010; James G. Kinkaid and Scott L. Harris. Both Mr. Kinkaid and Mr. Harris had seventeen and twelve years of experience bartending, respectively, and both were certified by alcohol server awareness programs. (Kinkaid deposition, p. 6, lines 3-5; Harris deposition, p. 9, line 21 through p. 16, line 21). Both Mr. Kinkaid and Mr. Harris were familiar with patron Daniel Neesham, as he came into the Greenville Inn once or twice a week. (Kinkaid deposition, p. 17, line 25; Harris deposition, p. 85, line 14).

##### **B. Neesham served only one drink at Greenville Inn.**

The night of December 18, 2010, the bar was crowded and Mr. Kinkaid recalled seeing Daniel Neesham and serving him one vodka and soda. (Kinkaid deposition, p. 24, line 23; page 26, line 17; page 34, lines 22-25). Mr. Kinkaid was able to specifically recall serving Mr. Neesham only one drink, due

to the unique way in which Mr. Neesham ordered his drinks: "a vodka and soda in a pint glass for the extra soda." (Kinkaid deposition, p. 34, lines 17-25). **Mr. Neesham did not appear intoxicated when Mr. Kinkaid served him the one drink.** (Id., at page 42, lines 12-22). Scott Harris, the other bartender on duty at the Greenville Inn, had no recollection whatsoever of seeing Mr. Neesham on the night of December 18, 2010. (Harris deposition, p. 86, lines 11-20).

At approximately 11:30 p.m., off duty University Heights police lieutenant Todd Kinley observed Daniel Neesham at the Greenville Inn. (Kinley deposition, p. 28). During the initial encounter, Kinley could not recall whether Mr. Neesham was drinking alcohol, however he did state that Neesham did not appear intoxicated at that time. (Kinley deposition, p. 30).

At some point later in the evening (approximately 1:30 a.m., December 19, 2010), as Kinley was heading toward the door, he again encountered Mr. Neesham. Kinley described Mr. Neesham as "laughing and carrying on pretty loud and stumbling". (Kinley deposition, p. 32). During the course of the latter encounter, Mr. Kinley testified that he did not know whether Daniel Neesham was drinking alcohol at that time. (Kinley deposition, p. 32). At no point during the course of Mr. Kinley's visit to the Greenville Inn late on December 18, 2010, and in the early morning hours of December 19, 2010, could he recall ever seeing any employee of Greenville Inn serve Mr. Neesham alcohol. (Kinley deposition, p. 33). On the night of the incident. Mr. Kinley did not report anyone, including Mr. Neesham, to the bartending staff at the Greenville Inn with regard to concerns about bartenders serving patrons past the point of intoxication. (Kinley deposition, p. 44).

### **C. Mark Smith**

British ex-patriot Mark Smith, Ph.D., met friends Steve Taylor, Keith Roberts and Tommy Goggins for an evening of drinking earlier on December 18, 2010. The group began drinking at Panini's Restaurant, then went to the Burntwood Tavern, before coming to the Greenville Inn. (Goggins

deposition, pp. 7, 10, 14, and 15). Mark Smith left the Greenville Inn on foot at some point, presumably intending to walk a distance of over half a mile to his home.

Shortly after 2:15 a.m. on December 19, 2010, Matthew Pfouts observed a man lying on the side of the road presumably unconscious, as Pfouts was being driven home by a friend. (Pfouts deposition, pp. 18, 19 and 20). The man was lying near the white fog line with his feet pointed uphill and his head pointed downhill and was unresponsive. The plaintiff's decedent was wearing dark clothing and there was snow piled on the side of the road. (Pfouts deposition, p. 20). The absence of tire marks going off the traveled portion of the road, combined with the damage to Neesham's Toyota one and one-half feet to the left of the right wheel placed Mr. Smith on the traveled portion of the road in violation of Ohio law at the time of the accident. (See testimony of Brian Tanner).

Later in the morning of December 19, 2010, Daniel Neesham was discovered dead in his bedroom by his mother. In the portions of a suicide note left by Daniel Neesham which were released by the Bainbridge Police Department, he admitted accidentally striking Dr. Smith with his vehicle, although he claimed he initially thought he struck a deer.

Ultimately, the Geauga County Court of Common Pleas determined, and the Eleventh District Court of Appeals affirmed that summary judgment was appropriate for the Greenville Inn because there were no genuine issues of material fact to be litigated regarding whether the Greenville Inn knowingly served a noticeably intoxicated Daniel Neesham or had actual knowledge that Mr. Neesham was intoxicated at the time he was served intoxicating beverages. (Appellate opinion, p. 13). The Court also held that the First, Second, Third, Fourth and Sixth District Courts of Appeals consistently have held that any recovery against a liquor permit holder for injuries caused by an intoxicated patron must be via a claim under R.C. 4399.18. The Court did not err in granting motions for summary judgment for the defendant appellees. Summary judgment was therefore affirmed.

ARGUMENT

**I. PROPOSITION OF LAW**

**The Court of Appeals appropriately held that actual knowledge is required to be successful on a claim under R.C. 4399.18(A)(1).**

“With respect to the sale of liquor to a ‘noticeably intoxicated’ person in R.C. 4399.18(A)(1), this court has applied an actual-knowledge standard.” *Lesnau v. Andate Ents., Inc.*, 93 Ohio St.3d 467, 472, 756 N.E.2d 97 (2001)(citing *Gressman v. McClain*, 40 Ohio St.3d 359, 533 N.E.2d 732 (1988)). Despite Appellant’s suggestion to the contrary, this Court’s analysis in *Gressman* applies to claims brought under R.C. 4399.18(A)(1). As this Court has stated:

Gressman analyzed a cause of action under R.C. 4301.22(B) and the permit holder's sale of intoxicating beverages to an intoxicated person. Although the Gressman court indicated that the newly enacted R.C. 4399.18 likewise incorporated an actual-knowledge standard, the court was addressing R.C. 4399.18(A)(1), i.e., when the permit holder knowingly sells an intoxicating beverage to a noticeably intoxicated person in violation of R.C. 4301.22(B).

*Lesnau*, 93 Ohio St.3d at 472. Therefore, this Court has expressly recognized that R.C. 4399.18(A)(1) requires an actual knowledge standard.

Further, despite Appellant’s suggestion, applying an actual-knowledge standard to claims brought under R.C. 4399.18(A)(1) is not at odds with *Lesnau v. Andate Ents., Inc.*, 93 Ohio St.3d 467, 756 N.E.2d 97 (2001), but rather it is perfectly in line with this Court’s opinion in that case. *Lesnau* addressed the provision of R.C. 4399.18 that involves serving alcohol to those under the legal drinking age (currently codified as 4399.18(A)(2)). This Court announced:

The circumstances surrounding the sale of liquor to one who is noticeably intoxicated differ from those where the permit holder or its employee sells to an underage person. A determination of whether a person is intoxicated requires the use of judgment and subjectivity. As the Gressman court noted, this involves a number of factors that may be derived from various sources, such as the employee's experience, or his or her knowledge of and/or familiarity with the patron's habits and capacities. However, whether a patron is of legal age to purchase beer or alcohol is an easily verifiable fact

that may be determined in many instances from a driver's license or photo identification card. In addition, we note that R.C. 4399.18(A)(1) includes the additional requirement that the sale be made to a "noticeably" intoxicated person, whereas subsection (A)(3) merely requires that the sale be in violation of R.C. 4301.69. Consequently, we find that the actual-knowledge standard in *Gressman* is distinguishable.

*Lesnau*, 93 Ohio St.3d at 472. Thus, this Court in *Lesnau* expressly rejected Appellant's suggestion that actual knowledge should not be required in cases involving serving alcohol to noticeably intoxicated individuals because actual knowledge is not required in cases that involve serving alcohol to those under the legal drinking age. Appellant further quotes *Gressman*, 40 Ohio St.3d at 362, in an attempt to blur this clear distinction between serving alcohol to a noticeably intoxicated person and serving alcohol to a minor. (Appellant's brief at 9). However, *Lesnau*, which was decided nearly 13 years after *Gressman*, makes clear that the two situations are in fact distinguishable, and for that reason, they require different states of culpability. *Lesnau*, 93 Ohio St.3d at 472. Thus, an actual knowledge standard should be applied to claims brought under R.C. 4399.18(A)(1).

## II. PROPOSITION OF LAW

### **The knowledge element required under the Dram Shop Act was appropriately applied by the trial court and the appellate court below.**

The appellant makes the dubious argument that somehow she was "never actually allowed" to demonstrate actual knowledge of Daniel Neesham's intoxication at the time he was served alcohol through means other than direct evidence. (Page 11 of the Brief in Support of Jurisdiction). There were twenty-one depositions taken, five experts were involved in the case, seven hours of video surveillance at the Eagles Lodge were scrutinized, and both bars were inspected and photographed in the early morning hours for purposes of documenting the location of the alleged alcohol service. Plaintiff could produce no specific individual witness who could testify that he or she observed Daniel Neesham being

served alcohol by the Greenville Inn after Neesham was arguably observed being loud and stumbling by Todd Kinley.

In 1986, the Dram Shop Act codified certain exceptions to the general rule of prohibiting liability. “The Dram Shop Act was intended to continue the longstanding rule of limiting the liability of liquor permit holders, not expanding their liability. Any exception to the general rule was explicit and narrow.” *Id.*, citing *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St. 3d 419, 421, 715 N.E.2d 536 (1999). Because the liability of a liquor permit holder is a narrow exception to Ohio’s general common law prohibition, the statute is strictly construed. Moreover, the cases cited by the appellant in support of her contention that the trial court applied an unrealistically high standard do not stand for the proposition asserted by the appellant.

The plaintiff cites several Dram Shop Act cases for the proposition that evidence other than direct admissions on the part of liquor permit holder employees can be used to establish knowledge under the Dram Shop Act. In *Sullivan v. Heritage Lounge*, 10<sup>th</sup> Dist. No. 04AP-1261, 2005 Ohio 4675, summary judgment for the liquor permit holder was upheld on appeal, despite evidence that the allegedly intoxicated patron was served six beers by a bartender over the course of three hours. *Id.* at page 12. There was no evidence whatsoever that the allegedly intoxicated patron was observed to be intoxicated before he was served alcohol. *Id.* The appellant’s reference to circumstantial evidence as proof of intoxication played no role whatsoever in the *Sullivan* case.

Likewise, *Bickel v. Moyer*, 3d Dist. Hancock No. 5-94-14, 1994 WL 530685 (September 29, 1994), does not stand for the proposition asserted by the appellant. At headnote 3 of the opinion in *Bickel*, the Court stated:

“The knowledge required of a liquor permit holder must be actual knowledge, and cannot be constructed knowledge. To hold otherwise

would subject vendors of intoxicating beverages to ruinous liability every time they serve alcoholic beverages.” *Id.* at 6.

In *Bickel*, there was a patron who testified that he saw patron Scott (the allegedly intoxicated patron) staggering and otherwise intoxicated before the defendant liquor permit holder “continued to provide him alcoholic beverages”. *Id.* at 7. The testimony was in conflict with testimony from two bartenders who denied that the allegedly intoxicated patron appeared to be intoxicated before they served him. Summary judgment was, therefore, overturned. *Id.*

In *Studer v. Veterans of Foreign Wars Post 3767*, 185 Ohio App. 3d 691, 2009-Ohio-7002, 925 N.E.2d 629 (11<sup>th</sup> Dist.), a patron who killed a pedestrian after leaving the defendant tavern in an intoxicated state had been at the defendant VFW for seven hours and consumed at least nine beers which he bought directly from various VFW employees. Significantly, there was evidence in that case that the felonious patron was observed to be in an intoxicated state earlier in the evening, before he sat at the bar and consumed two of the nine beers. *Id.* at 697.

Similarly, in *Harris v. Pallone Management, Inc.*, 70 Ohio App. 3d 207, 590 N.E.2d 874 (10<sup>th</sup> Dist. 1990), the standards of evidence necessary under the Dram Shop Act were also consistently applied. In *Harris*, the plaintiff was a minor who surreptitiously obtained entry into the defendant liquor permit premises using a friend’s identification. The evidence in the case indicated that the minor had already consumed fifteen beers before he came to the door of the liquor permit holder premises where the permit holder’s personnel had direct interaction with him for purposes of clearing his identification. *Id.* at 211. Thereafter, the minor gained entry and was served four beers in the bar. *Id.* The Court reversed summary judgment regarding a question of fact regarding whether the liquor permit holder had knowledge of the minor’s age or intoxication because of the evidence of his alcohol consumption before he had the direct

interaction with the liquor permit holder's employees at the door, before he was served the four beers in the establishment. *Id.*

The factual element that *Sullivan*, *Bickel*, and *Harris* have in common is that evidence existed in the trial court suggesting visible intoxication by either a patron or employee of the premises liquor permit holder prior to a time when alcohol was served to the allegedly intoxicated patron. None of these cases stand for the proposition that circumstantial evidence by itself of mere intoxication in a liquor establishment is sufficient to defeat summary judgment in a Dram Shop case. To the contrary, each of the district courts in their opinions adhere to the proposition that liability under the Dram Shop Act is a narrow exception to the general common law prohibition against liability for liquor permit holders. Additionally, each of the opinions suggest that it is the timing of the evidence that is crucial to a determination of whether summary judgment was appropriate. In *Sullivan*, the Court pointed out that the lack of evidence indicating service of alcohol after the patron was observed to be intoxicated was pivotal to the Court upholding summary judgment.

### **III. PROPOSITION OF LAW**

**No independent negligence claim exists which states a cause of action against liquor permit holders to impose liability for acts committed by intoxicated patrons off premises, outside of the Dram Shop Act.**

The appellant misstates the approach of the trial court and appellate court relative to the appellant's attempt to create common law causes of action which do not exist. The Eleventh District Court of Appeals did not subsume the appellee's duty to prevent its customer from driving his vehicle, convincing him to turn over his keys or calling the police on the customer into the Dram Shop Act because none of those duties actually exist at common law in the State of Ohio in any appellate district. The appellant can provide the Ohio Supreme Court with no case law supporting the proposition that a

liquor permit holder has an obligation to affirmatively engage customers before they leave the premises to determine whether they should be driving a vehicle and then physically prevent them from driving their vehicle by restraining them, taking their keys or otherwise preventing them from entering their vehicle.

**A. The Greenville Inn made no effort to interfere with Daniel Neesham's departure.**

The appellant provided no case law at the trial court level which would impose a duty upon a liquor permit holder to physically prevent a patron from leaving the premises of the liquor permit holder. Ohio does not recognize a common law cause of action for negligence against a liquor permit holder for injuries occasioned as a result of the alleged consumption of alcohol by an intoxicated patron.

The Court noted in *Aubin v. Metzger* 3<sup>rd</sup> Dist. No. 1-03-08, 2003-Ohio-5130, "As various other courts have noted, R.C. 4399.18 was created with the intent to merge and limit previous common law remedies." See *Stillwell v. Johnson*, 76 Ohio App. 3d 684 (1<sup>st</sup> Dist. 1991); see also *Lesnau v. Andate Enterprises, Inc.*, 93 Ohio St. 3d 467, 468-469, 2001-Ohio-1591; *Litteral v. Ole Managerie*, 4<sup>th</sup> Dist. No. 95CA33, 1996 Ohio App. LEXIS 3870 (Sept. 4, 1996), at \*9-\*10; *Cummins*, 87 Ohio App. 3d at 520.

To impose a duty upon the liquor permit holder to take affirmative steps to physically sequester patrons in the bar to prevent them from leaving , or forcing patrons to relinquish their car keys or otherwise preventing them from getting into their cars is unworkable, legally actionable, and simply unprecedented.

**1. The Ohio Dram Shop Act**

In her brief, the appellant states that the Court of Appeals ruling stretches the Dram Shop Act too far and that liquor permit holders remain subject to general common law causes of action. (Brief of appellant p. 26-27). However, Courts of Appeal in seven Ohio Districts have recognized that R.C. 4399.18 abrogates all common law negligence claims against liquor permit holders for damage that

results from the negligent actions of intoxicated patrons: The First, Second, Third, Fourth, Sixth, Ninth, and Eleventh. *See Studer v. VFW Post 3767*, 185 Ohio App. 3d 691, 2009-Ohio-7002, 925 N.E.2d 629 (11<sup>th</sup> Dist.), ¶41<sup>1</sup>; *Diquattro v. Stellar Group Inc.*, 9<sup>th</sup> Dist. No. 04CA0095-M, 2005-Ohio-6547, ¶11<sup>2</sup>; *Aubin v. Metzger*, 3<sup>rd</sup> Dist. No. 1-03-08, 2003-Ohio-5130, ¶17<sup>3</sup>; *Litteral v. Ole Managerie*, 4<sup>th</sup> Dist. No. 95CA33, 1996 Ohio App. LEXIS 3870 (Sept. 4, 1996), at\*9-\*10<sup>4</sup>; *Cummins v. Rubio*, 87 Ohio App. 3d 516 (2<sup>nd</sup> Dist. 1993); *Stillwell v. Johnson*, 76 Ohio App. 3d 684 (1<sup>st</sup> Dist. 1991)<sup>5</sup>; *Brown v. Hyatt-Allen Am. Leg. Post 538*, 6<sup>th</sup> Dist. No. L-89-336, 1990 Ohio App. LEXIS 4886 (Nov. 9, 1990), at \*12<sup>6</sup>.

The appellant relies primarily on four cases for her position that the Greenville Inn is liable to the decedent for breaching a duty that is independent from the Ohio Dram Shop Act: *Mid-Continent Ins. Co. v. Coder*, 6<sup>th</sup> Cir. No. 13-3573, 2014 U.S. App. LEXIS 7460 (Apr. 21, 2014), *Auto-Owners v. JC KC*, 9<sup>th</sup> Dist. No. 18937, 1998 Ohio App. LEXIS 5268 (Nov. 4, 1998), *Prince v. Buckeye Union Ins. Co.*, 5<sup>th</sup> Dist.

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<sup>1</sup>“[S]ince the enactment of R.C. 4399.18 in 1986, it has consistently been held that the General Assembly clearly intended that 4399.18 provided the exclusive remedy against liquor permit holders \*\*\* for the negligent acts of intoxicated patrons\*\*\*.”

<sup>2</sup>“[T]he Ohio Dram Shop Act, R.C. 4399.18, does in fact provide the sole means for imposing liability on a liquor permit holder when a third party suffers injuries caused by a permit holder’s intoxicated patron.”

<sup>3</sup>“A plain reading of the law demand that common law liability based upon the on [sic] premise actions of an intoxicated person be subsumed within R.C. 4399.18.”

<sup>4</sup>stating that R.C. 4399.18 abrogates the applications of common law negligence in situations involving injuries caused to a third-party by an intoxicated patron

<sup>5</sup>“[T]he clear intent of the General Assembly is that all common-law and prior statutory actions against liquor-permit holders or their employees for the negligent actions of intoxicated patrons are now merged and limited to those remedies available either in 4399.01 or R.C. 4399.19.”

<sup>6</sup>R.C. 4399.18 provides the exclusive remedy against liquor permit holders for parties injured by the actions of intoxicated persons

No. 92-CA-6, 1992 Ohio App. LEXIS 6155 (Dec. 2, 1992), and *William v. Saga Enterprises, Inc.*, 225 Cal. App. 3d 142 (Cal. App. 1990).

The Ninth District Court of Appeals, which issued the *Auto-Owners Ins. Co. V. JC KC, INC.*, 1998 WL766695 decision in 1998 which Appellant relies upon, changed its position two years later and explicitly stated that after the enactment of the Dram Shop Act, R.C. 4399.18 is “now the sole means for imposing liability on a liquor permit holder when a third party suffers injuries caused by the permit holder’s intoxicated patron.” *Tollet v. Bokor*, 9<sup>th</sup> Dist. No. 98CA007227, 2000 Ohio LEXIS 1798 (Apr. 26, 2000), at \*12. This position has been reiterated in numerous Ninth Circuit opinions, the position in *Auto-Owners* has not. See *Billi v. Moyses-Morgan Enters.*, 9<sup>th</sup> Dist. No. 12CA010260, 2013-Ohio-1214, ¶14; *Jackson v. Walker*, 9<sup>th</sup> Dist. No. 22996, 2006-Ohio-4351, ¶20; *Diquattro v. Stellar Group*, 9<sup>th</sup> Dist. No. 04CA0095-M, 2005-Ohio-6547, ¶11.

In *Sullivan v. Heritage*, 10<sup>th</sup> Dist. No. 04AP-1261, 2005-Ohio-4675, the plaintiff made a claim against the liquor-permit holder for violating the Dram Shop Act and negligently breaching its duty to protect him. *Sullivan*, at ¶10. The Tenth District “acknowledged” that precedent from the Courts of Appeal of the Second, Third, Fourth, and Sixth Districts hold that any recovery against a liquor permit holder for injuries caused by an intoxicated patron must be via R.C. 4399.18. The Tenth District stated that while the defendants failed to make this argument, if they had, the plaintiff’s negligence claim would have been dismissed. *Sullivan*, at ¶36. Thus, the Tenth District also implicitly rejected the holdings of *Prince* and *Auto-Owners*.

As stated above, Courts of Appeal in seven Ohio District have determined that the Dram Shop Act is the exclusive means of recovery against a liquor-permit holder for injury or death resulting from the actions of intoxicated patrons. See *supra*, p. 20-21. Also, as noted above, Courts of Appeal in the third, ninth, tenth, and twelfth districts have explicitly or implicitly rejected the position set forth in

*Prince* and *Auto-Owners*; this is especially significant since *Auto-Owners* is from the Ninth District Court of Appeals. Thus, the majority of Ohio Appellate Districts have recognized that the Dram Shop Act subsumes all claims against a liquor-permit holder that arise out of conduct of intoxicated patrons. *Prince* is the only opinion that counters the majority and, as evidenced above, has not been adopted by any other district. As such, the appellant's theory that she has a negligence action that is independent from claims that arise under the Dram Shop Act is without merit.

Even if it could be determined that *Prince v. Buckeye Union Ins. Co., supra* and *Auto-Owners v. JC KC, supra* were controlling authority, it would be irrelevant because those cases are factually distinguishable from the present case and therefore are inapplicable.

In *Prince*, a third-party (Prince) was injured while riding as a passenger in the car of Gibson, who had negligently been served alcohol by a liquor permit holder known as Night Moves Café. *Prince*, at \*2. It was learned throughout the course of litigation that while Gibson was patronizing Night Moves Café, his car keys were confiscated an employee due to Gibson's apparent intoxication. *Prince*, at \*2. However, despite initially being prevented from driving, an employee negligently returned Gibson his keys and the none of the Night Moves Café employees took any additional steps to prevent Gibson from driving. *Id.*

In *Auto-Owners*, Horton and Supple were socializing at a bar known as K.C.'s Lakes Lounge. It appears that throughout the course of the evening, both Horton and Supple became visibly intoxicated. *Auto-Owners*, at \*2. At the close of the evening, an employee of K.C.'s Lakes Lounge placed Horton into the backseat of Supple's car despite the fact that Supple was driving and was clearly intoxicated. *Id.* After leaving the bar, Supple caused a car accident that resulted in Horton's death. *Id.*

In both *Prince* and *Auto-Owners*, an employee of the liquor-permit holding establishment took an affirmative action to assist the visibly intoxicated patron to engage in dangerous behavior in which harm to the intoxicated patron or to a third-party was foreseeable.

Conversely, in the present case, no such affirmative step was taken. In fact, the employees of Greenville Inn were only aware of serving Mr. Neesham one alcoholic beverage and were not aware that he was drunk, nor were they aware when he left. *See supra*, p 2-5. The employees could not have known that Mr. Neesham was going to drive drunk because unlike *Prince* and *Auto-Owners*, they did not facilitate for him to do so. The trial court judge determined, the Greenville Inn employees were unaware that Mr. Neesham was intoxicated. (*See Judgment Entry* dated Jan. 31, 2013). Further, there has been no evidence presented by the appellant that the Greenville Inn employees were aware of how Mr. Neesham would be getting home – Mr. Neesham could have had a ride arranged. Thus, regardless of whether *Prince* or *Auto-Owners* are controlling law, the present case is factually distinguishable and thus the two cases have no bearing on this case. As such, the trial court's determinations should be upheld and the appellant's claims dismissed.

**2. The appellant fails to support her position that there exists an independent negligence action.**

As explained above, Greenville Inn's alleged liability is limited to that set forth in the R.C. 4399.18 as the appellant's alleged independent negligent claims arise from Greenville Inn's sale and service of alcohol to Mr. Neesham. The appellant has failed to provide adequate support for her theory that the Greenville Inn employees, whose testimonies have demonstrated they were unaware of Mr. Neesham's alleged intoxication, had affirmative duty to confiscate Mr. Neesham's keys, persuade him not to enter his vehicle, and call the police upon his exit.

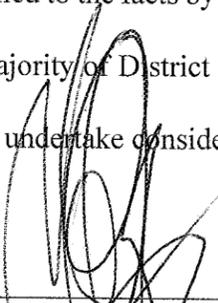
Despite this, the appellant argues that Greenville Inn breached its duty to the decedent because it failed to take steps to protect its patrons when it knew or should have known that criminal activity emanating from its property and Mr. Neesham allegedly engaged in a crime by driving drunk. However, the case law cited by the appellant to support this position limits this duty to property that *is in the*

*possession or control of the business owner.* In *Simpson v. Big Bear Store Co.*, 73 Ohio St. 3d 130, 652 N.E.2d 702 (1995), the Ohio Supreme Court explicitly states in the syllabus that a business owner has a duty to warn or protect its business invitees from anticipate criminal acts of third-parties, however, "The duty does not extend to premises not in the possession and control of the business owner." *Simpson*, at syllabus (emphasis added).

The incident that resulted in the decedent's death did not occur on property that was owned or within the control of Greenville Inn. Thus the alleged duty owed by Greenville Inn to the decedent pursuant to *Simpson v. Big Bear Store, supra*, is entirely irrelevant.

#### **CONCLUSION**

There is simply no compelling reason why the Ohio Supreme Court should exercise jurisdiction in this case. The Dram Shop Act was appropriately applied to the facts by the trial and appellate courts, consistent with the precedents of this Court and the majority of District Courts of Appeals in Ohio. Consequently, there is no rational basis for the Court to undertake consideration of this matter.



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