[Cite as *Caplinger v. Korrzan Restaurant Mgt., Inc.*, 2011-Ohio-6020.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JOHN D. CAPLINGER, JR., et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2011-06-099
	:	O P I N I O N
- vs -		11/21/2011
	:	
KORRZAN RESTAURANT MANAGEMENT, INC., et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-02-0547

John A. Smalley, 131 N. Ludlow Street, Suite 1400, Cincinnati, Ohio 45402, for plaintiffs-appellants

Matthew R. Skinner, P.O. Box 145496, Cincinnati, Ohio 45250, for defendant-appellee, Korrzan Restaurant Management, Inc.

Thomas J. Downs, 130 West Second Street, Suite 410, Dayton, Ohio 45402, for defendant-appellee, John D. Caplinger, Sr.

Robert J. Byrne, 150 East Gay Street, 21st Floor, Columbus, Ohio 43215, for defendant-appellee, Ohio Department of Job and Family Services

PIPER, J.

{¶1} Plaintiffs-appellants, John Caplinger, Jr. and Sandra Nelson, appeal the

decision of the Butler County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, Korrzan Restaurant Management, Inc. (Korrzan). We affirm the decision of the trial court.

{¶2} Korrzan owns and operates Willie's Sports Café (Willie's) in West Chester, Ohio. John Caplinger, Sr. (Caplinger) was an employee at Willie's, and began drinking at Willie's bar after completing his Wednesday afternoon shift on August 28, 2008. Two bartenders served Caplinger various alcoholic beverages between 3:40 p.m. and 5:15 p.m. Caplinger's bar tab for the afternoon included two "BLT combos," two 16 ounce draft beers, as well as three shots of Jagermiester. The shots may have been four ounces each because, according to Caplinger, the bartenders usually filled the shot glasses to the rim, instead of the normal "half pour" of two ounces.

{¶3} During the time that Caplinger was drinking at Willie's, his ex-girlfriend, Sandra Nelson, called Caplinger to inquire into his whereabouts because he was late picking up their son, John Caplinger Jr. (John), a minor, for his weekly visitation. Nelson asked Caplinger if he had been drinking and later stated in a deposition that she thought Caplinger was drunk because he was slurring his speech and was in a hyper mood. Nelson told Caplinger not to pick up John if he had been drinking. Nelson called her husband, Brian Nelson, and told him to check on Caplinger's condition before letting John get in the car with him.

{¶4} Caplinger left Willie's almost immediately after hanging up with Nelson, as established by the fact that the trip from Willie's to Nelson's home takes approximately 45 minutes and Caplinger arrived at Nelson's home approximately 45 minutes after completing the call. Once at Nelson's home, John got into the car with Caplinger and drove away before Brian Nelson had time to come from the backyard/garage area of the house in order to check on Caplinger's physical state. Shortly after Caplinger drove away from Nelson's home, he passed out at the wheel, and slammed into the underlying concrete foundation of an

overpass. Both Caplinger and John were seriously injured as a result of the wreck, and Caplinger has no memory of what occurred on the day of the accident, including his time at Willie's.

{¶5} Police officers responding to the scene found broken beer bottles in Caplinger's vehicle, and Caplinger does not remember whether the beer bottles were in his vehicle prior to the date of the accident. Caplinger's blood alcohol level, drawn at 7:29 p.m. on the night of the accident, was .182. Caplinger's toxicology screening also tested positive for Vicodin and cocaine.

{¶6} Caplinger had been, up to the day of the accident, an experienced drinker, who abused alcohol on several occasions. Prior to the accident, Caplinger had been arrested four other times for driving while intoxicated, once when John was in the car. Since the time of the accident, Caplinger has begun attending Alcoholics Anonymous meetings.

{¶7} Sandra Nelson, for herself and on behalf of John, filed a complaint against Korrzan and Caplinger for damages resulting from the accident. The claim against Korrzan alleged that Willie's served an already intoxicated person in violation of Ohio's Dram Shop Act. Korrzan filed a motion for summary judgment, and the trial court granted it. John and his mother now appeal the decision of the trial court, raising the following assignment of error.

{¶8} "THE TRIAL COURT ERRED IN DETERMINING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT IN THIS CASE; CONSEQUENTLY, THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE, WILLIE'S MOTION FOR SUMMARY JUDGMENT."

{¶9} John and his mother claim in their single assignment of error that the trial court erred in granting summary judgment in favor of Korrzan because there are genuine issues of material fact to be litigated regarding whether Willie's served an already intoxicated Caplinger in violation of Ohio's Dram Shop Act.

{¶10} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶11} "Once the moving party's burden has been satisfied, the burden shifts to the non-moving party, as set forth in Civ.R. 56(E)." *Jackson v. Walker*, Summit App. No. 22996, 2006-Ohio-4351, ¶10. The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389. Not all arguable facts are material. A dispute of fact can be considered "material" only if it affects the outcome of the litigation. *Myers v. Jamar Enterprises* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352. Not all disputes of fact create a genuine issue. Instead, a dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. Id.

{¶12} According to Ohio's Dram Shop Act, "a person has a cause of action against a permit holder or an employee of a permit holder for personal injury, death, or property damage caused by the negligent actions of an intoxicated person occurring off the premises or away from a parking lot under the permit holder's control only when both of the following can be shown by a preponderance of the evidence: (A) The permit holder or an employee of the permit holder knowingly sold an intoxicating beverage to * * * (1) A noticeably intoxicated

person in violation of division (B) of section 4301.22[1] of the Revised Code * * * [and] (B) The person's intoxication proximately caused the personal injury, death, or property damage." R.C. 4399.18.

{¶13} The Ohio Supreme Court examined Ohio's Dram Shop Act in *Gressman v. McClain* (1988), 40 Ohio St.3d 359, 363, and held that "actual knowledge of intoxication is a necessary component in fashioning a justiciable claim for relief under R.C. 4301.22(B). * * * *Constructive knowledge will not suffice*. It has been observed that to hold otherwise would subject vendors of intoxicating beverages to ruinous liability every time they serve an alcoholic beverage." (Emphasis added and internal citations omitted.) In explaining actual knowledge, the court stated, "knowledge of a patron's intoxication may be obtained from many sources and in many ways, and is furnished or obtained by a variety of facts and circumstances. Generally speaking, a person has knowledge of an existing condition when his relation to it, his association with it, his control over it, or his direction of it are such as to give him actual personal information concerning it." Id.

{¶14} After reviewing the record, and construing all facts in a light most favorable to John and his mother, summary judgment was appropriate, as there are no genuine issues of material fact to be litigated regarding whether Willie's knowingly served a noticeably-intoxicated Caplinger or had "actual knowledge" Caplinger was intoxicated at the time he was served intoxicating beverages.

{¶15} As stated above, Caplinger has no memory of what occurred on the day of the accident, or between the hours of 3:40 p.m. and 5:16 p.m. when he was drinking at Willie's. For purposes of review, we accept as true the allegations that Willie's bartenders served Caplinger two 16-ounce beers and three four-ounce shots of Jagermiester. However, no

1. According to R.C. 4301.22(B), "no permit holder and no agent or employee of a permit holder shall sell or furnish beer or intoxicating liquor to an intoxicated person."

evidence demonstrates any employee of Willie's had actual knowledge that Caplinger was noticeably intoxicated at the time of service.

{¶16} Sherry Ann Robinson, the General Manager of Willie's, testified via deposition that she was working on the day of the accident, and spoke to Caplinger as he drank at the bar. She stated that she did not perceive any change in his speech pattern or in his affect, and that Caplinger seemed "normal" during her interaction with him. Michelle Holland, a bartender and 15-year employee at Willie's who served Caplinger, testified via deposition that in her experience "some people can drink all day long and it doesn't affect them, some people can drink for an hour and it affects them. So, every single person is different." Holland testified that Caplinger "was not drunk" when she served him on the day of the accident.

{¶17} John did not offer any evidence to rebut the testimony of Robinson or Holland that Willie's employees did not knowingly sell an intoxicating beverage to Caplinger while he was noticeably intoxicated. No evidence was presented indicating any employee of Willie's witnessed, or had any actual personal information, that Caplinger was noticeably intoxicated. Instead, John challenges the credibility of Robinson and Holland, and offers multiple after-the-fact inferences, compounding one another, offered in hindsight to suggest that Caplinger was noticeably intoxicated at the time he was served. However, a review of the record indicates that even when construing the evidence in a light most favorable to John, the compilation of inferences creates a suggestion of constructive knowledge rather than actual knowledge.

{¶18} In its summary judgment motion, Korrzan informed the court of its basis for summary judgment and identified Robinson's and Holland's depositions as demonstrating that Willie's did not knowingly serve a noticeably intoxicated person. As stated above, neither Robinson nor Holland believed, based on their actual personal information, that

Caplinger was intoxicated at the time he was served alcohol. Korrzan therefore asserted a valid summary judgment argument because John could not support at least one element of his Dram Shop claim. At that point, the summary judgment burden shifted to John, and he was required to "set forth specific facts showing that there is a genuine issue for trial," according to Civ.R. 56(E). Even if we were not to believe Willie's witnesses, there remain no specific facts showing that Willie's did in fact have actual knowledge that Caplinger was noticeably intoxicated at the time he was served, and as stated earlier, John cannot rest on the mere allegations in his pleadings that Willie's had actual knowledge.

{¶19} John relies heavily on several items that he argues should be considered as circumstantial evidence to demonstrate Willie's actual knowledge of Caplinger's noticeably intoxicated condition at the time intoxicating beverages were sold. It is possible to use circumstantial evidence to demonstrate actual knowledge, such as testimony from a witness that the server of alcohol observed a patron intoxicated such that the patron could not talk or that he fell off of his barstool several times, but the server continued to serve alcohol anyway. See *Hlusak v. Sullivan* (June 29, 2000), Cuyahoga App. No. 74367, 2000 WL 868495, *2. However, the circumstantial evidence John offers does not establish actual knowledge that Caplinger was noticeably intoxicated at the time he was served. The Ohio Supreme Court has specifically stated that constructive knowledge (i.e., arguments of what someone should have known), whether it is based on direct or circumstantial evidence, *will not suffice* to demonstrate a claim under Ohio's Dram Shop Act. See *Gressman*.

{¶20} First, John argues that a genuine issue exists regarding the amount of alcohol Caplinger consumed on the day of the accident. While Holland and Robinson stated that Willie's pours two-ounce shots, Caplinger, who does not remember the day in question, stated that he normally received shots in glasses filled to the rim, which would therefore contain four ounces of liquor. However, the difference in testimony does not create an issue

of fact, as we have construed the facts in a light most favorable to John, and have therefore assumed that each shot glass was full upon service to Caplinger.

{¶21} Even then, the amount of alcohol consumed by Caplinger does not create a genuine issue of material fact without evidence that Caplinger was noticeably intoxicated at the time he was served. The effect alcohol has on someone differs with each person, and varies depending on factors such as drinking experience, weight, and food consumed in relation to alcohol intake, and it was established by evidentiary materials that Caplinger was an experienced drinker who consumed alcohol regularly.

{¶22} The fact that Caplinger consumed two beers and three full shots does not establish that he was in fact noticeably intoxicated at the time he was served. The bar tab relied upon by John does not list at what times the alcohol or food were served to Caplinger, and no evidence exists to establish when during the course of the evening Caplinger consumed the food and drinks. According to the statutory provisions, the focus must be on the time of service, and John has not offered any evidence that Caplinger was noticeably intoxicated when served.

{¶23} Relying on the amount of alcohol Caplinger consumed at Willie's raises only a question of constructive knowledge, which is directly contradicted by the witnesses who had contact with Caplinger at the time he was served alcohol. There is no evidence Caplinger was noticeably intoxicated when he was served. See *Tillett v. Tropicana Lounge & Restaurant, Inc.* (1991), 81 Ohio App.3d 46, 49 (affirming summary judgment where fact that Tillett drank 15 cans of beer while at the Tropicana raised only a question of constructive knowledge, which was "rebuffed by the uncontested accounts of his actual appearance of sobriety"); and *Cattabiani v. Purvis* (Nov. 15, 1996), Montgomery App. No. 15851, 1996 WL 664993, *4 (affirming summary judgment where there was no evidence that the bartenders and servers had actual knowledge that Cattabiani was noticeably intoxicated at the time of

service even though he consumed eight to ten beers, and assessed in hindsight that he was "shit-faced" while in the bar).

{¶24} Next, John argues that Sandra Nelson's deposition testimony that Caplinger was drunk when she called him creates a genuine issue of fact. In her deposition testimony, Nelson states that she knew that Caplinger was drunk when she called him because of the way he spoke, that he was slurring his words, and because of his hyper mood. However, the phone call between Caplinger and Nelson occurred just prior to Caplinger leaving Willie's and did not happen as Caplinger was being served by employees of Willie's. No server or employee of Willie's observed Caplinger on the phone, nor did anyone overhear the call. Accepting as true that Caplinger was slurring his speech and acting in a hyper mood, the only fact that could be established by Nelson's testimony is specific to the time of the phone call, right before Caplinger left the bar. However, as we've indicated above, a person must be noticeably intoxicated *at the time of service* – not at the time he leaves the bar – for purposes of the Dram Shop Act.

{¶25} John also argues that an affidavit from his expert witness creates a genuine issue of material fact because in it, the witness posits that Caplinger's blood alcohol content was between .179 and .238 at the time he left the bar. John submitted the affidavit of Dr. John Wyman who is an expert in the field of forensic toxicology. In his affidavit, Dr. Wyman states several assumptions based on the bar tab mentioned above, such as Caplinger drinking two beers and three four-ounce shots of Jagermiester. While the affidavit does not contain any mention of the two sandwich meals listed on the bar tab, we construe Dr. Wyman's assumptions and conclusions in favor of John. However, even assuming that Caplinger's blood alcohol level was between .179 and .238, Dr. Wyman's affidavit specifically states that these levels were specific to the time Caplinger left the bar. Nowhere in Dr. Wyman's affidavit does he state what the levels were at the time that Caplinger was served,

or whether Caplinger would have been noticeably intoxicated at the time he was actually served alcohol. See *Hlusak*, 2000 WL 868495 at *3, (affirming summary judgment where expert's affidavit failed to establish "that before the last drink was served at [the bar], appellant would have appeared visibly intoxicated").

{¶26} John relies on *Morrison v. Fleck* (1997), 120 Ohio App.3d 307, for the proposition that an expert's affidavit can create a genuine issue of material fact. In *Morrison*, the court found that there was a genuine issue of material fact based on the expert's affidavit, which determined that based on the number of beers a patron consumed, an experienced bartender would know that the patron was intoxicated enough "for even a casual observer to have noticed it." Id. at 317. However, we do not find *Morrison* persuasive for two reasons.

{¶27} First, the court in *Morrison* did not recognize the difference between actual and constructive knowledge, nor did the court analyze whether the information in the affidavit constituted actual or constructive knowledge. This distinction is significant when following the clear precedent of *Gressman v. McClain,* which clearly requires actual knowledge and rejects arguments of constructive knowledge. Second, Dr. Wyman's affidavit is factually unlike the affidavit cited in *Morrison*, such that the facts and opinions therein do not correspond.

{¶28} Dr. Wyman's affidavit suggests that when a person's intoxication levels are between ".179 and .237 (sic) g/dL, essentially everyone will be profoundly impaired. At these blood alcohol levels, it is illegal to drive and not reasonably safe for anyone to operate a motor vehicle. These levels of intoxication will affect everyone, even experienced drinkers, by causing drowsiness, slowed reaction times, diminished critical judgment and ability to process information, reduced visual acuity and impaired sensory-motor coordination. All of these effects would have severely compromised Mr. Caplinger's ability to drive an automobile."

{¶29} Accepting these statements as true, Dr. Wyman's affidavit establishes that

someone with these levels would not be fit to drive given slowed reaction times, diminished judgment and so on. However, Dr. Wyman's statements do not establish that these same signs would appear in Caplinger such that he would have been noticeably intoxicated at the time he was actually served, or that an experienced bartender or casual observer would have noticed his intoxication because of his conduct. Instead, the only physical manifestation, visible indication, or outward sign listed in Dr. Wyman's affidavit is drowsiness. However, there was no evidence submitted that Willie's or anyone else ever witnessed Caplinger being drowsy. In fact, Sandra Nelson testified that Caplinger's mood while she talked to him was hyper and agitated. There is no testimony from anyone that Caplinger displayed observable signs of intoxication at the time he was being served alcohol.

{¶30} Regardless of what genuine issues of material fact John contends the affidavit creates, the fact remains that Dr. Wyman's assumptions and conclusions are at all times directed to the time when Caplinger *left* Willie's, and not when he was served. While expressing his opinion as to what impact a blood alcohol level might have on drinkers in the general population, Dr. Wyman cannot say, and *does not say*, Caplinger exhibited signs of being noticeably intoxicated when he was served at Willie's. "The mere fact that [a person's] blood alcohol content was in excess of the legal limit when tested after the accident, does not lead one to conclude, without additional evidence, that [an establishment] knowingly served alcohol to a visibly intoxicated person in violation of R.C. 4399.18." *Rockwell v. Ullom* (Sept. 3, 1998), Cuyahoga App. No. 73961, 1998 WL 563967, *6 (affirming summary judgment where tortfeasor's blood alcohol content was .169 but plaintiff failed to produce evidence that the servers had actual knowledge that he was visibly intoxicated at the time of service).

{¶31} Even when disregarding that Dr. Wyman's affidavit uses inference upon inference, offers conclusions in generalities, and contains speculative facts based on hindsight, Dr. Wyman's affidavit still does not create any genuine issues of material fact. See

Fuerst v. Ford, Allen App. No. 1-03-81, 2004-Ohio-1510, ¶7, (affirming grant of summary judgment because plaintiff's submitted evidence required the court to make inference upon inference where the underlying evidence was not more than speculation and hindsight).

{¶32} The minority view below characterizes Holland's and Robinson's testimony as opinion, yet the testimony was a factual, unchallenged reporting of their direct and personal contact with Caplinger. Even when construing *all* of John's evidence in the light most favorable to him, there were no facts presented to contradict their testimony. The minority view suggests that application of *Gressman* results in a viable claim only being established with "an unbiased third-party" or the actual admission of the commercial establishment. To quite the contrary, the factual scenarios that would allow for a viable claim are limitless. While direct and/or circumstantial evidence can be used, we rightfully avoid what constructive knowledge suggests *possibly might have* happened and adhere to what *did happen*.

{¶33} The minority view desires to use inferences and speculation to suggest what it believes might have occurred. However, inferentially creating constructive knowledge was explicitly rejected in *Gressman*. The minority attempts to circumvent *Gressman* by selectively hand-tailoring the arguments of possibility while simultaneously ignoring *Gressman's* cogent rational and full application. *Gressman's* reasoning is sound: constructive knowledge will not suffice "because to hold otherwise would subject vendors to ruinous liability every time they serve an alcoholic beverage." Ohio's Dram Shop Act was not meant to create liability on the part of a commercial establishment for every patron who voluntarily consumes alcohol and irresponsibly injures another; both the Dram Shop Act and *Gressman* rightly require more for such liability to occur.

{¶34} After reviewing the record, John has failed to produce any evidence to demonstrate that Willie's had actual knowledge that Caplinger was noticeably intoxicated at the time he was served any of the alcoholic beverages mentioned above. Pursuant to Civ.R.

56, summary judgment was correctly given to Willie's. We need not address whether or not John's injuries were proximately caused by Caplinger's alcohol intoxication, or cocaine and Vicodin consumption, creating an intervening act to break the causal connection between Caplinger's alcohol consumption at Willie's and John's injuries as a result of the accident. John's assignment of error is overruled.

{¶35} Judgment affirmed.

HENDRICKSON, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶36} I respectfully dissent from the majority's decision for when the evidence is looked at in the light most favorable to John, the nonmoving party, a genuine issue of material fact remains as to whether Caplinger was noticeably intoxicated at the time he was served.

{¶37} Initially, while I agree with the majority finding the Ohio Supreme Court's decision in *Gressman v. McClain*, (1988), 40 Ohio St.3d 359, has some application here, I believe the majority improperly construes that decision in an overly broad fashion.

{¶38} In *Gressman*, Holly C. Pasch went to the Green Hills Golf Course clubhouse after playing a round of golf to have a drink and socialize with other patrons. Id. at 359. While there, Pasch, a regular clubhouse patron described as "reserved and ladylike," consumed three or four alcoholic beverages, and potentially more provided to her by other patrons, before the bartender stopped serving her after observing her "openly kissing a member of the group to whom she had just been introduced." Id. Pasch subsequently drove away from the premises "with her tires spinning" only to lose control of her vehicle on the

highway causing her to collide with an oncoming vehicle killing its driver, his three passengers, and herself. Id.

{¶39} In reversing the trial court's decision granting Green Hills a directed verdict, the court, relying on Civ.R. 50(A)(4), which essentially mirrors the summary judgment standard, found "the trial court and the court of appeals both relied upon [*Settlemyer v. Wilmington Veterans Post No. 49* (1984), 11 Ohio St.ed 123] as the basis for deciding that Green Hills owed no duty to third persons who were injured by one of its patrons off the permit premises." The court continued by stating that because it had previously "confined *Settlemyer* to its facts" and announced a rule of law requiring a plaintiff seeking to recover damages in a civil action based upon a violation of R.C. 4301.22(B) to "prove that the permit holder or his employee knowingly sold an intoxicating beverage to a noticeably intoxicated person whose intoxication proximately caused the damages sought," the matter must be reversed and remanded.

{¶40} As can be seen, in *Gressman*, unlike the case at bar, the question of whether Green Hills' employees lacked actual knowledge of Pasch's intoxication was not in dispute for the Green Hills' employees immediately stopped serving her upon noticing that she was intoxicated. Instead, the court's discussion regarding actual knowledge was triggered only by the decedent's estate claiming constructive notice as the proper standard. Nowhere did the court in *Gressman* hold one's claim of actual knowledge could not be subject to dispute by otherwise contradictory evidence. Despite the majority's implications otherwise, the court's holding in *Gressman* does not prohibit the trial court from considering evidence indicating noticeable intoxication so as to create an issue of fact regarding a witness' claim of actual knowledge.

{¶41} That said, while the majority claims John did not offer any evidence to rebut the deposition testimony of Robinson or Holland, Caplinger's fellow co-workers, the majority fails

to properly take into account the evidence John provided discrediting their opinions. This includes, among other things, evidence from Caplinger's ex-wife indicating he was drunk, evidence that he exhibited noticeably slurred speech, and evidence that he had a blood alcohol content between .179 and .238. As Dr. Wyman's affidavit indicates, exhibiting such a high blood alcohol content would have caused even an experienced drinker like Caplinger to be "profoundly impaired."

{¶42} Common knowledge teaches us that one simply cannot reach such a high level of intoxication instantaneously. In turn, while I agree this evidence more accurately describes Caplinger's level of intoxication upon leaving the bar, the opinions advanced by Robinson and Holland should involve a credibility determination by the trier of fact. By holding otherwise, this court simply ignores the evidence provided by John, not to mention common knowledge regarding alcohol consumption, and establishes an unnecessary and unreasonable burden on him to find an unbiased third-party patron who personally observed Caplinger at the time he was served. Even then, under the majority's rationale, such testimony would likely only establish constructive notice and not create an issue of fact regarding the credibility of Robinson and Holland's opinions claiming Caplinger was not noticeably intoxicated. One should not be held to such a high standard in order to get his day in court. This is especially true in this case as reasonable minds could easily conclude Robinson and Holland were being untruthful by denying actual knowledge of Caplinger's otherwise obvious intoxicated state.

{¶43} Although they remain undeterred, I find the majority's rationale leaves no set of facts that could preclude the trial court from granting a bar owner's motion for summary judgment when it denies actual knowledge. This is not the General Assembly's intent behind Ohio's Dram Shop Act or the Ohio Supreme Court's holding in *Gressman*. The *Gressman* decision, in particular the court's discussion regarding actual knowledge, may need further

clarification to address this apparent confusion. Accordingly, I respectfully dissent from the majority's decision and would find the trial court erred by granting summary judgment to Korrzan.