[Cite as *Kulin v. Van Hart, Inc.*, 2008-Ohio-5050.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOHN KULIN, et al.,	)	
	)	CASE NO. 07 CA 850
PLAINTIFFS-APPELLEES,	)	
	)	
- VS. -	)	O P I N I O N
	)	
VAN HART, INC., et al.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 05CVH24452.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellees:

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For Defendants-Appellants:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 25, 2008

VUKOVICH, J.

¶{1} Defendant-appellant Van Hart, Inc. appeals the decision of the Carroll County Common Pleas Court which granted judgment in favor of plaintiff-appellee John Kulin (and his wife) in his "dram shop" action. The main issues on appeal are whether appellee's injury was foreseeable, whether actual knowledge of the tortfeasor's intoxication was required, whether there was such knowledge, and whether the tortfeasor was served by an employee of the bar. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On October 1, 2004, John Kulin sustained a severe injury at the Corner Bar in Minerva, Ohio, when another patron, Calvin Perrine, landed a flying kick into the side of Mr. Kulin's knee. Mr. Kulin and his wife, Tommie Kulin, filed a dram shop complaint against Van Hart, Inc., dba Corner Bar, and its president, who has since been dismissed as a defendant. Also sued were Calvin Perrine, Bud Perrine (Calvin's father who is alleged to have served alcohol to his son as a bartender) and another bartender (Jennifer Wiley, who has since been dismissed as a defendant).

¶{3} A bench trial proceeded from March 27 through 29, 2007. At this trial, Mr. Kulin testified that he was talking to friends when he heard a stomping noise and then felt his leg painfully buckle. He saw Calvin Perrine, whom he did not know at the time, standing over/on him. (Tr. Vol I at 45-46, 95). When Mr. Kulin's cousin, Jason Johnson, pushed Calvin Perrine off Mr. Kulin's leg, a scuffle between Mr. Johnson and others then ensued. After Mr. Kulin and his cousin escaped to the parking lot, Bud Perrine, whom Mr. Kulin recognized as one of the bartenders, exited and apologized for his son's behavior. (Id. at 51-52, 115).

¶{4} A bystander had called police, and Mr. Kulin filed a police report, which apparently resulted in criminal charges against Calvin Perrine. Mr. Kulin was then brought to the hospital where it was determined that he suffered tears in his knee and a fracture. He required surgery and was off work for six months. (Id. at 69). Upon return to work, he had to take a lower paying position due to his permanent restrictions. (Id. at 71).

¶{5} Jason Johnson testified that a group of people, including Calvin Perrine, were loud, screaming, pushing and shoving, mostly jokingly, throughout the night. (Id. at 177-178, 201). When he heard the aforementioned stomp, he turned and saw Calvin Perrine flying through the air at him. He quickly moved, resulting in the "super kick" hitting his cousin in the knee. (Id. at 145). Mr. Johnson stated that Bud Perrine had served him and Mr. Kulin drinks and had also served drinks to his own sons, Calvin and Josh Perrine. (Id. at 163-164). Three other witnesses were called to confirm that they have witnessed Bud Perrine bartending. (Id. at 101-102, 107-109, 111-112).

¶{6} Patron Roger Poling testified that he knew the Perrines but had just met Mr. Kulin and Mr. Johnson on the night of the incident. (Vol. II at 13-14). Mr. Poling testified that Bud Perrine and Jennifer Wily were bartending that night. (Id. at 14). He witnessed Bud Perrine serve his son, Calvin, drinks that appeared to be whiskey. (Id. at 15-16, 31-32). Mr. Poling described Calvin as acting drunk and differently than normal. (Id. at 28, 73). In fact, he witnessed Calvin fall off his barstool backwards. He then saw Bud Perrine help his son back onto the stool and then "cut him off" for a couple of hours. (Id. 15-16). Mr. Poling believed Calvin was "sobering up" during that time. (Id. at 48, 55). Some fifteen minutes or so before the incident, Mr. Poling saw Bud Perrine start serving Calvin again. (Id. at 59). Thereafter, Mr. Poling watched Calvin go behind the bar and then jump up and slide over the top of it in order to begin a flying kick toward Mr. Kulin and Mr. Johnson. (Id. at 19, 46, 76).

¶{7} Next to testify was Richard Hartong, the president of Van Hart, Inc. Although he admitted that Bud Perrine occasionally tends bar and checks identifications at the door, he declined to characterize him as an employee since he is not on the official payroll. (Id. at 185-187). Mr. Hartong acknowledged that Bud Perrine's compensation for his actions is often in the form of free drinks or forgiving a tab at the bar or forgiving an overdue personal loan. (Id. at 206-207). Mr. Hartong conceded that Bud Perrine was working at the bar that night in various capacities and that he did help out behind the bar that night as well. (Id. at 208-209).

¶{8} Mr. Hartong also revealed that the bar has a "no whiskey" rule in place for the Perrine boys, Calvin and Josh. (Id. at 188). He explained that the bar's policy

was to prohibit twenty-two-year-old Calvin Perrine from drinking anything stronger than beer. He disclosed that Calvin Perrine would do "dumb things" when drinking whiskey and characterized his behavior when on whiskey as "wound tight," "rowdy," "loud," "wild," "crazy" and "obnoxious." (Id. at 188-189).

¶{9} The defense's three witnesses then contradicted much of what the defendant's own representative, Mr. Hartong, freely admitted. For instance, the two scheduled bartenders testified that Bud did not drink for free and that he always paid his own tab. (Id. at 269, 296). One of these bartenders testified that Bud did not help tend bar on the night of the incident. (Id. at 296). She also stated that she did not serve Calvin and that he did not appear impaired when she saw him. (Id. at 286-286, 288).

¶{10} Bud Perrine testified that he occasionally helps at the bar by stocking, serving, cooking and checking identifications. (Vol. III at 6-7). Yet, he denied that he receives free drinks or is forgiven for tabs or loans. (Id. at 7-8, 38-39). He also denied that he was bartending that night. (Id. at 9). He especially denied that he had served Calvin any type of beverage. (Id. at 25-26). He stated that his son had been out before coming to the Corner Bar on the night of the incident but that he was not intoxicated. (Id. at 10, 12). He noted the "whiskey rule" and testified that he did not see Calvin consume anything at the Corner Bar. (Id. at 26, 52-53). Finally, he claimed that Calvin did not kick but merely pushed Mr. Kulin for blocking the exit. (Id. at 61).

¶{11} After trial, the court allowed post-trial briefs, ordered production of transcripts and encouraged continued settlement efforts. The parties' briefs argued over the application and evidence supporting the dram shop provisions in R.C. 4399.18. More than seven months after trial, on November 2, 2007, the trial court released its decision in favor of the Kulins.

¶{12} The trial court found that Mr. Kulin's injury was caused by Calvin Perrine's intentionally inflicted flying kick. The court also found that Calvin Perrine was intoxicated and was served by the Corner Bar. The court opined that his behavior was consistent with his reputation when intoxicated, citing the whiskey rule. The court discounted Bud Perrine's credibility concerning whether he served his son and whether his son appeared intoxicated. Rather, the court found credible Mr. Poling's

testimony about Calvin falling off his stool and appearing drunk and about Bud serving Calvin and helping him back onto his stool.

¶{13} The trial court concluded that Mr. Kulin's injury was proximately caused by the negligence of the bar's employee in serving alcohol to Calvin Perrine. Thus, the court found Van Hart, Inc. jointly and severally liable with Bud and Calvin Perrine for Mr. Kulin's compensatory damages, which the court calculated to be $238,524. Van Hart, Inc. filed timely notice of appeal and is the only appellant herein.

THE STATUTE: R.C. 4399.18

¶{14} The relevant dram shop statute provides in its entirety:

¶{15} "Notwithstanding division (A) of section 2307.60 of the Revised Code and except as otherwise provided in this section, *no person, and no executor or administrator of the person, who suffers personal injury, death, or property damage as a result of the actions of an intoxicated person has a cause of action against any liquor permit holder or an employee of a liquor permit holder who sold beer or intoxicating liquor to the intoxicated person unless the personal injury, death, or property damage occurred on the permit holder's premises or in a parking lot under the control of the permit holder and was proximately caused by the negligence of the permit holder or an employee of the permit holder*. [Emphasis and paragraph break added.]

¶{16} "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:

¶{17} "(A) The permit holder or an employee of the permit holder knowingly sold an intoxicating beverage to at least one of the following:

¶{18} "(1) A noticeably intoxicated person in violation of division (B) of section 4301.22 of the Revised Code;

¶{19} "(2) A person in violation of section 4301.69 of the Revised Code.

¶{20} "(B) The person's intoxication proximately caused the personal injury, death, or property damage.

¶{21} "Notwithstanding sections 4399.02 and 4399.05 of the Revised Code, no person, and no executor or administrator of the person, who suffers personal injury, death, or property damage as a result of the actions of an intoxicated person has a cause of action against the owner of a building or premises who rents or leases the building or premises to a liquor permit holder against whom a cause of action may be brought under this section, except when the owner and the permit holder are the same person." R.C. 4399.18 (emphasis added).

¶{22} As can be seen, there are differences in the liability for on premises versus off premises injuries. For instance, for off premises acts, the permit holder can only be held liable for negligent, not intentional, acts of the intoxicated person. However, *for an on premises act such as here, the permit holder can be liable for both negligent and intentional acts inflicted by the intoxicated person.*

¶{23} Moreover, for off premises acts, the statute speaks of the permit holder's knowing act, e.g., knowingly serving a noticeably intoxicated person. Yet, *for on premises acts, the statute requires merely negligence by the permit holder.* Any further interpretation and application of the statute shall be set forth upon addressing appellant's arguments below.

ASSIGNMENT OF ERROR

¶{24} Appellant's sole assignment of error provides:

¶{25} "THE TRIAL COURT'S JUDGMENT FINDING LIABILITY AGAINST APPELLANT, VAN HART, INC. UNDER REV. CODE § 4399.18 IS NOT SUPPORTED BY COMPETENT CREDIBLE EVIDENCE AS TO ALL MATERIAL ELEMENTS AND, THEREFORE, JUDGMENT MUST BE REVERSED."

¶{26} Judgments supported by some competent, credible evidence will not be reversed on appeal as being against the manifest weight of the evidence. *State v. Wilson,* 113 Ohio St. 382, 2007-Ohio-2202, ¶24 (a civil sexual predator case), citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. When addressing a trial court's decision on weight and credibility, the reviewing court is guided by the presumption that the findings of the trial court are correct. *Wilson,* 113 Ohio St. 382 at ¶24, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77,

80-81. The rationale for this presumption is that the trial court is in the best position to view witnesses and observe their demeanor, voice inflection, and gestures. Id.

¶{27} "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." Id.

¶{28} Besides reiterating these well-established premises, this new *Wilson* precedent definitively determined that the standard for evaluating the weight of the evidence in a civil case is even more deferential to the finder of fact than in a criminal case. *Wilson,* 113 Ohio St. 382 at ¶26. The Court pointed out that criminal appeals allow reweighing, but civil appeals require affirmance of judgments supported by some competent, credible evidence. Id.

¶{29} In arguing a lack of competent, credible evidence to support appellee's case, appellant breaks its argument here into four sections, which we shall address in order. First, appellant points out that R.C. 4399.18 requires negligence by the bar or its employee and he focuses his argument on his claim that the attacker's conduct was not foreseeable as this was an unprovoked attack.

¶{30} However, a rational trier of fact could find that an incident such as this was foreseeable considering the bar's and the serving employee's past experience with Calvin Perrine. As the trial court emphasized, it was undisputed that this bar had a well-publicized "no whiskey rule" for this attacker and his brother. Bud Perrine stated that the rule was by his suggestion as the attacker's father. Yet, he is the one alleged to have served his son whiskey. The bar owner himself testified that the Perrine whiskey policy was in place because Calvin Perrine would get "wound tight" on whiskey and would act "rowdy," "loud," "obnoxious," "wild," and "crazy," and would do "dumb things." (Vol. II at 188-189). Testimony also established that Calvin Perrine was involved with a group of loud people who were jokingly screaming at and shoving each other. (Vol. I at 145, 177-178, 201).

¶{31} As aforementioned, R.C. 4399.18(A) allows for liability for not only intentional acts by the patron by also reckless and even negligent acts. The patron's act here, whether intentional, reckless or negligent, could reasonably be described as

foreseeable if Calvin was drinking whiskey and/or was intoxicated. Due to the bar's rule, the employees' undisputed knowledge of such rule, their knowledge of Calvin Perrine's rowdy and wild character when drunk on whiskey in particular, his involvement in roughhousing throughout that very night and the evidence of his intoxication such as falling off a barstool backwards and being "cut off" for a period of time, this case is distinguishable from any case cited by appellant on this issue. See, e.g., *Campbell's v. Chris's Café*, 5th Dist. No. 2005-CA-108, 2006-Ohio-4063. Under the particular circumstances in the case before us, we cannot say that the trial court's judgment was contrary to the manifest weight of the evidence on this ground.

¶{32} The second argument appellant makes is that there is no evidence of a bar employee's actual knowledge of Calvin Perrine's intoxication. Before disputing the weight of the evidence on actual knowledge, appellant raises a legal issue as to whether actual knowledge of intoxication is required by the bar or its employee or whether constructive knowledge is sufficient. He cites a Sixth District case in support of his conclusion that actual knowledge of intoxication is required. See *Brown v. Hyatt-Allen American Legion Post 538* (Nov. 9, 1990), 6th Dist. No. L-89-336.

¶{33} The *Brown* court's decision was premised upon a Supreme Court case, which arose prior to the enactment of the dram shop statute but which noted the new statute nonetheless for the proposition that the legislature maintained the prior common law actual knowledge test. Id., citing *Gressman v. McClain* (1988), 40 Ohio St.3d 359. Although *Brown* was an on premises injury case, *Gressman* was an off premises injury case. When pointing out the features of the new statute, the Supreme Court quoted only the portion of R.C. 4399.18 dealing with off premises injuries. *Gressman*, 40 Ohio St.3d at 362-363. Thus, the Sixth District's *Brown* case erroneously relied upon *Gressman* as *Gressman* only applies the actual knowledge standard (in dicta for that matter) to an off premises injury under R.C. 4399.18(A)(1). See *Lesnau v. Andate Ent., Inc.* (2001), 93 Ohio St.3d 467, 472 (where the Supreme Court refused to apply the actual knowledge standard to R.C. 4399.18(A)(2) dealing with underage patrons).

¶{34} Moreover, the Sixth District's *Brown* case misinterpreted the plain language of R.C. 4399.18 concerning on premises injuries. As noted above in our

review of the statute, the off premises injury section specifically states both "knowingly" and "noticeably intoxicated". R.C. 4399.18(A)(1). Thus, any cases dealing with off premises liability would correctly state that actual knowledge is required when applying the noticeably intoxicated provision in R.C. 4399.18(A)(1). See, e.g., *Sullivan v. Heritage Lounge*, 10th Dist. No. 04AP-1261, 2005-Ohio-4675, ¶17; *Diquattro v. Stellar Group, Inc.*, 9th Dist. No. 04CA0095-M, 2005-Ohio-6457, ¶11.

¶{35} However, our case is concerned with on premises injuries. Nowhere does the portion of R.C. 4399.18 relevant to on premises injuries mention knowingly or noticeably. In fact, it specifically states that the permit holder or its employee must be *negligent*. This specific standard of conduct rules out any argument that actual knowledge of intoxication is required. This analysis is not without support. See *McKinley v. Chris' Band Box* (2003), 153 Ohio App.3d 387, 392 (on premises injury caused by negligence exists where permit holder persists in serving alcoholic beverages to a person whom he knows *or should know* is intoxicated).

¶{36} Even if appellant were correct in arguing that actual knowledge was required, appellant's weight of the evidence argument would fail as a reasonable trier of fact could determine that Bud Perrine in fact knew his son was drunk. Either way, we recap various factors that also support the negligence standard outlined above.

¶{37} Firstly, contrary to appellant's suggestion, the testimony of bar employees that Calvin did not appear drunk need not be taken as true. As set forth above, key portions of the testimony presented by these three defense witnesses conflicted with the testimony of defendant's own president. The trial court specifically found Bud Perrine's testimony to lack credibility. He denied bartending that night, but multiple witnesses placed him behind the bar serving drinks.

¶{38} Mr. Poling, who was apparently adjudged credible by the fact-finder, testified that Bud Perrine served his intoxicated son drinks in a glass appearing to contain whiskey, notwithstanding the no whiskey policy and the well-known wild, crazy and rowdy state that whiskey causes in Calvin. Mr. Poling knew Calvin Perrine's normal, sober behavior and opined that Calvin was acting drunk. Mr. Poling witnessed Calvin Perrine fall backwards off of his barstool. Both his brother and Bud Perrine had

to help Calvin back onto his stool. According to Mr. Poling, Bud Perrine even "cut off" his son from drinking for awhile.

¶{39} Mr. Johnson witnessed Calvin Perrine involved with a joking but loud, screaming and shoving group of people throughout the evening. Bud Perrine was noticed trying to calm the group down. However, according to Mr. Poling, Bud Perrine recommenced serving Calvin after initially cutting him off. The unprovoked flying kick off the bar also tends toward a finding that Calvin Perrine was in fact intoxicated. For all of these reasons, a rational fact-finder could properly determine that Bud Perrine was not only negligent regarding his son's intoxicated state (which is the proper test) but also that he had actual knowledge of his son's intoxication.

¶{40} Appellant's third argument, which he raises for the first time, is that there was no evidence that Van Hart, Inc. is a liquor permit holder. This argument is without merit. The defendant did business as the Corner Bar and admittedly sold drinks at a bar to patrons. Moreover, contrary to appellant's misstatement, Van Hart's own president testified that Van Hart, Inc. owns the building, the realty *and the liquor license*. (Vol. III at 66). That Van Hart, Inc. owns the liquor license is equivalent to testifying that Van Hart, Inc. is a liquor permit holder for purposes of the statute. See R.C. 4399.18. (We note that this testimony also established that Van Hart, Inc. was more than just a building owner for purposes of the last clause of statute.)

¶{41} Appellant's final argument is that there was insufficient evidence that Bud Perrine is an employee of the permit holder. Appellant cites cases dealing with the distinction between an independent contractor and an employee and urges that it had no right to control Bud Perrine. See, e.g., *Bostik v. Connor* (1988), 37 Ohio St.3d 144; *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187. Specifically, appellant states that Bud Perrine was not a scheduled employee with set hours, was not on the payroll and is merely a friend of the owner.

¶{42} The dram shop statute basically makes the permit holder vicariously liable for the acts of its employee. In a typical respondeat-superior analysis, the master, principal or employer is liable for the torts of the servant, agent or employee while acting in the scope of employment and if such servant, agent or employee is subject to the control of the master in the performance of his duties. *Comer v. Risko*,

106 Ohio St.3d 185, 2005-Ohio-4559, ¶18, citing *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, ¶1 of syllabus. Thus, the principal is not liable for the negligence of an independent contractor over whom he retained no right to control the mode and manner of performing the work. Id. As appellant outlines, the *Bostic* Court provided a non-exhaustive list of factors for determining whether there is right to control such as who sets the hours worked, who selects and/or supplies material, tools, personnel and routes, the length of employment, the type of business and the method of payment. *Bostic*, 37 Ohio St.3d at 146.

¶{43} Here, multiple witnesses testified that Bud Perrine was bartending on the night of the incident, and it was established that Bud Perrine regularly bartended at the Corner Bar, at least in the sense that this was not an isolated instance of his working at the bar. Appellant's own president admitted that Bud tended bar on occasion such as when the bar was busy or when a scheduled bartender got sick. Bud would also check identification at the door, stock coolers, cook food orders and change beer kegs. Appellant's president specifically acknowledged that Bud was working in various capacities on the night of the incident, including that of bartender.

¶{44} Although appellant contends that Bud was not a scheduled employee with regular hours, he was in fact scheduled at times including the night of the incident. For instance, the testimony of appellant's president that Bud was supposed to work the door that night and help behind the bar if it got busy, shows that he was in fact scheduled to work on the night of the incident.

¶{45} Bud Perrine did not select or supply any materials, tools or personnel. Rather, he used the bar's materials and tools. Bud Perrine could also be considered to be subject to some of the same rules as other employees as he could not charge whatever he wanted for drinks. Moreover, the testimony makes clear that when Bud was bartending, he was to abide by the bar's no whiskey rule and to refrain from serving whiskey to his sons.

¶{46} Contrary to Bud's testimonial claims, he was not a volunteer (which would still not per se make him a non-employee). Rather, defendant's own president disclosed that Bud was compensated for his work by forgiven bar tabs and forgiven overdue personal loans; he was also provided free drinks when he worked the door.

The mere fact that a person is essentially paid under the table (and/or never receives actual physical money because he already owes the bar or its owner money) does not destroy that person's status as an employee.

¶{47} Finally, a relevant factor to consider here is the type of business involved. That is, a bartender at a neighborhood bar is not the type of position associated with an independent contractor, especially under the circumstances presented here. As such, the trial court's decision that Bud Perrine was an employee of the Corner Bar at the time of the incident was not contrary to the manifest weight of the evidence.

¶{48} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs in judgment only.
Waite, J., concurs.