[Cite as *Diquattro v. Stellar Group Inc.*, 2005-Ohio-6457.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

JAMES C. DIQUATTRO	C. A. No. 04CA0095-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
STELLAR GROUP, INC., et al.	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellees	CASE No. 03 CIV 1330

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge

{¶1} Appellant, James Diquattro, appeals from the judgment of the Medina County Court of Common Pleas directing a verdict in favor of Appellee, Stellar Group, Inc., on Appellant's tort action and denying his motion for a new trial. This Court affirms.

I.

{¶2} Our review of the record reveals that Appellant has not provided this Court with a complete transcript of the trial court proceedings as required by App.R. 9(B); Loc.R. 5. See *State v. McCowan*, 9th Dist. No. 02CA008124, 2003-Ohio-1797, at ¶6 (an appellant bears the burden to ensure that the record necessary

to determine the appeal is before the appellate court, citing *State v. Williams* (1995), 73 Ohio St.3d 153, 160). Appellant has only supplied a transcript from the hearing on Appellee's motion for a directed verdict and Appellant's motion for a new trial. We will consider Appellant's assignment of error despite the lack of a complete transcript as this case can be disposed of on the following undisputed facts.

{¶3} Appellee is the holder of a liquor permit and the owner of The Oaks Lodge ("The Oaks"). On January 30, 2000, Appellant was injured while trying to aid a man who was injured by the intentional actions of Appellee's intoxicated patron. The offending action occurred off Appellee's premises. Appellant filed suit against Appellee in a Dram Shop action in which he sought recovery for his injuries. The action proceeded to trial. On October 15, 2004, at the conclusion of Appellee's case, Appellee moved for a directed verdict on the grounds that R.C. 4399.18 created liability of a liquor permit holder only for off premises injury to a third person caused by the *negligent* acts of the intoxicated person. Appellee contended that it could not be held statutorily liable because the perpetrator's actions were intentional. The trial court granted Appellee's motion for a directed verdict. Appellant filed a motion for a new trial on October 20, 2004, which was denied. Appellant timely appealed from the trial court's order and has presented one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "IN A DRAMSHOP ACTION, WHERE THE EVIDENCE, CONSTRUED MOST STRONGLY IN FAVOR OF [APPELLANT], SHOWS THAT THE PERMIT HOLDER SERVED A SEVEN OUNCE GLASS OF WINE AND EIGHT TO TEN MIXED DRINKS TO A PATRON WHO, AS A RESULT OF HIS STATE OF INTOXICATION VIOLENTLY ASSAULTED ANOTHER PERSON OFF THE PREMISES WITHIN MINUTES OF FINISHING HIS LAST DRINK, IT IS ERROR FOR THE TRIAL COURT TO GRANT A DIRECTED VERDICT[.]"

{¶4} In his only assignment of error, Appellant contends that the trial court erred in directing a verdict in favor of Appellee. We disagree.

{¶5} A motion for a directed verdict does not present a question of fact, but instead presents a question of law, even though in deciding such motion it is necessary to review and consider the evidence. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, paragraph one of the syllabus. An appellate court reviews de novo the trial court's granting of a directed verdict. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257. An appellate court should affirm the trial court's decision if "when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds could only find against the nonmoving party." *Pusey v. Bator* (2002), 94 Ohio St.3d 275, 278, citing Civ.R. 50(A)(4); *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 23.

{¶6} Pursuant to Civ.R. 50(A)(4), a trial court is authorized to grant a directed verdict only when:

> "[A]fter construing the evidence most strongly in favor of the party against whom the motion is directed, [the court] finds that upon any

> determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶7} When ruling on a motion for a directed verdict, the court considers the sufficiency of the evidence. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119, reversed on other grounds (1999), 85 Ohio St.3d 457.

> "When a motion for a directed verdict is entered, what is being tested is a question of law; that is, the legal sufficiency of the evidence to take the case to the jury. This does not involve weighing the evidence or trying the credibility of witnesses; it is in the nature of a demurrer to the evidence and assumes the truth of the evidence supporting the facts essential to the claim of the party against whom the motion is directed, and gives to that party the benefit of all reasonable inferences from that evidence." *Ruta*, 69 Ohio St.2d at 68; see, also *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-85.

{¶8} If the party opposing the motion for a directed verdict fails to present evidence on one or more of the essential elements of a claim, a directed verdict is proper. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695. However, where substantial evidence is presented such that reasonable minds could come to differing conclusions, the court should deny the motion. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1997), 45 Ohio St.2d 271, 275. Under the "reasonable minds" portion of Civ.R. 50(A)(4), the court is only required to consider whether there exists any evidence of probative value in support of the elements of the non-moving party's claim. See *Coleman v. Excello-Textron Corp.* (1989), 60 Ohio App.3d 32, 40; *Ruta*, 69 Ohio St.2d at 69.

{¶9} Appellant filed suit under the Dram Shop Act, R.C. 4399.18. At the conclusion of Appellant's case, Appellee moved for a directed verdict on the grounds that R.C. 4399.18 created liability only for the *negligent* conduct of its intoxicated patrons. Appellee contended that it could not be held liable for Appellant's injuries which were indisputably caused by the *intentional* actions of its intoxicated patron.

{¶10} R.C. 4399.18 provides a narrow exception to the general rule that liquor permit holders are absolved of liability for actions of intoxicated persons to whom they sold alcohol:

> "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 at least one of the following:
>
> "(1) A noticeably intoxicated person in violation of division (B) of [R.C. 4301.22];
>
> "(2) A person in violation of [R.C. 4301.69].
>
> "(B) The person's intoxication proximately caused the personal injury, death, or property damage."

{¶11} The legislature enacted R.C. 4399.18 in 1986, and it "now provides 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." *Tollett v. Bokor*

(Apr. 26, 2000), 9th Dist. No. 98CA007227, at *4; See *Klever v. Canton Sachsenheim, Inc.* (1999), 86 Ohio St.3d 419, 421.

{¶12} Notably, Appellant has not disputed that the perpetrator's action was intentional but rather contends that R.C. 4399.18 encompasses intentional as well as reckless conduct. In support of this contention, Appellant cites *Gressman v. McClain* (1988), 40 Ohio St.3d 359, in which the Supreme Court held that, in actions arising before July 21, 1986 (the effective date of R.C. 4399.18), the holder of a liquor permit could be held liable to third persons for injuries or death occurring off the premises of the permit holder. Appellant further contends that *Gressman* states the preexisting public policy that permit holders should be liable for off premises conduct committed by their intoxicated patrons, regardless of the patron's mental state. Appellant urges this Court to follow this alleged preexisting public policy.

{¶13} First and foremost, we note that the Supreme Court expressly limited *Gressman* to events occurring prior to the enactment of R.C. 4399.18 in 1986 and consequently, *Gressman* has no binding effect on this matter. In addition, *Gressman* involved *negligent* conduct, i.e. the failure to control a motor vehicle, and is clearly distinguishable. Moreover, the *Gressman* court expressly held that "[i]n 1986, after this cause of action arose, the General Assembly clearly set forth the preexisting public policy on this issue in R.C. 4399.18." Id. at 362. In contrast to Appellant's assertion, the public policy embodied in R.C. 4399.18 provides that

permit holders should only be liable for *negligent* actions of intoxicated patrons, and only when two additional conditions are met. See R.C. 4399.18(A) and (B). Appellant has cited no law in support of his contention that R.C. 4399.18 encompasses intentional conduct. "It is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A)(7); Loc.R. 7(A)(7).

{¶14} Appellant also urges us to apply the criminal code's definition of "negligence" which provides that "[w]hen the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element." R.C. 2901.22(E). Again, Appellant fails to cite any authority for the application of R.C. 2901.22(E) and further, fails to refute that this matter involves *intentional* conduct. Several courts have recognized the distinction between negligent and intentional conduct in actions against liquor permit holders. See *McKinley v. Chris' Band Box*, 153 Ohio App.3d 387, 2003-Ohio-4086, at ¶14 (finding that an assault is an intentional act and that the portion of R.C. 4399.18 pertaining to negligent acts has no application to an intentional act); *Colburn v. Maynard* (1996), 111 Ohio App.3d 246, 250, fn. 3 ("the text of R.C. 4399.18, when addressing injuries occurring off the premises of the permit holder, specifically limits liability to injuries resulting from negligent acts of an intoxicated patron. *** Thus, the Ohio

General Assembly apparently intended to exclude those victims intentionally injured away from the permit holder's premises from recovering under this statute"); *Trexler v. R.M.D.M. Ent.* (Aug. 7. 2001), 10th Dist. No. 00AP-1193, at *3 ("A permit holder's liability for intentional criminal acts ends where his control ends. This intention is especially clear since off-premises liability for knowingly serving a noticeably intoxicated patron is limited to negligent conduct by the patron and does not apply to intentional misconduct").

{¶15} The actions at issue here were clearly intentional and Appellee cannot therefore be held liable under R.C. 4399.18 for the actions of his intoxicated patron. Viewing the evidence most strongly in favor of Appellant, reasonable minds could only find against Appellant. We therefore overrule Appellant's assignment of error.

III.

{¶16} Appellant's assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

CARLA MOORE
FOR THE COURT

SLABY, P. J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

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