

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**JOSE ANTONIO CAMACHO,  
Individually, and JOSE ANTONIO  
CAMACHO and DANIELA  
TORRES as Surviving Parents and  
Administrators of the Estate of  
LEONARDO CAMACHO, Deceased,**

**Plaintiffs,**

**v.**

**TEXAS ROADHOUSE HOLDINGS  
LLC,**

**Defendant.**

**CIVIL ACTION FILE NUMBER:  
1:20-cv-03931-ELR**

**Removed from Gwinnett County  
State Court – Civil Action File No.  
20-C-0551-S4**

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**BRIEF IN SUPPORT OF DEFENDANT TEXAS ROADHOUSE  
HOLDINGS LLC’S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs lack any valid claim against Texas Roadhouse Holdings LLC (“Texas Roadhouse”). Plaintiffs cannot show any conduct by Texas Roadhouse that violates Georgia’s Dram Shop law codified in O.C.G.A. § 51-1-40. Indeed, to recover, Plaintiffs must prove that Texas Roadhouse knowingly served alcohol to Pancione while she was noticeably intoxicated and did so knowing that she would soon be driving. Plaintiffs have failed to establish these requirements, and therefore, all of their claims in this case should be dismissed with prejudice.

## I. UNDISPUTED FACTS

On June 16, 2020 at approximately 6:37 p.m., Katie Pancione was operating a motor vehicle on Kelly Mill Road in Cumming, Georgia, when she struck Jose Camacho and his thirteen-year-old son Leonardo Camacho while they were doing yardwork.<sup>1</sup> Pancione struck the curb on the right side of the roadway, traveled up onto the sidewalk, and struck the Camachos.<sup>2</sup> Both were injured, and Leonardo later passed away from his injuries.<sup>3</sup>

Twenty minutes before the collision at approximately 6:17 p.m., Pancione ordered one pint of Michelob Ultra beer while she waited for her takeout food at Texas Roadhouse.<sup>4</sup> Prior to serving her this one beer, bartender Sierra “Cheyenne” Phillips asked for Pancione’s identification and talked with her.<sup>5</sup> During their discussion, Phillips learned that their birthdays were the same month, and Pancione was able to quickly do the math to figure out their age difference.<sup>6</sup> Phillips did not observe any signs of intoxication before serving Pancione the one beer.<sup>7</sup> In fact, Phillips testified unequivocally that Pancione was not showing noticeable or visible

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<sup>1</sup> 2020 Compl. at ¶ 4-7; Forsyth County E911 Event Record, attached as Exhibit 1.

<sup>2</sup> *Id.*; Police Report attached as Exhibit 2.

<sup>3</sup> *Id.*

<sup>4</sup> Sierra “Cheyenne” Phillips January 18, 2024, Depo. attached as Exhibit 3, at p. 23; June 16, 2020, Texas Roadhouse Receipts for Katie Pancione collectively attached as Exhibit 4.

<sup>5</sup> Exhibit 3 at p. 22.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at pp. 49-50.

signs of intoxication.<sup>8</sup> After serving the beer, Phillips checked on Pancione and still did not observe any signs of intoxication.<sup>9</sup> Pancione consumed approximately ¾ of the beer before leaving when her takeout was ready.<sup>10</sup> Pancione was at Texas Roadhouse for only approximately seventeen minutes.<sup>11</sup> At no time did Phillips observe any signs of intoxication.<sup>12</sup> In addition, there is no testimony in the record that anyone at Texas Roadhouse observed any noticeable signs of intoxication. Further, Phillips did not know that Pancione was driving.<sup>13</sup> Phillips specifically testified:

**Q.** ...and so you know she's driving?

**A.** I can't assume that she's driving.

**Q.** Okay. Do, do people commonly come into Texas Roadhouse to get to go food like some means other than driving?

**A.** Yes.

**Q.** What are, what are those? Like Uber?

**A.** Well sometimes they have someone waiting in the car for them that's driving while they just run in and pick it up.

**Q.** Okay. What about run in and have a beer for 15, 20 minutes?

**A.** Well if the food's not ready yet, then yes it's been, I've seen people sit and wait.<sup>14</sup>

Pancione left Texas Roadhouse at approximately 6:27 p.m.<sup>15</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at p. 50.

<sup>10</sup> *Id.* at pp. 23, 28, 35; Katie Pancione January 5, 2024, Deposition attached as **Exhibit 5**, at p. 59; George Morris February 8, 2022, Depo. attached as **Exhibit 6**, at p. 77.

<sup>11</sup> Pancione Cellphone Record, attached as **Exhibit 7**, at p. 5; *see also* Exhibit 3 at pp. 53-54.

<sup>12</sup> Exhibit 3 at pp. 49-50.

<sup>13</sup> *Id.* at pp. 53-54.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Approximately ten minutes later, Pancione was involved in the incident, wherein she struck Jose and Leonardo Camacho.<sup>16</sup> Pancione immediately left the scene of the collision and went to her boyfriend's nearby house.<sup>17</sup> When she arrived, her boyfriend observed the damage on her vehicle and asked what happened.<sup>18</sup> Pancione told him that she was looking down at her phone when she stuck a curb.<sup>19</sup>

Pancione then ingested an excessive number of prescription Klonopin pills, which she consumed with two 100 mL Fireball Whiskey bottles in an apparent attempt to end her life.<sup>20</sup> Pancione discarded the whiskey bottles in the yard at her boyfriend's residence.<sup>21</sup> After ingestion of the pills and whiskey, Pancione's boyfriend called the police who responded to the scene, rendered medical assistance to Pancione, and ultimately arrested her.<sup>22</sup> Responding police officers did not search the premises for any alcohol containers, and the whiskey bottles were never recovered.<sup>23</sup>

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<sup>16</sup> Exhibit 2.

<sup>17</sup> Exhibit 5 at pp. 41-42.

<sup>18</sup> Exhibit 6 at p. 28.

<sup>19</sup> *Id.* at p. 28; Exhibit 5 at pp. 41-42.

<sup>20</sup> Exhibit 5 at pp. 51-53; Exhibit 6 at pp. 35-36; Barbara Melka February 8, 2022, Depo., attached as Exhibit 8, at p. 20; Robert Melka February 8, 2022, Depo., attached as Exhibit 9, at pp. 19, 26; Charles McKay February 27, 2024, Depo., attached as Exhibit 10, at pp. 82-83; 89 (Pancione testified that "they're not the smallest bottle, they're the – the slightly – or the slightly larger one which would have been the 100-milliliter bottles, as I understand[.]" Based on this the two 100mL bottles of Fireball Whiskey Pancione testified she drank after the collision were the "equivalent of four shots consumed[.]").

<sup>21</sup> Exhibit 5 at p. 109.

<sup>22</sup> Exhibit 6 at pp. 45-46.

<sup>23</sup> William Loring January 23, 2024, Depo., attached as Exhibit 11, at pp. 21, 31.

**A. There is no dispute that Texas Roadhouse’s bartender was well-trained in identifying noticeable signs of intoxication.**

Pancione was served one pint of Michelob Ultra beer by Texas Roadhouse server/bartender Phillips. Phillips received training in responsible alcohol service by Texas Roadhouse when she was hired in 2016.<sup>24</sup> She was also trained and certified by a nationally-accredited alcohol service program. Phillips received a copy of Texas Roadhouse’s employee manual which contains a section describing the signs of intoxication and Texas Roadhouse’s policy of not serving alcohol to anyone who is showing signs of intoxication.<sup>25</sup> Texas Roadhouse records of Phillips’ training<sup>26</sup> evidence ongoing alcohol service training in 2016, 2019, and 2021.<sup>27</sup> Further, Phillips attended pre-shift training called Alley Rallies where employees and management discussed responsible alcohol service.<sup>28</sup>

**B. There is no testimony that Pancione drank any alcohol before going to Texas Roadhouse.**

Prior to the collision, Pancione spent most of the day at her parents’ house<sup>29</sup> before going to Texas Roadhouse on the way to her boyfriend’s house.<sup>30</sup> The

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<sup>24</sup> See Sierra Phillips’ (aka Cheyenne Lee) TIPS certification, attached as **Exhibit 12**; TRH Responsible Serving, attached as **Exhibit 13**.

<sup>25</sup> Texas Today Policy and Procedures to Sierra Phillips (aka Cheyenne Lee), attached as **Exhibit 14**.

<sup>26</sup> Copies of Sierra Phillips’ (aka Chyenenne Lee’s) training records collectively attached as **Exhibit 15**.

<sup>27</sup> Exhibits 12-15; *See also* Exhibit 3, at p. 9.

<sup>28</sup> Exhibit 3 at p. 69.

<sup>29</sup> Exhibit 8 at p. 8; *See also* Exhibit 7, showing Pancione was at her Parents’ home between 11:05 a.m. and 4:47 p.m.

<sup>30</sup> Exhibit 5 at pp. 18-22.

undisputed testimony shows that Pancione did not drink anything during the day before driving to the Texas Roadhouse.<sup>31</sup> Pancione arrived at Texas Roadhouse at approximately 6:10 p.m.<sup>32</sup> Her 40-minute drive from her parents' home to Texas Roadhouse was uneventful. Numerous witnesses have testified that Pancione did not drink any alcohol prior to going to Texas Roadhouse:

Pancione's mother is confident she did not drink while at her house because she "was with her and [she] said goodbye to her and [she] talked to her, and [she] interacted with her through the day. And if [she] would have [known] if she was drinking, [she] would have just known. [She] would have seen it at [her] house."<sup>33</sup>

Pancione's father also testified that Pancione "hadn't had anything to drink when she left" their home.<sup>34</sup> Pancione left her parents' home at approximately 5:33 p.m.<sup>35</sup> Pancione's father testified that he did not smell alcohol or observe any other signs of intoxication when she hugged him goodbye.<sup>36</sup>

Pancione's estranged ex-husband, Michael Pancione, even agreed that Pancione did not appear intoxicated when he saw her on a Zoom court hearing for their divorce proceedings that day.<sup>37</sup> Pancione's ex-husband elaborated that it was

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<sup>31</sup> Exhibit 8 at p. 12.

<sup>32</sup> Exhibit 7, showing approximately 213 steps, which is consistent with her arrival at Texas Roadhouse.

<sup>33</sup> Exhibit 8, at p. 12.

<sup>34</sup> Exhibit 9, at p. 29.

<sup>35</sup> *Id.* at p. 38.

<sup>36</sup> *Id.*

<sup>37</sup> Michael Pancione January 8, 2024, Depo., attached as **Exhibit 16**, at pp. 85-86.

uncommon for Pancione to drink during the day, and that when she would have beers in the past it was usually during the evenings.<sup>38</sup>

Pancione's aunt, Susan Wilensky, spoke with Pancione around noon on the date of the incident, and Pancione told her she was going to lay down for a nap.<sup>39</sup> At approximately 4:15 p.m. Pancione called Wilensky back and told her she would be leaving soon.<sup>40</sup> When asked if Pancione appeared intoxicated during either of those phone calls, Wilensky testified "Absolutely, unequivocally, no."<sup>41</sup> In fact, there was nothing about the interaction between Pancione and Wilensky that would have suggested to Wilensky that Pancione had been drinking alcohol.<sup>42</sup>

Pancione's boyfriend, Gus Morris, testified that he spoke with Pancione several times during the day before she left her parents' home.<sup>43</sup> At one point during the day, Pancione called Morris and told him that she would be late getting to his house that evening.<sup>44</sup> During that call, Pancione seemed "normal" according to Morris.<sup>45</sup> Morris explained that during that call he "saw nothing out of the ordinary" and "just, same old Katie."<sup>46</sup>

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<sup>38</sup> *Id.* at p. 87.

<sup>39</sup> Susan Wilensky January 22, 2024, Depo., attached as **Exhibit 17**, at p. 12.

<sup>40</sup> *Id.* at pp. 13-14.

<sup>41</sup> *Id.* at p. 14.

<sup>42</sup> *Id.*

<sup>43</sup> Exhibit 6, at pp. 17-20.

<sup>44</sup> *Id.* at p. 20.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

**C. Plaintiffs' experts concede there is no testimony that Pancione drank alcohol prior to arriving at Texas Roadhouse.**

Plaintiffs' dram shop expert, Marissa Orlowski, agrees that Pancione's testimony is that she did not drink any alcohol prior to arriving at Texas Roadhouse that day.<sup>47</sup> Orlowski also agrees that Barbara Melka, Robert Melka, and Gus Morris all agree that Pancione did not appear noticeably intoxicated at any point in the day prior to going to Texas Roadhouse.<sup>48</sup>

Plaintiffs' toxicology expert Matthew Myers agrees there is no testimony that Pancione drank any alcohol prior to walking into Texas Roadhouse.<sup>49</sup> He agrees that Pancione herself testified that she did not drink any alcohol from the time she woke up until she walked into Texas Roadhouse.<sup>50</sup> He also agrees that everyone who spoke with Pancione on the date of the incident before she went to Texas Roadhouse (Barbara Melka, Robert Melka, Michael Pancione, and Gus Morris), all agree that Pancione showed no signs of visible intoxication.<sup>51</sup> Ultimately, Myers agrees that all of the testimony in the record is consistent with Pancione not having drank any alcohol prior to entering Texas Roadhouse.<sup>52</sup>

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<sup>47</sup> Marissa Orlowski March 12, 2024, Depo., attached as Exhibit 18, at p. 68.

<sup>48</sup> *Id.* at pp. 68-69.

<sup>49</sup> Matthew Myers March 6, 2024, Depo., attached as Exhibit 19, at p. 60.

<sup>50</sup> *Id.* at p. 62.

<sup>51</sup> *Id.* at pp. 65-66.

<sup>52</sup> *Id.* at p. 78.



Plaintiffs' toxicology expert Charles McKay concedes that Pancione testified that she did not drink any alcohol prior to going to Texas Roadhouse.<sup>53</sup> He also agrees there is no testimony in the record that Pancione drank any alcohol prior to walking into Texas Roadhouse.<sup>54</sup>

Plaintiffs' toxicology expert, David Eagerton, agrees that there is no testimony in the record that Pancione drank any alcohol prior to arriving at Texas Roadhouse on the date of the incident.<sup>55</sup> Eagerton also agrees that no one who spoke with Pancione on the date of the incident before she went to Texas Roadhouse observed any noticeable signs of intoxication.<sup>56</sup> Eagerton did not even base his opinions on the testimony in the record. He advised that "there was no evidence or testimony that I reviewed that said she drank anything after Texas Roadhouse."<sup>57</sup> But as this Court is aware from the above, there is testimony from Pancione and Gus Morris that Pancione consumed two bottles of Fireball Whiskey *after* leaving Texas Roadhouse.<sup>58</sup>

**D. The DUI investigation did not uncover any evidence that Pancione had consumed any alcohol prior to going to Texas Roadhouse.**

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<sup>53</sup> Exhibit 10, at pp. 69-70.

<sup>54</sup> *Id.* at p. 69.

<sup>55</sup> David Eagerton March 5, 2024, Depo., attached as Exhibit 20, at pp. 51-52.

<sup>56</sup> *Id.* at pp. 52-53.

<sup>57</sup> *Id.* at p. 54.

<sup>58</sup> Exhibit 5 at pp. 42-43, 51-53, 109; Exhibit 6 at pp. 35-36; Exhibit 8, at p. 20; Exhibit 9, at pp. 19, 26; Exhibit 10, at pp. 82-83; 89.

The Police DUI investigation regarding this incident was led by Seargent Kurt Chambers of the Forsyth County Sheriff's Department.<sup>59</sup> Deputy Chambers is specially trained in investigating DUIs.<sup>60</sup> Chambers noted in his investigation of the incident that the witnesses were describing driving that was consistent with either an impaired or distracted driver.<sup>61</sup> He did not immediately note the smell of alcohol on Pancione when he encountered her, but instead arrested her for DUI related to drug intoxication.<sup>62</sup> Chambers did not conduct a field sobriety test on Pancione, he did not administer a breathalyzer, and he did not search her boyfriend's property for any alcohol bottles or cans.<sup>63</sup>

Chambers arrested Pancione inside of her boyfriend's home for leaving the scene of an accident.<sup>64</sup> Afterwards when she was in another deputy's police vehicle, Chambers noticed the smell of alcohol and added a DUI charge.<sup>65</sup> Upon adding that charge, Chambers conducted no further investigation of the scene.<sup>66</sup>

After Pancione's arrest, a warrant was obtained to conduct a blood alcohol content test on a blood sample; the sample was obtained at approximately 9:48 p.m.,

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<sup>59</sup> See Exhibit 2.

<sup>60</sup> Kurt Chambers January 23, 2024, Depo., attached as **Exhibit 21**, at pp. 14-15.

<sup>61</sup> *Id.* at pp. 25-26.

<sup>62</sup> *Id.* at pp. 33-37.

<sup>63</sup> *Id.* at p. 41.

<sup>64</sup> *Id.* at p. 43.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

over three hours after Pancione left Texas Roadhouse.<sup>67</sup> The test returned results of 0.176% BAC.<sup>68</sup> The sample was also positive for Klonopin.

## II. STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see In re Ethicon Physiomesb Flexible Composite Hernia Mesh Products Liab. Litig.*, 1:23-CV-3529-RWS, 2024 WL 2078455, at \*2 (N.D. Ga. Apr. 9, 2024). Once a movant has identified the evidence that demonstrates there is no issue of material fact, the burden “shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The “applicable substantive law identifies which facts are material[.]” *In re Ethicon* 2024 WL 2078455, at \*2. A fact “is not material if a dispute over that fact will not affect the outcome of the case [.]” *Id.*

In resolving a motion for summary judgment, the court will “consider the record and draw all reasonable inferences in the light most favorable to the non-moving party.” *Blue v. Lopez*, 901 F.3d 1352, 1357 (11th Cir. 2018). But the court

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<sup>67</sup> Exhibit 20 at p. 24.

<sup>68</sup> July 27, 2020, Blood Alcohol Report, attached as Exhibit 22.

is bound only to draw those inferences that are reasonable. “Where the records taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (internal quotations omitted). “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 106 S. Ct. at 2511 (citations omitted); *see also Matsushita*, 106 S. Ct. at 1356 (once the moving party has met its burden under Rule 56(a), the non-moving party “must do more than simply show there is some metaphysical doubt as to the material facts”).

### III. ARGUMENT

Texas Roadhouse’s conduct does not meet the criteria for dram shop liability under Georgia law. Under Georgia’s Dram Shop Statute, Plaintiffs must fulfill three elements. They must prove that: (1) Texas Roadhouse knowingly furnished alcohol to Pancione while she was noticeably intoxicated; (2) Texas Roadhouse did so knowing that Pancione would soon be driving a motor vehicle; and (3) this act of providing the alcohol was the proximate cause of the injuries sustained by Plaintiffs. O.C.G.A. § 51-1-40.<sup>69</sup> In general, Georgia’s legislature has restricted liability of

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<sup>69</sup> *See also, Birnbrey, Minsk & Minsk, LLC v. Yirga*, 535 S.E.2d 792, 794-795 (Ga. Ct. App. 2000) (finding that “Drawing an inference premised on a nonexistent fact, ‘[i]f Defendant Campbell was showing manifestations,’ cannot surmount positive direct testimony that Campbell appeared and acted ‘normal’ to the attendees of the luncheon. Rather, the uncontroverted evidence of record demonstrates that while at the luncheon, Campbell did not appear to be in a ‘state of noticeable intoxication.’”).

alcohol providers by declaring that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted by an intoxicated person. O.C.G.A. § 51-1-40(a). Of course, Pancione is the only consumer of alcohol in this matter.

To trigger liability, an alcohol provider like Texas Roadhouse must “willfully, knowingly, and unlawfully” provide alcoholic beverages to a person who is in a state of “noticeable intoxication,” knowing that the intoxicated person will soon be driving a motor vehicle. O.C.G.A. § 51-1-40(b). Because Georgia’s Dram Shop Statute is in derogation of the common law, it must be strictly construed. *Delta Airlines v. Townsend*, 614 S.E.2d 745 (Ga. 2005); *see also Shin v. Estate of Camacho*, 690 S.E.2d 444, 447 (2010). Strictly construing a statute requires the Court “to construe [the] statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage.” *Charter Club, etc. v. Walker*, 689 S.E.2d 344 (2009) (punctuation omitted). Furthermore, the Dram Shop Statute presents itself as an injured person’s exclusive remedy for imposing liability on a bar providing alcohol to a driver. *Shin*, 302 Ga. App. 243 (Ga. 2010). If this Court finds that there is no evidence in the record to support any one of the above elements, Plaintiffs’ claims against Texas Roadhouse must be dismissed as a matter of law.

Plaintiffs fail to satisfy the first two criteria required by the Dram Shop Statute. First, there is nothing in the record to support that Pancione was noticeably intoxicated at the time she was served at Texas Roadhouse. Second, there is nothing in the record to suggest that Texas Roadhouse's bartender Sierra "Cheyenne" Phillips knew or should have known that Pancione would be driving soon.

**A. There is nothing in the record to support an allegation that Pancione was noticeably intoxicated at the time she was served at Texas Roadhouse.**

Plaintiffs cannot satisfy the first element of dram shop liability because there is no evidence Pancione was noticeably intoxicated when she visited Texas Roadhouse. To the contrary, the only evidence regarding her behavior indicates that she was not intoxicated when she arrived at Texas Roadhouse.<sup>70</sup>

***1. Substantial direct evidence supports the conclusion that Pancione was not noticeably intoxicated when she was served one beer at Texas Roadhouse and there is no evidence in the record to refute this.***

Pancione did not show any signs of intoxication while she was at Texas Roadhouse. Texas Roadhouse Bartender Phillips testified that Pancione showed no signs of intoxication,<sup>71</sup> and she has extensive training and experience in observing these signs.<sup>72</sup> Phillips observed Pancione demonstrating quick recall and calculation,

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<sup>70</sup> Exhibit 3, at p. 49-50.

<sup>71</sup> *Id.*

<sup>72</sup> *See* Exhibits 12-15.

indicating that she was sober.<sup>73</sup> And this observation spanned the duration of Pancione's short time at Texas Roadhouse.<sup>74</sup> At no time during the approximately seventeen minutes she was in Texas Roadhouse, did Pancione show any noticeable signs of intoxication.<sup>75</sup>

Additionally, numerous fact witnesses have all testified that throughout the day leading up to her arrival at Texas Roadhouse there was no indication that Pancione was intoxicated.<sup>76</sup> In fact, every single one of Plaintiffs' experts agrees and acknowledges that every witness who interacted with Pancione in person, over Zoom, and over the phone in the hours leading up to her arrival at Texas Roadhouse testified under oath that Pancione was not intoxicated.<sup>77</sup>

When witness testimony regarding lack of visible intoxication is undisputed, summary judgment is appropriate. In *Birnbrey, Minsk & Minsk, LLC v. Yirga*, 535 S.E.2d 792, 794 (Ga. Ct. App. 2000), the Georgia Court of Appeals reversed the trial court's denial of summary judgment for a party host who had provided alcohol to a driver who later crashed into and injured another motorist. In finding that the host was entitled to summary judgment, the court relied on the testimony of several

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<sup>73</sup> Exhibit 3, at p. 22.

<sup>74</sup> *Id.* at pp. 49-50.

<sup>75</sup> *Id.*

<sup>76</sup> Exhibit 6, at pp. 17-20; Exhibit 8, at p. 12; Exhibit 9, at pp. 29, 38; Exhibit 16 at pp. 88-86; Exhibit 17, at pp. 12-14.

<sup>77</sup> *Id.*

witnesses who had also attended the party, stating that they did not perceive any unusual and/or intoxicated behavior by the driver before he left. *Id.* Considering the direct evidence of no visible signs of intoxication, the court found plaintiff's proffered circumstantial evidence – testimony from a law enforcement officer who interacted with the driver several hours after the party and testified that the driver appeared to have a BAC of .1% inadequate to escape summary judgment. *Id.* at 795. The undisputed eyewitness testimony that the driver did not appear intoxicated at the time of service was dispositive. *Id.* Accordingly, the court granted summary judgment in favor of the host. *Id.*

Like the plaintiffs in *Birnbrey*, Plaintiffs in this case have offered no direct evidence that can overcome the direct evidence in the record that Pancione was not noticeably intoxicated when she was served one beer at Texas Roadhouse. Specifically, the following direct evidence shows she was not visibly intoxicated:

- Pancione's testimony that she did not consume any alcohol before going to Texas Roadhouse;
- Robert and Barbara Melka's testimony that Pancione was not intoxicated when she left their home approximately 40 minutes before arriving at Texas Roadhouse;
- Susan Wilensky's testimony that Pancione was not noticeably intoxicated approximately two hours before arriving at Texas Roadhouse;



- Michael Pancione’s testimony that Pancione did not appear intoxicated during their virtual court proceeding before she left for Texas Roadhouse;
- Gus Morris’ testimony that he was texting and speaking on the phone with Pancione throughout the day and she seemed entirely normal;
- Bartender Phillips’ testimony that Pancione did not show any signs of visible intoxication when she carded her after Pancione sat down at the bar; and
- Phillips’ testimony that Pancione was doing math to compare their ages once they realized they had similar birthdays.

To “refute” this evidence, Plaintiffs have offered no fact witnesses that can testify that Pancione was noticeably intoxicated when she was served. Further, Plaintiffs have offered expert opinions based on Pancione’s BAC over three hours later at 9:48 p.m., but every single one of those experts has admitted that (1) there is no testimony to support a conclusion that Pancione consumed alcohol prior to arriving at Texas Roadhouse; (2) there is no evidence to support a conclusion that Pancione was served more than one pint of beer while she was at Texas Roadhouse; (3) they do not know whether Pancione consumed alcohol after leaving Texas Roadhouse; (4) there is sworn testimony from two witnesses that Pancione consumed two 100 mL bottles of Fireball Whiskey after leaving Texas Roadhouse; and (5) their respective opinions on what Pancione’s BAC would have been when she was served at Texas Roadhouse all rely on the unsupported assumption that she consumed alcohol earlier in the day.

***2. Plaintiffs cannot rely on Pancione's BAC over three hours after she was served at Texas Roadhouse to create an issue of fact as to whether she was noticeably intoxicated at the time she was served.***

Plaintiffs' proffered circumstantial evidence of intoxication is insufficient to avoid summary judgment. Plaintiffs' only argument that Pancione could have been intoxicated at the time that Bartender Phillips served her stems from a blood sample taken over three hours later, at 9:48 p.m.<sup>78</sup> But Pancione's intoxication at that point in the evening is not an issue. To the contrary, Pancione consumed at least two 100 mL bottles of Fireball Whiskey after leaving Texas Roadhouse, which unsurprisingly contributed to her high BAC later that night.<sup>79</sup> Without any evidence that Pancione was noticeably intoxicated at the actual time she was served at Texas Roadhouse, summary judgment must be granted.

In *Wright v. Pine Hills Country Club, Inc.*, 583 S.E.2d 569 (Ga. Ct. App. 2003), the Georgia Court of Appeals considered whether summary judgment in favor of a defendant country club was appropriate where the club had served alcohol to a driver who subsequently drove away and crashed into the plaintiff. The plaintiff pointed to medical tests performed on the driver indicating a high blood alcohol level, expressly relying on *Northside Equities, Inc. v. Hulsey*, 567 S.E.2d 4 (Ga.

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<sup>78</sup> See Exhibit 22.

<sup>79</sup> Exhibit 5 at pp. 51-53; Exhibit 6 at pp. 35-36; Exhibit 8, at p. 20; Exhibit 9, at pp. 19, 26; Exhibit 10, at pp. 82-83; 89.

2002), for the proposition that such evidence satisfied her burden. The Court disagreed, finding that the plaintiff in that case (unlike the *Hulsey* plaintiff) had not coupled the toxicology results with an expert to explain why the results indicated that the driver would have manifested signs of intoxication while she was at the country club. *Id.* at 572. (finding “Unlike in *Hulsey*, in this case there is no expert opinion that Yawn actually drank six or more drinks [while at the defendant dram shop], nor an expert opinion on blood absorption for a person of Yawn’s weight and past pattern of alcohol consumption.”). Considering the plaintiff’s failure to produce expert testimony on this point, the Court found that summary judgment in favor of the country club was appropriate. *Id.*

Here too, Plaintiffs’ experts are unable to shield Plaintiffs from summary judgment because they do not contradict the direct evidence that Pancione showed no noticeable signs of intoxication at Texas Roadhouse. All testimony in the record supports the conclusion that Pancione did not drink prior to arriving at Texas Roadhouse. Plaintiffs’ expert’s guesstimations regarding Pancione’s BAC at the time she was served at Texas Roadhouse necessarily ignore that testimony. Both the *Wright* and *Hulsey* courts focused on whether the direct eyewitness testimony regarding intoxication was contradicted by expert testimony. In *Wright*, it was not contradicted, so summary judgment was awarded. In *Hulsey*, it was uncontradicted

that the intoxicated driver “drank only at work[.]” 548 S.E.2d at 44. As a result, the plaintiff’s experts were able to use Hulsey’s BAC, taken later in the evening, to accurately determine her approximate BAC when she was served alcohol at work. *Id.* Therefore, summary judgment was denied.

This case is like *Wright*, because there is no expert testimony to contradict the direct evidence that Pancione did not appear intoxicated at Texas Roadhouse. Plaintiffs’ experts do nothing to establish that Pancione actually appeared intoxicated when she entered Texas Roadhouse. As the *Wright* court explained, “Unlike in *Hulsey*, in [Wright] there [was] no expert opinion that Yawn actually drank six or more drinks [prior to departing.]” 583 S.E.2d at 572. In the present case, there is no evidence that Pancione consumed any alcohol before going to Texas Roadhouse. There is copious evidence that she did not. Plaintiffs offer no testimony that Pancione was noticeably intoxicated when she was served. Again, there is copious evidence that she was not. Therefore, summary judgment is appropriate.

Plaintiffs’ experts speculate that Pancione *could have been* intoxicated at the time she was served at Texas Roadhouse, without any proof to substantiate their speculations. Plaintiffs’ experts all admit that they do not know when Pancione consumed the alcohol (in addition to the one beer at Texas Roadhouse) that contributed to her .176% BAC three hours later at 9:48 p.m. Far from asserting that

Pancione must have had six or more drinks prior to departing (as in *Hulsey*), Plaintiffs' experts cannot be sure when or what Pancione consumed apart from the one beer at Texas Roadhouse that is undisputed.

All of Plaintiffs' experts explicitly state that they do not know whether Pancione consumed alcohol before or after going to Texas Roadhouse.<sup>80</sup> And none of Plaintiffs' experts have any idea when or what alcohol Pancione might have consumed before arriving at Texas Roadhouse as they claim she did. In concluding that she was noticeably intoxicated at the time Texas Roadhouse served her, Plaintiffs' experts give "no credence" to the evidence in the record that Pancione consumed two 100 mL bottles of Fireball Whiskey after leaving Texas Roadhouse.

***3. There is nothing in the record to indicate that Texas Roadhouse's Bartender knew or should have known that Pancione would be driving a car shortly after serving her at Texas Roadhouse.***

Independent of whether Pancione appeared intoxicated, Texas Roadhouse is entitled to summary judgment because Bartender Phillips did not know Pancione would soon be driving when she served her. Georgia law does not impose a duty on a provider of alcoholic beverages to prevent an intoxicated person from driving. *See Shin*, 302 Ga. App. 243. Bar owners will not be liable under the Dram Shop Statute for injuries caused by an impaired driver where there is no evidence that the bar

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<sup>80</sup> Exhibit 10, at pp. 39-41; Exhibit 18, at pp. 68-69; Exhibit 19, at pp. 41-42, 60; Exhibit 20, at pp. 51-52.

owner knew that the patron was going to drive. *Becks v. Pierce*, 282 Ga. App. 229 (2006). For liability to attach, the alcohol provider must know that the intoxicated person to whom the alcohol is furnished “will soon be driving a motor vehicle.” *Delta Airlines, Inc. v. Townsend*, 279 Ga. 511 (2005); *see also Kappa Sigma Intern. Fraternity v. Tootle*, 221 Ga. App. 890 (1996).

Georgia decisions have illuminated when a vendor might have constructive knowledge that an intoxicated patron is soon to drive. In *Beck v. Pierce*, 638 S.E.2d 390 (Ga. Ct. App. 2006), the Georgia Court of Appeals considered whether a sports bar knew (or should have known) that an intoxicated guest was about to drive. The sports bar moved for summary judgment but was denied. On appeal, the court reversed, finding that there was “an absence of evidence to satisfy the statutory requirement that [the sports bar] knew that [the guest] was soon to drive.” *Id.* at 392. The court found that there was no evidence that the guest displayed his car keys at any time “or otherwise did anything to indicate that he might be driving.” *Id.* The court also found that the guest was not a regular customer of the sports bar “such that the employees would know that he would be driving.” *Id.* With respect to the plaintiff’s argument that the sports bar’s location in a remote area buttressed an inference that the guest would have to drive, the court concluded that “circumstantial evidence that an alcoholic beverage server does business in a ‘remote’ location and

that most customers drive to the server's place of business is insufficient to show that the server knew a customer would soon be driving." *Id.* at 235-36. Finally, the court also considered the plaintiff's argument that the guest walked past three employees before exiting the premises, and that at least one of them should have realized he was about to drive. *Id.* at 235. The court held that these arguments were irrelevant as "the statute requires that the person serving the last drink know that the patron is soon to drive." *Id.* Accordingly, the court reversed the trial court's denial of summary judgment in favor of the sports bar. *Id.* at 236.

The Georgia Court of Appeals also addressed this issue in *Griffin Motel Co. v. Strickland*, 479 S.E.2d 401 (Ga. Ct. App. 1996). There, the court considered whether a motel's staff should have realized, in the exercise of reasonable care, that an intoxicated patron would soon be operating a motor vehicle. The court laid out several facts in assessing whether the staff should have realized that patron was going to drive: was he picking up another person who did not have a vehicle? Did he indicate readiness to leave? Had anyone observed the patron entering a vehicle?

Examining these factors illustrates Texas Roadhouse's lack of constructive knowledge. Bartender Phillips had no reason to know Pancione would soon be driving a motor vehicle. There is no indication that Pancione showed anyone her car keys. Pancione arrived to pick up carry out food, and as Phillips has testified, it is

common for individuals to come into Texas Roadhouse to pick up carry out orders while other individuals who are with them waited in the car. It was in no way clear that Pancione would be driving soon.

Nor did Phillips have a duty to investigate how Pancione would be departing Texas Roadhouse. While an alcohol vendor may have a duty not to serve a noticeably intoxicated person who will soon drive, the Supreme Court of Georgia has held that an alcohol provider has no affirmative duty to determine the specific method by which an intoxicated person will depart an establishment. *See e.g., Sugarloaf Café, Inc. v. Willbanks*, 612 S.E.2d 279 (Ga. 2005). Without any actual or constructive knowledge that Pancione would be operating a motor vehicle, Texas Roadhouse cannot be charged with Dram Shop liability. As a result, Texas Roadhouse is entitled to summary judgment.

## **V. CONCLUSION**

For the foregoing reasons, Texas Roadhouse respectfully requests Summary Judgment be granted and all of Plaintiffs' claims against it be dismissed with prejudice.



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**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**JOSE ANTONIO CAMACHO,  
Individually, and JOSE ANTONIO  
CAMACHO and DANIELA  
TORRES as Surviving Parents and  
Administrators of the Estate of  
LEONARDO CAMACHO, Deceased,**

**Plaintiffs,**

**v.**

**TEXAS ROADHOUSE HOLDINGS  
LLC,**

**Defendant.**

**CIVIL ACTION FILE NUMBER:  
1:20-cv-03931-ELR**

**Removed from Gwinnett County  
State Court – Civil Action File No.  
20-C-0551-S4**

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**CERTIFICATE OF FONT COMPLIANCE**

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The foregoing **DEFENDANT’S BRIEF IN SUPPORT OF DEFENDANT TEXAS ROADHOUSE HOLDINGS LLC’S MOTION FOR SUMMARY JUDGMENT** is double spaced in 14-point Times New Roman font consistent with Local Rule 5.1 and complies with the type-volume limitation set forth in Local Rule 7.1.

This 28th day of May, 2024.

**[SIGNATURES ON FOLLOWING PAGE]**

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this day I have served a copy of the within and foregoing **DEFENDANT’S BRIEF IN SUPPORT OF DEFENDANT TEXAS ROADHOUSE HOLDINGS LLC’S MOTION FOR SUMMARY JUDGMENT** upon all parties to this matter by depositing same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows and/or filing said document electronically with the Court’s ECF system which will automatically send electronic notification to the following:

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