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.	CASE NO. 1:20-cv-03931-ELR

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs, by and through their undersigned counsel of record and hereby respond to Defendant's Motion for Summary Judgment as follows:

Defendant's Motion for Summary Judgement is wide of the mark. Plaintiffs can prove that Defendant "Texas Roadhouse knowingly served alcohol to Katie Pancione while she was noticeably intoxicated and did so knowing (or should have known, as required under Georgia law) that she would soon be driving." (Def. Br., p.1) [Doc ID 71-1]. Conspicuously missing from Defendant Texas Roadhouse's brief is the fact that the alleged impaired driver, Pancione,

has Huntington's disease, a progressive neurodegenerative disease that presents symptoms consistent with signs of alcohol impairment.[1] Simply stated, she always appears impaired even if she is not. Yet instead of arguing that Defendant's employees knew that Pancione's obvious impairment was an expression of her genetic condition, they deny that they perceived her impairment at all.

Pancione was tested for the disease before the incident because her mother's Huntington's doctor, Dr. Sung, noted her symptoms when she took her mother to UAB for her Huntington's treatment.[2] Huntington's is permanent, progressive and unfortunately fatal. The symptoms that Pancione was manifesting which made Dr. Sung recommend getting tested for the inheritable disease are the same "signs" of impairment indicative of intoxication. But unlike intoxication, Huntington's symptoms cannot be slept off. As a result, Pancione presents as impaired, even when she has not been drinking.

Plaintiffs contend Pancione had been drinking prior to arriving at Texas Roadhouse, where she continued drinking immediately before the fatal incident. All the witnesses relied upon by Defendant in their motion – Pancione (the former criminal and civil defendant driver), Gus Morris, her boyfriend, Bob and Barbara Melka, her parents, Susan Wilensky, her aunt, and Cheyenne Lee (C.

[1] Plaintiffs' Statement of Material Facts [hereinafter "Pltfs' SMF] at ¶¶ 1–5.
[2] Pltfs' SMF at ¶ 1.

Lee), her last bartender – deny that Pancione showed signs of impairment, despite the fact that Pancione *always* presents as impaired.

I. DEFENDANT'S "UNDISPUTED" FACTS NEED SOME CLARIFICATIONS.

Plaintiffs agree to the approximate time, place and date of the incident, but note that it occurred not just approximately 20 minutes after Pancione ordered the beer, but also less than five minutes after she finished drinking it and left Texas Roadhouse.[3] Pancione then drove less than three miles before passing out at a red light (or being so inattentive that other motorists honked their horn for six seconds to alert her).[4] Another motorist proceeded without the right of way in front of her because she was not moving.[5] Pancione then struck a curb, crossed the double yellow lines, swerved back, and struck the curb again. This time, she kept going until she hit the two pedestrians. For a more complete discussion of disputed facts, Plaintiffs refer the Court and Counsel to their statement of disputed facts filed contemporaneously with this brief. Due to the need to address and differentiate Defendant's legal arguments, facts are more fully listed in the separate filing.

II. STANDARD

Summary judgment is appropriate when the pleadings, the discovery and

[3] Def. Br. Ex. 1; Def. Br. Ex. 4.

[4] *See* Exhibit 9 to Plaintiffs' Response in Opposition to Defendant's Motion to Exclude Plaintiffs' Expert Matthew Myers [Doc ID 73-9] at 10:11–11:7 and 13:2–3.

[5] *See* Exhibit 11 to Plaintiffs' Response in Opposition to Defendant's Motion to Exclude Plaintiffs' Expert Matthew Myers [Doc ID 73-11].

disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Swinney v. Schneider Nat'l Carriers, Inc., 829 F. Supp. 2d 1358, 1364 (N.D. Ga. 2011) (citing FED. R. CIV. P. 56(c)). The movant bears the initial burden of affirmatively demonstrating an absence of evidence to support the nonmoving party's case. *Swinney*, 829 F. Supp. 2d at 1364. Once the movant has carried its burden, the nonmoving party must present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 1365 (quoting FED. R. CIV. P. 56(e)).

"Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. *Swinney*, 829 F. Supp. 2d at 1364. Instead, only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party" is there no genuine issue for trial. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (internal quotations omitted) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). "An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant," and "the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party." *Swinney*, 829 F. Supp. 2d at 1364–65. "Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing

the motion must be given the benefit of all reasonable doubts . . . ." Northside Equities, Inc. v. Hulsey, 567 S.E.2d 4, 5–6 (Ga. 2002). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Allen*, 121 F.3d at 646.

III. ARGUMENT

Texas Roadhouse's conduct meets the criteria for dram shop liability under Georgia's Dram Shop Statute. O.C.G.A. § 51-1-40. Plaintiffs can prove that: (1) Texas Roadhouse knowingly furnished alcohol to Pancione while she was noticeably intoxicated;[6] (2) Texas Roadhouse did so knowing (or should have known) that Pancione would soon be driving a motor vehicle;[7] and (3) this act of providing the alcohol was the proximate cause[8] of the injuries sustained by Plaintiffs.

A. There is sufficient evidence in the record to support a jury finding that Pancione was noticeably intoxicated at the time she was served by Texas Roadhouse.

The record of this case presents the jury with plenty of evidence to find that Pancione was noticeably intoxicated when Defendant provided her with more alcohol. First, although Pancione's blood alcohol content (BAC) was measured

[6] Even sober, Katie Pancione presents with the same signs as alcohol impairment. *See* Exhibit 6 to Plaintiffs' Response in Opposition to Defendant's Motion to Exclude Plaintiffs' Expert Matthew Myers [Doc ID 73-6] at 39:9–24 and 52:4–6.

[7] A "to go" food order was called in on her way to Texas Roadhouse, to be picked up and taken with her. Pancione waited 17 minutes for her order while she had another beer.

[8] *See* Exhibit 7 to Plaintiffs' Response in Opposition to Defendant's Motion to Exclude Plaintiffs' Expert Matthew Myers [Doc ID 73-7] at p. 7; [Doc ID 73-9] at 10:11–11:7 and 13:2-3.

three hours after she left Texas Roadhouse, her reading of 0.176[9] is more than sufficient to support a finding that she was noticeably intoxicated at the time she was served at Texas Roadhouse. Second, eyewitnesses who observed Pancione after she left Texas Roadhouse, but before she could have consumed any more alcohol, testified that Pancione drove in an obviously impaired manner.[10] Finally, Pancione's medical condition causes her to always exhibit symptoms of intoxication, controverting any testimony that she did not appear impaired.

1. ***Pancione's blood alcohol content reading at 9:48 p.m. demonstrates that she must have been noticeably intoxicated when she entered Texas Roadhouse.***

Blood alcohol readings are not only direct evidence of an impaired driver's BAC at the time it is measured, but also circumstantial evidence of the impaired driver's BAC earlier in the day. *See, e.g.*, *In re* Dale, 199 B.R. 1014, 1017–18 (Bankr. S.D. Fla. 1995) (BAC reading of 0.10 supported expert inference that the driver's BAC was around 0.17 at the time of the collision four hours earlier); *Hulsey*, 567 S.E.2d at 5, 275 Ga. at 364 (BAC reading of 0.18 taken two hours after driver was served supported extrapolation as high as 0.21 at the time of collision). Even where an impaired driver testifies that she drank alcohol after being served by a dram shop defendant, these extrapolations remain probative of her intoxication beforehand. *See Dale*, 199 B.R. at 1018.

[9] Pltfs' SMF at ¶ 8.
[10] *See* Pltfs' SMF at ¶¶ 25, 74–85.

Defendant Texas Roadhouse contends that Pancione's BAC at the time it was measured is "not an issue" in this case because her alleged alcohol consumption between the time she struck Jose and Leo Camacho and her arrest "contributed to her high BAC later that night." (Def. Br., p.18). However, Pancione testified that she drank only two miniature "airplane" bottles of Fireball whiskey between leaving Texas Roadhouse and the measurement of her BAC. (Doc ID 73-3 at 35:20–36:1 and 84:7–9). James Gordon, a forensic toxicologist with the Georgia Bureau of Investigation, testified that the beer Pancione consumed at Texas Roadhouse and the two airplane bottles of Fireball could not have produced a BAC reading of 0.176 at 9:48 p.m. (Deposition of James Gordon [Doc ID 73-4] at 7:22–8:7 and 41:13–42:17). Gordon testified that if Pancione is telling the truth about having consumed two airplane bottles of Fireball,[11] she would still be "basically two drinks short" of a BAC reading of 0.176. (Doc ID 73-4 at 42:17). Moreover, if a fact finder did not believe Pancione's testimony about having consumed Fireball after the collision, her BAC when she entered the Texas Roadhouse would have to have been 0.225. (Doc ID 73-4 at 45:20–25).

When coupled with expert testimony indicating the level of impairment concomitant with an impaired driver's extrapolated BAC at the time she was

[11] Pancione's testimony that she consumed alcohol after arriving at the home of her boyfriend, Gus Morris, is directly contradicted by Morris's own testimony. Deposition of Gus Morris (Doc ID 73-2 at 44:9–11, 51:8–22). The arresting officer, Sgt. Kurt Chambers, also noted that the stench of alcohol on Pancione was more consistent with beer than cinnamon flavored liquor like Fireball. Deposition of Kurt Chambers at 59:9–60:1. (Pltfs' SMF, Exhibit 11).

served, this evidence is sufficient to contradict testimony that the driver was not noticeably intoxicated. As the Supreme Court of Georgia has explained:

> The evidence that [Pancione] was not noticeably intoxicated [is] not uncontradicted because the expert testimony [is] that a woman with [Pancione's] blood alcohol level would have exhibited manifestations of intoxication. Since the direct evidence [is] not uncontradicted, the inference to be drawn from the circumstantial evidence ha[s] probative value and, coupled with the conclusive presumption in OCGA § 40-6-391(a)(5) that a person with a blood alcohol level less than half of [Pancione's] is impaired, [is] sufficient to create a question of fact whether [Pancione] was noticeably intoxicated when she was served alcohol at [Texas Roadhouse].

Hulsey, 567 S.E.2d at 5. Thus, Gordon's testimony that, based on Pancione's extrapolated BAC when she entered Texas Roadhouse, she would have exhibited "pronounced manifestations" of intoxication is sufficient to contradict the testimony of Texas Roadhouse employee denying that Pancione was noticeably intoxicated.

Defendant argues that "Plaintiffs' proffered circumstantial evidence[12] of intoxication is insufficient to avoid summary judgment. Plaintiffs' only argument that Pancione could have been intoxicated at the time that Bartender C. Lee served her stems from a blood sample taken over three hours later, at 9:48 p.m." (Def. Br., p.18).[13] Defendant's reliance on *Wright v. Pine Hills Country Club,*

[12] As detailed below, the "circumstantial" evidence in question consists of the expert testimony of GBI toxicologist James Gordon, three eyewitnesses to Pancione's reckless driving, and the assessment of Pancione's own boyfriend, Gus Morris, who testified that Pancione appeared "disoriented and confused" BEFORE the alleged Fireball consumption.

[13] The BAC may be the only objective, empirical, uncontradicted and irrefutable evidence in the case.

Inc., 583 S.E.2d 569 (Ga. Ct. App. 2003) is entirely misplaced. Defendant looks to *Wright* for the proposition that the testimony of Plaintiffs' experts regarding Pancione's level of impairment does not create a triable issue of fact. (Def. Br., p.19–20). In fact, *Wright* demonstrates that the opposite is true. The *Wright* Court affirmed summary judgment precisely because the plaintiff had not presented expert testimony that contradicted the testimony of bartenders that an impaired driver was not noticeably intoxicated at the time she was served. 583 S.E.2d at 750. The Court reasoned that, regardless of the driver's post-collision BAC, without expert testimony that would connect the BAC to the issue of whether the driver was noticeably intoxicated, there was no contradiction for the jury to resolve. *Id.*

That is a stark contrast to the case at bar. Here, Plaintiffs have obtained a known BAC (3 hours later) and the expert testimony of James Gordon, a GBI toxicologist, who has opined that Pancione would have had a BAC of approximately 0.225 at time of service and "pronounced" manifestations of impairment, including slurred speech and unsteady gait. (Doc ID 73-4 at 45:20–46:3). Moreover, other witnesses to Pancione's reckless driving and muddled demeanor contradict the self-serving testimony of the Texas Roadhouse bartender. Even Gus Morris testified Pancione was "disoriented and confused" when she got out the car at his house, before she allegedly consumed the

Fireball.

In addition to the three independent scene witnesses who all testified that Pancione's driving was consistent with substantial impairment,[14] Plaintiffs' expert testimony includes Dr. Charles McKay, Dr. David Eagerton and Marissa Orlowski, all of which opined about the manifestations of impairment expected at Pancione's BAC[15] and based on her known BAC over three hours after the incident.

Because the record in this case contains a known BAC and direct eyewitness testimony of Pancione's driving moments before the tragic event,[16] this case is substantially similar to that *distinguished* by the Court in *Wright*. In *Hulsey*, numerous dram shop employees had produced affidavits averring that the driver was not noticeably intoxicated. 567 S.E.2d at 5. However, because the plaintiff in *Hulsey* produced expert testimony that extrapolated the driver's pre-collision BAC and "opined that various manifestations of intoxication would appear at that level," the contradictory evidence created a question of fact for a jury to resolve. *Id.*

And because there is a known BAC in this case, Plaintiffs' experts were able to determine Pancione's BAC when she was served a beer at Texas Roadhouse.[17] In

[14] Pltfs' SMF at ¶ 56, 70.
[15] Pltfs' SMF at ¶¶ 8–11, 33–73.
[16] *See* Pltfs' SMF at ¶¶ 25, 74–85.
[17] Pltfs' SMF at ¶¶ 8–11

the words of the *Hulsey* Court:

> The scientific reliability and objectivity of testing for blood alcohol concentration have been recognized by the General Assembly and by the courts. The salient circumstance in this case is the forensic analysis of a substantially contemporaneous blood sample, placing Greene's blood alcohol level at 0.18 grams percent. This is direct proof that her motor skills should have been degraded. In our view, that fact distinguishes this case from precedents where circumstantial evidence of subsequent intoxication was insufficient to rebut direct and uncontradicted evidence that a person was not noticeably intoxicated when last served alcohol.

Hulsey v. Northside Equities, Inc., 548 S.E.2d 41, 44 (Ga. Ct. App. 2001), *aff'd*, 567 S.E.2d 4. This case is not like *Wright* precisely because there *is* expert testimony to contradict the testimony of Defendant's employees. Plaintiffs' experts establish that Pancione would have appeared intoxicated when she entered Texas Roadhouse based on the same studies relied upon by Defendant's experts. This testimony makes Pancione's post-collision BAC probative of whether Pancione was noticeably impaired at Texas Roadhouse.[18]

Only a jury can determine 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. The collective testimony of this case gives the jury two choices: (1) Fireball whiskey consumption after the wreck (insufficient to obtain a 0.176 BAC);[19] or (2) alcohol consumption before she got to Texas

[18] [Doc ID 73-4]; Pltfs' SMF at ¶¶ 8–11.
[19] [Doc ID 73-4] at 42:17; Pltfs' SMF at ¶¶ 8–11, 23, 55, 60.

Roadhouse. The jury should consider Gus Morris's inherent contradiction in his testimony as well as the conflict with Pancione, who said she did not discuss the Fireball until after meeting with her criminal defense attorney, whereas Morris claimed she told him at his house.[20] Furthermore, no Fireball bottles were recovered at the scene or are observed on the numerous sheriff's bodycams all around the car, yard and interior of the house.[21]

Defendant complains that 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. (Def. Br., p.21). Plaintiffs' experts did consider that theory, but because that narrative is contradicted by the testimony of Gus Morris and scientifically unsupportable according to GBI toxicologist James Gordon, a jury should determine which theory makes sense.

Defendant's argument is simply that Plaintiffs' experts do not deny the *existence* of testimony that contravenes their conclusions. In complaining that the conclusions of Plaintiff's experts "necessarily ignores" the testimony of Texas Roadhouse employees[22] (Def. Br., p.19), Defendant plainly acknowledges that **Plaintiffs have produced the very testimony necessary to create a contradiction.** Unlike *Wright*, Plaintiffs' experts have considered Pancione's

[20] Pltfs' SMF at ¶¶ 16, 20.
[21] Pltfs' SMF at ¶¶ 80, 93, 103, 109, 111.
[22]Putting aside Defendant's characterization of Plaintiffs' expert's retrograde extrapolation as mere "guesstimations," these experts did not "ignore" testimony favorable to Defendant. James Gordon simply relied on his expertise (forensic toxicology) rather than impeding on the expertise of the jury (weighing credibility).

known BAC and have disputed her contentions of after-the-fact Fireball whiskey consumption (a contention that, if believed, empirically fails to explain her measured BAC). The conflicts between Plaintiffs' expert testimony and that of Morris, Pancione, and Defendant's employees are for the jury to resolve.

2. *Eyewitnesses to Pancione's driving at the time of the collision perceived that she was impaired before she allegedly drank the Fireball whiskey.*

Defendant has offered only the unreliable testimony of interested parties to support its assertion that Pancione was not noticeably intoxicated at Texas Roadhouse. Witnesses to Pancione's reckless driving directly contradict that characterization. Three eyewitnesses to her driving 2.3 miles away from the bar and even Pancione's boyfriend, Gus Morris, testified that she was noticeably intoxicated *before* the alleged Fireball consumption.

In their respective witness statements, three other drivers who witnessed Pancione's erratic driving after leaving Texas Roadhouse described how obviously impaired Pancione was. Thomas Gault said Pancione had difficulty staying in her lane of travel, struck the curb, overcorrected, and even crossed the center line into the path of oncoming traffic. Jeremy Hayes witnessed Pancione cross the centerline and nearly strike an oncoming vehicle. In his deposition, Hayes characterized Pancione's driving as "extremely unsafe." Finally, Lesley Zarzana saw Pancione twice strike the curb and swerve into oncoming traffic. Zarana then saw Pancione strike Jose and Leo Camacho without even slowing down.

After Pancione fled the scene and arrived at the home of her boyfriend, Gus Morris, he noted that Pancione was "disoriented and confused" before she allegedly consumed the Fireball. (Doc ID 73-2 at 29:14–15). In light of Pancione's testimony that she did not consume alcohol between leaving Texas Roadhouse and arriving at Morris's home, Pancione must have been in a state of noticeable intoxication at Texas Roadhouse. The testimony of Defendant's employees to the contrary is anything but "uncontradicted."

Defendant argues that summary judgment is appropriate in light of *Birnbrey, Minsk & Minsk, LLC v. Yirga*, 535 S.E.2d 792, 794 (Ga. Ct. App. 2000) (Def. Br., p. 15). "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." (Def. Br., p. 16). However, the facts of *Birnbrey* are easily distinguished. (1) In *Birnbrey*, there was **no BAC,** but merely an officer estimating what he thought the BAC was some time after the incident. Here, Pancione had a measured BAC of .176, 3 hours post-incident. (2) That same officer indicated the *Birnbrey* driver "did not seem confused," but Morris testified Pancione presented as "disoriented and confused"

upon arrival at his house.[23] (3) The wreck in *Birnbrey* was caused when the injured party suffered a medical episode and crossed the centerline into the allegedly impaired driver. Here there is no allegation that Jose or Leo Camacho contributed to the collision, and there is no doubt that three eyewitnesses saw Pancione exhibiting signs of impairment before causing a double-fatal pedestrian strike. (4) The proffered expert in *Birnbrey*, a retired toxicologist, based his own extrapolation estimating the impaired driver's BAC at the time of the wreck on an off-duty officer's estimate of what the driver's BAC might have been after the wreck.

The record in this case contains an actual BAC measurement, as well as three eyewitnesses to the pre-wreck driving of Pancione, and Morris's testimony of Pancione appearing disoriented and confused. The *Birnbrey* Court cautioned:

> Where direct and positive testimony is presented on an issue, the opposing party must show some other fact which contradicts the testimony. If this other fact is direct evidence, that is sufficient to allow the case to go to the jury; if the other fact is circumstantial evidence, it must be inconsistent with the defendant's evidence, or if consistent, it must demand a finding of fact on the issue in favor of the plaintiff.

535 S.E.2d at 794 (quoting Michelin Tire Corp. v. Irving, 366 S.E.2d 156, 157 (Ga. Ct. App. 1988). Plaintiffs have more than met this mark. Pancione's BAC three hours post-incident is direct and objective proof of her level of intoxication.

[23] Pltfs' SMF at ¶ 75.

According to Plaintiffs' experts, this BAC reading cannot be reconciled with Pancione's testimony regarding how much alcohol she consumed and when. Nor can Pancione's alleged Fireball consumption comport with the testimony of Morris or Sgt. Chambers. Plaintiffs' experts certainly contradict the testimony of the family and friends of Pancione and the bartender who served her. Defendant is simply asking this Court to credit the latter testimony over the former.

Unlike the proffered expert in *Birnbrey*, who drew an inference "premised on a nonexistent fact," 535 S.E.2d at 795, Plaintiffs' experts and the GBI toxicologist all agree Pancione would have needed to have 4–5 drinks "on board" (in her system, being metabolized) to obtain her recorded BAC.[24] When asked by defense counsel about Defendant's Fireball theory of how she got to her elevated BAC, GBI toxicologist James Gordon has made it clear that even the two 100 mL bottles of Fireball would still not get her to a 0.176 BAC.

For illustrative purposes, James Gordon was given as exhibits two 100 mL bottles of Fireball, so he could be clear that even if she drank two as claimed, despite no evidence of the purchases or empty bottles in a well-kept yard, Pancione and Texas Roadhouse come up short on their story about how she got so drunk.[25] Bottom line, "[w]e (Texas Roadhouse) need 300 mL of fireball to get

[24] *See* Doc ID 73-4 at 34:12-37:4; Plfts' SMF at ¶ 10.
[25] *See* Doc ID 73-4 at 49:8-21

there."[26] Further, James Gordon did a retrograde extrapolation at the request of defense counsel and estimated that Pancione presented to Texas Roadhouse with a BAC of 0.225.[27]

Unlike the plaintiffs in *Birnbrey*, Plaintiffs in this case have offered considerable direct evidence to overcome Defendant's unreliable, inherently inconsistent and often contradictory "direct evidence in the record that Pancione was not noticeably intoxicated when she was served one beer at Texas Roadhouse." (Def. Br., p.16). Defendant continues to cite Plaintiffs' experts who acknowledge the contested, disputed and unreliable "direct evidence" of family and friends who repeat what they have been told and draw conclusions that they have little opportunity to observe.

3. *Pancione's neurological symptoms belie Defendant's assertion that she did not present as intoxicated.*

Plaintiffs further satisfy the first element of dram shop liability because the same witnesses who deny Pancione was drinking before arriving at Texas Roadhouse, despite having little if any opportunity to make that determination, are the same witnesses who testified that Pancione regularly slurs her words and has an unsteady gait.[28]

While the Texas Roadhouse security video does not show gross

[26] *See* Doc ID 73-4 at 54:5-6.
[27] See Doc ID 73-4 at 44:11-45:25
[28] Pltfs' SMF at ¶¶ 1–3.

impairment visible from a distance, the failure of the camera to capture Pancione's symptoms of intoxication is not dispositive. Studies confirm what humans have always known: video alone, without sound or smell or being able to see details like pupil dilation, only permits a lay observer to perceive impairment at a much greater BAC.[29]

While Bartender C. Lee has extensive training and experience in observing signs of impairment,[30] if she does not utilize that training, it is ineffective. Bartender C. Lee was impressed by Pancione's math skills in calculating their age difference, with birthdates in the same month, supposedly "indicating that she was sober."[31] (Def. Br., p.15). But bartender C. Lee was not able to answer if a BAC of 0.176 was more than twice the legal limit of 0.08.[32] Defendant discusses at some length the observations made by C. Lee, yet (other than that Pancione was "not showing signs of impairment") C. Lee does not seem to remember much. C. Lee testified numerous times that she did "not recall, not remember or not know" a great deal of information, such as her TIPS training.[33] In fact, when asked about

[29] Pltfs' SMF at ¶ 57.

[30] Despite this training, she has a poor understanding of the signs of impairment and usually depends on "drink counting." Deposition of C. Lee at 13:3-12, 15:12-16:20.

[31] *See* Exhibit 6 at 22:7-23:2

[32] *See* Exhibit 6 at 51:24-52:21

[33] *See* Exhibit 6 at 52:23-53:7. In addition to not recalling her TIPS training, Lee did not recall the conversation with her manager day after wreck (Exhibit 6 at 17:11, 23:24, 34:16, 37:13-23, 38:6 and 58:8). She did not remember if Point of Sale document shows where Pancione was seated (Exhibit 6 at 19:17) or the sequence of Pancione ordering beer, being carded, and making introductions (Exhibit 6 at 22:5). She did not remember if Pancione asked for or was offered a beer (Exhibit 6 at 24:17 and 24:23). She did not remember discussing her to go food order (Exhibit 6 at 26:25, 27:9) or if she offered her "anything else" (Exhibit 6 at 29:13). She did not remember Pancione making any

how she thought Pancione would be leaving the bar she said that "she did not remember."[34]

As Pancione would have been exhibiting Huntington's symptoms, which are signs of alcohol impairment, it is significant that bartender C. Lee did not differentiate that condition from being impaired. Defendant's continued reliance on the self-serving testimony of Pancione's family and friends, who had little (if any) opportunity to observe Pancione before her arrival at Texas Roadhouse, elides an interesting conflict in the testimony – one that only a jury can resolve.

B. There is evidence in the record to support that Texas Roadhouse's bartender knew or should have known that Pancione would be driving a car shortly after serving her at Texas Roadhouse.

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). In arguing for strict construction of the derogation of the common law, Defendant mistakenly relies on *Delta Airlines v. Townsend*, 614 S.E.2d 745 (Ga. 2005) and *Shin v. Estate of Camacho*, 690 S.E.2d 444, 447 (Ga. Ct. App. 2010). (Def. Br., p.13). In *Townsend*, the Supreme Court addressed the application of the Georgia Dram

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phone calls at the bar (Exhibit 6 at 30:15) or the substance of conversation with Ashleigh Merchant, Katie Pancione's criminal defense attorney (Exhibit 6 at 46:25-47:2,49:23-24). She did not remember anybody else interacting with Katie Pancione (Exhibit 6 at 60:18-19, 61:12-15, 62:8, 62:22, 63:7 and 63:9), nor did she remember when Pancione walked into the bar (Exhibit 6 at 70:7-13).

[34] See Exhibit 6 at 54:12-55:2

Shop Act (GDSA) to an airline passenger who was impaired and injured another motorist after landing in Atlanta and driving from the airport.

> In the commercial setting, the General Assembly certainly intended that the owners of **bars, restaurants** and similar businesses would be subject to potential liability under the GDSA. **The customers** of such purveyors of alcohol **necessarily travel to and from the establishment by some land-based means of transportation**, so that financial viability often depends on the accessibility of the premises by motor vehicle. A clear proximate connection thus exists between such businesses and motor vehicular traffic.

Townsend, 614 S.E.2d at 748, 279 Ga. 511 at 514 (emphasis added). The *Townsend* Court was considering the foreseeability of an airline's constructive knowledge (knew or should have known) that the consumer would soon be driving a car. "[I]n light of the use of automobiles and the increasing frequency of accidents involving drunk drivers, . . . the consequences of serving liquor to an intoxicated person whom the server **knows or could have known** is driving a car, is reasonably foreseeable." *Elsperman v. Plump*, 446 N.E.2d 1027, 1030 (Ind. Ct. App. 1983) (citation omitted). **Because the patrons of land-based establishments serving alcohol** generally have **direct and immediate access to their vehicles**, liability should attach to an owner who **knew or should have known** that a departing intoxicated customer will shortly be driving. *Townsend*, 614 S.E.2d at 749 (emphasis added) (citing *Griffin Motel Co. v. Strickland*, 479 S.E.2d 401, 403, 223 Ga. App. 812, 814(2), (1996)).

Although bartender C. Lee denies actual knowledge that Pancione would

soon be driving a car, she served her a beer while Pancione waited on her "to go" food, which Pancione ordered on her way to the restaurant from Alpharetta, Georgia. C. Lee asked Pancione to produce her driver's license and the two even discussed birthdays and age differences. C. Lee could have noted Pancione's distant address or even asked her if she drove. While there is no affirmative duty to determine how her customer intended to leave,[35] a reasonable jury may easily conclude that the bartender knew that a customer waiting for carry-out food might be driving. The test is not what bartender C. Lee *says* she subjectively knew, but whether a jury could consider it reasonable to presume a customer getting to-go food and waiting alone for 17 minutes at the bar drove herself. To the extent that Defendant argues the statute does not specifically say knew "or should have known," the Supreme Court of Georgia established in *Townsend* that Georgia's Dram Shop Act extends liability to purveyors with either actual or implied knowledge.[36]

Whether the provider of alcohol had knowledge that the customer would soon be operating a vehicle, as opposed to calling a taxi, taking public transportation, or riding home with a friend is a question of fact, especially for

[35] "[A]n affirmative duty on providers of alcohol to determine the method by which a patron plans to depart the [premises where the liquor was consumed], and how that patron plans eventually to get home. . . . exceeds the duty established by the legislature." Sugarloaf Café v. Willbanks, 279 Ga. 255, 612 S.E.2d 279 (2005).

[36] ""Under the common law rule, no liability attached unless the provider of alcohol had actual knowledge that the purchaser was underage and would be driving soon, but under the statute implied knowledge is sufficient." *Townsend*, 614 S.E.2d at 750 (Fletcher, J., dissenting) (citing Riley v. H & H Operations, 436 S.E.2d 659, 660–61, 263 Ga. 652, 654 (Ga. 1993).

land-based establishments. *See Townsend*, 614 S.E.2d 745, 750, 279 Ga. 511, 517 (Fletcher, J., dissenting) (disapproving of the majority's creation of an exception to the objective standard for airlines); *accord Becks v. Pierce*, 638 S.E.2d 390, 393, 282 Ga. App. 229, 233 (Ga. Ct. App. 2006).

Defendant continues their argument stating that "the Dram Shop Statute presents itself as an injured person's exclusive remedy for imposing liability on a bar providing alcohol to a driver. (Def. Br., p.13).[37] In *Shin*, the impaired driver caused the wreck "within 15 minutes of leaving Shin's home" and had a B.A.C. of 0.147. In the case before this Court, the wreck happened approximately 5 minutes after leaving Texas Roadhouse and Pancione's B.A.C. was 0.176 even three hours after the wreck.

Plaintiffs satisfy the first two criteria required by the Dram Shop Statute. First, there is expert testimony about what signs of intoxication Pancione would have been exhibiting, despite the subjective denial of bartender C. Lee and Pancione herself. Additionally, her Huntington's symptoms are always present and she would have appeared intoxicated, even if she was not (for arguments sake, Plaintiffs do not argue she was not intoxicated based on her BAC 3 hours post wreck). Second, there is evidence in the record to suggest that Texas Roadhouse's bartender C. Lee knew or should have known that Pancione would

[37] If this dram shop claim is the exclusive remedy, presumably Defendant's motion of intent to seek apportionment is misplaced. [Doc ID 66].

be driving soon after waiting 17 minutes for her "to go" food and having provided identification with an out-of-town address.

Bartender C. Lee should have known Pancione would soon be driving when she came in to pick up a "to go" food order, which she called in while she drove there from another town. C. Lee checked Pancione's identification for her age and could have looked at the address. While there is no affirmative duty to determine the manner a customer intends to leave, C. Lee should have known a customer waiting for her "to go" order was going to drive away with it. The idea that a driver may have been waiting for Pancione as she drank her beer for 17 minutes should be left for a jury to determine, not Defendant's bartender declaring "I can't assume she is driving." In fact, she can and Plaintiffs' expert Marisa Orlowski has testified that it is an industry standard to do so.[38] 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. But is does provide for a remedy with these facts under the Georgia Drams Shop Statute. Defendant cites *Becks v. Pierce*, where the Georgia Court of Appeals stated:

> It is a long-standing rule that the [Georgia Dram Shop] Act does not require that the person selling, furnishing, or serving alcohol have actual knowledge that the patron was soon to drive. Rather, if a provider in the exercise of reasonable care *should have known* both that the recipient of the alcohol was noticeably intoxicated and that the recipient would be driving soon, the provider will be deemed to

[38] Pltfs' SMF at ¶ 46.

have knowledge of that fact.

638 S.E.2d 390, 393, 282 Ga. App. 229, 233 (Ga. Ct. App. 2006) (emphasis added) (citation omitted). For example, "if a customer left the bar alone (like Pancione), it was more likely than not he was driving" id at 392. The *Becks* court discussed at some length an expert's opinion about being in a remote location to "know" the customer was about to drive. Actual knowledge is not what is required, but constructive knowledge. In this case, we have a customer who called in an order while driving to the restaurant, arrived at the bar to get her "to go" food - which was not ready - so she was offered or ordered a beer and sat alone for 17 minutes until her food was ready and then left, alone.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request Summary Judgment be denied and a jury be permitted to resolve the disputed facts, liability and damages.

Respectfully submitted this 18th day of June, 2024.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the foregoing 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 18th day of June, 2024.

BUCK ROGERS LAW, LLC

/s/ Brian D. Rogers
BRIAN D. ROGERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, I served the foregoing via the court's electronic filing system to the following attorneys of record:

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This 18th day of June, 2024.

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