Rel: May 3, 2019

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170874

Katerial Wiggins, individually and as administrator of the estate of Dominic G. Turner, deceased, and as next friend of Dominic Turner, Jr., a minor

v.

Mobile Greyhound Park, LLP, and Mobile Greyhound Racing, LLP

Appeal from Mobile Circuit Court (CV-16-900306)

BRYAN, Justice.

Katerial Wiggins, individually and as the administrator of the estate of Dominic G. Turner, deceased, and as the next friend of Dominic Turner, Jr. ("D.T."), appeals from a summary

judgment entered by the Mobile Circuit Court ("the circuit court") in favor of Mobile Greyhound Park, LLP ("MGP"), and Mobile Greyhound Racing, LLP ("MGR"). We affirm in part and reverse in part the circuit court's judgment and remand the cause for further proceedings.

Facts and Procedural History

On June 6, 2015, a vehicle being driven by Willie McMillian struck from behind a vehicle being driven by Wiggins on Interstate 10 in Mobile County. Wiggins's fiancé, Turner, and their child, D.T., were riding in the backseat of the vehicle being driven by Wiggins when the collision occurred. As a result of the collision, Turner died and Wiggins and D.T. were injured. After obtaining evidence indicating that McMillian was under the influence of alcohol, law-enforcement officers arrested McMillian. He later pleaded guilty to reckless murder and was sentenced to imprisonment for 15 years.

In February 2016, Wiggins, in her individual capacity, on behalf of D.T., and on behalf of Turner's estate, sued McMillian. In relevant part, the complaint also named MGP and

MGR as defendants.[1] Wiggins alleged that MGR and MGP operated a dog-racing track and that, on the day of the collision, MGR and MGP sold alcohol to McMillian at the dog-racing track while he was visibly intoxicated; she requested compensatory damages and punitive damages, pursuant to § 6-5-71, Ala. Code 1975 ("the Dram Shop Act"), for Turner's death and the injuries she and D.T. had sustained.[2] (This action is hereinafter referred to as "the dram-shop action.") Wiggins later filed a report of special damages in the dram-shop action that, in relevant part, included a request for damages under the Wrongful Death Act, § 6-5-410, Ala. Code 1975.

Wiggins also sought to consolidate the dram-shop action with an interpleader action that had been initiated in 2015 by Alfa Mutual Insurance Company ("Alfa"), McMillian, and Lutenia

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[1]The complaint also named as defendants the Poarch Band of Creek Indians, Creek Indian Enterprises, and PCI Gaming d/b/a Creek Entertainment Center. Those defendants were later dismissed.

[2]The complaint also included separate counts of negligence, wantonness, and "[t]he negligence, wantonness, violation of statutes, and the wrongful conduct of" the defendants, which she said had "combined and concurred" to cause Turner's death and her and D.T.'s injuries. The circuit court later entered a summary judgment in favor of MGR and MGP on those claims. That summary judgment is not at issue in this appeal.

Campbell, McMillian's longtime partner and the owner of the vehicle he was driving at the time of the collision ("the interpleader action"). In relevant part, the complaint filed in the interpleader action named as defendants Wiggins; D.T.; Turner's estate; Sarah Hinkle, McMillian's mother and a passenger in the vehicle he was driving at the time of the collision; and Michael and Dana Davis, who were occupants in a vehicle that was struck by the vehicle being driven by Wiggins at the time of the collision. Pursuant to the limits of Campbell's vehicular-insurance policy, Alfa interpleaded $100,000 to the circuit court clerk. The record does not contain an order consolidating the dram-shop action and the interpleader action. The parties to the interpleader action later reached a settlement. The circuit court dismissed McMillian from the dram-shop action, leaving as defendants only MGP and MGR.

In April 2018, MGR moved for a summary judgment in the dram-shop action and submitted evidence in support of its motion. Among other things, MGR argued that Wiggins had failed to present sufficient evidence indicating that McMillian had appeared "visibly intoxicated" while purchasing

alcohol at the dog-racing track operated by MGR. MGR also argued that the issue whether McMillian had appeared "visibly intoxicated" during the relevant times had already been litigated in the interpleader action and that Wiggins was, therefore, precluded by the doctrine of res judicata from relitigating that issue in the dram-shop action. MGR also filed a motion to strike Wiggins's "claims for damages other than damages allowed under § 6-5-71, Ala. Code 1975." In relevant part, MGR argued that any claim of "wrongful death" asserted by Wiggins should be struck because, MGR argued, such claims "are not allowed under the Dram Shop Act."

Wiggins filed a brief in response to MGR's summary-judgment motion and submitted evidence in support of her response. Wiggins also filed a response to MGR's motion to strike portions of her complaint, in which she argued, in relevant part, that "claims for wrongful death are proper under the Dram Shop Act."

In May 2018, MGP also moved for a summary judgment. In relevant part, MGP asserted that it was a limited partnership that owned a minority interest in MGR. MGP asserted that it was not responsible for the operation of the dog-racing track

and that none of its employees was working at the dog-racing track on the day of the collision. Thus, MGP asserted, it was not liable under the Dram Shop Act. Wiggins did not file a response to MGP's summary-judgment motion.

On May 30, 2018, the circuit court entered an order granting MGP's summary-judgment motion. That same day, the circuit court also entered an order granting MGR's "motion to strike [Wiggins]'s claim for damages for wrongful death." Finally, the circuit court entered an order granting MGR's summary-judgment motion; in so doing, the circuit court concluded that Wiggins had failed to present sufficient evidence demonstrating the existence of a genuine issue of material fact regarding whether "McMillian appeared to be intoxicated when he was served at the dog track."

Wiggins appealed from the circuit court's judgment, naming both MGR and MGP as appellees. In her principal appellate brief, Wiggins challenges the summary judgment in favor of MGR and its decision to grant MGR's motion to strike her wrongful-death claim. For the first time in her reply brief, Wiggins asserts that MGP is not a separate entity from

MGR and that "Mobile Greyhound Park" is merely a trade name used by MGR. We address each argument in turn.

Standard of Review

> "'A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ala. Code 1975, § 12-21-12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
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> "Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994). Questions of law are reviewed de novo. Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)."

Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006).

Analysis

I. Summary Judgment in Favor of MGR

A.

We first address Wiggins's challenge to the summary judgment in favor of MGR. The Dram Shop Act provides, in relevant part:

> "(a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages."

§ 6-5-71 (emphasis added). "In order to show a violation of the Dram Shop Act the plaintiff must prove three elements: The sale must have 1) been contrary to the provisions of law; 2) been the cause of the intoxication; and 3) resulted in the plaintiff's injury." Attalla Golf & Country Club, Inc. v. Harris, 601 So. 2d 965, 967 (Ala. 1992).

"It is well settled in Alabama that a sale to a visibly intoxicated person is 'contrary to the provisions of law.' Ala. Code 1975, § 28-3-49; ABC [Alcoholic Beverage Control] Board Regulations 20-x-6.02(4)." 601 So. 2d at 968. Alabama Administrative Code (ABC Board), Regulation 20-X-6-.02(4),

provides: "No ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if such person appears, considering the totality of the circumstances, to be intoxicated." The question presented in this appeal is whether sufficient evidence was produced demonstrating the existence of a genuine issue of fact regarding whether MGR sold beverages to McMillian "contrary to the provisions of law," specifically, those set out in Reg. 20-X-6-.02(4).

As a preliminary matter, however, we note that Wiggins's principal appellate brief includes some discussion regarding whether the "totality of the circumstances," as mentioned in Reg. 20-X-6-.02(4), should be evaluated in considering her dram-shop claim. She contends that it should. Although neither the circuit court's summary judgment nor MGR's appellate arguments explicitly conflict with Wiggins's assertion, we find it necessary to address the question in light of its potential impact on the manner in which the evidence should be viewed.

Wiggins begins her discussion of the issue by pointing out that the version of Reg. 20-X-6-.02(4) existing in 1987

did not specifically require Alcoholic Beverage Control Board ("ABC Board") on-premises licensees to consider "the totality of the circumstances" in evaluating whether a potential customer appeared to be intoxicated. She cites Ward v. Rhodes, Hammonds & Beck, Inc., 511 So. 2d 159, 164 (Ala. 1987), in which this Court stated:

> "[I]n September of 1982, the Alcoholic Beverage Control Board promulgated Regulation 20-X-6-.02, which reads, in part, as follows:
>
> "'....
>
> "'(4) No on premise licensee may serve a person any alcoholic beverage if such person is acting in such a manner as to appear to be intoxicated.'"

In 1991, this Court decided Espey v. Convenience Marketers, Inc., 578 So. 2d 1221, 1221 (Ala. 1991), a case involving James Espey's claim under the Civil Damages Act, codified at § 6-5-70, Ala. Code 1975.[3] Espey also asserted a

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[3]Section 6-5-70 provides:

> "Either parent of a minor, guardian or a person standing in loco parentis to the minor having neither father nor mother shall have a right of action against any person who unlawfully sells or furnishes spirituous liquors to such minor and may recover such damages as the jury may assess, provided the person selling or furnishing liquor to the minor had knowledge of or was chargeable with

claim, individually and on behalf of his son, Jimmy, who was a minor during the relevant times, under the Dram Shop Act. The defendant at issue in that case, Convenience Marketers, Inc. ("Convenience"), had sold beer to Jimmy one evening while Jimmy was with a companion, Connie, who was also a minor. Later that evening, Jimmy was riding in a vehicle being driven by Connie when Connie lost control of the vehicle, causing it to collide with an electric pole. Jimmy was injured and Connie died. Connie had been intoxicated. This Court affirmed the circuit court's summary judgment in favor of Convenience on Espey's claim under the Dram Shop Act.

The Court noted that Espey's claim under the Dram Shop Act was predicated on Connie's intoxication, not Jimmy's. Because Convenience had sold the beer to Jimmy, not Connie, the Court declined to hold that the sale was "contrary to the provisions of law," within the meaning of the Dram Shop Act. In a footnote, the Court noted its decision in Laymon v. Braddock, 544 So. 2d 900, 904 (Ala. 1989), which held that a

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notice or knowledge of such minority. Only one action may be commenced for each offense under this section."

"totality of the circumstances" test should be used when evaluating claims brought under specific language used in the Civil Damages Act. Espey, 578 So. 2d at 1233 n.4. In so doing, the Court stated: "[W]e have not yet applied a 'totality of the circumstances' test to Dram Shop actions." Id.

Two years later, in Moreland v. Jitney Jungle, Inc., 621 So. 2d 285 (Ala. 1993), the Court considered the language of the footnote in Espey. The Moreland Court summarized the facts in that case as follows:

> "At approximately 4:40 p.m. on October 25, 1991, Michael Quillan and Amanda Hamner, who were 19 and 21 years of age, respectively, visited the Jitney Jungle supermarket in Florence, Alabama, operated by the defendant Jitney Jungle, Inc., to purchase beer. Quillan, accompanied by Hamner, carried a carton containing 24 cans of the beverage to the front of the store and placed it on the conveyor belt at the checkout counter. The checkout clerk asked: 'Which one is of age?' Miss Hamner replied: 'I have an ID.' She then paid for the beer and carried it from the store.
>
> "At approximately midnight, Quillan was driving his vehicle on Lauderdale County Road 38 and, while attempting to negotiate a curve in the road, collided with Michael Moreland, who was riding a motorcycle. Moreland subsequently sued Jitney Jungle; he alleged that Jitney Jungle had violated the Dram Shop Statute and that its violation had caused the injuries he suffered in the collision. On October 30, 1992, the trial court entered a

summary judgment for Jitney Jungle. On appeal, the plaintiff, Moreland, contends that Jitney Jungle 'sold' beer to Quillan in violation of Ala. Code 1975, § 28-3A-25(a)(3), and thus, he argues, he has a cause of action pursuant to the Dram Shop Statute, Ala. Code 1975, § 6-5-71. Section 28-3A-25(a)(3) provides:

"'(a) It shall be unlawful:

"'....

"'(3) For any licensee or the board either directly or by the servants, agents or employees of the same, or for any servant, agent, or employee of the same, to sell, deliver, furnish or give away alcoholic beverages to any minor, or to permit any minor to drink or consume any alcoholic beverages on licensee's premises.'

"....

"It is undisputed that Jitney Jungle was legally entitled to sell beer to Miss Hamner. The plaintiff contends, however, that the transaction was, in effect, a 'second-sale subterfuge,' that is, that the checkout clerk knew or should have known from the 'totality of the circumstances' surrounding the sale that the beer was purchased by Miss Hamner for consumption by Quillan 'contrary to the provisions of law,' within the meaning of the Dram Shop Statute, considering the provisions of § 28-3A-25(a)(3)."

621 So. 2d at 286. After considering the relevant language from Espey, the Court concluded: "The plaintiff in this case

has presented no compelling reason for extending the application of the 'totality of the circumstances test' to Dram Shop Statute claims." 621 So. 2d at 288. The Court reasoned that, because the Dram Shop Act

> "authorizes an action by any 'person who shall be injured in person [or] property,' § 6-5-71(a), [it] would, in conjunction with the totality of the circumstances test, subject a large number of Alabama citizens to liability that is not only strict, McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991), but nearly absolute."

Moreland, 621 So. 2d at 288. In Jones v. BP Oil Co., 632 So. 2d 435 (1993), the Court applied the reasoning of Espey and Moreland under similar circumstances, i.e., in an action involving an injury, in that case, death, caused by an intoxicated minor who had not obtained the alcohol at issue directly from the defendant.

Wiggins argues that the ABC Board disagreed with this Court's reasoning in Espey and Moreland and, in 1998, changed Reg. 20-X-6-.02(4) to include the "totality of the circumstances" language. We express no opinion regarding whether the changes reflected in Reg. 20-X-6-.02(4) were a response by the ABC Board to this Court's decisions in Espey and Moreland. We note, however, that Reg. 20-X-6-.02(4) was

not at issue in either Espey or Moreland. As noted above, Reg. 20-X-6-.02(4) prohibits ABC Board on-premises licensees from serving alcoholic beverages to someone who is visibly intoxicated. In relevant part, Espey and Moreland addressed the defendants' potential liability under the Dram Shop Act for injuries caused by minors who had consumed alcoholic beverages obtained indirectly from the defendants, not potential liability for injuries caused by visibly intoxicated persons who had purchased alcoholic beverages directly from the defendants.

In other words, the "provisions of law," see § 6-5-71(a), at issue in Espey and Moreland are not the same provisions of law at issue in this case. As noted in Moreland, 621 So. 2d at 286, ABC Board licensees are prohibited from selling alcohol to minors by § 28-3A-25(a)(3), Ala. Code 1975. In this case, it is undisputed that McMillian was an adult on the night of the collision and, as is explained in more detail infra, that he purchased alcohol directly from MGR. Therefore, we are not concerned with the question whether the totality of the circumstances should be considered when evaluating whether a defendant acted contrary to the

provisions of law by indirectly furnishing alcohol to minors, as this Court was in Espey and Moreland.

In this case, we are concerned with whether the totality of the circumstances should be considered when evaluating whether MGR sold alcoholic beverages directly to McMillian when he was visibly intoxicated. Regulation 20-X-6-.02(4) indicates that ABC Board on-premises licensees should consider the totality of the circumstances when evaluating whether a potential customer appears intoxicated. As Wiggins points out, this Court has previously noted that Reg. 20-X-6-.02 "has 'the full force and effect of law.'" Krupp Oil Co. v. Yeargan, 665 So. 2d 920, 924 (Ala. 1992)(quoting Evans v. Sunshine-Jr. Stores, Inc., 587 So. 2d 312, 316 (Ala. 1991)); see also § 28-3-49(a). Therefore, we hold that, in accordance with the requirements imposed on ABC Board on-premises licensees by Reg. 20-X-6-.02(4), the totality of the circumstances should be considered when evaluating a claim that an ABC Board on-premises licensee, its employee, or agent has unlawfully sold alcohol directly to someone appearing visibly intoxicated.

We will now consider the evidence presented regarding whether McMillian appeared visibly intoxicated when he was purchasing alcohol from MGR. In his deposition, McMillian testified that, sometime around 3:00 p.m. or 5:00 p.m. on June 6, 2015, he and his mother, Hinkle, arrived at the dog-racing track operated by MGR. Before that time, McMillian said, he had not consumed any alcoholic beverages that day.

McMillian said that he went to the track to win money and not to drink or party. At the track, McMillian placed bets on horse races that were being broadcast on a television. He testified that, although his cousin and a few other people were sitting at a table, he mostly stayed "[r]ight by the TV" by himself while watching the races. At some point, McMillian won two "trifectas," worth about $400 or $500 each. He testified that he was excited, but "[n]ot too excited," and that he "[k]eep[s his] money quiet." McMillian testified that he "didn't drink the beer until after [he] hit the race," but, McMillian said, after winning the trifectas, he purchased two 12-ounce cans of Budweiser brand beer from a person working at the counter on the bottom floor of the track.

After drinking the beers, McMillian drove himself and Hinkle from the track in Campbell's vehicle. McMillian testified that he did not drink any alcoholic beverages after leaving the track. Approximately 15 to 20 minutes after leaving the track, McMillian estimated, the accident occurred. McMillian testified that traffic had slowed down as a result of an accident farther down the road, and, he said, the vehicle being driven by Wiggins swerved "right in front" of him. McMillian testified that he drove "off to the right into woods" to avoid running into the slowed traffic, and he said that the vehicle he was driving did not collide with the car being driven by Wiggins before leaving the road.

In her deposition, Wiggins testified that traffic on Interstate 10 had slowed as a result of a "wreck up ahead" and that "all the traffic was braking." Wiggins estimated that she was driving at a speed of approximately 30 miles per hour, and she denied changing lanes in traffic. She testified that the vehicle she was driving was then struck from behind by another vehicle, causing Turner's death and injuries to her and D.T.

Jeff Robinson, who was a traffic-homicide investigator with the Mobile Police Department on the night in question, testified in his deposition regarding his investigation of the incident. During his investigation, Robinson spoke with Hinkle. Hinkle said that she and McMillian had arrived at the dog-racing track around 5:00 p.m. and had left shortly after 8:00 p.m. Robinson said that a call had come in at 8:30 p.m. regarding a collision on Interstate 10. Robinson estimated that traveling from the dog-racing track to the scene of the collision takes approximately 10 minutes if traffic laws are obeyed.

During his investigation, Robinson spoke with witnesses to the collision. He said that one witness said the vehicle being driven by McMillian had passed her vehicle at a high rate of speed, struck the vehicle being driven by Wiggins, and had then gone off into the woods. The witness and her husband pulled their vehicle over to help. She said that McMillian was stumbling when he got out of the vehicle he had been driving and was complaining of a knee injury. The witness said she could smell an odor of alcoholic beverage or beer on McMillian's breath. According to Robinson, one witness also

said that McMillian could not recall what day it was after the collision. Officers responded within three minutes of the call because they were already in the area responding to another traffic incident.

One of the officers who responded to the call, Joshua Coleman, testified in his deposition that he came into contact with McMillian about five minutes after arriving at the scene. While he was speaking with McMillian, Coleman noticed an odor of alcoholic beverage coming from McMillian's person and signs of impairment. Specifically, Coleman said, he noticed that McMillian's speech was slurred and that his eyes were bloodshot. Another officer at the scene, Steven Chandler, testified in his deposition regarding his written report of the incident. He said that he had noted asking McMillian if he was injured. During that exchange, Chandler had noted, McMillian's speech was slurred, he was slightly unsteady on his feet, and Chandler could smell alcohol on McMillian's breath and coming from his clothing. Based on those observations, Chandler determined that McMillian "was probably too intoxicated to be standing out in the street." McMillian was secured in the back of Coleman's vehicle. Coleman

testified that he later noticed that McMillian had urinated "all over himself and all over the seat."

In his deposition, Robinson testified that he arrived at the scene later than other officers and that, upon arriving, he located the black Chevrolet Impala automobile driven by McMillian deep in a patch of woods to the side of the interstate. He testified that the vehicle driven by Wiggins was wedged under the vehicle the Davises had been in. Robinson asked another officer where the driver of the black Chevrolet Impala was. Robinson was informed that the driver, McMillian, was being detained because an odor of alcoholic beverage was coming from his person.

Robinson testified that, at around 10:40 p.m., he went to speak with McMillian, who was still being detained in the backseat of a police car. Robinson testified that he could smell an odor of alcoholic beverage coming from McMillian's person, that McMillian's eyes were bloodshot, that McMillian was unsteady on his feet, and that he had trouble following instructions. McMillian said that he had been drinking earlier and that he was coming from the dog-racing track when the accident occurred. During the deposition, Wiggins's

attorney asked: "Corporal Robinson, as I understand it, ... starting from the minute witnesses arrived on the scene within minutes after the accident occurring, anybody that came in contact with Mr. McMillian observed some sign of alcohol. Is that correct?" Robinson responded affirmatively. Robinson testified that the signs of McMillian's alcohol consumption would have been visible to anyone looking at him.

Robinson said that he asked McMillian to perform a field-sobriety test. McMillian indicated that he would be unable to perform the test because he suffered from bad knees as a result of diabetes. However, McMillian volunteered to provide a blood sample. Two blood samples were ultimately taken. At 11:06 p.m. on June 6, 2015, McMillian had a blood-alcohol concentration ("BAC") level of 0.202. At 12:14 a.m. on June 7, 2015, McMillian had a BAC level of 0.183. No alcohol containers were found in the vehicle McMillian was driving.

Robinson testified regarding certain information that had been downloaded from the electronic-control modules located in the vehicle driven by McMillian and the vehicle driven by Wiggins. According to the data taken from the vehicle driven by McMillian, five seconds before the collision, McMillian had

engaged "[t]he accelerator pedal percentage to full." At that time, "[t]he engine throttle percentage" was 80% and the vehicle was traveling at a speed of 97 miles per hour. The brake pedal was not activated until the last half second before the collision. At the moment of impact, the vehicle being driven by McMillian was traveling at a speed of 95 miles per hour.

The data downloaded from the vehicle driven by Wiggins showed that, during the five seconds before the collision, the speed of the vehicle slowed from 32 miles per hour to 25 miles per hour. Wiggins was not engaging the accelerator pedal, and she was engaging the brake pedal intermittently. The data indicated that Wiggins had turned the steering at some point.

Dr. Jack Kalin, a former toxicology-laboratory supervisor at the Alabama Department of Forensic Sciences, testified in his deposition regarding "the general effects of ethanol and ... signs and symptoms you might expect to see [and] the symptoms the subject may expect or experience at different alcohol concentrations." Dr. Kalin said that he could not give an opinion regarding whether McMillian exhibited specific signs and symptoms on the night of the collision because he

did not personally observe McMillian's behavior. Dr. Kalin did, however, perform certain calculations based on McMillian's BAC levels that were recorded on the night of the collision.

Based on McMillian's recorded BAC levels, Dr. Kalin was able to determine the specific rate at which McMillian eliminated alcohol from his system, i.e., his elimination rate. Dr. Kalin was able to determine, based on McMillian's elimination rate, McMillian's approximate BAC level at 9:15 p.m. on the night of the collision, or about one hour after he left the dog-racing track, which, he said, was the approximate time at which McMillian's body would have stopped absorbing alcohol. According to those calculations, McMillian's BAC level at 9:15 p.m. would have been approximately 0.24.

During his deposition, Dr. Kalin referenced "Understanding Blood Analysis in DUI and Traffic Homicide Investigations," a training document he had helped edit. A chart in that document describes the clinical signs and symptoms resulting from ingestion of alcohol by referring to the signs and symptoms relating to specific ranges of BAC levels. The chart provides:

"CLINICAL SIGNS/SYMPTOMS

"0.01-0.05 Subclinical

"Influence/effects usually not apparent or obvious
"Behavior nearly normal by ordinary observation
"Impairment detectable by special tests

"0.03-0.12 Euphoria

"Mild euphoria, sociability, talkativeness
"Increased self-confidence; decreased inhibitions
"Diminished attention, judgment and control
"Some sensory-motor impairment
"Slowed information processing
"Loss of efficiency in critical performance tests

"0.09-0.25 Excitement

"Emotional instability; loss of critical judgment
"Impairment of perception, memory and comprehension
"Decreased sensatory response; increased reaction time
"Reduced visual acuity & peripheral vision; and slow glare recovery
"Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness

"0.18-0.30 Confusion

"Disorientation, mental confusion; vertigo; dysphoria
"Exaggerated emotional states (fear, rage, grief, etc.)
"Disturbances of vision (diplopia, etc.) and perception of color, form, motion, dimensions
"Increased pain threshold
"Increased muscular incoordination; staggering gait; ataxia
"Apathy, lethargy

"0.25-0.40 Stupor

"General inertia; approaching loss of motor functions
"Markedly decreased response to stimuli
"Marked muscular incoordination; inability to stand or walk
"Vomiting; incontinence of urine and feces
"Impaired consciousness; sleep or stupor

"<u>0.35-0.50 Coma</u>

"Complete unconsciousness; coma; anesthesia
"Depressed or abolished reflexes
"Subnormal temperature
"Impairment of circulation and respiration
"Possible death

"<u>0.45+ Death</u>

"Probable death from respiratory arrest."

Dr. Kalin testified that the overlapping BAC ranges in the chart represented an acknowledgment that individuals may exhibit or experience different signs or symptoms at different BAC levels based on each individual's tolerance to alcohol. Dr. Kalin said: "[U]ltimately, tolerance is exploiting the genetics of a person's ability to withstand the insult of an intoxicant or their ability to eliminate that intoxicant more rapidly. So this range is really a direct reflection of tolerance and innate genetics."

Dr. Kalin also testified that "one of the aspects of tolerance is compensation." He said that someone who is more

experienced with alcohol may develop an ability to conceal outwardly visible signs of impairment or intoxication. Dr. Kalin said that compensation "is not true for all of the faculties. It's not true for your visual acuity or your fine motor skills or your ability to coordinate your higher intellectual functions, your confusion, but it certainly is with people's ability to walk and talk."

Dr. Kalin testified that a person's elimination rate can be affected by a person's tolerance or innate genetics. "With tolerance," he said, "you can increase your rate of elimination." Dr. Kalin testified that, according to his calculations based on McMillian's BAC levels recorded on the night of the collision, McMillian's elimination rate was 0.017 "grams percent per hour, which," he said, "puts him pretty much in the middle of the pack as far as most humans are concerned. It's an elimination rate that is not unexpected."

Dr. Kalin testified that "gross intoxication," or intoxication that can be seen through casual observation, is difficult to conceal at BAC levels above 0.183 or 0.202, which, as noted above, were McMillian's recorded BAC levels several hours after the collision. MGR's attorney asked Dr.

Kalin about an excerpt from "Garriott's Medicolegal Aspects of Alcohol," a textbook Dr. Kalin said was reliable and that he described as "a great reference for alcohol." The excerpt states: "In conclusion, outward physical signs of intoxication do not correlate well with blood alcohol concentrations as measured by alcohol testing. This is especially true for chronic drinkers with tolerance that masks visible signs of intoxication as BACs increase above 0.10 g/dL." Dr. Kalin testified that he agreed with that assertion, which he paraphrased as concluding "that an experienced drinker above a .10 may not necessarily be identified outwardly [as] visibly intoxicated."

After his deposition, Dr. Kalin executed an affidavit providing additional opinions. In relevant part, his affidavit stated that he had reviewed certain materials, and he opined:

> "Mr. McMillian attended Mobile Greyhound Park (MGP) 6/6/2015 from approximately 5:00 through 8:20 PM. Mr. McMillian stated his sole ingestion of alcoholic beverages that day comprised two (2) 12-ounce Budweiser beers shortly before departing MGP. Mr. McMillian was witnessed at the scene of the collision to exhibit unsteadiness, slurred speech and odor of alcoholic beverage, sufficient for his detention for DUI.

> "... From said materials I concluded the following. Mr. McMillian's stated ingestion conflicts with toxicological findings. Mr. McMillian's residual ethanol, based upon his reported blood ethanol concentration 6/6/2015 at 11:05 PM was the equivalent of 12 to 14 twelve-ounce beers or other alcoholic beverages. Had Mr. McMillian ingested alcoholic beverages solely during the period 6/6/2015 5:00 PM through 8:20 PM, his total ingestion could have been 15 to 27 beverages. However, with Mr. McMillian's individual ethanol elimination rate determined from the two reported ethanol findings, his ingestion was more likely 18 to 23 beverages. Said conclusion is based upon accepted forensic toxicological princip[les] and is stated to a degree of toxicological probability.
>
> "... Evidence of visible intoxication exhibited by Mr. McMillian at the scene of the collision is reported by [Mobile Police Department] officers. While there is no description of Mr. McMillian's appearance at MGP, Mr. McMillian's intoxication before leaving the dog track within 30 minutes of this crash would have been substantially similar and visible by individuals trained to identify the untoward effects of alcohol ingestion."

After executing the affidavit, Dr. Kalin gave a second deposition. He corrected his estimate regarding the amount of alcohol McMillian had consumed on the night of the collision from an amount equal to 18 to 23 beers to an amount equal to 20 to 23 beers. Dr. Kalin testified that he calculated that estimate using McMillian's height, weight, and elimination rate.

Armondo Love, MGR's corporate representative, testified in his deposition that employees of MGR who were responsible for serving alcohol were trained in the Training for Intervention Procedures ("TIPS") program. Love said that the TIPS program instructs employees regarding how to identify intoxicated patrons. When asked by Wiggins's attorney how he defined "visibly intoxicated," Love responded:

> "Well, I'm again, referring back to the TIPS program. Once a -- once you identify the behavioral cues, of course, one being the loss of or lowered inhibitions; and then you have impaired judgment; you have slowed reactions and then loss of -- of coordination. Through interacting with the guest, you begin to ascertain if this person has had enough. And once you feel this person is visibly intoxicated, they've had enough, then that's it. So it'd be -- it'd be hard for me to say what is the line because it all depends upon the interaction with the guest and them being served at that -- at that particular time."

The circuit court's order granting MGR's summary-judgment motion adopted an order proposed by MGR "with minimal editorial changes" because, the circuit court stated, it "fully agree[d] with the facts, conclusions, analysis, and rationale of [MGR's] proposed order." In relevant part, the circuit court's order, in concluding that there was no genuine issue of material fact regarding whether McMillian appeared

visibly intoxicated when purchasing alcohol at the dog-racing track, stated:

> "In the facts before the Court ... there is no evidence to prove or [from which] to infer that McMillian appeared to be intoxicated when he was served alcohol at the dog track. The most that can be determined from the evidence is that McMillian drank numerous beers and had an elevated BAC.
>
> "Specifically, the facts show that genetics and a tolerance for alcohol may allow a person who is impaired or intoxicated not to appear intoxicated. In addition, one with a tolerance for alcohol may conceal the visible signs of intoxication in the way he walks and talks. While an inference may be drawn that McMillian had an elevated BAC when he was at the dog track, that inference does not suggest that McMillian appeared to be intoxicated when he was served alcohol at the dog track. There is no evidence upon which such an inference can be based.
>
> "Because [Wiggins] ha[s] failed to produce substantial evidence for one of the elements of the cause of action, MGR is entitled to summary judgment.
>
> "....
>
> "[Wiggins] contend[s] that McMillian's BAC of .202 approximately three hours after he left the dog track, an expert opinion that McMillian probably had a BAC of .24 an hour after the accident, an expert opinion that McMillian drank between 20 and 23 beers, and an opinion that a person trained to identify signs of intoxication would have recognized symptoms of intoxication in McMillian constitutes circumstantial evidence sufficient to defeat summary judgment. Inherent in [Wiggins]'s argument is that [Wiggins] lack[s] any direct evidence that McMillian appeared intoxicated. Yet, [Wiggins] must produce

> substantial evidence from which an inference can be made that McMillian appeared to be intoxicated at the dog track, either through circumstantial or direct evidence, or a combination of both.
>
> "....
>
> "MGR has shown through McMillian's testimony that McMillian did not exhibit any signs of intoxication while at the dog track and has proven through [Wiggins's] expert that one cannot infer McMillian was visibly intoxicated based upon McMillian's estimated BAC or the number of beers he may have had. [Wiggins] ha[s] presented no evidence to the contrary."

Wiggins argues that the circuit court erred in concluding that insufficient circumstantial evidence was presented of McMillian's visible intoxication when purchasing alcohol at the dog-racing track. As the circuit court's order notes, the only direct evidence presented regarding McMillian's behavior at the dog-racing track was McMillian's deposition testimony, in which he indicated that he drank only two beers and kept to himself while watching the races. However, direct evidence was presented indicating that, within minutes of leaving the track, McMillian appeared visibly intoxicated to other travelers on the interstate and to law-enforcement personnel.

The deposition testimony elicited from McMillian and Robinson indicates that McMillian left the dog-racing track

sometime after 8:00 p.m. on the night of the collision. Robinson estimated that traveling from the dog-racing track to the site of the collision takes approximately 10 minutes if traffic laws are obeyed, but the electronic-control module taken from the car McMillian was driving indicated that he was driving at a speed of approximately 97 miles per hour on the interstate. The collision occurred sometime before 8:30 p.m.

McMillian testified that he drank only two beers at the dog-racing track on the night of the collision, after winning two trifectas. Dr. Kalin opined that McMillian's BAC levels indicated that he had consumed an amount of alcohol equivalent to 20 to 23 beers between 5:00 p.m. and 8:20 p.m. McMillian's behavior immediately following the collision corresponds with the signs of impairment and intoxication noted in the chart referenced in Dr. Kalin's deposition. The speed at which McMillian was driving, along with his failure to activate the brake pedal until the last half second before the collision, supports a reasonable inference that McMillian was experiencing diminished attention and control, sensory-motor impairment, slowed information processing, muscular incoordination, and a loss of critical judgment. McMillian's

testimony that the vehicle he was driving did not collide with Wiggins's vehicle, in light of the evidence presented to the contrary, supports a reasonable inference that McMillian also experienced impaired memory and comprehension.

According to Robinson, every person who came into contact with McMillian at the scene of the collision noted outward signs that he had consumed alcohol, including the odor of alcoholic beverages on his person, bloodshot eyes, unsteadiness on his feet, slurred speech, and an inability to follow instructions. McMillian admitted to having drunk alcohol. While being detained in a police vehicle, McMillian urinated on himself. Each of the foregoing pieces of direct evidence supports a reasonable inference that McMillian was visibly intoxicated at the scene of the collision.

In his affidavit, Dr. Kalin opined that McMillian's "intoxication before leaving the dog track within 30 minutes of this crash would have been substantially similar and visible by individuals trained to identify the untoward effects of alcohol ingestion." In other words, Dr. Kalin's opinion indicates that the direct evidence of McMillian's intoxication around the time of the collision is

circumstantial evidence of McMillian's intoxication 30 minutes earlier, when McMillian was at the dog-racing track. Although the trial court's order notes that "[Wiggins] must produce substantial evidence from which an inference can be made that McMillian appeared to be intoxicated at the dog track, either through circumstantial or direct evidence, or a combination of both[,]" the order also appears to emphasize the trial court's conclusion that "[i]nherent in [Wiggins]'s argument is that [Wiggins] lack[s] any direct evidence that McMillian appeared intoxicated."

In Edwards v. State, 139 So. 3d 827 (Ala. Crim. App. 2013), the Court of Criminal Appeals noted, in relevant part:

> "'"'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Crim. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."'"

139 So. 3d at 836-37 (quoting Holloway v. State, 979 So. 2d 839, 843 (Ala. Crim. App. 2007), quoting in turn White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989)).

In United States v. Hirani, 824 F.3d 741 (8th cir. 2016), the United States Court of Appeals for the Eighth Circuit

addressed an appellant's challenge to a federal district court's judgment revoking the appellant's citizenship and certificate of naturalization. On appeal, the appellant argued that the district court had erroneously considered circumstantial evidence in reaching its determination. 824 F.3d at 747. In relevant part, the Eighth Circuit noted:

> "Appellant's argument assumes that circumstantial evidence is inherently less probative or reliable than direct evidence and is therefore unable to satisfy high evidentiary burdens. Yet Appellant's distinction between the probative value of direct and circumstantial evidence has no basis in the law, which treats both types of evidence alike. 'The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."' Desert Palace, Inc. v. Costa, 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (quoting Rogers v. Mo. Pac. R. Co., 352 U.S. 500, 508 n.17, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)). 'The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.' Id.; see United States v. Crumley, 528 F.3d 1053, 1065 (8th Cir. 2008)('[C]ircumstantial evidence is just as probative as any other type of evidence.'); United States v. McCrady, 774 F.2d 868, 874 (8th Cir. 1985)('Circumstantial evidence is "intrinsically as probative as direct evidence" and may be the sole support for a conviction.' (quoting United States v. Two Eagle, 633 F.2d 93, 97 (8th Cir. 1980))).

> "In both civil and criminal cases, circumstantial evidence is considered just as probative as direct evidence ...."

824 F.3d at 747 (emphasis added).

Similarly, in Alabama State Personnel Board v. Palmore [Ms. 2170090, Aug. 3, 2018] ____ So. 3d ____ (Ala. Civ. App. 2018), the Court of Civil Appeals cited decisions from the Court of Criminal Appeals in determining the value that should be accorded circumstantial evidence:

> "'"Circumstantial evidence is not inferior or deficient evidence."' Hill v. State, 651 So. 2d 1128, 1130 (Ala. Crim. App. 1994)(quoting Holder v. State, 584 So. 2d 872, 875 (Ala. Crim. App. 1991)). '"'Circumstantial evidence is entitled to the same weight as direct evidence, provided it points to the guilt of the accused.'"' Id. (quoting Holder, 584 So. 2d at 876, quoting in turn Casey v. State, 401 So. 2d 330, 331 (Ala. Crim. App. 1981))."

In light of the foregoing, we conclude that circumstantial evidence of McMillian's intoxication at the dog-racing track is entitled to the same weight as would be direct evidence regarding the same factual issue.

In their appellate brief, the parties argue regarding the meaning of Dr. Kalin's opinion. MGR asserts:

> "Dr. Kalin opined only that persons trained to detect signs of intoxication could have determined that McMillian was intoxicated. ... The corollary of that opinion is that someone who was not so

> trained could not have detected that McMillian was intoxicated. In other words, McMillian was not visibly intoxicated because he would not have exhibited behavior that a casual person would have noticed."

MGR's brief, at 31-32. Wiggins, on the other hand, asserts:

> "Dr. Kalin is not saying that you had to be trained to see McMillian's intoxication. In fact, lay witnesses described to the responding officers that they deemed McMillian to be intoxicated after the crash. Dr. Kalin is putting his opinion that McMillian would have been exhibiting signs of visible intoxication in the context of the TIPS[-] trained servers at the dog track, making it even more unlikely that McMillian's gross intoxication would have gone unnoticed."

Wiggins's brief, at 21.

Both interpretations of Dr. Kalin's opinion appear reasonable. This Court, however, is in no position to decide which interpretation is correct. "In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw." Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2000). In so doing, we conclude that a jury could reasonably infer from Dr. Kalin's opinion that, considering the totality of the circumstances, McMillian's intoxication would have been

visible to MGR's employees.[4] Because we conclude that a genuine issue of material fact remains regarding that question, the summary judgment is due to be reversed.

In its order, the circuit court also concluded that Dr. Kalin's deposition testimony effectively foreclosed an inference that McMillian appeared visibly intoxicated when he purchased alcohol at the dog-racing track. The circuit court's order specifically cites the portions of Dr. Kalin's deposition testimony indicating that an individual's ability to compensate or to conceal outward signs of intoxication <u>may</u>

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[4]MGR cites in support of its argument a special concurrence in <u>Owens v. Hooters Restaurants</u>, 41 So. 3d 743 (Ala. 2009), a case in which this Court affirmed a trial court's judgment, without an opinion. That case also involved a dram-shop claim arising from an automobile collision caused by a driver who had recently left the facilities of an ABC Board on-premises licensee, Hooters Restaurants. The trial court entered a summary judgment in favor of Hooters Restaurants. Although evidence was presented indicating that the driver causing the collision was intoxicated at the time of the collision, the special concurrence noted that the record "contain[ed] no evidence that would support an inference that any employee of Hooters served [the driver] alcohol while he was visibly intoxicated." 41 So. 3d at 744. It went on to note that the plaintiff's attempt to submit to this Court receipts substantiating the driver's purchase of alcohol was ineffective because that information was not in the record. In this case, however, it is undisputed that McMillian purchased alcohol while at the dog-racing track. The only remaining issue is whether McMillian appeared visibly intoxicated while doing so.

be enhanced by the individual's tolerance to alcohol. How that portion of Dr. Kalin's opinion applies to the facts of this case, however, depends upon the evidence presented regarding whether McMillian had, in fact, developed such a tolerance to alcohol. In its brief, MGR argues that McMillian had likely developed a tolerance to alcohol, in light of Dr. Kalin's opinion that McMillian consumed an amount of alcohol equivalent to 20 to 23 beers during a period of a little more than 3 hours. Assuming that MGR has accurately articulated an inference that can be drawn from the evidence presented, however, other evidence was also presented that would support alternative inferences.

As Wiggins points out, whatever tolerance to alcohol McMillian had developed, evidence of his behavior at the scene of the collision supports a reasonable inference that such tolerance was not accompanied by an ability to effectively conceal the outward signs of intoxication at that BAC level.[5]

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[5]In its appellate brief, MGR argues that McMillian's BAC level at the time of the collision was higher than his BAC level when purchasing alcohol at the dog-racing track because McMillian's body was still in the process of absorbing alcohol when he was at the dog-racing track. MGR contends that McMillian's behavior at the dog-racing track was, therefore, likely different than his behavior at the scene of the

Wiggins also points to Dr. Kalin's testimony that an individual's tolerance to alcohol can increase the individual's elimination rate, or the speed at which the person clears alcohol from his or her blood. Using McMillian's BAC levels recorded on the night of the collision, Dr. Kalin concluded that McMillian's personal elimination rate was approximately 0.017 "grams percent per hour, which," he said, "puts him pretty much in the middle of the pack as far as most humans are concerned. It's an elimination rate that is not unexpected." Dr. Kalin did not testify regarding the likelihood that an individual whose personal elimination rate was "pretty much in the middle of the pack as far as most humans are concerned" would have developed a tolerance to alcohol that would allow the individual to effectively conceal

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collision. MGR also appears to attribute McMillian's behavior at the scene of the collision, in part, to the severity of the circumstances. MGR states: "One's behavior at an interstate roadside after being in a serious automobile accident is much different than one's behavior standing at a television screen watching horse races." MGR's brief, at 16-17. Again, MGR has perhaps articulated inferences that reasonably follow from the evidence presented. At this stage in the proceedings, however, we must view the evidence presented in the light most favorable to the nonmovant, Wiggins, and entertain all reasonable inferences that support her theory of the case. Nationwide, 792 So. 2d at 373.

outward signs of intoxication after consuming between 20 and 23 beers over the course of a period of 3 hours and 20 minutes.

Dr. Kalin's testimony does not foreclose an inference that McMillian appeared visibly intoxicated when he purchased alcohol at the dog-racing track. In other words, simply because an individual can, in theory, develop a tolerance to alcohol that allows the person to compensate for the effects of intoxication in his or her outward appearance does not mean that McMillian had, in fact, done so. When viewed in a light most favorable to Wiggins, see Nationwide, 792 So. 2d at 373, a genuine issue of material fact remains regarding whether, based on a developed tolerance to alcohol, McMillian effectively concealed outward signs of intoxication when purchasing alcohol at the dog-racing track. The circuit court erred in concluding that Dr. Kalin's testimony conclusively resolved that issue of fact in MGR's favor.

Wiggins argues that, as the party moving for a summary judgment, MGR failed to meet its burden of making a prima facie showing that there was no genuine issue of material fact. Assuming without deciding that MGR met its initial

burden, we conclude that Wiggins presented substantial evidence creating a genuine issue of material fact regarding whether McMillian appeared visibly intoxicated while purchasing alcohol from MGR in response to MGR's summary-judgment motion. See Pritchett, 938 So. 2d at 935. Accordingly, we reverse the summary judgment in favor of MGR.

B.

MGR also alternatively argues on appeal, as it did to the circuit court, that Wiggins's dram-shop claim is precluded by the doctrine of res judicata. Because this Court, subject to certain constraints not applicable here,[6] may affirm a summary judgment on any valid ground presented by the record, see Norvell v. Norvell, [Ms. 1170544, Oct. 19, 2018] ____ So. 3d ____ (Ala. 2018), even a ground that has been considered and rejected by the trial court, we must also address MGR's

[6]This Court will not affirm a trial court's judgment when "due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment ...." Liberty Nat'l Ins. Co. v. University of Alabama Health Servs. Found., 881 So. 2d 1013, 1020 (Ala. 2003).

alternative preclusion argument as a basis for affirming the trial court's judgment in favor of MGR.

MGR argues:

> "The defendants/claimants in the [interpleader action] ... settled between themselves the amount of money each would receive from the monies ALFA paid into Court. The Court then entered a judgment in which it approved the settlement and entered a final order setting forth the disbursements. Of particular significance is that the defendants, including Katerial Wiggins, individually [and] as Administratrix of the [estate] of Dominic G. Turner, Sr. and as the [next friend of] D.T., Jr., a minor, agreed that Ms. Sara Hinkle, the mother of McMillian, should receive $10,000.
>
> "On the day of the automobile accident, Ms. Hinkle traveled with McMillian to the Mobile Greyhound Park. She was with McMillian the entire time they were at the park, left the park as a passenger in the car driven by McMillian, and was injured in the automobile wreck. Under the doctrine of assumption of risk, Ms. Hinkle would not have been entitled to recover from McMillian if she knew that McMillian was intoxicated at the time she entered the car. She would have 'assumed the risk' of riding with an intoxicated driver. ... If McMillian was visibly intoxicated while at the dog track, Ms. Hinkle would have knowledge of McMillian's intoxication and would have been barred from any recovery against McMillian in the ALFA lawsuit. Yet, Ms. Hinkle was allowed to recover. Therefore, the issue of McMillian's intoxication has been adjudicated. That issue cannot be re-litigated in this case due to the doctrine of res judicata."

MGR's brief, at 43-44 (footnote omitted). MGR cites Equity Resources Management, Inc. v. Vinson, 723 So. 2d 634, 636

(Ala. 1998), for a recitation of the elements of the doctrine of res judicata, which MGR contends are satisfied in this case. MGR's argument, however, demonstrates that its assertions of preclusion are actually based on the doctrine of collateral estoppel, or issue preclusion, as opposed to the doctrine of res judicata, or claim preclusion.

MGR argues that litigation in the dram-shop action of a particular factual issue, as opposed to litigation of a particular claim, is precluded by the interpleader action. Specifically, MGR contends that Wiggins is precluded from litigating what MGR describes as the "cornerstone issue," MGR's brief, at 42, which, according to MGR, is the factual issue whether McMillian appeared visibly intoxicated when he was purchasing alcohol at the dog-racing track.

In Lee L. Saad Construction Co. v. DPF Architects, P.C., 851 So. 2d 507, 516 (Ala. 2002), this Court noted the following regarding claim preclusion and issue preclusion:

> "Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.

> "'The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label "claim preclusion," while collateral estoppel ... refers to "issue preclusion," which is a subset of the broader res judicata doctrine.'
>
> "Little v. Pizza Wagon, Inc., 432 So. 2d 1269, 1272 (Ala. 1983)(Jones, J., concurring specially). See also McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998)."

(Emphasis added.) Quoting Stephenson v. Bird, 168 Ala. 363, 366, 53 So. 92, 93 (1910), the Court reiterated: "'In order for a judgment between the same parties to be res judicata, it must, among other things, ... involve a question that could have been litigated in the former cause or proceeding.'" Lee L. Saad, 851 So. 2d at 517 (emphasis added). By contrast, the Court noted that "'[o]nly issues actually decided in a former action are subject to collateral estoppel.' Leverette ex rel. Gilmore v. Leverette, 479 So. 2d 1229, 1237 (Ala. 1985)(emphasis added)." Lee L. Saad, 851 So. 2d at 520. See also Aliant Bank v. Four Star Invs., Inc., 244 So. 3d 896, 911 (Ala. 2017)("Essentially, the doctrine of collateral estoppel operates to bar the relitigation of issues actually litigated in a previous action, while the doctrine of res judicata bars the litigation of claims that were or could have been

litigated in a previous action."). The Court noted that, in addition to the other elements of collateral estoppel, the party asserting preclusion based on that doctrine bears the burden of proving that the relevant issue was actually litigated in a prior action. Lee L. Saad, 851 So. 2d at 520.

In deciding that litigation of the relevant issue was not precluded in that case, the Court stated:

> "The appellees have not satisfied their burdens of proof as to their affirmative defense of collateral estoppel. As previously noted, one who claims the defense of collateral estoppel must prove, among other things, that the issue was 'actually decided,' Leverette [ex rel. Gilmore v. Leverette], 479 So. 2d [1229,] 1237 [(Ala. 1985)], and 'that resolution of the issue was necessary to the prior judgment,' Biles [v. Sullivan], 793 So. 2d [708,] 712 [(Ala. 2000)]. Moreover, because we are reviewing a summary judgment, we 'must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.' Hobson [v. American Cast Iron Pipe Co.], 690 So. 2d [341,] 344 [(Ala. 1997)]."

Lee L. Saad, 851 So. 2d 520-21.

In this case, MGR does not argue that Wiggins's dram-shop claim could have been litigated in the interpleader action. MGR's preclusion argument is limited to only the factual issue of McMillian's visible intoxication when purchasing alcohol at the dog-racing track on the day of the collision. Therefore,

the doctrine of collateral estoppel, or issue preclusion, not the doctrine of res judicata, or claim preclusion, provides the appropriate framework for evaluating MGR's argument. See Aliant Bank, 244 So. 3d at 911 ("As explained in Lee L. Saad, collateral estoppel operates to prevent the relitigation of factual issues that have already been decided in a prior action. 851 So. 2d at 519." (emphasis added)).

MGR failed to present any evidence indicating that the factual issue of McMillian's visible intoxication when purchasing alcohol at the dog-racing track was "actually litigated" in the interpleader action. Lee L. Saad, 851 So. 2d at 520. MGR argues only that the issue was effectively adjudicated in the interpleader action because, MGR asserts, Wiggins "could have raised the same allegation/issue as a defense to Ms. Hinkle's claim in the [interpleader action]." MGR's brief, at 47. However, "[i]ssue preclusion is distinguishable from claim preclusion in that it may apply in a second action on a cause of action different from the first action, but does not extend beyond the matters actually litigated and determined in the first action." 50 C.J.S. Judgments § 928 (2009)(emphasis added). Thus, MGR has failed

to satisfy its burden of proving that there is no genuine issue of material fact regarding whether Wiggins is precluded from litigating the factual issue of McMillian's visible intoxication in the dram-shop action based on the doctrine of collateral estoppel. We cannot, therefore, affirm the circuit court's judgment on that basis.

II. Motion to Strike

Wiggins next argues that the circuit court erred by granting MGR's motion to strike her request for damages arising from Turner's death. The circuit court adopted as its order regarding the motion to strike an order drafted by MGR. The order includes a lengthy analysis in support of the conclusion that a claim asserted under the Dram Shop Act is distinct from a claim asserted under the Wrongful Death Act. Although we agree with that basic conclusion, we find it unnecessary to summarize that analysis here.

In her complaint, Wiggins, as the administrator of Turner's estate, alleged that Turner died as a result of injuries he sustained in the collision. She requested an award of compensatory damages and punitive damages for Turner's death. As noted above, the Dram Shop Act provides a

right of action "for all damages actually sustained, as well as exemplary damages." In relevant part, the Dram Shop Act also provides: "(b) Upon the death of any party, the action or right of action will survive to or against the executor or administrator." § 6-5-71(b). Thus, the plain language of the Dram Shop Act provides for the relief sought in Wiggins's complaint.

Although Wiggins's complaint did not explicitly assert a claim under the Wrongful Death Act, she requested such damages in a report of special damages she filed in the circuit court. Moreover, Wiggins has consistently argued in the circuit court and on appeal that the relief she seeks is available to her under both the Dram Shop Act and the Wrongful Death Act. This Court has previously held that "[t]he Dram Shop Act provides the exclusive remedy for the unlawful dispensing of alcohol to an adult." Johnson v. Brunswick Riverview Club, Inc., 39 So. 3d 132, 139 (Ala. 2009). "In Alabama, one cannot recover for negligence in the dispensing of alcohol." Williams v. Reasoner, 668 So. 2d 541, 542 (Ala. 1995).

Thus, Wiggins cannot assert both a claim under the Dram Shop Act and a claim under the Wrongful Death Act for the same

injury. To the extent that the circuit court's order granting MGR's motion to strike is based on such a conclusion, it is affirmed. Our decision in that regard, however, does not alter the relief available to Wiggins under the Dram Shop Act for damages arising from Turner's death.

III. Summary Judgment in Favor of MGP

Finally, we consider the circuit court's summary judgment in favor of MGP. MGP moved for a summary judgment based, in part, on its contention that MGP is a distinct entity from MGR. The circuit court's order granting MGP's summary-judgment motion was based on "the evidence being undisputed that [MGP] did not own or manage" the dog-racing track. Wiggins presents no argument in her principal appellate brief regarding the circuit court's conclusion, and, for the first time in her reply brief, she asserts that MGP and MGR, are, in fact, the same entity. She contends that "Mobile Greyhound Park" is merely a trade name used by MGR. However, arguments made for the first time in a reply brief are "waived, and will not be considered by this Court." Perkins v. Dean, 570 So. 2d 1217, 1220 (Ala. 1990). Therefore, we will not consider

Wiggins's argument, and the summary judgment in favor of MGP is affirmed.

Conclusion

When viewed in the light most favorable to Wiggins, a genuine issue of material fact exists regarding whether McMillian appeared visibly intoxicated when purchasing alcohol from MGR on the night of the collision. The circuit court's summary judgment in favor of MGR is, therefore, reversed. To the extent that Wiggins seeks to recover damages stemming from Turner's death under both the Dram Shop Act and the Wrongful Death Act the circuit court's order granting MGR's motion to strike Wiggins's request for damages under the Wrongful Death Act is affirmed; Wiggins may recover only damages based on Turner's death under the provisions of the Dram Shop Act. Because Wiggins has waived any challenge to the summary judgment in favor of MGP, the circuit court's decision in that regard is affirmed. We remand this cause for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Parker, C.J., and Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Bolin and Sellers, JJ., concur in part and dissent in part.

Shaw, J., recuses himself.

BOLIN, Justice (concurring in part and dissenting in part).

I believe that Katerial Wiggins failed to present substantial evidence creating a genuine issue of material fact as to whether Willie McMillian was "visibly intoxicated" when Mobile Greyhound Racing, LLP ("MGR"), served him alcohol. Accordingly, I dissent insofar as the main opinion reverses the summary judgment in favor of MGR.

The purpose of the Dram Shop Act is to punish licensed establishments that continue to serve alcohol to drunk patrons. Johnson v. Brunswick Riverview Club, Inc., 39 So. 3d 132 (Ala. 2009). Alabama, like a majority of jurisdictions, does not recognize a common-law cause of action for negligent dispensing of alcohol. The Dram Shop Act, § 6-5-71, Ala. Code 1975, provides the exclusive remedy for the unlawful dispensing of alcohol to an adult. The refusal to recognize an action based on negligence in the distribution of alcohol appears to be based, at least in part, on the principle that "'it is the consumption of alcohol -- not the purchase of it -- that is the proximate cause of injuries resulting from the purchaser's intoxication.'" Johnson, 39 So. 3d at 140 (quoting Jones v. BP Oil Co., 632 So. 2d 435, 438 (Ala. 1993)).

> "[Section] 6-5-71 is penal in nature and ... its purpose is to punish the owners of taverns who continue to serve customers after they have become intoxicated. The legislature intended to stop or to deter drunken driving facilitated by bar owners, in order to protect the public at large from tortious conduct committed by any intoxicated person who was served liquor by a bar owner while in an intoxicated condition."

McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991).

The provision of law Wiggins contends MGR violated is Alcoholic Beverage Control ("ABC") Board Regulation 20-X-6-.02(4), Ala. Admin. Code, which states: "No ABC Board on-premises licensee, employee or agent thereof, shall serve any person alcoholic beverages if such person appears, considering the totality of the circumstances, to be intoxicated." In other words, Wiggins claims MGR served McMillian alcoholic beverages while he appeared to be intoxicated, or "visibly intoxicated" as the standard is sometimes referenced. Odum v. Blackburn, 559 So. 2d 1080 (Ala. 1990).

In the present case, Wiggins failed to present substantial evidence that McMillian was visibly intoxicated when he was served alcohol at the dog-racing track operated by MGR. Wiggins's reliance on the toxicologist's expectation

that McMillian would have exhibited signs of intoxication is not enough. McMillian's height, weight, and blood-alcohol content, along with the toxicologist's predictions of his elimination rate and impairment, amount to speculation concerning how alcohol consumption affected McMillian on the night of the accident. Although Wiggins presented substantial evidence that McMillian was intoxicated at the scene of the accident, this did not establish that anyone witnessed his visible intoxication at the dog track or that he was visibly intoxicated when he was served beer at the dog track. Wiggins's evidence of visible intoxication came after the sale and after McMillian left the premises where the sale occurred.

The Michigan Supreme Court, in a similar case, explained:

> "This standard of 'visible intoxication' focuses on the objective manifestations of intoxication. Miller v. Ochampaugh, 191 Mich. App. 48, 59–60, 477 N.W.2d 105 (1991). While circumstantial evidence may suffice to establish this element, it must be actual evidence of the visible intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was visibly intoxicated because it does not show what behavior, if any, the person actually manifested to a reasonable observer. These other indicia -- amount consumed, blood alcohol content, and so forth -- can, if otherwise admissible, reinforce the finding of visible

> intoxication, but they cannot substitute for showing visible intoxication in the first instance. While circumstantial evidence retains its value, such (and any other type of) evidence must demonstrate the elements required by § 801(3), [Mich. Comp. Laws,] including 'visible intoxication.'
>
> "Plaintiffs here presented no evidence of Breton's visible intoxication at the time he was served at defendant's establishment in response to defendant's motion for summary disposition. The record reflects that all four eyewitnesses saw no signs that Breton was visibly intoxicated. Plaintiffs further relied on two expert toxicologists' expectations that Breton would have exhibited signs of intoxication. But reports discussing Breton's physical statistics and alcohol consumption, coupled with predictions of his impairment, offer only speculation about how alcohol consumption affected Breton that night. Expert post hoc analysis may demonstrate that Breton was actually intoxicated but does not establish that others witnessed his visible intoxication. Consequently, no basis for a [Dram Shop Act] claim against defendant existed. Because plaintiffs failed to establish a genuine issue of material fact that Breton was visibly intoxicated even under § 801(3), the trial court correctly granted summary disposition for defendant."

Reed v. Breton, 475 Mich. 531, 542-43, 718 N.W.2d 770, 776-77 (2006)(footnotes omitted).

In order to show a violation of the Dram Shop Act, a plaintiff must prove three elements: The sale of alcohol 1) must have been contrary to the provisions of law; 2) must have been the cause of the defendant's intoxication; and 3) must

have resulted in the plaintiff's injury. Attalla Golf & Country Club, Inc. v. Harris, 601 So. 2d 965 (Ala. 1992).

The Dram Shop Act is a legislatively created remedy for injuries arising from the unlawful sale of alcohol where liability is imposed upon the dram shop for the act of serving alcohol to a visibly intoxicated tortfeasor before the accident causing the injuries. In my opinion, the issue is not whether circumstantial evidence is entitled to the same weight as direct evidence; the issue is whether Wiggins submitted sufficient circumstantial evidence to establish McMillian's visible intoxication during the time he patronized the dog track. She did not. Reliance upon the toxicologist's expectations does not provide evidence that McMillian was visibly intoxicated when he was served alcohol by MGR. Accordingly, I dissent insofar as the main opinion reverses the summary judgment in favor of MGR. In all other respects, I concur in the main opinion.

Sellers, J., concurs