Case No. 2019-1725

In the Supreme Court of Ohio

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APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE NOS. 18 CA 011405, 18 CA 011417

_____

TIMOTHY A. WEEKS,
Administrator of the Estate of Christine A. Weeks,

Appellee,

v.

203 MAIN STREET, LLC dba MOSEY INN, et al.,

Defendants,

v.

OHIO RESTAURANT INVESTMENT OF WELLINGTON, LLC,

Appellant.

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

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I. Statement of Interest of Amicus Curiae

The Ohio Association of Civil Trial Attorneys (OACTA) is a statewide organization comprised of attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits. For over 50 years, OACTA has provided a forum where professionals work together to promote and improve the administration of justice in Ohio in the ongoing effort to ensure that the civil justice system is fair, efficient, and just.

Although Appellant Ohio Restaurant Investment of Wellington, LLC (Ohio Restaurant) has three appeals pending before this Court involving varying propositions of law, OACTA's interest in this case is directed to the propositions of law that challenge the Ninth Appellate District's decision allowing an expert witness's state-of-mind opinion—i.e., what a defendant "knows"—to create an issue of fact in this dram-shop liability case brought under R.C. 4399.18. The expert, a forensic toxicologist, generated alcohol-consumption calculations based on a patron's height, weight, and post-accident blood alcohol concentration (BAC), and then opined that the patron would have exhibited "signs of alcohol intoxication" that "would have been noticeable and obvious" to Ohio Restaurant's bartender and manager, and thus actionable under R.C. 4399.18. *Weeks v. 203 Main Street LLC*, 9th Dist. Lorain Nos. 18CA011405, 18CA011417, 2019-Ohio-2850, ¶ 10. The Ninth District found this state-of-mind expert opinion evidence created a triable issue of fact sufficient to defeat summary judgment. *Id*. at ¶ 14.

But, as explained below, allowing the expert's opinion to create a triable issue of fact runs counter to well-established law from courts around the country that a party's state of mind is not a matter for expert opinion. *See, e.g.*, *In re C.R. Bard, Inc.*, 948 F.Supp.2d 589, 628-29 (S.D.W.Va.2013); *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 192 (S.D.N.Y.2009); *In re Rezulin Prods. Liab. Litig.*, 309 F.Supp.2d 531, 545-46 (S.D.N.Y.2004). Rather, a defendant's state of mind—i.e., what the defendant "knows"—is a matter that laypersons are capable of understanding and deciding without an expert's help. Because this is so, it therefore follows that an expert's inadmissible state-of-mind opinions cannot create a triable issue sufficient to defeat summary judgment.

II. Statement of public and great general interest

This case is of public and great general interest because the Ninth District furthered the division in dram-shop liability law by allowing an otherwise inadmissible expert's opinion to create a triable issue of fact. Courts, in general, prohibit an expert from giving expert opinions about what a person knows or would know. That sort of expert testimony has been generally found to be within a layperson's knowledge and experience, and thus needs no expert assistance.

Yet in dram-shop liability cases, Ohio intermediate courts have created an artificial distinction between opinions about what a person *should* know and what a person *would* know so that the latter are admissible as evidence of actual knowledge and sufficient to defeat summary judgment while the former are inadmissible constructive-knowledge opinions. *Compare Lanham v. Fox*, 5th Dist. Richland No. 13CA94, 2014-Ohio-1092, ¶ 17-22 (finding expert toxicologist's opinion, based on defendant's BAC, was evidence of constructive knowledge because expert opined that there "should have been" observable

signs of alcohol intoxication); *Privett v. QSL-Milford*, 12th Dist. Clermont No. CA2013-04-025, 2013-Ohio-4129, ¶ 22-24 (finding expert toxicologist's opinion was evidence of constructive knowledge where expert opined that the patron "would likely" exhibit signs of intoxication); and *Clark v. McCollum*, 6th Dist. Lucas No. L-92-158, 1993 WL 380115, at *2 (May 28, 1993) (finding expert report did not create genuine issue of material fact regarding any actual knowledge of the patron's intoxication) *with Morrison v. Fleck*, 120 Ohio App.3d 307, 316, 697 N.E.2d 1064 (9th Dist.1997) (finding issue of fact where expert toxicologist opined that "an experienced bartender *would have known*" that the amount of alcohol served to a person of similar body type as the tortfeasor, in the allotted amount of time, "*would have* resulted in his intoxication," and that intoxication "*would have* been noticeable even to a casual observer") (emphasis added); *Thompson v. Winn*, 10th Dist. Franklin No. 18AP-81, 2018-Ohio-5249, ¶ 14, 30 (finding issue of fact where expert toxicologist opined that defendant "would have been exhibiting noticeable signs of alcoholic influence" and "these signs of alcohol intoxication *would have been* noticeable and obvious to the bartenders or manager") (emphasis added); and *Hlusak v. Sullivan*, 8th Dist. Cuyahoga No. 74367, 2000 WL 868495, at *3 (June 29, 2000) (finding issue of fact where expert toxicologist opined that, based on the tortfeasor's BAC, the tortfeasor "would have been" intoxicated).

This artificial distinction underlies the Ninth District's conclusion here. Relying on the "would know" and "would have been known" line of cases, it found the expert's opinion—i.e., "signs of alcohol intoxication *would have been* noticeable and obvious" to Ohio Restaurant—sufficient to create a genuine issue of material fact as to Ohio Restaurant's actual knowledge. (Emphasis added.) *Weeks*, 9th Dist. Lorain Nos. 18CA011405, 18CA011417, 2019-Ohio-2850, ¶ 10, 14.

But there is no difference between what a person "knows" and what a person "would know" or "would have known," or what otherwise "would have been known." A purported expert witness who seeks to opine about what a person knows, would know, or would have known, or any other variation, is still opining about a person's known knowledge—and, unless that expert witness is a mind-reader, the expert possesses no such extraordinary skills to do so. *See In re Fosamax*, 645 F.Supp.2d at 192 (rejecting an expert's state-of-mind opinions because the expert's expertise "does not give her the ability to read minds"); *see also In re Rezulin*, 309 F.Supp.2d at 546 (finding an expert's state-of-mind opinions "have no basis in any relevant body of knowledge or expertise").

And as courts in other litigation contexts consistently find, this type of expert opinion testimony fails to satisfy the foundational requirements for the admissibility of expert testimony—i.e., that the expert's testimony "relates to matters beyond the knowledge or experience possessed by lay persons[.]" Evid.R. 702(A); *see also In re C.R. Bard*, 948 F.Supp.2d at 628 (finding expert's opinions about what "Bard knew and when Bard knew it" inappropriate subjects for expert testimony because what Bard knew and when are "factual inferences for the jury to determine, not for an expert to opine"); *In re Rezulin*, 309 F.Supp.2d at 546 (finding state-of-mind opinion testimony improper because it describes "'lay matters which a jury is capable of understanding and deciding without the expert's help'"), quoting *Andrews v. Metro North Commuter RR. Co.*, 882 F.2d 705, 708 (2d Cir.1989).

The average layperson is competent to make judgments about what a person knows or would know when in the company of a person who may have had too much alcohol to drink. Indeed, the average layperson most likely can draw on their own experiences to make

that determination. No "calculations" are needed to be made by an expert to fill that knowledge gap.

Nor would an expert be needed to "dispel a misconception common among lay persons" about what a person knows when deciding to serve a person alcohol. This alternate basis for admissibility under Rule 702(A) of the Ohio Rules of Evidence provides no basis for state-of-mind opinions in dram-shop liability cases. Reiterating, the average layperson has been with and around persons who both serve and drink alcohol to draw conclusions about what each knows or would know. Nothing in those experiences is shrouded in misconception as there is when making conclusions about the reasonableness of the actions taken by a person in an abusive relationship where expert state-of-mind opinions are permitted about the battered-woman syndrome. *See, e.g., State v. Koss*, 49 Ohio St.3d 213, 216-18, 551 N.E.2d 970 (1990); *see also State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶ 29-35.

At bottom, expert state-of-mind opinions in dram-shop liability cases should be treated no differently than those same opinions in other litigation contexts. Accepting jurisdiction here would make this rule of law clear and clarify for the courts that what-a-person-would-know opinions are insufficient to create triable issues of fact just as they are improper in other contexts.

III. Statement of the case and facts

OACTA defers to the Statement of the Case and Facts set forth in Ohio Restaurant's Memorandum in Support of Jurisdiction. For the purposes of this amicus brief, however, OACTA highlights the following facts that are important to resolving the issue important to OACTA that is before the Court:

- Defendant Raymond McKissick was a patron of Ohio Restaurant in June 2017.

- After being there for a time, he left to pick up a friend and was involved in an automobile accident with a car driven by Christine Weeks. Ms. Weeks died in the accident. McKissick was found to have a blood-alcohol level of 0.188 grams.

- Timothy Weeks, as administrator of her estate, sued McKissick and Ohio Restaurant, among others. As to Ohio Restaurant, Weeks alleged it was liable under R.C. 4399.18, which allows recovery against a permit holder that "knowingly sold an intoxicating beverage to * * * [a] noticeably intoxicated person" who later causes injury or death to another.

- In opposing Ohio Restaurant's motion for summary judgment, Weeks relied on the expert report of a forensic toxicologist, who opined that, factoring in McKissick's height, weight, and blood-alcohol level, the "signs of alcohol intoxication would have been noticeable and obvious" to Ohio Restaurant's bartender and manager. *Weeks*, 9th Dist. Lorain Nos. 18CA011405, 18CA011417, 2019-Ohio-2850, ¶ 10. The trial court nonetheless found this to be essentially "constructive knowledge" evidence insufficient to create a triable issue of fact and granted Ohio Restaurant summary judgment.

- The Ninth District reversed. It found the same report sufficient to create a triable issue as to whether Ohio Restaurant "knowingly sold alcohol" to McKissick "while he was noticeably intoxicated." *Id*. at ¶ 14.

These facts fit squarely within the rule of law that "what a person knows" is not the subject of expert testimony. The Ninth District's finding to the contrary to create a triable issue of fact as to whether Ohio Restaurant "knowingly sold alcohol" under R.C. 4399.18 runs counter to that law.

IV. Argument

Ohio Restaurant's Proposition of Law No. 1

> Expert testimony cannot create a question of fact when it is inconsistent with the direct evidence.

Ohio Restaurant's Proposition of Law No. 2

> Constructive knowledge is insufficient to create liability on a permit holder under R.C. 4399.18.

Subsumed within these propositions of law is the proposition of law that OACTA proposes here:

> Expert opinions as to what a person "knows" or "would have known" are improper state-of-mind opinions that usurp the role of the jury and cannot create a genuine issue of material fact sufficient to defeat a motion for summary judgment.

A. Expert opinions about what a person knows, would know, or would have known are improper state-of-mind opinions.

Rule 702 of the Ohio Rules of Evidence sets forth the requirements for the admissibility of expert testimony. At its foundation is that the witness's testimony either "relates to matters beyond the knowledge or experience possessed by lay persons" or, alternatively, it "dispels a misconception common among lay persons[.]" Evid.R. 702(A).

1. State-of-mind opinions are improper because a layperson is capable of drawing conclusions about what a person knows without expert testimony.

Opinion testimony about what a person "knows" is generally impermissible expert testimony because it does not relate to any matter beyond the common knowledge or experience of the average layperson. In *In re C.R. Bard*, for example, an expert reviewed various corporate documents and sought to opine about "what Bard knew and when Bard knew it." *In re C.R. Bard*, 948 F.Supp.2d at 628. Although plaintiffs argued that this evidence is a "classic use of expert testimony to establish what was known and knowable to a

defendant, and when it was known or knowable," the district court disagreed. While the expert could properly rely on corporate documents in formulating the expert's opinions, the jury is capable of drawing conclusions about what a person knows from those documents without an expert telling it what those conclusions should be. *Id*. at 628-29.

The court in *In re Rezulin* reached the same conclusion. There, experts offered opinions about what certain persons and the corporation "believed" or "knew." *In re Rezulin*, 309 F.Supp.2d at 545, fn. 38, 547. The court found this testimony improper because the jury can draw conclusions about what a person knows or knew without an expert's help. *Id*. at 546.

Other courts have found similarly. In *Siring v. Oregon State Bd. of Higher Edn.*, 927 F.Supp.2d 1069 (D. Ore.2013), for example, the court found an expert's opinions about what certain university personnel "may have been thinking" to be improper state-of-mind opinions. It noted that "[c]ourts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind," and relied on case law from various jurisdictions to that effect. *Id*. at 1077-78, citing *United States v. Benson*, 941 F.2d 598, 604 (7th Cir.1991); *United States Gypsum Co. v. Lafarge N. Am., Inc.*, 670 F.Supp.2d 786, 775 (N.D.Ill.2009); *Smith v. Wyeth-Ayerst Labs. Co.*, 278 F.Supp.2d 684, 700 (W.D.N.C.2003); and *Baldonado v. Wyeth*, No. 04 C 4312, 2012 WL 1802066, at *8 (N.D.Ill. May 17, 2012); *see also Krause v. CSX Transp.*, 984 F.Supp.2d 62, 80 (N.D.N.Y.2013) (finding expert's state-of-mind opinion inadmissible); *In re Flonase Antitrust Litig.*, 884 F.Supp.2d 184, 193 (E.D. Pa. 2012) (finding expert's opinion that the defendant "was well aware" of the merits of certain positions it was taking to be improper state-of-mind opinions); *Lewis v. Ethicon, Inc.*, No. 2:12-cv-4301, 2014 WL 186872, at *5-6 (S.D.W.Va. Jan. 15, 2014) (finding expert's opinions about what Ethicon "knew" to be

improper state-of-mind opinions); *Brady Fray v. Toledo Edison Co.*, 6th Dist. Lucas No. L-02-1260, 2003-Ohio-3422, ¶ 39 (finding expert's opinions about decedent's fear that dead tree limbs would cause harm to be improper state-of-mind opinions because "any information offered by the [expert] is not beyond the knowledge of lay persons").

There should be no different result here. What Ohio Restaurant knew or would have known are not proper subjects for expert testimony because the effects of alcohol consumption are not beyond the common knowledge of the average lay person.

2. State-of-mind opinions are improper because no expert is qualified to read minds.

Rule 702 also makes clear that an expert must be qualified "by specialized knowledge, skill, experience, training or education" to give the opinions the expert seeks to offer. Evid.R. 702(B).

Courts have routinely found, however, that experts seeking to offer what-a-person-knows opinions possess no specialized knowledge that equips them to read minds. *In re Fosamax*, for example, the expert in that case sought to offer opinions about what "Merck should have known in light of the information available to it." *In re Fosamax*, 645 F.Supp.2d at 190. Finding the expert's regulatory experience "does not give her the ability to read minds," the court found the expert's opinions were "not a proper subject for expert or even lay testimony." *Id*. at 192; *accord In re Mirena IUD Prod. Liab. Litig.*, 169 F.Supp.3d 396, 486 (S.D.N.Y.2016); *Deutsch v. Novartis Pharmaceuticals Corp.*, 768 F.Supp.2d 420, 442 (E.D.N.Y.2011); *Rheinfrank v. Abbott Labs., Inc.*, No. 1:13-cv-144, 2015 WL 13022172, at *9 (S.D.Ohio Oct. 2, 2015); *see also Fleischman v. Albany Med. Ctr.*, 728 F.Supp.2d 130, 168 (N.D.N.Y.2010) ("[The expert's] expertise as an economist does not give him any specialized

knowledge to discern the thought processes of those setting compensation at Defendant Hospitals.").

Like these experts, the forensic toxicologist here has no specialized knowledge that gives him the ability to "discern the thought processes" or otherwise "read the minds" of Ohio Restaurant employees to conclude that "alcohol intoxication would have been noticeable and obvious" to them. No matter how skilled or experienced that toxicologist is, he cannot know what those employees knew or would have known. No amount of study can make one clairvoyant. *Union Pacific RR. Co. v. Chicago & N.W. Ry. Co.*, 226 F.Supp. 400, 409 (N.D.Ill. 1964) ("[N]o engineering course or other professional training has ever been known to qualify anyone as a clairvoyant[.]").

3. No misconceptions about the effects of alcohol use need to be dispelled that would make state-of-mind opinions alternatively proper under Rule 702(A).

Rule 702(A)'s alternate basis for admissibility—the rule's dispels-a-misconception-common-among-lay-persons prong—provides no basis to find an expert's state-of-mind opinions proper in dram-shop liability cases. OACTA acknowledges that this Court's jurisprudence has developed to permit an expert to offer state-of-mind opinions on the battered-woman syndrome and whether the defendant, in proving she acted in self-defense, "reasonably believed she was in danger of imminent death or serious bodily harm." *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, ¶ 35-42. But that expert testimony is appropriate under this alternative prong because it "dispels a misconception common among lay persons[.]" As the *Koss* court explained:

> Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any "common sense" conclusions by the

> jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.

Koss, 49 Ohio St.3d at 216, 551 N.E.2d 970, quoting *State v. Hodges*, 239 Kan. 63, 68, 716 P.2d 563 (1986), citing Walker, *The Battered Woman*, 19-31 (1979); *see also Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶ 32. Ohio courts now permit these kinds of state-of-mind expert opinions because the "'purported common knowledge of the jury may be very much mistaken'" and the expert's knowledge in this area "'would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.'" *Koss* at 217, quoting *State v. Kelly*, 97 N.J. 178, 206, 478 A.2d 364 (1984).

There are no common myths associated with how a person acts around persons who may have consumed too much alcohol that would call into play the dispels-a-misconception prong of Rule 702(A) and have this Court permit an expert to give state-of-mind opinions as it did in *Koss*, *Haines*, and *Goff*. On the contrary, it is well within the average layperson's knowledge and experience to draw conclusions about what a person knows or would know when serving alcohol to an individual.

B. What a person "would know" or "would have known" are the same as what a person "knows," making these types of expert opinions improper.

As said, courts have allowed experts to offer state-of-mind opinions in dram-shop liability cases when those experts opine about what a person "would know" or "would have known" as opposed to what a person "should have known." *See Thompson*, 10th Dist. Franklin No. 18AP-81, 2018-Ohio-5249, ¶ 25-30 (discussing when expert opinions are sufficient to create triable issues as to actual knowledge in dram-shop liability cases). But

improper what-a-person-knows opinions are no different from opinions about what a person "would know" or "would have known." "Would," by definition, is simply the past tense of the verb "will."[1] When used with any form of the verb "know," it still is the same as what is "known." Thus, what a person "knows" and what a person "would know" are variations of the same known knowledge. It therefore follows then that expert opinions about what a person knows—improper generally—are no different from opinions about what a person "would know" or "would have known," and should be equally improper.

At bottom, existing case law from courts in Ohio and around the country support that, in general, expert opinions about what a person knows or would know are improper. Experts are not clairvoyant and cannot read minds to know what a person knows or would know. Rather, a layperson is capable of drawing conclusions about what a person knows or would know from the factual evidence presented. No expert testimony is needed to explain what the average layperson already knows.

It is no different in the dram-shop context. As discussed, the average layperson can easily draw conclusions about what a person serving alcohol to a patron knows or would know. Alcohol use is neither uncommon nor misconceived that would require the expertise of an expert to explain the effects of alcohol or dispel misconceptions about that use and effect. And because it is not, an expert who gives opinions about what a person serving alcohol knows or would know are improper state-of-mind opinions that should not be sufficient to create a triable issue of fact for summary-judgment purposes.

[1] https://www.merriam-webster.com/dictionary/would (last visited Dec. 19, 2019).

V. Conclusion

This Court should accept jurisdiction to clarify that an expert who opines that a person "would know" or "would have known" that another person is "noticeably intoxicated" are improper state-of-mind opinions that cannot create a genuine issue of material fact sufficient to defeat summary judgment on whether a permit holder acted "knowingly" under R.C. 4399.18(A).

Respectfully submitted,

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A copy of the foregoing was served on December 19, 2019 per S.Ct.Prac.R. 3.11(B) by email to:

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