NO. 100133-9

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I, NO. 81285-8

DENISE WALLACE, as Personal Representative of the ESTATE OF PATRICK JOSEPH WALLACE,

Petitioner,

v.

DH SEATTLE MANAGEMENT, LLC, a Washington state limited liability company; and KAYA SULLIVAN, individually,

Respondent,

and

RICHARD PECK and JENNIFER PECK, husband and spouse, individually and the marital community composed thereof; GREATER SEATTLE CONCRETE, INC.; LOWE ENTERPRISES REAL ESTATE GROUP, INC., a foreign profit corporation; DESTINATION HOTELS AND RESORTS, LLC, a foreign limited liability company; EC RESTAURANTS (SEATTLE) CORP., a foreign profit corporation; 1415 5th AVENUE SEATTLE, LLC, a foreign limited liability company; KAYA SULLIVAN and THOMAS L. SULLIVAN, wife and husband, and the marital community composed thereof; THOMAS L. SULLIVAN, individually; LEON JAY JOHNSON and WENDY MARIA JOHNSON, a married

couple, individually and the marital community composed thereof; JOHN DOE CHAUFFER BUSINESS; JOHN DOES 1-12,

Defendants.

PRECIPE

Attorneys for Respondent:

Ted Buck, WSBA #22029
Mark Conrad, WSBA #48135
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
(206) 486-8000
tbuck@freybuck.com
mconrad@freybuck.com

Mark Tuvim WSBA #31909
Trevor J. Mohr, WSBA #1857
J.J. Hutson, WSBA #16328
Gordon & Rees Scully Mansukhani
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Telephone: (206) 695-5144
Facsimile: (206) 689-2822
mtuvim@grsm.com
tmohr@grsm.com
jjhutson@grsm.com

Respondent respectfully requests that the Clerk of the Court replace its Answer to Petition for Review with the revised version attached hereto. The original contained a scrivener's error in heading "E." Respondent has changed "service" to "served" and "early" to "nearly." No other changes were made.

RESPECTFULLY SUBMITTED this 11th day of October, 2021.

FREY BUCK, P.S.

By: _____
Ted Buck, WSBA #22029
Mark Conrad, WSBA #48135
Attorneys for Respondent
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
Telephone: (206) 486-8000
tbuck@freybuck.com
mconrad@freybuck.com

GORDON & REES SCULLY MANSUKHANI

By: s/ Mark Tuvim
Mark Tuvim WSBA #31909
Trevor J. Mohr, WSBA #1857
J.J. Hutson, WSBA #16328
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Telephone: (206) 695-5144
mtuvim@grsm.com
tmohr@grsm.com
jjhutson@grsm.com

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of ***Precipe*** on:

Kenneth W. Masters Shelby R. Frost Lemmel MASTERS LAW GROUP, P.L.L.C. 241 Madison Avenue North Bainbridge Island, WA 98110 ken@appeal-law.com shelby@appeal-law.com *Counsel for Appellant*	[ ] [ ] [X]	Via USPS Via Electronic Mail Via COA E-Service
Patricia A. Willner Attorney at Law 2223 – 112th Avenue NE, Suite 202 Bellevue, WA 98004 patty@willner-law.com pawassist@willner-law.com paw-assist2@willner-law.com *Co-counsel for Appellant*	[ ] [ ] [X]	Via USPS Via Electronic Mail Via COA E-Service
Brian M. Sullivan Sullivan Law Group, PLLC 2932 Hoyt Avenue Everett, WA 98201 brian@sullivanpllc.com cassidy@sullivanpllc.com kris@sullivanpllc.com *Co-counsel for Appellant*	[ ] [ ] [X]	Via USPS Via Electronic Mail Via COA E-Service
Paul L. Crowley	[ ]	Via USPS

Crowley & Kay, Inc., P.S. 524 Tacoma Avenue South Tacoma, WA 98402 crowley@524law.com *Counsel for Defendants Richard Peck and Jennifer Peck*	[ ] [X]	Via Electronic Mail Via COA E-Service
Gordon & Rees Scully Mansukhani Trevor J. Mohr Mark B. Tuvim 701 – 5th Avenue, Suite 2100 Seattle, WA 98104 tmohr@grsm.com mtuvim@grsm.com seaasbestos@grsm.com *Counsel for Respondent DH Seattle Management, LLC*	[ ] [ ] [X]	Via USPS Via Electronic Mail Via COA E-Service
J. J. Hutson, L.L.C. John J. Hutson PO Box 329 North Bend, WA 98045 jjhutsonllc@gmail.com *Co-Counsel for Respondent DH Seattle Management, LLC*	[ ] [ ] [X]	Via USPS Via Electronic Mail Via COA E-Service

DATED October 11, 2021, at Seattle, Washington.

Adriane Stocking

NO. 100133-9

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I, NO. 81285-8

DENISE WALLACE, as Personal Representative of the ESTATE OF PATRICK JOSEPH WALLACE,

Petitioner,

v.

DH SEATTLE MANAGEMENT, LLC, a Washington state limited liability company; and KAYA SULLIVAN, individually,

Respondent,

and

RICHARD PECK and JENNIFER PECK, husband and spouse, individually and the marital community composed thereof; GREATER SEATTLE CONCRETE, INC.; LOWE ENTERPRISES REAL ESTATE GROUP, INC., a foreign profit corporation; DESTINATION HOTELS AND RESORTS, LLC, a foreign limited liability company; EC RESTAURANTS (SEATTLE) CORP., a foreign profit corporation; 1415 5th AVENUE SEATTLE, LLC, a foreign limited liability company; KAYA SULLIVAN and THOMAS L. SULLIVAN, wife and husband, and the marital community composed thereof; THOMAS L. SULLIVAN, individually; LEON JAY

JOHNSON and WENDY MARIA JOHNSON, a married couple, individually and the marital community composed thereof; JOHN DOE CHAUFFER BUSINESS; JOHN DOES 1-12,

Defendants.

ANSWER TO PETITION FOR REVIEW

Attorneys for Respondent:

Ted Buck, WSBA #22029
Mark Conrad, WSBA #48135
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
(206) 486-8000
tbuck@freybuck.com
mconrad@freybuck.com

Mark B. Tuvim WSBA #31909
Trevor J. Mohr, WSBA #1857
J.J. Hutson, WSBA #16328
Gordon & Rees Scully Mansukhani
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Telephone: (206) 695-5144
Facsimile: (206) 689-2822
mtuvim@grsm.com
tmohr@grsm.com
jjhutson@grsm.com

TABLE OF CONTENTS

Page

Table of Authorities

State Cases

State Statutes

I. INTRODUCTION

Washington precedent establishes a clear factual threshold to advance an alcohol over-service claim beyond summary judgment – *direct observational evidence* that *readily and certainly* shows that a patron was intoxicated at or very near the time of service. Here, there is ample direct observational evidence of the drunk driver, Richard Peck's, appearance while at Frolik Kitchen + Cocktail[1]– every person deposed who saw him at Frolik testified he *did not appear intoxicated*, evidence that is fatal Plaintiff/Appellant Denise Wallace's claims.[2]

Wallace's petition continues to ignore this fact and seeks to overturn long standing Washington precedent. She asks this Court, as she did below, to use circumstantial evidence to establish a speculative inference that Richard appeared intoxicated when he was served at Frolik – a standard

[1] Defendant/respondent Frolik Kitchen and Cocktails ("Frolik"), is a restaurant/bar located in downtown Seattle and operated by DH Seattle Management. LLC.
[2] We refer to the parties by their first name or last name only to provide clarity. No disrespect is intended.

Washington law plainly prohibits. Following long-standing precedent, both the trial court and Court of Appeals properly held that extrapolating what Richard may have looked like at the time of service from– a dark blurry photo of Richard, his overall alcohol consumption, observations long after service, and a BAC test taken even later – is not a permissible substitute for direct observational evidence of apparent intoxication. In her petition, Wallace seeks to open the door to a legal regime that would allow suit against any establishment that serves alcohol based solely on speculation that the person may have appeared intoxicated at the time of service.

Importantly, Washington precedent in overservice cases exists for highly sensible reasons: bars cannot know how much a patron has imbibed before entering their establishment, and the observable effects of alcohol ingestion vary significantly from person to person depending on several factors including food ingestion, gender, size, health, and tolerance. Indeed, precisely because people react differently to alcohol, our precedent

prohibits the use of circumstantial evidence as a substitute for direct observational evidence.

Both the trial court and the Court of Appeals took a thorough, reasoned approach and correctly ruled that Wallace's reliance upon a dark burry photo and other circumstantial evidence was "woefully insufficient to show apparent intoxication." *See* Appendix A (*Wallace v. Peck*, Wash. Ct. App. No. 81285-8-I, slip op. (July 26, 2021)); Appendix B (King County Superior Court Order on Summary Judgment (February 12, 2020)). There is no credible basis to accept review of this decision.

II. COUNTER-STATEMENT OF THE CASE

A. Statement of the Facts

1. On the night of the accident, Richard and Jennifer Peck attended a birthday party in a chauffeured limousine.

As required, the following facts are presented in a light more favorable to the plaintiff/appellant.

On the evening of May 20, 2016, Richard and Jennifer

Peck attended a surprise birthday party for Leon Johnson. CP 173. There was a large group of people attending the party including the Pecks, Leon Johnson and his wife Wendy Johnson, the Johnsons' two adult aged children, Tom Sullivan and his wife Kaya Silkiss-Hero, and members of the Johnsons' bible study group. CP 189; CP 201. The party was organized by Kaya Silkiss-Hero, who rented a stretch limousine to chauffer the group for the night from Lake Stevens to Seattle, Washington. CP 194. The limousine picked up the group, including Richard and Jennifer, from Beers & Brauts, where Richard ate and parked his vehicle. CP 220, 221. Richard testified and his wife corroborated that Richard did not drink at Beer and Brats. CP 176. CP 215.

On the way to downtown Seattle, the limousine drove the passengers to Safeway, where Richard bought a small bottle of "Fireball" whiskey for his wife and an energy drink for himself. CP 178 – 179. Richard denied drinking any alcohol in the limousine at any time. CP 179, CP 268. When pressed by

Wallace's counsel whether he drank any of the Fireball whiskey, Richard testified, "No. That stuff gives me heartburn." CP 269.

The limousine first took the group to a nearby arcade bar called "Add-a-Ball." Richard testified that he had a single 12oz can of beer at the arcade. CP 177, CP 178. There is no evidence he drank more at that location. The group then left the arcade shortly after arrival and the limousine drove to Frolik, a rooftop restaurant and bar located in Seattle. CP 217, CP 218. Each witnesses testified that, when they arrived at Frolik, it did not appear that Richard had consumed alcohol yet. CP 218; CP 196. CP 208; CP 223.

2. Richard Peck was served two drinks at Frolik; no witness testified that he appeared under the influence of alcohol at or near the time of service.

Some point after arriving at Frolik, Richard stepped outside to smoke a cigar. Richard testified that outside he met two men who noticed his Marine Corps tattoo and offered to buy him a drink when they returned to Frolik. CP 180, CP 182. Richard went back into Frolik where he showed the bartender a

stamp on his hand which was placed there by Frolik when he first entered the restaurant after verifying he was over 21 years old. CR 181. The men he met outside then bought him a "Tokyo Tea." CP 183. Richard testified that it took him approximately 10 minutes to finish his drink. *Id*. Thereafter, one of the two men then ordered a second round, including a second Tokyo Tea for Richard. *Id.* Richard testified that those were the only drinks he had at Frolik and the group left shortly after he finished his second Tokyo Tea. *Id*.

There is no testimony from any witness that Richard appeared to be under the influence of alcohol at any time while at Frolik. CP 218; CP 196; CP 208; CP 223. According to Richard, he was not feeling any effects from alcohol at the time he was served his second Tokyo Tea. CP 184. A photograph of Richard at 10:43 p.m. shows him standing casually erect and his eyes closed at the instant the photo was taken.[3]

3. After consuming two drinks, Richard Peck left

[3] Frolik had two receipts that included two Long Island iced teas sold at 10:36 p.m. and 10:53 p.m. which plaintiff relies upon to establish when Richard consumed "Tokyo Teas."

Frolik by chauffeured limousine. Each witness in limousine testified that Richard did not appear under the influence prior to driving.

The evidence suggests the group left Frolik between 11:15 p.m. and 11:25 p.m. in the limousine to return to Beer and Brats in Lake Stevens. CP 195, CP 196. The limousine stopped in the University District to drop off the Johnsons' son and his fiancée. CP 206.

Kaya Silkiss-Hero, a chemical dependency counselor, testified that she had direct interaction with Richard after the limousine returned to Beer and Brats, and he did not appear under the influence:

> A. … as a person who does have a degree in chemical dependency counseling and does have the education that I have, knows that I am not responsible for every single person on this planet, nor could I ever dream to be. And I will tell you that, being who I am, I do not think that I saw or said goodbye to a man that was under the influence of alcohol and should not be driving a car or I would not have allowed that to happen.
>
> Q So you don't think Richard Peck was under the influence of alcohol when he left Beer and

Brats?

A I think that Richard Peck had drank alcohol throughout the evening. I do not think that the person that I said at the time when I said goodbye to Richard Peck, that knowing my constitution and the things in my value system, that if I thought he was too inebriated to operate a vehicle and if I had any impression of that, that I never would have allowed that, to the best of my ability.. . . I have no problem telling a grown man, "You are too drunk to drive." And if I did not say those exact words to him, it is because I felt convinced at the time that that was not the situation.

CP 191, CP 192. Silkiss-Hero's observations of Richard in this description were after the group left Frolik. Silkiss-Hero continued:

Q And you don't remember anything about how Peck was acting, in particular [after being dropped off by the limo]?

A In particular, he was not outside of what I considered to be a sober Mr. Peck. I don't recall him showing any visible signs of intoxication to – of any concern at all….

CP 193. Wendy Johnson also testified that Richard did not appear intoxicated upon his return to Beers & Brats:

Q Okay. How did he seem to you?
A I don't know him. He seemed like a person sitting in a car.
Q Okay. Did he seem drunk to you or stoned?
A No.

CP 205. Indeed, the record establishes that no person who saw Richard that night believed he was apparently intoxicated until after the fatal car wreck.[4]

4. After the chauffeured limousine dropped Richard off at his vehicle, he ran a red light and killed Patrick Wallace.

At around 12:15 a.m. on May 21, 2016, Richard failed to stop at a red light, driving through the light at a high speed and colliding with the driver's side of Patrick Wallace's vehicle. *CP 230*. Patrick died instantly. *Id*.

Trooper Axtman's report indicates he arrived on scene at 12:46 and sometime thereafter evaluated Richard for suspicion of driving under the influence. CP 230.[5] Trooper Axtman observed that Richard was apparently intoxicated; he administered field sobriety tests that Richard failed. *Id.*

[4] Wallace never presented any testimony from nor deposed any Frolik employee.

At 1:04 a.m., nearly two hours after Richard left Frolik and even longer since he was served his last drink at Frolik – Trooper Axtman obtained a portable breath test sample which showed Richard's blood alcohol level above legal limit to drive. CP 231. Trooper Axtman arrested Richard. A blood draw taken at 2:33 a.m., approximately four hours after Richard's last drink at Frolik, revealed a .18 BAC and marijuana in Richard's system. *Id.*

Richard made varying statements to the arresting officers regarding his consumption. Officer Parnell's report states that Richard said that he had three 18 to 20-ounce beers the entire evening. CP 262. Trooper Axtman's report states that he asked Richard how much he had to drink, and that Richard responded that he had one to one and a half beers since 5:30 p.m. CP 257. Officer Heck's report states that Richard admitted to consuming a couple of beers a couple of hours ago and that he had a couple of drinks at a new restaurant in Snohomish. CP 259. Officer Monson's report indicates that Richard's wife, Jennifer, told an

officer at the scene of the accident that Richard had "a few drinks of the Fireball whiskey in the limousine and also a Jack Daniels and Coke," but this statement does not indicate if this referred to the limousine ride to Seattle or from Seattle. CR 270. The police report also indicate that officers found "a fifth bottle of Fireball . . . behind the front passenger seat of the vehicle" after the accident. CP 163.

B. Procedural History of the Case

Wallace's estate filed this wrongful death action alleging Frolik was at fault for serving Richard alcohol when he was apparently under the influence of alcohol in violation of RCW 66.44.200(1).

1. Wallace's claim that Richard consumed 11.3 drinks prior to being served alcohol at Frolik belies her admissions to the trial court, lacks foundation, and is ultimately irrelevant.

Frolik moved for summary judgment because there was no direct observational evidence that Richard was apparently intoxicated at or near the time of service at Frolik. Wallace's

opposition hinged on the argument that a dark, shadowy and blurry photo of Richard purportedly taken at 10:43 p.m. constitutes direct observational evidence of apparent intoxication. Wallace also presented an expert declaration from Patricia Ferguson that based on Richard's alcohol consumption there is a "good possibility that he was showing signs of intoxication." CP 325.

During oral argument on summary judgment, Wallace's counsel admitted that her proposed expert testimony was not relevant to the threshold inquiry, nor were the observations and statements taken at the accident scene:

> The drink received times, though, aren't critical, the post arrest observation isn't critical for your decision today. The expert's testimony isn't critical for your decision today. I didn't know we were having a Frye hearing and a motion to exclude experts today, but they aren't really relevant. The issue that's relevant is the photo.

RP at 23:19-25.

Wallace's counsel also admitted that "there is no testimony of [Richard] drinking any more than those 3 drinks,

beside his inconsistent statement to police in the hours after the crash where he reported having as little as 1 beer and as much as 3 x 18–20-ounce beers that evening." CP 358. Indeed, Wallace's own expert, Ferguson, also expressly admitted that "Peck consumed an *unknown* amount of alcohol prior to arriving at Frolik." CP 388 (emphasis added).

However, Wallace completely changed course on appeal, claiming for the first time to know that Richard consumed exactly "11.3 drinks" prior to being served a second drink at Frolik and "started the evening" with three 18-to-20-ounce beers. AOP at 4. These assertions not only contradict Wallace's admissions to the trial court but, as the Court of Appeals noted, are unsupported by the record.[6] CP 301. More importantly, the Court recognized that Wallace's 11.3-drinks-claim served no purpose other than to invite what our precedent disallows –create an inference of apparent intoxication based on consumption in

[6] Wallace never deposed any Frolik employee and her "Tokyo Tea" recipe was merely taken from an allegedly "typical" cocktail recipes found online, despite Frolik submitting by declaration the true recipe.

lieu of direct observation of apparent intoxication.

Ultimately, both the trial court and the Court of Appeals thoroughly reviewed the record, took all reasonable inferences in Wallace's favor and correctly found that the amount of alcohol consumed, the photograph, and the post-accident BAC/observations taken long after Richard was served alcohol are immaterial to the threshold evidentiary requirement in over-service cases – direct observational evidence that readily and certainly establishes Richard was apparently intoxicated at or near the time of service. To the contrary, each witness present at Frolik indicated that Richard did not appear intoxicated during his time there. In affirming summary judgment, the Court of Appeals explained that while it is clear that at some point Richard became highly intoxicated, Wallace failed to present any direct evidence showing that Richard's intoxication was readily perceptible when Frolik served him alcohol.

III. ARGUMENT AND AUTHORITY

A. The Standard of Review of the Trial Court's Order

This Court reviews a summary judgment ruling *de novo*. *Ensley v. Mollman*, 155 Wn. App. 744, 750-51, 230 P.3d 599 (2010). "[F]acts and the reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party." *Id*. Once the moving party shows there are no genuine issues of material fact, "[t]he nonmoving party may not rely on speculation . . . 'for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). "Conclusory statements and speculation will not preclude a grant of summary judgment." *Elcon Const., Inc. v. Eastern Wash. Univ*., 174 Wash.2d 157, 169, 273 P.3d 965, 971 (2012), citing *Greenhalgh v. Dep't of Corr.*, 160 Wn.App. 706, 714, 248 P.3d 150 (2011). Additionally, matters not raised in trial court cannot be raised for first time on appeal. *Moore v. Mayfair Tavern, Inc.*, Wn.2d 401, 451 P.2d 669 (1969).

B. Pursuant to *Faust* and *Purchase*, the Court of Appeals correctly found that Wallace failed to meet the threshold evidentiary requirement of direct, observational evidence that readily and certainly establishes intoxication at or near the time of service.

Wallace argues that review should be granted because the Court of Appeal's opinion conflicts with this Court's opinion in *Faust v. Alberston* and relies too heavily on the opinion in *Purchase v. Meyers.* Wallace suggests some conflict between *Purchase* and *Faust.* However, Wallace's argument conveniently ignores portions of the *Faust* opinion that undermine her argument. Indeed, in *Faust* this Court specifically stated, "We see no reason to doubt the underlying logic and reasoning contained within the *Purchase* decision, and we do not move away from its established rule." *Faust v. Albertson*, 167 Wn.2d 531, 541, 222 P.3d 1208, 1210 (2009)

At the outset in *Faust*, this Court explained the fundamental evidentiary showing necessary to thwart summary judgment in an over-service claim – that while a plaintiff may normally establish a fact through circumstantial evidence, over-

service cases significantly depart from this standard by requiring that "evidence on the record must demonstrate that the tortfeasor was apparently under the influence *by direct, observational evidence at the time of the alleged over-service or by reasonable inference deduced from observation shortly thereafter*." 167 Wn.2d at 538-9 (emphasis added). Apparently means "*readily* perceptible to the senses and capable of being readily perceived by the sensibilities and understanding as *certainly existent or present*." *Ensley*, 155 Wn. App. at 756 (internal quotation marks omitted, emphasis added); *Dickerson v. Chadwell*, Inc., 62 Wn. App. 426, 435 n.4, 814 P.2d 687, 693 (1991) ("apparent is commonly understood as being capable of easy perception.").

Wallace simply ignores this standard – that liability hinges on actual appearance as opposed to *assumed* appearance. *Faust,* 167 Wn.2d at 541. "Under this rule, jurors are not permitted to make an inferential leap of the 'driver's BAC was X, so he *must have* appeared drunk.'" *Id*. (emphasis in original). Thus, circumstantial evidence, like a BAC, cannot carry the load, but

rather can only corroborate existing, direct observational evidence: "blood alcohol content evidence may be admitted as corroborative and supportive of the credibility of firsthand observations." *Id.*, 167 Wn.2d at 534 (emphasis added). Hence, as the *Faust* Court detailed, the only allowable inference must be premised first upon direct observations of apparent intoxication at or shortly after the alleged overservice. *Id*., 167 Wn.2d at 541. The facts of *Faust* are illustrative of this.

In *Faust*, the patron consumed the equivalent of 21 beers, got in his car, and got in an accident. 167 Wn.2d at 535. The bartender serving the patron admitted that the patron was so drunk that she had to cut him off, he became belligerent and argumentative with her, and he was too "tipsy" to be driving when he left the bar. *Id*. 167 Wash. 2d at 535. The court held that due to the bartender's firsthand observations of obvious drunkenness at the time of serving him, the jury could permissibly infer that the patron was apparently intoxicated when last served. *Id*. at 542.

Here, the trial court and appellate court rejected Wallace's claims because there is no firsthand direct observation evidence of *readily apparent* intoxication at or shortly after service; indeed, as the appellate court noted, the firsthand direct observational evidence is uniformly contrary to her claim – all witnesses testified that he *did not* appear to be intoxicated at or near the time of service. Wallace's effort to overcome these firsthand observations by presenting purely circumstantial evidence, law enforcement observations well after service, and dubious expert opinion disavowed at oral argument on summary judgment, have long been held legally insufficient to create an issue of fact. See *Purchase,* 108 Wn.2d at 226 (a combination of post-accident observational evidence, expert testimony, and BAC were insufficient to survive a summary judgment motion); *Faust*, 167 Wn.2d at 542-43 (BAC evidence may only be used to corroborate first-hand observations of apparent intoxication, not as a substitute); *Ensley*, 155 Wash. App. at 756 (evidence of the amount of alcohol consumed is insufficient to establish that the

person was apparently under the influence at the time of service.).

C. The appellate court correctly determined that Wallace's reliance upon a "woefully insufficient" photograph and expert testimony to establish readily apparent intoxication at the time of service is insufficient as a matter of law to overcome summary judgment.

At oral argument Wallace's counsel admitted she had no testimonial observational evidence of apparent intoxication and that the post-service police observations were insufficient; she also recognized the experts' testimony could not defeat the motion and did not even offer the speculative alcohol intake argument upon which she now relies. Rather, Wallace relied only upon a photo taken at 10:43 p.m..[7]

As the appellate court noted, however, Wallace's photograph is a single, static moment in time that provides no firsthand observational evidence that readily and certainly

[7] "…post arrest observation isn't critical for your decision today. The expert's testimony isn't critical for your decision today. . . The issue that's relevant is the photo." RP 23:19-25.

establish Richard's intoxication. In the photo, Richard is not disheveled, gesturing wildly, or falling over; he is standing casually. CP 276. He is not wearing party novelties, downing shots of alcohol, or dancing on a table; he is not even holding a drink. As the appellate court noted, a sober person caught mid-blink or mouth open mid-word could appear intoxicated, and an intoxicated person can appear sober.

As the appellate court correctly determined, Wallace's claim that the photo shows that Richard was apparently intoxicated rests upon pure speculation; she is not, however, "justified in inferring, from mere possibilities, the existence of facts." *Gardner v. Seymour*, 27 Wn.2d 802, 810-11, 180 P.2d 564 (1947). Further, where the facts present speculative causes, "identifying speculation becomes the prerogative of the judge, not the jury." *Behla v. R.J. Jung*, LLC, 11 Wn. App. 2d 329, 335, 453 P.3d 729, 733 (2019).

Wallace attempts to create an issue of fact through the testimony of Patricia Ferguson, an alcohol server trainer, who

testified that Richard appeared intoxicated in the photo. Though Ferguson may have experience in recognizing intoxication, she established no special credentials in determining intoxication in photos like the one at issue. Ferguson admits that she is unaware of how much alcohol Richard consumed and confirms "these photos are not a full stop indication or confirmation that he is intoxicated." CP 300, 322, 323. Ferguson's speculation is precisely the type of evidence our courts have rejected.

Wallace asks this Court to find that *because of circumstantial* evidence a reasonable inference from the photo is that Richard was apparently intoxicated. In this regard, Wallace puts the cart before the horse ignoring the speculation such a finding would require and the legal requirement that the evidence *readily and certainly* show observable impairment at the time of service.

D. The appellate court correctly found that Wallace's consumption evidence, BAC level, and expert testimony do not show that Richard Peck was apparently intoxicated at the time of service.

Wallace argues that the Court of Appeals did not take the facts in a light most favorable to her when considering her consumption evidence and BAC level. However, Wallace continues to unreasonably contort the record in support of her new claim on appeal that Richard consumed exactly 11.3 drinks prior to last service at Frolik. However, not only is this an unreasonable and speculative interpretation of the evidence, but it also fails to recognize what the appellate court specifically noted, "[e]vidence of the amount of alcohol consumed is insufficient to establish that the person was apparently under the influence at the time of service." Op. at 11 citing *Ensley*, 155 Wn. App. at 756; Purchase, 108 Wn.2d at 225-226 (concluding that the same type of evidence was insufficient as a matter of law.)

As this Court in *Faust* explained,

> Because a heavy drinker may not appear intoxicated despite a high BAC and because alcohol may react on the human body differently because of "medically recognized variables," the court restated the rule that sobriety must be judged at the time of service.

Faust, 167 Wn.2d at 539-40 citing *Purchas*e, 108 Wn.2d at 225-

226. As this Court explained, because a commercial establishment has no means of determining how much a patron has imbibed before entering the establishment, the court requires direct observation of intoxication. *Purchase*, 108 Wn.2d at 225-26.

The appellate court thoroughly reviewed Wallace's evidence and noted that Washington courts have consistently held that circumstantial evidence of the amount of alcohol a patron consumed, post-accident observations made a substantial time after service, and expert testimony surrounding BAC do not establish a material issue of fact as to whether a patron was "apparently intoxicated" at or near the time of service. This is precisely the type of evidence that Wallace relies on.

E. Observations of Richard by police an hour and half after Richard was last served at Frolik are not nearly close enough in time to allow an inference when served.

As a matter of law and common sense, police observations of Richard made an hour and a half after he was served at Frolik are insufficient evidence that he was apparently intoxicated when

he was served. Wallace conceded that point at the trial court: "post arrest observation isn't critical." RP 23:19-25. This is because a person's appearance "a substantial time after service [will not] defeat summary judgment." *Ensley*, 155 Wn. App. at 756. Indeed, a witness' observations are direct evidence of apparent intoxication only if they were made within a "very short time after service of alcohol." *Dickinson*, 105 Wn.2d at 463 (emphasis added).

In *Purchase*, this Court held that observations of apparent intoxication made an hour or more after service are insufficient as a matter of law. *Purchase,* 108 Wn.2d at 227. In *Purchase*, a minor patron drank margaritas at a Mexican restaurant, got in her car, and caused an accident. *Id*. at 221-22. An "hour or two" after she was served, an officer observed her to be visibly intoxicated. *Id*. at 227. The Court, reviewing the denial of summary judgment, viewed the evidence in the light most favorable to the plaintiff. Though not explicitly stated, the light most favorable to the plaintiff was that that the officer's observations were made

one hour after service, not two. The Court held that such observations were insufficient as a matter of law to show apparent intoxication at the time of service and reversed the trial courts denial of summary judgment. Id.

Wallace seeks respite in *Fairbanks v. J.B. McLoughlin* Co, 131 Wn.2d 96, 929 P.2d 433 (1997), which held that a jury could reasonably infer apparent intoxication when there was 20-30 minutes between service and observed intoxication. In *Fairbanks*, Ann Neely drank alcohol at a banquet and then left between 10:00 p.m. and 10:30 p.m. *Id*. at 98-99. At about 10:50 p.m., Neely rear ended Carolee Fairbanks' vehicle, injuring Fairbanks. *Id*. at 99. Fairbanks testified that Neely appeared intoxicated at the scene. Additionally, an officer also observed Neely's drunkenness around 11:00 p.m. *Id*. Because the Court was reviewing a summary judgment grant for the defendant, it viewed the facts in the light most favorable to the plaintiff and assumed the Neely left the banquet at 10:30pm. *Id*. at 102. The Court explicitly stated, "Because a reasonable jury could find

based on Neely's own testimony that she left the banquet at 10:30 p.m. and was involved in the accident *just 20 minutes later*, Fairbanks' and Officer Asheim's observations were sufficient to raise a factual issue as to whether she was obviously intoxicated at the banquet." *Id*., 131 Wn.2d at 103 (emphasis added)

Other cases cited by Wallace have an even shorter time gap. In *Dickinson v. Edwards*, a patron consumed 15-20 drinks at a banquet, left and was in an accident within five minutes. 105 Wn.2d 457, 464, 716 P.2d 814 (1986). Five minutes later (thus ten minutes after leaving the banquet) an officer observed the patron obviously drunk. *Id*. The Court held that the officer's observations were close enough in time so that a reasonable inference could be made about his appearance when he was last served. *Id*. at 464.

As the appellate court noted, the facts of this case are distinguishable from *Fairbanks* and *Dickinson*. Here, the officers' observations of Peck at least 90 minutes after service are insufficient evidence of apparent intoxication as a matter of

law, as Wallace admitted at oral argument. This undisputed time gap is well over an hour, a gap already firmly rejected in Purchase. Importantly, as the appellate court noted, *Fairbanks* is also distinguishable because, here, "the testimony of those who observed [Richard] at Frolik, at least an hour prior to the officers' observations and the breath test, indicated that he did not appear intoxicated." Op at 12. For these reasons, the appellate court opinion correctly applied existing caselaw to the facts of this case.

IV. CONCLUSION AND RELIEF REQUESTED

The only direct observational evidence in this case is that Richard Peck was not apparently intoxicated while at Frolik. Wallace's efforts to overcome this fact through use of an inconsequential photo, circumstantial evidence, and disavowed, speculative expert opinion is contrary to well-developed Washington precedent. She presents no foundation for discretionary review, no conflict in case law, and no burning issue of import. This case was twice rejected for lack of

foundational evidence of readily observable intoxication at or near service. Patrick Wallace's death was a tragedy. But Richard Peck – not Frolik – is the responsible party and Richard is currently serving a prison sentence for his actions.

The Court of Appeals' unpublished ruling follows Washington precedent and rightfully determined that Wallace's claims against Frolik for alleged overservice are unsupported by the evidence required. Wallace's petition for review is not warranted under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 24th day of September, 2021.

FREY BUCK, P.S.

By: _____

Ted Buck, WSBA #22029
Mark Conrad, WSBA #48135
Attorneys for Respondent
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
Telephone: (206) 486-8000
tbuck@freybuck.com
mconrad@freybuck.com

GORDON & REES SCULLY MANSUKHANI

By: *s/ Mark B. Tuvim*

Mark B. Tuvim WSBA #31909
Trevor J. Mohr, WSBA #1857
J.J. Hutson, WSBA #16328
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Telephone: (206) 695-5144
mtuvim@grsm.com
tmohr@grsm.com
jjhutson@grsm.com

I certify that this Reply contains 4969 words, in compliance with RAP 18.17 (b) and RAP 18.17 (c) (10)

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of ***Answer to Petition for Review*** on:

Kenneth W. Masters Shelby R. Frost Lemmel MASTERS LAW GROUP, P.L.L.C. 241 Madison Avenue North Bainbridge Island, WA 98110 ken@appeal-law.com shelby@appeal-law.com *Counsel for Appellant*	[ ] Via USPS [ ] Via Electronic Mail [X] Via COA E-Service
Patricia A. Willner Attorney at Law 2223 – 112th Avenue NE, Suite 202 Bellevue, WA 98004 patty@willner-law.com pawassist@willner-law.com paw-assist2@willner-law.com *Co-counsel for Appellant*	[ ] Via USPS [ ] Via Electronic Mail [X] Via COA E-Service
Brian M. Sullivan Sullivan Law Group, PLLC 2932 Hoyt Avenue Everett, WA 98201 brian@sullivanpllc.com cassidy@sullivanpllc.com kris@sullivanpllc.com	[ ] Via USPS [ ] Via Electronic Mail [X] Via COA E-Service

Co-counsel for Appellant
Paul L. Crowley
Crowley & Kay, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402
crowley@524law.com
[ ] Via USPS
[ ] Via Electronic Mail
[X] Via COA E-Service

Counsel for Defendants Richard Peck and Jennifer Peck
Gordon & Rees Scully Mansukhani
Trevor J. Mohr
Mark B. Tuvim
701 – 5th Avenue, Suite 2100
Seattle, WA 98104
tmohr@grsm.com
mtuvim@grsm.com
seaasbestos@grsm.com
[ ] Via USPS
[ ] Via Electronic Mail
[X] Via COA E-Service

Counsel for Respondent DH Seattle Management, LLC
J. J. Hutson, L.L.C.
John J. Hutson
PO Box 329
North Bend, WA 98045
jjhutsonllc@gmail.com
[ ] Via USPS
[ ] Via Electronic Mail
[X] Via COA E-Service

Co-Counsel for Respondent DH Seattle Management, LLC

DATED September 24, 2021, at Seattle, Washington.

Adriane Stocking

FREY BUCK, P.S.

October 11, 2021 - 11:47 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,133-9
Appellate Court Case Title:	Denise Wallace v. Richard Peck, et al.

The following documents have been uploaded:

- 1001339_Other_20211011114351SC524703_4635.pdf
  This File Contains:
  Other - Precipe
  The Original File Name was Precipe.pdf

A copy of the uploaded files will be sent to:

- brian@sullivanpllc.com
- crowley@524law.com
- dfalkowski@freybuck.com
- jjhutsonllc@gmail.com
- ken@appeal-law.com
- mtuvim@grsm.com
- paralegal@appeal-law.com
- patty@willner-law.com
- paw1958@icloud.com
- seaasbestos@grsm.com
- shelby@appeal-law.com
- tbuck@freybuck.com
- tmohr@grsm.com

Comments:

Sender Name: Lisa Smith - Email: lsmith@freybuck.com
Filing on Behalf of: Mark Russell Conrad - Email: mconrad@freybuck.com (Alternate Email: astocking@freybuck.com)

Address:
1200 5th Ave, Ste 1900
Seattle, WA, 98101
Phone: (206) 486-8000

Note: The Filing Id is 20211011114351SC524703