97683-0

No. 78908-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

HEIDI SCHUYLEMAN, individually, and as Personal Representative of the ESTATE OF JASON LYLE SCHUYLEMAN, and as representative OF SERENA SCHUYLEMAN, child of JASON LYLE SCHUYLEMAN and JASON'S stepchildren, HAILEY WOOLSEY, age 7, COLLEEN SCHEWEKING, age 10, JULIA SCHEWEKING, age 12, SERENA SCHUYLEMAN, age 14, and RICHARD LOTHROP, age 20,

Plaintiffs,

v.

BRIAN JEFFREY SMITH, as a separate person in his own right; BRIAN JEFFREY SMITH and JANE DOE SMITH, husband and wife and the marital community composed thereof and other unknown parties; and BP WEST COAST PRODUCTS, LLC, a Delaware Limited Liability Corporation and its affiliates Cherry Point Refinery at Ferndale, Washington,

Defendants, Appellees.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS FOR DIVISION ONE

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IDENTITY OF PETITIONER

Heidi Schuyleman, individually and as personal representative of the Estate Of Jason Lee Schuyleman, seeks review of the Court of Appeals decision designated below.

COURT OF APPEALS DECISION

The Court of Appeals decision is Schuyleman v. BP West Coast Products, LLC, No. 78908-2-1 (Division One, unpublished), issued July 1, 2019. A copy of the opinion is attached as Appendix 1-11. The Court of Appeals denied a motion for reconsideration on August 19, 2019. A copy of the order denying reconsideration is attached as Appendix 12-13.

ISSUES PRESENTED FOR REVIEW

1. Vicarious liability.

When an employee gets drunk at a company Christmas party and causes a highway accident death shortly after leaving the party, the victim's estate may establish that the employer is vicariously liable by proving the elements of the groundbreaking respondeat superior theory stated by this court in Dickinson v. Edwards, 105 Wn.2d 457, 468-69, 716 P.2d 814 (1986). Must the victim's family also prove that the employer furnished the alcohol? Schuyleman contends the Court of Appeals has added a "furnishing" element neither stated nor implied by this court, weakening one of the remedies provided by Dickinson.

2. Negligence under Restatement 317.

An employer may be found negligent for failing to control an employee whose conduct "on premises in possession of the master" has created an unreasonable risk of harm to others. Restatement (Second) of Torts Sec. 317 (Am. Law Inst. 1965). Does an employee who is on company premises create an unreasonable risk of harm by becoming too drunk to drive? Schuyleman contends the Court of Appeals erroneously interpreted the Restatement to be inapplicable when the injury occurs away from the premises, even if the employee's risky conduct occurs on the premises.

STATEMENT OF THE CASE

Plaintiff's action against Respondent BP West Coast Products was dismissed on summary judgment. This statement of the case narrates the facts in the light most favorable to the plaintiff.

In this civil case, it is Schuyleman's burden to prove that: (1) BP was vicariously liable for injuries caused by its employee Brian Smith after he became intoxicated at the company party, or (2) under Restatement 317, BP was directly liable for its own negligence in failing to prevent its employee Brian Smith from driving away from the party when he was noticeably drunk.

From the beginning, BP has maintained it is "mere speculation" that Brian Smith got drunk or appeared intoxicated while at the employee party. CP 18, BP Motion for Summary Judgment. The evidence Schuyleman relies on to prove that Brian got drunk at the party is set forth in detail in this Statement of the

Case. Although the Court of Appeals did not discuss this issue, Schuyleman anticipates that BP will offer it as an alternative ground for affirmance.

BP operates an oil refinery at Cherry Point near Ferndale, Washington. On the evening of Friday, December 5, 2014, BP hosted its annual Christmas party for employees and their children at the Lynden fairgrounds. BP employee Brian Smith received the email invitation that was sent to the whole refinery. Smith Deposition, January 11, 2017, CP 383.[1] BP did not furnish alcohol. Employees understood that it was to be an alcohol-free event. The party was attended by 389 adults and 483 children. CP 132 (Declaration of Katie Welch).

Brian Smith attended the party with his wife and children. Smith Deposition at 21. Driving home alone after the party, Brian crashed into the motorcycle being driven by Jason Schuyleman. Smith Deposition, CP 416. Smith was very drunk at the time of the crash.

Schuyleman died from his injuries. His widow, Heidi, sued Smith and BP on behalf of herself and their children. Complaint, CP 1-11. She asks this court to order a trial to determine whether BP is liable for their damages.

Brian Smith reported for work at the refinery at 6:30 a.m. on the day of the Christmas party. It was a Friday. Brian was not scheduled to work but he had volunteered for overtime. Smith Deposition, CP 375. Brian worked all day until 5 p.m. He did not consume any alcohol while working at the refinery. Smith

[1] In this brief, most of the citations to Brian Smith's testimony refer to a lengthy deposition taken on January 11, 2017, after the criminal trial. This deposition, which begins at CP 368, will be referred to as "Smith Deposition". A very short deposition of Brian Smith was taken in this civil case on May 20, 2016, before the criminal trial. CP 189. It will be cited by its date.

Deposition, CP 381. He knew drinking on the job was against the company rules and grounds for firing. Smith Deposition, CP 381, 454.

After getting off work at 5 p.m., Brian drove by himself to the fairgrounds. He did not stop anywhere along the way. Smith Deposition, CP 382. At the fairgrounds, he parked next to his wife's minivan. She had just arrived with their children. They all went inside together. A BP badge was necessary for admission, as the party was only for BP employees. Smith Deposition, CP 388, 391.

Brian was at the fairgrounds from around 5:30 p.m. until a little after 7 p.m. when the party ended and everyone left. Smith Deposition, CP 391, 396. Brian's sister and brother-in-law, Rhonda and Ken Brown, had been at the fairgrounds party with their own three children. It was agreed that the two families would go and get a bite to eat at the Rusty Wagon restaurant, about 15 minutes away. Smith Deposition, CP 398-99. At about 7:15 p.m., Brian and his wife left the fairgrounds in their respective vehicles. They arrived at the restaurant at the same time, about 7:30 p.m., and met up with the Browns. Brian did not stop anywhere en route. Smith Deposition, 399-404.

Karis Van Diest, a waitress, served Brian and his family at the Rusty Wagon. CP 1040-46. Their order was taken at 7:45 p.m. CP 1442, 1447 (restaurant records). Based on her training as a server of alcoholic beverages, Ms. Van Diest concluded Brian was drunk. She shared this observation at the time with her fellow employees. CP 1045. Brian did not order anything to drink

at the Rusty Wagon. The bill was paid at 8:19 p.m. CP 1442, 1447. Brian claimed he had no alcohol in his system at that point. Smith Deposition at 403.

When the Browns departed, Brian's wife decided to sit in her van in the restaurant parking lot to nurse their infant before leaving for home. Brian decided to sit with her and keep her company. Smith Deposition, CP 406.

Brian's wife had Budweiser beer in the back of her van. Smith Deposition, CP 407-09. He testified that when he got in his wife's van, she told him she had purchased beer and snacks for when they got home. Smith Deposition, CP 408-09. Brian claimed he did not know about the beer earlier. He testified that he went around to open up the cargo space where the beer was, took out one beer, and returned to the passenger seat where he drank it. He could not recall whether the beer was in an open box or how much there was. CP 411-412.

At about 8:30 p.m., Brian got into his own SUV alone and left for home, a drive of 10 or 15 minutes from the Rusty Wagon. He did not stop anywhere along the way. CP 792-93, Criminal Trial VRP 11-21-2016.[2]

Brian was almost home when he made a left turn in front of Jason Schuyleman's oncoming motorcycle. Smith Deposition, CP 416. Jason landed face up on the hood of Brian's SUV with his head against the windshield. CP 417. It was 8:43 p.m., approximately 1 hour and 30 minutes after Brian left the party. Jason died just under three hours later at Saint Joseph's hospital.

Local police responded immediately to a 911 call and arrived at the accident scene at 8:44 p.m. CP 572-723, 576, Criminal Trial VRP, November 8.

[2] Volume 3 of the Clerk's Papers consists of transcripts of the testimony from the criminal trial, which occurred over 6 days in November 2016. See CP 543, Declaration of Counsel.

State Trooper Brad Beattie, who arrived at 9:07 p.m., talked to Brian and observed that he had bloodshot, watery eyes and smelled of alcohol. CP 615, 619, Criminal Trial VRP, November 8. Brian said he hadn't had anything to drink. CP 105 (State Patrol Report). When Beattie asked Brian to obtain his registration and insurance papers from the SUV, Brian instead locked all the car doors. Beattie observed that he was smiling and laughing. Brian performed poorly on field sobriety tests. Beattie arrested him for DUI. CP 622-644, Criminal Trial VRP, November 9, 2016. A portable breath test was administered, producing a reading of .145 at 9:40 p.m. CP 106 (State Patrol report). No containers of alcohol were found in Brian's car. CP 130 (State Patrol).

Brian sat in the back of Beattie's patrol car for more than half an hour. Beattie could smell the "strong odor" of alcohol coming from the backseat when he drove Brian to the hospital. CP 647, Criminal Trial VRP, November 9, 2016. A warrant was obtained for a blood draw. Brian strenuously resisted having his blood drawn, delaying the process. CP 649-719, Criminal Trial VRP November 9, 2016; CP 1134, Criminal Trial VRP, November 15, 2016; CP 1012, Criminal Trial VRP November 21, 2016.[3] Despite his obstructive behavior, a sample was obtained at 1:30 a.m. showing a blood alcohol level of .05. CP 911, Criminal Trial VRP, November 15, 2016. At the criminal trial, a state toxicologist explained retrograde extrapolation and opined that Brian's blood level was over the legal limit of .08 at the time of impact. CP 914-920. Medical examiner Dr. Gary

[3] The State's testimony describing Brian's conduct at the hospital is summarized in the Court of Appeals opinion affirming the verdict finding him guilty of vehicular homicide and obstructing a law enforcement officer. State v. Brian Smith, No. 76340-7 (Division One, unpublished), issued December 3, 2018.

Goldvogel agreed with this opinion. CP 1040. The criminal case established, and BP does not dispute, that Brian Smith was intoxicated and was driving negligently when he crashed into Jason Schuyleman at 8:43 p.m.

BP disputes Schuyleman's contention that Brian Smith got drunk while he was at the party. Brian Smith's own sworn testimony is evidence that he did not drink at the refinery, or on the way to the party, or after he left the party—with the possible exception of a single beer at the Rusty Wagon parking lot. Brian's blood alcohol level was .13 at the time of impact. It is not possible that Brian could have achieved that level if all he had to drink was one beer. CP 301-04, deposition testimony of Dr. Goldvogel. A jury may choose to believe Brian's testimony that he did not drink before or after the employee party. If they do, they will have to deduce that the only way he could have consumed enough alcohol to achieve a blood alcohol level of .13 by 8:43 p.m. was by drinking at the party.

Brian understood that it was against company rules to bring alcohol to the fairgrounds or to consume alcohol while there. He understood that the company would sanction him if he violated those rules. Smith Deposition, 19-20, 89. Thus, it was in his self-interest to deny drinking at the party. At the criminal trial, Brian denied drinking at the party, although he left open the possibility that others might have been drinking outside the main building.[4] After the criminal trial, Brian was asked in a deposition in this civil case whether he had consumed alcohol at the Christmas party. He categorically denied it. Smith Dep. at 31.

[4]The prosecutor asked Brian if there was any drinking out in the parking lot. Brian's response was, "No, not, not that I was involved in." Criminal Trial VRP 11-21-2016 at 71-72.

In an earlier civil deposition that occurred before the criminal trial, Brian was asked the same question—whether he had consumed alcohol at the Christmas party. His answer: "I decline to answer on the ground my answer may incriminate me." Deposition of Brian Smith, May 20, 2016, CP 189. The inference from Brian's invocation of the Fifth Amendment is not only that he did drink at the Christmas party, but also that he drank enough to put him above the legal limit for driving. See Ikeda v. Curtis, 43 Wash.2d 449, 261 P.2d 684(1953). To hold that no such inference can be drawn in a civil case "would be an unjustifiable extension of the privilege". Ikeda, 43 Wash.2d at 458. Had Brian admitted that he drank enough at the Christmas party to be over .08, it would have been incriminating evidence that the State could have used in the upcoming criminal trial. At a trial in this civil case, the jury will be allowed to draw the adverse inference.

Further evidence that Brian got drunk at the party is the testimony of disinterested witness Karis Van Diest, who concluded Brian was drunk based on how he looked and acted when he arrived at the Rusty Wagon. As is more fully discussed below in connection with Restatement 317, a jury may infer that he had a similar appearance when he left the party 15 minutes earlier.

PROCEEDINGS

Schuyleman filed this lawsuit December 30, 2014. Her allegations against Smith were resolved by settlement in August, 2016. Criminal charges against Smith resulted in a guilty verdict after a jury trial in November, 2016. BP moved for summary judgment dismissal in this civil case on November 8, 2017. The order granting the motion for summary judgment was entered December 15,

2017 after a hearing. An order granting Schuyleman's motion for reconsideration was entered on January 12, 2018 after another hearing.

Schuyleman moved for direct review. This court transferred the appeal to the Court of Appeals. The Court of Appeals heard oral argument on June 11, 2019 and filed its opinion on July 1, 2019. Schuyleman filed both a motion to publish and a motion to reconsider on July 18, 2019. On July 30, 2019, the Court of Appeals denied the motion to publish but called for an answer to the motion to reconsider. BP filed an answer. On August 19, 2019, the Court of Appeals denied the motion to reconsider.

ARGUMENT

1. BP's vicarious liability

The Court of Appeals held that when an employee gets drunk at a company-sponsored party and then causes an accident while driving home, the employer is not vicariously liable unless the employer furnished the alcohol or encouraged drinking at the party. Opinion at 7. Review should be accepted under RAP 13.4(b)(1) because the Court of Appeals holding is in conflict with the prima facie test for vicarious liability set forth in Dickinson, 105 Wn.2d 457, 468 (1986):

> A plaintiff may recover from a banquet-hosting employer if the following prima facie case is proven:
> 1. The employee consumed alcohol at a party hosted by the employer which was held to further the employer's interest in some way and at which the employee's presence was requested or impliedly or expressly required by the employer.
> 2. The employee negligently consumed alcohol to the point of intoxication when he knew or should have known he would need to operate a vehicle on some public highway upon leaving the banquet.
> 3. The employee caused the accident while driving from the banquet.

4. The proximate cause of the accident, the intoxication, occurred at the time the employee negligently consumed the alcohol.
5. Since this banquet was beneficial to the employer who impliedly or expressly required the employee's attendance, the employee negligently consumed this alcohol during the scope of his employment.

See also Fairbanks v. J.B. McLoughlin Co., 131 Wash. 2d 96, 102, 929 P.2d 433, 436 (1997).

The first part of Dickinson, 105 Wash.2d at 461-466, allowed the injured plaintiff to proceed on the claim that the two defendants "were negligent in furnishing alcohol to an obviously intoxicated person." 105 Wash.2d at 461. The second part, 105 Wash.2d 466-470, allowed the claim of vicarious liability against the employer defendant. Furnishing of alcohol by the employer was a key fact only in the first section. The word "furnishing" is not used by the court in the section on vicarious liability. The Court of Appeals believed furnishing is an implied element. This court should disagree.

The doctrine of respondeat superior makes the master liable for the acts of his servant committed within the course or scope of employment. Dickinson, 105 Wash.2d at 466. To determine if an employee was in the scope of employment at any given time, the question is whether he was engaged at the time in the furtherance of his employer's interest. Dickinson, 105 Wash.2d at 467. The benefit to the employer is the important question, not "the control or involvement of the employer." Dickinson, 105 Wash.2d at 468. The employee's negligence that causes the off-premises accident is drinking to the point of intoxication. The employee's negligence is within the scope of employment if the employee became intoxicated at a party "hosted by the employer", the employer

requested the employee's presence,[5] and the party was held to further the employer's interest "in some way". 105 Wash.2d at 468.

The Court of Appeals accepted BP's argument that by using the phrase "a party hosted by the employer", 105 Wash.2d at 468, the Dickinson court necessarily meant a party where the employer furnished the alcohol. The Court of Appeals reasoned that if the company did not provide alcohol or encourage drinking at the party, there would be no foreseeable risk to third parties from an employee driving home at the party. Opinion, at 7. The concept of foreseeability, typically associated with negligence, is mentioned in the law review article from which the Dickinson court adapted its prima facie case. But the concept of foreseeability is not mentioned in the Dickinson opinion, and it is inconsistent with Dickinson's stated rationale. The rationale for vicarious liability stated by Dickinson is that the employer hosts the party to further its own interests. There is no requirement that the host employer furnishes or even knows about the alcohol or the drinking. The Court of Appeals in effect decided to follow the California line of cases discussed in the law review article rather than following the Dickinson test.

Dickinson is controversial. The dissent criticized the majority for "radically altering" the doctrine of respondeat superior.[6] The Massachusetts high court referred to Dickinson's application of respondeat superior as "strained" and refused to follow it. Mosko v. Raytheon, 416 Mass 395, 398-99, 622 NE 2d 1066 (1993).

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[5] Edwards, the intoxicated employee in Dickinson, was requested to be present at the banquet but was not required to be there. 105 Wash. 2d at 467-68.

[6] Dickinson, 105 Wash.2d at 491 (Durham J., dissenting).

> An employee's voluntary attendance at a social event sponsored by his employer, like the party here which was off the employer's premises and outside of normal working hours, cannot reasonably be viewed as conduct within the scope of his employment.

Mosko, 416 Mass. at 400. See also Bruce v. Charles Roberts Air Conditioning, 801 P.2d 456, 462 (Ariz. App. 1990), agreeing with Justice Durham's dissent. Hawaii, on the other hand, has for the most part adopted Dickinson's vicarious liability test. Wong-Leong v. Hawaiian Indep. Refinery, Inc., 76 Haw. 433, 439 and n.6, 879 P.2d 538, 545 (1994). Hawaii recognized that the negligence of the employer in furnishing alcohol had no place in Dickinson's prima facie case of vicarious liability. Wong-Leong, 76 Haw. at 440 n.8. "Liability under the respondeat superior theory, however, does not require fault or knowledge on the part of the employer." Wong-Leong, 76 Haw. at 441-42 n.13.

The Washington Court of Appeals is the only court to read Dickinson and conclude that it requires proof of furnishing. To prove furnishing is to prove the employer was controlling the availability of alcohol. This is the "quagmire of exceptions based on employer involvement" that the Dickinson court explicitly sought to avoid. Dickinson, 105 Wash.2d at 468.

Under Dickinson, the inquiry focuses on "whether the employee was within the scope of employment when he was drinking at the banquet," i.e., "whether the banquet was a purely social function or sufficiently related to the employer's business to bring the employee's attendance within the scope of employment." Dickinson, 105 Wash.2d at 469. This is ordinarily a jury question. Dickinson, 105 Wash.2d at 469. It is at least a jury question here. A holiday party attended by almost 900 individuals is a major event designed to evoke good will toward BP

among its employees and their family members. Offering pictures with Santa, a symbol of good will if there ever was one, does not transform such a party into a purely social function. When a company hosts an employee party for business reasons, the party venue becomes an extension of the company's workplace premises. If employees bring their own bottles to the party and drink clandestinely to the point of intoxication before driving away, the employer is liable the same as if the covert drinking had occurred at the workplace. If the party had not occurred, Jason Schuyleman would still be alive. It is fair and entirely in keeping with the Dickinson rationale for vicarious liability that the damage caused by his death be paid for not just by Brian Smith, but also by the employer who, to serve its own business interests, requested Brian's presence.

BP argues that vicarious liability turns on whether the employer obtains a benefit from employees' consumption of alcohol.[7] Dickinson does not support this argument. The intoxicated employee was on his way to work the night shift when he caused the accident. His presence was not required at the party and drinking alcohol was not in his job description. Dickinson, 105 Wash.2d at 460, 467-68. The company did not benefit from the consumption of alcohol by him or other employees; it benefited from the general good will generated by the company party, at which Edwards' presence had been requested. The same is true in our case. Good will does not depend on the availability of alcohol.

The Court of Appeals decision will inevitably lead to another quagmire of special rules for parties with children, parties where BYOB is encouraged or

[7] BP's Answer to Schuyleman's Motion for Reconsideration in the Court of Appeals, at 5.

tolerated or frowned upon, parties with no-host bars, parties where the employees get one or two drink coupons, and so on. This court should take review because the Court of Appeals improperly added a burdensome element to the unique and simple prima facie case established in Dickinson.

2. Negligence under Restatement 317.

This court should take review for the additional reason that Schuyleman's petition "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). We have here the recurring fact pattern of an employee who gets drunk at a holiday party and then causes a fatal accident on the highway. If the Court of Appeals opinion is allowed to stand, it substantially limits the remedies available to the families of a drunk driving victim. The Court of Appeals confines Dickinson to cases where the employer furnishes the alcohol, and it also rejects the applicability of Restatement 317. Plaintiff has pleaded Restatement 317 as the basis of an alternative theory applicable if the jury finds Brian was not within the scope of employment.

Restatement 317 theory is a negligence theory. It imposes on an employer a duty of control arising from the special master-servant relationship:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
> (a) the servant
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
> (ii) is using a chattel of the master, and
> (b) the master
> (i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). The duty of control is for the protection of third parties. Niece v. Elmview Grp. Home, 131 Wash. 2d 39, 51, 929 P.2d 420, 427 (1997). The duty was held to apply in a case much like this one. Peal by Peal v. Smith, 115 N.C. 225 (1994).

The Restatement requires that the servant be "upon the premises in possession of the master" when the servant is engaging in the unreasonably risky conduct. The Lynden Fairgrounds were BP's premises for the duration of the party. In addition, the checking of badges shows that Brian Smith was privileged to enter only as BP's servant.

The Restatement requires that the employer have notice of the necessity for exercising control over the employee. BP gathered almost 900 individuals together for a Friday evening party, knowing that many employees would be arriving directly from the refinery without any dinner after working a long day. The party was scheduled during the holiday season at a distant fairgrounds venue reachable only by driving on dark rural roads. BP should have known, as law enforcement agencies do, that there is an increase in drinking and driving during the holiday season, especially on Friday and Saturday nights, making it riskier to be on the highway. This is why police have DUI emphasis patrols. CP 1432-33 (Declaration of retired deputy sheriff Huntoon). BP reasonably should have anticipated that out of the 389 adults present, some of them would find a way to drink, and that it would be necessary to control them to prevent them from

driving home drunk. BP is able to control its employees, for example by training staff or hiring security to watch for signs of impairment and to arrange transportation for any employee who has had too much to drink.

BP has disputed the applicability of Restatement 317 on three grounds. First, BP argues it cannot be proved that Brian was drinking at the party—and if he was not drinking at the party there was nothing for BP to control. BP does not come to grips with the evidence that makes it hard to imagine where else Brian could have gotten so drunk that he still had a BAC level of .13 at 8:43 p.m., an hour and a half after leaving the party. Such evidence includes the timeline, the police witness testimony, the retrograde extrapolation testimony, Brian's own testimony, and his invocation of the Fifth Amendment to refuse to answer the question whether he drank at the party.

Second, BP argues that even if Brian was drunk at the party, BP personnel had no reason to know of the necessity of controlling him, because no one who saw him at the party has come forward to say they saw him drinking or acting drunk. BP relies on the many BP employees who testified that Brian appeared sober when they saw him at the party. These statements are not decisive. They are like the declarations in Fairbanks that the employer relied on (unsuccessfully) to prove that the drunk driving employee (Ms. Neely) did not appear to be intoxicated while she was at the company banquet. Fairbanks, 131 Wash.2d at 99-100. Neely claimed that she only had two glasses of champagne at the banquet. She accounted for her visible intoxication at the time of the car

accident by saying she drank several cognacs at the Empress of China lounge after leaving the party. Fairbanks, 131 Wash.2d at 98-99. This court held that the employee testimony was not necessarily credible in view of the timeline and other evidence indicating that Neely did not stop at the Empress of China. Fairbanks, 131 Wash. 2d at 101–02. Similarly here, a jury is not required to believe that Brian looked sober throughout the party simply because some of his fellow employees said he looked fine to them.

BP argues that the inference that Brian got drunk at the party is too conjectural because "there are multiple unaccounted for time periods during which Smith had opportunities to consume alcohol after he left the Children's Christmas Party". CP 26, Motion for Summary Judgment. BP speculates he could have been drinking while he was driving to the Rusty Wagon, or while in the restaurant parking lot, or while driving to his house between 8:30 and 8:43 p.m. While it is theoretically possible Brian chugged a lot of beer during these brief 10 to 15-minute intervals, a scenario in which he did so "could seem implausible to a jury". See Fairbanks, 131 Wash.2d at 102. Brian admitted to only the one beer after leaving the party. There were no cans in his car.

The implausibility of alternative scenarios is illuminated by Dr. Goldvogel's deposition answers to hypothetical questions. CP 359-363, Exhibit 1; CP 301-305 (deposition testimony concerning same). If Brian had only the one beer at 8:30 p.m., his BAC at the time of impact would have been zero. If Brian drank only between 7 and 7:15 p.m. while en route to the Rusty Wagon, he would have had to consume seven 12-oz. beers to get to his BAC of .13 at the time of impact.

If Brian only consumed alcohol while driving from the refinery to the fairgrounds, it would have required eight to nine beers. CP 362-63.[8]

In an overservice case, jurors "are allowed to consider and weigh circumstantial evidence of the appearance of intoxication when the witness's observation occurred within a short period of time after the alleged overservice." Faust v. Albertson, 167 Wash. 2d 531, 542, 222 P.2d 684 (2009). The same rule applies in this case because Brian's appearance of intoxication is what gave BP reason to know of the necessity of exercising control. From the bartender's recognition that the drinker was intoxicated when he left, the jury in Faust could infer that the bartender could tell he was drunk when she last served him 15 minutes earlier. Id. Here we have the same 15-minute window. Karis Van Diest saw that Brian was drunk when he arrived at the Rusty Wagon. A jury could infer that Brian's impairment was just as visible when he left the party 15 minutes earlier. See also Fairbanks, 131 Wash. 2d at 103, cited in Faust, 167 Wash.3d at 541. Such an inference must be allowed so as not to deprive the plaintiff and the court of useful evidence and so as not to limit the plaintiff to self-interested witnesses. Dickinson, 105 Wash.2d at 464.

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[8] BP seizes upon the court's statement in Fairbanks that proving Neely became intoxicated at the banquet would depend on whether she could have consumed additional alcohol after leaving. 131 Wash.2d at 102. BP argues that Brian could not possibly have become intoxicated at the BP party because he drank one beer in the Rusty Wagon parking lot. This argument fails. According to Dr. Goldvogel, one beer would be insignificant in accounting for the .13 BAC at time of impact. Also, the only evidence that Brian drank a beer at the Rusty Wagon parking lot is his own testimony, which is contradicted by his initial statement to police that he had nothing to drink all day.

In short, where Brian drank is not a mystery. More probably than not, he got drunk at the party. The evidence is at least sufficient to raise a jury question. Any uncertainty exists only because Brian has hidden the truth. It is unfair to the Schuyleman family to allow BP to hide behind Brian's lies and evasions.

Third and most important, BP persuaded the Court of Appeals that even if Brian was noticeably drunk at the party, "Schuyleman's injuries occurred away from BP's premises, and therefore BP owed no duty to Schuyleman under section 317 of the Restatement." Opinion at 9. The Restatement does not say that the *injury* must occur on the master's premises. What must occur upon the master's premises is the employee's conduct that creates an unreasonable risk of bodily harm to others. Excessive drinking by an employee who will be driving home is that type of conduct. Like in Dickinson, the negligent conduct of the employee is drinking to excess at the company party, before the employee even attempts to drive away. Dickinson, 105 Wn. 2d at 469.

Restatement 317 would never apply to a drunk driving highway accident under the Court of Appeals reasoning. The Court of Appeals relieves employers from liability for the acts of a drunk employee as soon as that employee drives away from any company premises, no matter how much liquor that employee consumed and no matter how drunk that employee appeared before leaving the premises. Given the substantial public interest in combating drunk driving, this court should take review to reverse this erroneous and harmful holding.

The Court of Appeals relied on a cursory analysis of Restatement 317 in Tallariti v. Kildare, 63 Wn. App. 453, 458-59, 820 P. 2d 952 (1991). This court

need not defer to Tallariti. The Tallariti court did not consider the reasoning in Dickinson that the employee's conduct of drinking to intoxication is the proximate cause of the injuries. Dickinson, 105 Wash.2d at 469.

Because there is sufficient evidence that Brian Smith was noticeably drunk by the time he left the Christmas party, BP may be found liable for failing to intervene and find some other way for him to get home.

CONCLUSION

Jason Schuyleman's family lost virtually all of its financial support along with a beloved father and husband because BP desired to secure the business benefits of hosting a holiday party for its employees. With Dickinson and Fairbanks, the Washington Supreme Court has led the way in developing causes of action against employers that will serve to reduce the recurrence of this all-too-common fact pattern. These cases and Faust show that this court has little patience with business entities who attempt to insulate themselves from liability in drunk driving cases by relying on false, evasive, or implausible testimony.

By confining Dickinson to its facts and electing to brush off Restatement 317 with no real analysis, the Court of Appeals retreated from this court's leadership. Schuyleman's petition for review tests whether Dickinson and Restatement 317 mean exactly what they say. If they do, plaintiffs should be allowed to employ them to argue that an employer who hosts a holiday party must do more than simply declare the event to be alcohol-free. The Court of Appeals has improperly decided as a matter of law questions that rightfully

should be heard by a jury. Schuyleman asks this court to reverse and remand for trial.

Respectfully submitted this 16th day of September, 2019

William Johnston

William Johnston, WSBA 6113
Attorney for Plaintiffs

FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HEIDI SCHUYLEMAN, individually and a Personal Representative of the ESTATE OF JASON LYLE SCHUYLEMAN, and as representative of SERENA SHUYLEMAN, age 14, child of JASON LYLE SCHUYLEMAN and JASON'S stepchildren, HAILEY WOOLSEY, age 7, COLLEEN SHEWEKING, age 10, JULIA SHEWEKING, age 12, and RICHARD LOTHROP, age 20, Appellant, v. BP WEST COAST PRODUCTS, LLC, a Delaware Limited Liability Corporation and its affiliates Cherry Point Refinery at Ferndale, Washington, Respondent, BRIAN JEFFREY SMITH, as a separate person in his own right, BRIAN JEFFREY SMITH and JANE DOE SMITH, husband and wife and the marital community composed thereof and other unknown parties, Defendants.	No. 78908-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

HAZELRIGG-HERNANDEZ, J. — Heidi Schuyleman seeks reversal of an order dismissing her claims of vicarious liability and negligence against BP West Coast

Products, LLC. Because BP's company Christmas party was aimed toward children and there was no alcohol served or expectation that attendees would be drinking, BP was not a "banquet-hosting employer." Therefore, it is not vicariously liable for the injuries caused by its intoxicated employee when he was driving home over an hour and a half after he left the party. Additionally, because the injury occurred off of BP's premises, BP had no duty to protect third parties from its employee acting outside the scope of employment. We affirm.

FACTS

BP West Coast Products, LLC, operates the Cherry Point Refinery in Ferndale, Washington. The Cherry Point Rec Club is a volunteer group of refinery employees that organizes the Cherry Point Rec Club Annual Children's Christmas Party each year. The afternoon event is geared toward children aged twelve and younger, and features such activities as face-painting, crafts, and pictures with Santa. Refinery employees, retirees, and contractors are invited to attend the party with their families, but attendance is not compulsory. The organizers track the total number of adult and child attendees but do not track attendance of individual employees. A BP identification badge is required for entry. No alcohol is provided at the party. Although they were not aware of a written rule forbidding drinking at the party, multiple BP employees asserted that the company has a strict drug and alcohol policy at work and that there is typically no drinking at the Christmas party. One Rec Club member asserted that she had never known of anyone drinking or being intoxicated at the party in the 39 years that she had attended the event.

On December 5, 2014, Brian J. Smith left work at the refinery around 5:00 p.m. and drove to the Lynden Fairgrounds to meet his wife and children for the party. Multiple party attendees said that they interacted with Smith and he did not appear intoxicated at the event. Smith and his family left the party shortly after it ended at 7:00 p.m. and went to dinner at the Rusty Wagon. The Smiths were at the restaurant from approximately 7:30 to 8:20 p.m. Their server told co-workers that she thought Smith was drunk because he appeared disoriented and slow to respond to her questions, but she did not smell alcohol on him. She asserted that she had been trained on indicators of intoxication to avoid overservice of alcohol. Smith did not order any drinks at dinner, but admitted he drank one beer after dinner in the parking lot. Smith left the restaurant and drove home alone in his own car.

At approximately 8:43 p.m., as he was driving home, he collided with Jason Schuyleman, who was driving a motorcycle. The trooper who responded to the scene observed that Smith's eyes were bloodshot and watery and his speech was slightly slurred. Smith performed poorly on field sobriety tests, and a voluntary breath sample produced a reading of .145 on the portable breath test at 9:40 p.m. Smith was arrested for driving under the influence. Four hours and 47 minutes after the collision, a blood test measured Smith's blood alcohol content at 0.05 grams per 100 milliliters. Jason Schuyleman died from the injuries he sustained in the collision.

Heidi Schuyleman, individually, as personal representative of Jason's estate, and as representative of each of their children, filed a complaint against

Smith and BP West Coast Products LLC. The complaint alleged that BP was negligent in failing to identify Smith as intoxicated at the Christmas party and vicariously liable for Smith's negligence in driving a motor vehicle while intoxicated. Schuyleman alleged that BP was vicariously liable because Smith had consumed the alcohol at the company party and the party served a business interest of the company.

BP moved for summary judgment, arguing that Schuyleman had not established the elements of vicarious liability or direct negligence and her claims failed as a matter of law. The trial court granted the motion and dismissed all of Schuyleman's claims against BP with prejudice.

DISCUSSION

Schuyleman contends that the court erred in dismissing her claims of vicarious liability or, in the alternative, direct negligence against BP on summary judgment.

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). A trial court may properly grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment is warranted when the plaintiff has failed to make a factual showing sufficient to establish an essential element of a claim. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). When reviewing a dismissal by summary judgment, we accept the affidavits and deposition testimony as verities and

considers all facts and reasonable inferences in the light most favorable to the plaintiff. Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986).

I. Vicarious Liability

Generally, an employer is liable for the acts of an employee committed within the scope or course of employment. Nelson v. Broderick & Bascom Rope Co., 53 Wn.2d 239, 241, 332 P.2d 460 (1958). With several exceptions, traveling to or from work is usually not an action within the scope of employment. Aloha Lumber Corp. v. Dep't of Labor & Indus., 77 Wn.2d 763, 766, 466 P.2d 151 (1970). When an intoxicated employee causes an accident after leaving a company party, the "banquet-hosting employer" may be vicariously liable for the plaintiff's injuries in certain instances. Dickinson, 105 Wn.2d at 468. Dickinson introduced this "new application" of the vicarious liability doctrine as follows:

> A plaintiff may recover from a banquet-hosting employer if the following prima facie case is proven:
>
> 1. The employee consumed alcohol at a party hosted by the employer which was held to further the employer's interest in some way and at which the employee's presence was requested or impliedly or expressly required by the employer.
>
> 2. The employee negligently consumed alcohol to the point of intoxication when he knew or should have known he would need to operate a vehicle on some public highway upon leaving the banquet.
>
> 3. The employee caused the accident while driving from the banquet.
>
> 4. The proximate cause of the accident, the intoxication, occurred at the time the employee negligently consumed the alcohol.
>
> 5. Since this banquet was beneficial to the employer who impliedly or expressly required the employee's attendance, the employee negligently consumed this alcohol during the scope of his employment.

> The employer is, therefore, vicariously liable under respondeat superior on the ground that the proximate cause of the accident occurred while the employee was acting within the scope of his employment. This action does not affect the "going and coming" rule since it asserts that the proximate cause of the accident occurred at the banquet, before the employee even attempted to drive away. See Comment, Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior, 19 Cal. W.L. Rev. 107, 137 (1982) and Chastain v. Litton Sys., Inc., 694 F.2d 957 (4th Cir.1982).

Id. at 468–69.

Dickinson did not define the term "banquet-hosting employer" and did not explicitly state that the employer must have provided the alcohol to the employee to be vicariously liable for the employee's negligence. In that case, the employee had attended a banquet provided by his employer where dinner, champagne, wine, and mixed drinks were served. Id. at 459. The employer paid for the use of the facilities, service, and all of the food and beverages. Id. The banquet order directed the servers to "keep the glasses filled." Id. at 459–60. In Fairbanks, which refined the elements first set out in Dickinson, the banquet-hosting employer held a company Christmas banquet at one of its properties and provided food, wine, and champagne for the guests. Fairbanks v. J.B. McLoughlin Co., 131 Wn.2d 96, 98, 929 P.2d 433 (1997).

When the lead opinion in Dickinson introduced this new theory, it drew the above-quoted language nearly verbatim from analysis proposed in the cited law review comment. See Patrick J. Barry, Comment, Employer Liability for a Drunken Employee's Actions Following as Office Party: A Cause of Action Under Respondeat Superior, 19 Cal. W. L. Rev. 107, 137 (1982). The Comment

addressed "the specific employer-sponsored party situation where an employee becomes intoxicated, attempts to drive home, and injures a third party." Id. at 107. It framed the legal issue as "the conflict between the employer's act of goodwill and the creation of a foreseeable risk of harm to drivers and pedestrians who might encounter the drunken employee." Id. Before reaching the prescriptive portion of the Comment from which Dickinson drew heavily, Barry reviewed general liquor liability laws, liability of social hosts who supply alcohol, and analyzed a specific California case in which an employee caused an accident after drinking alcoholic beverages furnished by his employer at an office Christmas party. Id. at 108.

Schuyleman argues that the language of Dickinson and Fairbanks does not indicate that the alcohol must be furnished by the employer for it to be vicariously liable. Although the elements as written do not include this specific language, the court's rationale does not support Schuyleman's position. There would be no foreseeable risk of harm to third parties from an employee driving home from a company party at which the employer did not provide alcohol or encourage drinking. Schuyleman also contends that there would be no consequences for an employee who drank to intoxication on the job and then drove and injured a third party if the employer did not directly supply or encourage the drinking. However, the banquet-hosting employer analysis would not apply if there was no party furthering the employer's interests.

We decline to apply the banquet-hosting employer analysis for vicarious liability to an employer who did not supply alcohol to employees or explicitly or implicitly condone drinking at an afternoon company Christmas party aimed toward

young children. The trial court did not err in dismissing Schuyleman's claim of vicarious liability.

II. Negligence

Schuyleman contends in the alternative that BP was directly negligent in failing to anticipate and prevent an employee from leaving the event in an intoxicated condition and driving on rural roads after dark. To establish direct negligence, Schuyleman must show "(1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992) (citing Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)).

Generally, there is no duty to protect another from the actions of a third person. Tallariti v. Kildare, 63 Wn. App. 453, 458, 820 P.2d 952 (1991). However, in certain instances, an employer has a duty to control an employee acting outside the scope of employment:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
> (ii) is using a chattel of the master, and
>
> (b) the master
> (i) knows or has reason to know that he has the ability to control his servant, and
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Id. (quoting Restatement (Second) of Torts § 317 (Am. Law. Inst. 1965). In Tallariti, the plaintiffs filed a negligence claim against an employer after an employee drank to intoxication on the employer's job site, left to drive home, and collided with the plaintiff. Id. at 454–55. This court found that "unless the employee is using a chattel of the master, an employer has a duty to protect third persons only from acts of an employee that are committed while the employee is on the employer's premises." Id. at 458–59 (citing Restatement (Second) of Torts § 317(a) (Am. Law. Inst. 1965)) (emphasis in original). Because the employee was "miles from the jobsite" when he caused the injuries to the plaintiffs, this court found that the employer owed no duty to the plaintiffs. Id. at 459.

As in Tallariti, Schuyleman's injuries occurred away from BP's premises, and therefore BP owed no duty to Schuyleman under section 317 of the Restatement. Schuyleman argues that the Tallariti court did not consider the holding in Dickinson that "the relevant conduct of the drunk employee driver is the conduct that occurs at the company party[.]" She argues that section 317 imposes a duty on the employer to control the employee while on the premises to prevent the employee from drinking to intoxication so as to create an unreasonable risk of harm to others when he leaves the premises. However, this court cited Dickinson to distinguish Tallariti from the scenario in which the employer furnished alcohol to the employee. Tallariti, 63 Wn. App. at 459–60. There is no indication that the Tallariti court failed to consider Dickinson. Also, as BP noted in its briefing, the Dickinson banquet-hosting employer analysis involved vicarious employer liability

for breach of the employee's own duty of care rather than any duty that the employer owed to third parties directly. Dickinson, 105 Wn.2d at 457.

Schuyleman argues that a North Carolina case found that section 317 of the Restatement applied in a similar factual scenario. In that case, the Court of Appeals found that the employer had a duty to control the actions of the employee when supervisory personnel were aware that employees commonly met in the parking lot of the work site to drink beer before driving home and the action violated company policy. Peal ex rel. Peal v. Smith, 115 N.C. App. 225, 226, 233, 444 S.E.2d 673 (1994). The court found that "the common law duty of a master to control his servant under certain circumstances as outlined in Restatement § 317, taken together with the defendants' own written policies established a standard of conduct that if breached could result in actionable negligence." Id. at 233.

However, the fact that supervisory personnel were aware of the activity is a significant factual distinction from the present case. Also, as BP pointed out in its briefing, Peal was upheld by the North Carolina Supreme Court in an equally divided, per curiam opinion and therefore "the decision of the Court of Appeals is left undisturbed and stands without precedential value." Peal ex rel. Peal v. Smith, 340 N.C. 352, 352, 457 S.E.2d 599 (1995). We elect not to rely on this decision rather than relevant case law from Washington courts.

Because BP had no duty to protect third parties from the acts of its employees acting outside the scope of employment and off of BP's premises, the trial court properly dismissed Schuyleman's negligence claim.

Affirmed.

WE CONCUR:

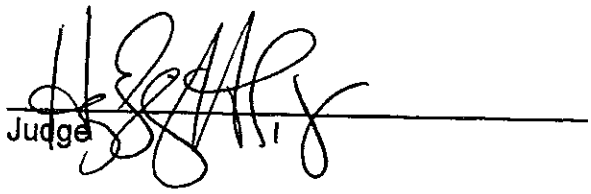
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HEIDI SCHUYLEMAN, individually and a Personal Representative of the ESTATE OF JASON LYLE SCHUYLEMAN, and as representative of SERENA SHUYLEMAN, age 14, child of JASON LYLE SCHUYLEMAN and JASON'S stepchildren, HAILEY WOOLSEY, age 7, COLLEEN SHEWEKING, age 10, JULIA SHEWEKING, age 12, and RICHARD LOTHROP, age 20, Appellant, v. BP WEST COAST PRODUCTS, LLC, a Delaware Limited Liability Corporation and its affiliates Cherry Point Refinery at Ferndale, Washington, Respondent, BRIAN JEFFREY SMITH, as a separate person in his own right, BRIAN JEFFREY SMITH and JANE DOE SMITH, husband and wife and the marital community composed thereof and other unknown parties, Defendants.	No. 78908-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant filed a motion for reconsideration of the opinion filed on July 1, 2019. The respondents have filed a response. A majority of the panel having determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

WILLIAM JOHNSTON

September 16, 2019 - 5:00 PM

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