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No. 57821-9-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as guardian of  
GARY C. FAUST, a minor, and  
BIANCA CELESTINE MELE, BRYAN MELE,  
BEVERLY MELE, and ALBERT MELE,

Petitioners,

v.

MARK ALBERTSON, as Personal Administrator  
for the ESTATE OF HAWKEYE KINKAID, deceased,  
LOYAL ORDER OF MOOSE, INC.,  
MOOSE INTERNATIONAL, INC.,  
JOHN DOES (1-10) (fictitious names  
of unknown individuals and/or entities) and  
ABC CORPORATION (1-10) (fictitious  
names of unknown individuals and/or entities),

and

BELLINGHAM LODGE #493; ALEXIS CHAPMAN,

Respondents.

PETITION FOR REVIEW

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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A. IDENTITY OF PETITIONERS

Bianca Faust, in her individual capacity and as the guardian of Gary C. Faust, Bianca Celestine Mele, Bryan Mele, Beverly Mele, and Albert Mele (Fausts), ask the Court to grant review of the Court of Appeals decision terminating review identified in Part B.<sup>1</sup>

B. COURT OF APPEALS DECISIONS

The Court of Appeals filed its unpublished opinion in this case on January 7, 2008 and reversed a judgment on the verdict of the jury; the jury had awarded the Fausts \$14 million after a three-week trial. A copy of the opinion is in the Appendix at pages A-1 through A-15.

The Fausts filed a timely motion to publish the opinion, which the Court of Appeals granted on February 14, 2008. A copy of the Court's order is in the Appendix at pages A-16 through A-17.

C. ISSUES PRESENTED FOR REVIEW

1. Where the jury made significant decisions on Hawkeye Kinkaid's overservice and the credibility of the Moose defendants' witnesses and there was substantial evidence from which the jury could infer that Kinkaid was apparently under the influence of alcohol at the

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<sup>1</sup> The Bellingham Moose Lodge and Alexis Chapman are referred to collectively as the "Moose defendants."

Bellingham Moose Lodge bar, including an extraordinarily high BAC level and admissions by his bartender girlfriend Alexis Chapman that he was drunk at the bar when she terminated alcohol service to him, did the Court of Appeals err in vacating the jury's verdict, arrived at after a 3-week trial, because the court misapplied this Court's decision in *Barrett* and Washington law on the evidence from which the trier of fact may infer a patron was overserved by a commercial establishment and caused harm to others?

2. Does RCW 4.56.110(3), which allows judgment interest at a lower rate for tort judgments than all other judgments in Washington, violate the Fausts' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution where there was no rational basis for allowing judgments generally to bear interest at 12 percent, and the interest rate on judgments for tort victims to be significantly smaller?

D. STATEMENT OF THE CASE

The factual recitation in the Court of Appeals opinion is remarkable for the facts it omits. The court omits significant facts that bore on the jury's credibility decisions. It also omits facts that supported the jury's decision on the Moose defendants' liability for overservice of Hawkeye Kinkaid who then drove drunk and seriously harmed the Fausts.

Taking the evidence in a light most favorable to the Fausts, Chapman served an enormous number of alcoholic beverages to Kinkaid, her barfly boyfriend, at the Moose Lodge bar on April 21, 2000. Exceedingly drunk, Kinkaid left the Lodge and drove his van. Kinkaid crossed the centerline of a Ferndale road, smashing head-on into the car operated by Bianca Faust, with her children and a grandchild as passengers. Exs. 5-6, 10. Bianca and her daughter, Bianca Celestine Mele, were very seriously injured; Bianca Faust's seven-year-old son Gary Christopher Faust was rendered a paraplegic from the injuries he sustained in the massive collision. Br. of Appellants at 10-12. Kinkaid later died of his injuries from the collision. Ex. 9.

The Court of Appeals reversed a \$14 million verdict rendered by the jury after a 3-week trial, in effect, reversing the trial court's order denying the Moose defendants' posttrial motions. The Court of Appeals gave scant attention to the trial court's extensive memorandum decision denying the Moose defendants' posttrial motions that touched on virtually every issue at trial. CP 839-44. *See* Appendix.

The Court of Appeals opinion either downplays, or simply ignores, the following facts that were before the jury:

- Hawkeye Kinkaid had not been drinking prior to 4:30 p.m., when he arrived at the Bellingham Moose Lodge bar with his girlfriend, Alexis Chapman. RP 427-31, 1737-38.

- Alexis Chapman was an experienced alcohol server who had been trained in recognizing persons under the influence of alcohol by the Washington State Liquor Control Board. RP 1108-10, 1692-99. *See generally*, RCW 66.20.300-350, ch. 314-17 WAC.
- Chapman had a history of slipping free drinks to Kinkaid at various bars where she worked. RP 451-52, 516-17.
- Chapman admitted to Kinkaid's daughter, Rainy, that he was drunk on April 21 at the Moose Lodge bar, he had been drinking for quite awhile at the bar, he was belligerent and argued with her, and he was so "tipsy" that he should not be driving. RP 264-67.
- Chapman told Kinkaid's friend, Lisa Johnston, that he was so drunk at the Moose Lodge bar that she cut him off. RP 335.
- Chapman's ex-wife told the State Patrol he was drunk at the bar. Ex. 71.
- The record supports the fact Kinkaid left the Moose Lodge bar at 7:30 p.m. RP 364, 670, 907-08; CP 1264; Ex. 10.
- The collision occurred at 7:45 p.m. Ex. 10.
- The parties stipulated to the fact Kinkaid was drunk at the time of the collision. RP 243-44. *See also*, RP 192 (medical examiner found Kinkaid was drunk at the time of the collision).
- Kinkaid reeked of alcohol at the collision scene. Ex. 10.
- Kinkaid's BAC at the collision scene was .032%, which means he had to have consumed 21 twelve-ounce containers of beer or 30 ounces of 80-proof alcohol to achieve that level of intoxication. RP 232, 245.

- On autopsy, Kinkaid's stomach contents included 1.5 liters of liquid reeking of alcohol that had not been absorbed into his bloodstream so that it could even be measured in a BAC test. RP 202-05.
- The Moose defendants offered implausible explanations for Kinkaid's extreme level of intoxication.<sup>2</sup> Chapman and other Moose Lodge members claimed Kinkaid drank only two beers at the Moose Lodge bar. RP 443, 540, 631-32, 1270-71, 1291-92, 1319-20; Kinkaid ordinarily did not drink beer. RP 270; CP 1264 (Ex. 1 to Beers depo.). The Moose defendants offered the testimony of two witnesses, Richard Zoerb and Mac Pope, who claimed he was drinking beer at a local bowling alley after he left the Moose Lodge. They could not get the time he left the bowling alley straight, RP 1677-79, the drinks he consumed, RP 1240, 1664, nor his clothing on the day in question. RP 1257-61; Ex. 86. More critically, their testimony was contradicted by the bowling alley proprietor and the waitress there who testified Kinkaid was not at the bar on April 21. RP 1808, 1811. It was further contradicted by Zoerb's girlfriend, RP 1667-68, 1813, and a local television station. RP 1669, 1805. The Moose defendants also tried to claim the fact an empty liquor bottle was found in Kinkaid's van was significant, Ex. 91-92; RP 1377-78, but no diet Pepsi was found there, Ex. 91-92, and it was undisputed Kinkaid never drank hard liquor without it. RP 395, 420, 512, 1742.
- The Bellingham Moose Lodge was suffering from hard financial times and its membership had declined at the time of Kinkaid's overservice. RP 551, 604, 1324; it was under heavy pressure from Moose International to remedy its financial status. Ex. 20, 21, 25, 26, 47, 84. The only way it could remedy its predicament was by increasing liquor sales. RP 616-17, 1026, 1655-56.

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<sup>2</sup> Richard Zoerb, for example, signed a statement at Chapman's insistence when he was drunk. RP 1678-79; Ex. 93. Chapman urged him to testify Kinkaid left the bowling alley at 9 p.m. RP 1677-79.

- The only people in the Moose Lodge bar who could testify to Kinkaid's appearance were Moose or Moose Auxiliary members who had strong ties to the fraternal organization and strangely could not recall who was in attendance at the Lodge on April 21. RP 431-35, 527-31, 537-38, 541, 590, 592, 1293, 1307-08, 1313, 1322-23, 1329-30; Ex. 19.
- The most direct evidence of the Moose "conspiracy of silence" was the testimony of Ron Beers; in his deposition, Beers recanted his sworn declaration in which he testified that Chapman had previously overserved patrons and Kinkaid left the Moose Lodge bar between 7 and 7:15 p.m. RP 907-08; CP 1264 (Ex. 1); CP 1264 (at 16, 17, 30-31, 32, 33, 41).

The jury heard this evidence over a 3-week trial and was properly instructed on the law of overservice of patrons by a commercial establishment. In returning a verdict for the Fausts, it believed that Kinkaid was overserved at the Moose Lodge bar on April 21 when he was "apparently under the influence of alcohol." CP 1120-22. The trial court properly denied the Moose defendants' posttrial motions for judgment as a matter of law.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED<sup>3</sup>

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<sup>3</sup> The criteria governing acceptance of review by this Court are set forth in RAP 13.4(b).

The Court of Appeals articulated this Court's standard for motions seeking judgment as a matter of law, op. at 4-5,<sup>4</sup> but then promptly disregarded the central focus of this Court's off-expressed standard:

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Such motion can be granted only when it can be said, as a matter of law, there is no competent and substantial evidence upon which the verdict can rest.

*Guijosa v. Wal-Mart Stores, Inc.*, 141 Wn.2d 907, 915, 32 P.3d 250 (2001) (citations omitted).<sup>5</sup> This Court requires that the truth of the nonmoving party's evidence must be accepted by the trial court, and the court must draw *all favorable inferences from that evidence that may reasonably be evinced from it*. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 73, 684 P.2d 692 (1984). Credibility decisions are for the jury. In *Morse v. Antonellis*, 149 Wn.2d 572, 70 P.3d 125 (2003) this Court stated that an

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<sup>4</sup> In a recent formulation, this Court stated in *Schmidt v. Coogan*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 173 P.3d 273 (2007), a court should grant judgment as a matter of law *only* in "circumstances in which there is *no doubt* as to the proper verdict." (Emphasis added.)

<sup>5</sup> The Court of Appeals recited various facts unfavorable to the Fausts such as the time he left the Moose Lodge bar (op. at 4), demonstrating it did not construe the evidence and inferences from it in a light most favorable to the Fausts.

appellate court may not substitute its judgment for that of the jury and reversed a Court of Appeals decision determining negligence as a matter of law. “Juries decide credibility, not appellate courts.” *Id.* at 575. The Court of Appeals here neglected the *inferences* the jury could make from the evidence presented and the jury’s credibility decisions.

(1) The Court of Appeals Narrow Interpretation of the Trier of Fact’s Ability to Infer that the Patron Was Overserved by Conduct Postservice Is Contrary to *Barrett*

The Court of Appeals opinion acknowledged this Court’s opinion in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), op. at 5, 6, but neglected to note that this Court adopted a *lower* burden for plaintiffs in overservice cases when it abandoned the common law standard for overservice that required the commercial establishment to serve an “obviously intoxicated” person to be liable, substituting instead the statutory standard of serving a patron who was “apparently under the influence of liquor.” 152 Wn.2d 274-76. *See* RCW 66.44.200. This Court stated the new standard was less stringent, requiring less certainty. 152 Wn.2d at 267-69. Nevertheless, the Court of Appeals opined “the required evidence [to sustain a claim] does not appear to have changed.” Op. at 6 n.3. The Court of Appeals then incorrectly applied the cases under the old “obviously intoxicated” standard which expressly permit the inference of intoxication at the time of service from the postservice

conduct of the person who was overserved by the commercial establishment. Review is merited. RAP 13.4(b)(1), (2), (4).

This Court's purpose in adopting the new standard was clear: to deter commercial establishments from overserving patrons and thereby protect the public "from the enormous personal and social costs arising from drunk driving accidents." The Court of Appeals opinion fails to implement this Court's purpose in *Barrett*.

The Court of Appeals was incorrect that the level and nature of proof necessary to prove a claim for overservice of a patron under the *Barrett* standard is the same as that which existed under prior law. Plainly, the appearance of *obvious* intoxication is a higher burden than demonstrating a person is apparently under the influence. For example, if a person consumes 20 alcoholic beverages over a short period, few human beings could fail to be "under the influence of alcohol" at that level of alcohol consumption.

The question of the level and nature of proof under the new *Barrett* approach to overservice cases is a question of first impression in Washington. Such questions of first impression are deservedly reserved to this Court to resolve. RAP 13.4(b)(4). *See, e.g., Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 213, 87

P.3d 757 (2004); *New Hampshire Indemn. Co., Inc. v. Budget Rent-A-Car Systems, Inc.*, 148 Wn.2d 929, 64 P.3d 1249 (2003).

But even under the old “obviously intoxicated” standard, the trier of fact could infer intoxication of the patron from postservice conduct. In *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), a commercial overserving case, the patron consumed 10 drinks before dinner, and 15-20 drinks in a 3.5 hour period. This Court surveyed earlier cases on the evidence from which an inference of the “obviousness of intoxication at the time of service” could arise and concluded that blood alcohol test results were admissible as evidence of intoxication at the time the person was served, but not as evidence of the obviousness of intoxication. *Id.* at 463.<sup>6</sup> Thus, the trial court here properly admitted evidence and expert testimony on Kinkaid’s blood alcohol level at the time of the accident and when he was in the Moose Lodge bar. The *Dickinson* court also permitted admission of a trooper’s affidavit of his post-accident observations of the defendant, observations made about 10 minutes after the defendant was last served, that he was unsteady on his feet, had bloodshot eyes and a flushed face, and smelled of alcohol. *Id.* at 464.

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<sup>6</sup> RCW 46.61.506(1) specifically permits introduction of blood alcohol results into evidence in civil cases to prove intoxication.

This Court also indicated in *Dickinson* that evidence of the amount of alcohol the defendant consumed was admissible to raise an inference of obvious intoxication. The Court surveyed cases from other jurisdictions in which a patron had consumed large quantities of alcohol in a short time. “We hold that the evidence of the amount of alcohol consumed here raises a material issue of fact as to (1) whether a person in the position of Mr. Edwards would have displayed some outward manifestation of intoxication in advance of ordering and (2) whether a person in the position of the furnisher . . . knew or should have known in the exercise of reasonable care, that the drinker was intoxicated.” *Id.* at 465-66. Given Kinkaid’s huge quantity of alcohol in his system, the jury properly inferred that he was under the influence of alcohol when served at the Moose Lodge bar. The Court of Appeals decision contradicted this Court’s *Dickinson* holding. RAP 13.4(b)(1).

Similarly, in *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997), an employee left a company banquet between 10 and 10:30 p.m. She was involved in a serious automobile accident at 10:50 p.m. Her BAC obtained at about midnight was .17. When confronted by police at about 11 p.m., her speech was slurred, she stumbled getting out of the car; she staggered when walking, and she smelled of alcohol. This Court noted:

A police officer's subjective observation that the employee was obviously intoxicated shortly after leaving the banquet may raise an inference that she was obviously intoxicated when the employer served her, provided that the employee did not consume any alcohol after leaving the banquet and provided that no time remains unaccounted for between the banquet and the subsequent observation.

*Id.* at 103. The Fausts met this standard here.

In *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997), the Court of Appeals held that a directed verdict was properly denied where various witnesses testified a patron was drunk or tipsy at a restaurant bar and then assaulted a third person. The court found that an expert's testimony on the patron's BAC was relevant to enhance the credibility of the observations that the patron was drunk. *Id.* at 250.

The Court of Appeals in this case referenced *Dickinson* and *Fairbanks* in its opinion, *op.* at 6-7, but stated that these cases stand for the proposition that the postservice evidence must be very close in time to the injury to the victim. *Op.* at 7-8. Kinkaid had to appear "under the influence" to those around him at the bar in order to allow the inference. *Op.* at 8-9. However, this Court *rejected* a set time for the postservice evidence in *Dickinson*, stating "It is of little use to set a specific time period within which the observations must be made." 105 Wn.2d at 464. In *Fairbanks*, the accident occurred 20 minutes after the patron left the

bar. 131 Wn.2d at 103. Here, under the Fausts' evidence, Kinkaid struck their vehicle about 15 minutes or so after leaving the Moose Lodge bar.

The Court of Appeals failed to assess the evidence and reasonable inferences from that evidence in a light most favorable to the Fausts. The court discussed Alexis Chapman's admission to Kinkaid's daughter, Rainy, and Lisa Johnston regarding his drunkenness but parses Kinkaid's appearance at the bar while being served from his appearance when he was finally cut off by Chapman. Op. at 9-12. Chapman admitted Kinkaid was *drunk* at the Moose Lodge bar. The court also ignored the Fausts' other evidence that Kinkaid was drunk at the bar. He had a .32 percent BAC, which could be reached only by ingesting 21 beers or 30 ounces of alcohol. He had unassimilated alcohol in his gut on autopsy. That ingestion occurred between 4:30 p.m. and 7:30 p.m. By her own testimony, Chapman served Kinkaid every drink he had from the time he first came to the Moose Lodge bar. From this evidence, the jury could reasonably infer Chapman served Kinkaid at least 21 beers or 30 ounces of alcohol over 3 hours. The collision occurred 15 minutes after Kinkaid left the Moose Lodge bar.

The Court of Appeals substituted its judgment for that of the jury that plainly understood a person does not become "under the influence of liquor" *all at once*. A jury could reasonably infer here, as the *Dickinson*

court contemplated, that Kinkaid was under the influence at the Moose Lodge bar when his girlfriend overserved him.

Finally, under the unique facts of this case, a standard that relies exclusively on the patron's appearance is peculiarly unfair where the other bar patrons have a reason not to remember that patron's actual appearance. All the bar patrons here were *Moose members*; they did not want their Lodge to be liable. The memories of the Moose defendants' witnesses were so selective and their stories about Hawkeye Kinkaid's actions were so plainly contrary to scientific data and the facts in this case, and their alternate explanations for his drunkenness so implausible, this Court should not reward their "conspiracy of silence." The jury did not credit their testimony. Its credibility determination was a vital part of its verdict.

The Court of Appeals opinion flies in the face of *Dickinson*, *Fairbanks*, and *Cox*. The Court of Appeals decision severely undercuts this Court's *Barrett* holding in which this Court consciously lowered the standard in commercial overservice cases. Review is merited. RAP 13.4(b)(1), (2).

Finally, the question of whether a jury may infer that a patron was under the influence of alcohol from evidence that arises post-service, such as BAC results, autopsy findings, or observations of that person, is one of

“substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

As this Court observed in *Barrett*, the purpose of permitting third persons to have a civil cause of action against a commercial establishment for overserving patrons is to deter such overservice and avoiding having drunks on the road. This is also the policy rationale that prompted the Legislature to *mandate* training of alcohol servers like Chapman. RCW 66.20.320.<sup>7</sup>

The Court of Appeals analysis only encourages overservice. It gives license to commercial establishments to serve persons who are clearly drunk, but do not exhibit *obvious* signs of drunken behavior. A person who enters a bar and orders 20 drinks from the same server over a short period by simply waving for another drink, but does not fall off his barstool, *is just as dangerous to drivers on the road* when he leaves the bar as the patron who is “falling down” drunk. The server should know

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<sup>7</sup> The Legislature found with respect to training of alcohol servers:

... that education of alcohol servers on issues such as the physiological effects of alcohol on consumers, liability and legal implications of serving alcohol, driving while intoxicated, and methods of intervention with the problem customer are important to protecting the health and safety of the public. The legislature further finds that it is in the best interest of the citizens of the state of Washington to have an alcohol server education program.

Laws of 1995, ch. 51, § 1.

better, and is trained to know that such a patron is apparently under the influence of alcohol and should not be served drinks. A jury is entitled to apply its real world experience to infer that the patron served 20 drinks was apparently under the influence of alcohol at the commercial establishment after that patron causes harm to others on the road. A rule allowing the jury to infer overservice from postservice evidence better implements *Barrett* and RCW 66.44.200. Review should be granted. RAP 13.4(b)(4).

(2) RCW 4.56.110(3) Is Unconstitutional

The trial court here entered a judgment in favor of the Fausts that accrued interest at 6.002 percent. CP 1081. This rate is consistent with the direction of RCW 4.56.110(3), but that statute is unconstitutional. The Court of Appeals upheld the statute's constitutionality. Op. at 13-15.<sup>8</sup> Construction of the 2004 statute is an issue of first impression, one relating to constitutional issues, and this issue merits review. RAP 13.4(b)(4).

RCW 4.56.110(3) was enacted in 2004 as part of House Bill 2485. It provides tort judgments "shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by

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<sup>8</sup> Given the court's decision on liability, this was an issue it did not need to reach. The fact that the Court of Appeals decided the issues indicates it is an issue of public significance.

the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry.”

Prior to 2004, interest on contract judgments bore interest at the rate specified in the contract. RCW 4.56.110(1). Child support judgments bore interest at 12 percent. RCW 4.56.110(2). All other judgments bore interest at the maximum rate permitted under RCW 19.52.020, usually 12 percent.

The Legislature offered no rationale for the special interest rate for tort judgments. The Legislature neglected to provide findings or any other explanation for its decision. The proponents for the bill in the House of Representatives simply argued the interest rate of 12 percent was “unreasonably high” without other explanation of how high the interest rate should be. They also asserted “the current rate makes considerations of interest charges alone drive decisions on whether to appeal a case.” House Bill Report at 3. Similarly, the proponents testified in the Senate that the existing 12 percent judgment interest rate “is punitive and discourages justifiable appeals.” Senate Bill Report at 2. The proponents’ ostensible rationale for the bill made little sense. Under it, higher interest rates for contract, child support, and all other nontort judgments are not

punitive, and do not discourage “justifiable” appeals, but tort judgments inexplicably require a lower interest rate.

Washington courts have found legislative classifications that bear disproportionately on certain classes of litigants to be unconstitutional. *See, e.g., Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 539 P.2d 845 (1975) (special nonclaim period for litigants against local government); *Petersen v. State*, 100 Wn.2d 421, 443-46, 671 P.2d 230 (1983) (cost bonds on appeal in cases against state); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989) (limitations on noneconomic damages recoverable by tort claimants); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998) (shorter statute of repose for medical negligence cases).

“The right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment.” *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). To withstand scrutiny under equal protection principles, the legislative classification in RCW 4.56.110(3) must rest on grounds relevant to the achievement of legitimate state objectives. *Id.* at 235-36. That is, there must be some rational basis for the lower interest rate applicable to tort judgments. *Id.* at 236.

There is no rational basis for the Legislature's decision to allow a lower rate of interest on tort claims, other than a punitive one. The Legislature singled out tort judgment creditors, people who had been injured by the wrongful conduct of others, for special, unfair treatment without demonstrating a legitimate legislative rationale for such treatment. There is seemingly little justice for an injured tort victim receiving half the judgment interest that a business can earn on a judgment to collect a debt, particularly when the tort judgment creditor cannot collect prejudgment interest while the collection creditor usually will do so because the amount at issue is likely liquidated. *See, e.g., Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).<sup>9</sup>

RCW 4.56.110(3) violates the Faustus' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution or article I, § 12 of the Washington Constitution. Review is merited on this issue of first impression on the interpretation of a statute. *See Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 632 P.2d 948 (1982) (1981 tort reform legislation reviewed as matter of first impression); RAP 13.4(b)(4).

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<sup>9</sup> Washington is only one of eight states not permitting prejudgment interest on tort claims. House Bill Report at 3.

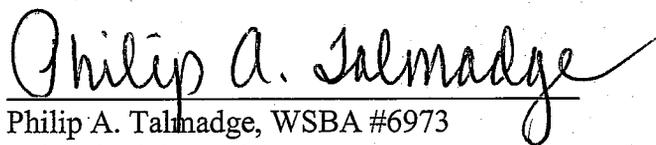
F. CONCLUSION

Hawkeye Kinkaid arrived at the Moose Lodge bar sober and left exceedingly drunk. He operated a vehicle and smashed into the Faust vehicle, irrevocably changing their lives. After a long, fair trial, the jury rendered a verdict in the Fausts' favor after the Moose defendants' negligence and Kinkaid's irresponsibility tragically and irreparably damaged the lives of Bianca Faust, her two children, and the rest of the family. The Court of Appeals should not have invaded the jury's province and taken away that verdict.

This Court should reverse the Court of Appeals and reinstate the trial court's judgment and the order denying the Moose defendants' posttrial motions. The Court should direct that the Fausts' judgment against the Moose defendants bear interest at 12 percent per annum. Costs on appeal should be awarded to the Fausts.

DATED this 21st day of February, 2008.

Respectfully submitted,



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# APPENDIX

RCW 46.61.506(1):

Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

COURT'S INSTRUCTION NUMBER 12 TO THE JURY:

An establishment, such as the Moose Lodge, owes a duty to third persons not to serve alcohol to a person who is apparently under the influence of alcohol.

CP 1120.

COURT'S INSTRUCTION NUMBER 13 TO THE JURY:

Whether a person was apparently intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was served to the person. Neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was served alcohol while apparently under the influence.

CP 1121.

COURT'S INSTRUCTION NUMBER 14 TO THE JURY:

"Apparently" is defined as, in an apparent manner: seemingly, evidently or readily perceptible to the senses.

CP 1122.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as  
Guardian of GARY C. FAUST, a minor,  
and BIANCA CELESTINE MELE,  
BRYAN MELE, BEVERLY MELE, and  
ALBERT MELE,

Respondents,

v.

MARK ALBERTSON, as personal  
Administrator for the ESTATE OF  
HAWKEYE KINKAID, deceased,  
LOYAL ORDER OF MOOSE, INC.,  
MOOSE INTERNATIONAL, INC., JOHN  
DOES (1-10) (fictitious names of  
unknown individuals and/or entities) and  
ABC CORPORATION (1-10) (fictitious  
names of unknown individuals and/or  
entities)

Defendants,

BELLINGHAM LODGE #493, ALEXIS  
CHAPMAN,

Appellants.

No. 57821-9-1  
Consolidated with  
No. 57321-7-1  
Linked with No. 57320-9-1

DIVISION ONE

UNPUBLISHED

FILED: January 7, 2008

APPELWICK, C.J. — After they were injured when their vehicle was struck by a drunk driver, the Fausts brought suit against the estate of the driver, who was killed in the accident. They also sued Alexis Chapman, bartender at the Moose Lodge and the Lodge itself for overservice of alcohol. The jury returned a

verdict for the Fausts. Chapman and Moose Lodge appeal. The Fausts cross-appeal contending that the interest rate on tort judgments violates their constitutional right to equal protection. Liability for overservice of alcohol requires that the consumer appear under the influence at the time of service. The evidence does not support overservice. We reverse and vacate the judgment against Chapman and the Moose Lodge, and deny the cross-appeal.

#### Facts

At approximately 7:45 p.m. on April 21, 2000, while driving southbound down LaBounty Road in Ferndale, Hawkeye Kinkaid's<sup>1</sup> van wandered across the center line and struck a northbound vehicle head-on. The car held the Faust family. Bianca Faust was driving the car which also contained her children, Bianca Celestine Mele and Gary Christopher Faust, and her infant granddaughter. Bianca Faust suffered a broken kneecap and other injuries. Bianca Mele broke both of her wrists and a femur and also received lacerations and a knee injury. Of the car passengers, Christopher suffered the most serious injuries resulting in paraplegia. Kinkaid sustained severe injuries resulting in massive bleeding that required administration of significant amounts of fluid to replace the lost blood. He later died at the hospital.

One hour after the accident, toxicology showed that Kinkaid's blood alcohol content (BAC) was .16 percent, significantly above the legal limit of .08

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<sup>1</sup> Except where necessary, in quoting the record, we use the correct spelling of Kinkaid throughout this opinion.

percent.<sup>2</sup> At autopsy, Kinkaid's BAC was .09 percent after losing significant amounts of blood and receiving large quantities of fluids. The medical examiner also explained that Kinkaid's stomach contents included 1.5 liters of liquid that smelled strongly of alcohol. This alcohol had not yet been absorbed into his bloodstream and was therefore not reflected in the BAC analyses. The Fausts' forensic science consultant estimated that at the time of the accident, Kinkaid's BAC was approximately .32 percent. In order to achieve this level, the expert calculated that Kinkaid needed to consume twenty-one 12-ounce containers of beer or 30 ounces of 80-proof alcohol.

On the evening of the accident, Kinkaid had been at the Moose Lodge in Bellingham where his girlfriend, Alexis Chapman, was the bartender. The Faust family filed suit against Hawkeye Kinkaid's estate, the Bellingham Moose Lodge, Moose International, Inc., and Chapman as employee and bartender at the Moose Lodge in Bellingham. The suit alleged that Kinkaid negligently injured the Fausts, that the Moose Lodge and Chapman overserved alcohol to Kinkaid, that the Lodge negligently hired and supervised Chapman, and that Moose International failed to adequately monitor the Lodge and Chapman. Moose International was dismissed from the case during trial. The parties stipulated to a judgment against Kinkaid's estate.

Testimony showed that Kinkaid and Chapman arrived at the Lodge at about 4:30 p.m. According to Chapman who had spent the afternoon with

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<sup>2</sup> The initial analysis was done on a plasma sample with a result of .16 percent. The legal standard for intoxication is based on whole blood BAC. The expert estimated Kinkaid's initial whole blood BAC was .14 percent based on a conversion that assumes 16 percent difference between plasma and whole blood BAC levels.

Kinkaid, he was sober upon arrival at the Lodge. Chapman testified that she only served Kinkaid two beers. Members of the Lodge who remembered seeing Kinkaid at the Lodge that night testified that he appeared sober. The parties dispute the time of Kinkaid's departure from the Lodge. The Fausts presented evidence that he left the bar around 7:30 p.m. including Chapman's original statement to an investigator. Other witnesses testified that Kinkaid left around 6 p.m. Two witnesses testified that they had seen Kinkaid drinking a beer at a bowling alley after 6 p.m. but the bartender at that establishment stated that Kinkaid had not been in the bar that night.

A jury returned a verdict for the Fausts and awarded significant damages, totaling approximately 14 million dollars. In apportioning negligence among the defendants, the jury attributed 50 percent to Kinkaid, 15 percent to Chapman, and 35 percent to the Moose Lodge. The Moose Lodge and Chapman (collectively the Lodge) appeal.

### Discussion

#### I. Overservice of Alcohol

##### A. Requirements for Liability for Overservice of Alcohol

The Moose Lodge and Chapman moved for a judgment as a matter of law during and after trial and also moved for a new trial based on insufficiency of evidence as to overserving.

[A] challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict, admits the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most

strongly against the moving party and in a light most favorable to the opponent.

Davis v. Early Constr. Co., 63 Wn.2d 252, 254, 386 P.2d 958 (1963). In reviewing a ruling on a motion for a judgment as a matter of law we engage in the same inquiry as the trial court. Stiley v. Block, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). A judgment as a matter of law requires the court to conclude as a matter of law, "that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). However, the court must "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Overturning a jury verdict is only appropriate when the verdict is clearly unsupported by substantial evidence. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 108, 864 P.2d 937 (1994). Because the standards of review and issues are the same, this section will discuss whether the trial court erred in its denial of both motions for judgment as a matter of law and the motion for a new trial.

Civil liability for overservice of alcohol arises from the fact that "a commercial host has a statutory duty to refrain from serving persons 'apparently under the influence of liquor.'" Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 273, 96 P.3d 386 (2004). "This duty is a limited exception to the general rule that it is not a tort to sell alcohol to 'ordinary able-bodied men' on the theory that it is the drinking of the alcohol that is the proximate cause of any injury, not the furnishing of it." Dickerson v. Chadwell, Inc., 62 Wn. App. 426, 434, 814 P.2d

687 (1991). The exception arises because, “[o]nly when a commercial establishment furnishes liquor to one ‘in such a state of helplessness or debauchery as to be deprived of his will power or responsibility for his behavior’, does applicability of this proximate cause rationale cease.” *Id.* (quoting Halvorson v. Birchfield Boiler, Inc., 76 Wn.2d 759, 762, 458 P.2d 897 (1969)).<sup>3</sup> Thus, the duty only applies to service of alcohol to those already exhibiting manifestations of the effect of alcohol.

Moose Lodge contends that the Fausts needed to provide direct, observational evidence that Kinkaid was “apparently under the influence” at the time Chapman served him. The Fausts disagree, claiming that blood alcohol evidence can prove that a person is apparently under the influence of alcohol. The Washington Supreme Court has indicated its concern “that blood alcohol content be used only as evidence of intoxication at the time of the accident and not as evidence of the obviousness of intoxication at the time of alcohol service.” Dickinson v. Edwards, 105 Wn.2d 457, 463, 716 P.2d 814 (1986). As a result, of this concern, the court determined that “[w]hen the obviousness of intoxication is at issue, firsthand observations and other circumstances from which such obviousness can be inferred are most valuable to the court.” *Id.* “Whether a person is ‘obviously intoxicated’ or not is to be determined by the person’s appearance to others around him or her at the time the intoxicating liquor is

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<sup>3</sup> “Obviously intoxicated” was the common law standard for overservice. The Washington Supreme Court has determined that RCW 66.44.200 establishes an “apparently under the influence of liquor” standard. Barrett, 152 Wn.2d at 274-75. Cases prior to Barrett refer to the “obviously intoxicated” standard but the required evidence does not appear to have changed. See, e.g., Christen v. Lee, 113 Wn.2d 479, 487, 780 P.2d 1307 (1989); Purchase v. Meyer, 108 Wn.2d 220, 223, 737 P.2d 661 (1987).

furnished to that person.” Christen v. Lee, 113 Wn.2d 479, 487, 780 P.2d 1307 (1989).

Despite these clear pronouncements, the court has permitted cases to go forward from summary judgment based on direct observation evidence of obvious intoxication at the time of the accident, rather than service, See, Dickinson, 105 Wn.2d at 464; Fairbanks v. J.B. McLoughlin Co., 131 Wn.2d 96, 929 P.2d 433 (1997). In Dickinson, the court considered statements of the investigating officer who observed the defendant’s behavior a mere 10 minutes after the conclusion of a banquet where he had consumed 15 to 20 drinks in three and a half hours. Id. at 464-465. The court reversed the summary judgment because “subjective observations of obvious intoxication made in close time proximity to the period of alcohol consumption may raise an inference of obvious intoxication upon which to base a material question of fact.” Dickinson, 105 Wn.2d at 464. Similarly, in Fairbanks, a police officer’s firsthand observations of the defendant’s slurred speech and staggering raised an inference about her intoxication when served since she did not consume alcohol after leaving the premises and no time remained unaccounted for between consumption of the beverages and the observation. 131 Wn.2d at 103.

Such inferences create fact evidence of over consumption that raise issues of material fact as to a defendant’s condition upon service sufficient to defeat summary judgment. But, the Supreme Court has limited the use of this post-consumption evidence to factually unique cases where “the very close time proximity of service of alcohol to when the driver was seen obviously intoxicated

following the accident.” Purchase v. Meyer, 108 Wn.2d 220, 227-28, 737 P.2d 661 (1987). The inferences are not sufficient to prove the statutory standard of service to someone “apparently under the influence of liquor,” nor to allow consideration of other corroborating evidence, like BAC. Cases lacking observational evidence have not survived summary judgment. See, Purchase, 108 Wn.2d at 226 (results of observations of behavior and BAC taken hours after service of alcohol did not establish overservice when nothing in the record suggested defendant appeared intoxicated at the bar); Christen, 113 Wn.2d at 488-89 (“neither the results of a blood alcohol test nor the appearance of a person a substantial time after the intoxicating liquor was served constitutes sufficient evidence of obvious intoxication.”) Absent observational evidence that the drinker appeared under the influence of alcohol when served, a plaintiff cannot establish overservice by a preponderance of the evidence. Where this observational evidence is lacking, directed verdict is appropriate. Evidence of appearance of intoxication at the time of the subsequent accident, including BAC, cannot be considered in the absence of evidence of appearance of being under the influence at the time of service: BAC is merely relevant to enhance the credibility of observations about the defendant’s condition at the time of service. Cox v. Keg Restaurants, U.S., Inc., 86 Wn. App. 239, 250, 935 P.2d 1377 (1997.)

The current statutory standard is “apparently under the influence of liquor.” “[A]pparently under the influence of liquor” means “seemingly” drunk, as opposed to the higher standard of “unmistakably” or “certainly” drunk. Barrett, 152 Wn.2d at 264. “Evidence of the amount of alcohol consumed is not sufficient by itself to

establish that a person was furnished intoxicating liquor while [apparently under the influence].” Id. at 279 (quoting Christen 113 Wn.2d at 489). Thus to meet the legal standard, the plaintiffs needed to present evidence concerning whether Kinkaid was “seemingly” drunk at the time Chapman served him alcoholic beverages. If evidence does not show that Kinkaid appeared intoxicated to those around him, the evidence is insufficient to raise an issue of fact as to overservice. Christen, 113 Wn2d. at 490.

#### B. Evidence Presented at Trial

The trial court denied the motions for judgment as a matter of law and new trial. In its post-trial ruling the trial court stated:

In this case, the court’s previous ruling that the statements of Alexis Chapman, the bartender at the Moose Lodge, was sufficient evidence of behavior evidencing that Hawkeye Kincaid was apparently under the influence of liquor reflects the determination by the court that the person serving the alcohol directly to Kincaid, who has a personal knowledge of him and his behavior, is well placed to observe those behaviors. Those statements provide sufficient evidence to take the case to the jury for determination as to liability.

According to the trial court, the statements Chapman made to Rainy Kinkaid, Hawkeye Kinkaid’s daughter, and Lisa Johnston provided adequate evidence. “In these statements, it was declared that Hawkeye Kincaid had too much to drink or was drunk, shouldn’t have been driving, and should have been cut off from further service. It is for the jury, then, to decide from these statements whether or not the last service of alcohol, based on the bartender’s familiarity with Hawkeye Kincaid, was over-service.” The court also found the “evidence of Hawkeye Kincaid’s blood alcohol level was not the sole evidence on which the

jury's decision is based, but merely supporting evidence." However, the trial court did admit that "[w]ithout the statements of the bartender Chapman, Defendants' motion would be granted." Based on this statement, the trial court relied heavily on the testimony of Rainy and Lisa Johnston about Chapman's comments in order to deny the motions for a defense verdict.

Rainy testified that Chapman admitted to her that Kinkaid was drunk.

A: That he was at the bar, and they were having an argument or not getting along or however you want to say it, and pretty much either she kicked him out or didn't want him there or told him to leave.

Q: And did she describe his condition when she told him to leave?

A: Yeah, she knew that he was tipsy, that he shouldn't be behind the wheel.

Q: What did she say to you?

A: She said that he had too much to drink, and shouldn't be driving.

Rainy also testified that Chapman made similar comments at a later date.

Q: [T]he second time that she talked to you, did she again indicate what his condition was when he left the Moose Lodge?

A: Yes.

Q: And what did she tell you the second time?

A: That he had been drinking for quite awhile.

Q: And what did she say in terms of his ability to operate a vehicle?

A: Drunk.

While Rainy's testimony appears damning for Chapman, the questions center on Kinkaid's condition when he left the Lodge. The statute does not impose liability for allowing a drunken patron to leave the premises regardless of whether he is cut off, thrown out or leaves voluntarily. Rainy's testimony about Chapman's admissions do not show that she served Kinkaid when he was "apparently under

the influence of liquor," only that he was intoxicated upon his departure. The statements do not fix Chapman's perception of Kinkaid's condition at the appropriate time to establish liability for overservice.

Similarly, Johnston's testimony about Chapman's statements does not establish Kinkaid's appearance to others around him at the time of service. Chapman apparently revealed that Kinkaid had been drunk to Johnston, a friend of Kinkaid and bouncer at the bar where Chapman had been employed as a bartender.

Q: [D]id you ever talk to her about what happened that evening?

A: Yes.

Q: What did she tell you?

A: She said that Hawkeye was sitting at the bar and he was being obnoxious and that he was drunk, and she cut him off and he got mad.

Q: And then what happened after she cut him off and he got mad?

A: He left. . . .

Q: And you're certain, though, that she did tell you that he—she knew he was drunk?

A: Yes.

Once again, this testimony shows Kinkaid's condition after he had consumed alcohol, not when Chapman served the beverages. The statements provide no insight into whether Kinkaid had been "apparently" under the influence when he was served. Instead, the testimony describes Kinkaid's drunken condition after he had been drinking. Nothing says he was drunk when he got there, so that any service would have been overservice. In addition, the statements support responsible behavior by Chapman—she cut him off when he became drunk and

obnoxious. This suggests that Chapman recognized signs of drunkenness and refused to serve him, as required by law.

The evidence relied upon by the trial court to deny a defense verdict does not appear to meet the standard required for liability based on a claim of overservice. This liability requires specific point-in-time evidence establishing “that person’s appearance at the time the intoxicating liquor is furnished to the person.” Purchase, 108 Wn.2d at 223. Here, both Rainy and Johnston testified that Chapman admitted that Kinkaid was drunk when he left the Moose Lodge. This does not prove overservice. The trial court erred by relying on Chapman’s statements, as related by Rainy and Johnston, as sufficient evidence to forestall a directed verdict. This evidence is not sufficient to establish Kinkaid’s appearance at the time of service of alcohol. Because “[t]he purpose of this provision is to protect against foreseeable hazards resulting from service to an intoxicated person,” the duty only applies to the service of alcohol to those already exhibiting signs of the influence of alcohol. Dickerson, 62 Wn. App at 435. The Lodge cannot be held liable when a patron is not “apparently under the influence” when served. As long as Chapman did not serve Kinkaid after he “appeared” under the influence, neither she, nor the Lodge, are liable for the Faustus’ injuries. Since, no evidence describes Kinkaid’s state when Chapman served him, substantial evidence does not support the jury verdict against Moose Lodge and Chapman for overservice.

We reverse verdict against the Lodge and Chapman on liability for overservice. As a result, we must also reverse the negligent hiring/supervision

claim against the Lodge since it is based on Chapman's negligent overservice.

The verdict and judgment against the estate of Hawkeye Kinkaid remains.

## II. Constitutionality of RCW 4.56.110(3)

The Fausts requested and received a 6.002 percent interest rate on their judgment. They agree that this interest rate is consistent with RCW 4.56.110(3) which awards interest on tort judgments at

two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry.

For the first time on appeal, the Fausts challenge the constitutionality of RCW 4.56.110(3) because the statute applies a different rate of interest to tort judgments than other judgments. They base the challenge on both federal and state equal protection grounds.

Under both the federal and state constitutions, "[t]he right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment." State v. Harner, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). The Fausts contend the judgment interest statute violates equal protection because it punitively applies a lower interest rate to tort judgments than contract or child support judgments. However, "[a] statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt." State v. Thorne, 129 Wn.2d 736, 769-770, 921 P.2d 514 (1996). The parties agree that the statute is subject to rational basis review. "[U]nder the rational basis

standard the law must be rationally related to a legitimate state interest, and will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919, (1998). This “[standard] is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause.” Id. (quoting State v. Heiskell, 129 Wn.2d 113, 124, 916 P.2d 366 (1996)).

Both parties cite to House Bill report for (HB) 2485 which discusses the reasoning behind the bill.

[I]nterest on judgments should reflect to some degree economic reality at the time a judgment is entered. The current rate makes considerations of interest charges alone drive decisions on whether to appeal a case. Interest charges on a judgment against a local government can grow to hundreds of thousands of dollars while a case is being appealed. The bill will let appeal decisions be made more on the merits of the case itself.

This legislative report shows a clear purpose—to align interest on tort judgments with the economy at judgment and help ensure that decisions to appeal are based on merit, rather than concern about the growth of a judgment due to interest. These are legitimate government interests, therefore the statute is constitutional “unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” DeYoung, 136 Wn.2d at 144. The Fausts provide no evidence that the new method of determining the interest rate on tort judgments does not contribute to the achievement of the legitimate government objective. Instead, the Fausts merely argue that the statute is “punitive” because it requires a lower interest rate on tort judgments. As a result,

the Fausts do not meet their burden of proof that the statute is unconstitutional beyond a reasonable doubt. The statute does not violate equal protection law.

We reverse and vacate the verdicts against Chapman and the Lodge. We deny the cross-appeal.

Appelwick, J.

WE CONCUR:

Esentzon, J.

Colman, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

BIANCA FAUST, individually and as )  
Guardian of GARY C. FAUST, a minor, )  
and BIANCA CELESTINE MELE, )  
BRYAN MELE, BEVERLY MELE, and )  
ALBERT MELE, )

Respondents, )

v. )

MARK ALBERTSON, as personal )  
Administrator for the ESTATE OF )  
HAWKEYE KINKAID, deceased, )  
LOYAL ORDER OF MOOSE, INC., )  
MOOSE INTERNATIONAL, INC., JOHN )  
DOES (1-10) (fictitious names of )  
unknown individuals and/or entities) and )  
ABC CORPORATION (1-10) (fictitious )  
names of unknown individuals and/or )  
entities) )

Defendants, )

BELLINGHAM LODGE #493, ALEXIS )  
CHAPMAN, , )

Appellants. )

No. 57821-9-1  
Consolidated with  
No. 57321-7-1  
Linked with No. 57320-9-1

**ORDER GRANTING  
MOTION TO PUBLISH**

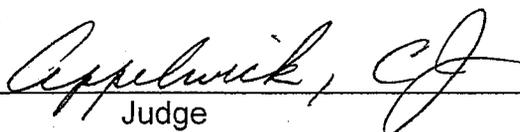
Respondents, the Fausts, having filed their motion to publish and appellants having filed an answer to the motion to publish and the hearing panel having reconsidered its prior determination not to publish the opinion filed for the above entitled

matter on January 7, 2008, and the court having determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the written opinion filed January 7, 2008, shall be published and printed in the Washington Appellate Reports.

DATED this 14<sup>th</sup> day of February, 2008.

  
\_\_\_\_\_  
Judge

FILED  
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STATE OF WASHINGTON  
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STEVE CHANCE  
Attorney at Law, P.C.

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY**

BIANCA FAUST, Individually and as guardian of GARY C. FAUST, et al	No. 03-2-00859-8
Petitioner/Plaintiff vs.	ORDER ON DEFENDANTS' POST- TRIAL MOTIONS
MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINCAID, deceased, et al	
Respondent/Defendant	

This matter having come before the court on the motions of Defendant post-trial, the court having heard the argument of counsel and having considered the written submissions of the parties, does hereby issue the following order on the motions of the Defendant, in the order in which the motions were presented to the court.

**A. THE MOTIONS AND DISCUSSION**

**I. MOTION FOR JUDGMENT AS A MATTER OF LAW**

Defendants' motion for Judgment as a Matter of Law rests on both legal and factual bases. The legal ground is that evidence of over-service of alcohol is insufficient if it does not include a direct observation by the witness of behavior of the allegedly over-served person. The factual ground is that the record does not include such evidence. Both of these arguments were presented in pre-trial motions as well. The motions made post-trial are denied for the reasons set out below.

In this case the court's previous ruling that the statements of Alexis Chapman, the bartender at the Moose Lodge, was sufficient evidence of behavior evidencing that Hawkeye Kincaid was apparently under the influence of liquor reflects the determination by the court that the person serving the alcohol directly to Kincaid, who has a personal knowledge of him and his behavior, is well placed to observe those behaviors. Those statements provide sufficient evidence to take the case to the jury for determination as to liability.

The factual prong of this motion addresses the testimony of Ron Beers, Rainy Kincaid and Lisa Johnston. The court previously ruled that the deposition of Beers was admissible due to his unavailability and that the other statements, reciting admissions of Defendant Chapman, were likewise admissible as admissions of a party opponent. In these statements, it was declared that Hawkeye Kincaid had too much to drink or was drunk, shouldn't have been driving, and should have been cut off from further service. It is for the jury, then, to decide from these statements whether or not the last service of alcohol, based on the bartender's familiarity with Hawkeye Kincaid, was over-service.

Other evidence of Hawkeye Kincaid's blood alcohol level was not the sole evidence on which the jury's decision is based, but merely supporting evidence. The jury was so instructed (Instruction 13), and the jury is presumed to follow the court's instructions. Without the statements of the bartender Chapman, Defendants' motion would be granted, but that is not the situation that the court is presented with.

Finally, Defendant seeks a new trial on the issue of the negligent hiring claim, arguing that it is subsumed into the over-service claim. For the same reasons as set out above in regard to the over-service claim, this motion is denied.

## II. MOTION FOR NEW TRIAL ON LIABILITY AND DAMAGES

This motion is made in the alternative to the previous motion. It is based on the same claims as discussed above, and on allegations which will be addressed below in the order they were presented in the motion and which are related to CR 59(a) (1), irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (2), misconduct of prevailing party; (8), error in law occurring at the trial and objected to at the time by the party making the application; and (9), that substantial justice has not been done.

### A. Mac Pope and Alcohol

Witness Mac Pope testified as to his supposed contact with Hawkeye Kincaid on the night of the accident. At trial he exhibited the odor of intoxicants which was evident to the court and Plaintiffs' counsel. With the proximity to the jury of the witness chair this may also have been noted by jurors. At sidebar, Plaintiffs' counsel asked to be able to inquire on recross as to whether he had been drinking. The court determined that this inquiry might lead to proper evidence regarding his credibility as a witness in view of the possibility that the jury could detect the odor observed by the court. He denied consuming alcohol on the day of his testimony, and that ended the inquiry. Mr. Pope's memory was effectively impeached by other questioning so the issue of his consumption of alcohol on the day of trial is cumulative to that. It is the opinion of the court that this was an ancillary part of the evidence, that it bore solely on the credibility of the witness, his ability to relate accurately at trial his recollections, and that all that it established is that Mr. Pope maintained that he had not been drinking. In view of the minor role that Mr. Pope's testimony played in the trial, it is not unduly prejudicial and it is not a ground for new trial.

B. Alexis Chapman's Alleged Over-service of Kincaid on Prior Occasions

After hearing on a motion in limine, the court limited evidence of over-service of alcohol by Defendant Chapman to those times when she is alleged to have over-served Hawkeye Kincaid. This evidence is admissible to prove absence of mistake or accident on the part of the Defendant on the day of the incident, as well as knowledge of the behavior of Hawkeye Kincaid when over-served. All relevant evidence has some prejudicial value. In this case whatever prejudice it contained did not outweigh the probative effect. It provided a basis for the jury to evaluate Chapman's own testimony about how she knew when to stop service of alcohol. As noted by the Defendants in their motion, the testimony was not altogether conclusive as to the incidence of over-service. There is nothing presented to support a conclusion that the jury used this evidence other than for the limited purposes set out above. As to the testimony from Ron Beers in this regard, the evidence was relevant as to knowledge of the members of the Moose Lodge. Defendants allege that it was non-specific as to time, date, etc, which goes to the weight rather than to the issue of admissibility. This is not a basis for a new trial.

C. Double Hearsay Admitted Via State Trooper Van Diest's Testimony and Report

Defendants' objections to this evidence were overruled as the Trooper's report was submitted as one of Defendants' ER 904 documents. There was no objection to the document filed by Plaintiffs. Defendant cannot now object to the document, having first offered it. The trooper's testimony was consistent with the report.

D. Kincaid's BAL and Other Toxicological Evidence

This part of the motion addressed the use of evidence other than that of direct observation of the allegedly intoxicated person to prove that Hawkeye Kincaid was apparently affected by alcohol on the day in question. As noted above, once the determination has been made that the statements of Alexis Chapman are sufficient to take the case to the jury, other evidence may be introduced that is consistent with that allegation. Clearly, Washington law does not allow this evidence as sole proof of the issue of being apparently under the influence at the time of service, but may be introduced once that threshold has been crossed.

E. Ron Beers' Declaration

Beers' declaration was admitted for the limited purpose of impeachment of the testimony given in his deposition. He was unavailable for trial. The court gave a limiting instruction on the use of the statement, reasoning that the evidence provided from other witnesses about how the statement was created and obtained would allow its use to impeach had Beers been present in court as a witness. Extensive cross-examination was had of Mr. Beers at his deposition. After considering the entire set of circumstances around this deposition and statement to impeach, the court is convinced that the value of the Beers testimony is very limited and that use of the statement to impeach, combined with the limiting instruction, is consistent with the evidentiary rules and their application.

F. Demonizing Defendants as a Nefarious Secret Society to Discredit Defendants

This ground for the motion is based on one exchange of questions between Plaintiffs' attorney DeZao and John Leibrant of the Moose Lodge. Defendants' motion mentions the Ku Klux Klan but that name does not appear in the testimony or questions. In fact, it was the witness who volunteered the term "white hoods". The remainder of the inquiry is innocuous. There was no racial or other improper allegation nor was there even any remote reference to anything similar. Certainly, the testimony of the lodge members and their reluctance to share information was clear from the testimony of all of the lodge members as a whole. The implication that they were drawing close together to protect the lodge is something left to the jury to determine. Defendants present no evidence to show that the jury decision was somehow tainted in this way.

G. The Negligent Hiring/Supervision Claim

Defendants' allegation that the negligence claim is untenable have been determined by the court in earlier rulings, and those rulings need not be repeated here. It should be noted that the testimonial evidence objected to is that of industry practices and standards, a common basis for determining the existence of negligence. The objections go to the weight rather than the admissibility of the evidence, and therefore becomes the province of the jury.

G. Questions Re: Discovery of the Membership List

Defendants' contention is that allowing testimony as to the fact that the membership list of the Moose Lodge was not produced until ordered by the court is improper. In light of the nature of the testimony given by the various lodge members which the jury could clearly have believed indicated an unwillingness to reveal facts detrimental to the lodge's position, the single inquiry as to this fact is minor and merely cumulative to the other testimony. Use of the fact in argument is not improper in light of the instruction to the jury, given both prior to trial and after trial, that the statements of the attorneys are not evidence. This testimony was not irrelevant as it relates to the lodge members' credibility and motives.

H. Passion and Prejudice

The questions mentioned in this section were propounded by Plaintiffs' counsel, and objections were sustained in each case, including the striking of an answer and advisement of the jury to that effect. There is nothing to set these questions apart from others to which an objection was raised and sustained. The jury was instructed on the issue of objections, and is presumed to follow that instruction. Although the questions may have, in fact, pushed beyond the limits of the court's rulings on the motions in limine, they are not remotely sufficient to support a new trial.

## I. Instructional Errors

Instruction #3: The standard instruction was given in this case and is sufficient to properly state the law for the jury. As there was direct evidence of apparent intoxication, there is no need to amend the approved instruction. Defendant remained free to argue the weight and sufficiency of the evidence to the jury.

Instruction #5: As there was a passing mention of insurance in the testimony, this instruction as properly given.

Instruction #14: The court's decision to give the definition of "apparently" was based on the language of the *Barrett v. Lucky 7 Saloon, Inc.* decision but was a shorter, more concise version. The entire *Barrett* definition is repetitive and the meaning is conveyed in the version given. The court believes that the version given is sufficient, particularly where Defendant has not shown how the longer version would be more effective or better reflected the state of the law.

Instruction #19: This will be discussed below in section IV.

Defendants' Proposed Instruction #29: This will be discussed below in Section IV.

The Special Verdict Form: Defendant sets out no authority or reasoning to support its objection in this motion, and the court will rely on its decision at trial regarding the special verdict form.

## III. MOTION FOR NEW TRIAL ON DAMAGES ONLY

Defendants contend that the damages awarded are the result of passion or prejudice because they are grossly excessive and exceed the bounds of fair and reasonable compensation. The gist of the contention is that the testimony of Dr. Joan Gold was not on a "more probable than not" basis and that the inclusion of testimony from the life care planner Helen Woodard and the economist Robert Moss compounded the error. The court determined before and during trial that the testimony was sufficiently based on the doctor's medical expertise and knowledge and that she gave testimony which was admissible. The motions contain no reference or citation to the portions of the depositions that would support Defendants' contentions. Therefore, these rulings will stand as previously made. The Defendants have not provided any additional basis for the court to revise or reverse its prior rulings.

## IV. MOTION FOR REMITTITURS

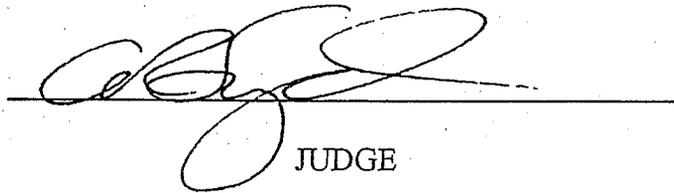
This presents the most significant issue for the court in this series of motions. Defendants note that jury members admitted in post-trial discussions that they had determined the amount to award for future surgery for Bianca Faust on the experience that one juror had with prior, albeit different, orthopedic surgery. The testimony at trial was that Bianca Faust

would likely require orthopedic surgery to replace a joint in the future. However, it is the opinion of the court that there has not been a sufficient showing of impropriety. The jury was given costs through the testimony of the two life care planners (one presented by each side). The life care plans themselves were not introduced into evidence and were not before the jury in their deliberations. With regard to this one element of the award to Bianca Faust a member of the jury related that the jury had discussed the cost of surgery that one juror had undergone. There is no affidavit in the record from any member of the jury contending that the sole basis for calculation was this prior juror surgery. It cannot be said that the discussion after the trial was completed was conclusive as to the method that the jury used to determine damages, and it is the opinion of the court that the jury's processes are inherent in the verdict. Without supplemental information that the jury disregarded the testimony at trial and, instead, substituted another cost, the court cannot say that the verdict is the result of passion or prejudice. Likewise, the court cannot find, on the basis of the submission with the motions, that the jury disregarded the evidence presented or otherwise acted improperly in reaching its verdict. The economic and non-economic damages are within the ranges given in testimony and cannot be said, on the record before the court, to be excessive or unsupported by the evidence at trial.

**B. ORDER**

Based on the motions, the argument of counsel, and the discussion above, it is hereby ordered that the Post-Trial Motions of the Defendant are denied.

SIGNED this the 11 day of January, 20 06.

  
JUDGE

DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the attached document: Petition for Review, Court of Appeals Cause No. 57821-9-I, to the following:

Steve Chance  
Attorney at Law  
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Bellingham, WA 98225

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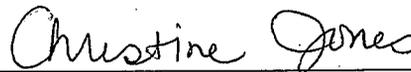
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Original sent for filing with fee to:  
Court of Appeals, Div. I  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 22, 2008, at Tukwila, Washington.



Christine Jones, Legal Assistant  
Talmadge/Fitzpatrick

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STATE OF WASHINGTON  
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