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SUPREME COURT
STATE OF WASHINGTON

No. 81356-6.

2009 APR 13 IN THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER

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

Plaintiffs/Petitioners,

vs.

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,

and

BELLINGHAM LODGE #493; and ALEXIS CHAPMAN,

Defendants/Respondents.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the rights of plaintiffs bringing personal injury claims against commercial sellers of alcohol for overservice to an apparently intoxicated person.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves legal questions surrounding the type and quantum of evidence required to establish a triable issue of fact in a third party claim for personal injuries against a commercial seller of alcohol for negligent overservice to an apparently intoxicated person. The case arises out of an automobile accident in which members of the Faust family (Faust) suffered personal injuries when a car driven by an intoxicated

Hawkeye Kinkaid (Kinkaid) crossed the centerline and struck the Faust vehicle. Earlier that evening, Kinkaid had been drinking at Moose Lodge #493 in Bellingham (Moose Lodge), where his girlfriend Alexis Chapman (Chapman) was employed as a bartender. The pivotal question on review is whether the evidence at trial was sufficient to support a jury verdict that Chapman negligently overserved Kinkaid with alcohol while he was apparently intoxicated. The underlying facts are drawn from the Court of Appeals opinion, the briefing of the parties, and the superior court's instructions to the jury. See Faust v. Albertson, 143 Wn.App. 272, 178 P.3d 358, *review granted*, 164 Wn.2d 1025 (2008); Moose Lodge Br. at 1, 4-19; Faust Br. at 1-3, 4-13; Faust Pet. for Rev. at 2-6; Moose Lodge Ans. to Pet. for Rev. at 1-6; Faust Supp. Br. at 3-7; Moose Lodge Supp. Br. at 1-4; Court's Instructions to the Jury (CP 1105-1133).

The evidence regarding Kinkaid's apparent intoxication was sharply disputed at trial. For purposes of this brief, the following facts are relevant to the legal argument that follows: Approximately 7:45 p.m. on April 21, 2000, the vehicle driven by Kinkaid crossed the centerline and struck the Faust vehicle head-on, causing serious injuries. Kinkaid was fatally injured in the accident. Faust sued Moose Lodge, Chapman, Kinkaid's estate and others for negligence. Faust contended that in violation of RCW 66.44.200(1) Moose Lodge, through employee

Chapman, negligently served Kinkaid alcohol while “apparently under the influence of liquor” (hereafter apparently intoxicated). Moose Lodge and Chapman denied any overservice.

Faust principally sought to establish Chapman negligently overserved Kinkaid through the testimony of two witnesses who recounted admissions by Chapman regarding Kinkaid’s intoxicated condition on the night of the accident, coupled with other evidence corroborating overservice while Kinkaid was apparently intoxicated. The first witness, Rainy Kinkaid, testified that Chapman told her that by the time Kinkaid left the Moose Lodge, Chapman knew that he was “tipsy, that he shouldn’t be behind the wheel.” See Moose Lodge Br. at 8 (quoting RP 266). The same witness testified that Chapman said Kinkaid had been drinking “for quite awhile” at the Moose Lodge the day of the accident, and that when he left he was “drunk.” Id. (citing to RP 267-68). The second witness, Lisa Johnston, testified as to similar admissions made by Chapman in a separate conversation, indicating that on the day of the accident Kinkaid was “obnoxious” and “drunk,” and that she had cut him off and he had left. See id. at 8-9.¹

¹ It appears that Moose Lodge and Chapman do not challenge the admissibility of the Chapman admissions, contending only that they do not support an inference that Kinkaid was apparently intoxicated at the time of service, as opposed to the time he left the Moose Lodge. See Moose Lodge Ans. to Pet. for Rev. at 6 & n.1; Moose Lodge Br. at 2-4, 25-27.

To corroborate the claim of negligent overservice, Faust presented, inter alia, a toxicology report showing that one hour after the accident Kinkaid's blood alcohol content (BAC) was 0.16 percent, well above the legal limit. See Faust, 143 Wn.App. at 277. This evidence also included expert testimony by Faust's forensic consultant estimating that Kinkaid's BAC at the time of the accident was 0.32 percent. See id. The expert calculated that to generate this level of intoxication, Kinkaid would have had to consume an extraordinary amount of alcohol. See id.

In opposition, Moose Lodge and Chapman presented eyewitness testimony at trial that Kinkaid was not apparently intoxicated at the time he was served alcohol at Moose Lodge. Chapman denied making any admissions, and testified that Kinkaid was not intoxicated at the time he left the Moose Lodge. See Moose Lodge Br. at 6. Moose Lodge and Chapman further contended that Kinkaid became intoxicated after leaving the Moose Lodge. See Moose Lodge Br. at 32.²

There were also factual disputes regarding the time when Kinkaid left the Moose Lodge, and whether he consumed any alcohol after leaving the premises. See e.g. Faust Br. at 32-33 & n.21 (re: timelines); id. at 33-34 (re: subsequent consumption of alcohol). There was evidence before

² Apparently, Moose Lodge conceded at trial that Kinkaid was intoxicated at the time of the accident. See Faust Br. at 32 (citing RP 192).

the jury that Kinkaid left the lodge at 7:30 p.m., approximately 15 minutes before the accident. See Faust Br. at 7.

At the close of the evidence, the trial court denied Moose Lodge and Chapman's motion for directed verdict based upon lack of sufficient evidence that Kinkaid was negligently overserved in an apparently intoxicated condition. The jury was instructed on apparent intoxication and returned a verdict for Faust.³ Moose Lodge and Chapman's post-trial motions for judgment as a matter of law and new trial were denied, and they appealed.

The Court of Appeals reversed and vacated the verdict against Moose Lodge and Chapman, concluding that Faust's proof of negligent overservice failed as a matter of law. In particular, the court held that the testimony regarding Chapman's admissions was insufficient to create an issue of fact as to whether Kinkaid was apparently intoxicated at the time of service of the alcohol. See Faust, 143 Wn.App. at 285. The court held:

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." 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

³ The trial court's principal instructions regarding the claim for negligent overservice are reproduced in the Appendix to this brief.

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.

Id. at 285 (citation omitted).

This Court granted Faust's petition for review.

III. ISSUES PRESENTED

In a claim for personal injuries against a commercial seller of alcohol for negligently overserving a person while apparently intoxicated:

- 1.) What evidence is sufficient to establish a triable issue of fact that the person was negligently overserved?
- 2.) To what extent may BAC evidence corroborate the requisite degree of intoxication at the time of overservice?
- 3.) How does Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004), which changed the inquiry from "obvious intoxication" to "apparent intoxication," impact the CR 50 analysis in this case?

IV. SUMMARY OF ARGUMENT

Under pre-Barrett Washington law, a third-party claim against a commercial seller of alcohol for negligently overserving an obviously intoxicated person requires proof of obvious intoxication at the time of service. Obvious intoxication must be proved by means of firsthand observational evidence, or equivalent evidence from which such obviousness can be inferred. At the time of service, firsthand observations

constitute direct evidence of obvious intoxication. Within a short time after service, firsthand observations constitute circumstantial evidence entitling the jury to draw (or not draw) the necessary inference of obvious intoxication at the time of overservice.

Admissions by a commercial seller that a person was intoxicated while he or she was at the seller's establishment, even if controverted or denied, are a specie of firsthand observational evidence when other corroborative evidence supports an inference of negligent overservice. When there is conflicting evidence regarding an admission, or when there are conflicting inferences that can be drawn therefrom, it is a question of fact for the jury.

A plaintiff may corroborate firsthand observations, including admissions, with a BAC reading that is above the legal limit, even though BAC evidence is insufficient by itself to establish the requisite degree of intoxication.

Following Barrett, the standard of liability for negligent overservice has changed to "apparent intoxication," a lesser degree of intoxication than "obvious." Substantial evidence can only be evaluated on a CR 50 motion through the prism of the substantive legal standard that must be met, and the quantum of evidence should be adjusted accordingly

to correspond with the lower substantive standard of intoxication after Barrett.

V. ARGUMENT

Re: Governing Law. In Barrett, this Court altered the standard of proof from obvious intoxication to apparent intoxication, which is a lesser degree of intoxication. See 152 Wn.2d at 267-75. The jury in this case was instructed under the apparent intoxication standard. See supra n.3 & Appendix. What is unclear is whether, after Barrett, the evidence requirement developed under the obvious intoxication standard remains controlling under the apparent intoxication standard. It is assumed for purposes of the argument in §§ A through C below that pre-Barrett case law also applies in the apparent intoxication context, and to the CR 50 analysis required in this appeal. However, this premise is questioned in § D, which urges a re-evaluation of the evidentiary threshold in negligent overservice cases, in light of the new apparent intoxication standard.

Re: Standard Of Review. Judgment as a matter of law under CR 50 is not appropriate unless there is no competent and substantial evidence to support a verdict. See Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001). In reviewing a CR 50 motion, the Court must view the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences to sustain the verdict.

Id. CR 50 contains the same judgment-as-a-matter-of-law language as the summary judgment rule, CR 56, applied in many of the negligent overservice cases. For purposes of this appeal, it is assumed that the sensibilities reflected in this Court's application of CR 56 to negligent overservice cases carries forward in this CR 50 context. See 4 Karl B. Tegland, Wash. Prac., Rules Practice CR 50, note 1 (5th ed. 2008) (noting similarity between rules).

A. Overview Of Pre-Barrett Washington Law on Commercial Sellers' Liability for Negligently Overserving Alcohol, The Requirement of Firsthand Observational Evidence, And The Court Of Appeals' Misapprehension Of This Law.

Following the repeal of Washington's Dramshop Act,⁴ this Court recognized the common law rule of non-liability for furnishing alcohol to an able-bodied person in Halvorson v. Birchfield Boiler, Inc., 76 Wn.2d 759, 762, 458 P.2d 897 (1969). However, the Court also recognized an exception to the rule for furnishing alcohol to persons "in such a state of helplessness or debauchery as to be deprived of his [or her] will power or responsibility for his [or her] behavior." Id., 76 Wn.2d at 762; accord Wilson v. Steinbach, 98 Wn.2d 434, 437-38, 656 P.2d 1030 (1982) (discussing Halvorson). Later cases refer to this state of helplessness or

⁴Former RCW 4.24.100, derived from Laws of 1905, ch. 62, repealed by Laws of 1955, ch. 372.

debauchery as “an obviously intoxicated condition.” See e.g. Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 641, 618 P.2d 96 (1980).

A commercial seller owes a duty not to furnish alcohol to a person who is obviously intoxicated, and third parties injured by the intoxicated person have a common law cause of action against the seller for negligent breach of this duty. See Purchase v. Meyer, 108 Wn.2d 220, 225, 737 P.2d 661 (1987). Under this cause of action, the furnishing of the alcohol rather than the drinking of the alcohol is considered the cause of the plaintiff’s injury. See Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (lead opinion).

An essential element of the cause of action against a commercial seller of alcohol is proof of obvious intoxication at the time the alcohol was furnished to the intoxicated person. See Purchase, 108 Wn.2d at 223. This element must be proved by “firsthand observations and other circumstances from which such obviousness can be inferred[.]” Dickinson, 105 Wn.2d at 463 (lead opinion).⁵ “Firsthand observations” consist of the testimony of witnesses who observed the intoxicated person’s appearance and behavior. See Young v. Caravan Corp., 99 Wn.2d 655, 659, 663 P.2d

⁵ The three-justice lead opinion in Dickinson, which allows observations of obvious intoxication shortly after the person left the premises where s/he had been drinking to support a claim of negligent overservice, was concurred in by two additional justices, rendering the opinion binding on this issue. See 105 Wn.2d at 463-65 (lead opinion); id.

834, *amended*, 672 P.2d 1267 (1983) (“the sobriety of a person must be judged by those who observe the person’s behavior”); Christen v. Lee, 113 Wn.2d 479, 489, 780 P.2d 1307 (1989) (“resort must be had to evidence of a person’s appearance in order to determine whether that person was obviously intoxicated”).⁶ The requirement of proof by such firsthand observations has repeatedly been described as settled under the Halvorson line of cases. See Purchase, 108 Wn.2d at 226; Christen, 113 Wn.2d at 487; Wilson, 98 Wn.2d at 439.

When firsthand observations of obvious intoxication are made at the time of furnishing alcohol, they constitute direct evidence of the essential element. Direct evidence refers to evidence that is given by a witness who has directly perceived something at issue in the case. See 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.03 (5th ed. 2005). When firsthand observations of obvious intoxication are made *after* the time of furnishing alcohol, they constitute circumstantial evidence of the essential element. Circumstantial evidence refers to evidence from which

at 477 (Utter, J., concurring). This holding is reaffirmed in Fairbanks v. J.B. McLoughlin Co., 131 Wn.2d 96, 102-03, 929 P.2d 433 (1997) (per curiam).

⁶“Firsthand observations” is the language used to describe this evidence in Dickinson, 105 Wn.2d at 463, and it is adopted for purposes of this brief because it seems to describe most accurately the nature of the evidence. Dickinson includes within this type of evidence “subjective observations” of witnesses occurring shortly after the person left the commercial establishment where s/he was negligently overserved. 105 Wn.2d at 464; accord Fairbanks, 131 Wn.2d at 103. This evidence is also described as “direct observation evidence” or “observational evidence.” See Faust, 143 Wn.App. at 280-82.

something at issue in the case can be inferred based on common sense and experience. See id. Of course, the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in establishing the facts of the case. “One is not necessarily more or less valuable than the other.” Id.

Firsthand observations of obvious intoxication made within “very close time proximity” *after* furnishing alcohol will support an inference of obvious intoxication *at the time of service*, and are “sufficient to get past a defense motion for summary judgment on the ‘obvious intoxication’ at the time of serving issue.” Purchase, 108 Wn.2d at 227-28 (citing Dickinson).

Most recently, in Fairbanks this Court concluded, citing Dickinson:

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.

131 Wn.2d at 103 (emphasis added). Both Fairbanks and Dickinson make clear that the inferences to be drawn from firsthand observations, including related credibility determinations, are to be resolved by the jury. Fairbanks, 131 Wn.2d at 102-03; Dickinson, 105 Wn.2d at 464-66.

This does not involve per se liability. The defense may offer countervailing evidence—before, during, and after the time of service—

indicating that the drinker was not obviously intoxicated. The defense may also present evidence that the drinker subsequently consumed alcohol elsewhere, or that there is unaccounted for time subsequent to the alleged overservice. See Fairbanks at 102-03; Dickinson at 464. However, “[i]t is not the court’s function to resolve existing factual issues, nor can the court resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence.” Fairbanks at 102; see also Dickinson at 461.

Fairbanks and Dickinson allow the jury to infer obvious intoxication at the time of service from firsthand observations of obvious intoxication within a short time afterward.⁷ If post-service observations occur a “substantial time” afterward, then the inference is weaker and the observations “are not by themselves sufficient” to withstand summary judgment. Purchase, 108 Wn.2d at 223; accord Christen, 113 Wn.2d at 488-89. However, “[i]t is of little use to set a specific time period within which the observations must be made.” Dickinson, 105 Wn.2d at 464.

While Faust apparently offered no firsthand evidence other than Chapman’s admissions, the Court of Appeals below did not question the substance of the admissions in this case, i.e., that Kinkaid was “tipsy,”

⁷ The exact phrasing from the cases is “within a very short time” and “in close time proximity,” Dickinson, 105 Wn.2d at 463 & 465; “very close time proximity,” Purchase, 108 Wn.2d at 227-28; and “shortly after,” Fairbanks, 131 Wn.2d at 103.

“drunk,” “obnoxious,” and “shouldn’t be driving” when he left the Moose Lodge. See Faust, 143 Wn.App. at 282-85 (quoting admissions). Instead, the court questioned the extent of the inference allowable under the admissions because they related to the time when Kinkaid left the Moose Lodge rather than the precise time of the alleged overservice. Id. at 285. The court purported to rely on Purchase for the proposition that “specific point-in-time evidence” of obvious intoxication is required. Id. (citing Purchase, 108 Wn.2d at 223). However, there is nothing in Purchase that supports this proposition. To the contrary, Purchase specifically recognizes, as noted above, that post-service observations such as those present in Dickinson are “sufficient to get past a defense motion for summary judgment on the ‘obvious intoxication’ *at the time of serving issue.*” Purchase, 108 Wn.2d at 227-28 (emphasis added); see also Fairbanks, 131 Wn.2d at 103 (relating post-service observations back to time of alleged overservice).

The Court of Appeals’ restrictive view of the inferences that the jury may draw from the admissions is inconsistent with the extent of the inferences allowed in Fairbanks and Dickinson, where post-service observations of intoxication are involved.⁸ Chapman’s admissions in this

⁸ The Court of Appeals below otherwise recognized that this Court “permitted cases to go forward from summary judgment based on direct observation evidence at the time of the accident, rather than service.” Faust, 143 Wn.App. at 280-81.

case were offered to prove apparent intoxication, and Faust should be entitled to the benefit of the same inferences.⁹

B. Corroborated Admissions By A Commercial Seller Are A Specie Of Firsthand Observational Evidence.

Admissions by a commercial seller of alcohol that support an inference that a person was apparently intoxicated are indistinguishable from the firsthand observations of obvious intoxication held sufficient to create a question of fact for the jury under this Court's pre-Barrett cases. The commercial seller is in no worse position than any other witness to observe the intoxicated person's appearance and behavior. In fact, given the legally required training of commercial sellers of alcohol, the seller may well be in a better position to judge the person's degree of intoxication. See Ch. 314-17 WAC (mandatory alcohol server training).

The only difference between the seller's admissions and firsthand observations by any other witness is that out-of-court admissions are not considered hearsay. See ER 801(d)(2). As happened in this case, out-of-court admissions of apparent intoxication provided substantive evidence, even if later denied, whereas out-of-court statements by a non-party witness can only serve to impeach the witness's testimony and do not

⁹ Moreover, after Barrett an admission regarding the *actual* intoxication of Kinkaid while at the Moose Lodge should support an inference of his *apparent* intoxication at the time of the last service of alcohol. See infra § D.

provide substantive evidence. See Barrie, 94 Wn.2d at 643-44.

Under Washington law, corroborated admissions of a party may constitute substantial evidence of any fact in issue, even if the admissions are later denied. See Smith v. Leber, 34 Wn.2d 611, 622, 209 P.2d 297 (1949); Schatter v. Bergen, 185 Wash. 375, 382, 55 P.2d 344 (1936). The admissions in this case—corroborated by BAC evidence as explained in § C—entitle Faust to the benefit of the same type of inferences that the Court has allowed from other post-service firsthand observations supporting the requisite degree of intoxication. In the language of Dickinson, “[t]o hold differently would unfairly deprive the plaintiff and the court of useful evidence[.]” 105 Wn.2d at 464.

C. Under Pre-Barrett Law, BAC Evidence May Corroborate Firsthand Observational Evidence Of The Requisite Degree Of Intoxication.

This Court has declined to measure the degree of intoxication “solely” in terms of BAC evidence. Kelly v. Falin, 127 Wn.2d 31, 37-38, 896 P.2d 1245 (1995). The Court has also stated that BAC evidence, “by itself,” is insufficient to prove obvious intoxication. Purchase, 108 Wn.2d at 223; Christen, 113 Wn.2d at 487. This “solely” and “by itself” language clearly implies that BAC evidence is probative of obvious intoxication, even though it may be insufficient standing alone. Accordingly, the relevant pattern instruction permits (but does not require) the jury to

consider BAC along with the other evidence in the case as evidence of obvious intoxication. 6A Wash. Prac., supra, WPI 370.02.¹⁰ However, the Court has not directly addressed whether BAC can be considered as corroborative evidence of obvious intoxication. See Kelly, 127 Wn.2d at 41 n.4; Cox v. Keg Restaurants U.S., Inc., 86 Wn.App. 239, 248-49, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997).

This Court should take the opportunity to approve of the use of BAC evidence to corroborate firsthand observations of apparent intoxication, including those based on admissions by a party.¹¹ In Cox, the Court of Appeals held that BAC evidence is relevant to corroborate and enhance the credibility of firsthand observations of obvious intoxication. See 86 Wn.App. at 248-50; see also Faust, 143 Wn.App. at 282 (citing Cox). BAC evidence is already generally admissible to establish the fact of intoxication at the time of the accident causing injury to the plaintiff. See Dickinson, 105 Wn.2d at 463. A statute provides for the admission of BAC evidence in civil as well as criminal actions precisely for this purpose. See Purchase, 108 Wn.2d at 224 & n.6 (citing RCW 46.61.506).

¹⁰ The current version of WPI 370.02 is reproduced in the Appendix of this brief.

¹¹ Although Moose Lodge suggests that the admissibility of BAC evidence in this case is an issue for the Court of Appeals on remand, if this Court reverses and restores the verdict, this question appears implicated here if BAC evidence is considered as a basis for corroboration of the admissions. See Moose Lodge Ans. To Pet. For Rev. at 6 & n.1; RAP 13.7(b).

This statute and regulations promulgated thereunder contain detailed requirements to ensure the reliability of BAC evidence.¹²

With respect to firsthand observations of apparent intoxication, BAC evidence can help the jury distinguish between innocent and incriminating conduct. For example, it can help the jury decide whether it is more likely that a person tripped over his own feet or stumbled because s/he was drunk. Similarly, BAC evidence can help the jury resolve disputes between otherwise conflicting evidence regarding the requisite degree of intoxication or the lack thereof. The parties are free to introduce evidence and cross-examine “as to the relationship between BAC and obvious intoxication,” and argue their respective theories to the jury. Cox, 86 Wn.App. at 250; see also RCW 46.61.506(4)(c) (permitting challenges to BAC evidence and leaving the question of what weight to give the evidence to the jury).

The Court should approve the holding in Cox and its application in the apparent intoxication context.

¹² The current version of RCW 46.61.506 is reproduced in the Appendix of this brief. The state toxicologist’s regulations can be found in Ch. 448-13 WAC. See generally RCW 46.61.502 & .504 (establishing BAC legal limit).

D. Barrett Necessarily Affects This Court's CR 50 Analysis, Given The Less Onerous Apparent Intoxication Standard; Whether Barrett Also Requires Re-Evaluation Of The Type Of Evidence Necessary To Prove Negligent Overservice Remains An Open Question.

In Barrett, 152 Wn.2d at 273-74, this Court changed the inquiry from “obvious intoxication” to “apparent intoxication” in order to conform the standard of civil liability to the legislative standard in RCW 66.44.200(1).¹³ Barrett recognizes that “apparent” describes a lesser degree of intoxication than “obvious.” 152 Wn.2d at 267-68. While the Court did not attempt to describe exhaustively the distinction between apparent and obvious, it is clear that apparent intoxication involves “less certainty.” Id. at 268. Apparent intoxication also involves less immediacy, in that “unlike the determination of something *obvious*, determination of something *apparent* requires at least some reflection and thought.” Id.

While acknowledging the change in the standard, the Court of Appeals below indicated that “the evidence does not appear to have changed” after Barrett. Faust, 143 Wn.App. at 280 n.2. The court did not explain whether it was referring to the *type* of evidence, the *quantum* of evidence, or both. While it does not appear to be necessary to consider whether the allowable types of evidence have changed after Barrett to resolve this case, the Court of Appeals’ statement is troubling. Substantial

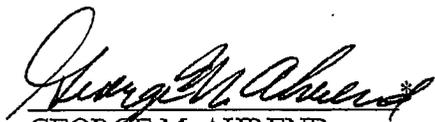
¹³ The current version of RCW 66.44.200 is reproduced in the Appendix of this brief.

evidence can only be evaluated under CR 50 through the prism of the substantive legal standard that must be met. Consequently, at least the quantum of evidence should be adjusted to correspond with the decrease in the substantive standard for proof of negligent overservice after Barrett. Whether Barrett also impacts the type of freestanding evidence allowed in apparent intoxication cases need not be decided here, if the BAC evidence was properly admitted as corroborative evidence.

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief and resolve this appeal accordingly.

DATED this 13th day of April, 2009.


GEORGE M. AHREND


BRYAN P. HARNETIAUX
per authority

On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

APPENDIX

Trial court's principal instructions on apparent intoxication

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 (instr. #12).

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 (instr. #13).

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

CP 1122 (instr. #14).

WPI 370.02 Furnishing Alcohol—Obviously Intoxicated Person— Definition

A person is obviously intoxicated that he or she is effectively deprived of will power or responsibility for his or her own actions.

Whether a person was obviously intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was [sold] [served] [furnished] 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 [sold] [served] [furnished] alcohol while obviously intoxicated.] [The appearance of the person a substantial time after the alcohol was [sold] [served] [furnished] is [also] not sufficient by itself to establish obvious intoxication at the time the alcohol was [sold] [served] [furnished].]

[Current as of April 2004.]

RCW 46.61.506. Persons under influence of intoxicating liquor or drug—Evidence—Tests—Information concerning tests

- (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.
- (2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.
- (3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.
- (4) (a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:
 - (i) The person who performed the test was authorized to perform such test by the state toxicologist;
 - (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
 - (iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

- (iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;
 - (v) The internal standard test resulted in the message "verified";
 - (vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;
 - (vii) The simulator external standard result did lie between .072 to .088 inclusive; and
 - (viii) All blank tests gave results of .000.
- (b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.
- (c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.
- (5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW; an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter

18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

- (6) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.
- (7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

[2004 c 68 § 4, eff. June 10, 2004; 1998 c 213 § 6; 1995 c 332 § 18; 1994 c 275 § 26; 1987 c 373 § 4; 1986 c 153 § 4; 1979 ex.s. c 176 § 5; 1975 1st ex.s. c 287 § 1; 1969 c 1 § 3 (Initiative Measure No. 242, approved November 5, 1968).]

RCW 66.44.200. Sales to persons apparently under the influence of liquor—Purchases or consumption by persons apparently under the influence of liquor on licensed premises—Penalty—Notice—Separation of actions

- (1) No person shall sell any liquor to any person apparently under the influence of liquor.
- (2)
 - (a) No person who is apparently under the influence of liquor may purchase or consume liquor on any premises licensed by the board.
 - (b) A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.
 - (c) A defendant's intoxication may not be used as a defense in an action under this subsection.
 - (d) Until July 1, 2000, every establishment licensed under RCW 66.24.330 or 66.24.420 shall conspicuously post in the establishment notice of the prohibition against the purchase or consumption of liquor under this subsection.

- (3) . . . An administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.

[1998 c 259 § 1; 1933 ex.s. c 62 § 36; RRS § 7306-36.]

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Dear Clerk Carpenter:

A proposed amicus brief on behalf of the Washington State Association for Justice Foundation is attached to this email. WSAJ Foundation's application for amicus curiae status was previously transmitted to the Court by email on April 10, 2009.

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