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In the  
**Supreme Court**  
of the State of Washington

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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, MOOSE INTERNATIONAL, INC. and JOHN DOES (1-10),

*Defendants,*

and BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC., and ALEXIS CHAPMAN,

*Respondents.*

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**SUPPLEMENTAL BRIEF OF RESPONDENTS  
BELLINGHAM LODGE #493, LOYAL ORDER  
OF MOOSE, INC. AND ALEXIS CHAPMAN**

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## STATEMENT OF THE CASE

The court of appeals' opinion and respondents' prior briefing contain most facts needed here. The Lodge and Chapman add this supplemental statement to further assist the Court.

### **The Lack Of Observational Evidence**

The parties agree that Hawkeye Kinkaid entered the lodge about 4:30 p.m. and had not been drinking earlier that day (RP427-31, 1737-38). Alexis Chapman testified that she served Kinkaid two beers at the lodge, the first around 4:30 p.m. (RP444). There was no evidence that anyone saw Kinkaid drinking more than two beers or drinking any liquor other than beer. There was no evidence as to when Chapman served the second beer.

No witness testified that Kinkaid appeared intoxicated. John Leibrant sat with Kinkaid and saw him drink a beer (RP537-41). He saw no evidence that Kinkaid was under the influence of alcohol (RP560). Leibrant and Kinkaid left the Lodge at the same time, and Kinkaid appeared "totally sober" (*Id.*). Frank Rose, who spoke to Kinkaid, saw him drink a beer (RP631-32). Rose saw no sign of slurred speech, unsteady balance, or behavior nearing intoxication (RP649-50). The Fausts called Ron Beers via deposition. He did not even recall being in the lodge (CP962 at 16; CP969 at 43). Beers did not remember seeing

anyone, including Kinkaid, intoxicated at the lodge while Chapman was serving (CP965 at 28; 966 at 30-32; 968 at 40-41).<sup>1</sup>

Defense witness Eleanor Rose saw “nothing out of the ordinary” with Kinkaid’s behavior and no signs of intoxication (RP1275). To Larry Rayborn, who sat with Kinkaid, Kinkaid did not appear intoxicated (RP1292). Ray Anderson testified that Kinkaid “acted perfectly normal to me” and showed no sign of intoxication (RP1321). Alexis Chapman did not see Kinkaid intoxicated, whether stumbling, slurring words, or acting drunk (RP396-97). No other witness testified to observing Kinkaid at the lodge.

The evidence widely varied as to when Kinkaid left the lodge, but plaintiff Bianca Mele pinpointed the time of the accident. The car clock read 7:28 when she saw Kinkaid’s vehicle entering her lane (RP91). No one approached the Fausts’ car for 5-10 minutes to offer help (RP94). A 911 call reached the police at 7:46 p.m. (RP1393).

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<sup>1</sup> Beers’ deposition was not helpful, but the Fausts introduced it anyway in order to offer an allegedly impeaching prior statement given by Beers. The statement was not taken in accordance with ER 801(d)(1) and so was substantively inadmissible. Although the court allowed it for impeachment purposes, impeachment evidence is not substantive evidence (RP841). *State v. Flieman*, 35 Wn. 2d 243, 212 P.2d 794, 795 (1949). Under ER 607, the statement was not even usable for impeachment purposes. *State v. Hancock*, 109 Wn. 2d 760, 763, 748 P.2d 611, 613 (1988). The Lodge and Chapman challenged the use of the statement. The court of appeals did not reach the issue.

Although the lodge is in Bellingham, the accident occurred in Ferndale, about seven miles and 14-17 minutes to the north (RP919-20, 1238, 1376). Kinkaid was driving southbound toward the lodge, not northbound from it (RP1376). There was no evidence that after Kinkaid left the lodge, he appeared to be intoxicated. No one observed any behavior by Kinkaid following the accident. The medical examiner testified that Kinkaid was “essentially dead at the scene” (RP186-87).

A State trooper observed that to the right of Kinkaid’s seat “was a 40 ounce bottle of an alcoholic beverage (hard alcohol) which had some of the contents removed . . .” (Ex. 71; RP1378-79).

### **The Trial Court Rulings**

The Lodge and Chapman moved for directed verdict (RP1834). Although finding that “there isn’t very much” observational evidence, the court denied the motion (1840). The Lodge and Chapman requested JMOL or new trial in their post-trial motion, but the court denied relief (RP839-40). However, the court admitted that “[w]ithout the statement of bartender Chapman [as testified by Rainy Kinkaid and Lisa Johnston] Defendant’s motion would be granted . . .” (CP840).

**The Court Of Appeals Finds No Evidence  
To Support The Overservice Claim**

The court of appeals focused on the testimony of Rainy and Johnston (A.9-13). Neither were in the lodge at the time of service. The court of appeals stated that their testimony about Chapman's statements was not directed to the time of alcohol service (A.10-11). Instead, it was directed to the time at which Chapman told Kinkaid to leave the lodge (*Id.*). The court ruled:

[Overservice] liability requires point-in-time evidence sustaining "that person's appearance at the time the intoxicating liquor is furnished to the person." . . . 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 Fausts' injuries. Since, no evidence describes Kinkaid's state when Chapman served him, substantial evidence does not support the jury verdict against the Moose Lodge and Chapman for overservice.

(A.12). For like reason, the court reversed the Fausts' negligent hiring/supervision claim (A.12-13).

**ARGUMENT**

**The Court Of Appeals Correctly Ruled That The  
Fausts Failed To Create A Fact Issue As To Overservice.**

- 1. The law requires observational evidence of  
apparent intoxication at the time of service.**

The Lodge and Chapman moved for judgment or for new trial based on the insufficiency of evidence as to overservice. The standards of review are *de novo*. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn. 2d 907, 915, 32 P.3d 250, 254 (2001) (JMOL); *Hizey v. Carpenter*, 119 Wn. 2d 251, 272, 830 P.2d 646, 657 (1992) (new trial for insufficient evidence).

This Court last discussed the overservice issue in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 96 P.3d 386 (2004). The Court stated that the statutory “apparently under the influence” standard and the common-law “obviously intoxicated” standard define different “degrees of intoxication.” *Id.* at 267. It held that the “apparently under the influence” standard establishes the degree of intoxication needed in overservice cases. (*Id.* at 274). The court of appeals correctly applied that standard to this case (A.5, 6 n. 3).

Although *Barrett* lessened the degree of intoxication needed to prove overservice, it did not change the law as to how that degree must be proven. *Barrett* “upset no established precedent.” *Id.* at 274. So the focus here must be on the type of evidence needed to prove overservice.

Prior to 1955, the Dramshop Act imposed liability on a tavern whenever the furnishing of liquor was likely to result in intoxication. *See* RCW 4.24.100 as quoted in *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn. 2d 759, 761, 458 P.2d 897, 898 (1969). Following the 1955 repeal of the

Act, this Court adopted a general rule of non-liability for furnishing liquor to able-bodied persons. *Halvorson*, 76 Wn. 2d at 762-63; *Estate of Kelly v. Falin*, 127 Wn. 2d 31, 36, 869 P.2d 1245, 1247 (1995). But the Court carved exceptions, one being the furnishing of liquor to obviously intoxicated adults. *Halvorson*, 76 Wn. 2d at 762. The Court found that licensed liquor sellers are generally “in a position to adjudge the physical condition” of those consuming alcohol. *Id.* at 763-64.

Since *Halvorson*, this Court has consistently required direct observational evidence supporting overservice. It has rejected the use of blood alcohol evidence as circumstantial evidence proving overservice. In *Shelby v. Keck*, 85 Wn. 2d 911, 541 P.2d 365 (1975), plaintiff’s decedent was killed when a lounge patron’s gun accidentally discharged. The patron had a 0.16 blood alcohol content (BAC). *Id.* at 369. The Court affirmed a directed verdict for the lounge owner:

It is our considered opinion that one cannot logically or reasonably infer that Keck was intoxicated merely from the fact that he was in the establishment for several hours. Even if Keck had consumed more than two drinks, ***his state of sobriety must be judged by the way he appeared to those about him, not by what a blood alcohol test later revealed.***

*Id.* at 915 (emphasis supplied). Imposing liability based on BAC would create strict liability under a common law dramshop act, a result found to be “totally unacceptable.” *Id.* at 915-16.

In *Barrie v. Hosts of America, Inc.*, 94 Wn. 2d 640, 618 P.2d 96 (1980), plaintiff's decedent died in a one-car accident after drinking at defendant's lounge. He was last observed at 10:30 p.m. and died at 12:30 a.m. Decedent had a 0.29 BAC at the time of the accident. *Id.* at 643 n.1. Based on the depositions of defendant's personnel, the court affirmed summary judgment for defendants. The bartender had no recollection of decedent. A cocktail waitress stated that he did not appear intoxicated and that he walked and talked normally. The manager testified that decedent did not show signs of intoxication. The Court rejected the hearsay affidavit of plaintiff's attorney offered to create inconsistencies with the observational evidence.

In *Wilson v. Steinbach*, 98 Wn. 2d 434, 657 P.2d 1030 (1982), plaintiffs' decedent died in a vehicle accident after drinking at a party hosted by her fiancée's parents. Plaintiffs sued the parents. Decedent's fiancée and his parents submitted uncontradicted affidavits that decedent did not show signs of intoxication and appeared "responsible and ladylike." *Id.* at 438. Citing to *Shelby* and *Barrie*, this Court stated that "a person's sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal." *Id.* at 439.

In *Young v. Caravan Corp.*, 99 Wn. 2d 655, 663 P.2d 834 (1983), plaintiff's decedent was killed in a one-car accident after drinking at

defendant's restaurant. His BAC at time of death was 0.21. Plaintiff claimed that defendant continued to serve decedent when he was obviously intoxicated. As proof, plaintiff submitted the affidavit of a cocktail waitress (decedent's girlfriend) stating that his ability to speak and write were substantially impaired and that he was beyond self-control. In reversing summary judgment for defendant, this Court reaffirmed that to prove overservice, "the sobriety of a person must be judged by those who observe the person's behavior." *Id.* at 659.

In *Purchase v. Meyer*, 108 Wn. 2d 220, 737 P.2d 661 (1987), the Court reaffirmed the rule yet again. A minor was involved in a vehicle accident after consuming more than two drinks at a restaurant. Four hours later, a breath test revealed a 0.13% BAC. There was no observational evidence that the minor appeared intoxicated. *Id.* at 227. In ruling that the restaurant was entitled to summary judgment, this Court stated:

CONCLUSION. Insofar as a cause of action for furnishing intoxicating liquor to an "obviously intoxicated" person is concerned, ***the results of a blood alcohol test (by an alcohol blood testing machine) and an expert's opinions based thereon, and the physical appearance of that person at a substantial time after the intoxicating liquor was served,*** are not by themselves sufficient to get a cause of action past a motion for summary judgment. Whether a person is "obviously intoxicated" or not ***is to be judged by that person's appearance at the time the intoxicating liquor is furnished to the person.***

*Id.* at 233 (emphasis supplied). The Court rejected the alcohol-testing and toxicological evidence as not competent:

The pharmacologist's affidavit *purporting to relate Meyer's blood alcohol content to what it was when she was last served at the El Torito, and then from that to determine what he claims was the "obviousness" of her intoxication at the time of the last serving, is based entirely on the inadmissible alcohol breath testing results. It suffers from the same legal infirmities as the test results and is speculative.* Thus there was *no competent evidence in the record* to establish that Meyer appeared "obviously intoxicated" to those around her when she was served at the El Torito.

*Id.* at 226-27 (emphasis supplied).

In *Christen v. Lee*, 113 Wn. 2d 479, 780 P.2d 1307 (1989), plaintiff was shot after leaving a bar. Plaintiff's assailant had been drinking in the bar and left with plaintiff. A former bar employee testified that the assailant was intoxicated "based solely on the amount of alcohol she saw him consume, not on his actual appearance." *Id.* at 489-90. No evidence existed that he "actually appeared intoxicated to others around him." *Id.* at 485. The Court upheld summary judgment for the bar owner:

In *Purchase*, we articulated several reasons why resort must be had to evidence of a person's appearance in order to determine whether that person was obviously intoxicated. First, we noted that a furnisher of intoxicating liquor ordinarily has no way of knowing how much alcohol a person has consumed before entering the establishment. Next, we observed that a person who is a heavy drinker may be legally intoxicated yet still not appear intoxicated. Finally, we explained that there are medically recognized

variables in the way that alcohol may react on the human body.

*Id.* at 489. The Court found no direct evidence of overservice:

It is [the bar employee's] testimony that she thought [the assailant] was intoxicated, ***but her conclusion was based solely on the amount of alcohol she saw him consume, not on his actual appearance.*** In fact, [she] denied that [the assailant] appeared intoxicated. ***There is no evidence in the record to the effect that [the assailant] actually appeared intoxicated to others around him.*** We conclude, therefore, that there was insufficient evidence to raise an issue of fact as to whether [the assailant] was obviously intoxicated ***when served at the [bar].***

*Id.* at 489-90 (emphasis supplied). In short, direct observational evidence at the time of service is generally required.

The Fausts argued that a different rule should apply here because of the close relationship of the lodge members to the Lodge (Pet.14). However, in *Wilson* this Court affirmed summary judgment based upon the affidavits of defendants and their son. In *Young*, it reversed summary judgment based on the affidavit of decedent's girlfriend. The substance of a witness's testimony is controlling, not his relationship to a party.

For decades, this Court has been mindful of the problem of drunk driving. But it has also recognized the unfairness of imposing negligence liability on a server without observational evidence of a drinker's intoxication at the time of service. Starting with *Halvorson*, at least 26

justices have spoken on the issue.<sup>2</sup> “This court has made it abundantly clear” that a person’s intoxication “*is not to be measured by a blood alcohol test but is instead to be measured by the person’s appearance at the time alcohol is provided to the person.*” *Barrett*, 152 Wn. 2d at 278-79 (Madsen, J., *dissenting*) (emphasis supplied).

**2. The court of appeals correctly ruled that no competent evidence of overservice existed.**

The Fausts try to create factual disputes rather than focusing on the real issue: the observed condition of Kinkaid at the time of service (Pet.3-6). On that score, the court of appeals correctly ruled that their proof failed.

Kinkaid had not drunk prior to entering the lodge (427-31, 1737-38). He was first served around 4:30 p.m.; no one claims that he appeared intoxicated (RP444). There was no evidence that anyone saw Kinkaid drink more than two beers at the lodge or drink any liquor other than beer. There was no evidence as to when Kinkaid was served his second beer. And there was no evidence that Kinkaid appeared intoxicated at that time. A jury could only speculate about Kinkaid’s condition when last served. Not even the rules of liberality permit that. *Adams v. King County*, —Wn.

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<sup>2</sup> And if the count includes the justices deciding *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn. 2d 96, 929 P.2d 433 (1997) (discussed *infra* at 17-18), the number is higher.

2d—, 192 P.3d 891, 895 (2008); *Little v. King*, 160 Wn. 2d 696, 705, 161 P.3d 345, 350 (2007).

Besides, every witness who saw Kinkaid testified that he did not appear intoxicated. John Leibrant, Frank Rose, Eleanor Rose, Larry Rayborn, Ray Anderson, and Alexis Chapman testified that Kinkaid appeared “totally sober,” “acted perfectly normal,” did “nothing out of the ordinary,” and showed no signs of slurred speech, unsteady balance, stumbling, acting drunk, or any other behavior nearing intoxication (RP396-97, 537-41, 560, 631-32, 649-50, 1275, 1292, 1294-95, 1298, 1311, 1317, 1319-21).

Conceding that “there isn’t very much” observational evidence of overservice, the trial court relied on the testimony of Rainy Kinkaid and Lisa Johnston. Without it, the court would have granted judgment (CP840). Neither witness was at the Lodge, and Chapman disputed their testimony (RP1727-28). The court of appeals correctly accepted the truth of their testimony but found it insufficient to create a fact question.

Rainy testified that Chapman twice spoke to her about Kinkaid’s condition. The Fausts asked Rainy:

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 (RP266).

The second conversation was similar (RP267). Rainy testified:

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

\* \* \*

A. Drunk (RP267-68; emphasis supplied).

As the court of appeals found, this testimony was directed to the time of Kinkaid's departure, not the time of service (A.10-11).

Likewise, the court correctly ruled that Lisa Johnston's testimony was not competent to prove overservice (RP280, 331) (A.11-12).

According to Johnston, "[Chapman] said that Hawkeye was sitting at the bar and he was being obnoxious and he was drunk, and she cut him off and he got mad" (RP336). Kinkaid then left (*Id.*). Like Rainy, Johnston testified to Kinkaid's condition when he left the lodge, not when Chapman served him. And Chapman did exactly what the law requires. She cut Kinkaid off when he appeared intoxicated.

During oral argument in the court of appeals, the Fausts claimed that other evidence created a fact question. About one day after the accident, a woman claiming to be Kinkaid's wife phoned the investigating trooper (RP1387). The trooper reported:

She also indicated that Hawkeye's girlfriend Alexis Chapman is a bartender at the Moose Lodge. Chapman supposedly overserved Hawkeye, then cut him off from alcohol and asked him to leave the premises. This person admitted that she was not at the Moose Lodge nor did she discuss this with Hawkeye prior to the collision (Pl.71).

Over respondents' hearsay objection, the trooper testified to the conversation (RP1387-88).

The evidence was not probative of overservice. The Fausts did not bring her to court; a jury could only speculate as to her identity. She admittedly was not at the lodge, nor did she speak to Kinkaid. She did not state that she spoke to Chapman or anyone in the lodge. A police report may be admissible as a business record provided that it fully fits within hearsay exceptions. ER 605; *State v. Bellerouche*, 129 Wn. App. 912, 917, 120 P.3d 971, 974 (2005); see also *United States v. Vigneau*, 187 F. 3d 70, 75 (1st Cir. 1999) [discussing FRE 803(6)]. The woman lacked personal knowledge of Kinkaid's condition, and she did not reveal the source of her information. The court rightly refused to consider her comments.

The court of appeals' analysis is unassailable. Liability requires "specific point-in-time evidence establishing apparent intoxication at the time of service" (A.12). The Fausts presented no observational evidence of it. Their overservice claim failed as a matter of law. And the court's

ruling applied to the Fausts' negligent hiring/supervision claim. Because Chapman properly served Kinkaid, any alleged negligent hiring/supervision was not a proximate cause of the Fausts' injuries. *Christensen v. Royal School District No. 160*, 156 Wn. 2d 62, 66, 124 P.3d 283, 285 (2005) (proximate cause required); *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108, 1110 (1992) (same in negligent hiring/retention case).

### 3. The Fausts' cases are distinguishable.

Neither *Dickinson v. Edwards*, 105 Wn. 2d 457, 716 P.2d 814 (1986) (plurality), nor *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn. 2d 96, 919 P.2d 433 (1997) (*per curiam*), helps the Fausts. In *Dickinson*, plaintiff was injured in a vehicle accident at 10:25 p.m., five minutes after Edwards left a company banquet. Edwards admitted to being served 15-20 drinks in 3-1/2 hours. Two co-employees stated that Edwards did not appear intoxicated between 9:00-9:30 p.m. An investigating officer arriving at 10:30 p.m. stated that Edwards was unsteady on his feet, had bloodshot eyes, smelled of alcohol, and failed physical testing. *Id.* at 816. The trial court granted summary judgment for the employer and banquet hall, and the court of appeals affirmed. This Court reversed.

Citing to *Shelby*, *Barrie*, and *Wilson*, the Court stated that BAC is evidence of intoxication at the time of accident but is not evidence of

obvious intoxication at the time of service. *Id.* at 463. It affirmed the court of appeals' refusal to consider breathalyzer test results. *Id.* But *Dickinson* presented a new factual twist: "statements of firsthand observations made within a very short time *after* service of alcohol or an admission by the drinker of gross over consumption of alcohol." *Id.* (emphasis in original). Both were present. The issue was whether the post-service evidence could create a reasonable inference of overservice.

This Court ruled that under limited circumstances, post-service evidence may raise an inference of overservice:

. . . the trial court, in ruling on the motion for summary judgment, must consider whether the drinker had consumed any alcohol after and independent of the defendants' furnishing or whether any time remained unaccounted for between the last furnishing by the defendants and the subsequent observations. ***In either of these cases, the subsequent observations may not raise an inference of obvious intoxication upon which to base a material issue of fact.*** Otherwise, 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. *Id.* at 464 (emphasis supplied).

As for an admission of over-consumption, that evidence must be linked to the ***place of overservice***. Edwards admitted to being served 15-20 drinks in a 3-1/2 hour period. *Id.* at 818. During the entire period, he was ***at the banquet***, nowhere else. Given Edwards' admission of over-consumption

at the banquet, this Court found sufficient evidence to create a reasonable inference of overservice.

*Dickinson* did not change the law as to proof of overservice.

*Purchase* and *Christen*, two post-*Dickinson* cases, reaffirmed the rule that overservice “is to be judged by [a] person’s appearance at the time the intoxicating liquor is furnished to the person.” *Purchase*, 108 Wn. 2d at 223; *Christen*, 113 Wn. 2d at 487. Both cases called *Dickinson* “factually unique.” *Purchase* at 227; *Christen* at 491; see also *Burkhart v. Harrod*, 110 Wn. 2d 381, 392, 755 P.2d 759 (1988) (Utter and Brachtenbach, J.J., concurring).

*Fairbanks* involved a straightforward application of *Dickinson*. Plaintiff was injured by Neely 20 minutes after Neely left a company banquet. Neely claimed that she drank only two glasses of champagne at the banquet and that she left between 10:00-10:30 p.m. Three employees submitted declarations that Neely did not appear intoxicated. Neely claimed that she went to a lounge and drank 2-3 cognacs. Neely allegedly left at 10:45 p.m.; the accident occurred at 10:50 p.m. Ten minutes later, a responding officer observed that Neely smelled of alcohol, slurred her speech, stumbled out of her car, and staggered when she walked. *Id.* at 434. She registered 0.17 on a breathalyzer test. The lounge owner testified that the lounge closes at 10:00 p.m. and rarely serves a group as

big as Neely's group. She did not recall seeing a large group that night, and bar receipt records, including pop, were paltry.

This Court reversed summary judgment for Neely's employer. A genuine issue existed as to whether Neely drank at the lounge. Neely's own timetable contradicted her alibi. The police officer's observations ten minutes after the accident supported an inference of obvious intoxication under the *Dickinson* rationale. *Id.* at 102-03.

*Dickinson* and *Fairbanks* are inapplicable. Even under *Dickinson*, evidence of Kinkaid's BAC was inadmissible. Unlike *Dickinson*, Kinkaid did not admit to over-consuming liquor. Unlike *Fairbanks*, there is undisputed evidence that Kinkaid had liquor available to him outside the Lodge. Trooper VanDeist found a partially-empty 40 oz. bottle of hard liquor next to Kinkaid's seat. This means that Kinkaid was in his next bar as soon as he entered his van — with himself as bartender. And Kinkaid had time to drink. He needed to travel seven miles north to Ferndale before he could turn around and head south to the point of the accident. Kinkaid had both opportunity and time to drink outside the lodge. Finally, unlike both *Dickinson* and *Fairbanks*, there is no observation of Kinkaid's behavior after he left the lodge. No one spoke to Kinkaid after the accident. The medical examiner testified that he was "essentially dead at

the scene” (RP186-87). The circumstances of *Dickinson* and *Fairbanks* are not present here.

*Cox v. The Keg Restaurants U.S., Inc.*, 186 Wash. App. 239, 935 P.2d 1377 (1997), is also distinguishable. Witnesses testified to their personal observations of a patron’s belligerent conduct while defendant continued to serve him. The court of appeals ruled that it was not an abuse of discretion to admit BAC evidence to enhance the witnesses’ credibility. 86 Wash. App. at 248-50. Here, the Fausts lacked observational evidence.

In the end, the Fausts are left with hyperbole. The court of appeals’ analysis does not “encourage overservice” (Pet.15). There was no evidence that Kinkaid “order[ed] 20 drinks from the same server over a short period by simply waving for another drink . . .” (*Id.*). The court of appeals did not reward a “conspiracy of silence” — a conspiracy about which the Fausts had not a shred of evidence (Pet.14). The tragedy of the Fausts’ injuries did not give them license to run roughshod over the witnesses, the evidence, and the court of appeals. Under the governing rule of law, the Fausts are not entitled to recover from the Lodge and Chapman.

CONCLUSION

For the foregoing reasons, respondents ask this Court to affirm the decision of the court of appeals. Alternatively, respondents ask this Court to order the court of appeals to consider those issues previously raised by the Lodge and Chapman but not addressed in the opinion.

Respectfully submitted,



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# APPENDIX

A.

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-I  
Consolidated with  
No. 57321-7-I  
Linked with No. 57320-9-I

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 Fausts’ 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 Faustus 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 Faustus 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.

Columan, J.

**DECLARATION OF SERVICE**

On said day below I deposited in the United States mail one true and accurate copy of the following document: Supplemental Brief Of Respondents Bellingham Lodge #493, Loyal Order Of Moose, Inc. And Alexis Chapman, to each of the following:

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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 this 3<sup>rd</sup> day of November, 2008 at Chicago, IL

