No. 100133-9

Court of Appeals No. 81285-8-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

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

Petitioner,

v.

DH SEATTLE MANAGEMENT, LLC, a Washington state limited liability company,

Respondent,

and

RICHARD PECK and JENNIFER PECK, husband and spouse, individually and the marital community composed thereof; KAYA SULLIVAN, individually; GREATER SEATTLE CONCRETE, INC.; LOWE ENTERPRISES REAL ESTATE GROUP, INC., a foreign profit corporation; DESTINATION HOTELS AND RESORTS, LLC, a foreign limited liability company; EC RESTAURANTS (SEATTLE) CORP., a foreign profit corporation; 1415 5th AVENUE SEATTLE, LLC, a foreign limited liability company; KAYA SULLIVAN and THOMAS L. SULLIVAN, wife and husband, and the marital community composed thereof; THOMAS L. SULLIVAN, individually; LEON JAY JOHNSON and WENDY MARIA JOHNSON, a married couple, individually and the marital community composed thereof; JOHN DOE CHAUFFER BUSINESS; JOHN DOES 1-12,

Defendants.

PETITION FOR REVIEW

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INTRODUCTION

About 15 minutes past midnight on May 21, 2016, Richard Peck crashed head on into the driver's side door of 18-year-old Patrick Wallace's Honda Civic, killing him instantly. About 90 minutes earlier, Frolik Kitchen+Cocktails ("Frolik") served Richard the second of two five-shot cocktails. By that time, Richard had consumed the equivalent of 11.3 drinks.

A picture of Richard taken 10 minutes before last service shows him leaning to one side, his bloodshot, watery eyes half closed. An expert in training servers to recognize apparent intoxication opined that Richard looked intoxicated, particularly to a trained server. Those who witnessed the crash described Richard as combative, and police described him as wreaking of alcohol, struggling to stand, and slurring his words. He failed field sobriety tests overwhelmingly; his BAC was .18; he eventually passed out.

Yet the appellate court affirmed summary judgment dismissal, effectively holding that the picture was alone insufficient to withstand summary judgment. ***Wallace v. Peck***, Wash. Ct. App. No. 81285-8-I, slip op. (July 26, 2021) That incorrect decision conflicts with controlling precedent and mishandles an issue of substantial public interest. This Court should accept review and reverse.

ISSUES PRESENTED FOR REVIEW

To survive summary judgment, Patrick's[1] mother Denise Wallace had to prove that when Frolik last served Richard, he appeared intoxicated "by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter." ***Faust v. Albertson***, 167 Wn.2d 531, 539, 222 P.3d 1208 (2009). The trial court dismissed her claims despite: (1) pictures of Richard minutes before last service that would allow a jury to infer apparent intoxication; (2) evidence that Richard drank as much as 11.3 standard drinks before last service; (3) evidence that Richard did not drink more after leaving Frolik; (4) testimony from responding officers that Richard exhibited poor coordination, slurred speech, glassy watery eyes, and other signs of apparent intoxication; and (5) Blood Alcohol Content ("BAC") test results and related expert evidence that Richard's BAC was .18 approximately two hours after last service. Did the appellate court erroneously affirm summary judgment for Frolik's owner, DH Seattle Management, LLC? Should a jury decide this case?

[1] We used first names when needed to avoid confusion, intending no disrespect.

FACTS RELEVANT TO PETITION FOR REVIEW

A. After consuming the equivalent of about 11.3 drinks, Richard Peck was photographed minutes before Frolik last served him, allowing a jury to infer he appeared intoxicated at the time.

On the evening that he drove drunk, hitting and killing Patrick, Richard started drinking at a co-worker's birthday dinner at Beer & Brats in Lake Stevens. CP 129-32, 270. By the time the partygoers left for Seattle in a chauffeured limousine, Richard had consumed three 18-to-20-ounce beers. CP 259, 262. Frolik questioned that assertion, but Richard told police at the scene that he consumed a "couple beers a couple hours ago," and "a couple of drinks at a new restaurant in Snohomish." BR 12-13; CP 259. He later admitted consuming "three 18-20 ounce beers." CP 262.

Richard admitted drinking another 12-ounce beer at an arcade on the way to Frolik. CP 177, 269. He denied drinking more in the limousine, but his wife Jennifer acknowledged that he drank straight Fireball Whisky and a Jack Daniels and Coke. *Compare* CP 268 *with* CP 235, 270. Frolik argued there was no evidence he drank it before reaching Frolik, rather than after. BR 4-5. But in addition to Jennifer's admission, Richard purchased the Fireball on the way to Seattle, is pictured holding it on the way to Seattle, and denied drinking during the limousine ride home. CP 235, 239, 264-68, 270.

The party arrived at Frolik just after 10:00 pm, at which point Richard had consumed no less than three 18-to-20-ounce beers, another 12-ounce beer, a whisky drink, and an unknown amount of straight whisky. CP 177, 234-36, 257, 259, 262, 264-77, 280. About one-half hour later, Frolik served Richard his first "Tokyo Tea," the equivalent of 5 shots or 3.3 "standard" drinks." CP 183, 238, 273-74, 277, 280, 301-02, 361-62. Frolik's self-interested testimony that its recipe includes less alcohol merely creates a fact question, as the trial court acknowledged. CP 349.

Together, the beer Richard admitted drinking, the straight whisky and cocktail Jennifer saw him drinking, and the first Tokyo Tea Frolik served him add up to the "equivalent" of about 11.3 drinks. CP 177, 234-36, 257, 259, 262, 264-77, 280, 301-02, 361-62. Richard drank the first Tokyo Tea in about ten minutes, and the same Frolik bartender served him another minutes later. CP 183, 277-78, 301-02. In a photo taken just ten minutes before last service, Richard stands leaning to his right, hands thrust in pockets, appearing lethargic and drowsy, eyes droopy and only partially open. CP 237, 275-78, 300-01, 322-23.

The party left Frolik at approximately between 11:15 and 11:25, heading back to Beer & Brats. CP 238, 283-84. Richard did

not drink more. CP 239. Jennifer was so intoxicated that she recalled little of the ride home and vomited in the limousine and on Richard. CP 269, 298. Richard decided to drive home. CP 295.

B. Eighty-two minutes after Frolik last served Richard, he hit and killed Patrick Wallace.

Eighty-two minutes after Frolik served him his second five-shot cocktail in a 20-minute window, Richard ran a red light and crashed broadside into Patrick. CP 239, 260-61, 269. Richard appeared "combative" looking to fight Patrick, who died instantly. CP 262, 295. Jennifer was either "asleep" or "passed out," so does not remember the collision. CP 269.

C. Richard was so intoxicated that he needed help standing and eventually passed out.

Responding police noticed that Richard smelled strongly of alcohol five feet away, exhibited poor coordination, swayed, and had "watery/bloodshot eyes [and] slurred speech." CP 241, 248-49, 260-61, 294-95. He stumbled and nearly fell over, failing field sobriety tests "overwhelmingly." CP 294. A portable breath test taken about two hours after Richard left Frolik showed his BAC was .177. CP 242, 257. His venous BAC taken over two hours after last service was .18. CP 242, 262, 280, 285, 296. Richard struggled to stay awake, passing out in the back of the police car. CP 262.

D. Corroborative experts opined that Richard appeared intoxicated when Frolik last served him.

Patricia Ferguson, an expert in Mandatory Alcohol Server Training ("MAST"), opined "to a reasonable degree of certainty" that Richard appeared intoxicated when Frolik last served him, if not when he arrived. CP 299-304. While the exact amount Richard drank was "unknown," her opinion is based on Richard's admitted consumption and his "outward appearance" in photographs taken shortly before last service. CP 300-02.

Joseph Anderson, a Ph.D. in bioengineering and expert in "measuring concentrations of various chemicals in breath," opined "to [a] reasonable degree of certainty" that Richard would have appeared intoxicated when Frolik last served him. CP 279-81. He explained that to reach a BAC of .18, Richard had to consume about 12 ounces of 80 proof liquor before last service. CP 280. He would have been above the legal limit, with his BAC rising rapidly. *Id*.

E. The appellate court affirmed summary judgment for Frolik, failing to take all reasonable inferences in Denise's favor.

This Court reviews the trial court's order granting summary judgment *de novo*, taking all facts and reasonable inferences therefrom in the light most favorable to Denise, the non-moving party. ***Ensley v. Mollman***, 155 Wn. App. 744, 750-51, 230 P.3d 599 (2010)

(citing ***Jones v. Allstate Ins. Co.***, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). The appellate court failed to do so.

The appellate court incorrectly stated that expert Ferguson "admitted that there was no evidence of direct observation of Richard's intoxication at the time he was served either teas at Frolik." Op. at 6 (without citation). The court apparently refers to Ferguson's deposition testimony that while she believed Richard likely appeared intoxicated "when he was served *the first round*," she did not have a photo from which to assess "signs of intoxication *before the first round*." CP 325 (emphases supplied). This relates only to the first drink Frolik served Richard, not to last service (CP 325):

> Q. Now, your opinion is that Mr. Peck was intoxicated and doesn't recall, but you don't have an opinion that he was intoxicated before the first round, right?
>
> A. I don't have a -- a clear enough photo of him to see if he was showing signs of intoxication before the first round.
>
> Q. Okay. So you don't have any information regarding how he appeared when he was served the first round?
>
> MR. SULLIVAN: Object to form.
>
> Q. (BY MR. MOHR) Or do you?
>
> A. I, as I stated previously, judging from the amount of alcohol that we know he -- that is reported to -- that he consumed, I would say that there was a good possibility that he was showing signs of intoxication.

> Q. But as far as you know, there's no evidence of any direct observation of Mr. Peck at the time of service, right?
>
> A. Correct.

At the barest minimum, the court's conclusion that this "admission" relates to last service fails to take inferences in Denise's favor.

The court also omits Ferguson's "expert opinion that Mr. Peck was apparently under the influence of alcohol prior to being served his last drink at Frolik." CP 300. Ferguson opined that pictures taken minutes before Frolik last served Richard, "appear to show [him] intoxicated at Frolik." *Id*. His "eyes appear watery and glassy, and bloodshot." *Id*. This "outward appearance" is one of the first, if not the first signs of intoxication a trained server is given. *Id*. "More likely than not, it would have been apparent to the server that Mr. Peck appeared intoxicated upon arrival to Frolik or shortly thereafter." *Id*.

Again failing to take all reasonable inferences in Denise's favor, the court adopted Frolik's argument that the record does not support Denise's assertion that Richard "started the evening" with three 18-to-20-ounce beers. Op. at 11. It is reasonable to infer that the three 18-to-20-ounce beers Richard admitted consuming are the "couple drinks" he also admitted consuming at Beer & Brats, the "new restaurant in Snohomish" where the evening started. CP 259, 262. It

is not at all unclear whether Richard drank these three beers "specifically prior to Frolik," or at some other time "prior to the accident." Op. at 11, 12. Richard stated he did not drink during the limousine ride back from Frolik. CP 239.

Nor is it unclear whether Richard drank straight Fireball whisky on the way to Frolik. Op. at 3 fn.3. Richard purchased Fireball on the way to Frolik, is pictured holding it on the way to Frolik, and denied drinking on the way home. CP 239, 264-68. The only reasonable inference from this evidence, coupled with Jennifer's admission that Richard drank Fireball in the limousine, is that he drank it when he was holding it – on the way to Frolik.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate court's decision conflicts with this Court's decision in *Faust v. Albertson* and its predecessors in failing to consider the totality of the evidence of apparent intoxication. RAP 13.4(b)(1).

The appellate court relied heavily on this Court's decision in ***Purchase v. Meyer***, virtually ignoring more recent developments in the law, including this Court's decision in ***Faust***, *supra*. Op. at 8-9 (citing 108 Wn.2d 220, 226-27, 737 P.2d 661 (1987)). In ***Faust***, this Court examined two decades of cases "interpreting the evidentiary burden a plaintiff must carry to defeat a defense motion for summary judgment," beginning with ***Purchase***. 167 Wn.2d at 539. In

Purchase, there was no "direct, observational evidence," and driver Meyer's BAC was taken 3.5 to 4 hours after she left the drinking establishment and longer after she was last served at an unknown time. ***Faust***, 167 Wn.2d at 539. This Court held that the BAC result was not competent evidence of a contemporaneous observation and that police observation at the accident scene could not "cure this defect." ***Purchase***, 108 Wn.2d at 227-28. That is, "'the results of a blood alcohol test … and an expert's opinion 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 such a cause of action past a motion for summary judgment.'" ***Faust***, 167 Wn.2d at 539-40 (quoting ***Purchase***, 108 Wn.2d at 223).

Similarly, in ***Christen v. Lee***, this Court affirmed summary judgment for the defendant "because no evidence existed on the record as to the tortfeasor's actual appearance." ***Faust***, 167 Wn.2d at 540 (discussing 113 Wn.2d 479, 489-90, 780 P.2d 1307 (1989)). But ***Faust*** distinguishes ***Purchase*** and ***Christen*** from ***Dickinson v. Edwards***, in which this Court reversed summary judgment on the basis that over-consumption and police observation of apparent intoxication soon after the driver left the drinking establishment "could provide the basis for a reasonable inference about the driver's

appearance when he was served." 167 Wn.2d at 540 (citing 105 Wn.2d 457, 464, 716 P.2d 814 (1986)). Similarly in ***Fairbanks v. J.B. McLoughlin Co.***, this Court held that "observational evidence by a police officer and the victim of a collision obtained shortly after the alleged overservice can give rise to a material question of fact." ***Faust***, 167 Wn.2d at 541 (discussing 131 Wn.2d 96, 103, 929 P.2d 433 (1997)).

Faust makes plain that contemporaneous observation at the time of service is not required, but that observation shortly after last service may suffice:

> Our precedent is clear that jurors are allowed to consider and weigh circumstantial evidence of the appearance of intoxication when the witness's observation occurred within a short period of time after the alleged overservice.

167 Wn.2d at 542. There, this Court reversed the appellate court and reinstated the trial court's denial of a defense motion for judgment as a matter of law, holding that a server's observation that her patron was intoxicated when he left the bar would allow a jury to infer that he was apparently intoxicated at last service. *Id*. at 542-43. As discussed more fully below, this Court held too that the driver's BAC was relevant to corroborate that post-service observation. *Id*.

Relying on ***Purchase***, the appellate court held that the photo of Richard minutes before last service did not even create a fact question as to whether his "intoxication was readily apparent …" Op. at 8-9. It contradicts ***Faust*** to hold that the photo is insufficient as a matter of law, and to consider it in isolation, rather than in conjunction with post-service observations.

It is error to take the question of apparent intoxication away from the jury if the evidence "leaves open the possibility that the jury could infer" apparent intoxication at the time of last service. ***Faust***, 167 Wn.2d at 542. The photo of Richard minutes before service does not just show his eyes closed, they are also glassy and bloodshot. *Compare* Op. at 9 *with* CP 275-76. Based on this photo, Ferguson, whose expertise includes recognizing the signs of intoxication and training others to do so, opined that Richard appeared intoxicated when Frolik last served him, if not earlier. CP 299-300. Her perspective is invaluable to a jury because she can shed light on apparent intoxication in the eyes of a trained professional whose job is largely to spot intoxication and prevent overservice. *Id.* The jury could certainly look at the photo and agree with her – or disagree with her – but *that is its job*, not the court's.

Moreover, the photo must be viewed in conjunction with the observations of Richard obviously intoxicated at the scene. *See* ***Faust***, 167 Wn.2d at 539. Witnesses to the collision stated that he appeared combative, seemingly intent on fighting Patrick. CP 260-61, 295. Police described him as falling-down drunk. CP 241, 248-49, 260-61, 294-95. That is, the evidence of Richard's apparent intoxication was not just the photo taken minutes before last service, but the observations of him immediately after the crash.

But the appellate court was "not persuaded" by these observations because it was "unaware of whether Richard consumed any alcohol after leaving Frolik." Op. at 12. In this way, the court distinguished ***Fairbanks***, in which this Court held that the police officer's observations of obvious intoxication shortly after the driver left an office banquet were sufficient to raise an inference of apparent intoxication at last service, so long as she did not drink in between. 131 Wn.2d at 103. But again, Richard denied consuming any alcohol after leaving Frolik. CP 239. The court is not "unaware of whether Richard consumed any alcohol after leaving Frolik" – he stated that he did not. *Compare* Op. at 12 *with* CP 239.

Even setting aside Richard's admission that his last drink was at Frolik, there is no evidence at all that he consumed more alcohol

after leaving. This gives rise to an additional conflict with ***Fairbanks***, in which the conflicting evidence as to whether the driver consumed more alcohol after leaving the defendant's establishment rendered summary judgment improper. 131 Wn.2d at 102-03. The mere possibility that Richard drank more after leaving Frolik would at best create a fact question, not eliminate one.

The appellate court did not address the duration of time between last service and these observations, stating only that while the driver in ***Purchase*** "was served around three and a half to four hours prior to breath test … Richard was served around two hours before his breath test." Op. at 11 n.8. It is worth noting that ***Purchase*** does not establish when the driver was last served, stating only that her BAC result 3.5-4 hours "after she had left the restaurant." ***Faust***, 167 Wn.2d at 539. Here, police observed Richard wreaking of alcohol from five feet away 97 minutes after Frolik last served him. CP 238-41, 248-49, 259-61, 294-95. That "leaves open the possibility that the jury could infer" apparent intoxication at the time of last service, particularly coupled with the photo. ***Faust***, 167 Wn.2d at 542.

B. The appellate decision conflicts with *Faust* and others in declining to consider that Richard's .18 BAC and over-consumption corroborate contemporaneous evidence of apparent intoxication. RAP 13.4(b)(1)&(2).

The court quickly rejected Richard's .18 BAC result, holding that it does not show "direct observational evidence" under ***Purchase***. Op. at 10-11. That ignores this Court's unequivocal holding in ***Faust*** that "BAC evidence is relevant as corroborative and supportive of the credibility of firsthand observations." 167 Wn.2d at 543. As this Court explained, "BAC is admissible in both criminal and civil cases." *Id*. at 542 (citing RCW 46.61.506(1)). While ***Purchase*** and ***Christen*** provide that BAC is insufficient "*by itself* to establish a triable issue of fact regarding apparent intoxication," BAC evidence is relevant to corroborate and support "the credibility of firsthand observations" at last service or shortly thereafter. 167 Wn.2d at 542-43 (emphasis original) (citing ***Cox v. Keg Rests. U.S., Inc.***, 86 Wn. App. 239, 248-50, 935 P.2d 1377, *rev. denied*, 133 Wn.2d 1012 (1997)). That is, it was for a jury to determine whether Richard's .18 BAC corroborated the picture taken minutes before last service. *Id*. The appellate decision ignores this Court's holding in ***Faust*** and the appellate court's holding in ***Cox***, conflicting with both.

The same is true for the evidence of Richard's copious consumption, which the appellate court also summarily rejected. Op. at 11. In ***Dickinson***, this Court held that overconsumption, along with police observation of intoxication shortly after the drunk driver left the drinking establishment was sufficient to raise a fact question on "obvious" intoxication (the previous standard). 105 Wn.2d at 463. While this Court subsequently referred to ***Dickinson*** as "factually unique," (***Christen***, 113 Wn.2d at 490-91 (quoting ***Purchase***, 108 Wn.2d at 227)) it clarified in ***Faust*** that ***Dickinson*** remains good law. 167 Wn.2d at 542.

The court's refusal to consider expert testimony is incorrect for the same reason – it may corroborate observations at the time of last service, or shortly thereafter. *See* ***Faust***, 167 Wn.2d at 542-43. BAC and related expert testimony may not substitute for observational evidence, but it may corroborate it. *Id*.

This Court should accept review and reverse.

C. This matter raises questions of substantial public interest this Court should determine. RAP 13.4(b)(4).

With little consideration of Richard's copious consumption and obvious intoxication at the scene, the appellate court effectively held that the photo of Richard minutes before last service is insufficient *by*

itself to withstand summary judgment. That decision rests on a story that improperly takes every possible inference *against* Denise. And it reads the law far too narrowly, at odds with controlling precedent. The question is not whether the photo is enough. The question is whether the photo is enough with evidence of Richard's considerable overconsumption and his acknowledgement that he did not drink after leaving Frolik, expert opinion of apparent intoxication, a .18 BAC two hours after last service, and police observation of obvious intoxication at the scene.

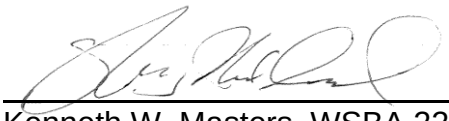
This Court's decision in ***Faust*** speaks loudly on this issue, but apparently not loudly enough. This Court should accept review and further develop this important area of the law.

CONCLUSION

The appellate decision conflicts with cases from this Court and the appellate courts in an area of substantial public interest. This Court should accept review and reverse.

RESPECTFULLY SUBMITTED this 25th day of August 2021.

MASTERS LAW GROUP, P.L.L.C.



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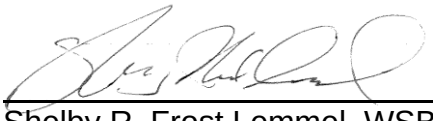

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellant,

v.

RICHARD PECK and JENNIFER PECK, husband and spouse, individually, and the marital community composed thereof; GREATER SEATTLE CONCRETE, INC; LOWE ENTERPRISES REAL ESTATE GROUP, INC., a foreign profit corporation; DESTINATION HOTELS AND RESORTS LLC., a foreign limited liability company; TWO ROADS HOSPITALITY, LLC, a foreign limited liability company; EC RESTAURANTS (SEATTLE) CORP., a foreign profit corporation; 1415 5th AVENUE SEATTLE, LLC, a foreign limited liability company; SEATTLE 1415 HOTEL OWNER, LLC, a foreign limited liability company; KAYA SULLIVAN AND THOMAS L. SULLIVAN, wife and husband, individually, and the marital community composed thereof; LEON JAY JOHNSON and WENDY MARIA JOHNSON, a married couple, individually and the marital community composed thereof; JOHN DOE CHAUFFEUR BUSINESS; JOHN DOES 1-12,

Defendants,

No. 81285-8-I

DIVISION ONE

UNPUBLISHED OPINION

and

DH SEATTLE MANAGEMENT, LLC, a Washington state limited liability company,

Respondent.

SMITH, J. — This case pertains to the tragic death of a young man during a traffic accident in which the other driver was intoxicated. Following a night out drinking at Frolik Kitchen + Cocktails, Richard Peck hit and killed 18-year-old Patrick Wallace.[1] Patrick's mother, Denise Wallace, sued, among other entities and individuals, DH Seattle Management LLC, which owns and operates Frolik. She alleged that Frolik overserved alcohol to Richard prior to the accident. On DH Seattle's motion, the trial court granted summary judgment in its favor, concluding that pursuant to RCW 66.44.200, there was no evidence that Richard was "apparently" intoxicated when he was served alcohol at Frolik. Denise challenges this conclusion on appeal.

Because the photographic and other evidence presented did not provide direct observational evidence that Richard was readily and apparently intoxicated when Frolik served him alcohol, the trial court did not err. Therefore, we affirm summary judgment in favor of DH Seattle.

FACTS

On the evening of May 20, 2016, Richard and Jennifer Peck attended a surprise birthday party for Leon Johnson. A group of individuals attended the

[1] We refer to parties by their first name where it provides clarity.

party, including Richard's coworkers from Greater Seattle Concrete Inc., his supervisor, Thomas Sullivan, and Thomas's wife, Kaya Silkiss-Hero.[2] Silkiss-Hero organized the birthday party, which included a chauffeured limousine service to Seattle from Lake Stevens, Washington. Silkiss-Hero had a cooler with rum and coke in the limousine so that the occupants could make themselves drinks. The limousine picked up the group, including Richard and Jennifer, from Beers & Brauts, where Richard ate and parked his vehicle.

On the way to downtown Seattle, the limousine drove the passengers to Safeway, where Richard bought a bottle of "Fireball" whiskey and an energy drink. Another passenger bought a bottle of rum. An image shows Richard holding a bottle of Fireball in the limousine around 9:00 p.m., but Richard testified that he did not drink it. Jennifer later told an officer at the scene of the accident that Richard had "a few drinks of the Fireball whiskey in the limousine and also a Jack Daniels and Coke."[3]

The limousine next dropped the passengers off at Add-a-Ball arcade bar, where Richard had one 12-ounce beer. They left shortly after arriving, and around 10:00 p.m., the limousine dropped the group off at Frolik, a rooftop bar in Seattle. Witnesses later testified that, when they arrived at Frolik, it did not appear that Richard had consumed or purchased alcohol yet.

At some point, Richard stepped outside to smoke a cigar. Outside,

[2] At the time of the accident, Sullivan and Silkiss-Hero were married but had divorced by the time of the complaint and Silkiss-Hero had changed her last name.

[3] It is not clear if this statement referred to the limousine ride to Seattle or from Seattle.

Richard met two men with whom Richard discussed his service in the Marines. The men offered to buy Richard a drink when they returned to Frolik. Richard showed the bartender the stamp on his hand to verify that he was over 21 years of age before the men bought him a "Tokyo Tea." After he finished the drink at the bar, one of the men ordered a second tea for Richard, and the three individuals continued to speak at the bar. Richard later testified that he did not feel the effects of the drinks until after his second tea, but he did feel the effects while he was still at Frolik. Frolik had two receipts that included two Long Island iced teas sold at 10:36 p.m. and 10:53 p.m. A photograph of Richard at 10:43 p.m. shows his eyes not opened all of the way. Testimony from individuals at Frolik indicated that they did not see Richard drinking, that he did not appear intoxicated, or that they did not see him at all.[4]

The group left Frolik between 11:15 p.m. and 11:30 p.m.[5] A photograph taken during the drive shows Richard with bloodshot eyes. Silkiss-Hero, however, testified, "I think that [Richard] had consumed alcohol through the night and that he was sober—appearing sober enough to operate a motor vehicle" when he left Beers & Brauts. Richard and Jennifer left Beers & Brauts, and Richard began the drive back to their home.

At around 12:15 a.m. on May 21, 2016, Richard drove his vehicle into a small car driven by Patrick. Richard failed to stop at a red light, driving through

[4] Witnesses testified, "I don't recall [Peck] showing any visible signs of intoxication," and "He seemed fine."

[5] The last photograph taken at Frolik was taken at 11:11 p.m. and testimony indicated that the group left shortly thereafter.

the light at a high speed and colliding with the driver's side of Patrick's vehicle. Patrick died instantly. Richard got out of his vehicle following the accident and "was very agitated."

Washington State Patrol Trooper John Axtman arrived at the accident scene and administered field sobriety tests (FSTs), which Richard failed "overwhelmingly," unable to stand and smelling strongly of intoxicants.[6] Richard made varying statements to the arresting officers, including that he had one and a half beers beginning at 5:30 p.m., that he had "a couple of beers with dinner," and that he had no more than three beers total that night. The reporting officers found "a fifth bottle of Fireball . . . behind the front passenger seat of the vehicle." And at around 1:04 a.m., Trooper Axtman obtained a portable breath test, showing Richard's blood alcohol concentration level (BAC) was .177 g/100ml—well above the legal limit for driving a motor vehicle.

Trooper Axtman arrested Richard and transported him to Providence Regional Medical Center in order to obtain a blood draw. While waiting for the nurse, Richard could not stay awake and was falling over. The blood draw taken at 2:33 a.m. showed that Richard's BAC at that time was .18 g/100ml. His blood also showed that he had consumed or smoked marijuana. Richard later pleaded guilty to a charge of vehicular homicide and received a 78-month sentence.

Denise sued DH Seattle under RCW 66.44.200, which prohibits the sale of liquor to any person apparently intoxicated. And DH Seattle admitted that "at all relevant times it was responsible for operations and management of" Frolik.

[6] Richard showed almost all signs of intoxication according to the FSTs.

DH Seattle moved for summary judgment. In response, Denise provided an expert declaration by Joseph C. Anderson, Ph.D., which concluded that, in order to have the BAC that Richard had at the time of the accident, Richard would have had to consume around eight standard drinks before having consumed the two Tokyo Teas between 10:30 and 11:00 p.m. Dr. Anderson asserted that "[b]ased on the materials I've reviewed in this case and my expertise, my opinion, on a more probable than not basis and to reasonable degree of certainty, is that Mr. Richard Peck would have appeared to be intoxicated when he was served his last drink at approximately 10:53 PM." Another expert, Patricia Ferguson, asserted that "[i]t was irresponsible for staff at Frolik to serve Mr. Peck *any* alcohol so soon after serving him the first Tokyo Tea without doing a full assessment of demeanor."[7] Ferguson also asserted that "judging from the amount of alcohol that . . . is reported . . . that he consumed, I would say that there was a good possibility that he was showing signs of intoxication." Ferguson, however, admitted that there was no evidence of direct observation of Richard's intoxication at the time he was served either teas at Frolik.

The trial court granted the motion finding that, "[w]hile there are issues of fact concerning how much Mr. Peck had to drink prior to Frolik," the photographic evidence presented by Denise was "woefully insufficient to show apparent intoxication," and "the pictures in this case [were] insufficient as a matter of law to show Mr. Peck to be apparently intoxicated at Frolik."

[7] (Emphasis in original.)

Denise appeals.

ANALYSIS

Denise asserts that the trial court erred when it granted DH Seattle's motion for summary judgment and when it found that she "fail[ed] to provide any evidence of apparent intoxication at the time of service." Because Denise failed to provide evidence sufficient to demonstrate an issue of material fact, we disagree.

We review summary judgment orders de novo, viewing all evidence and reasonable inferences in the light most favorable to the nonmoving part. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Under CR 56(c), "summary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (alteration in original).

RCW 66.44.200(1), the overservice statute, provides that "[n]o person shall sell any liquor to any person apparently under the influence of liquor." "Businesses that violate the statute by serving drunk drivers will be civilly liable to third-party victims for damages caused by their patron." Faust v. Albertson, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). To survive summary judgment in an overservice case, "evidence on the record must demonstrate that the tortfeasor was 'apparently under the influence' by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter." Faust, 167 Wn.2d at 539. "'Apparently' means 'readily

perceptible to the senses and *capable of being* readily perceived by the sensibilities or understanding as certainly existent or present.'" Ensley v. Mollmann, 155 Wn. App. 744, 756, 230 P.3d 599 (2010) (internal quotation marks omitted) (quoting Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 268, 96 P.3d 386 (2004)).

Purchase v. Meyer, 108 Wn.2d 220, 737 P.2d 661 (1987), is instructive. There, El Torito restaurant had served Mary Margaret Meyer, a minor, three margaritas. Purchase, 108 Wn.2d at 222. Sometime after leaving El Torito, Meyer crashed her vehicle into David Purchase's motorcycle, injuring Purchase. Purchase, 108 Wn.2d at 222. At that time, Meyer had a BAC of 0.13 g/100ml. Purchase, 108 Wn.2d at 222. Purchase sued El Torito under the overservice statute, and the trial court denied El Torito's motion for summary judgment. Purchase, 108 Wn.2d at 222. However, Purchase provided no testimony indicating that anyone believed Meyer was intoxicated at the time that El Torito served her. Purchase, 108 Wn.2d at 222.

On appeal, the court reversed the trial court's decision to deny El Torito's motion, noting: "It does not [necessarily] follow . . . that a person who is apprehended driving with a bac of .10 [g/100ml] . . . was also 'obviously intoxicated' for purposes of the Washington State Liquor Act[, Title 66 RCW,] when, at some earlier time, an intoxicating beverage was sold to that person." Purchase, 108 Wn.2d at 226. It concluded that "the results of the alcohol breath test taken hours after the minor was served alcoholic beverages at the El Torito restaurant was not competent evidence against El Torito." Purchase, 108 Wn.2d

at 226-27.

Similarly, here, Denise failed to present evidence showing that Richard's intoxication was readily perceptible when Frolik served him alcohol. Richard received two drinks while at the bar within a short period of time. The bartender saw Richard when Richard showed them his hand stamp to verify his age. And it is clear that, at some point, Richard became highly intoxicated, but there is no evidence that it was before Frolik served Richard either the first or the second Tokyo Tea. To this end, witnesses present at Frolik indicated that Richard did not appear intoxicated during his time there.

In addition, the photographs taken at Frolik do not show that Richard's intoxication was readily apparent to the senses. One photograph shows Richard with no apparent signs of intoxication, and a second photograph shows Richard with his eyes shut or partially opened. Although Ferguson alleged that the latter photograph was proof that Richard appeared intoxicated, the photograph is insufficient to create an issue of material fact as to whether Richard was apparently intoxicated when Frolik served him. Specifically, this type of evidence typically is used to corroborate evidence that someone was apparently intoxicated, and relying solely on the photograph of Richard at Frolik as proof of his apparent intoxication would require a jury to speculate that Richard's eyes were closed because he was intoxicated. But Denise had to provide direct observational evidence at or near the time of service that supports a finding that a server could readily perceive Richard's intoxication; the photographs do not. And those who observed Richard firsthand at Frolik testified that he did not

appear intoxicated. Cf. Faust, 167 Wn.2d at 541 (Case law "allow[s] juries to draw inferences from firsthand observations of a person's intoxication and to make any related credibility determinations."). Therefore, even taking the evidence in the light most favorable to Denise, she presented insufficient evidence to withstand DH Seattle's motion for summary judgment. See Becker v. Wash. State Univ., 165 Wn. App. 235, 245-46, 266 P.3d 893 (2011) (Once the moving party shows there are no genuine issues of material fact, "[t]he nonmoving party may not rely on speculation . . . 'for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.'") (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

Denise disagrees and relies heavily on Richard's high BAC, which the officers took following the accident, and her experts' conclusions that Richard likely was apparently intoxicated. Under Purchase, the results of the breath test and the blood draw, and Denise's experts' opinions do not show direct observational evidence that Richard was intoxicated when he was last served at Frolik. See Purchase, 108 Wn.2d at 226-27 (concluding that the same type of evidence was insufficient as a matter of law to show that the individual was apparently intoxicated); see also Ensley, 155 Wn. App. at 756 ("[A] person's appearance a substantial time after the service is insufficient evidence of apparent intoxication to defeat summary judgment."). Although the time differed between El Torito serving Meyer and her accident, and Frolik serving Richard

and his accident, like in Purchase, Denise fails to provide direct observational evidence showing that Richard was apparently intoxicated when he was at Frolik an hour before the accident.[8] Cf. Dickinson v. Edwards, 105 Wn.2d 457, 460, 716 P.2d 814 (1986) (holding that officer's testimony regarding what they directly observed ten minutes after the intoxicated individual left the bar where they were served alcohol was sufficient to withstand summary judgment).

Denise also points to Richard's alleged statements to the arresting officers where he indicated that he drank at a restaurant in Snohomish to one officer and that he had one to one and a half beers since 5:30 p.m. She uses these statements to support her factual assertion that "Richard acknowledged that he started with three 18-to-20 ounce beers." But the record does not provide evidence of that fact. Rather, Richard allegedly told one of the arresting officers that he had three beers prior to the accident, not specifically prior to Frolik. Furthermore, "[e]vidence of the amount of alcohol consumed is insufficient to establish that the person was apparently under the influence at the time of service." Ensley, 155 Wn. App. at 756.

Denise cites Fairbanks v. J.B. McLoughlin Co., 131 Wn.2d 96, 929 P.2d 433 (1997), for the proposition that evidence of intoxication shortly after service can be sufficient to show that an individual was apparently intoxicated when they were overserved. In Fairbanks, the driver of an automobile, Ann Neely, attended a company Christmas party before hitting Carolee Fairbanks' vehicle and causing

[8] In Purchase, Meyer was served around three and a half to four hours prior to the breath test. 108 Wn.2d at 222. But Richard was served around two hours before his breath test.

her injuries. 131 Wn.2d at 98-99. Fairbanks sued the company, J.B. McLoughlin Co., for vicarious liability. Fairbanks, 131 Wn.2d at 100. McLoughlin moved for summary judgment and submitted Neely's declaration stating that she went to a bar following the Christmas party and before the accident. Fairbanks, 131 Wn.2d at 100. However, Neely originally had testified that she left the party immediately prior to the accident, and Fairbanks produced additional evidence that Neely did not go to the bar. Fairbanks, 131 Wn.2d at 98-100. The court concluded that there was an issue of material fact as to whether Neely was intoxicated after she left the banquet because of the contradicting evidence regarding whether she went to a bar after the party. Fairbanks, 131 Wn.2d at 102-03. The court held that

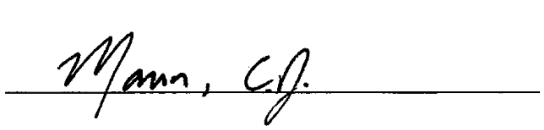
> [a] police officer's subjective observation that the employee was obviously intoxicated shortly after leaving the banquet may raise an inference that she was obviously intoxicated when the employer served her, provided that the employee did not consume any alcohol after leaving the banquet and provided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

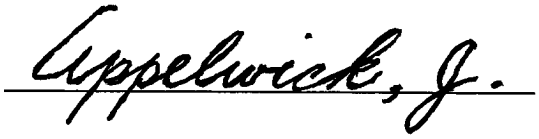
Fairbanks, 131 Wn.2d at 103.

Fairbanks is distinguishable because, here, we are unaware of whether Richard consumed any alcohol after leaving Frolik, and testimony of those who observed him at Frolik, at least an hour prior to the officers' observations and the breath test, indicated he did not appear intoxicated. Thus, even under Fairbanks, the observational evidence of Richard after the accident does not create an issue of material fact as to whether Richard was apparently intoxicated at Frolik. Thus, we are not persuaded.

For these reasons, Denise failed to present evidence sufficient to create an issue of material fact as to whether Richard was apparently intoxicated when Frolik served him alcohol. Therefore, we affirm.

WE CONCUR:





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