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NO. 66101-9-I

WASHINGTON STATE COURT OF APPEALS
DIVISION I

TAYNA OSHATZ,
Appellant,

vs.

GINSING, LLC, dba THE WILD GINGER and
THE TRIPLE DOOR,

Respondent(s).

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY
THE HONORABLE DOUGLASS A. NORTH

APPELLANT'S AMENDED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in disregarding numerous material factual disputes in dismissing all claims against the defendant Ginsing, LLC.
2. The trial court erred in limiting its analysis of Ginsing's liability to the plaintiff's status as a business invitee.
3. The trial court erred in disregarding the plaintiff's expert testimony that the defendant was negligent in ejecting the defendant Crossen onto the sidewalk in front of the restaurant, within a six or seven feet of another patron who he assaulted.
4. The trial court erred in concluding there was no issue of fact regarding the defendant Crossen's intoxication.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the appellant's expert testimony present an independent basis for liability, with respect to the duty owed to a business invitee, once a danger becomes open and obvious?
2. Does the tortfeasor's testimony regarding his copious consumption of alcohol throughout the evening of the

incident, satisfy the *Faust* requirement of “apparent” intoxication, necessary to survive summary judgment?

3. Does the testimony of the appellant or her mother, regarding the obvious intoxication of Crossen, satisfy the Faust requirement for “apparent” intoxication?
4. Can a bar owner immunize itself from liability where its negligence results in a harm immediately contiguous to the bar?
5. Can a bar owner immunize itself from all liability for injury caused by a drunken customer, merely by ejecting the customer onto the sidewalk in front of the bar?
6. Does a business owner’s potential liability to innocent parties injured by a drunk patron, end when the patron is cut-off from further service?
7. Should an appeal proceed where the only remaining defendant in the case does not defend himself, or participate in the litigation, or provide counsel with notice of his whereabouts?

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III. STATEMENT OF THE CASE

A. INTRODUCTION

The defendant Ginsing owns two businesses next door to each other in Seattle; one is a restaurant and the other is a bar. The defendant Brad Crossen went to the bar with friends on the evening of June 21, 2009. He was already “very intoxicated” by his own admission, having consumed at least 16 drinks and smoked marijuana in the prior four hours. His blood-alcohol level was very likely more than three times over the legal limit.

After being served at least two more mixed drinks inside the bar, Mr. Crossen assaulted several persons inside the bar. One employee even testified that Crossen appeared intoxicated. Bar employees ejected him onto the side walk directly in front of the bar, where Mr. Crossen again assaulted the plaintiff in less than a minute. The plaintiff and her mother were business invitees, having just completed dinner at the restaurant next door. Both testified by declaration that Crossen appeared obviously intoxicated by his breath, language and lack of steadiness.

Besides giving a deposition, Mr. Crossen has shown no interest in defending himself or participating in this litigation. He is

the only remaining defendant in the action still pending in the trial court. His present whereabouts is unknown. The plaintiff appeals a summary judgment granted by the trial court, dismissing the defendant owner of the bar and restaurant – Ginsing, LLC.

B. THE PLAINTIFF IS INJURED

Tanya Oshatz is forty-one (41) years of age and employed by a Swedish pharmaceutical company with business operations in the U.S. She is based in Seattle but travels extensively as part of her job. CP 128 at par. 5. On June 21, Tanya’s mother was visiting Seattle from Oregon and the two decided to go out to dinner. Tanya had been to the Wild Ginger and its neighboring establishment, the Triple Door, on several prior occasions. CP 128 at par. 6. She believed that they were owned by the same company because they shared many of the same menu items. CP 129 at par. 7. Because of these prior visits, Tanya had no reason to be concerned with the safety for herself and her mother. *Id.* At par. 6.

On their way to the Wild Ginger, the pair heard live music as they approached the Triple Door. They stopped at the Triple Door, said hello to the doorman, and looked inside. CP 128 at par 7. However, they could not find a table so they went around the corner to the Wild Ginger. CP 128 at pars. 6 and 7 and CP 129 at par. 8.

Mother and daughter enjoyed a slow dinner that began around 9 pm. They stayed for “almost two hours” (CP 129 at par. 8) and left before 10 pm. As the pair walked out of the Wild Ginger, they turned the corner at 3rd Avenue and Union Street and began walking down Union to their car on 2nd Avenue. As they approached the Triple Door right around the corner, the doorman recognized them and asked if they wanted to go in. *Id.* at par. 9. They paused for a moment, thinking they might enter, and then said “no thank you,” or words to that effect. *Id.*

Both women then turned to look across the street, trying to read the inscription on the side of Benaroya Hall. The women had their backs to the Triple Door, just six or seven feet from the front of the entrance to the bar. Just then, Brad Crossen walked up from behind and asked Tanya where she came from, or words to that effect. CP 130 at pars. 11 and 12.

Within just a few seconds after that, and before Tanya knew what was happening, Crossen bent over, grabbed Tanya around the knees, and then stood up, throwing her completely over his right shoulder. CP 130 at pars. 11-13. Tanya kept going and landed on the sidewalk behind Crossen, on her shoulder. Police were immediately called to the restaurant and Crossen was

arrested and taken to jail. No blood or breathalyzer test was ever performed on Mr. Crossen by police that evening. CP 86 at 21/12-13. However, Tanya and her mother testified that Crossen was obviously drunk.

C. CROSSEN WAS “VERY INTOXICATED” BEFORE ARRIVING AT THE TRIPLE DOOR BY HIS OWN ADMISSION

Mr. Crossen testified that he began smoking pot and drinking right after he got off work on Friday, June 21, 2009. He went his apartment and began by smoking marijuana “right around 5 pm.” CP 87 at 25/4-11. Around 6 pm, he drank two “big energy drinks infused with alcohol”¹ and four to five beers. CP 86 at 21/17 – 22/14. Around 7 pm, Crossen met a former co-worker, Edwin Briceno, at the Ram Restaurant (CP 87 at 22/17-19) and began

¹ This testimony was given by Mr. Crossen five months before the nationally publicized incident in Roslyn, Washington, on October 8, 2010, involving a party where CWU students were consuming the kind of beverage described by Mr. Crossen. Nine students were hospitalized and one was placed in a medically-induced coma, for alcohol poisoning following the consumption a caffeinated alcohol beverage called Four Loko. See “Caffeine and Alcohol Drink Is Potent Mix for Young,” *New York Times*, October 26, 2010. On November 10, 2010, the state Liquor Control Board issued an emergency rule banning the sale of alcohol energy drinks in Washington effective November 18, 2010. Encouraged by Attorney General Rob McKenna, the FDA began regulating such beverages. See Attorney General McKenna’s November 17, 2010 press release, “Attorney General McKenna Applauds FDA’s Action to Regulate Alcoholic Energy Drinks,” at the agency’s website: <http://www.atg.wa.gov/pressrelease.aspx?&id=26850>. Alcohol energy drinks are almost always sold in large cans varying in size from 16 to 32 fluid ounces, and have an alcohol content greater than beer, according to commonly available consumer information on the internet and elsewhere.

drinking “quite a few” more beers (CP 82 at 4/12-5/3). When asked whether he felt like he was “under the influence” when he left the Ram, Mr. Crossen replied with one word: “Yep.” CP 83 at 7/12. But he did not stop there.

After leaving the Ram, Mr. Crossen and Mr. Briceno walked across the street to Mr. Briceno’s apartment. There, the two men continued to drink more beer and “quite a few” vodka drinks. *Id.* at 7/15-20. At this point, Mr. Crossen unequivocally admitted that he was “very intoxicated.” *Id.* at 7/24-25. He does not know how much he had to drink at Mr. Briceno’s apartment---he testified “I just remember drinking a lot of vodka.” *Id.* at 8/1. The two men then left Briceno’s apartment and Briceno drove them to the Triple Door in Seattle. On the way, Crossen drank more beer in the car. CP 83 at 8/10-15.

It is no wonder that Mr. Crossen blacked out before leaving Mr. Briceno’s apartment. He had smoked marijuana; then consumed two large alcohol energy drinks; then drank 4-5 beers before leaving his apartment; then drank “quite a few more beers” at the Ram; then drank “a few more” beers and “a lot of vodka” at his friend’s apartment; then still more beer on the way to Seattle. A reasonable inference of “quite a few” beers that Crossen drank at

the Ram, would be at least three beers. At his friends apartment, he drank “quite a few” more beers (CP 83 at 7/19-20) and “a lot of vodka.” A reasonable inference of this testimony would be at least three more beers and three vodkas at Briceno’s apartment. About this time, Mr. Crossen’s memory fails because he blacked out, even though he was still able to move about and apparently communicate. And he was at least functional enough to drink at least one more beer on the way to Triple Door.

The total amount of alcohol and drugs Mr. Crossen consumed before arriving at the Triple Door is stunning. He smoked marijuana; then between 6 pm² and 10 pm³, he drank two large alcohol energy drinks and at least four beers at his apartment; then he drank at least three beers at the Ram; then he drank at least three more beers and three Vodkas at Mr. Briceno’s apartment; then he drank at least one beer on the way to the Triple Door. *That is a total of at least 16 drinks over a three hour period, but likely more.* And then there is the marijuana that Crossen also smoked at his apartment.

² This is the time that Mr. Crossen claims he began drinking at his apartment. CP 86 at 21/17 – 22/14.

³ This is the time that Tanya Oshatz and her mother left the Wild Ginger and Tanya was assaulted. CP 129 at par. 8.

One of the principal issues in this appeal is this: *Does Mr. Crossen's own testimony raise a factual issue as to whether he was "apparently" intoxicated when he arrived at the restaurant?* The answer is clear: *absolutely*. Since common sense dictates that most humans, including jurors, would not even be able to stand upright after consuming such volumes of intoxicants, the plaintiffs urged the trial court to consider this factual issue. It did not.

D. GINSING SERVES CROSSEN EVEN MORE ALCOHOL

Crossen testified that he was so drunk after leaving Mr. Briceno's apartment, that he does not even recall arriving at the Triple Door. CP 83 at 8/16. He does recall later talking with a Caucasian female bartender, but he could not recall "the specifics." *Id.* at 8/21-2/6. He had "some type of big mixed drink" (CP 83 at 9/11-12) at the Triple Door, which was probably a Long Island Iced Tea (*Id.* at 9/13-16), in addition to a smaller drink.

According to *Wikipedia*, the drink commonly referred to as a Long Island Iced Tea has the following contents:

A Long Island Iced Tea is a highball made with, among other ingredients, vodka, gin, tequila, and rum. A popular version mixes equal parts vodka, gin, tequila, rum and triple sec with 1½ parts sour mix and a splash of cola. Most variants use equal parts of the main liquors but include a smaller amount of triple sec (or other orange-flavored liqueur). Close variants

often replace the sour mix with sweet and sour mix or with lemon juice, the cola with actual iced tea, or add white crème de menthe; however, most variants do not include any tea, despite the name of the drink. Some restaurants substitute brandy for the tequila. A true Long Island Iced Tea, as it was originally made, has always had tequila.

The drink has a much higher alcohol concentration (about 28 percent) than most highballs because of the proportionally small amount of mixer. Long islands can be ordered "extra long," which further increases the alcohol to mixer ratio.

http://en.wikipedia.org/wiki/Long_Island_Iced_Tea (emphasis in original).

E. GINSING EMPLOYEES SAW CROSSEN COMMIT MULTIPLE ASSAULTS IN THE CLUB

The record of the case includes the declarations of six Ginsing employees: Miller, Echert, Ferrante, Holloman, Hasko and Pak. Miller testified that Crossen was "rude" and declined an order for a drink, CP 59 at lines 22. Miller also saw Crossen in a "scuffle" and facing off with another patron "arguing." *Id.* at lines 23-25. Miller also saw Crossen make another "general threat toward another patron." *Id.* at lines 25-26. Miller then "isolated Crossen so he could not go after anyone." CP 59, line 25 – CP 60, line 1.

Echert testified that he was the doorman at the Triple Door and that he was working when Crossen was ejected from the bar.

CP 63-64. Two different employees told Echert not to let Crossen back in. Echert was “told later that Crossen had hit or tried to hit another patron.” CP 63 at lines 23-25. “Will and Jay released him near the door...” *Id.*

Echert also watched as Crossen picked up Tanya and then saw her fall to the ground. Echert tried to help but Crossen then started pushing and yelling at Echert. Echert then went inside and called 911.

Ferrante testified that he was also an employee at the Triple Door and working on the night of the incident. Cp 55-56. Ferrante testified that an employee (Pak) poured Crossen a drink, but that Hasko stopped her. Crossen then “turned away and pushed another patron behind him.” CP 55 at lines 22-24. Crossen then “made a motion to hit the other patron [and] other patrons stepped in and stopped him.” *Id.*

Holloman was also an employee of the Triple Door and provided a declaration. CP 13-14. Holloman testified that “Crossen was antagonistic toward other customers.” CP 13 at lines 21-22. When Holloman saw the “commotion,” he approached “Crossen as he was having words with another patron” CP 13 at lines 23-24.

“Crossen threatened to pummel another patron, but we surrounded him and started leading him to the door.” CP 13 at lines 24-25.

Hasko, another employee of the Triple Door, testified that he saw Crossen “acting rudely toward customers.” CP 61-61. Hasko, unlike the other employees, indicates a time in his declaration. He states that “some time after 9 pm, this man [Crossen] came up and asked for a drink...He did not seem intoxicated at first, but he stood behind another couple near the bar and was acting rude and I started to notice he was likely under the influence of alcohol.” CP 61 at 23-26.

Pak was working as one of three bartenders at the Triple Door on the evening of the incident. CP 57-58. She testified that Crossen ordered a double rum and coke, but that she only poured him a single. Just as she was “about to hand it over,” she was told that Crossen was being belligerent, so she poured out the drink. CP 57 at line 23 – CP 58 at line 2.

Interestingly, every employee except the doorman Echert, executed a declaration in support of the defendant’s motion for summary judgment, stated the same thing about Mr. Crossen. “I did not see Crossen with any beverages in his possession and to my knowledge nobody at the Triple Door served him anything...” or

words to that effect. CP 14 at lines 8-10; CP 56 at lines 3-4; CP 58 at lines 8-10; CP 60 at lines 4-5; CP 62 at lines 7-8. None of them recall at least two drinks that Crossen testified being consumed at the Triple Door.

F. CROSSEN RECKLESSLY ASSAULTS OSHATZ

Mr. Crossen testified that he had never seen Ms. Oshatz before that evening. CP 86 at 19/20-21. Later, Mr. Crossen's companion, Edwin Briceno, told Crossen that he "seemed really, really drunk." Mr. Briceno also said that Crossen "was like yelling at somebody and like talking to a whole bunch of people and just seeming really drunk." Id. at 19/25 – 20/2. He also said that Crossen was "acting crazy..." Id. at 20/16.

Crossen testified at his deposition about his reckless conduct leading to the injury of Tanya Oshatz:

Q: Do you recall any of the thought processes at all that went into the decision to pick her up?

A: No.

Q: Why would you do that?

A: I just remember like kind of flirting with her and like being real --- her like being real happy, like more celebratory.

Q: So you remember, at least, your intention was to flirt with her, talk her up basically; is that right?

A: That is what I can remember. I can remember hearing her voice but not remember what she was saying at all.

Q: Do you remember anything at all about what you were thinking when immediately before picking her up and falling over with her?

A: I don't remember---I remember my general mood, but not my actual thought process.

Q: So do you have any idea why you physically picked her up off the ground?

A: I don't know why I did that.

Q: You didn't intend to hurt her, but do you know what you did intend?

A: No.

Q: Do you believe that you did intend to pick her up?

A: I can't---it is just hard for me to answer because I don't recall doing it, I just recall being [in a] super happy drunken state.

CP 85 at 15/14 – 16/20.

G. CROSSEN IS CONVICTED

During his deposition, Mr. Crossen testified that it was "typical" for him to drink a lot, but that the night at the Triple Door was "not typical, per se." CP 87 at 23/10-13. Mr. Crossen usually drank at his apartment and rarely went to bars. CP 89 at 33/2-5.

Mr. Crossen testified that he drank that evening “even more than [he] typically would.” *Id.* at 23/15-16. Even though he usually drank 6-12 drinks a day, he usually did not “blackout and not remember large chunks of the evening.” *Id.* at 23/15-23. Since the evening at the Triple Door, Mr. Crossen testified that he has not had any alcoholic drink. After his release from the King County Jail, Crossen moved to California for an in-patient stay at a rehabilitation facility, paid for by his parents. He was there for nearly three months. *Id.* at 25/2-3.

Tanya sustained a third degree shoulder separation for which she later required surgery, and a variety of lesser injuries. CP 3 at par. 2.11. She was “emotionally upset and traumatized by the assault.” CP 4. She was unable to drive a car or work for months after the injury, and again after her surgery. *Id.* Her mother Penelope, who was visiting her from Oregon, moved in with her and cared for her for several weeks. *Id.* Tanya was unable to return to work full-time for six months.

Mr. Crossen sent Ms. Oshatz a letter of apology. CP 88 at 26/2-14. In February of 2010, Crossen pled guilty to a single count

of third degree assault (RCW 9A.36.031(1)(f))⁴ before the Honorable Douglass A. North. CP 43-53. As part of his statement included in the plea, Mr. Crossen stated: "I was extremely intoxicated at the time and did not intentionally harm her," referring to Ms. Oshatz. Mr. Crossen was sentenced to two years of probation, completion of an alcohol treatment program, and ordered to complete 240 hours of community service. He was also ordered to have no alcohol or any contact with Ms. Oshatz. He has apparently complied with all terms of his sentencing and there is no indication in the record of any other contact with law enforcement agencies.

H. THE PLAINTIFF SUES CROSSEN AND GINSING

Four months after her injury, Tanya filed suit against Crossen and Ginsing LLC, the owner of the two establishments---the Wild Ginger and the Triple Door. CP 1-7. Tanya alleged that Crossen was "extremely intoxicated" on the evening of the incident. CP 4 at par. 3.2. She also alleged that Ginsing and its employees

⁴ RCW 9A.36.031(1)(f) provides: (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree...(f) With criminal *negligence*, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. . .
(*Emphasis added*).

either knew or should have known that Crossen was extremely intoxicated. *Id.* She further alleged that Ginsing and its employees “negligently failed to intervene and escort Crossen *out of and away from the premises*, before his conduct escalated from belligerent and disruptive, to assaultive conduct.” *Id.* (*Emphasis added*).

I. GINSING’S MOTION FOR SUMMARY JUDGMENT

Ginsing filed a motion for summary judgment on or about June 3, 2010, after taking Brad Crossen’s deposition a month earlier. The defense did not provide Mr. Crossen with a copy of the motion, or any other pleadings connected with this motion. Neither has the appellant.⁵ The motion was heard by Judge North, who coincidentally presided over Crossen’s entry of guilty plea four months earlier.

Oral argument on the motion was heard on July 2, 2010, by the Hon. Douglass A. North – who coincidentally presided before the hearing four months earlier when Crossen entered his guilty plea. The motion was continued until September on the plaintiff’s objection that additional discovery was necessary to defend the motion, under CR 56(f).

⁵ Appellant’s counsel tried to reach Mr. Crossen at the address he provided in his deposition but he no longer resides at his parents’ home. Mr. Crossen has not contacted counsel to provide any new contact information where he can be located.

The plaintiff then filed declarations of additional witnesses, which included photographs of the scene where the incident occurred. The plaintiffs also obtained a video clip from a Triple Door surveillance camera, which filmed the entire incident involving Crossen and Oshatz. Several frames of this video were also submitted to the court.

A sur-reply was also filed by the plaintiff, which was inadvertently omitted from the record of this appeal. Appellant will file a motion to supplement the record with the sur-reply.

Ginsing's motion for summary judgment does not follow the form prescribed by the Local Rules to the extent that it does not specifically identify the relief sought. However, the first paragraph of the motion (CP 15) suggests that Ginsing sought relief on two bases, as a matter of law:

1. That the plaintiff's claims against Ginsing be dismissed because her injuries were caused by the "intentional actions of co-defendant Crossen;" and
2. If Ginsing is not dismissed, then Ginsing should not be held jointly and severally liable because Crossen's acts were intentional.

Even if Crossen *deliberately* intended to cause bodily injury and harm to the plaintiff, however, this is not a basis for the dismissal of the plaintiff's complaint. If Crossen was an intentional tortfeasor, it would have only affected the apportionment of liability. See RCW 4.22.070. Ginsing sought a determination as to the applicability of *Tegman v .Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).⁶

J. THE PLAINTIFF'S OPPOSITION TO THE MOTION

1. THE DECLARATION OF TANYA OSHATZ

Tanya Oshatz submitted a declaration in opposition to the motion for summary judgment. CP 127-133. She testified in her declaration that:

12. I nearly fell over backwards from the smell of alcohol on Mr. Crossen. It was immediately obvious to me and my mother that he was totally and absolutely drunk. He had trouble standing up and he slurred his words. There was no doubt whatsoever that he was extremely intoxicated. As he picked me up, he sort of tossed me over his shoulder. I knew immediately that I was in trouble; Mr. Crossen was simply too drunk and unstable. He dropped me upside down onto my right shoulder, on the cement. He barely avoided landing on me himself.

⁶ Third degree assault does not constitute an intentional tort. See RCW 9A.08.010, which sets forth the requirements of culpability and distinguishes between intentional acts, knowing acts, reckless acts, and criminally negligent acts – which require no scienter whatsoever. See *State v. Koch*, 157 Wn. 2d (2010), for a discussion regarding these distinctions, particularly with respect to assault. See also RCW 9A.16.090.

14. When I learned that managers of the Triple Door had just ejected him, it made me angry. Why would they deposit an extremely drunk person right outside the doors, who had just assaulted two or three people inside?

15. In just a few steps, Mr. Crossen was right in front of me and my mother. Isn't it the job of restaurant managers to protect their patrons from people like this? Or at least warn them? I thought it was.

16. In the past when I visited the Triple Door, I saw the doorman to the Triple Door organize lines of patrons on the sidewalk in front of the restaurant. I have also seen the doorman clear panhandlers from the sidewalk and alley, who were annoying customers. It seemed to me that the Triple Door always exercised control over the sidewalk in front of the club when their interests were at issue.

17. Had I been standing across the street, or down the street, or up the street, I would not be upset with the actions of the Triple Door managers. They cannot reasonably be expected to keep those areas safe for their patrons. But the sidewalk directly in front of the Triple Door? That is different. They must think so too, because they have cameras outside the entrance to the Triple Door and in the alley. Why is it important for them to monitor this area if they claim they have no control over what happens there?

2. THE DECLARATION OF PENELOPE OSHATZ

Penelope Oshatz also provided a declaration in opposition to the defendant's motion for summary judgment. CP 134-137. She corroborated her daughter's testimony and asserted the following:

5. While we were looking at Benaroya Hall, and with no notice at all, we were approached from behind by a man I now know to be Brad Crossen. We were not warned in any way that he had just been ejected from the Triple Door for drunkenness and attacking customers.

6. As Mr. Crossen moved around in front of us, I immediately noticed that he was extremely drunk. The odor of booze was all over him and he was unsteady on his feet. Without any warning, he bent over and picked up Tanya and tried to lift her to his shoulder. Almost as soon as he did so, they both crumpled to the ground. I could see that Tanya was immediately hurt.

. . .

7. Had we been told first that the restaurant was about to eject a young man who was both drunk and attacking customers, we would have practically run to our car on Second Avenue before he even came out the door. I strongly believe that the managers of the Triple Door should have warned us before they shoved Mr. Crossen out the door right behind us.

CP 135.

3. THE DECLARATION OF STEVEN OSHATZ

As Tanya Oshatz indicates in her declaration, the Triple Door operates two security cameras on the outside of the building. One is near the entrance to the club which, according the Ginsing, was inoperative on the evening of the incident. It would have provided the best view of what actually happened. However, investigating detectives from the Seattle Police Department were

able to obtain a video clip from the camera attached to the side of the building in the alley, and about 50 feet away. The camera has a fixed view looking from the alley towards Union Street and (just barely) captured Mr. Crossen approaching Tanya and her mother, and the subsequent injury to Tanya.

Tanya's father in Oregon received a CD of this video clip, which was branded with a Seattle Police Department label. It was hand-carried to him in Oregon by his wife, Penelope. From the video, Mr. Oshatz was able to isolate several frames from a span of about 53 seconds.⁷ These frames reveal 1) precisely where Tanya and her mother were standing before the assault; 2) the position of Tanya and her mother as Mr. Crossen approached them; 3) Mr. Crossen bending over and picking up Ms. Oshatz; 4) both of them falling to the sidewalk; and then 5) two other men (Mr. Crossen's friend and the doorman) attempting to intervene. The video also shows the elapsed time in which all of this took place---53 seconds. There is no audio track with the video clip

4. THE DECLARATION OF GORDON NACCARATO

⁷ The video frames attached to Mr. Oshatz's declaration (CP 140) are mistakenly dated June 22, 2009. The same frames show a starting time of 00:21:07, or twenty-one minutes after midnight. This, too, is incorrect, according to all information about the incident. However, the elapsed time on the video clip appears to be correct.

The plaintiff submitted the declaration of Gordon Naccarato in opposition to the Ginsing's motion for summary judgment. CP 141 – 144. Mr. Naccarato testified that he is the chef and one of the owners of the Pacific Grill restaurant located in Pierce County. The Grill is a full-service, upscale restaurant similar to the Wild Ginger and Triple Door. The restaurant's customers are usually professionals, tourists and guests of the adjoining Marriot, for which the restaurant provides room service. Mr. Naccarato has been in the restaurant business for 30 years as a chef, executive chef, general manager, and owner of restaurants located in Aspen, Miami Beach, Los Angeles, New York, and Tacoma.

Mr. Naccarato testified in his declaration that the duty of a restaurant and bar to exercise reasonable care for the safety of its customers extends to the area immediately outside the establishment --- *“at least where the restaurant owner or operator has specific knowledge of an actual danger which the customers lack.”* CP 143 at par. 8.

Mr. Naccarato further testified:

9. For example, if a crack in the sidewalk in front of our restaurant caused customers to frequently fall and injure themselves when entering our restaurant, and I knew it, I do not believe that I could repeatedly

avoid liability to my customers by claiming it was the city's responsibility and not mine.

10. I do not believe that a business has a duty to protect customers from every danger that might be encountered on the way to the business. I cannot protect or warn customers who park down that street, from dangers they encounter on the way to my restaurant, that I do not know about. However, this is not what happened here. It seems clear that the restaurant here was not only aware of the danger, but *created* the danger.

11. I believe that the negligence is different when the restaurant's own employees create the danger on the sidewalk---as in the case of a customer who is ejected onto the sidewalk for being drunk and assaultive. This is a frequent situation in the restaurant and bar business and presents an unusually high risk of harm to customers standing right outside the door, unless they are protected or warned.

12. In this case, the employees of the restaurant and bar indicated their subjective knowledge by their own conduct: the employees believed the drunk and assaultive person was too dangerous to remain inside the restaurant with customers. Why is the drunk and assaultive customer any less dangerous to customers on the sidewalk directly in front of the restaurant?

13. I specifically believe that restaurant and bar employees have a duty to protect or warn its customers on the outside of the business, before ejecting a person they know to be drunk and *assaultive*.

14. The first solution is to call the police, but frequently they arrive too late to prevent harm. In those situations, my employees have actually surrounded customers we believed represented a

danger to other customers, and tried to move the person away from other customers until police arrived. When that is not possible, our duty is [to] warn customers so they can avoid the danger themselves, by whatever means are available to them. My understanding is that the Triple Door made no effort to protect or warn the plaintiff that they were ejecting a drunk and assaultive customer within a few feet directly behind her.

15. In my opinion, it is an unreasonable breach of the restaurant's duty to eject a drunk and *assaultive* customer on the sidewalk in front of other customers, without first taking steps to protect or warn those customers outside, and giving them an opportunity to come into the restaurant or get away from the assaultive customer.

5. THE PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

The plaintiff submitted a supplemental memorandum on August 2, 2010. CP 152 – 157. The memo mistakenly asserts “this is not a premises liability case.” CP 154. In fact, there are elements of a premises liability case, in the facts of this appeal.

K. CROSSEN DISAPPEARS

At his deposition, counsel for the appellant made the following remarks at the conclusion of Mr. Crossen's testimony:

Q: I am not sure if you have been provided with a case schedule sheet, along with the summons and complaint. If you haven't, I will send you a copy. My telephone number, my office number, is 206-527-2700, it will be on the transcript when you get it. I am happy to give it to you also after the deposition.

MR. BOLIN: Gordon's telephone number is?

MR. HAUSCHILD: 206-386-0124.

Q: You can contact either of us if you are unrepresented and you have questions about any part of the proceedings. We have a trial date in the case. I think it is a little more than a year away and there may be some proceedings or motions filed between now and the trial date that require us to contact you again about that. If you move, change numbers, leave the state, do any of those things, please contact us so we can at least keep you in the communication loop through the trial date. All right?

A: Yes.

Q: Have you got any questions for us about the communication process from here?

A: No.

MR. BOLIN: That is all I have. Thank you.

CP 90 at 35/7 – 36/5

Mr. Hauschild continued the deposition with a few more questions:

Q: Do you intend to defend yourself in this lawsuit?

A: I don't think so. I don't really have any money.

Q: Do you understand that if you fail to defend yourself in this lawsuit or choose not to, that you may end up with a judgment entered against you for money?

A: Yeah.

Q: What do you think of that? How would you pay a judgment?

MR. BOLIN: Object to the form.

A: I don't know.

Q: Do you feel like you have an obligation to assist her in making her claims in this case or to not defend yourself because of the injury that she suffered?

MR. BOLIN: Object to the form.

A: I mean, I feel horrible about what happened. I don't know what else to do. I mean, I am a convicted felon, and I don't know how I am going to get a job and do that, but---I don't know how to answer that.

CP 90 at 36/20-37/15.

The trial court entered an order dismissing the plaintiff's claims against the defendant Ginsing, LLC, on September 7, 2010. This appeal was initiated with the filing of a notice of appeal timely filed on October 7, 2010.

Despite the dismissal of Ginsing, and despite the unknown whereabouts of Brad Crossen, Tanya Oshatz intended to proceed to trial against Crossen in King County. She was, however, reluctant to take a default judgment against Mr. Crossen any earlier than the scheduled trial date, in the event he reappeared. She wanted to tell a jury about her case, provide Crossen with an opportunity to defend, and let a jury return a verdict. The week

before trial, however, it became clear that Mr. Crossen was not going to reappear. Ms. Oshatz therefore noted a motion for a default judgment against Crossen to be heard on the latest possible date: the originally scheduled trial date of Monday, April 4, 2011.

Ms. Oshatz received a default judgment against Mr. Crossen in the amount of \$998,264.51. The judgment against Mr. Crossen will now likely energize the respondent Ginsing to renew its claims in the trial court, that Crossen's conduct was intentional and therefore supported their motion for summary judgment. The default judgment against Crossen may also cause the Court of Appeals to take a closer look at the plaintiff's claims of business invitee liability, asserted in the complaint. The plaintiffs have therefore addressed both of these issues in the instant brief.

IV. LAW AND ARGUMENT

A. THE MOVING PARTY'S BURDEN IN A MOTION FOR SUMMARY JUDGMENT

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court, viewing the facts and all reasonable in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only

where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c) *Jones*, 146 Wn.2d at 300-01. The sole consideration is whether the pleadings, affidavits, depositions, and admissions on file show that there is no genuine issue as to any material fact. *Teagle v. Fischer & Porter Co.*, 89 Wn. 2d 149, 152, 570 P.2d 438 (1977).

In the trial court, the parties briefed and argued Ginsing's liability in part, under premises liability law. The court concluded that, since the injury occurred on the sidewalk at the entrance to the Triple Door, any claim based on traditional theories of premises liability may not apply.

In *Mucsi v. Graoch Assocs. P'ship # 12*, 144 Wn.2d 847 (2001), our Supreme Court reviewed the general principles applicable to business invitees:

A landowner has an affirmative duty to maintain common areas in a reasonably safe condition. *Iwai v. State*, 129 Wn.2d 84, 91, 915 P.2d 1089 (1996). "The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition." *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975).

[A tenant] " 'enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such *repair, safeguards, or warning* as may be reasonably necessary for his protection under the circumstances.' "

Degel, 129 Wn.2d at 53 (emphasis added) (quoting *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 327, 666 P.2d 392 (1983) (quoting *Restatement (Second) of Torts* § 343 cmt. b (1965))). Under the *Restatement (Second) of Torts*, a landowner is subject to liability for harm caused to his tenants by a condition on the land, if the landowner (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenant against danger. *Restatement (Second) of Torts* § 343 (1965). "Reasonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant's] protection under the circumstances.' " *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting *Restatement (Second) of Torts* § 343 cmt. b (1965)).

Id. at 855-56. (*Italics in original*).

In *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984), a hotel guest was shot and killed on land serving as a public sidewalk, just outside the entrance of the hotel. The court quoted W. Prosser, *Law of Torts* § 61, at 392 (4th ed. 1975):

This area of invitation will of course vary with the circumstances of the case. It extends to the entrance of the property and to a safe exit after the purpose [of the visit] is concluded; and it extends to all parts of the premises to which the purpose may reasonably be expected to take him.

Id. At 222.

In *Southland Corp. v. Superior Court*, 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988), a 7-11 customer was assaulted in a vacant parking lot 10 feet from the store, but not owned by 7-11. In affirming the trial court's denial of liability, the California Court of Appeal held:

The 'premises' may be less or greater than the invitor's property. The premises may include such means of ingress or egress as a customer may reasonably be expected to use. *The crucial element is control. 'It is clear [for example], . . . that if the tenant exercises control over a common passageway outside the leased premises, he may become liable to his business invitees if he fails to warn them of a dangerous condition existing thereon.'* [Citation omitted.] An invitor bears a duty to warn an invitee of a dangerous condition existing on a public street or sidewalk adjoining his business which, because of the invitor's special benefit, convenience, or use of the

public way, creates a danger." (*Id.*, at pp. 239-240, italics supplied.)

Id. at 665. (*Emphasis in original*).

In *Osborne v. Stages Music Hall*, 312 Ill. App. 3d 141, 726 N.E.2d 728 (2000), a nightclub ejected two combative patrons onto the sidewalk in front of the club, who then assaulted a female patron as she exited the club. The court held:

Whether the assault takes place in or outside the actual premises of the business owner, the dispositive factor remains the reasonable foreseeability of the actions taken by the third party. See *Shortall v. Hawkeye Bar and Grill*, 283 Ill. App. 3d 439, 670 N.E.2d 768, 219 Ill. Dec. 90 (1996) (tavern owner may not avoid duty to protect against criminal attack by third parties simply because the disturbance occurs just outside the front door) . . .

Id. at 148.

This case also involves other issues that are very similar to the instant case: two contiguous business establishments sharing common areas; an unintended injury to the female victim; and control of the public sidewalk area outside the club.

Thompson v. Gallo, 680 So. 2d 441 (1996), involved consolidated cases arising from a serious motor vehicle collision on a public road at the entrance to a Florida shopping center, caused by confusing signage. The court held that business property

owners have a duty to provide safe ingress and egress to their premises, even though the injury here occurred on a public roadway. *Id.* at 443.

Lutheran Hosp. v. Blaser, 634 N.E.2d 864 (Indiana 1994) ("A duty of reasonable care may be extended beyond the business premises when it is reasonable for invitees to believe that the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use such adjacent premises in connection with the invitation." *Id.* at 870 (citations omitted)).

In *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902

. . . business inviters in the District of Columbia have a duty of care to monitor the entrances and exits of their premises. "There is nothing novel or extraordinary surrounding the duty of an invitor to use care with reference to exits, entrances, and approaches to his premises." [citation omitted]. The duty, the Court concluded, is well grounded in the common law and Supreme Court precedent:

As long ago as 1881, the United States Supreme Court, speaking through Justice Harlan, stated the rule, "founded in justice and necessity and illustrated in many adjudged cases in the American courts" that an owner or occupant of land is liable to an invitee "for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the

public or to those who were likely to act upon such invitation."

Id. at 119-20 (quoting *Bennett v. Louisville & Nashville R.R. Co.*, 102 U.S. 577, 580, 26 L. Ed. 235 (1881)) (emphasis added). Thus, a business invitor's duty does not strictly end at the shopkeeper's door. "[I]t has been specifically held," the Court observed, "that the duty to properly maintain approaches to an invitor's property is not to be determined by the exact boundaries of the premises, and that such duty does not end at the door through which the invitee makes his exit." [Citation omitted].

Id. at 908. (*Emphasis in original*).

Piedaloe v. Clinton Elementary Sch. Dist., 214 Mont.

99, 104 (1984), the Supreme Court of Montana held:

To incur liability to a business invitee, it is not necessary that the owner or occupier *own* or *control* the property on which the hazardous ingress or egress exists or that the owner or occupier create the hazard, if the hazard created a *foreseeable* risk of harm to business invitees and the owner or occupier knew of its presence and should have taken reasonable precautions to eliminate it . . .

(*Emphasis added*).

B. THE FAUST CASE AND "APPARENT" INTOXICATION

Recently the Supreme Court re-examined and clarified the evidence necessary to properly establish a triable issue of fact

regarding the overservice of alcohol under RCW 66.44.200(1).⁸ *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009). The court specifically reviewed the nature and quantum of evidence necessary for a plaintiff to survive summary judgment in an overservice case. The plaintiff 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. Businesses that violate the statute by serving drunk drivers are civilly liable to third-party victims for damages caused by their patron. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 262-63, 96 P.3d 386 (2004).

In *Faust*, a customer (Kinkaid) consumed several drinks at the Bellingham Moose Lodge where his girlfriend worked. He became “belligerent and argumentative” with his girlfriend, who also said that he was too “tipsy” to be driving. In addition, the girlfriend said that her boyfriend/customer was so drunk that night that she had to “cut him off.” 167 Wn.2d at 535.

⁸ RCW 66.44.200(1) provides that “[n]o person shall sell any liquor to any person *apparently* under the influence of liquor.” (*Emphasis added*).

There are several distinctions between *Faust* and the instant appeal, which make the instant action even more compelling. First, there was no indication that the tortfeasor, Kinkaid, was drinking before he arrived at the lodge on the evening in question. One hour after the accident giving rise to the lawsuit, Kinkaid had a blood-alcohol level of .14, not quite twice the legal limit. There is also no indication in the opinion that Kinkaid assaulted anyone, or threatened anyone, before leaving the Lodge later in the evening. His vehicle crossed the centerline on the drive home, resulting a paraplegia to one plaintiff and injuries to others. The jury awarded the plaintiffs \$14 million.

The Court of Appeals reversed and vacated the trial court's verdict for the plaintiff. The Court of Appeals held that plaintiffs must provide specific "point-in-time" observational evidence of the tortfeasor's appearance close to the time of service, in order to send the question to the trier of fact. *Faust*, 143 Wn. App. at 281-82. Finding no evidence of this kind in the record of the trial court, the Court of Appeals reversed the verdict on the basis of CR 50.

The plaintiffs appealed and the Supreme Court granted discretionary review. After a careful analysis of the applicable legal standards, the Supreme Court reversed the Court of Appeals and

reinstated the trial court's verdict. Citing *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994), the Supreme Court held that, "typically, plaintiffs 'may establish any fact by circumstantial evidence.'" 167 Wn.2d at 538. The Supreme Court also held that "a combination of post-accident observational evidence, expert testimony, and BAC were insufficient evidence to survive a summary judgment motion." *Purchase v. Meyer*, 108 Wn.2d 220, 223, 737 P.2d 661 (1987). In other words, there is no necessity for the plaintiff to produce "point-in-time" evidence, when the tortfeasor was actually served a drink.

The Supreme Court in *Faust* also reiterated its holding in *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 929 P.2d 433 (1997): ". . . 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." *Id.* at 103. This is what occurred here. *Both Tanya and Penelope Oshatz testified that Crossen was obviously drunk because of the smell of liquor about him, his unsteadiness on his feet, and his slurred speech.* This is totally consistent with the employees of the Triple Door, who testified that Crossen was belligerent and apparently intoxicated. Paraphrasing the *Faust* court, Tanya and Penelope Oshatz, along

with virtually every employee at the Triple Door, could recognize that Crossen was drunk at the time he left the bar. This leaves open the possibility that the jury could infer that bar employees could tell he was drunk when they last served him. Therefore, “[i]t was error to take this question away from the jury on appeal.” 167 Wn.2d at 542.

C. APPELLANT SATISFIES THE *FAUST* REQUIREMENT

Crossen’s blood alcohol level was over .30 before he ever arrived at the Triple Door. We know this from Crossen’s own testimony, and commonly available scientific data concerning blood alcohol rates after the consumption of specific amounts of alcohol.

Many colleges, universities, police departments and municipalities publish alcohol impairment charts on their websites as a public service.⁹ They illustrate typical alcohol content in the

⁹ See for example <http://www.ou.edu/oupd/bac.htm> (University of Oklahoma Police Department); <http://www.cwu.edu/~wellness/bloodAlcoholLevels.html> (Central Washington University); <http://www.bayfieldcounty.org/Blood-Alcohol-Content-Charts.asp> (Bayfield County, Wisconsin); http://www.calpoly.edu/~hps/pulse/blood_alc.html (Cal Poly University); <http://www.csub.edu/counselingcenter/mentalHealth/bloodAlcohol.shtml> (California State University at Bakersfield). The court may take judicial notice of such tables and graphs if it chooses to do so, ER 201 (judicial notice of adjudicative facts must be generally known with the jurisdiction of the court, and capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.) See also, *McFerran v. Heroux*, 44 Wn. 2d 631, 645, 269 P. 2d 315 (1954) (mortality tables); *State ex rel. Helm v.*

blood levels of men and women consuming beer, wine or mixed drinks over a period of time. Many of these charts do not extend to the volume of alcohol consumed by Mr. Crossen before he ever arrived at the Triple Door----at least 16 drinks over a three hour period.

For example, the website for Central Washington University in Ellensburg, calculates a maximum of only nine drinks.¹⁰ Sites which permit the calculation of alcohol impairment caused by 16 drinks over a three hour period, reveal a blood/alcohol content over .30---more than three times the legal level of intoxication in Washington is .08.

According to the CWU website, persons typically demonstrate the following behaviors and complications with various levels of alcohol consumption:¹¹

- .02 Mellow feeling. Slight body warmth. Less inhibited.
- .05 Noticeable relaxation. Less alert. Less self-focused. Coordination impairment begins.

Kramer, 82 Wn. 2d. 307, 319, 510 P 2d 1110 (1973) (consumer price indexes); *State v. Royal*, 122 Wn. 2d 413, 417-418, 858 P. 2d 259 (1993)(statistics compiled by the County Clerk); *Hoppe v. State*, 78 Wn. 2d 164, 172, 469 P. 2d 909 (1970)(diminishing purchase power of the dollar); *State ex rel. Cornell v. Smith*, 155 Wash. 422, 428, 284 P. 796 (1930)(census statistics); *State v. Evans*, 100 Wn. App. 757, 762, 998 P. 2d 373 (2000)(demographic statistics).

¹⁰ See <http://www.cwu.edu/~wellness/bloodAlcoholLevels.html>

¹¹ *Id.*

- .08 Drunk driving limit. Definite impairment in coordination and judgment.
- .10 Noisy. Possible embarrassing behavior. Mood swings. Reduction in reaction time.
- .15 Impaired balance and movement. **Clearly drunk.**
- .30 **Many lose consciousness.**
- .40 Most lose consciousness. Some die.
- .50 Breathing stops. Many die.

(Emphasis added).

V. CONCLUSION

The trial court erred in dismissing the defendant Ginsing, LLC, by granting its summary judgment. In so doing, the trial court disregarded numerous material facts which go to the heart of the plaintiffs claims of negligence in Ginsing. Ginsing served an already-intoxicated patron more alcohol, who then assaulted various Ginsing patrons and employees inside the bar. Concluding that the drunken, assaultive patron was too dangerous to be left inside the bar, employees then ejected him from the bar and directly onto the sidewalk. There, he predictably assaulted *another* customer in less than one minute while apparently flirting with her. The reckless assault on the appellant was entirely foreseeable and

should have never occurred. For all of these reasons, and others recited herein, the Court of Appeals should reverse the trial court and remand the case to trial.

RESPECTFULLY SUBMITTED this 20th day of June, 2011,
at Edmonds, Washington.

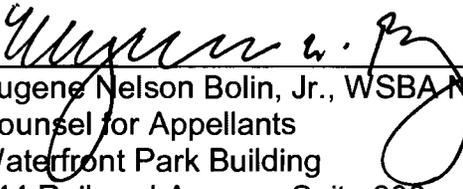


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted and mailed *via* United States Postal Service a true and accurate copy of Appellant's Amended Opening Brief to counsel for respondents.

DATED this 20th day of June, 2011, at Edmonds, Washington.


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