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

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

Respondents/Cross-Appellants,

v.

BELLINGHAM LODGE #493, LOYAL
ORDER OF MOOSE, INC., ALEXIS CHAPMAN,
JOHN DOES (1-10) (fictitious names
of unknown individuals and/or entities) and
ABC CORPORATION (1-10) (fictitious
names of unknown individuals and/or entities),

Appellants,

and

MOOSE INTERNATIONAL, INC.,

Cross-Respondent,

and

MARK ALBERTSON, as Personal Administrator
for the ESTATE OF HAWKEYE KINKAID, deceased,

Defendant.

BRIEF OF RESPONDENTS/
CROSS-APPELLANTS

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 SEP 22 PM 3:18

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A. INTRODUCTION

After a three-week trial, the jury determined the Bellingham Moose Lodge's bartender and Hawkeye Kinkaid's girlfriend, Alexis Chapman, overserved Kinkaid alcohol at the Moose Lodge bar. The jury found Chapman negligent. It found the Moose Lodge liable on two bases: respondeat superior for Chapman's conduct in the course of her employment and negligence in its hiring of Chapman without appropriate background checks.

Chapman overserved alcoholic beverages to Kinkaid at the Moose Lodge bar on April 21, 2000, after being with him the entire day. Kinkaid's likely blood alcohol level when he struck the Faust vehicle only a few minutes after he left the Lodge was 0.32%. Chapman admitted to Rainy Kinkaid and Lisa Johnston that she served alcohol to Kinkaid when he was drunk at the Bellingham Moose Lodge bar.

Kinkaid left the bar and attempted to operate his van. He crossed the centerline of a road in Ferndale, smashing head-on into the car operated by Bianca Faust, with her children and a grandchild as passengers. Bianca and her daughter, Bianca Celestine Mele, were seriously injured. Bianca Faust's seven-year-old son Gary Christopher Faust (Christopher) was rendered a paraplegic from the injuries he

sustained in the collision. Kinkaid was also injured, later dying from his injuries.

The trial court properly instructed the jury on the law governing liability of commercial purveyors of alcohol, like the Moose defendants,¹ for overserving persons apparently under the influence.

The Moose defendants complain about evidentiary rulings by the trial court, but they failed to even object below to many of the rulings about which they now complain, thereby failing to preserve any alleged errors for review.

No matter how the Moose defendants attempt to spin the facts or the conduct of this lengthy trial, Washington law is clear that establishments such as the Moose Lodge bar may not serve persons such as Hawkeye Kinkaid who are under the influence of alcohol. Ample evidence supported the jury's verdict that the Moose defendants overserved Kinkaid when he was apparently under the influence of alcohol. Because of such overservice, the Moose defendants are responsible for the havoc caused by Kinkaid to the Fausts.

The Moose defendants received a fair trial and the jury simply determined the key factual points against them -- Chapman overserved

¹ Bellingham Moose Lodge Number 493 and Chapman will be referred to collectively as the Moose defendants, unless an individual name is necessary. Similarly, the respondents will be referenced as the Fausts, unless an individual name is necessary.

alcohol to her boyfriend at the Moose Lodge bar and he caused the horrible injuries to the Fausts.

B. ASSIGNMENTS OF ERROR

The Fausts acknowledge the assignments of error in the brief of appellants, but believe the issues pertaining to those assignments of error are more appropriately formulated as follows:

(1) Where the trial court properly instructed the jury on the duty owed by a commercial establishment such as the Moose Lodge bar to avoid serving alcohol to Hawkeye Kinkaid who was apparently under the influence of alcohol, did the trial court abuse its discretion in instructing the jury on the significance of circumstantial evidence in the case when it gave the WPI instruction on circumstantial evidence?

(2) Did substantial evidence support the jury's determination that Hawkeye Kinkaid was apparently under the influence of alcohol when he was overserved by his girlfriend Alexis Chapman at the Bellingham Moose Lodge bar?

(3) Did the trial court abuse its discretion in admitting the deposition testimony of Ron Beers and his declaration into evidence?

(4) Did the trial court abuse its discretion in handling the cross-examination of Mac Pope as to whether he had been drinking the morning he testified in court?

(5) Did the trial court abuse its discretion in denying the Moose defendants' motion for mistrial as to testimony allegedly "demonizing" the Moose Lodge at trial when that testimony was elicited in the course of appropriate cross-examination?

With respect to their cross-appeal, the Fausts assign error as follows:

1. The trial court erred in entering the judgment on the verdict of the jury.

The issue pertaining to this assignment of error is as follows:

(1) Does RCW 4.56.110(3), which allows judgment interest at a lower rate for tort judgments than all other judgments in Washington, violate the Fausts' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution? (Assignment of Error on Cross-Review Number 1).

C. STATEMENT OF THE CASE

The Moose defendants offer a statement of the case that is highly selective as to the facts developed during the 3-week trial in this case. The Fausts offer this more complete statement of the case.

Hawkeye Kinkaid entered the Bellingham Moose Lodge with his girlfriend,² Alexis Chapman, at about 4:30 p.m. on April 21, 2000. RP 429. Kinkaid had not been drinking before 12:30 p.m. RP 1738. Chapman was with Kinkaid the entire day, from 12:30 p.m. onward; Kinkaid was sober when he arrived at the Moose Lodge bar. RP 427-31, 1737-38. Chapman was the bartender at the Moose Lodge that evening. *Id.* Chapman had been trained in the state-mandated responsible service of alcohol program. RP 1108-10, 1692-99.³

The only persons allegedly present in the Moose Lodge bar when Kinkaid was there were Chapman, Kinkaid, Larry Rayborn, John Leibrant, Ray Anderson, Frank Rose, and Eleanor Rose. *See, e.g.*, RP 431-35, 537-38; Ex. 19. All were Moose or Moose auxiliary members with a long

² Kinkaid had been living with Chapman for 1 ½ to 2 years before April 21, 2000. RP 385. Chapman paid for Kinkaid's housing and meals. RP 386-87. Kinkaid was destitute. RP 386.

³ RCW 66.20.300-350 directs the Washington Liquor Control Board to establish a mandatory alcohol server training program. No person in Washington may serve alcohol without obtaining a server permit. RCW 66.20.310(2)(e); the training program is required before such a permit may be issued. RCW 66.20.320(2).

The Board has adopted regulations setting forth the requirements for the mandatory training program. Ch. 314-17 WAC. The course for a Class 12 mixologist includes a standard workbook covering the mandates of Washington liquor laws as they relate to: "(i) Recognizing and dealing with intoxicated persons." WAC 314-17-060(1)(a)(i). *See also* WAC 314-17-060(2)(a)(i) (similar requirement applies to Class 13 server). The Board's Handbook for liquor licensees, which includes a discussion of the signs of intoxication licensees and their employees must know and a description of the Mandatory Alcohol Server Training permit, can be found at www.liq.wa.gov/publications/onpremiseslicenseehandbook.pdf.

history in the organization; Rose, for example, had been a Moose member for 50 years, RP 590, Anderson had been a member for 40 years. RP 1313. Although these witnesses to Kinkaid's alcohol consumption at the Moose Lodge bar were intimately aware of the Moose membership, they could not recall any of the other 20-25 people who were present at the Lodge that evening preparing or consuming dinner. RP 431-32, 541, 1293, 1307-08, 1329-30.

At trial, Chapman claimed Kinkaid was sober when they arrived and that she only served him two beers. RP 443. However, Chapman told numerous people that she cut him off from additional alcohol because he was drunk. For example, Rainy Kinkaid, Hawkeye Kinkaid's daughter, testified Chapman told her on two occasions that Kinkaid was drunk on April 21 at the Moose Lodge bar; she told Rainy Kinkaid that she and Hawkeye had been arguing at the bar and she told him to leave. RP 265. She knew he was "tipsy" and should not be driving. *Id.* On the second occasion, Chapman told Rainy that Kinkaid had been drinking for quite a while and was "drunk." RP 267. Chapman made these statements in her home at the time of Hawkeye Kinkaid's funeral. RP-264, 266.

This training is designed to acquaint commercial establishments and their alcohol servers with the impact of alcohol on patrons with an eye toward preventing patrons from drinking and driving.

Lisa Johnston, the bouncer at the Pioneer Tavern who gave Kinkaid's eulogy, RP 330, 335, also testified that Chapman told her she cut off Kinkaid on April 21 because he was drunk. RP 335.

The time Kinkaid left the Moose Lodge bar is disputed. The Moose defendants offered testimony he left the Lodge's bar at 6 p.m. and went to a local bowling alley's bar. RP 437-40. This testimony was contradicted by numerous witnesses. Ron Beers placed Kinkaid's departure from the Moose Lodge bar between 7:00 and 7:30 p.m. RP 907-08; CP 1264 (Ex. 1 to Beers deposition). Chapman told investigator Scott Hatten that Kinkaid left the Moose Lodge bar at 7:30 p.m. RP 364. Similarly, Frank Rose, the Moose Lodge administrator, told the investigating Ferndale police detective that Kinkaid left the Lodge bar around 8 p.m. RP 670; Ex. 10.

The two witnesses who allegedly drank beer at the bowling alley bar with Kinkaid, Robert Zoerb and Mac Pope, were less than clear on the events. While intoxicated, Zoerb agreed to sign a statement Chapman gave him. RP 1678; Ex. 93. Chapman had Zoerb testify that Kinkaid left the bowling alley at 9 p.m. RP 1677-79. Zoerb claimed Kinkaid had one bottle of beer. RP 1664. Pope said Kinkaid had one glass of beer. RP 1240. Pope could not remember the correct color of the shirt Kinkaid wore on April 21. RP 1257-61; Ex. 86.

By contrast, Carol Swartos-Scott, the bowling alley bartender, testified Kinkaid was not in her bar on April 21. RP 1808. Jim Stack, the bowling alley operator, testified bar records indicated no bottle of beer like the one Zoerb claimed Kinkaid consumed was sold between 6 p.m. and 7:30 p.m. on April 21. RP 1811.

At about 7:46 p.m., Kinkaid was driving his van southbound on LaBounty Road in Ferndale, Washington when he crossed the centerline and struck an oncoming car head-on. Ex. 10. The collision was massive. Exs. 5-6. Bianca Faust was the driver of the oncoming car, and her children, Bianca Celestine Mele and Gary (Christopher) Faust, and her granddaughter were passengers. RP 773. Kinkaid smelled of alcohol at the collision scene. Ex. 10.

Dr. Gary Goldfogel, the Whatcom County Medical Examiner,⁴ testified that soon after the accident, paramedics determined Kinkaid's blood alcohol level was 0.16%. RP 192; Ex. 8. They pumped large quantities of fluids into his system because he sustained massive bleeding and lost two-thirds of his blood. RP 193-98. Kinkaid was transported to a

⁴ Dr. Goldfogel performed the autopsy on Kinkaid. RP 181; Ex. 8.

Bellingham hospital where a blood sample was drawn for toxicological analysis; the sample measured whole blood and registered an alcohol reading of 0.09%. RP 185; Ex. 8. Kinkaid died at the hospital. Ex. 9.

The Fausts' forensic science consultant, Dr. Richard Saferstein, calculated that Kinkaid's blood alcohol level at the time of the collision was 0.32%. RP 232. Dr. Saferstein stated that if Kinkaid had begun drinking at about 4:45 p.m., he "would have had to consume twenty-one 12 ounce containers of beer or thirty ounces of 80 proof alcohol to reach a tested blood alcohol level of 0.32% at 8:49 p.m." RP 245.⁵

In addition to the foregoing, Dr. Goldfogel testified Kinkaid's stomach contents included 1.5 liters of a liquid substance reeking of alcohol, RP 201, 203, that had not yet been absorbed into his bloodstream. RP 202. Kinkaid's condition could not have resulted from the ingestion of two beers, according to Dr. Goldfogel. RP 206. Dr. Goldfogel testified Kinkaid was legally intoxicated at the time of his death. RP 192. The parties also stipulated Kinkaid was legally intoxicated at the time of the collision. RP 243-44.

⁵ The Moose defendants presented the testimony of Dr. Michael Hlastala on Kinkaid's blood alcohol content. Dr. Hlastala testified Kinkaid had a blood alcohol level of between 0.00% and 0.02% at the time he left the Lodge bar. RP 692, 737. However, Dr. Hlastala, who testifies usually on behalf of criminal defendants accused of drunk driving, RP 713, assumed Kinkaid consumed only two beers at the Lodge bar and left at 6 p.m. CP 690-92. Hlastala even opined Kinkaid might not have been intoxicated at the time of the collision, despite the admission of Kinkaid's estate that he was. RP 729-30.

The Fausts filed this action in the Whatcom County Superior Court against Hawkeye Kinkaid's estate, the Bellingham Moose Lodge, Moose International, Inc., and Alexis Chapman. CP 1685-1702.⁶ The Moose defendants answered, CP 1674-82, and moved for summary judgment, CP 766-82, which the trial court, the Honorable Charles Snyder, granted in part and denied in part by an order entered on September 26, 2005. CP 1301-03. The court denied the Moose defendants' motion as to Kinkaid's overservice at the Lodge bar, but granted their motion as to the evidence of service of Kinkaid while he was in a "state of helplessness" and as to a special relationship between Chapman and Kinkaid. The court also granted a partial dismissal as to Moose International. CP 1302. Later, during trial, the court fully dismissed Moose International from the case. CP 1093-94. The parties also stipulated to a judgment in the Fausts' favor against Hawkeye Kinkaid's estate. CP 1281-82.

The testimony offered at trial indicated the collision and the damages Kinkaid caused the Fausts were devastating. Exs. 1-4, 28-35, 42. Bianca Faust, the driver of the vehicle, RP 773, suffered facial injuries and damage to her knees, requiring multiple surgeries, RP 778-81, 784, 872, and painful physical therapy. RP 782-84, 792. She was in the hospital for

⁶ The procedure by which the present lawsuit was initially commenced is set forth in detail in *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 103 P.3d 792 (2004).

a number of weeks, and could not care for her injured children, Bianca and Christopher. RP 776-77, 790-91. *See generally*, CP 1265 (8/25/05 deposition of Dr. Michael Gannon re: condition/treatment of Mrs. Faust). Since the collision, she had to forego her training in computers to care for Christopher. RP 768, 833-71, 878-79.

Bianca Mele gave birth to her daughter, Sienna shortly before the collision. RP 87. Bianca suffered two broken wrists, leg injuries, and facial scarring in the collision, RP 93, 95, 99, 106-08, 111, requiring multiple surgeries, RP 106-07, 122-23, 146-47, 149-50, and painful physical therapy. RP 126-28, 139. She had a metal rod installed in her leg. RP 107. She was hospitalized until the end of May, RP 126, and later recuperated in a nursing home in Seattle's Queen Anne neighborhood for a number of weeks. RP 114. While at the nursing facility, she had a blood clot. RP 112, 121. She was separated from her husband and child, and compelled by that separation to forego nursing Sienna. RP 116. She later returned home where she spent three weeks in bed. RP 135. *See generally*, CP 1266 (3/27/03 deposition of Dr. Michael Gannon re: condition/treatment of Bianca Mele).

Christopher, who was seven years old at the time of the collision, sustained life-altering injuries. He was rendered a paraplegic by the collision, RP 1179, necessitating extensive medical care and training in

procedures required to address his medical condition such as procedures to deal with his bladder and bowels. RP 842-49. *See generally*, CP 1708-09. (depositions of Dr. Joan Gold re: Christopher's condition and treatment for his paraplegia). Christopher's initial care was entrusted to his 15-year-old sister, Daicha, who made important decisions for Christopher with the help of Larry Hays, a person not known to the Fausts previously. RP 477-80, 785-87, 790. Daicha even assisted Christopher with shots of anti-clotting medication and the insertion of catheters. RP 791. Christopher is confined to a wheelchair, or must walk laboriously with braces. RP 860-62.

Neither Christopher nor Daicha, who had been in gifted education programs, were able to continue to participate in such programs. RP 838, 883-85. Daicha had to repeat courses in school due to time lost assisting Christopher. RP 795.

Similarly, Joshua Faust, Bianca's other son, who was not involved in the collision, was adversely affected by the profound changes the collision caused in the Fausts' lives. RP 879-82. A gifted student, his educational achievement fell dramatically after the collision. RP 882.

After a more than three-week trial, the jury rendered a verdict finding Chapman and the Bellingham Moose Lodge liable, and the Fausts to be without fault. CP 1096-98. The jury awarded the Fausts more than

\$14 million in damages. CP 1096-98. The trial entered a judgment on the jury's verdict on November 4, 2005. CP 1080-82.

After the entry of the judgment, the Moose defendants moved for judgment as a matter of law, for a new trial on liability and damages raising numerous contentions, and for a new trial on damages. CP 1043-79. In a careful, detailed memorandum opinion,⁷ the trial court rejected each of the Moose defendants' arguments. CP 839-44. *See* Appendix. This appeal followed. CP 792-830.

D. SUMMARY OF ARGUMENT

The trial court properly instructed the jury on overserving a person apparently under the influence of alcohol in the terminology of the

⁷ In that motion, the Moose defendants also argued that Trooper J. P. Van Diest's report was improperly admitted into evidence, CP 1061-62, the trial court erred in separately instructing the jury on the Moose Lodge's negligent hiring and supervision of Alexis Chapman, CP 1053-54, 1068-69, and the trial court abused its discretion by failing to award them a remittitur or a new trial. CP 1074-78. Although the Moose defendants make a passing reference to their former argument that the Fausts' negligent hiring claim against them was somehow subsumed under their general negligence claim, br. of appellants at 19, they do not assign error to the trial court's instruction number 16 on negligent hiring, CP 1124, br. of appellants at 2, and this argument, like the argument as to the admissibility of the trooper's report or excessive damages, has been abandoned by the Moose defendants on appeal.

Regardless of the disposition of the appeal as to the overserving of Hawkeye Kinkaid, the jury's verdict and the judgment on it must stand as negligent hiring/supervision is a distinct theory of the Moose defendants' liability to the Fausts. Chapman had serious problems with serving alcohol at her prior places of employment. RP 451-52, 516-17. Hawkeye Kinkaid was a patron at each of these earlier places of employment, as long as Chapman was the bartender. RP 391-94, 511. The manager of Deming's, one of Chapman's former employers, believed Chapman slipped free drinks to Kinkaid. RP 451-52. The Moose Lodge, however, did not do a background check on Chapman prior to hiring her, RP 454, 518, 606-08, nor did it properly supervise her. RP 1093.

Supreme Court's opinion in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004). The trial court also did not abuse its discretion in instructing the jury on circumstantial evidence, and rejecting the Moose defendants' instruction on circumstantial evidence.

The jury's verdict was amply supported by the evidence as Hawkeye Kinkaid, while apparently under the influence of alcohol, was overserved alcohol at the Bellingham Moose Lodge by his girlfriend, Alexis Chapman. Chapman, herself a trained bartender, told Rainy Kinkaid and Lisa Johnston she served Kinkaid at the Moose Lodge on April 21 when he was drunk. While under the influence, Kinkaid drove his car across the centerline of a road and into the Faust vehicle, ultimately killing himself and seriously injuring members of the Faust family. The Moose Lodge was liable on principles of respondeat superior for Chapman's conduct and independently liable to the Faustus under the tort of negligent hiring/supervision.

The trial court did not abuse its discretion in making its evidentiary rulings on the cross-examination of Mac Pope, or the alleged "demonizing" of the Moose organization.

The trial court erred in entering the judgment in this case with interest at 6.002%. The judgment should have borne interest at 12% per annum. RCW 4.56.110(3), which sets a lower interest rate for tort

judgments is unconstitutional, violating the Fausts' right to equal protection.

E. ARGUMENT

(1) Washington Law on the Overserving of Alcohol to Persons Under the Influence of Alcohol

The Moose defendants offer virtually no discussion of Washington law on the civil liability of commercial purveyors of alcohol for the consequences of overserving alcohol. But this background is important in light of the Supreme Court's *Barrett* decision.

Washington law makes it a crime for a bar or restaurant to serve a person who is apparently under the influence of alcohol.⁸ RCW 66.44.200(1) provides: "[n]o person shall sell any liquor to any person apparently under the influence of liquor." Moreover, although Washington's dram shop law was repealed in 1955, Laws of 1955, ch. 372 § 1, the Washington Supreme Court determined in *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 458 P.2d 897 (1969), that a common law negligence cause of action existed for a person injured by a commercial

⁸ Washington courts have also provided for liability where a social host or commercial establishment provided alcohol to a minor in violation of RCW 66.44.270(1); RCW 66.44.320. See generally *Young v. Caravan Corp.*, 99 Wn.2d 655, 660, 663 P.2d 834, 672 P.2d 1267 (1983); *Purchase v. Meyer*, 108 Wn.2d 220, 228-29, 737 P.2d 661 (1987); *Hansen v. Friend*, 118 Wn.2d 476, 482, 824 P.2d 483 (1992); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998); *Crowe v. Gaston*, 134 Wn.2d 509, 515-16, 951 P.2d 1118 (1998).

establishment providing liquor to an impaired individual who then injures the person, given the statutory directive in RCW 66.44.200.⁹

In its most recent discussion of a commercial alcohol purveyor's liability for overservice of alcohol, our Supreme Court more strictly adhered to the specific language of RCW 66.44.200(1) in a case where a saloon overserved a patron, and that patron drove his car and was involved in an accident that seriously injured the plaintiff. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004). The Court reversed a judgment for the defendant where the trial court refused to instruct the jury in the language of the statute and instead gave an instruction that the saloon's liability could follow only if it served alcohol to an "obviously intoxicated" person.

The Court believed the "apparently under the influence" and "obviously intoxicated" standards differ. "Apparently under the influence" is a less stringent, less certain standard than "obviously intoxicated." *Id.* at 267-69. This Court discussed this distinction as well in *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 814 P.2d 687 (1991),

⁹ While Washington no longer follows negligence per se, violation of a statute is evidence of negligence. RCW 5.40.050. See *Hansen v. Friend*, 118 Wn.2d 476, 482-83, 824 P.2d 483 (1992).

concluding the statutory standard of "apparently under the influence" is less stringent than the older common law standard. *Id.* at 435.¹⁰

The *Barrett* court determined the statutory language, rather than the judicial gloss given to it over the years, should describe the duty owed by commercial establishments to the driving public not to put drunks on Washington's roadways. This is consistent with the statutory direction to liberally construe Title 66 RCW to protect the health and safety of Washington's people. RCW 66.08.010.

The trial court here instructed the jury on the duty owed by Chapman and the Moose Lodge in Instruction Numbers 12-14. Instruction Number 12 states that an establishment must not serve a person who is apparently intoxicated. CP 1120. Instruction Number 14 is taken from the dictionary definition of "apparently;" the instruction defines the term as: "seemingly, evidently or readily perceptible to the senses." CP 1122. The Moose defendants did not assign error to Instruction Numbers 12 and 14. Br. of Appellants at 2. They stand as the law of this case. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998).

¹⁰ The *Dickerson* court directed exclusion of the testimony of a Liquor Board agent that an apparently intoxicated person need not be "dead drunk," but only "starting to show some signs of intoxication," 62 Wn. App. at 435, because such testimony was not relevant to the common law standard. Plainly, it is relevant after *Barrett*.

(2) Circumstantial Evidence Is Admissible to Prove that Hawkeye Kinkaid Was Apparently under the Influence When He Was Overserved at the Moose Lodge Bar and the Trial Court Properly Instructed the Jury on Circumstantial Evidence

The Moose defendants ignore the Supreme Court's holding in *Barrett*, hoping to preclude all evidence that is not the testimony of a direct observer of the person allegedly under the influence. Br. of Appellants at 20-24, 46-47. Such a standard would obviously benefit the Moose defendants as only Moose members could be in the Moose Lodge bar. RP 419, 592. Moreover, they had an interest in being close-mouthed about the events of April 21 as the members see themselves as brothers, members of a fraternal, familial, sacred organization, fiercely protective of each other, bound together by oath. RP 527-31, 592, 1322-23.¹¹ But the Moose defendants misstate the law in Washington on the evidence that may be used to prove a case of liability for a commercial purveyor's overserving of alcohol. Br. of Appellants at 20-24.¹²

(a) Kinkaid's Blood Alcohol Level and Expert Testimony on It Were Admissible

¹¹ Lawyers for the Moose defendants sent letters to Moose members reminding them to be close-mouthed about the events of April 21. Ex. 15.

¹² The Moose defendants do not specifically assign error to the admission of Kinkaid's blood alcohol test results, the Washington State Patrol accident report, or the expert testimony of Dr. Richard Saferstein regarding Kinkaid's blood alcohol levels at the Moose Lodge bar. Br. of Appellants at 2. Moreover, the trial court properly articulated its rationale for admitting blood alcohol and other toxicological evidence in denying the Moose defendants' posttrial motions. CP 841.

Washington law permits the admission of blood alcohol results in a case involving a commercial purveyor's overserving of alcohol. RCW 46.61.506(1) specifically permits introduction of blood alcohol results into evidence in civil cases to prove intoxication. In *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), a commercial overserving case, the Supreme Court surveyed earlier cases on the evidence from which an inference of the "obviousness of intoxication at the time of service" could arise and concluded that blood alcohol test results were admissible as evidence of intoxication at the time the person was served, but not as evidence of the obviousness of intoxication. *Id.* at 463. Thus, the trial court here properly admitted evidence and expert testimony on Kinkaid's blood alcohol level at the time of the accident and when he was in the Moose Lodge bar. The *Dickinson* court permitted admission of a trooper's affidavit of his post-accident observations of the defendant, observations made about 10 minutes after the defendant was last served, that he was unsteady on his feet, had bloodshot eyes and a flushed face, and smelled of alcohol. *Id.* at 464. The Court also indicated evidence of the amount of alcohol the defendant consumed was admissible:

In addition, the amount of liquor admittedly consumed by Mr. Edwards raises an inference of obvious intoxication upon which to base a material question of fact. Mr. Edwards admitted to 10 drinks before dinner and slightly fewer than that in the time between dinner and 10:20 p.m.

The admitted fact, therefore, is that Mr. Edwards was served between 15 and 20 drinks in a 3 ½ hour period. A logical consequence, i.e., an inference, from this fact, is that Mr. Edwards could have at the very least appeared obviously intoxicated to those who furnished the drinks. Questions with respect to this material issue of fact are the number of employees serving Mr. Edwards; the number of drinks served by any one employee; whether any of these employees or Kaiser supervisory employees observed signs of obvious intoxication; whether Mr. Edwards was a heavy drinker who could consume one mixed drink per 10 to 13 minutes for 3 ½ hours and still appear sober; and whether the testimony of the Kaiser employees is credible testimony in light of their relationship to one of the parties of this litigation and in light of the conflicting testimony of the investigating officer and Mr. Edwards himself.

Id. at 464-65. *Dickinson* has never been overruled. The Moose defendants do not even cite it.¹³

Dickinson authorizes admission of blood alcohol evidence to prove a person is apparently under the influence of alcohol. Nothing in *Barrett* precludes admission of such evidence. The Moose defendants' reading of the law is far too narrow and would allow far too many commercial establishments to escape liability when they clearly know a patron is

¹³ Evidence of the blood alcohol level of the person who is overserved is also admissible in other jurisdictions. See, e.g., *Hamilton v. Killian*, 296 Minn. 256, 207 N.W.2d 703 (1973) (blood alcohol level enough without direct evidence of intoxication, to create question for jury); *Woodard v. Mainer*, 167 Ill.App.3d 488, 521 N.E.2d 303 (1988); *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. App. 1994) (blood alcohol level of defendant was admissible and expert could testify any person with .21% reading would have shown visible signs of intoxication); *Adamy v. Zirakus*, 231 A.D.2d 80, 659 N.Y.S.2d 623 (1997), *aff'd*, 92 N.Y.S.2d 396, 681 N.Y.S.2d 463, 704 N.E.2d 216 (1998) (blood alcohol level relevant to issue of visible intoxication; rejects argument only "direct" evidence can sustain finding of visible intoxication).

drunk. A commercial establishment is in the best position, based on its staff's experience and training through the Liquor Board, to know when a patron has been served too much. The Moose defendants seemingly argue for a standard under which bartenders can ignore their training and can wait until the patron is literally "falling down drunk" before liability attaches, as the fact a person is apparently under the influence may not be inferred. Br. of Appellants at 20. Their position is bad public policy, depriving the public of the training of alcohol servers.

The Moose defendants also contend that "heavy" or "very experienced" drinkers are entitled to get even more drunk than the "average" drinker, or apparently even more than state law allows, because such drunks are able to "tolerate" greater levels of drinking. Br. of Appellants at 24. They offer no authority for their understanding of the physiology of drinking. *Id.* Such an argument for a "free pass" for heavy drinkers to run amok on Washington's highways freely wreaking havoc is contrary to the training given by our Liquor Board to servers of alcohol.

The Moose defendants rely on *Purchase*, a social host case, in which the Supreme Court stated that "the outward signs of intoxication may vary from person to person." 108 Wn.2d at 226 n.12. The Court has been more aggressive in *social host* cases in requiring the necessary evidence to establish liability to focus on the drinker's appearance to the

social host, but even in such cases, and in *Purchase*, it did not hold that the blood alcohol test results were excluded from jury consideration. The *Purchase* court acknowledged RCW 46.61.515¹⁴ permits the introduction of blood alcohol results in civil cases. *Id.* at 224.

The Moose defendants also rely on *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989). Br. of Appellants at 20-21. In that case, the Supreme Court held that evidence of the amount of alcohol consumed by a person is not sufficient *by itself* to establish that a commercial purveyor served an *obviously intoxicated* person. *Id.* at 487.¹⁵ Again, the Court did not preclude admission of blood alcohol test results, the number of drinks consumed by the person, or the appearance of the person after the liquor was served. In fact, the Court found that a waitress' testimony that a patron was "very drunk" was enough to meet the test. *Id.* at 489.

The Moose defendants cite *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982) and *Shelby v. Keck*, 85 Wn.2d 911, 54 P.2d 365 (1975), but do not discuss them. Br. of Appellants at 22. Neither case is supportive of the Moose defendants' position. In *Shelby*, the only evidence in the record was that a patron was in a bar for two hours and consumed two drinks. "According to all of the witnesses, Keck's behavior

¹⁴ RCW 46.61.515 was a predecessor to RCW 46.61.506(1).

was normal and at no time did he become boisterous, out of line, or cause a disturbance indicating that he was intoxicated.” 85 Wn.2d at 912. The patron was later determined to have a 0.16% blood alcohol level after his revolver misfired while he was attempting to load it. The witnesses in *Shelby* were disinterested observers in a bar. They were not Moose members with a reason to protect their organization, as in the present case. *Wilson* involved a social host serving liquor to a 19-year-old woman. The Court noted all the evidence admitted before the trial court indicated the young woman acted in a “responsible and ladylike” manner, 98 Wn.2d at 438, before she operated a motor vehicle and was killed in a collision with a utility pole. *Wilson* is no longer good law as any service of alcohol to a minor is actionable if it is the proximate cause of a third person’s injuries. *Purchase*, 108 Wn.2d at 228-29; RCW 66.44.320. See also, *Schooley v. Pinch’s Deli Market Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998) (commercial purveyor’s liability even extends to persons to whom minor gave liquor acquired in violation of statute).

Social host cases such as *Purchase* or commercial purveyor cases such as *Shelby* are no longer relevant post-*Barrett*. To be “obviously

¹⁵ Indeed, this is exactly what the trial court instructed the jury in Instruction Number 13. CP 1121.

intoxicated," the old standard, the person's appearance had to be readily perceived and certain; the standard required *intoxication*. *Barrett*, 152 Wn.2d at 268. And the intoxication had to be *obvious* to the observer. By contrast, "apparently under the influence" does not require certainty as to intoxication; it allows the observer time to think and reflect on whether the person was under the influence of alcohol. *Id.* The latter standard readily encompasses a broad array of evidence regarding the person's alcohol use.

This discussion of the law is important for the analysis of the Moose defendants' central argument – the trial court erred in instructing the jury on circumstantial evidence. The trial court here gave the appropriate WPI instruction to the jury on circumstantial evidence in Instruction Number 3. CP 1111.

(b) Standard of Review for Jury Instructions

The Moose defendants neglect to discuss Washington law on jury instructions or to properly characterize the standard of review for jury instructions. This Court must consider jury instructions as a whole. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 533, 730 P.2d 1299 (1987). Jury instructions are generally proper if they are supported by substantial evidence, allow a party to argue its theory of the case, and are not misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d

845 (2002). An instruction containing a misstatement of the law is misleading. *Id.*

Courts review errors of law in a jury instruction de novo. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). However, a court reviews the decision to give a particular instruction and its wording under an abuse of discretion standard. *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 176-77, 922 P.2d 59 (1996) (number and language of instructions left to trial court discretion); *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Any error on jury instructions is not grounds for reversal unless it is prejudicial, that is, unless it affects the outcome of the trial. *Id.* at 498-99.

Finally, a party arguing that the trial court erred in failing to give its proposed instruction must offer an instruction that provides a correct statement of law. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993) (party objecting to instruction has affirmative duty to propose an instruction that correctly states the law).

The trial court here did not abuse its discretion in giving Instruction Numbers 3 and 13, which are correct statements of the applicable law and in rejecting the wordsmithing of the Moose defendants in proposed instructions 36 and 39.

(c) The Trial Court Did Not Abuse Its Discretion in Giving Instruction Number 13 and Refusing the Moose Defendants' Proposed Instruction 36

The trial court gave Instruction Number 13 to the jury in which it carefully advised the jury that in order to prove the Moose defendants liable, the Fausts had to show Kinkaid was apparently under the influence of alcohol *as determined by his appearance to others at the time he was served*. CP 1121. The trial court further cautioned the jury the amount of alcohol Kinkaid consumed and any evidence on his blood alcohol levels was not “sufficient by itself” to show he was apparently under the influence. *Id.* These are correct statements of the law in Washington, as indicated supra.

By contrast, the Moose defendants' proposed instruction 36 is an incorrect statement of the law, stating that the jury may not consider Kinkaid's blood alcohol level *at all* and it must also disregard medical records evidence, the autopsy report, and the testimony of Dr. Richard Saferstein and Michael Hlstala. CP 1138.¹⁶ No Washington case has

¹⁶ *The Moose defendants* called Michael Hlstala. Their argument on the instruction as to Hlstala's testimony is invited error. *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000) (invited error prohibits a party from assigning error on appeal to a trial court action that party has acted in some way to create); *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (defendant made sexually explicit videotape of 7 year old; trial court admitted videotape into evidence after defendant withdrew objection to its admission and failed to seek limiting instruction; reference to other videotapes elicited by defense counsel were not subject to review as invited error).

excluded all evidence a person's blood alcohol level or expert testimony on its significance, and RCW 46.61.506(1) specifically states blood alcohol results are admissible in civil cases. The Moose defendants have not assigned error to the trial court's admission of Kinkaid's blood alcohol results, the medical records, the autopsy report, or the opinion testimony of Drs. Saferstein and Hlastala. Br. of Appellants at 2. See RAP 10.3(a)(4), RAP 10.3(g) (Moose defendants were obligated to have an assignment of error for each error they claim the trial court committed). Thus, such evidence was properly before the jury. All admissible evidence is properly before the jury for their deliberations. CR 51(b). The trial court so instructed the jury in Instruction Number 1, CP 1106, to which the Moose defendants did not object, making it the law of this case.

The Moose defendants' proposed instruction 36 was erroneous. It cannot be the indirect vehicle to challenge the admission of evidence they did not directly challenge by a proper assignment of error.

(d) The Trial Court Did Not Abuse Its Discretion in Giving Instruction Number 3 to the Jury

Similarly, the trial court's Instruction Number 3 on circumstantial evidence, derived from WPI 1.03, is a correct statement of the law. The

Moose defendants' proposed instruction 39 adds nothing.¹⁷ They argue over the wording of the court's instructions on the same issue.

The Moose defendants fail to discuss *Dickinson* or RCW 46.61.506(1). Evidence of Kinkaid's blood alcohol level and the expert testimony on its significance was properly before the jury, as the trial court ruled and the Moose defendants themselves concede by failing to assign error to the admission of the blood alcohol evidence. The trial court did not abuse its discretion in instructing the jury with Instruction Number 3.

In sum, the jury was properly instructed on the evidence necessary to establish that the Moose defendants overserved Kinkaid when he was apparently under the influence of alcohol.

(3) Substantial Evidence Supports the Jury's Verdict That Hawkeye Kinkaid Was Apparently under the Influence of Alcohol When He Was Overserved at the Moose Lodge Bar

¹⁷ The trial court noted in denying the Moose defendants' posttrial motions as to Instruction Number 3:

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

CP 843.

The Moose defendants argue the jury's verdict is not supported by substantial evidence. Br. of Appellants at 23-27.¹⁸ However, their argument is unclear as to whether it is predicated on CR 50 or CR 59. The Moose defendants were careful in their posttrial motions to distinguish those issues they were raising as part of their CR 50 motion and those raised as part of their CR 59 motion. Compare CP 1043-54 with CP 1054-74. The standard of review for motions under these rules differ.

The Moose defendants raise the issue of sufficiency of the evidence in the context of their failed posttrial motions, and argue such motions are reviewed de novo, citing *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 32 P.3d 250 (2001) and *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) for this contention. Br. of Appellants at 19. They misstate Washington law.

Motions for judgment as a matter of law are largely reviewed de novo. As the Supreme Court in *Guijosa* indicated, however, that standard must be considered in light of the burden at trial facing the moving party in such motions:

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to

¹⁸ The trial court rejected the Moose defendants' arguments advanced in support of their posttrial motions that the verdict was not supported by substantial evidence. CP 839-40.

sustain a verdict for the nonmoving party. Such motion can be granted only when it can be said, as a matter of law, there is no competent and substantial evidence upon which the verdict can rest.

Guijosa, 144 Wn.2d at 915 (citations omitted). “Substantial evidence” is a quantum of evidence sufficient “to persuade a fair-minded person of the truth of the declared premise.” *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

Contrary to the Moose defendants’ assertion, br. of appellants at 19, *Lockwood* does not stand for the proposition that a motion seeking a new trial based on the insufficiency of the evidence is reviewed de novo. *See*, 109 Wn.2d at 235. *Lockwood* involved review of a trial court’s denial of a motion for judgment notwithstanding the jury’s verdict, a motion for a directed verdict, or a motion for a new trial. As the *Lockwood* court noted:

In ruling on a motion for a directed verdict or judgment notwithstanding the verdict, the court must accept the truth of the nonmoving party’s evidence and draw all favorable inferences that may be reasonably be evinced. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wash.2d 846, 851, 586 P.2d 845 (1978). The evidence must be viewed in the light most favorable to the nonmoving party. *Davis v. Globe Mach. Mfg. Co.*, 102 Wash.2d 68, 73, 684 P.2d 692 (1984). The court may grant the motion only where there is no competent evidence or reasonable inference which would sustain a verdict in favor of the nonmoving party. “If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.” *Levy*, 90 Wash.2d at 851, 586 P.2d 845.

Id. at 243.

For motions brought under CR 59, the appellate court reviews the granting or denying of such motions for an abuse of discretion. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 176 n.6, 116 P.3d 381 (2005); *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). See also *Aluminum Co. of America v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 529, 537, 998 P.2d 856 (2000).¹⁹

The Moose defendants want to reargue their case to the jury. They spend considerable time in their brief rehashing, although not completely, the trial testimony below. Br. of Appellants at 5-10, 24-27. The record amply supports the fact Kinkaid was “seemingly” under the influence when he was overserved at the Bellingham Moose Lodge bar.

Both Rainy Kinkaid and Lisa Johnston testified that Alexis Chapman told them that she served Hawkeye Kinkaid at the Moose Lodge bar when he was drunk.²⁰ That testimony was more than enough to

¹⁹ This standard comports with the oft-expressed principle of judicial deference to the constitutional power of the jury to find the facts. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (under the constitution, jury is assigned the ultimate power to weigh the evidence and determine the facts).

²⁰ This is consistent with the fact Chapman had problems at her two previous places of employment – Pioneer Tavern and the Deming Steak House – in providing drinks to Kinkaid. RP 451-52, 511, 514. Chapman was fired by Deming’s manager, Lenny Chapman. RP 453.

establish Kinkaid was “apparently under the influence” at the time he was served at the Moose Lodge bar.

This testimony is further reinforced by the fact Kinkaid was legally intoxicated at the time of the collision, RP 192, with a blood alcohol level of 0.32%. RP 232. The Moose defendants stipulated Kinkaid was drunk at the time of the collision, RP 243-44, and Kinkaid’s estate admitted liability to the Fausts. RP 1281-82.

The Moose defendants’ explanation for Kinkaid’s drunken status at the time of the collision made little sense. It is undisputed that Chapman was with Kinkaid from at least 12:30 p.m. until they arrived at the Moose Lodge bar somewhere between 4 p.m. and 4:30 p.m. RP 427-31. Chapman testified Kinkaid was sober when he got to the Moose Lodge bar. RP 443, 1737-38.

Chapman and various Moose members testified Kinkaid had only one or two beers at the Moose Lodge bar and left between 6 and 6:30 p.m. RP 443, 540, 631-32, 1270-71, 1291-92, 1319-20.²¹

²¹ The time Kinkaid left the Moose Lodge bar is hotly contested. For example, Chapman told the Fausts’ investigator Kinkaid left the Moose Lodge bar at 7:30 p.m. RP 364. Zoerb said Kinkaid left the bar at 9 p.m. RP 1677; Ex. 93. Frank Rose told investigating Ferndale police that Kinkaid left at 8 p.m. RP 670. Beers testified in his declaration that Kinkaid left the bar between 7:00 and 7:30 p.m. CP 1264 (Ex. 1 to Beers deposition). John Leibrant testified Kinkaid left the bar at dusk. RP 567. The trial court took judicial notice of the fact that sunset on April 21, 2000 was at 8:11 p.m. RP 1233-34.

Zoerb and Pope testified Kinkaid went to a local bowling alley and consumed one beer, RP 1240, 1664,²² and left the bowling alley at 7:15 – 7:30 p.m. RP 1241, 1253, 1665.²³

It is undisputed the collision occurred at about 7:45 p.m. on April 21. Ex. 10.

The Moose defendants have never accounted for Kinkaid's consumption of alcohol leading to a 0.32% blood alcohol level, as well as the presence of 1.5 liters of liquid in his stomach at the autopsy that reeked of alcohol. RP 201, 203. That liquid never made it from Kinkaid's stomach to his blood stream to be measured. RP 202. Dr. Richard Saferstein testified that Kinkaid must have consumed 21 beers or 30 ounces of 80 proof alcohol to achieve his blood alcohol level. RP 245. The Moose defendants' witnesses cannot account for that quantity of alcohol. At best, the Moose defendants speculated that Kinkaid drank from a bottle of Black Velvet whiskey found in his van. RP 1377-78; Exs. 91-92. But that speculation is entirely inconsistent with Kinkaid's habit of only drinking whiskey with Diet Pepsi, RP 395, 420, 512, 1742, and the

²² Kinkaid's daughter, Rainy, testified he did not drink beer. RP 270. This was confirmed by Ron Beers' testimony. CP 1264 (Ex. 1 to Beers deposition) ("I never saw him drink beer at anytime.").

²³ The bowling alley's bartender, Carol Swartos-Scott, denied Kinkaid was even at the bar on April 21. RP 1808. Her testimony was supported by the bowling alley's business records. RP 1811.

possibility the bottle may have been moved. RP 1381-86. No Diet Pepsi was found in the van. Exs. 91-92.

The better explanation of the events is that Chapman overserved Kinkaid at the Lodge bar on April 21 when he was drunk. She had a history of giving drinks to Kinkaid. RP 451-52. The Fausts' liquor liability expert, Dr. Denny Rutherford, opined that because Kinkaid was Chapman's boyfriend, she deviated from that training, consciously disregarding the safety of patrons and others in violation of RCW 66.44.200 and WAC 314-16-150. RP 1095. Chapman's relationship with Kinkaid eroded her objectivity about his condition, making overservice entirely foreseeable. RP 1098-99.

Kinkaid left the Moose Lodge bar shortly before the collision and ran into the Faust vehicle with his van while he was intoxicated. After the collision, the Moose Lodge members, given their fraternal commitment to the Lodge, settled on a story that Kinkaid had just a few beers at the Lodge on April 21.²⁴ The testimony of the Moose witnesses, many of whom were Lodge officers, is strange in that they cannot remember either the

²⁴ The Moose members had strong financial reasons for doing everything they could to protect the club from the liability to the Fausts. The Lodge had experienced a very serious decline in its membership. RP 551, 604, 1324. It was in severe trouble with Moose International, being tardy in transmitting moneys due to it. RP 596-97, 602-03, 1633, 1645-47; Exs. 20, 21, 25, 26, 47, 84. The Lodge derived a large measure of its revenue from liquor sales. RP 616-17, 1655-56. It could not survive without liquor sales. RP 1026.

other persons in the Lodge bar that night, or the persons who served dinner, but they consistently recall Kinkaid's presence and consumption of only a few beers. Ron Beers' testimonial reversal is indicative of how Moose members' memories shifted.

The events in this case are classically factual issues to be sorted out by the jury. The jury was entitled to believe Rainy Kinkaid and Lisa Johnston on Kinkaid's intoxication and discount, or even disbelieve entirely, the testimony of the Moose defendants' witnesses, most of whom were Moose members or employees and were far from disinterested observers. Substantial evidence supported the jury's verdict.

(4) The Trial Court Did Not Abuse Its Discretion in Making Evidentiary Rulings

The Moose defendants raise a number of contentions regarding the trial court's evidentiary rulings, but some of these arguments seem to be less evidentiary in nature than they are allegations of misconduct by counsel at trial, justifying a new trial. However, as to evidentiary rulings, a party must properly object to the admission or exclusion of evidence, and the failure to do so precludes appellate review. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). Evidentiary rulings are entrusted to the discretion of the trial court, ER 102, and appellate courts review claims of evidentiary error under an abuse of discretion standard. *City of*

Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994) (“A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.”). The Moose defendants here labored under an added burden. They had to demonstrate any alleged evidentiary error was prejudicial, that is, that the alleged error had an actual impact on the outcome of the case. *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 174-75, 947 P.2d 1275 (1997). Any error in the trial court’s evidentiary rulings, which the Fausts specifically deny, could not have impacted the jury’s decision here. The trial court did not abuse its discretion in making the evidentiary rulings.

(a) Ron Beers’ Deposition/Declaration

The Moose defendants complain of the trial court’s handling of the admission of Beers’ deposition testimony and a declaration designed to impeach that testimony. Br. of Appellants at 27-32. Beers testified in his deposition regarding the events of April 21, 2000 when he was present in the Moose Lodge bar. RP 905-08; CP 1264. However, in his deposition, Beers recanted a number of statements he made in an earlier declaration.

CP 1264 (Beers deposition at 16, 17, 30-31, 32, 33, 41).²⁵ In that declaration, Beers indicated Chapman had previously overserved patrons and that Kinkaid left the bar between 7 and 7:15 p.m. RP 907-08; CP 1264 (Ex. 1 to Beers deposition).²⁶ Beers was examined and cross-examined extensively about his declaration in his deposition. CP 1264 (Beers deposition at 5-20, 44, 46-48, 49). The trial court treated Beers' testimony as if he were in court testifying. RP 820-23.

The Moose defendants again fail to apprise this Court of the law regarding the admission of the testimony at issue here. CR 32 governs the use of depositions at trial. In specific, CR 32(a)(3) provides that a deposition may be introduced as substantive evidence or for any other purpose if the witness is unavailable as defined in the rule. *Bertsch v. Brewer*, 97 Wn.2d 83, 89, 640 P.2d 711 (1982); *Hammond v. Braden*, 16 Wn. App. 773, 774-75, 559 P.2d 1357 (1977). The Moose defendants do not even cite the rule in their brief.

Cases arising under this rule make it clear the trial court has discretion in permitting depositions to be used as evidence. *Hammond*, 16

²⁵ Beers' recanting is further evidence of the Moose conspiracy of silence.

²⁶ The Moose defendants want to argue Beers gave the declaration under "duress" at his funeral home. Br. of Appellants at 28-29. Larry Langdale's trial testimony was that Beers was cooperative and his declaration was voluntarily given. RP 919-21. The declaration was based on the transcript of Langdale's interview of Beers; Beers received a copy of the transcript. RP 922-23.

Wn. App. at 776. The trial court here properly found Beers to be unavailable. RP 314-16. It did not abuse its discretion in allowing use of his deposition testimony.²⁷

Similarly, ER 607²⁸ confers substantial discretion on trial courts to allow impeachment of testimony. By its terms, the rule permits parties to attack a witness's credibility at any time, even if that witness is called by the party. The language of the rule itself would seemingly resolve the issue raised on appeal by the Moose defendants. They make only passing reference to it in their brief. Br. of Appellants at 29.

The Moose defendants, however, cite a criminal case, *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988), as authority for the

²⁷ Citing *State v. Fliehman*, 35 Wn.2d 243, 212 P.2d 794 (1949), the Moose defendants assert impeachment evidence is not substantive. This case long predates the adoption of ER 801(d)(1). As Professor Teglend notes in his treatise, citing *Fliehman*:

Nothing in this rule requires that the statement be subject to cross examination at the time it was made. The rule makes admissible as substantive evidence many statements that, under previous law, were admissible only for impeachment.

Karl B. Teglend, 5B *Wash. Prac. Evidence* § 801.19 at 316. In fact, Beers' deposition testimony is plainly substantive. Federal law clearly indicates evidence admitted under ER 801(d)(1) is not hearsay and is substantive evidence for the truth of the matter asserted. *United States v. DiCaro*, 772 F.2d 1314, 1321 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1985); *United States v. Williams*, 737 F.2d 594, 608 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *See also*, *Commonwealth v. Sineiro*, 432 Mass. 735, 741-44, 740 N.E.2d 602 (2000).

²⁸ ER 607 states:

The credibility of a witness may be attacked by any party, including the party calling the witness.

proposition that a party may not call a witness merely for the purpose of impeaching that witness's testimony. Br. of Appellants at 30.

This rule in Washington actually dates from *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1986). A prosecutor may not introduce such evidence if the *primary purpose* of the evidence is to place otherwise inadmissible evidence before the jury. *Id.* at 344. In *Lavaris*, inadmissible *hearsay* evidence was at issue; the State used an accomplice's unsworn statements to interviewing detectives to convict the defendant. Sixth Amendment confrontation issues were present. *Id.* at 344-45. *See also*, *State v. Barber*, 38 Wn. App. 758, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985); *State v. Hancock*, 46 Wn. App. 672, 731 P.2d 1133 (1987); *State v. Allen S.*, 98 Wn. App. 452, 989 P.2d 1222 (1999); *State v. Howard*, 127 Wn. App. 862, 113 P.3d 511 (2005). In *Allen S.*, the court held that for this criminal rule to apply, the witness's credibility must be "a fact of consequence to this action." 98 Wn. App. at 464. It is not of consequence where the witness fails to say anything pertinent to the case, which could include situations where the witness's testimony is stricken, or the witness cannot remember anything. Nothing indicates the *Lavaris* rule even applies in a civil case.

Here, Beers' testimony related to the events in the case and was probative of Kinkaid's whereabouts on the day in question. Moreover, the

Moose defendants believed Beers' testimony to be consequential to their version of facts.

The Moose defendants also complain that Beers' sworn declaration somehow cannot be used for purposes of impeachment because it was "ex parte." Br. of Appellants at 28-30. It can be so used.

The Moose defendants cite two federal decisions in support of their position that the Beers declaration was "hearsay" under ER 801 and did not fall within the hearsay exception of ER 801(d)(1).²⁹ Regardless of how federal courts interpret ER 801, Washington courts allow the admission of a declaration like that of Beers under ER 801(d)(1) so long as the declaration is subject to cross-examination, as the Beers declaration was in his deposition. *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982) (statement given to police was admissible as substantive evidence under ER 801(d)(1) because it was signed under oath, under penalty of perjury and subject to cross-examination at trial). *See also, State v. Thach*, 126

²⁹ ER 801(d) states:

A statement is not hearsay if:

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence

Wn. App. 297, 106 P.3d 782, *review denied*, 155 Wn.2d 1005 (2005) (written domestic violence victim's statement admitted); *State v. Nelson*, 74 Wn. App. 380, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994). The Moose defendants neglect to cite these controlling Washington authorities. The Beers declaration met all the *Smith* factors – it was voluntary, it was given under penalty of perjury, it was accurate as it was based on a taped interview, and it was subject to cross-examination in Beers' deposition.

Finally, the Moose defendants suffered no prejudice from the admission of Beers' deposition testimony and declaration. They had the benefit of Beers' favorable testimony. The trial court also specifically instructed the jury how they could use the evidence:

Ladies and gentlemen of the jury, there's a witness by the name of Ron Beers who is unavailable to the Court at this time. A deposition was obtained of his testimony, much like the ones that you've seen from the doctors in this case. It's going to be read to you rather than showing a video. The Plaintiffs are offering the testimony of Ron Beers by deposition because the witness no longer lives in Whatcom County. Part of the deposition testimony concerns a written statement given by the witness to the Plaintiffs' investigator which was attached to the deposition. This instruction concerns that written statement. If you give any consideration to the written statement, you may only consider it in deciding what weight and credibility to give to Mr. Beers' deposition testimony, and for no other

or motive, or (iii) one of identification of a person made after perceiving the person[.]

purpose, and keep that in mind as you hear the deposition testimony, and as you hear the statement being read, and so you may read it into the record.

RP 905-06.

In rejecting the Moose defendants' posttrial motions, the trial court made clear the admission of Beers' deposition testimony and declaration was proper. CP 841. The trial court's admission of Beers' testimony and his sworn declaration was not an abuse of discretion.

(b) Testimony of Mac Pope

The Moose defendants are critical of the cross-examination of their witness, Mac Pope, when he appeared in court with alcohol on his breath. Br. of Appellants at 32-38. The Moose defendants argue the trial court did not properly handle the question of Pope's smell of alcohol on his breath when he testified, and the scope of his cross-examination.³⁰

Pope smelled of alcohol in court at 9:00 a.m. A sidebar was held just before Pope was asked if he had been drinking; during that sidebar, the trial court acknowledged the obvious smell of alcohol on Pope's breath and expressed some concern about whether it might affect Pope's competence to testify. CP 840. With the trial court's permission, the Fausts' trial counsel was allowed to ask Pope if he had been drinking and

³⁰ In their posttrial motions, the Moose defendants also complained about a reference to Pope's smell of alcohol by the Fausts' counsel in closing arguments. CP 1059. They do not raise this issue in their brief, abandoning it on appeal.

did so without objection by the Moose defendants' trial counsel. RP 1262. That question and Pope's response to it were very brief, involving less than a half page of transcript, out of more than 2000 pages of trial transcript. *Id.* The Moose defendants were free to ask any follow up questions of Pope, but declined to do so. In denying the Moose defendants' posttrial motions, the trial court ruled a new trial was not justified by Pope's testimony. CP 840.

The Moose defendants did not preserve any error pertaining to Pope's testimony for review. They contended for the first time in their motion for new trial that the proper procedure for handling Pope's appearance in court with alcohol on his breath was to hold a competency hearing outside the presence of the jury. CP 1058. The Moose defendants *waived* any entitlement to such a hearing by failing to raise the issue with the trial court at the time the alleged error occurred; it cannot be raised in a posttrial motion for a new trial. *In re Custody of S.H.B.*, 118 Wn. App. 71, 86, 74 P.2d 674 (2003), *aff'd*, *In re Brown*, 153 Wn.2d 646, 105 P.3d 991 (2005) (issue raised in posttrial memorandum); *Bitzan v. Parisi*, 88 Wn.2d 116, 125, 558 P.2d 775 (1977) (court would not review instructional error in context of motion for new trial where objection to instruction was inadequate).

The Moose defendants argued below that "RCW 5.60.050 provides a procedure for properly addressing" a concern that a witness may not be competent as a result of being intoxicated, "and that procedure was not followed here." CP 1057. This statute provides no such procedure. It merely states an intoxicated person may not be competent to testify. There is no "proper procedure" for determining the competency of a witness who arrives in court at 9:00 a.m. with the strong odor of alcohol on his breath.

The Moose defendants' argument on a competency hearing has changed on appeal. They cite *State v. Watkins*, 71 Wn. App. 164, 857 P.2d 300 (1993) for the proposition that a court must *sua sponte* inquire into a witness's competency. Br. of Appellants at 33. *Watkins* does not support their argument. That case involved witnesses who were developmentally disabled and had other mental health issues. The witnesses testified without objection. The pertinent issue on appeal was whether the court had a duty *sua sponte* to determine whether the witnesses were competent to testify. As an issue of first impression, the Court of Appeals found no such duty exists in the law, nor did the facts support the existence of any legitimate issues of the witnesses' competency.

Under RCW 5.60.050, a person is incompetent to testify when intoxicated at the time of his or her testimony. The statute does not mandate a competency hearing for an intoxicated witness. Once determined to be intoxicated, the witness is not competent to testify. Therefore, the only inquiry is whether the witness has been drinking and how much he or she has imbibed. After the strong odor of alcohol was detected on the breath of Pope by counsel and the court during his testimony, the trial court was well within its discretion to allow inquiry into whether the witness had been drinking. Generally, the determination of the competency of a witness lies within the sound discretion of the trial court and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion. *State v. Froehlich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981); *State v. Allen S.*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The trial court has broad discretion specifically under RCW 5.60.050 and will be reversed only upon an abuse of discretion. *State v. Bishop*, 51 Wn.2d 884, 322 P.2d 883 (1958), citing *State v. Moorison*, 43 Wn.2d 23, 33, 259 P.2d 1105 (1953); *State v. Atkins*, 26 Wn.2d 392, 393, 174 P.2d 427 (1946). The trial court here did not abuse its discretion in allowing the Fausts' trial counsel to inquire of Pope whether he had been drinking. The trial court did not find Pope to be incompetent in any event, and he was allowed to testify.

The jury had ample other reasons to disbelieve Pope's testimony that he saw Kinkaid in the bowling alley bar the night of the accident. Pope, whose boss was a Moose member, RP 1243, made no effort to contact law enforcement about his knowledge, RP 1247, and did not come forward until March 2005, RP 1245, nearly five years after the collision, at the prompting of the Moose investigator. RP 1248. Moreover, he and his companion, Robert Zoerb, recall the events of that evening differently. Both claim to have been facing Kinkaid with the other having his back to him. RP 1251-52, 1672. They also differed substantially on what Kinkaid had to drink (16 oz. pounders of draft beer vs. a bottle of beer). RP 1240, 1664. Pope was certain that the night he saw Kinkaid he was wearing a light camel brown shirt despite the fact that he was actually wearing a dark burgundy shirt as confirmed by Dr. Goldfogel. RP 1257-61; Ex. 8.³¹ The jury was entitled to reject Pope's testimony.

(c) "Demonizing" the Moose Defendants

The Moose defendants assert the Fausts' counsel somehow impugned the integrity of the Moose defendants and their counsel in the

³¹ Zoerb's testimony was equally questionable. He claimed to have driven by the accident scene with his girlfriend, Donna Rambis. RP 1667-68. Rambis denied this ever occurred. RP 1813. Zoerb further claimed he saw something about the accident on the local Bellingham television station on April 22. RP 1669. That station never broadcasted anything about the accident. RP 1805. Zoerb, who had an alcohol problem, RP 1814, agreed to give his statement, Ex. 93, at Chapman's insistence, RP 1743-45, when he was intoxicated. RP 1678-79.

course of questioning various witnesses. The essence of the Moose defendants' argument on this issue is not precise. They argue that the Fausts' trial counsel engaged in misconduct. Br. of Appellants at 38-46. Misconduct by an attorney requires a new trial only if the attorney's comments were improper and there is a substantial likelihood the remarks materially affected the substantial rights of the moving party. *Aluminum Co. of America*, 140 Wn.2d at 539. Usually, such misconduct arises in closing arguments. The *Alcoa* court indicated the burden of proving misconduct of counsel is a difficult one. The Court there approved the description of grounds for ordering a new trial set forth in the Moore treatise on federal practice:

A new trial may properly be granted based on the prejudicial misconduct of counsel. As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . . . The movant must ordinarily have properly objected to the misconduct at trial, . . . and the misconduct must not have been cured by court instruction.

Id. at 539. Moreover, curative instructions can sufficiently address alleged misconduct of counsel. *Freeman v. Intalco Aluminum Corp.*, 15 Wn. App. 677, 680-81, 522 P.2d 214 (1976). Here, the Moose defendants failed to ask the trial court for a curative instruction either at the time of Leibrant's

testimony or Strode's testimony when the misconduct is alleged to have occurred. They failed to preserve any error.

The gravamen of the Moose defendants' argument seems to be that trial counsel for the Fausts conducted improper cross-examination of their witnesses. But Washington law is clear that the scope of cross-examination is left to the discretion of the trial judge. ER 611(b),³² *Smith v. Seibly*, 72 Wn.2d 16, 19, 431 P.2d 719 (1967); *Szupkay v. Cozzetti*, 37 Wn. App. 30, 35-36, 678 P.2d 358 (1984) (court allowed cross of plaintiff's wife, who was a physician, on matters within knowledge of expert even though she was ostensibly called as a lay witness); *Johnson v. Carbon*, 63 Wn. App. 294, 298-99, 818 P.2d 603 (1991), *review denied*, 118 Wn.2d 1018 (1992).

The only witnesses to Kinkaid's consumption of alcohol were Moose members such as Alexis Chapman, John Leibrant, Larry Rayborn, Ray Anderson, Frank Rose, and Eleanor Rose. Leibrant testified, for example, that the Moose organization was a fraternal, sacred organization akin to a family. RP 529, 531, 560. Members gave an oath to each other.

³² ER 611(b) states:

Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

RP 527. They were not to “blab” to outsiders about Moose activities. RP 531, 556-57, 560. The Fausts were entitled to establish that the observations and recollections of the Moose members on what occurred on the evening of the accident were not reliable. The Fausts had every right to attack the credibility of the testimony of Moose Lodge members.

In this case, the trial court did not abuse its discretion in allowing the Fausts’ trial counsel to cross-examine Leibrant, a defense witness and long-time Moose Lodge member. Far from “impugning” anyone, the Fausts’ lawyers were entitled to explore the relationship of those witnesses to the Moose organization. Moreover, the Moose defendants never objected to the questioning of Leibrant at trial, RP 535, again raising the issue for the very first time in their posttrial motions. If the line of questioning had been objected to and the trial court afforded the opportunity to rule on it, any alleged impropriety could have been addressed. The Moose defendants failed to preserve the issue for review.

In any event, the testimony about clothing worn during Moose ceremonies was not introduced to suggest that the Bellingham Moose Lodge had any racial animus. The Fausts never once raised the issue of race in this case, nor did they infer that race was an issue. Leibrant himself raised racial animus by stating that, “We don't wear white hoods if that's what you're getting at.” RP 535. James DeZao, the Fausts’ trial

counsel made clear, "I know that. I'm not asking you about white hoods. I'm asking you about other things of attire that you wear." *Id.* The Moose defendants failed to show this brief questioning had any improper impact on the jury. The trial court, which was in a better position to assess the actual impact of the testimony on the jury, rejected the Moose defendants' arguments, and denied their posttrial motions. CP 842.

The Moose defendants also assert counsel for the Fausts engaged in misconduct in cross-examining Moose member Glen Strode on the failure of the Moose defendants to turn over the Moose Lodge membership list. Br. of Appellants at 41-45. This testimony was elicited in response to Strode's testimony that the membership list was easy to obtain from the Lodge computer system. RP 1652-53. This contrasted with the discovery responses Strode signed stating production of the lists was burdensome. The testimony was again very brief. RP 1652-53. The Moose defendants failed to object to the question at the time it was asked, waiving any error by failing to timely object. In any event, the trial court again assessed this issue in the context of the Moose defendants' posttrial motions and found it to be "minor and merely cumulative to other testimony." CP 842.

The trial court did not abuse its discretion in denying the Moose defendants' motion for a new trial.

(5) RCW 4.56.110(3) Applies a Different Rate of Interest on Tort Judgments than Other Judgments in Washington, Violating the Fausts' Right to Equal Protection of the Law

The trial court here entered a judgment in favor of the Fausts that provided a 6.002% rate of interest. CP 1081. This rate is consistent with the direction of RCW 4.56.110(3), but that statute is unconstitutional.³³

RCW 4.56.110(3) was enacted in 2004 as part of House Bill 2485. It provides tort judgments “shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry.”

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

³³ The Fausts anticipate that the Moose defendants may argue this issue cannot be raised for the first time on appeal. It can. RAP 2.5(a)(3) indicates that a party may raise at any time a “manifest error affecting a constitutional right.” Here, the error was manifest on the face of the judgment. At stake is a legal issue, the constitutionality of RCW 4.56.110(3), that can be resolved by this Court. The error will have an actual, not theoretical, effect on the Fausts’ rights. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The Legislature offered no rationale for the special interest rate for tort judgments in the Final Bill Report on HB 2485. See Appendix. The Legislature neglected to provide findings or any other explanation for its decision. The proponents for the bill in the House of Representatives stated:

The current default of 12 percent interest is unreasonably high. The interest on judgments should reflect to some degree economic reality at the time a judgment is entered. The current rate makes considerations of interest charges alone drive decisions on whether to appeal a case. Interest charges on a judgment against a local government can grow to hundreds of thousands of dollars while a case is being appealed. The bill will let appeal decisions be made more on the merits of the case itself. The federal government has adopted an interest rate on judgments tied to the T-bill rate, and the state should do so as well.

House Bill Report at 3. Similarly, the proponents testified in the Senate:

This allows prevailing plaintiffs to be made whole without unjust enrichment. The current 12 percent rate is punitive and discourages justifiable appeals.

Senate Bill Report at 2. The proponents' ostensible rationale for the bill makes little sense. Under it, higher interest rates for contract, child support, and all other nontort judgments are just fine, are not punitive, and do not discourage "justifiable" appeals, while tort judgments inexplicably require a lower interest rate. The proponents' rationale for a lower interest rate applies to these other judgments.

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

“The right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment.” *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). To withstand scrutiny under equal protection principles, the legislative classification in RCW 4.56.110(3) must rest on grounds relevant to the achievement of legitimate state objectives. *Id.* at 235-36. That is, to overturn the classification here, there must be no rational basis for the lower interest rate applicable to tort judgments. *Id.* at 236.

There is no rational basis for the Legislature’s decision to allow a lower rate of interest on tort claims, other than a punitive one. It singled

out tort judgment creditors, people who had been injured by the wrongful conduct of others, for special unfair treatment without demonstrating a legitimate legislative goal for the different treatment. This Court should find RCW 4.56.110(3) unconstitutional as violative of the rights of the Fausts to equal protection of the law under the Fourteenth Amendment to the United States Constitution or article I, § 12 of the Washington Constitution.

F. CONCLUSION

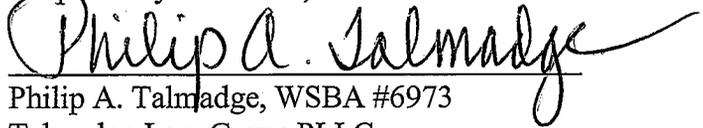
Alexis Chapman overserved Hawkeye Kinkaid at the Bellingham Moose Lodge bar when he was apparently under the influence of alcohol. The Moose defendants were unaware she had previous problems in serving alcohol because they neglected to check her employment history. From the Moose Lodge bar, Kinkaid drove drunk, crossed the centerline of a Ferndale road, smashed head-on into the Faust vehicle. Because of the Moose defendants' negligence and Kinkaid's irresponsibility, the lives of Bianca Faust, her two children, and the rest of the family were tragically and irreparably damaged.

After a long, fair trial, the jury rendered a verdict in the Fausts' favor. The Moose defendants simply do not like the verdict. However, they fail to show how the trial court committed prejudicial error in the conduct of the trial.

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

DATED this 1st day of February, 2007.

Respectfully submitted,



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(973) 808-8900
Attorneys for Respondents/
Cross-Appellants Faust

APPENDIX

RCW 46.61.506(1):

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

COURT'S INSTRUCTION NUMBER 3 TO THE JURY:

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 1111.

COURT'S INSTRUCTION NUMBER 13 TO THE JURY:

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

CP 1121.

DEFENDANTS' PROPOSED INSTRUCTION NUMBER 36:

You may not consider any evidence of Hawkeye Kinkaid's blood alcohol content (BAC) in deciding whether Hawkeye Kinkaid was apparently under the influence of alcohol when Alexis Chapman served him alcohol on April 21, 2000. This means you must disregard all evidence of Hawkeye Kinkaid's blood alcohol content, including evidence from medical records, the autopsy, and the opinion of Richard Saferstein and Michael Hlastala.

CP 1138.

DEFENDANTS' PROPOSED INSTRUCTION NUMBER 39:

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

Unless you are instructed otherwise, the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 1142.

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FILED IN OPEN COURT
11-4 2005
WHATCOM COUNTY CLERK
By
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

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

Plaintiffs,

v.

MARK ALBERTSON, as Personal
Administrator for the ESTATE OF
HAWKEYE KINKAID, deceased,
BELLINGHAM, LODGE #493, LOYAL
ORDER OF MOOSE, INC., ALEXIS
CHAPMAN, MOOSE INTERNATIONAL,
INC., JOHN DOES (1-10) (fictitious names
of unknown individuals and/or entities) and
ABC CORPORATION (1-10) (fictitious
names of unknown individuals and/or
entities)

Defendants.

No. 03-2-00859-8

JUDGMENT

Judge Charles Snyder

SUMMARY OF JUDGMENT

Judgment Creditors

Bianca Faust, Christopher Faust,
Bianca Mele, Bryan Mele

Judgment Creditor's attorneys

Steve Chance, James DeZao

Judgment Debtors

Estate of Hawkeye Kinkaid;
Alexis Chapman; Bellingham
Moose Lodge #493, Royal
Order of Moose, Inc.

ORIGINAL

1	Amount of Judgment:		
2	Bianca Faust		\$ 2,130,422.52
3	Bianca Mele		\$ 1,704,134.09
4	Gary Christopher Faust		\$10,198,407.62
5	Bryan Mele	\$ 10,000.00	
6	Attorneys fees	\$ 200.00	
6	Statutory Costs	\$ 2,103.55	
			\$ 12,303.55
7	Post Judgment Interest Rate		6.002 %
8	Total Judgment		\$14,045,267.78

HEARING

Date: September 28 - October 21, 2005.

Appearances: Plaintiffs appeared by and through counsel, Steve Chance, of Steve Chance, Attorney at Law, P.C. and James DeZao of DeZao & Dibrigida. Defendants appeared by and through counsel, William Fitzharris of Kingman, Peabody, Fitzharris & Ringer.

VERDICT

The verdict of the jury was entered on October 21, 2005.

JUDGMENT

The Court, having considered the evidence and argument of counsel, HEREBY ORDERS, ADJUDGES AND DECREES:

1. Plaintiffs are awarded judgment against the Defendants Estate of Hawkeye Kinkaid, Alexis Chapman, Bellingham Moose Lodge #493, Royal Order of Moose, Inc., jointly and severally, as follows:

- a. As to Bianca Faust, the sum of \$2,130,422.52;
- b. As to Bianca Mele, the sum of \$1,1704,134.09;

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c. As to Gary Christopher Faust, the sum of \$10,198,407.62; and
d. As to Brian Mele, the sum of \$12,303.55 which includes attorneys
fees in the amount of \$200.00 and statutory costs in the amount of
\$2,103.55.

2. Plaintiffs are awarded post-judgment interest at 6.002%.

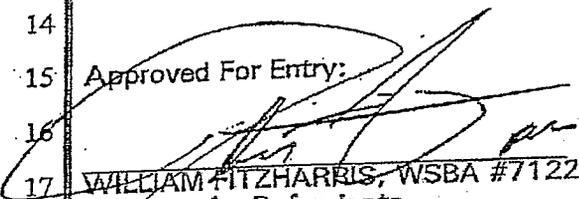
Dated this 4 day of November, 2005.


JUDGE CHARLES SNYDER

Presented by:


STEVE CHANCE, WSBA #19765
Attorney for Plaintiff

Approved For Entry:


WILLIAM FITZHARRIS, WSBA #7122
Attorney for Defendants

RECEIVED
JAN 13 2006

KINGMAN PEABODY FITZHARRIS
& RINGER

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

<p>BIANCA FAUST, Individually and as guardian of GARY C. FAUST, et al</p> <p>Petitioner/Plaintiff</p> <p>vs.</p> <p>MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINCAID, deceased, et al</p> <p>Respondent/Defendant</p>	<p>No. 03-2-00859-8</p> <p>ORDER ON DEFENDANTS' POST- TRIAL MOTIONS</p>
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This matter having come before the court on the motions of Defendant post-trial, the court having heard the argument of counsel and having considered the written submissions of the parties, does hereby issue the following order on the motions of the Defendant, in the order in which the motions were presented to the court.

A. THE MOTIONS AND DISCUSSION

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

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

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

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

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

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

II. MOTION FOR NEW TRIAL ON LIABILITY AND DAMAGES

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

A. Mac Pope and Alcohol

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

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

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

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

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

D. Kincaid's BAL and Other Toxicological Evidence

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

E. Ron Beers' Declaration

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

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

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

G. The Negligent Hiring/Supervision Claim

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

G. Questions Re: Discovery of the Membership List

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

H. Passion and Prejudice

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

I. Instructional Errors

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

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

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

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

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

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

III. MOTION FOR NEW TRIAL ON DAMAGES ONLY

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

IV. MOTION FOR REMITTITURS

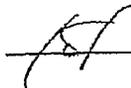
This presents the most significant issue for the court in this series of motions. Defendants note that jury members admitted in post-trial discussions that they had determined the amount to award for future surgery for Bianca Faust on the experience that one juror had with prior, albeit different, orthopedic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

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

B. ORDER

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

SIGNED this the 11 day of January, 2006.

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JUDGE

FINAL BILL REPORT

HB 2485

C 185 L 04

Synopsis as Enacted

Brief Description: Revising the rate of interest on certain tort judgments.

Sponsors: By Representatives Lantz, Carrell, Newhouse, Alexander, Jarrett, Moeller, Sommers, Kagi, Upthegrove, Schual-Berke and Darneille.

House Committee on Judiciary

House Committee on Appropriations

Senate Committee on Judiciary

Background:

Interest accrues on a tort judgment from the date of entry of the judgment at a rate determined as prescribed in statute. That rate is set at the maximum rate allowed under the state's general usury law. It is the higher of the two following rates:

- 12 percent; or
- 4 points above the 26-week Treasury bill (T-bill) rate established by the Federal Reserve Board.

This method of determining the rate was enacted in 1983 and applies to tort judgments against defendants who are government entities or private entities. Prior to 1983 the interest rate on judgments against private party defendants was 12 percent, and on judgments against the state it was 8 percent.

In 1983 the 26-week T-bill rate averaged 8.75 percent. Adding 4 percent to this amount made the two alternative methods of computing the interest rate for judgments roughly equivalent. Over the past 20 years, the highest average annual T-bill rate was 9.77 percent in 1984. However, since 1991 the T-bill rate has been no higher than 5.59 percent. As a result of these low T-bill rates, 12 percent has been the interest rate on judgments for the past decade or more.

In 1983 the legislation that created the current method of determining the interest rate on judgments expressly made the change apply only to judgments entered after the effective date of the change. There is case law suggesting that if legislation is silent on the issue, the courts may decide either way on whether the new rate will be applied to existing unpaid judgments as well. It appears, however, that the Legislature may make an interest rate change apply to existing judgments if it chooses to do so expressly. The courts of this state have said that interest on a judgment is not a matter of contractual right, but rather a matter of legislative discretion.

Summary:

The interest rate on tort judgments is to be determined by adding two points to the 26-week T-bill rate.

This new method of calculating interest rates applies to interest on judgments still accruing interest on the effective date of the act, as well as to interest on judgments entered after the act takes effect.

An express statement is provided to make it clear that the act does not change the interest rate on legal obligations imposed as the result of a criminal conviction.

Votes on Final Passage:

House 97 1
Senate 3 (Se
43 nate
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House 70 27 (House concurred)

Effective: June 10, 2004