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No. 81356-6
SUPREME COURT
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,

Petitioners,

v.

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

Defendant,

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

Respondents,

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.

FAUSTS' COMBINED ANSWER TO THE AMICI BRIEFS OF
MOTHERS AGAINST DRUNK DRIVING
AND
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. INTRODUCTION	1
B. ARGUMENT	2
C. CONCLUSION	10
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	<i>passim</i>
<i>Cox v. Keg Restaurants U.S., Inc.</i> , 86 Wn. App. 239, 935 P.2d 1377, <i>review denied</i> , 133 Wn.2d 1012 (1997).....	6, 9
<i>Dickinson v. Edwards</i> , 105 Wn.2d 457, 716 P.2d 814 (1986).....	5, 9, 10
<i>Fairbanks v. J.B. McLoughlin Co., Inc.</i> , 131 Wn.2d 96, 929 P.2d 433 (1997).....	5, 9, 10
<i>Faust v. Albertson</i> , 143 Wn. App. 272, 178 P.3d 358 (2008).....	4, 5
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	7
<i>State v. Hoffman</i> , 116 Wn.2d 51, 71, 804 P.2d 577 (1991).....	10
<u>Statutes</u>	
RCW 66.44.200	3
<u>Rules and Regulations</u>	
RAP 13.7(b)	10

A. INTRODUCTION

Amicus curiae Mothers Against Drunk Driving (“MADD”) contends the Court of Appeals’ opinion in this case weakens Washington public policy on drinking and driving and undermines the laudable social goal of deterring such conduct. The Fausts¹ agree.

Amicus curiae Washington State Association for Justice Foundation (“WSAJ”) separately argues the Court of Appeals misread the law concerning a commercial seller’s liability for negligently overserving alcohol, the requirement of firsthand observational evidence, and the admissibility of blood alcohol content (“BAC”) evidence. It also argues this Court should re-evaluate the evidentiary threshold in negligent overservice cases in light of the new “apparent intoxication” standard articulated in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004). The Fausts agree.

The Court of Appeals misapplied *Barrett* when it decided the type and quantum of evidence necessary to prove a claim for overservice is the same as that which existed under pre-*Barrett* law. What is more, the court erred when it concluded direct observational evidence was required to

¹ “The Fausts” refers collectively to Bianca Faust, in her individual capacity and as the guardian of Gary C. Faust, Bianca Celestine Mele, Bryan Mele, Beverly Mele, and Albert Mele.

prove Hawkeye Kinkaid was “apparently under the influence of alcohol” at the time he was overserved.

But even under the pre-*Barrett* “obviously intoxicated” overservice standard, the Fausts met their burden to take this case to the jury. The combination of post-service observations and the scientific and circumstantial evidence the Fausts presented satisfied what all parties agree is the less stringent standard enunciated in *Barrett*. The jury was entitled to infer Kinkaid was apparently under the influence of alcohol when his bartender girlfriend overserved him at the Moose Lodge shortly before he lost control of his van, crossed the centerline of a road, and crashed into the Faust vehicle.

Even supposing this Court established a new rule that all evidence – both direct and circumstantial – relating to the defendant’s post-service conduct was admissible to demonstrate the defendant was apparently under the influence of alcohol at the time he or she was overserved by a commercial establishment, the Fausts clearly offered sufficient evidence of Kinkaid’s post-service conduct to take their case to the Whatcom County jury.

B. ARGUMENT

As MADD expansively articulated, Washington has a strong public policy aimed at deterring drinking and driving. MADD Br. at 3-5.

Civil liability for those who enable drunk drivers is an important tool to curtail drinking and driving. *Id.* at 8. This policy rationale prompted the Legislature to enact RCW 66.44.200, which holds a commercial establishment civilly and criminally liable for overserving a patron “apparently under the influence of alcohol.”

Under pre-*Barrett* law, however, the common law standard for determining whether a commercial establishment breached its duty to avoid overserving alcohol was whether it served alcoholic beverages to an “obviously intoxicated” person rather than a person “apparently under the influence.” Faust Suppl. Br. at 9. *Barrett* signaled a departure from that standard. There, this Court acknowledged the terms “apparently under the influence” and “obviously intoxicated” defined different degrees of intoxication. 152 Wn.2d at 269. The *Barrett* court also noted apparent intoxication involved less certainty and immediacy, requiring at least some reflection and thought. *Id.* at 268. Recognizing that the purpose of RCW 66.44.200 was to protect the health and safety of the people of Washington, the Court reduced the degree of impairment needed to prove overservice to conform to the less stringent statutory standard because that standard better protected the public from the enormous personal and social costs arising from drunk driving accidents. *Id.* at 272, 274.

Despite *Barrett's* lower standard, the Court of Appeals reasoned here that the type and quantum of evidence necessary to prove a claim for overservice remained the same. *Faust v. Albertson*, 143 Wn. App. 272, 280 n.3, 178 P.3d 358 (2008). This is simply not the case. By its very nature, the *Barrett* standard depends more on subjective reflection and thought than on certainty. Thus, the quantum of evidence needed to prove apparent intoxication is correspondingly less than that which was formerly required to prove obvious intoxication. But even if the type and quantum of essential evidence remains the same after *Barrett*, the evidence the Fausts presented met the higher standard.

Unfortunately, the evidence required to take an overservice case to the jury has not been a picture of clarity under Washington common law. It is clear, however, that the plaintiff in an overservice case is not confined to direct observational evidence from bar patrons and staff to establish the defendant was obviously intoxicated at the time of overservice.²

² To hold that only direct observational evidence of the defendant's appearance satisfies the *Barrett* test would be extraordinarily unfair, especially in a case like this one where the bar patrons were all Moose Lodge members with every reason to suffer from "selective memory" concerning how much Kinkaid drank at the Moose Lodge bar. The idea that Kinkaid had only one or two beers during the many hours he was at the bar is absurd given the fact that he drank whiskey and Diet Pepsi by preference, RP 395, 420, 512, 1742, he had a BAC reading of 0.32% shortly after the accident, RP 232, and the autopsy revealed his stomach contained 1.5 liters of unabsorbed liquid that reeked of alcohol. RP 202-05.

MADD and WSAJ correctly note that even under the old “obviously intoxicated” standard, the trier of fact was permitted to infer intoxication at the time of service from post-service observations. MADD Br. at 7; WSAJ Br. at 12-13. These post-service observations constitute circumstantial evidence, which is as reliable as direct evidence. MADD Br. at 9; WSAJ Br. at 11-12. Importantly, and contrary to the Court of Appeals’ opinion on the matter, this Court has rejected a set period of time within which the post-service observations must be made and instead permitted such observations to relate back to the time of the alleged overservice. *See, e.g., Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997); *Dickinson v. Edwards*, 105 Wn.2d 457, 464, 716 P.2d 814 (1986). The Court of Appeals held that the jury could only infer that Kinkaid was apparently under the influence back to the time he left the bar rather than when he was cut off by Chapman when he was drunk. *Faust*, 143 Wn. App. at 284. But this Court’s decisions in *Fairbanks* and *Dickinson* are not so restrictive, particularly where, as here, Kinkaid’s collision with the Faust vehicle happened when he was clearly drunk and shortly after he left the Moose Lodge bar.

Additionally, Washington law is particularly unclear in its treatment of forensic evidence. The Moose defendants³ argue that forensic evidence like BAC test results is *never* admissible to prove a defendant is apparently under the influence. Moose Suppl. Br. at 18. They are mistaken.

MADD and WSAJ recognize the error in the Moose defendants' argument that BAC evidence is inadmissible in civil cases. MADD Br. at 8-9; WSAJ Br. at 16-18. RCW 46.61.506(1) is unambiguous: BAC test results are admissible in civil actions. Moreover, BAC evidence is direct evidence of the *fact* of intoxication. *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 249-50, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997). While BAC evidence may be insufficient to prove the degree of intoxication, without more, it is relevant to corroborate and enhance the credibility of firsthand observations that the defendant was drunk at the time of overservice. *Id.* at 250. In this case, Kinkaid's BAC test results are admissible to corroborate the testimony regarding his appearance when Chapman cut him off at the Moose Lodge bar.

Here, the Fausts presented ample evidence to document the fact that Kinkaid was apparently under the influence of alcohol when he left

³ "Moose defendants" refers collectively to the Bellingham Moose Lodge and Alexis Chapman.

the Moose Lodge bar.⁴ The jury had the firsthand observations of Kinkaid's bartender girlfriend, Alexis Chapman, a trained alcohol server, concerning Kinkaid's conduct while at the Moose Lodge bar; in particular, Chapman admitted *Kinkaid was drunk at the Moose Lodge bar* and that he was "tipsy," "belligerent," and "shouldn't be driving." RP 264-67, 335. Chapman had a history of overserving Kinkaid. RP 451-52, 516-17. The Moose defendants admitted that Kinkaid was legally drunk at the time of the collision. RP 243-44. Kinkaid did not abruptly become drunk at the Moose Lodge bar. Rather, Kinkaid had been drinking for quite a while at the bar and was drunk when Chapman told him to leave. RP 265, 267. The jury was entitled to infer that Kinkaid was "apparently under the influence" at the Moose Lodge bar from this testimony.

The Fausts presented abundant circumstantial evidence that Kinkaid was intoxicated at the time Chapman overserved him: Kinkaid's van crossed the centerline of LaBounty Road to slam into the Fausts' vehicle, (evidencing the fact he was under the influence and unable to control his vehicle), the collision occurred only 15 minutes after Kinkaid

⁴ The Court of Appeals misapplied the standard for a motion for judgment as a matter of law under CR 50 by considering the evidence in the light most favorable to the *Moose defendants*. This was error. A court ruling on a CR 50 motion must consider the evidence in the light most favorable to the *nonmoving party*. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (citations omitted). Here, that was the Fausts.

left the Moose Lodge, Kinkaid was drunk at the time of the collision, and he reeked of alcohol at the scene. RP 192, 243-44, 364, 670, 907-08; Ex. 10. To further corroborate their claim that Kinkaid was apparently under the influence of alcohol at the time of the collision, the Fausts presented evidence that Kinkaid's BAC level one hour after the accident was 0.16%, RP 192; Ex. 8, and his BAC at the time of the accident was 0.32%, a level which could only be reached by ingesting 21 12-ounce beers or 30 ounces of 80-proof alcohol between 4:45 p.m. and 7:30 p.m., the approximate time Kinkaid was in the Moose Lodge bar. RP 245-46. This BAC estimate also did not account for 1.5 liters of unabsorbed liquid reeking of alcohol that the medical examiner found in Kinkaid's stomach on autopsy. RP 201-203, 247. Dr. Richard Saferstein, the Fausts' toxicologist, testified an average normal human being would show outward signs of intoxication that would be apparent to others in his or her presence at a BAC of 0.10%. RP 241. These signs could include poor gait, inability to properly stand or walk, poor balance, slow and unsteady hand movements, and possibly slurred speech. *Id.* He also testified that a frequent drinker, someone who has developed a tolerance for alcohol, would begin to show the outward manifestations of intoxication at about 0.15%. RP 243. Regardless of a person's tolerance for alcohol, Dr. Saferstein testified a

person with a BAC of 0.26% would be significantly intoxicated and a menace on the road. *Id.*

Contrary to the Court of Appeals' opinion, even under the pre-*Barrett* evidence standard enunciated in *Cox*, *Fairbanks*, and *Dickinson*, the combination of post-service observations and circumstantial evidence the Fausts presented here satisfied the new standard articulated in *Barrett*. The jury properly inferred Kinkaid was apparently under the influence of alcohol when Chapman served him at the Moose Lodge bar, when he left the bar, when he operated and lost control of his van, and when he crashed into the Faust vehicle.

After *Barrett*, this Court should hold that evidence, whether direct or circumstantial, including forensic evidence like BAC test results and expert testimony, is admissible to establish that a defendant was apparently under the influence at the time he or she was overserved at a commercial establishment. This standard would be sensible post-*Barrett*, given the lowered burden of proof from "obvious intoxication" to "apparently under the influence" in overservice cases enunciated in *Barrett*. Under this standard, the Fausts presented ample evidence to take their case to the jury.

C. CONCLUSION

As *Fairbanks* and *Dickinson* make clear, the inferences to be drawn from firsthand observations, including related credibility determinations, are to be resolved by the jury. This is particularly true where, as here, the jury heard evidence for five weeks. It is the function of the jury to resolve factual issues. But in this case, unlike the trial court which denied the Moose Lodge defendants' motion for judgment as a matter of law in a reasoned opinion, the Court of Appeals substituted its judgment for that of the jury. The Court of Appeals should not have invaded the jury's province.

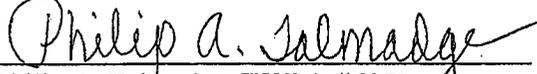
This Court should reverse the Court of Appeals and reinstate the trial court's judgment and the order denying the Moose Lodge's post-trial motions.⁵ Costs on appeal should be awarded to the Fausts.

⁵ The Moose defendants asserted in their answer to the Fausts' petition for review at 6, n.1, that there were four issues not addressed by the Court of Appeals requiring that if this Court reversed the Court of Appeals opinion, this Court must remand the case to the Court of Appeals to address those issues. The Moose defendants offer no authority for their argument. This Court need not consider this Fabian delay argument made without the citation of authority. *State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991) ("Arguments not supported by relevant citation of authority need not be considered by this Court.")

Under RAP 13.7(b), this Court could resolve such issues. Those issues are non-meritorious for all the reasons set forth in the Fausts' Court of Appeals briefing. Moreover, the devastating injuries the Fausts caused by Kinkaid and the Moose defendants occurred *in 2000*. The Fausts are entitled to have the benefit of the jury's verdict if this Court rules in their favor without any further delay.

DATED this 1st day of May, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

BY RONALD R. CARPENTER

On said day below I emailed and deposited in the U. S. Mail a true and accurate copy of the attached document: ~~Fausts' Combined Answer~~ to the Amici Briefs of Mothers Against Drunk Driving and Washington State Association for Justice Foundation in Supreme Court Cause No. 81356-6, to the following:

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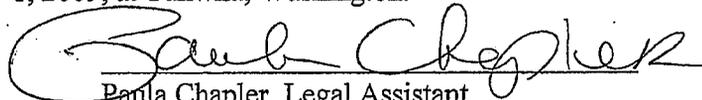
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 1, 2009, at Tukwila, Washington.

A handwritten signature in cursive script, appearing to read "Paula Chapler", written over a horizontal line.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick