

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,  
LOYAL ORDER OF MOOSE, INC.,  
MOOSE INTERNATIONAL, INC.,  
JOHN DOES (1-10) (fictitious names  
of unknown individuals and/or entities) and  
ABC CORPORATION (1-10) (fictitious  
names of unknown individuals and/or entities),  
and

BELLINGHAM LODGE #493; ALEXIS CHAPMAN,  
Respondents.

BRIEF OF AMICUS CURIAE  
MOTHERS AGAINST DRUNK DRIVING

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A. INTEREST OF AMICUS CURIAE

Since its inception in 1980, Mothers Against Drunk Driving ("MADD") has evolved into one of the strongest victim service, education, and activism organizations in the United States. The mission of MADD is to stop drunk driving, support the victims of this violent crime, and prevent underage drinking.

Since 1980, MADD's presence has resulted in a serious decrease in annual alcohol-related traffic fatalities, from over 30,000 lives lost in the 1980's to 13,000 lost in 2007. MADD has helped save over 300,000 lives throughout its history as a victim services provider and advocate for anti-drunk driving laws. MADD has made drunk driving, which was once socially accepted, socially repugnant. Today, MADD is on a quest to eliminate drunk driving. MADD's Campaign to Eliminate Drunk Driving, launched in 2007, relies on high visibility law enforcement, advanced technology, ignition interlock device use by all convicted drunk driving offenders, and grassroots support to eliminate drunk driving.

An integral part of MADD's overall effort to stop drunk driving and to support the victims of drunk driving is to promote appropriate legal standards to hold drunk drivers and third parties civilly responsible for the driver operating a vehicle under the influence. Civil liability for the financial consequences of the driver operating a vehicle under the

influence and injuring others is critical. MADD's website provides information regarding social host liability and Dram Shop Acts. MADD also provides information on how to select a civil attorney.

#### B. STATEMENT OF THE CASE

The present case involves the question of what evidence is necessary to establish a case of civil liability against a commercial establishment that overserves a patron who is "apparently under the influence" and then causes harm to others. This case follows upon the Washington Supreme Court decision in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004).

MADD acknowledges the description of the facts in this case in the Brief of Appellants.

#### C. ARGUMENT

As previously noted, MADD has been in the forefront of efforts to stop drinking and driving, to support the victims of drunk drivers, and to prevent underage drinking. These efforts have required aggressive legislative steps, as well as social and educational actions, to change public perception of drinking and driving.

In the legislative arena, the efforts have focused on prevention, treatment, and penalties for drunk drivers and those who aid and abet drinking and driving. MADD believes it is vital that a state's laws reflect

all of these activities. Civil liability for those who enable drunk drivers is a critical aspect of preventing and punishing drunk driving.

(1) Washington Public Policy on Drinking and Driving

Washington has adopted an array of criminal statutes supported by MADD designed to punish drinking drivers and, by such punishment, to deter drinking and driving.

Washington provides that by operating a vehicle, drivers give their implied consent to have their breath or blood taken for purposes of determining if they are driving under the influence of drugs or alcohol. RCW 46.20.308(1). Failure to submit to the testing results in administrative revocation of the driver's license for a year. RCW 46.20.308(2). The refusal to take the test may be used as evidence in a criminal trial. RCW 46.20.308(2)(b); RCW 46.612.517. If the person taking the test has a blood alcohol content ("BAC") of 0.08 or more (0.02 if a minor), the driver's license must be suspended for at least ninety days administratively. RCW 46.20.308(2)(c). This informed consent statute is designed to discourage people from driving vehicles under the influence of alcohol or drugs. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002).<sup>1</sup>

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<sup>1</sup> The 2004 Legislature observed in making changes to the statute:

Washington provides that persons over the age of 21 are guilty of the crime of driving under the influence of alcohol if the BAC is 0.08 or more. RCW 46.61.502(1). The offense is punished as a gross misdemeanor, RCW 46.61.502(5), but it is punishable as a felony if certain factors are present. RCW 46.61.502(6). A person under 21 is guilty of DUI if the person's BAC is 0.02. RCW 46.61.503. A person may also be punished for being in physical control of a vehicle while under the influence. RCW 46.61.504. This offense is designed to deter anyone who is intoxicated from even getting into a vehicle, except as a passenger. *State v. Votava*, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003).

These offenses all have serious consequences. A person convicted of these offenses faces imprisonment and fines. RCW 46.61.5055. After January 1, 2009, the person must also have an ignition interlock device on any vehicle he or she operates. Laws of 2008, ch. 282, § 14. A person may be required to undergo alcohol evaluation and treatment. RCW 46.61.5056. His or her vehicle may be subject to seizure and forfeiture of the vehicle. RCW 46.61.5058. Such a person may also be required to

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previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

Laws of 2004, ch. 68, § 1.

attend a program focusing on the emotional, physical, and financial suffering of victims of drunk drivers. RCW 46.61.5152.

Washington treats any injury or death by a drunk driver as the separate felony crimes of vehicular assault, RCW 46.61.522, and vehicular homicide. RCW 46.61.520. In addition to the other criminal penalties for those crimes, mandatory evaluation and treatment for alcohol or drugs must follow. RCW 46.61.524.

Washington law also forbids open containers of alcohol in vehicles, RCW 46.61.519, and authorizes more stringent local penalties for that offense. RCW 46.61.5191.

Washington also regulates the sale of alcoholic beverages by licensing alcohol providers and regulating the sale of alcoholic beverages through the Liquor Control Board. Title 66 RCW. Washington adopted an alcohol server education program in 1995. RCW 66.20.300.<sup>2</sup>

MADD's purpose in discussing these statutory provisions at length is to confirm Washington's public policy on drinking and driving:

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<sup>2</sup> The Legislature's purpose in enacting such a program was as follows:

The Legislature finds that education of alcohol servers on issues such as physiological effects of alcohol on consumers, liability and legal implications of serving alcohol, driving while intoxicated, and methods of intervention with the problem customer are important in protecting the health and safety of the public. The legislature further finds that it is in the best interest of the citizens of the state of Washington to have an alcohol server education program.

Washington state wants to stop drinking and driving, given the huge social cost of such behavior on the people of the state of Washington. This strong public policy also offers appropriate context for the discussion of the evidence necessary to prove a civil case against a commercial establishment that overserves its patrons who then go and cause havoc on Washington's roads and highways.

(2) Civil Liability for Commercial Establishments Overserving Patrons Who Cause Harm to Third Persons

The Washington Legislature established the public policy for commercial establishments overserving patrons in RCW 66.44.200 and RCW 66.44.270. An establishment is civilly and criminally liable for overserving adults "apparently under the influence of alcohol." RCW 66.44.200. Such an establishment is also liable for serving minors. RCW 66.44.270.

In *Barrett*, this Court removed the judicial gloss on the statutory language of RCW 66.44.200(1). Instead of the judicially-created liability standard of overservice to persons "obviously intoxicated," the Court restored the legislative language of "apparently under the influence." 152 Wn.2d at 274-75. The new standard was a lower standard of plaintiffs, as the Court observed. *Id.* at 389. However, the Court did not indicate in

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Laws of 1995, ch. 51, § 1.

*Barrett* the type of evidence that would be necessary for proof of the new standard.

Even under the old “obviously intoxicated” test, cases held that forensic evidence such as BAC test results could be admitted to confirm observational testimony. *See, e.g., Cox v. Key Restaurant U.S., Inc.*, 86 Wn. App. 239, 250, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997). Moreover, in some instances, cases held that evidence garnered after the harm caused by the drunk driver was admissible to allow a jury to infer what the appearance of the drunk driver was at the commercial establishment. *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986); *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997).

Despite this Court’s restoration of the “apparently under the influence” test, a lowered burden to establish civil liability, the Bellingham Moose Lodge here contends that this Court should tie the hands of plaintiffs in proving an overservice case. It variously contends that BAC test results should be inadmissible, as should other forensic evidence; it implies that circumstantial evidence should be inadmissible.

Moose Supplemental br. at 16, 19.<sup>3</sup> Its arguments fly in the face of the public policy of Washington described above.

In general, if the public policy of Washington is to deter drinking and driving, civil liability against those who overserve patrons who then go out and drive, causing harm to innocent third persons, is an important tool in the effort to curb drinking and driving. Commercial establishments are in the best position to monitor the alcohol ingestion of their patrons, as the mandatory server training program recognizes. A liberal standard for the introduction of evidence is appropriate for such civil liability.

As for the express arguments by the Moose Lodge, its argument on BAC results is contrary to statute. BAC results are admissible in Washington in civil actions. RCW 46.61.506(1) is unambiguous:

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.

The Legislature did not condition the admissibility of BAC test results in civil cases. It did not say the results were admissible only to confirm other

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<sup>3</sup> The Court of Appeals decision was imprecise as to what evidence could sustain an overservice case.

observational testimony regarding the appearance of the overserved patron.

Where the Legislature has provided that BAC test results are admissible in criminal cases, and the *refusal* to take the breathalyzer test is admissible to prove guilt in criminal cases or culpability in license revocation proceedings, RCW 46.20.308(2)(b), RCW 46.61.517,<sup>4</sup> it would be anomalous for this Court to restrict the admission of BAC test results in a civil case.

Contrary to the Moose Lodge's implicit argument, circumstantial evidence has traditionally been viewed in Washington on a par with direct evidence. *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994) ("A plaintiff may establish any fact by circumstantial evidence.") The pattern instruction on circumstantial evidence states:

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.

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<sup>4</sup> See, *State v. Baldwin*, 109 Wn. App. 516, 37 P.3d 1220, review denied, 147 Wn.2d 1020 (2001) (refusal admissible to prove guilt in criminal case); *City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 1248 (1993) (license revocation proceeding).

WPI 1.03.

Given Washington's public policy on drinking and driving, and the general principles regarding admission of circumstantial evidence, it would be anomalous for this Court not to trust juries to make the appropriate decision about whether a patron was apparently under the influence of alcohol, but nevertheless was served by the commercial establishment. A jury can be trusted to infer, from evidence that a patron had numerous drinks over a short period of time and had such elevated BAC test results at the accident scene minutes after leaving a bar, that any normal human being would be under the influence. Moreover, the jury can properly infer that a server, trained by the Washington Liquor Control Board, would appreciate that fact, given the impact of alcohol on people. A patron should not have to be stumbling drunk to be cut off. This Court should not retreat from the real world in its evidentiary decisions.<sup>5</sup> Ultimately, this Court should consider how its ruling on the evidence

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<sup>5</sup> This thought is particularly true in this case where the patrons in the Moose Lodge bar were interested in their Lodge avoiding liability. If there was only a bartender and a patron in the bar, for example, liability would be virtually impossible to prove without forensic and circumstantial evidence. Bar staff are not likely to be disinterested observers when their jobs and their own individual liability are at stake. A case of civil liability for overservice should not have to rely on the fortuity that there is a disinterested observer in the commercial establishment.

necessary to establish a civil claim of overservice best effectuates Washington's public policy on deterring drinking and driving.

(3) Allowing the Introduction of Forensic and Circumstantial Evidence to Prove a Person Was Overserved Is Good Social Policy

MADD believes that civil liability for commercial establishments who overserve patrons is a vital aspect of the effort to deter drinking and driving and the senseless carnage on the roads that killed 13,000 Americans in 2007 and maimed countless others. These deaths and injuries are *preventable*. This Court has a critical role in making that true. This Court made a large step in the right direction in *Barrett*. It can again do so here in making clear the evidence that will sustain a finding that a patron was “apparently under the influence” when overserved.

Others have noted the key role that civil liability plays in deterring drinking and driving; it is not enough to encourage citizens not to drink and drive:

As there are serious drawbacks to relying solely upon educational programs targeting the general public, attention must be turned to other areas that contribute to the occurrence of OUI [operating under the influence]. The alcohol serving industry is one such area. Presently, there is no real deterrent for this industry—which thrives on serving large amounts of alcohol—to stop pushing alcohol on consumers. The current status of selling alcohol without regard to limits is not a mere matter of ignorance on behalf of management and wait staff, but is a calculated effort to increase revenue. If more of these establishments

understood the risks and implications of their actions in continuing to serve alcohol to an individual up to and past the point of intoxication, they would make a concerted effort to stop doing so. These establishments know that under existing licensing schemes and enforcement, the likelihood of being held responsible for an alcohol related accident is low. "Reductions in budgets, decreasing available personnel, the absence of public and governmental support, and difficulties coordinating efforts with local law enforcement are some of the problems that affect enforcement of over-consumption policies." While most states have Dram Shop Laws, there is no uniformity in their drafting or application. Most notably, states have varying levels of proof on liability standards, on who can be held responsible and on what types of penalties can be imposed on violators. Some of these statutes require evidence that the alcohol server acted negligently, while others require proof of either actual knowledge that the patron was intoxicated or recklessness on the part of the server. Statutes also vary in term of who can be held liable for overserving alcohol to individuals. While most statutes appear to apply to both commercial and non-commercial servers, some of the statutory language is unclear and may be read to apply only to commercial establishments. In terms of penalties, some statutes make a violation criminal, while others handle a violation as a civil matter. Penalties typically range from suspension or revocation of liquor licenses to monetary fines or imprisonment. This lack of uniformity makes ineffective what could otherwise be a very successful tool in combating OUI.

Tina Wescott Cafaro, *You Drink, You Drive, You Lose: or Do You?*, 42

Gonz. L. Rev.1, 19-20 (2006-07) (footnotes omitted).

To advance the social policy of deterring drinking and driving,<sup>6</sup>

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<sup>6</sup> As noted in the Cafaro article, empirical studies have established a connection between tougher civil liability standards and a drop in single vehicle night time injury crashes. 42 Gonz. L. Rev. at 21, n. 129.

this Court should hold that a case of civil liability can be established against a commercial establishment if that establishment overserves a patron "apparently under the influence" of alcohol. A plaintiff in such an action should be able to prove that a person is "apparently under the influence" by direct or circumstantial evidence. BAC results should be admissible to do so pursuant to statute. Expert forensic evidence should also be admissible to establish such liability.

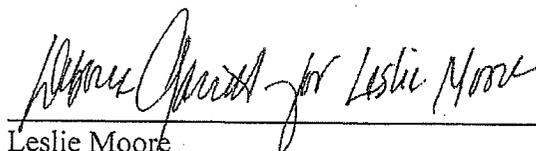
D. CONCLUSION

This Court should complete the work it started in *Barrett* to set civil liability for commercial establishments overserving patrons on solid ground consistent with Washington public policy and the worthy social goal of deterring drinking and driving.

MADD requests that this Court reverse the Court of Appeals and restore the judgment in favor of the Fausts.

DATED this 17<sup>th</sup> day of March, 2009.

Respectfully submitted,



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