IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1218
Polk County No. LACL 132459

RHONDA BANWART, Individually and as Next Friend of A.B. and M.B.

Plaintiffs-Appellants

vs.

50TH STREET SPORTS, L.L.C. d/b/a DRAUGHT HOUSE 50

Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY FARRELL

PLAINTIFFS-APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Cases:

Rathje v. Mercy Hosp., 745 N.W.2d 443, 447 (Iowa 2008)

Farm Bureau Mut. Ins. Co. v. Mine, 424 N.W.2d 422, 423 (Iowa 1988)

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Torrence v. Murphy's Bar & Grill, Inc., 2016 WL 1680470 (Iowa App. 2016)

Statutes and Rules:

Iowa Code § 123.92

STATEMENT OF THE CASE

STATEMENT OF FACTS

On February 27, 2015 at or near 4:30p.m. Defendant Michelle Campbell arrived at a bar in West Des Moines, Iowa known as Draught House 50 and met with some of her co-workers. App. at 32-22. Defendant Campbell remained at Draught House 50's bar until leaving shortly before 9:00 p.m. App. at 36. While at Draught House 50, Defendant Campbell consumed alcoholic beverages. App. at 33. A few minutes after leaving Draught House 50, Defendant Campbell caused a motor vehicle accident by striking the rear of Banwarts' vehicle. App. at 27-28. West Des Moines Police Officer Barry Graham initially responded to the motor vehicle accident. App. at 27-28. Upon arriving at the scene and talking to Defendant Campbell, Officer Graham noticed the odor of alcohol on her breath and that she had blood shot, watery eyes. App. at 42. Officer Graham subsequently conducted an O.W.I. investigation wherein he requested that Defendant Campbell perform certain field sobriety tests. App. at 44. Defendant Campbell agreed to perform the requested tests and while doing so, Officer Graham observed several signs of intoxication. App. 44-45. After completing the field sobriety tests, Officer Graham requested that Defendant Campbell provide a breath sample using a certified Datamaster machine. App. at 45. At 10:14 p.m. Defendant Campbell provided a breath sample and the result showed a blood alcohol level (B.A.C.) of .143. App. at 45. Defendant

Campbell was subsequently charged with operating a motor vehicle while under the influence of alcohol. App. at 27-28.[1]

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On April 2, 2015 Banwarts filed a petition at law pursuant to Iowa's dram shop statute alleging that Draught House 50's sale and service of alcoholic beverages to Defendant Campbell on February 27, 2015 was a cause of her intoxication and subsequent collision with Plaintiffs' vehicle.[2] App. at 1. On February 3, 2016, Draught House 50 filed a motion for summary judgment. Banwarts resisted the motion for summary judgment. On June 24, 2016 the Iowa District Court for Polk County entered a ruling granting Defendant Draught House 50's motion for summary judgment. Plaintiffs filed their Notice of Appeal of the Court's ruling on July 19, 2016. App. at 11.

ROUTING STATEMENT

This case involves application of existing principles of law and should be routed to the Court of Appeals.

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[1] Defendant Campbell subsequently plead guilty to O.W.I.1st offense and received a deferred judgment.

[2] On January 11, 2016 this action was consolidated with the pending action filed by Plaintiffs against Defendant Michelle Campbell.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NOT AN ISSUE OF FACT GENERATED AS TO WHETHER DEFENDANT DRAUGHT HOUSE 50 KNEW OR SHOULD HAVE KNOWN THAT DEFENDANT CAMPBELL WAS INTOXICATED OR WOULD BECOME INTOXICATED AT THE TIME OF ITS SERVICE OF ALCOHOLIC BEVERAGES TO HER.

a. Standard of Review

Appellate courts "review a district court ruling granting a motion for summary judgment for correction of errors at law." Rathje v. Mercy Hosp., 745 N.W.2d 443, 447 (Iowa 2008). Summary judgment is appropriate only if there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Farm Bureau Mut. Ins. Co. v. Mine, 424 N.W.2d 422, 423 (Iowa 1988). The evidence must be viewed in a light most favorable to the nonmoving party. Pappas v. Clark, 494 N.W.2d 245, 247 (Iowa 1992). A fact issue is generated, if reasonable minds can differ on how the issue should be resolved and the nonmoving party must be given the benefit of every legitimate inference that reasonably can be deduced from the evidence. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). It is well-settled that "questions of negligence or proximate cause are ordinarily for the jury, and only in exceptional cases should they be decided as a matter of law." Clinkscales v. Nelson Sec., 697 N.W.2d 836, 841 (Iowa 2005); see also, Virden v. Betts & Beer Constr. Co., 656 N.W.2d 805, 807 (Iowa 2003)(noting summary

judgment is usually inappropriate in negligence cases). In sum, the Court "indulges in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." Coralville Hotel Assocs., L.C. v. City of Coralville, 684 N.W.2d 245, 247-48 (Iowa 2004).

b. Discussion

Iowa's dramshop statute provides a remedy against a licensee or permittee for injuries as a result of the sale and service of alcohol to an intoxicated person. Grovijohn v. Virjon, Inc., 643 N.W.2d 200, 203 (Iowa 2002). The statute provides as follows:

> A person who is injured...by an intoxicated person ... has a right of action for all damages ... against any licensee or permittee ... who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.

Iowa Code § 123.92. The dramshop statute is designed to "place a hand of restraint" on those authorized to sell and serve intoxicating liquors. Thorp v. Casey's Gen. Stores, Inc., 446 N.W.2d 457, 467 (Iowa 1989). Thus, the Iowa Supreme Court has construed Iowa's dramshop statute ***"liberally to discourage the selling of excess liquor."*** Id. *Emphasis added.*

A person is ...intoxicated when one or more of the following are true:

> (1) The person's reason or mental ability has been affected: (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.

Smith v. Shagnasty's Inc., 688 N.W.2d 67, 72 (Iowa 2004) citing, Garcia v. Naylor Concrete Co., 650 N.W.2d 87, 90 (Iowa 2002)(defining intoxication for the purposes of defense to workers' compensation award) quoting Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352, 355 (Iowa 1995)(defining intoxication for purposes of an insurance-policy exclusion)); State v. Pierce, 65 Iowa 85, 88, 21 N.W.195, 197 (1884)("[A] person is drunk in the legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor."); State v. Huxford, 47 Iowa 16, 18 (1877)("When any person, from the use of intoxicating liquors, has affected his reason or faculties, or has rendered him incoherent of speech, or has caused him to lose control in any manner, or to any extent, of the action or motions of his person or body, such person, in contemplation of the law, is intoxicated."). "No particular degree of intoxication is required." Benavides, 539 N.W.2d at 355. [T]here are degrees of intoxication varying all the way from slight stimulation to complete coma." State v. Yates, 132 Iowa 475, 478, 109 N.W. 1005, 1006 (1906). "Utilizing the four Garcia/Benavides subjects of inquiry, the question is simply whether the person is 'under the influence of liquor so as not to be ... [herself], so as to be excited from it, and not to possess the clearness of intellect and that control of [herself] that [she] otherwise would have...."

Benavides, 539 N.W.2d at 355, quoting State ex rel. Cosson v. Baughn, 162 Iowa 308, 311, 143 N.W.1100, 1101 (Iowa 1913)).

In the present case, shortly after Defendant Campbell left Draught House 50[3] she was involved in a motor vehicle accident wherein she struck the rear of Banwarts' vehicle which was stopped at a stoplight. App. at 27-28. Defendant Campbell had just left Draught House 50 prior to the accident which occurred approximately one and a half miles from the Draught House 50 bar. App at 35; App. at 43. Officer Graham testified that he responded to this accident and when he first encountered Defendant Campbell he noticed the smell of alcohol coming from her breath. App. at 42. Officer Graham asked Defendant Campbell if she had been drinking and she indicated that she had been drinking at Draught House 50 and that she was coming from that bar when the accident occurred. App. at 43. Defendant Campbell informed Officer Graham that she felt "buzzed". App. at 43. Officer Graham testified that he noticed that Ms. Campbell had bloodshot, watery eyes and that her speech was slurred, which he testified based on his education, training and experience were all signs of intoxication. App. at 43. Officer Graham testified that Defendant Campbell had difficulty following his instructions when he requested her driver's license, proof of insurance and registration. App. at 43-44. Officer Graham

[3] Draught House 50 is a licensee permitted to sell beer, wine and intoxicating liquors under Iowa law and as set out in Iowa's Dramshop statute.

testified that based on his observations of Defendant Campbell he requested that she perform field sobriety tests (FST) and she agreed to do so. App. at 43-44. During the FST's Officer Graham observed that Defendant Campbell's balance and her ability to follow instructions were affected. App. 44-45. Officer Graham also testified that Defendant Campbell was very emotional and "would go from laughing and joking to crying" and that on several occasions her emotional state interfered with her being able to complete the test. App. at 44-45. Officer Graham testified that based on his education, training, and experience Defendant Campbell's emotional state was also a sign of intoxication. App. at 44-45. Finally, Officer Graham testified that Defendant Campbell agreed to provide a breath sample, and using a certified Datamaster machine it was determined that Defendant Campbell's B.A.C. on the evening in question was .143. App. 45-46. Defendant Campbell testified that the only alcohol she consumed prior to said accident was consumed at Draught House 50. App. at 35.

The District Court in the present case stated in its ruling on motion for summary judgment, "[T]he evidence from the accident scene and officer investigation is highly material to show that Ms. Campbell was intoxicated at the time she left Draught House." App. at. 16. Based on Defendant Campbell's difficulty with balance, confusion, inability to follow simple directions, varying emotional state, and B.A.C. taken shortly after leaving the Draught House 50 bar, a

reasonable fact finder could and most likely would infer that Defendant Campbell was intoxicated at the time she left Defendant's bar. Smith v. Shagnasty's, Inc. at 73,(stating, "evidence of a person's blood alcohol level, if available, **is important evidence of intoxication)** citing Garcia, 650 N.W.2d at 90; Benavides, 539 N.W.2d at 355, *Emphasis added.*

For all intents and purposes it is undisputed by all parties that Defendant Campbell left Draught House 50 in an intoxicated state. The next question to consider then is when affording the Banwarts all reasonable inferences that the evidence will bear in this case, does a fact question exists as to whether Draught House 50 and its staff, knew or should have known that Defendant Campbell was intoxicated or would become intoxicated as a result of the alcoholic beverages sold and served to her at its bar.

The Iowa Supreme Court previously considered this issue in in its decision in Smith v. Shagnasty's, Inc. In Shagnasty's a patron at a bar was attacked by an unidentified assailant (Doe) who struck the patron in the face with a beer bottle. Shagnasty's, 688 N.W.2d at 70. The patron filed a lawsuit against the bar asserting that the bar was responsible for the patron's damages under Iowa's dram shop statute. Id. The district court dismissed the patron's lawsuit concluding that based on the facts presented a jury could not reasonably conclude the bar served the

assailant alcohol when it knew or should have known that the assailant was or would become intoxicated. Id.

In considering Smith v. Shagnasty's, the Iowa Supreme Court stated that "the thorniest issue in this case is whether Smith can prove Shagnasty's sold and served Doe alcohol with the level of knowledge or scienter required by our dramshop statute." Id. at 74. In its analysis of this issue the Iowa Supreme Court stated:

> As the legislature's use of the locution "know of should have known" demonstrates, proof of scienter in a dramshop action may be shown by employing "either a subjective or an objective standard in establishing the defendant's knowledge."...we have upheld a jury instruction that required the plaintiff in a dram shop action to show " the defendant must have had actual knowledge or that a reasonably observant person under the same or similar circumstances would have had knowledge." Insofar as proof of a defendant's subjective intent is pursued, it must be remembered that "**direct proof of intent with which an act was committed is not to be had in many cases, and, when that is true, circumstantial evidence may be sufficient**. *Emphasis added.*

Id. at 74, citing State v. Debolt, 73, N.W. 499, 500 (Iowa 1897). The Iowa Supreme Court held, "[t]wo inferences, taken together, lead us to the conclusion that there is a genuine issue of material fact on the scienter requirement of Smith's dramshop claim. Id. The first inference arises from Doe's intoxicated condition shortly after the apparent time of service; the second redounds from the bouncers' actions that resulted in Doe's unknown identity." Id. at 74.

The Iowa Supreme Court went on to address whether or not an inference was created by Doe's subsequent intoxicated condition. Id. at 74. The Iowa Supreme Court stated:

> [a]t the time of the attack a jury could reasonably find (1) Doe was intoxicated and (2) Shagnasty's sold and served alcohol. If one bears in mind the commonsense inference that the solitary beer in Doe's hand at the time of the attack did not solely cause her intoxication, **then the inference arises that at the time of service Shagnasty's knew or should have known Doe was or would become intoxicated.**
>
> [i]n affording Smith all legitimate inferences, we simply recognize that if (1) one beer does not a drunk make, (2) Shagnasty's sold and served Doe a beer, and (3) Doe was shortly thereafter in a visibly intoxicated condition, then it stand to reason that (4) Doe was also noticeably intoxicated at the time of service. Moreover, if a patron was likely visibly intoxicated at the time of service, a jury could find (5) **the bar knew, or at the very least, should have known of her intoxication.** *Emphasis added.*

Shagnasty's at 75, citing Ward v. D & A enters. Of Clark County, Inc. 714 N.E.2d 728, 730 (Ind. Ct. App. 1999)(stating, "when viewed most favorably to the non-moving party, the fact that [a bar] **served even one beer to a person who shortly thereafter was in a state of serious intoxication gives rise to a question of fact whether [the intoxicated person] was visibly intoxicated at the time [of service]).** *Emphasis added.*

In the present case it is undisputed that Defendant Campbell was intoxicated at the time she left Draught House 50's bar. It is also undisputed that all of the alcohol consumed by Defendant Campbell on the night of the subject incident was

consumed at Draught House 50. Therefore, it is obvious that Defendant Campbell's intoxication occurred while consuming alcohol at Draught House 50. Further, evidence of the degree of Campbell's intoxication was that she was significantly intoxicated only a few minutes after leaving Draught House 50's bar. App. at 27-28; 36. This evidence when viewed most favorably to the Banwarts gives rise to a question of fact as to whether Draught House 50 and its staff, particularly the staff responsible for serving the alcoholic beverages to Defendant Campbell, knew or should have known that Defendant Campbell either had become intoxicated during the course of being served alcoholic beverages or would become intoxicated. See, Shagnasty's, 688 N.W.2d at 75 (holding that the commonsense inference that the solitary beer in Doe's hand at the time of the attack did not solely cause her intoxication, then an inference arises that at the time of service Shagnasty's knew or should have known Doe was or would become intoxicated).

Despite the District Court's conclusion that the evidence from Officer Graham's investigation was "highly material to show that Ms. Campbell was intoxicated at the time she left Draught House, the District Court stated that it "cannot find that the undisputed evidence of serving three beers[4] over four hours,

[4] It should be noted that the only evidence that Defendant Campbell consumed 3 beers was provided by her directly, first during Officer Graham's O.W.I. investigation and subsequently during her deposition in this matter. A reasonable fact finder could certainly question her credibility regarding the number of beers she admitted to consuming while under investigation for O.W.I.

absent something more, creates an inference that Drought House knew or should know that Ms. Campbell was intoxicated or would become intoxicated." App. at 16. In support of its conclusion the District Court cited the Iowa Court of Appeals ruling in Torrence v. Murphy's Bar & Grill, Inc. In Torrence, the Iowa Court of Appeals concluded that an uncontested expert opinion that the subject patron's blood alcohol level would have only been .03 to .035 at the time he left Defendant's bar and that a lack of evidence as to what happened after the subject patron left Defendant's bar since at least two hours went by from the time he left Defendant's bar until the time he was involved in a motor vehicle accident where it was subsequently determined that he was intoxicated did not generate an issue of fact as to whether or not the bar knew or should have known that the subject patron was intoxicated or would become intoxicated as a result of its service of alcohol to the subject patron. Torrence v. Murphy's Bar & Grill, Inc., 2016 WL 1680470 (Iowa App. 2016)

While in Torrence it was reasonable to conclude that the subject patron's subsequent intoxicated condition was insufficient to create an inference that a bar he left at least two hours earlier knew or should have known that he was intoxicated or would become intoxicated absent additional evidence, it was erroneous for the District Court to rely on this ruling in the present case for a number of reasons. First, in Torrence, the subject patron was not involved in a motor vehicle accident until at least two hours after leaving the Defendant's bar. Id. In the present case Defendant

Campbell was involved in a motor vehicle accident caused by her only a few minutes after leaving Draught House. App. at 27-28; 36. The subsequent investigation conducted by Officer Graham provided overwhelming evidence of her significant intoxication shortly after leaving Draught House. Second, in Torrence there was no evidence as to whether or not the subject patron consumed alcohol during the two-hour period of time between leaving defendant's bar and being involved in a motor vehicle accident. Id. In the present case, the evidence is undisputed that all of the alcohol consumed by Defendant Campbell on the evening in question was consumed at Draught House 50. Third, in Torrence the only evidence of the subject patron's blood alcohol level at the time he left the Defendant's bar was from an expert witness who opined that the subject patron's blood alcohol level would have been .03 to .035. The uncontested evidence in the present case is that Defendant Campbell's blood alcohol level shortly after leaving Draught House was .143, evidence of significant intoxication.

In the present case, the undisputed facts are that Defendant Campbell, who consumed all of her alcohol at Draught House 50, was proven to be significantly intoxicated only minutes after leaving Draught House 50's bar. This set of facts most certainly give rise to a question of fact as to whether Defendant Campbell was intoxicated at the time of service or at the very least would have become intoxicated at the time of service while at Draught House. One cannot conclude that there is no

question of fact as to whether Draught House knew or should have known that Defendant Campbell was intoxicated or would become intoxicated when the facts are that she consumed all of her alcohol at its bar and was found to be seriously intoxicated only a few minutes after leaving its bar. Ward, 714 N.E.2d at 730 (stating, "when viewed most favorably to the non-moving party, the fact that [a bar] ***served even one beer to a person who shortly thereafter was in a state of serious intoxication gives rise to a question of fact whether [the intoxicated person] was visibly intoxicated at the time [of service])***. *Emphasis added.*

CONCLUSION

For all of the foregoing reasons Plaintiff-Appellant urges the Court to reverse the lower court's ruling granting Defendant Drought Houses 50's Motion of Summary Judgment and remand the case for a trial.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFFS-APPELLANTS

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully request oral argument on the issues raised in this appeal.

Michael T. Norris AT0005909

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 22nd day of November, 2016, I served Plaintiffs-Appellants' Final Brief and Request for Oral Argument by mailing one copy to:

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I further certify that on the 22nd day of November, 2016 I filed the Plaintiff-Appellant's Final Brief and Request for Oral Argument via EDMS with the Clerk of the Iowa Supreme Court pursuant to the Iowa Rules of Appellate Procedure.

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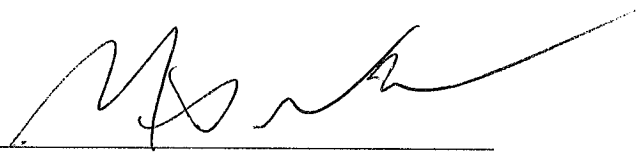

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