IN THE SUPREME COURT OF IOWA

CASE NO. 16-1218

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

Plaintiffs-Appellants

v.

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

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
FOR POLK COUNTY
HON. JEFFREY FARRELL

APPELLEE'S FINAL BRIEF

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Hobbiebrunken v. G&S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Horak v. Argosy Gaming Co., 648 N.W.2d 137 (Iowa 2002)

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STATUTES & RULES

Iowa Code § 123.92 (2015)

Iowa Code § 321J.2 (2015)

Iowa Rule of Civil Procedure 1.981(5)

Iowa Civil Jury Instruction 1300.2

Iowa Civil Jury Instruction 1300.7

ROUTING STATEMENT

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

STATEMENT OF THE CASE

On April 2, 2015, Rhonda Banwart filed a personal injury petition on behalf of herself and her children against Ms. Campbell for injuries arising out of an automobile accident that caused by Michelle Campbell the night of February 27, 2015. App. at 9. On the same day, she filed a petition at law on behalf of herself and her children against 50th Street Sports, L.L.C. d/b/a Draught House 50 (Draught House 50) under the Iowa Dramshop Act for the same accident. App. at 2. Ms. Campbell was a patron at Draught House 50 prior to the collision. App. at 2.

On January 12, 2016, the District Court granted Draught House 50's motion to consolidate the dram action with the Banwarts' automobile action against Ms. Campbell. Order on Mot. to Consolidate at 1.

On February 3, 2016, Draught House 50 filed a motion for summary judgment. App. at 11. A hearing was held May 6, 2016, and Judge Jeffrey Farrell issued a ruling granting Draught House 50 summary judgment on June 24, 2016. App. at 11, 18.

On August 16, 2016, the companion case with Ms. Campbell and her auto carrier was settled, and the petition dismissed with prejudice. App. at 29; *see* App. at 8. The Banwarts resolved the case through a settlement with the auto insurance carrier.

STATEMENT OF THE FACTS

On Friday, February 27, 2015, Michelle Campbell worked a full day at Holmes Murphy as a learning and development coordinator. App. at 32. Ms. Campbell had a management summit that week that she had just concluded, and her co-workers also had various projects coming to completion. App. at 34. Accordingly, Ms. Campbell's department decided to celebrate with an after work happy hour. App. at 33. The group elected Draught House 50 in West Des Moines and included both Ms. Campbell's immediate supervisor as well as the company's CEO. App. at 34.

The group started to arrive at Draught House 50 at approximately 4:30 p.m., and sat together at a table where they were waited on by a waitress. App. at 33–34. The group ordered wings, nachos, and beers. App. at 33–34. Given the after-work nature of the get-together, Holmes Murphy management paid for all the food and drinks, including any alcoholic beverages consumed by Ms. Campbell. App. at 33–35. Ms. Campbell was served three (3) Peace Tree beers over the course of the evening. App. at 33. Ms. Campbell did not have any other alcoholic beverages such as wine, shots, or mixed drinks that evening. App. at 33. Ms. Campbell's third and final beer was served to her at approximately 7:30 p.m., when the person buying the round left. *See* App. at 33–34.

While at Draught House 50, Ms. Campbell sat at the table conversing with the group. App. at 34–35. Ms. Campbell was at Draught House 50 from 4:30 p.m. until around 8:30 p.m., drinking three beers and eating appetizers. App. at 33–34. Ms. Campbell did not exhibit excited emotions or raise her voice. App. at 35. Nor did anyone else at her table. App. at 35.

Ms. Campbell left shortly before 8:30 p.m. App. at 33. Ms. Campbell drove herself from Draught House 50. *See* App. at 36. En route home, Ms. Campbell received a call on her cell phone and looked down to see who was calling. App. at 40; App. at 55. While Campbell looked down at her dashboard to see the incoming caller's name, impact occurred. App. at 40; App. at 55.

After impact, Ms. Campbell got out of her car to check whether the Banwarts were okay. App. at 40. Ms. Banwart indicated that she had already called in the accident. App. at 40. Ms. Campbell did not see any signs of trauma. App. at 40. Ms. Banwart's daughters indicated they were fine. App. at 51–52. Ms. Campbell was not injured and never sought medical treatment. App. at 39. Both vehicles had moderate damage but were operational. App. at 25.

Officer Graham arrived at the scene after the accident. App. at 26. Officer Graham admitted that Ms. Campbell never stumbled, and her

movements and coordination upon exiting her vehicle and moving about the scene gave absolutely zero indication of impairment. App. at 44, 47–49. Further, he indicated she did not have problems with her balance. App. at 47. Even Officer Graham's squad car's dash cam video shows AIP Campbell had no balance or coordination issues. App. at 51. Ms. Campbell relayed to Officer Graham that she had three beers at Draught House 50 that evening. App. at 47.

Officer Graham conducted field sobriety tests with Ms. Campbell at the scene. App. at 28; App. at 44. However, given the frigid cold impacted the field sobriety tests, the tests were completed at the police station. App. at 48 (describing the weather as "pretty frigid" that night); App. at 28. Officer Graham acknowledged field sobriety tests are designed such that even sober persons have difficulty completing those "tests." App. at 48–49. Officer Graham also acknowledged it is impossible to "pass" a field sobriety test or tests. App. at 49. Nevertheless, Ms. Campbell stood on one leg and counted to 30. App. at 49. Officer Graham wrote that he observed a smell of alcohol, bloodshot and watery eyes, slurred speech, and a heightened emotional state. App. at 43–45, 49; App. at 27–28). Officer Graham tested Ms. Campbell's BAC to be .143 and greater than the .08 legal limit to operate a motor vehicle. App. at 45; App. at 22. Officer Graham

acknowledged Ms. Campbell was cooperative throughout the investigation. App. at 46–47.

The Banwarts filed a personal injury caused by motor vehicle petition against Michelle Campbell and a dramshop claim against Draught House 50 in April 2015. App. at 1–3; App. at 8–10.

ARGUMENT

Scope and Standard of Review

This Court reviews a ruling on a motion for summary judgment for correction of errors at law. *Spencer v. Truro Tavern, Inc.*, No. 06-1178, 2007 WL 253529, at *1 (Iowa Ct. App. Jan. 31, 2007).

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "A fact is material if it will affect the outcome of the suit, given the applicable law." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). "An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Id.* (citing *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988)). The burden is on the party moving for summary judgment to prove the facts are undisputed. *Zaber v. City of Dubuque*, 789 N.W.2d 634, 636 (Iowa 2010). A moving party "may establish a right to summary judgment by establishing the limits of the other parties' proof." *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996). "If those limits reveal that the resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." *Id.* The court looks at the

pleadings, depositions, interrogatory answers, admissions, and any affidavits to evaluate if an issue of material fact exists. *Torrence v. Murphy's Bar & Grill, Inc.*, No. 15-0326, 2016 WL 1680470, at *1 (Iowa Ct. App. Apr. 27, 2016).

The court views the record "in the light most favorable to the nonmoving party." *Bass v. J.C. Penney Co.*, 880 N.W.2d 751, 755 (Iowa 2016). In reviewing the facts in the light most favorable to the resisting party, the court affords that party "all reasonable inferences that the record will bear." *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004). The court should "indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Id.* An inference is "legitimate" if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *Id.* (quoting *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002)). "[A]n inference is not legitimate if it is 'based upon speculation or conjecture.' " *Id.* Moreover, a plaintiff resisting a motion for summary judgment cannot rest on mere allegations in the pleadings, and must set forth "specific, material facts, supported by competent evidence" to establish the existence of a genuine issue for trial. *MGM Apartments, LLC v. Mid-Century Ins. Co.*, No. 13-0661, 2014 WL 251898, at *1 (Iowa Ct. App. Jan. 23, 2014). A genuine

issue of material fact exists "[i]f reasonable minds may differ on the resolution of an issue." *Smith*, 688 N.W.2d at 71.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE BANWARTS FAILED TO GENERATE AN ISSUE OF FACT AS TO THE "KNEW OR SHOULD HAVE KNOWN" ELEMENT OF THEIR DRAMSHOP CLAIM

The Iowa dramshop act is a creature of statute. Iowa Code § 123.92(1)(*a*) (2015).[1] Its elements as established by the legislature are therefore to be carefully construed. *See Reg'l Util. Serv. Sys. v. City of Mount Union*, 874 N.W.2d 120, 124 (Iowa 2016) (noting the importance of adhering to clear statutory language as showing the legislature's intent). To establish a prima facie showing for dramshop liability, a plaintiff must show a licensee "knew or should have known" of an alleged intoxicated person's ("AIP's") intoxication. *See* Iowa Code § 123.92(1)(*a*). "Intoxication" is a

[1] Iowa Code § 123.92(1)(*a*) provides:

> Any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for all damages actually sustained, severally or jointly, against *any licensee* or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, *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.

(Emphasis added).

term of art under the dramshop statute and is proven by showing at least one 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.
> (4) [the person] has, to any extent, lost control of bodily actions.

See Iowa Civil Jury Instructions 1300.2. *See also Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 72 (Iowa 2004) (quoting *Garcia v. Naylor Concrete Co.*, 650 N.W.2d 87, 90 (Iowa 2002)).

The licensee itself is not required to prove what they knew or should have known regarding the patron's intoxication. *See Hobbiebrunken v. G&S Enters., Inc.*, 470 N.W.2d 19, 21–22 (Iowa 1991) (declining to impose an affirmative duty on licensees to determine the person's condition). Instead, the dramshop statute "impose[s] upon plaintiffs in dramshop actions the duty to prove the defendant's knowledge of the patron's intoxication." *Id.* at 22.[2]

[2] Plaintiffs can use a subjective or an objective standard to establish defendant's knowledge. *Hobbiebrunken*, 470 N.W.2d at 22. However, they must show through either direct or indirect evidence that there was reason for the server to know the person was inebriated or would become so from the drinks sold and served. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 148 (Iowa 2002). Using this standard, the Banwarts must show Draught House 50 either had actual knowledge of intoxication or "that a reasonably observant person under the same or similar circumstances would have had knowledge" of the intoxication. *See* Iowa Civil Jury Instruction 1300.7 (defining term "knew or should have known").

Here, the district court held the Banwarts fell short of this prima facie burden as to the "knew or should have known" component of their claim:

> [T]he court cannot find that the undisputed evidence . . . , absent something more, creates an inference that Draught House knew or should know that Ms. Campbell was intoxicated or would become intoxicated.

App. at 18. The district court summarized the evidence the Banwarts adduced relative to their burden:

> There is no evidence that Ms. Campbell displayed signs of intoxication while at Draught House. There is no evidence she used loud, abusive language, that she confronted other patrons or staff, that she was seen bumping into people, that she unbalanced while walking or standing, or that she was visibly excited or emotional in any way. Rather, the undisputed evidence shows she sat at a table talking to coworkers during routine after work outing.

App. at 16.

Moreover, the uncontested evidence showed Ms. Campbell did not consume alcohol prior to arriving at Draught House 50. App. at 32. Ms. Campbell drank a total of three Peace Tree beers. App. at 33. She consumed no other mixed drinks, wine, or other alcoholic beverages. App. at 33. All three rounds were ordered between 4:30 and 7:30. App. at 33, 35 (direct supervisor left at 7:30, purchased third round of drinks). No one in her group drank shots. App. at 34. Ms. Campbell consumed food while at Draught House 50. App. at 34. The entire Holmes Murphy group was

speaking at a normal volume level for the establishment, and no one was yelling, crying, or showing other excited emotions. App. at 35.

Stated differently, the Banwarts did not offer any evidence that Ms. Campbell exhibited signs of intoxication at Draught House 50. *See* Iowa R. Civ. P. 1.981(5) (burden on nonmoving party); *Torrence*, 2016 WL 1680470, at *2 (itemizing potential evidence). Significantly, the Banwarts offered no lay witness to challenge the manner in which Ms. Campbell presented while at Draught House 50. *See Torrence*, 2016 WL 1680470, at *3. *Cf. Smith*, 688 N.W.2d at 70, 73 (noting evidence of patron insulting people, engaging in verbal sparring, and bumping into others before acquiring an alcoholic beverage); *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 148 (Iowa 2002) (noting witnesses' testimony of patron's visible intoxication, swearing, smelling of alcohol, being loud and obnoxious, and ejection due to intoxication). Nor did the Banwarts offer expert testimony as to the manner in which Ms. Campbell would have allegedly presented.

In fact, over and above the lack of direct evidence, the district court also expressly noted the lack of indirect evidence the Banwarts generated on this issue:

> There is no record as to the size or alcohol level of the Peace Tree beers drunk by Ms. Campbell. There is likewise no evidence as to her weight or other factors that might impact her level of intoxication.

App. at 18. Accordingly, absent any meaningful evidence as to what Draught House 50 "knew or should have known," the district court correctly concluded the Banwarts failed to meet their burden on their dramshop claim.

The Banwarts, however, attempt to end run their burden by pointing to selected observations by Officer Graham of Ms. Campbell, which were made at a different time, a different location, under different circumstances, and for a different purpose. With respect to time and location, Officer Graham's observations were made not only after she left Draught House 50, but also well after Draught House 50 sold and served the third beer to Ms. Campbell. *Compare* App. at 22, *with* App. at 33–34.

Indeed, the Banwarts have adduced no evidence that Officer Graham's observations were available to Draught House 50 prior to its sale and service of the third beer. With respect to different circumstances, the important observations for dramshop are prior to the order of alcohol. Here, Ms. Campbell, while at Draught House 50, was comfortable, relaxed, had just eaten, had two beers over the course of a few hours, and was generally having a good evening. When Officer Graham encountered Ms. Campbell, she had just experienced the mental, emotional, and physical surprise of

causing a vehicular accident, was standing outside in frigid weather, and had imbibed a third beer. *See, e.g.*, App. at 16–17.[3]

It is noteworthy that the Banwarts invite the Court to conflate the dram standard for intoxication with the OWI standard for intoxication. *See* Appellant's Br. at 10). The Court should decline that request. *Compare* Iowa Code § 321J.2(1)(*b*) (requiring .08 BAC), *with* Iowa Civil Jury Instructions 1300.2 (with no reference to BAC). While blood alcohol level evidence can be probative of intoxication, blood alcohol level evidence is *not* in isolation even relevant to the "knew or should have known" element of the claim. Indeed, section 123.92 does not contemplate Iowa's bartenders and wait staff breath test their patrons. *See Hobbiebrunken*, 470 N.W.2d at 21–22. Rather, it requires the licensee use common sense and judgment to look for objective indicators of intoxication at the time of service. Again, the Banwarts did not provide any evidence as to the import, if any, of Ms. Campbell's BAC. Nor did the Banwarts provide any evidence as to whether a reasonable person would have been able to observe those behaviors prior to the service of the third beer. *See Smith*, 688 N.W.2d at 75–76 (specifying

[3] Moreover, even if these observations could have been available to Draught House 50, the purpose of Officer Graham's interaction was different. Draught House 50's interaction was to provide reasonable and appropriate service under section 123.92 and Officer Graham's interaction was to conduct an OWI investigation. *See* App. at 17.

behaviors indicating intoxication at the time of service). Accordingly, the Banwarts failed their burden under Iowa law.

These clear burdens set forth by Iowa law also make good policy sense. The purpose of the dramshop statute is "to discourage the serving of excess liquor to patrons." *See Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 348 (Iowa 1991). In other words, the statute seeks to prevent over-service by imposing liability where a licensee "knew or should have known" over-service has or will occur. *Id.*; *see also* Iowa Code § 123.92 (limiting right of action to "damages actually sustained"). Accordingly, to impose liability where there is no demonstrable basis to know of over-service does not serve the end the statute seeks to achieve. *Id.* Indeed, to proceed as the Banwarts indicate would render the statute arbitrarily punitive as opposed to uniformly preventative and compensatory. *See also Nelson v. Restaurants of Iowa, Inc.*, 338 N.W.2d 881, 885 (Iowa 1983) (punitive damages are not recoverable under the Iowa dramshop act).

In short, the evidence the Banwarts presented from at the time of and following the accident all relates to Ms. Campbell's intoxication at the time of the accident. It is not evidence relating to what Draught House 50 knew or should have known about Ms. Campbell's state when she was served. *See* Iowa Code § 123.92(*a*)(1) (any licensee. . . who sold and served any. . . .

beer to the intoxicated person *when the licensee* 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); *see also* Iowa Civil Jury Instructions 1300.2 (defining "intoxication").

The district court carefully considered the evidence presented by the Banwarts. However, a finding of a genuine issue of material fact requires more than conjecture and speculation—it must be based in evidence before the court. *See Smith*, 688 N.W.2d at 71; *Torrence*, 2016 WL 1680470, at *2. The Banwarts had the burden to show that Draught House 50 knew or should have known Ms. Campbell was intoxicated based on observable behaviors which Ms. Campbell would have expressed while at the establishment. The Banwarts fell short of this burden.

CONCLUSION

The District Court correctly granted summary judgment in favor of Draught House 50 and dismissed the Banwarts' case. There is no evidence in the record showing Draught House 50 knew or should have known that Campbell was intoxicated or would become intoxicated when it served her final beer. The Banwarts cannot make a prima facie case of dramshop liability, and therefore the district court should be affirmed.

REQUEST FOR NON-ORAL SUBMISSION

Draught House 50 requests non-oral submission of this case to the Court.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 18, 2016, I electronically filed the foregoing Appellee's Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3681 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 pt.

Dated: November 18, 2016

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