

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 REPLY BRIEF**

Michael T. Norris AT0005909
SLATER AND NORRIS, P.L.C.
5070 Grand Ridge Drive
West Des Moines, Iowa 50265
Telephone: (515) 221-0918
Fax: (515) 226-1270
mnorris@snglaw.com

ATTORNEY FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Draught House 50, in footnote 1 of its brief, correctly cites Iowa's dram shop statute under Iowa Code § 123.92(1)(a), however, it neglects to emphasize specific language in the statute that is relevant to the consideration of the issue in this case. Draught House 50 emphasizes the following language: "any licensee...who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee...knew or should have known the person was intoxicated...." (Pg. 9, Appellee's brief). Banwarts' agree that said language is important in the consideration of the issue presented in this appeal, however the following language is as equally important: "any licensee....who sold to and served the person to a point where the licensee...*knew or should have known the person would become intoxicated.*" A review of all the facts in this case clearly establishes that a question of fact has been generated as to whether Draught House 50 knew or should have known that Campbell was intoxicated or would become intoxicated while serving her alcoholic beverages on the evening in question.

ARGUMENT

It is undisputed in this case that on February 27, 2015 Draught House 50 served Campbell alcoholic beverages to the point she became significantly intoxicated. App. at 16. Draught House 50 is not arguing to this Court that at

the time Campbell exited its bar she was not intoxicated. Instead, Draught House 50's argument is that there is no evidence wherein a reasonable fact finder could find that Draught House 50 knew or should have known that Campbell was intoxicated or would become intoxicated when it served her final beer. (Appellee's brief).

This is an appeal of a ruling granting a motion for summary judgment filed by Draught House 50. Therefore, the Banwarts 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 1992). The question for consideration in this appeal is as follows--based on the facts available in this case, could a reasonable fact find infer from this evidence that Draught House 50 at the very least should have known that Campbell would have become intoxicated as result of its service of alcohol to her? The answer is clearly yes. See, Smith v. Shagnasty's Inc., 688 N.W.2d 67, 72 (Iowa 2004)(holding that jury can infer that a bar knew or should have known of patron's intoxication when patron was intoxicated in the bar and was served alcoholic beverages). See also, 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 as to whether [the intoxicated person] was visibly intoxicated at the time [of service]). *Emphasis added.*

Draught House 50 argues in its brief that Banwarts “attempt to end run their burden by pointing to ... 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.” (Appellee’s brief at pg. 13). In responding to this argument, it is important to review the facts that are not in dispute, including those facts obtained from Officer Graham, regarding Campbell’s intoxication. These facts include the following: 1) all of the alcohol consumed by Campbell on the night the subject incident occurred, was consumed at Draught House 50 (App. at 35); 2) only a few minutes after leaving Draught House 50 and approximately 1.5 miles from Draught House 50’s bar, Campbell rear-ended Banwarts’ vehicle which was stopped at a stop light (App. at 35; App. at 43); 3) Officer Graham responded to this incident arriving only minutes later (App. at 42; 27-28); 4) upon his arrival at the scene, Officer Graham spoke with Campbell and immediately observed signs of intoxication including slurred speech, blood shot watery eyes and the smell of alcoholic beverages emanating from her breath (App.at 42-43) ; 5) Campbell admitted to Officer Graham that she had been drinking alcohol at Draught House 50 just prior to causing the subject accident and that she felt “buzzed”

at the scene (App. at 43); 6) Officer Graham observed during field sobriety tests that Campbell had difficulty with balance and following instructions and was emotional during this process going from crying to laughing (App. at 43-45); and finally 7) Campbell provided a breath sample which indicated that she had a blood alcohol level of .143 at the time she caused the subject collision. (App. at 45-46).

This evidence clearly establishes that when Campbell exited Draught House 50 she was intoxicated and it also clearly establishes that she was served alcohol while at Draught House 50. These facts, along with the facts gleaned from Officer Graham's observations of Campbell, particularly when viewed in a light most favorable to the Banwarts, provide an inference that Draught House 50 knew or should have known Campbell was intoxicated or would become intoxicated as a result of its service of alcoholic beverages to her. Shagnasty's, 688 N.W.2d at 72.

Draught House 50 also argues in its brief that "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 [dram shop] claim. (pg. 14, Appellee's brief). We disagree. Evidence of Campbell's blood alcohol level is relevant, and arguably the best evidence, of Campbell's degree of intoxication at the time she left Draught House 50.

Smith v. Shagnasty's, Inc. at 73,(stating, “evidence of a person’s blood alcohol level, if available, **is important evidence of intoxication**) *emphasis added*. Not only does this evidence provide the finder of fact with information about the degree or severity of Campbell’s intoxication, it provides credibility to the circumstantial evidence supporting an inference that Draught House 50 knew or should have known that Campbell was intoxicated or would become intoxicated. Draught House 50 attempts to minimize the importance of Officer’s Graham’s testimony by arguing that his observations where made as part of a criminal investigation into whether Campbell was operating her vehicle while intoxicated. (Appellee’s brief at pg. 13-14). Draught House 50 states in its brief, “Banwarts have adduced no evidence that Officer Graham’s observations were available to Draught House 50...” Id. This assertion by Draught House 50 is incorrect. First, the fact that only a few minutes had gone by from the time Campbell left Draught House 50 until the time Officer Graham had begun to make his observations of Campbell’s intoxicated condition is evidence wherein a fact finder could infer that Officer Graham’s observations of Campbell were also available to Draught House 50’s employees. See, Shagnasty’s, 688 N.W.2d at 77 (holding “**subsequent intoxicated condition inference**” is appropriate when there is a short time frame between the service of alcohol and the subsequent intoxicated

condition) *emphasis added*. Furthermore, Campbell's blood alcohol level evidencing significant intoxication shortly after leaving Draught House 50 lends credibility to Officer Graham's observations. A jury could certainly infer from Campbell's level of intoxication that all of Officer Graham's observations of Campbell including her difficulty with balance, her blood shot eyes, her slurred speech, her varying emotional state, the smell of alcohol on her breath, etc. could also have been made while she was at Draught House 50. Id. Moreover, Officer Graham made his initial observations of Campbell without the knowledge that Campbell had been drinking alcoholic beverages at Draught House 50 just prior to causing the subject motor vehicle accident. In other words, only minutes after leaving Draught House 50, the signs of Campbell's intoxicated condition were immediately observable to Officer Graham who had no prior knowledge of her consumption of alcohol that evening. Draught House 50, on the other hand, by virtue of the fact that it had been serving Campbell alcoholic beverages during the approximately four hours she was at its bar, knew of her consumption of alcohol and had ample time to observe her condition. A finder of fact could certainly conclude that during this time period observations made by Officer Graham most certainly could have been made by employees of Draught House 50 had they been attentive to the signs of Campbell's intoxication. Instead, Draught House 50

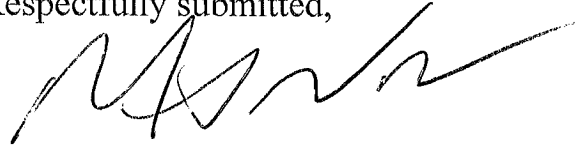
would like this Court to approve of its employees using a “head in the sand approach” wherein they continue to serve patrons without attempting to ascertain whether they are intoxicated or will become intoxicated as a result of further service of alcohol.

This is clearly not what the legislature had intended, and of course, the Iowa Supreme Court as previously stated that Iowa’s 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). Therefore, the Iowa Supreme Court has construed Iowa’s dramshop statute “*liberally to discourage the selling of excess liquor.*” Id. *Emphasis added.* Keeping this in mind when considering the facts in this case, it is clear the District Court erred in concluding that Banwarts had not generated an issue of fact as to whether Draught House 50 know or should have known that Campbell was intoxicated or would become intoxicated at the time of its service of alcohol to her. See, Farm Bureau Mut. Ins. Co. v. Mine, 424 N.W.2d 422, 423 (Iowa 1988)(holding summary judgment is not appropriate if a genuine issue of material fact exists).

CONCLUSION

For all of the foregoing reasons Banwarts urge the Court to reverse the lower court's ruling granting Draught Houses 50's Motion of Summary Judgment and remand the case for a trial.

Respectfully submitted,



Michael T. Norris AT0005909
SLATER AND NORRIS, P.L.C.
5070 Grand Ridge Drive
West Des Moines, Iowa 50265
Telephone: (515) 221-0918
Fax: (515) 226-1270
E-mail: mnorris@snglaw.com

ATTORNEY FOR PLAINTIFFS-APPELLANTS

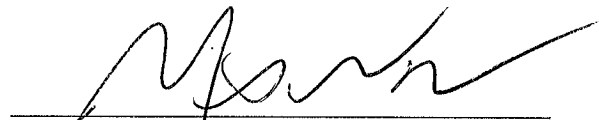
PROOF OF SERVICE AND CERTIFICATE OF FILING

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

Guy Cook
Adam Zenor
500 E. Court Ave., Ste 200
Des Moines, Iowa 50309

ATTORNEYS FOR DEFENDANT-APPELLEE 50TH STREET SPORTS, L.L.C.

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



Michael T. Norris AT0005909
SLATER AND NORRIS, P.L.C.
5070 Grand Ridge Drive
West Des Moines, Iowa 50265
Telephone: (515) 221-0918
Fax: (515) 226-1270
E-mail: mnorris@snglaw.com

ATTORNEY FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE

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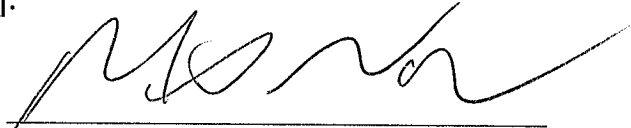
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Michael T. Norris AT0005909
SLATER AND NORRIS, P.L.C.
5070 Grand Ridge Drive
West Des Moines, Iowa 50265
Telephone: (515) 221-0918
Fax: (515) 226-1270
E-mail: mnorris@snglaw.com

ATTORNEY FOR PLAINTIFFS-APPELLANTS