

**IN THE SUPREME COURT OF IOWA**

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**SUPREME COURT NO. 16-1218**

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

Plaintiffs-Appellants

vs.

**50<sup>th</sup> STREET SPORTS, L.L.C. d/ba DRAUGHT HOUSE 50**

Defendant-Appellee

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**Date of filing of Court of Appeals' decision: May 4, 2017 (attached)**

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**PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW  
BY THE SUPREME COURT OF IOWA  
AND  
REQUEST FOR ORAL ARGUMENT**

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**QUESTION PRESENTED FOR FURTHER REVIEW**

1. Was an issue of fact generated as to whether Drought 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.

## TABLE OF AUTHORITIES

### Cases:

- Smith v. Shagnasty's Inc.*, 688 N.W.2d 67 (Iowa 2004)
- Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986)
- Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 203 (Iowa 2002)
- Sanford v. Fillenwarth*, 863 N.W.2d 286, 290 (Iowa 2015)
- Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 467 (Iowa 1989)
- Garcia v. Naylor Concrete Co.*, 650 N.W.2d 87, 90 (Iowa 2002)
- Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 355 (Iowa 1995)
- State v. Pierce*, 65 Iowa 85, 88, 21 N.W.195, 197 (1884)
- State v. Huxford*, 47 Iowa 16, 18 (1877)
- State v. Yates*, 132 Iowa 475, 478, 109 N.W. 1005, 1006 (1906)
- State ex rel. Cosson v. Baughn*, 162 Iowa 308, 311, 143 N.W.1100, 1101 (Iowa 1913)
- Ward v. D & A enters. Of Clark County, Inc.*, 714 N.E.2d 728, 730 (Ind. Ct. App. 1999)
- Torrence v. Murphy's Bar & Grill, Inc.*, 2016 WL 1680470 (Iowa App. 2016)

### Statutes and Rules:

Iowa Code § 123.92

### STATEMENT SUPPORTING FURTHER REVIEW

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*).

The undisputed evidence in this case is that on February 27, 2015 Defendant Campbell was at Draught House from 4:30 p.m. until approximately 8:30 p.m. during which period of time she consumed alcoholic beverages, and this is the only bar at which she consumed alcohol. (App. at 36). It is also undisputed that Defendant Campbell was intoxicated at the time she left Draught House. (App. at 11). The

subsequent motor vehicle accident occurred only blocks from Draught House and only a few minutes after Campbell had left this bar. (App. 35,43). It is further undisputed according to the report of the investigating police office that he was notified of the accident involving Defendant Campbell and Plaintiff at 8:45 p.m. and arrived at the scene at 8:47 p.m. (App. at 24). Upon arriving at the scene the officer smelled the odor of alcohol on Defendant Campbell's breath and observed her to have bloodshot and watery eyes. (App: at 42). During the conducting of various field sobriety tests the officer observed signs of intoxication in Defendant Campbell so he requested she provide a breath sample. (App. 44-45). It is undisputed that at 10:14 p.m. the breath sample provided by Defendant Campbell revealed a blood alcohol level (BAC) of .143. (App. at 45).

The District Court's ruling, which was upheld by the Iowa Court of Appeals, is inconsistent with Supreme Court cases permitting post-event evidence of intoxication to serve as the basis for the inference that the Dramshop knew or should have known at the time of service that the patron was intoxicated. Smith v. Shagnasty, 688 N.W.2d 67, 74-75 (Iowa 2004) (Doe's visibly intoxicated condition shortly after the service of alcohol warrants inference that she was also noticeably intoxicated at the time of service). Furthermore, this ruling is not consistent with intent of the legislature in adopting Iowa's dram shop statue which was intended to provide a remedy to innocent victims, such as the Banwarts, when harmed by

persons served excess liquor by licensees and permittees. Sanford v. Fillenwarth, 863 N.W.2d 286, 290 (Iowa 2015). The present case provides this Court with an opportunity to not only correct an error by the District Court and the Court of Appeals, but also provides an opportunity to uphold and enforce the intent of legislature when it passed Iowa's dram shop act.

### **BRIEF SUPPORTING FURTHER REVIEW**

**THE COURT OF APPEALS ERRED IN ISSUING A DECISION AFFIRMING THE DISTRICT COURT'S RULING 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 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.

Shagnasty's Inc., at 72, 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<sup>1</sup> 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 prior to the accident which occurred approximately one and

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<sup>1</sup> Draught House is a licensee permitted to sell beer, wine and intoxicating liquors under Iowa law and as set out in Iowa’s Dramshop statute.



a half miles from the Draught House 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 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 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. (App. at 35).

In its ruling the District Court stated, “[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 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 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 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 its decision in *Shagnasty's*, id. 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.

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 or 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.** (*Id.* at 74), citing *State v. Debolt*, 73, N.W. 499, 500 (Iowa 1897). (*emphasis added*).

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. *emphasis added*.

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'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. Therefore, it is obvious that Defendant Campbell's intoxication occurred while consuming alcohol at Draught House. Further, evidence of the degree of Campbell's intoxication was that she was significantly intoxicated only a few minutes after leaving Draught House. (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 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<sup>2</sup> over four hours, 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

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<sup>2</sup> 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.

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. 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.

The Iowa Court of Appeals stated in its decision, "there is simply no evidence in the record that Campbell exhibited any signs of intoxication while she was at Draught House before she was sold alcoholic beverages." The undisputed facts in the present case are that Defendant Campbell, who consumed all of her alcohol at Draught House, was proven to be significantly intoxicated only minutes after leaving Draught House'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*

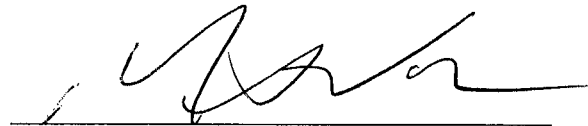


*to a person who shortly thereafter was in a state of serious intoxication gives rise to a question of fact whether [the intoxicated person] was visibly intoxicated at the time [of service]). Emphasis added.*

### **CONCLUSION**

For all of the foregoing reasons Plaintiff-Appellant urges the Court to overrule the Iowa Court of Appeals and 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,



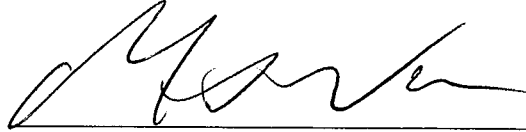
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**REQUEST FOR ORAL ARGUMENT**

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

A handwritten signature in black ink, appearing to read "M. Norris", written over a horizontal line.

Michael T. Norris AT0005909

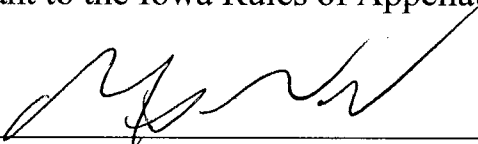
**PROOF OF SERVICE AND CERTIFICATE OF FILING**

I certify that on the 9<sup>th</sup> day of May, 2017, I served Plaintiffs-Appellants' Request for Further Review by mailing one copy to:

Guy Cook  
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ATTORNEYS FOR DEFENDANT-APPELLEE 50<sup>TH</sup> STREET SPORTS, L.L.C.

I further certify that on the 9<sup>th</sup> day of May, 2017 I filed the Plaintiff-Appellant's Request for Further Review via EDMS with the Clerk of the Iowa Supreme Court pursuant to the Iowa Rules of Appellate Procedure.



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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

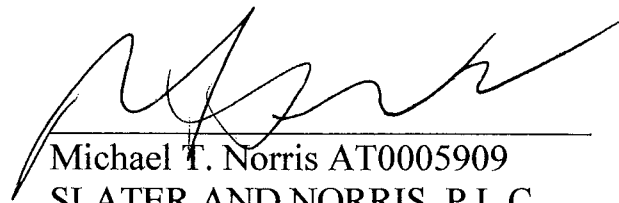
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