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IN THE SUPREME COURT OF THE STATE 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.

DECISION OF IOWA COURT OF APPEALS
FILED MAY 4, 2017

DEFENDANT-APPELLEE'S RESISTANCE TO PLAINTIFFS-APPELLANTS' APPLICATION FOR FURTHER REVIEW

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STATEMENT IN RESISTANCE OF FURTHER REVIEW

Plaintiffs-Appellants Banwarts' Application for Further Review does not implicate any of the grounds upon which this Court traditionally grants further review. *See* Iowa R. App. P. 6.1103(1). Rather, the Application asks the Supreme Court to reverse the decision of the Court of Appeals without support of any of the enumerated grounds within the Rule 6.1103(1).

Indeed, the Application poses *no* substantial question of constitutional law or important unsettled area of law. Nor is this a case implicating changing legal principles or presenting an issue of broad public importance. The Banwarts' initial briefing admitted none of the criteria for Supreme Court retention were implicated by recognizing this case should be routed to the Court of Appeals. The Banwarts now turn that admission upside down and claim the rulings from the District Court and Court of Appeals conflict with appellate case law and the legislature's intent. But the Court of Appeals's affirmance of the District Court's ruling is entirely consistent with the plain language of the statute and this Court's jurisprudence on the scienter element of the Iowa Dramshop Act.

The Banwarts' Application for Further Review should be denied.

BRIEF IN RESISTANCE OF FURTHER REVIEW

To determine if the Court of Appeals decision conflicts with current appellate case law and statutory language, it is helpful to consider what the legal framework is for the issue, and then apply the current case's facts to that framework.

Originally, dramshop law in Iowa was a strict liability statute. *See Hobbiebrunken v. G&S Enters., Inc.*, 470 N.W.2d 19, 21 (Iowa 1991). However, in 1986, amendments to Iowa's Dramshop Act added a scienter element on the part of the dramshop, imposing liability against a licensee selling and serving alcohol "when the licensee . . . knew or should have known the person was intoxicated" or would become intoxicated. Iowa Code § 123.92(1)(*a*). "[T]he amendment . . . expressed a legislative 'intent to narrow the conduct for which a licensee may be liable.' " *Sanford v. Fillenwarth*, 863 N.W.2d 286, 290–91(Iowa 2015) (quoting *Summerhays v. Clark*, 509 N.W.2d 748, 751 (Iowa 1993)). This statute establishes several elements that must be met for liability to attach: (1) alcohol is sold and served; (2) by a licensee; (3) to an intoxicated person; and (4) when the licensee knew or should have known of the intoxication.

In 1991, this Court interpreted the scienter element—knew or should have known—for the first time. *See Hobbiebrunken*, 470 N.W.2d at 21.

The Court faced a question of what the phrase "knew or should have known" meant and how it should be defined to a jury. *Id.* The court expressly rejected an interpretation of the language that would impose an affirmative duty to ascertain a person's intoxication on defendant-licensees, noting the legislature would have said so unambiguously in the amendment if that was its intent. *Id.* at 21–22. Instead, the court held the statute "imposed upon plaintiffs in dramshop actions the duty to prove the defendant's knowledge of the patron's intoxication." *Id.* at 22. This knowledge may be established using either an objective or subjective standard—actual knowledge of intoxication or "that a reasonably observant person under the same or similar circumstances would have had knowledge" that the person being served was intoxicated. *Id.* at 21–22.

More recently, this Court looked at the scienter element again in *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67 (Iowa 2004). The *Smith* court permitted circumstantial evidence to be used to infer the server had knowledge of the patron's intoxication when she was served alcohol. *Id.* at 74. In *Smith*, the aggressor was shouting epithets, running into people, and attacked another patron both before and after being seen holding a beer inside the bar, providing sufficient circumstance to infer the server knew or should have known the patron was already intoxicated when served. *Id.* at 73, 75 (noting

“there is sufficient evidence to show [the patron] was stupidly, staggering, and foolishly drunk” while drinking at the establishment). However, even this strong circumstantial evidence was combined with Shagnasty’s intentional release of the patron following the fight to create an inference that the bar knew it had served an intoxicated person sufficient to create an issue of material fact as to scienter. *Id.* at 75–76.

The *Smith* court defined how a *Hobbiebrunken*’s “reasonably observant person” would have knowledge of intoxication by listing specific signs indicating intoxication:

> (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, 688 N.W.2d at 72 (quoting *Garcia v. Naylor Concrete Co.*, 650 N.W.2d 87, 90 (Iowa 2002)); *see also* Iowa Civil Jury Instructions 1300.2. Evidence of these indicators at the time of service can be used to infer that a licensee had constructive knowledge that a patron is intoxicated when selling and serving alcohol.

In *Smith*, testimony established the presence of signs of intoxication both before and after the person was served alcohol. *Id.* at 70. This is noteworthy in light of the statute’s temporal requirement on the scienter—the licensee must meet the scienter requirement at the time the alcohol was

sold and served for the statute and its imposition of liability to apply. *See* Iowa Code § 123.92(1)(*a*) (providing the right of action against licensees "who sold and served [alcohol] to the intoxicated person *when* the licensee or permittee knew or should have known the person was intoxicated") (emphasis added). If no evidence shows the patron exhibited signs of intoxication prior to service, then no reasonably observant person would have known the patron was intoxicated, the scienter element fails, and no liability can attach.

Circumstantial evidence may be used to make legitimate inferences regarding knowledge of intoxication. A factfinder could infer a server had similar knowledge of a patron's intoxication as others present in the establishment. *See, e.g.*, *Smith*, 688 N.W.2d at 73 (noting "there is sufficient evidence to show Doe was stupidly, staggering, and foolishly drunk" while drinking at the establishment); *Horak*, *v. Argosy Gaming Co.*, 648 N.W.2d 137, 148 (Iowa 2002) (using testimony from patron's companions and casino personnel of visible intoxication and loud and obnoxious behavior to infer server's knowledge). Inferences are legitimate when they are "rational, reasonable, and otherwise permissible under the governing substantive law." *Smith*, 688 N.W.2d at 71. Inferences are not legitimate when based on speculation or conjecture. *Id.* Without evidence showing others present

knew the patron exhibited signs of intoxication, there is no knowledge to infer to the server.

Under this well-established case law, a plaintiff must present sufficient evidence the server knew, or that a reasonably observant person would have known, the patron was intoxicated at the time of service of alcohol to infer knowledge. This is the standard that was used by the District Court and the Court of Appeals in evaluating the evidence, and the decisions of those courts were consistent with this precedent.

The Banwarts offer no Iowa appellate case law that conflicts with the decision of the Court of Appeals. Instead, the Banwarts cherry-pick from *Smith* in an attempt to change the case's ruling from one requiring contemporaneous evidence of intoxication and intentional actions by the establishment to permit an inference of scienter to one where any evidence of intoxication observed by a trained officer long after service and in a different location is sufficient to infer the establishment's knowledge.

The Banwarts' application focuses on two ideas from *Smith* to argue a conflict with the decision from the Court of Appeals. First, that blood alcohol concentration provides evidence of intoxication. The second is that intoxication shortly after service provides an inference of intoxication at the time of service.

It is true that in *Smith*, this Court observed that "[e]vidence of a person's blood-alcohol level, if available, is important evidence of intoxication." *Smith*, 688 N.W.2d at 72. But a person's blood alcohol level cannot be determinative of *observable* intoxication without additional evidence. Blood alcohol level is not something a server would have actual or constructive knowledge of at the time of service, as it is not information readily available to a reasonably observant person, or observable at all without running specially designed tests. The server's knowledge is generally limited to the observable indicators of intoxication at the time of service and possibly the number of drinks previously served to the person.[1]

Second, the circumstantial observation evidence sought to be used by the Banwarts arises from the scene of the vehicular accident and the arresting officer's observations, not from a reasonably observant person in the establishment at the time of service. These observations occurred more than an hour after Draught House 50's last service to Campbell, and following the emotional event of having caused an accident. This is drastically different from *Smith*, where the signs of intoxication seen immediately before and after service, with the incident occurring bare

[1] An undisputed fact before both the District Court and Court of Appeals was that Ms. Campbell drank 3 beers and ate some food over the course of four hours at Draught House 50. The Banwarts' footnote now questioning Campbell's credibility on further review— and without any supporting evidence to the contrary—is inapposite and outside the scope of further review.

minutes after service, could be used to infer knowledge of intoxication. What is more, the officer's opinions were based on his "knowledge, training, and experience" gathered at the scene of a vehicular accident, using a more exacting standard than that of a reasonably observant person in an establishment selling alcohol. App. at 44–45.

While Campbell's blood alcohol level may have been in the intoxicated range for purposes of Iowa Code section 321J.2 when she left Draught House 50, this does not mean she was visibly intoxicated so that a reasonably observant person could have determined she was intoxicated one hour earlier and before service of her third (and final) beer of the evening for purposes of dramshop liability under section 123.92. Furthermore, the evidence gleaned by the officer after the accident, aside from her blood alcohol level, does not indicate she was seriously intoxicated. App. at 44, 47–49 (admitting at deposition that outside the specific sobriety tests, Campbell's movements and coordination did not indicate impairment).

The officer was not present at Draught House 50 at 7:30, when Campbell was served her last beer for the evening. Therefore, the officer could not testify to the signs of intoxication Campbell did or did not exhibit at 7:30 when Draught House 50 served her. The inference the Banwarts seek—that Campbell exhibited signs of intoxication prior to service—is

based purely on speculation and conjecture, with no testimonial or expert facts or evidence to provide it the substance necessary to transform it into a legitimate inference. *See Smith*, 688 N.W.2d at 71

The Banwarts offered no evidence that Draught House 50 and its servers knew or should have known Campbell was or would become intoxicated at the time she was served a third beer. The Banwarts offered no testimony of other patrons from the establishment or servers. As Campbell was out with a known group of people, observations of signs of her intoxication at the time of service could have been obtained if they existed. The Banwarts offered no toxicology expert to extrapolate the signs of intoxication that could have been visible at the time of service based on Campbell's blood alcohol level that was obtained later. Instead, as the Court of Appeals noted, "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 and served alcoholic beverages." *Banwart v. 50th St. Sports, LLC*, No. 16-1218, ___ N.W.2d ___ (Iowa Ct. App. May 3, 2017).

In summary, the Court of Appeals examined the applicable appellate case law, and applied it to the facts in this case. The resulting ruling is consistent with the prior appellate decisions, not in conflict. That the Banwarts do not like the result of the Court of Appeals decision does not

suddenly create a new or conflicting issue of law that merits this Court’s attention on further review.

CONCLUSION

The District Court correctly granted summary judgment in favor of Draught House 50 and dismissed the Banwarts' case. The Court of Appeals decision affirming the ruling is consistent with the plain language of the statute and the existing appellate case law. No issue of unsettled substantive or changing law or issue of broad public importance is presented by the Application for Further Review, and the Application should be denied.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 19, 2017, I electronically filed the foregoing Defendant-Appellee's Resistance to the Application for Further Review 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 Iowa Rules of Appellate Procedure 6.1103 and 6.701 and Iowa Rule of Electronic Procedure 16.315, this constitutes service for purposes of the Iowa Court Rules.

/s/ Adam D. Zenor
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CERTIFICATE OF COMPLIANCE

This resistance complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this resistance has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 pt. and contains 2169 words, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(*a*), or

[ ] this resistance has been prepared in a monospaced typeface using [state name of typeface] in [state font size] and contains [state the number of] lines of text, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(*a*).

Dated: May 19, 2017

/s/ Adam D. Zenor
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