

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**RHONDA BANWART, Individually and  
as Next Friend of ABBYGAIL BANWART  
and MADISON BANWART, Minor  
Children,**

**Plaintiffs,**

**v.**

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

**Defendant.**

**Case No. LACL132459**

**RULING ON MOTION FOR SUMMARY  
JUDGMENT**

This is a personal injury action by plaintiff Rhonda Banwart resulting from an automobile accident occurring on February 27, 2015. Ms. Banwart's car was struck by a car driven by Michelle Campbell, who is a defendant in a consolidated case.<sup>1</sup> Ms. Campbell was drinking at Draught House 50, a West Des Moines tavern, immediately prior to the accident. She filed this action against 50<sup>th</sup> Street Sports, L.L.C. (Draught House), the company that owns and operates Draught House 50, based on a dram shop theory.

On February 3, 2016, Draught House filed a motion for summary judgment. Plaintiff filed a resistance and the motion was set for hearing on May 6, 2016. Adam Zenor represented Draught House at hearing. Michael Norris represented Ms. Banwart. Ms. Campbell's counsel appeared but took no position on the motion.

**STATEMENT OF FACTS**

Michelle Campbell works as a learning and development consultant for Homes Murphy. On February 27, 2015, Ms. Campbell and five or six coworkers went to Draught House for drinks after work. She arrived at approximately 4:30 p.m. Ms. Campbell did not drink before arriving at Draught House. (Campbell Depo. pp. 4-6, 16).

<sup>1</sup> See Polk County No. LACL 132425.

Ms. Campbell drank three Peace Tree beers at Draught House. Peace Tree is a microbrewery from Knoxville, Iowa. There is no evidence as to the size or percentage of alcohol in the beers consumed by Ms. Campbell. She ordered the beers from a waitress who came to their table. Ms. Campbell did not personally buy any of the beers. Each round was placed on an open tab. Two rounds were purchased by the company CEO and her supervisor picked up the last round. Ms. Campbell did not drink any shots, mixed drinks, or wine. Ms. Campbell testified at her deposition that her group talked at a “normal voice level for a bar on a Friday evening.” She stated there was no yelling, screaming or crying at her table. (Campbell Depo. pp. 7-10, 14).

Ms. Campbell left the bar at approximately 8:30 p.m. She felt “in control” and able to drive. The accident occurred at the intersection of 60<sup>th</sup> and Ashworth, which is approximately 15 to 20 blocks away. Officer Barry Graham from the West Des Moines Police Department was dispatched to the scene at 8:36 p.m. Officer Graham could smell the odor of an alcoholic beverage coming from the front driver’s side of Ms. Campbell’s car when he first approached her. She told him that she had been at Draught House and drank three beers. In a response to his question, she said she felt “buzzed.” The officer stated Ms. Campbell had bloodshot, watery eyes, slurred speech, and difficulty complying with his requests for documents. He considered each to be a sign of intoxication based on his training and experience. (Campbell depo. pp. 7, 14; P. Exhibit 2, Purdy report, Graham report; P. Exhibit 3, Graham depo. pp. 8-12).

Officer Graham conducted field sobriety tests including the walk and turn and one-leg stand tests. Ms. Campbell completed the walk and turn test, but did not follow all of the instructions regarding when to start, stepping off the line, raising her arms, taking too many steps, and making an improper turn. The officer considered these to show signs of intoxication based on his training and experience. Ms. Campbell completed the one-leg stand, but swayed

from side to side and put her foot down during the test. The officer considered those as signs of intoxication. The officer also noted that Ms. Campbell was very emotional during testing, which he also considered a sign of intoxication. Following completion of the tests, Officer Graham took Ms. Campbell to the police station to be tested on the Datamaster. The test showed a blood alcohol level of .143. (Exhibit 3, Graham depo. pp. 14-19).

#### **STANDARD OF REVIEW**

“A district court may enter summary judgment only when no genuine issues of material . . . fact exist and the moving party is entitled to judgment as a matter of law.” *Rivera v. Woodward Resource Cntr.*, 830 N.W.2d 724, 727 (Iowa 2013); Iowa R. Civ. P. 1.981(3). A fact is “material” where it “might affect the outcome of the suit.” *Kolarik v. Cory Int’l Corp.*, 721 N.W.2d 159, 162 (Iowa 2006) (internal quotation marks omitted). “The burden is on the party moving for summary judgment to prove the facts are undisputed.” *Id.* (internal quotation marks omitted).

In determining whether summary judgment is appropriate, the court shall consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Iowa R. Civ. P. 1.981(3). “On a motion for summary judgment, the court must: ‘(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record.’” *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 774 (Iowa 2013) (quoting *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)).

#### **CONCLUSIONS OF LAW**

Ms. Banwart’s claim against Draught House is based on Iowa Code section 123.92(1)(a), which is commonly referred to as the Iowa Dram Shop Act. *See Sanford v. Fillenwarth*, 863

N.W.2d 286, 287-90 (Iowa 2015). The dram shop act is part of the larger Iowa Alcoholic Beverage Control Act, which has the purpose to protect the health, welfare, and safety of the general public. *Sanford*, 863 N.W.2d at 290 (citing Iowa Code § 123.1). More specifically, the dram shop act was intended to provide a remedy for innocent victims who are harmed by people who are served excess liquor by businesses who are licensed to sell alcoholic beverages. *Sanford*, 863 N.W.2d at 290.<sup>2</sup>

The dram shop act states in relevant part:

Any 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.

Draught House claimed that the undisputed facts show no evidence to support the elements of: 1) “sale,” 2) that it knew or should have known Ms. Campbell was intoxicated, or 3) proximate cause. At hearing, Draught House conceded that the argument regarding a sale was likely governed by *Sanford*. 863 N.W.2d at 294 (holding that the term “sale” is not confined to direct sales). Additionally, the court indicated that there was likely a fact question as to the proximate cause element. The argument focused on the second element, that is, whether Draught House knew that Ms. Campbell was intoxicated at the time she was served, or knew or should have known that she would become intoxicated.

Proof of knowledge may be shown by employing “either a subjective or an objective standard in establishing the defendant's knowledge.” *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 74 (Iowa 2004). *Shagnasty's* was cited by both parties and is helpful to deciding the issue in the

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<sup>2</sup> The term “dram” is an archaic term referring to an alcoholic drink that was sold to be drunk on the premises. See *Sanford*, 863 N.W.2d at 290 (citing *Malkan v. City of Chicago*, 217 Ill. 471, 75 N.E. 548, 551 (1905)).

present case. The plaintiff and a friend entered Shanasty's and became involved in a verbal confrontation with another patron (referred to by the court as "Jane Doe") in the restroom. *Id.* at 70. After the plaintiff and the friend left the restroom, they again ran into Jane Doe, who was holding a bottle of beer. Another verbal confrontation ensued and Jane Doe hit the plaintiff on the side of face with the beer bottle, causing physical injury. Jane Doe was initially detained by bouncers but was released and never identified. *Id.* at 71. The plaintiff filed a dram shop action claiming that Shagnasty's was liable for over-serving Jane Doe. The district court granted summary judgment in favor of the bar.

The Iowa Supreme Court first considered whether Jane Doe was intoxicated. The court used the following factors to consider 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. *Id.* at 72. The court found a genuine issue of material fact as to the intoxication element based on the statements of the plaintiff and her friend that they thought Jane Doe was intoxicated due to the tone of her voice, her use of vulgarities, that she was bumping into others, and she was holding a beer in her hand at the time of the attack. *Id.* at 73.

The court also considered whether there was a genuine issue of material fact as to the knowledge element, which the court referenced as the "thorniest issue in this case." *Id.* at 74. The court noted that subjective knowledge may be proved by circumstantial evidence. It ultimately found the existence of genuine issue of material fact based on two inferences. First, because Jane Doe was seen in a state of visible intoxication in the bar shortly after service of a bottle of beer, the court could infer that she was intoxicated at the time of service. *Id.* at 75. The court noted that this "subsequent intoxicated condition inference" might not be appropriate in

every case, but found it applied in *Shagnasty's* due to the “presumably short timeframe between service and the attack[.]” Second, because *Shagnasty's* bouncers let Jane Doe go before police arrived, the court held that a jury could draw an inference against the bar because it allowed evidence that may have benefited the plaintiff (e.g. Jane Doe's level of intoxication) to be lost when they let her go. *Id.* at 75-76. Taken together, the court determined that the two inferences created a genuine issue of material fact.

The present case does not contain similar evidence to *Shagnasty's*. 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.

Plaintiff attempts to draw an inference that Draught House knew or should have known that Ms. Campbell was intoxicated at the time of service through evidence discovered at and after the time of the accident. The accident occurred just a few minutes after Ms. Campbell left Draught House. The officer observed signs of intoxication, including odor of alcohol, bloodshot watery eyes, and slurred speech, immediately after approaching Ms. Campbell in her car. He conducted field sobriety testing showing lack of balance and other signs of intoxication. Ms. Campbell eventually gave a breath sample that showed a blood alcohol level of .143.

The 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. However, the question here is whether Draught House knew or should have known that Ms. Campbell was intoxicated or would become intoxicated at the time it served her. As suggested by Draught House's

attorney at the hearing, the focus in this case should be on the last beer served. There is no evidence to show when Draught House served her last beer. She was at the bar for four hours and may have been served the last beer at any point during that period. Plaintiff cannot show that the beer was served immediately before Ms. Campbell displayed signs of intoxication, as was true in *Shagnasty's*.

The evidence obtained by the officer was under considerably different circumstances and further distinguishes this case from *Shagnasty's*. The officer found the odor of alcohol to be a factor showing intoxication, but the odor of alcohol would not be notable to a waitress serving a patron at a bar. The officer found Ms. Campbell had slurred speech, but there is no evidence that she had slurred speech when speaking to servers at the bar. In fact, there is no evidence that she had any conversation with servers other than ordering a beer. Ms. Campbell was emotional while talking to the officer, but that can be expected under the circumstances of a car accident and OWI investigation, which differs completely from hanging out with some coworkers in the casual environment of a bar. The officer noted that Ms. Campbell was confused when handing over identification paperwork, but the bar did not ask her for paperwork. The bar obviously did not put her through sobriety testing or administer a Datamaster test. The information available to the officer cannot be attributed to the Draught House in the same way that Jane Doe's conduct could be attributed to Shagnasty's.

There is likewise no evidence to show that Draught House knew or should have known that Ms. Campbell was intoxicated or would become intoxicated based on the number of drinks served. A similar issue was raised in *Torrence v. Murphy's Bar & Grill, Inc.*, 2016 WL 1680470 at \*2 (Iowa App. 2016) (Table). In *Torrence*, a bar (Murphy's) served a patron two beers and a shot of whiskey. An expert report showed that the patron's blood alcohol level would not have

risen above .035 based on the alcohol in those three drinks. The court of appeals affirmed the district court's decision to grant summary judgment, concluding that there was "insufficient evidence beyond speculation and conjecture to create a genuine issue of material fact that [Murphy's] employees served Jackson when they knew or should have known he was intoxicated or would become intoxicated as a result of the alcohol served to him."

Certainly, there could be some threshold of drinks served that would or should give a tavern knowledge that the person was intoxicated or would become intoxicated due to the number of drinks served. However, as discussed in *Torrence*, a person's intoxication level depends on many factors including the amount of alcohol, the timeframe, and the size of the patron. The undisputed evidence in this case shows that Ms. Campbell was served three beers during a timeframe of four hours. 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. She obviously became intoxicated based on the evidence later discovered by the officer after the accident. However, the court cannot find that the undisputed evidence of serving three beers over four hours, absent something more, creates an inference that Draught House knew or should know that Ms. Campbell was intoxicated or would become intoxicated.

#### **RULING**

The summary judgment motion filed by Draught House is granted. This action is dismissed at plaintiff's costs. This ruling does not impact the action against Ms. Campbell in case number LACL 132425





State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
LACL132459      ABBYGAIL BANWART ET AL VS 50TH ST SPORTS LLC

So Ordered

A handwritten signature in cursive script, appearing to read "Jeffrey Farrell".

Jeffrey Farrell, District Court Judge,  
Fifth Judicial District of Iowa