

# ALERT

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## COMMERCIAL LIABILITY FOR DAMAGES CAUSED BY DRUNK DRIVERS IN WASHINGTON STATE: FAUST v. ALBERTSON

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In Washington state, commercial sellers of alcohol that negligently overserve an “apparently intoxicated” patron may be liable for damages caused by that patron. In *Faust v. Albertson*, No. 81356-6, 2009 WL 2048332 (Wash. July 16, 2009) the Washington Supreme Court held that direct or circumstantial evidence of the patron’s “postservice” appearance, including blood alcohol content and autopsy reports, was admissible to support an inference that the patron was apparently intoxicated at the time of service. The implication of this decision for insurers of these commercial establishments is that they will be forced to incur prolonged defense costs, even in cases with minimal merit.

Mr. Hawkeye Kinkaid was a patron at the Bellingham Moose Lodge, where he was served alcohol from 4:30 p.m. until at least 6:00 p.m. At 7:45 p.m., the van driven by Mr. Kinkaid crossed the center line and struck another vehicle head-on. Mr. Kinkaid sustained serious injuries and later died at the hospital. The driver of the other vehicle, Ms. Bianca Faust, and three passengers (including an infant) were seriously injured. One of Ms. Faust’s passengers was rendered paraplegic.

Ms. Faust sued Mr. Kinkaid’s estate, the Moose Lodge, and the bartender for negligence under several theories. Witnesses offered contradictory statements describing Mr. Kinkaid’s appearance and alcohol consumption at the Moose Lodge. One hour after the accident, a toxicology report showed that Mr. Kinkaid’s blood alcohol content (BAC) was approximately 0.14 percent, in excess of the .08 legal limit in Washington state. At Mr. Kinkaid’s autopsy, his BAC was .09 percent. After considering this evidence, the jury returned a verdict in Ms. Faust’s favor, attributing 50 percent fault to Kinkaid, 15 percent

to the bartender, and 35 percent to the Moose Lodge. Ms. Faust was awarded \$14 million.

On appeal, the Washington State Court of Appeals concluded that because no evidence was presented to describe Mr. Kinkaid’s state when he was served alcohol at the Moose Lodge, the evidence did not support the jury’s verdict. Thereafter, the Washington Supreme Court addressed for the first time whether evidence of BAC taken after a patron has left a commercial establishment can be considered in determining whether the patron was apparently intoxicated at the time of service.

The Court reaffirmed prior case law that rejected the sufficiency of BAC evidence by itself. Addressing the evidence properly presented on a negligent overservice claim, the Court reiterated the established rule in Washington as follows:

[E]vidence on the record must demonstrate that the tortfeasor was “apparently under the influence” by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter.

In so stating, the Court squarely rejected the arguments of Mothers Against Drunk Driving and the Washington State Association for Justice Foundation, as *amici curiae*, urging the Court to adopt a new standard that would lower the evidentiary burden for plaintiffs.

Nonetheless, the Court concluded that “BAC evidence is relevant as corroborative and supportive of the credibility of firsthand observations.” Applying this rule to Ms. Faust’s case, the Washington Supreme Court reinstated the jury’s verdict.

This decision has legal implications for the commercial establishments which sell alcohol and the insurers providing them coverage. Given the Court's ruling that BAC evidence is admissible to corroborate other evidence, commercial establishments selling alcohol and their insurers may be faced with protracted litigation despite scant evidence of apparent intoxication at the time of the alleged overservice.

*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Melissa O'Loughlin White (206.373.7240, [mwhite@cozen.com](mailto:mwhite@cozen.com)) or Jennifer L. Brown (206.224.1270, [jlbrown@cozen.com](mailto:jlbrown@cozen.com)).*