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September 12, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Carol Forsman,	) SUPREME COURT NO. 20110356
Plaintiff/Appellant,	) GRAND FORKS COUNTY NO. 10-C-01291
vs.	)
Blues, Brews and Bar-B-Ques, Inc.	)
d/b/a Muddy Rivers, and	)
Amanda Espinoza,	)
Defendants.	)
--------	)
Blues, Brews and Bar-B-Ques, Inc.	)
d/b/a Muddy Rivers,	)
Appellee.	)

APPEAL FROM THE OCTOBER 11, 2011 JUDGMENT OF DISMISSAL ON PLAINTIFF'S PERSONAL INJURY CLAIM AGAINST BLUES, BREWS AND BAR-B-QUES, INC. DBA MUDDY RIVERS, AND AMANDA ESPINOZA

DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

THE HONORABLE DEBBIE G. KLEVEN, PRESIDING

PETITION FOR REHEARING BY APPELLEE BLUES, BREWS AND BAR-B-QUES, INC.

D/B/A MUDDY RIVERS

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[1]**TABLE OF AUTHORITIES**

[2] PETITION FOR REHEARING

[3]Pursuant to Rule 40, N.D.R.App.P., the Appellee, Muddy Rivers, respectfully requests that the Court grants its Petition for Rehearing on the grounds that the Court reached its decision misapprehending the facts as there is a complete absence of any evidence establishing that Forsman was injured by an obviously intoxicated person, or that Muddy Rivers knowingly served Espinoza while obviously intoxicated. In addition, the Opinion fails to address the absence of any evidence indicating foreseeability of physical harm on the part of Muddy Rivers. Furthermore, clarification is requested with regard to the scope of the Opinion.

[4] FACTUAL SUMMARY

[5]Appellant Forsman brought an action alleging she was injured as a result of the direct and proximate negligence of Muddy Rivers and Amanda Espinoza.

[6]A jury trial was held during which Muddy Rivers moved the Court for a directed verdict on the bases that Forsman had failed to present sufficient evidence on several elements of her case. The District Court found in favor of Muddy Rivers and ordered Forsman's claims dismissed with prejudice. Forsman appealed. On August 30, 2012 this Court issued its Opinion reversing and remanding the case. The opinion held that there was sufficient evidence to find in favor of Forsman on the claims of dram shop liability and premises liability.

[7] SUMMARY OF ARGUMENT

[8] I. The Opinion misapprehend the facts as there was a complete absence of evidence establishing the element of injury by an obviously intoxicated person and the element of knowingly selling alcohol to an obviously intoxicated person.

[9] II. The opinion fails to address the absence of any evidence indicating the element of foreseeability.

[10] III. The opinion does not address Forsman's claims against Amanda Espinoza.

[11]**ARGUMENT**

[12] **I. THE OPINION MISAPPREHEND THE FACTS AS THERE WAS A COMPLETE ABSENCE OF ANY EVIDENCE AT TRIAL ESTABLISHING THE ELEMENT OF INJURY BY AN "OBVIOUSLY INTOXICATED PERSON" AND THE ELEMENT OF KNOWINGLY SELLING ALCOHOL TO AN OBVIOUSLY INTOXICATED PERSON, BOTH ESSENTIAL ELEMENTS OF DRAM SHOP LIABILITY**

Section 5-01-06.1, N.D.C.C. provides in pertinent part;

> Every spouse, child, parent, guardian, employer, or other person who is injured *by any obviously intoxicated* person has a claim for relief for fault under section 32-03.2-02 against any person who *knowingly* disposes, sells, barters, or gives away alcoholic beverages to […] an obviously intoxicated person,

(emphasis added) N.D.C.C. § 5-01-06.1. For dram shop actions, "knowingly" means acting voluntarily and not because of mistake or inadvertence. *Ashlock v. Norris*, 475 N.E.2d 1167 (Ind.Ct.App.1985). "Knowingly" means "a firm belief, unaccompanied by substantial doubt." *Stewart v. Ryan*, 520 N.W.2d 39, 49 (N.D. 1994). "Generally, whether a person act(s) knowingly is a question of fact." *Id.* However, in order for the jury to decide a question of fact there must be *some* evidence presented to enable the jury to reach a decision. "When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise, or speculation, it is proper for the trial court to direct a verdict for the defendant. *State Bank of New Salem v. Bismarck Elevator & Inv. Co.*, 31 N.D. 102, 153 N.W. 459, 460 (1915). In this case there is no evidence establishing that Forsman was assaulted by "an obviously intoxicated person" or that Muddy Rivers *knowingly* sold, bartered or gave

alcoholic beverages to an *obviously* intoxicated person.

[13]The only testimony in this case with regard to Espinoza consuming alcohol comes from Forsman. Forsman testified that the first time she remembers seeing Espinoza at the Christmas party was just before the auction at which time there was some commotion with Espinoza where she had been asked to leave. (Trial Tr. Vol. I, 100-101:23-6; 112:5-16.) Forsman stated that prior to the auction Espinoza appeared to be obviously intoxicated. (Trial Tr. Vol. I, 109:7-14.) There was no testimony as to what signs of obvious intoxication Espinoza exhibited, or what made Forsman believe that she was obviously intoxicated. Forsman testified that she observed Espinoza drinking beer earlier in the evening, but that she did not see Espinoza being served anything after she was asked to leave just prior to the auction. (Trial Tr. Vol. I, 110-111: 22-14; 113:1-4.) Forsman went on to testify that Espinoza during the auction, "seemed okay". (Trial Tr. Vol. I, 102:6-8.) According to Forsman only 10-15 minutes passed in-between the time Forsman saw Espinoza win a bottle at the auction, at which time Espinoza seemed fine, and the time when Espinoza sat down in the booth where the incident allegedly took place. (Trial Tr. Vol. I, 113-114:18-1; 102:2-8.)

[14]This Court's Opinion is based on there being testimony by Forsman establishing that she observed Espinoza drinking beer and that she also noticed signs indicating that Espinoza was intoxicated. However, this testimony by Forsman cannot support a finding that Muddy Rivers "knowingly" served Espinoza alcohol while being obviously intoxicated. According to Forsman, Espinoza exhibited signs of being obviously intoxicated prior to the auction. (Trial Tr. Vol. I, 109:7-14.) Forsman went on to state she did not see Espinoza being served alcohol after this point. (Trial Tr. Vol. I,

113:1-4.) According to Forsman, Espinoza appeared fine when she won the bottle at the auction and that 10-15 minutes later, the alleged assault took place. (Trial Tr. Vol. I, 113-114:18-1; 102:2-8.) The evidence in this case show, through Forsman's testimony, that Espinoza appeared intoxicated prior to the auction, that she was not served anything after that time, that during the auction she appeared fine and that the assault occurred 10-15 minutes after she appeared to be fine. (Trial Tr. Vol. I, 109:7-14; 113:1-4; 113-114:18-1; 102:2-8.) Forsman's testimony can, therefore, not support any inference that Espinoza was served the beer Forsman observed her drink, *after* being observed exhibiting signs of obvious intoxication. The facts cited in the Opinion are therefore misapprehending the facts and testimony in this case.

[15]In order for the jury to find that Muddy Rivers knowingly, served alcohol to Espinoza while she was obviously intoxicated, the jury would have to find that Forsman was not telling the truth about Espinoza appearing to be fine during the auction, and Forsman's testimony that she did not see her being served anything after being asked to leave. In addition, the jury would have to base their determination that Muddy Rivers knowingly served alcohol to Espinoza while she was obviously intoxicated, on absolutely no evidence or testimony whatsoever. "Where an issue is raised by the pleadings and no testimony is adduced concerning it which would support a verdict in favor of the party having the burden of proof, it is error to submit such issue to the jury." *Bentley v. Oldetyme Distillers*, 69 N.D. 587, 289 N.W.2d 92, 99 (1939); *Ternes v. Farmers Union Cent. Exch.*, 144 N.W.2d 386, 390 (N.D. 1966). In this case there is no evidence, whatsoever, for the jury to find that Muddy Rivers knowingly served alcohol to Espinoza while she was obviously intoxicated. In addition to there being no evidence supporting

such a conclusion, the testimony by Plaintiff supports the conclusion that Espinoza was in fact *not* served while being obviously intoxicated.

[16]Section 5-01-06.1, N.D.C.C. provides that a person has a claim for relief pursuant to the statute if that person has been injured by an "obviously intoxicated person". *See* N.D.C.C. § 5-01-06.1. According to Forsman Espinoza appeared to be fine 10-15 minutes prior to the alleged assault. (Trial Tr. Vol. I, 102:2-8; Trial Tr. Vol. II, 8:20-25.). The jury would have to find that Forsman was not telling the truth about Espinoza's appearance, and base its determination on no evidence whatsoever, in order to find that Forsman was injured by an "obviously intoxicated person". The jury's decision would have to be "based upon mere conjecture, surmise, or speculation". *State Bank of New Salem v. Bismarck Elevator & Inv. Co.*, 31 N.D. 102, 153 N.W.2d 459, 460 (1915).

[17]The District Court's grant of Defendant's Motion for a Judgment as a Matter of Law should be affirmed as Forsman failed to offer any evidence supporting essential elements of her claim.

[18] II. THE OPINION FAILS TO ADDRESS THE ABSENCE OF ANY EVIDENCE ESTABLISHING THE ELEMENT OF FORESEEABILITY, AN ESSENTIAL ELEMENT OF PREMISES LIABILITY

[19]"Under premises liability law, landowners owe a general duty to lawful entrants to maintain their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk." *Saltsman v. Sharp,* 2011 ND 172, 803 N.W.2d 553. With respect to liability of a bar owner for assaults upon its patrons, this court has adopted the approach of Section 344 of the Restatement of Torts and concluded that "a bar or night club owner owes a duty to its patrons to protect them from assault by other

patrons when the owner has *reasonable cause* to *anticipate* conduct on the part of third persons which is likely to endanger the safety of patrons." (emphasis added) *Zueger v. Carlson*, 542 N.W.2d 92, 97 (N.D. 1996)

[20]In *Zuger v. Carlson*, the evidence showed that the defendant bar knew that fights had occurred on their premises in the past, knew that Carlson, the individual allegedly assaulting plaintiff, was a violent person, and that Carlson had been involved in prior altercations at the bar. On the basis of these facts, this Court held that there was a question of fact regarding whether the assault was foreseeable to the bar and that even if found not foreseeable, the bar had a duty to exercise reasonable care to stop the attack once it had begun. *Zuger*, 542 N.W.2d at 97.

[21]In cases cited by this Court in support of *Zuger*, it was found that foreseeability of harm play a prominent role in determining whether a bar owner owes a legal duty of care to its patrons and other persons legitimately on the premises. *See Observatory Corp. v. Daly*, 780 P.2d 462, 467 (Colo. 1989). In *Observatory*, the Supreme Court of Colorado noted that;

> Cases from other jurisdictions also support the view that prior notice of a patron's unreasonable risk of harm to others is essential to establish the foreseeability element of legal duty. *See, e.g., McFarlin v. Hall,* 127 Ariz. 220, 619 P.2d 729 (1980) (where evidence showed that tavern owners were aware of patron's propensity for violence, tavern owners had duty to take precautions to prevent violence to customers while patron remained intoxicated on the premises); *Heathcoate v. Bisig*, 474 S.W.2d 102 (Ky.1971) (jury verdict upheld where evidence showed that patron-assailant knocked plaintiff off bar stool ten minutes before inflicting severe beating on plaintiff, since reasonably prudent tavern keeper would have anticipated further violence after first altercation and would have taken precautionary action); *Filas v. Daher,* 300 Minn. 137, 218 N.W.2d 467 (1974) (court affirmed judgment for tavern proprietor notwithstanding jury verdict for plaintiff-patron, since no possible inflammatory conduct existed to forewarn proprietor of assailant's unusual or abnormal conduct resulting in injuries to plaintiff); *Yarborough v. Erway,* 705 S.W.2d 198

> (Tex.App.1985) (court reversed jury verdict because of insufficient evidence to place tavern proprietor's employees on notice or to alert them of dangerous or threatening situation between two patrons of tavern); *Moore v. Mayfair Tavern, Inc.*, 75 Wash.2d 401, 451 P.2d 669 (1969) (court affirmed jury verdict in favor of bar owner where, notwithstanding patron-assailant's *noisy conduct and profane language*, no evidence indicating patron would shoot another patron).

(emphasis added) *See Observatory Corp. v. Daly*, 780 P.2d 462, 468 Footnote 4 (Colo. 1989). In *Observatory*, the Supreme Court of Colorado found that although the bar is not required to foresee the specific type of harm likely to be caused, the foreseeability element of the legal duty does require that the bar has actual or constructive notice that the patron poses *an unreasonable risk of physical harm* to other persons legitimately on the premises. *See Observatory Corp.*, 780 P.2d at 469. There is no evidence in this case of any prior notice on the part of Muddy Rivers that Espinoza constituted an unreasonable risk of physical harm to Forsman or anyone else on the premises. The only testimony regarding Espinoza being asked to leave prior to the alleged assault, comes from Forsman who testified that just before the auction there had been *some commotion* with Espinoza where she had been asked to leave, and that Espinoza at that time was *upset* because she was told she had to leave. (Trial Tr. Vol. I, 101:2-5; 112:14-23.)

[22]There is no evidence of Muddy Rivers having any knowledge to whether Espinoza was a violent person, or that Muddy Rivers had any prior knowledge regarding Espinoza at all. There was no evidence that Espinoza acted in an aggressive or threatening manner towards anyone prior to the alleged assault. There was no evidence of anything giving Muddy Rivers a reason to anticipate any violence by Espinoza.

[23]Furthermore, if it is found, that a third person being upset in a bar is sufficient to create an issue of fact of whether a bar has actual or constructive notice that a patron poses an unreasonable risk of *physical harm* to other patrons it would be tantamount to

requiring a tavern employee to predict future violence on the part of a bar patron notwithstanding the absence of any objective evidence indicating that the patron constituted an unreasonable risk to the safety of others. The practical consequence of such a rule would be to render the bar a virtual insurer of the safety of all persons legitimately on its premises. This Court has held that a bar owner or occupier of land, is not the insurer of the safety of its patrons or its premises. *See Zuger,* 542 N.W.2d at 96*; O'Leary v. Coenen*, 251 N.W.2d 746, 752 (N.D. 1977); *Makeeff v. City of Bismarck*, 2005 ND 60 ¶ 27, 693 N.W.2d 639.

[24] III. THE OPINION DOES NOT ADDRESS FORSMAN'S CLAIMS AGAINST AMANDA ESPINOZA

[25]The opinion by this Court is unclear as to whether Forsman's claims against Amanda Espinoza are reversed and remanded. Forsman did appeal the entire judgment by the District Court. This Court did state in its Opinion that the "judgment" is reversed and remanded for further proceedings. However, if this Petition for Rehearing is denied, some clarification showing that the Opinion applies to the dismissal of the claims against Espinoza would be desirable.

[26]**CONCLUSION**

[27]For all the forgoing reasons, the Appellee Muddy Rivers respectfully request that its Petition for Rehearing be granted.

Respectfully submitted this 12th day of September, 2012.

/s/ Marianne O. Knudson
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d/b/a Muddy Rivers, and	)
Amanda Espinoza,	)
	)
Defendants/Appellees.	)

CERTIFICATE OF SERVICE BY ELETRONIC MEANS

I hereby certify that on September 12, 2012 the following documents:

BRIEF OF APPELLEE BLUES, BREWS AND BAR-B-QUES, INC. d/b/a MUDDY RIVERS

were served upon:

Laura Reynolds, Attorney at Law, Reynolds Law Office, PLLC, 44520 19th Avenue S.W., Suite 5, Fargo, ND 58103

via e-mail at laurareyndols@laurareynoldslaw.com.

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Amanda Espinoza,	)
	)
Defendants/Appellees.	)

CERTIFICATE OF SERVICE BY ELETRONIC MEANS

I hereby certify that on September 13, 2012 the following documents:

PETITION FOR REHEARING OF APPELLEE BLUES, BREWS AND BAR-B-QUES, INC. d/b/a MUDDY RIVERS

were served upon:

Laura Reynolds, Attorney at Law, Reynolds Law Office, PLLC, 44520 19th Avenue S.W., Suite 5, Fargo, ND 58103

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