

**DOCKET NO. 611776**

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION .

VS.

NAT'S ENTERPRISES L.L.C.  
D/B/A NAT'S PUB  
PERMIT/LICENSE NO(s). MB543181  
TRAVIS COUNTY, TEXAS  
(*SOAH DOCKET NO. 458-07-0203*)

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§

BEFORE THE TEXAS  
  
ALCOHOLIC  
  
BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 31<sup>st</sup> day of December, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ami L. Larson. The hearing convened on 18th day of December, 2006 and the record was held open until February 23, 2007. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 20th day of April, 2007. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the complaint be **DISMISSED**.

This Order will become final and enforceable on 30<sup>th</sup> day of January, 2008, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this the 31 day of December, 2007, at Austin, Texas.

On Behalf of the Administrator,

  
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Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

JLK/yt

The Hon. Ami L. Larson  
Administrative Law Judge  
SOAH – Austin  
**VIA FACSIMILE: (512) 475-4994**

Brian W. Bishop  
**ATTORNEY FOR RESPONDENT**  
900 West Avenue  
Austin, Texas 78701  
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Nat's Enterprises L.L.C.  
d/b/a Nat's Pub  
**RESPONDENT**  
1310 RR 620S 'B12'  
Austin, Texas 78734  
**REGULAR MAIL**

Judith Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Austin District Office

SOAH DOCKET NO. 458-07-0203

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
V.	§	
	§	OF
NAT'S ENTERPRISES, L.L.C. d/b/a	§	
NAT'S PUB, PERMIT/LICENSE NO.	§	
MB543181,	§	
Respondent	§	ADMINISTRATIVE HEARINGS
	§	

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff/TABC) requested that the mixed beverage permit issued to Nat's Pub (Respondent)<sup>1</sup> be canceled, based on allegations that Respondent violated the Texas Alcoholic Beverage Code (Code) on May 4, 2004, by selling alcoholic beverages to an intoxicated person. Respondent asserted that no violation occurred and that even if it did, Respondent is exempt under the "safe harbor" defense.<sup>2</sup> The Administrative Law Judge (ALJ) finds that the preponderance of the evidence does not establish that a violation occurred and, therefore, Respondent's permit should not be canceled.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction. Therefore, these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened December 18, 2006, at the State Office of Administrative Hearings (SOAH), 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas, before ALJ Ami L. Larson.

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<sup>1</sup> Nat's Enterprises, L.L.C. d/b/a Nat's Pub.

<sup>2</sup> Code § 106.14(a).

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TABC was represented by its staff attorney Judith L. Kennison. Respondent appeared in person and through counsel Brian W. Bishop. Evidence was taken that day and the record was held open until February 23, 2007, to allow the parties to submit written arguments.

## II. FACTUAL BACKGROUND<sup>3</sup>

Respondent is the holder of Mixed Beverage and Mixed Beverage Late Hours permits issued by TABC for the premises known as Nat's Pub, located at 1310 RR 620 South, in Lakeway, Travis County, Texas.

At approximately 9:30 p.m. on the evening of May 4, 2004, Kevin Clark, along with two friends,<sup>4</sup> went to Nat's Pub. Melissa Falls, who is a co-owner and bartender there, served Mr. Clark and his friends several alcoholic beverages. At some point, Ms. Falls recognized that Mr. Clark appeared to be intoxicated. She then immediately removed Mr. Clark's drink from his reach and insisted that he take a taxi home rather than drive the motorcycle on which he had arrived. Over his protestations, Ms. Falls called a cab for Mr. Clark. When the cab arrived, at approximately 11:50 p.m., Ms. Falls walked Mr. Clark to the door and continued to watch from the window to make sure he got into the cab and did not try to drive. From inside the bar, Ms. Falls observed Mr. Clark appear to fall and not get up so she went outside to see what had happened. Once outside, she saw that Mr. Clark was on the ground and was bleeding from his nose and ears. Ms. Falls then re-entered the bar to call for help.

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<sup>3</sup> The facts in this matter were almost entirely uncontested.

<sup>4</sup> The evidence refers, in various places to Fritz, Hayden, Lewis and Paul as being with Mr. Clark when he arrived at Nat's Pub that night. It is not clear if those references are to four separate people or if Hayden or Lewis are last names. Additionally, there is conflicting evidence as to how many friends were with Mr. Clark when he arrived. Some reports refer to only one friend, while Ms. Falls testified that he arrived with two friends. The preponderance of the evidence suggests, however, that Mr. Clark initially arrived with Fritz and Paul and that Paul left the bar early while Fritz and Mr. Clark remained.

Mr. Clark died early the next morning from a skull fracture, which he sustained when he fell at Nat's Pub. According to the toxicology report, Mr. Clark's blood alcohol concentration (BAC) was between 0.260 - 0.319 gm% based on a blood sample drawn at 1:06 a.m. at the hospital. The report further indicated that, by extrapolating backwards, it could be determined that Mr. Clark's BAC would have been approximately 0.165 - 0.170 gm% when he arrived at Nat's Pub at about 9:30 p.m. on May 4.<sup>5</sup>

### III. THE ALLEGATIONS AND APPLICABLE LAW

#### A. Staff's Allegations

Staff alleged that Respondent, its agent, servant or employee, sold or delivered an alcoholic beverage to an intoxicated person, Kevin Clark, in violation of Code § 11.61(b)(14). Staff further alleged a violation of Code § 2.02(b) based on its assertion that Respondent, its agent, servant or employee, sold, served, or provided an alcoholic beverage to Kevin Clark when he was obviously intoxicated, so that he presented a clear danger to himself and others, and the intoxication was the proximate cause of damages suffered.

#### B. Respondent's Defense

Respondent contended that no Code violation occurred since Ms. Falls acted appropriately by taking away Mr. Clark's drink and calling him a cab at the first sign of his intoxication. Alternatively, Respondent asserted that even if there were a violation, under Code § 106.14(a), commonly known as the "safe harbor" defense, Respondent is protected from TABC's action because Respondent complied with all of the requirements of the statute.

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<sup>5</sup> Under TEX. PENAL CODE § 49.01, an alcohol concentration of 0.08 percent or higher per 210 liters of breath or 100 milliliters of blood constitutes legal intoxication.

#### IV. SUMMARY OF EVIDENCE PRESENTED

Petitioner presented six documentary exhibits as well as the testimony of City of Lakeway Police Officer Mike Pribble, TABC Investigator Sheila Doyle, and Forensic Toxicologist Dr. Ashraf Mozayani.

Respondent called Melissa Falls to testify and offered two exhibits.

##### A. Officer Mike Pribble

Officer Pribble testified that he has been a police officer with the Lakeway Police Department for approximately three and one-half years and that on the evening of May 4, 2004, he was working routine patrol when he was dispatched to Nat's Pub to assist EMS with an incident involving an unconscious person.

Officer Pribble testified that when he arrived at midnight, he noted that Kevin Clark still had a pulse and that Mr. Clark's friend, who seemed very intoxicated, was attempting to administer CPR to Mr. Clark. While at the scene, Officer Pribble spoke to Ms. Falls, who could not initially recall what time Mr. Clark and his friends arrived at the bar but estimated that it was about 9:30 p.m. Ms. Falls recounted that Mr. Clark was a frequent customer and that one minute he would seem fine and the next he would exhibit signs of intoxication. She stated that when she observed signs of his intoxication, she cut him off from further alcohol sales. Officer Pribble also took a written statement from Ms. Falls at the scene.<sup>6</sup> After releasing Mr. Clark's friend to the cab driver,<sup>7</sup> Officer Pribble went back to the police department where he wrote a report about the incident. Officer Pribble later called and spoke to a nurse at Brackenridge Hospital to check on Mr. Clark's status. Upon finding

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<sup>6</sup> Petitioner's Exhibit 3.

<sup>7</sup> Although he stated he believed Mr. Clark's friend was intoxicated and a danger to himself, Officer Pribble did not arrest him or issue a citation for public intoxication.

out Mr. Clark was deceased, Officer Pribble spoke to his sergeant and contacted TABC to report the incident as a possible sale of alcohol to an intoxicated person.

**B. Sheila Doyle**

Ms. Doyle has worked for TABC since 1999. She is currently a licensing standards investigator, but at the time of the incident at issue, she was a TABC law enforcement agent. Ms. Doyle testified that whenever there is a report of a fatality due to alcohol consumption, TABC investigates the source of the alcohol. She was assigned to investigate the incident at Nat's Pub on May 4, 2004, that resulted in the death of Kevin Clark.

Ms. Doyle testified that during the course of her investigation she spoke with Ms. Falls several times, both by phone and in person. She also took a written statement from Ms. Falls on May 20, 2004.<sup>8</sup> Additionally, Ms. Doyle collected receipts that were believed to be from purchases made by Mr. Clark and his friend at Nat's Pub on May 4, 2004.<sup>9</sup>

As part of her investigation, Ms. Doyle spoke to Mr. Clark's mother and sister and to the bartender at Big Dave's Saloon, where Mr. Clark and his friend had been on May 4, 2004, before they arrived at Nat's Pub.<sup>10</sup> She testified that she did not receive any information to indicate that Mr. Clark was showing signs of intoxication before he arrived at Nat's Pub. In fact, she said that her investigation revealed that Mr. Clark was not intoxicated while he was at Big Dave's that night and accordingly, no action was brought against Big Dave's for serving him alcohol. Ms. Doyle also determined that there had been no significant law enforcement calls for service regarding issues at Nat's Pub before the night at issue.

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<sup>8</sup> Petitioner's Exhibit 4.

<sup>9</sup> Petitioner's Exhibit 5.

<sup>10</sup> Ms. Doyle also attempted to interview Mr. Clark's friend who was with him at Nat's Pub but was unable to reach him.

Ms. Falls mentioned that, at one point, Mr. Clark's almost fell off his stool when his friend kicked it, but he was able to recover his upright position without falling. Ms. Doyle testified that she was concerned that Ms. Falls served Mr. Clark after he almost fell off his barstool. She conceded, however, that falling off a barstool when a friend is kicking the stool could happen to anyone - even someone who is sober. She also conceded that catching oneself before falling completely off a tipping stool is as consistent with having the normal use of one's faculties as not.

**C. Ashraf Mozayani**

Dr. Ashraf Mozayani, Pharm. D., Ph.D., is board certified as a Forensic Toxicologist by the American Board of Forensic Toxicology and is employed as the Chief Toxicologist and Laboratory Director for the Harris County Medical Examiner's Office.<sup>11</sup> Dr. Mozayani reviewed witness statements, and the police and Travis County Medical Examiner's reports relating to the events preceding Kevin Clark's death.

By extrapolating backwards from the toxicology results of a sample of Mr. Clark's blood collected at the hospital about one hour after he fell, Dr. Mozayani was able to determine that his approximate blood alcohol concentration (BAC) would have been between 0.165 and 0.170 gm% when he arrived at Nat's Pub at about 9:30 p.m. on May 4. She also deduced that his approximate BAC when he left Nat's Pub at about 11:50 p.m. would have been between 0.283 and 0.342 gm%. According to Dr. Mozayani, to reach that level of blood alcohol concentration, Mr. Clark must have either consumed a significant amount of alcohol before he arrived at Nat's Pub, or he must have consumed more than four drinks during the two hours he was at Nat's Pub.

Dr. Mozayani stated that 90 % of individuals with a BAC of 0.2 or 0.25 gm% would exhibit signs of intoxication to the degree that even an untrained person would know that they were intoxicated. The typical signs of intoxication for someone with Mr. Clark's BAC at the time he left

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<sup>11</sup> Dr. Mozayani's curriculum vitae was admitted into evidence as part of Petitioner's Exhibit 6.

Nat's Pub could include drowsiness, confusion, staggering, slurred speech, a lack of motor coordination, the inability to exercise good judgment, or a tendency to be argumentative. Dr. Mozayani agreed that just one of these symptoms might not signal a person's intoxication, but rather intoxication may not be evident until two or three such indicators were visible. She also acknowledged that catching oneself before falling off a stool would probably indicate the ability to use one's mental and physical faculties as could the ability to operate a motorcycle. She said the evidence she reviewed did not include anything to suggest that Ms. Falls should have recognized signs of intoxication in Mr. Clark before he became argumentative.<sup>12</sup> She also agreed that being argumentative does not necessarily mean that one is intoxicated. Dr. Mozayani further testified that Mr. Clark could have been among the 10% of people who do not show signs of intoxication at high levels of BAC.

#### **D. Melissa Falls**

Ms. Falls testified that she is a co-owner and employee of Nat's Pub, which has been licensed since 2003. She stated that she attended the TABC sponsored seller-server course and is currently TABC certified. Ms. Falls was working as the bartender at Nat's Pub on May 4, 2004, when Mr. Clark and his friends arrived at approximately 9:30 p.m. She stated Mr. Clark was a fairly regular patron at Nat's Pub and she saw him there approximately once a week. According to Ms. Falls' testimony, when Mr. Clark arrived on May 4, he was with two friends and she did not see any signs that he was intoxicated. She stated they were celebrating a birthday and that they sat at the bar, ordered drinks and shots, and talked. She stated that Mr. Clark observed her prepare his first mixed drink and told her she had not made it strong enough. She stated that it seemed that he was trying to show off in front of his friends and that he did not continue to press the issue. Ms. Falls testified that she observed Mr. Clark go to the restroom once and that he seemed fine. She also spoke to and heard him speak and he did not have any problems with his speech.

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<sup>12</sup> It was not clear from the testimony whether the reference to Mr. Clark's becoming argumentative related to his initial brief argument with Ms. Falls about the strength of his drink or to his later protests regarding taking a cab home after he had already been "cut off."

At one point, one of his friends, in what appeared to be horseplay, kicked Mr. Clark's barstool causing it to wobble and fall. Mr. Clark, however, was able to catch himself on a nearby ledge to avoid falling down. Ms. Falls said that she did not believe Mr. Clark was intoxicated at that time since his stool tipped as a result of having been kicked and Mr. Clark was able to recover his upright position without falling. She stated that she has witnessed others fall off stools who were not intoxicated and that she herself fell off a stool at Nat's Pub once, while sitting down to eat, because of the new floor and plastic barstool.

Later that night, Ms. Falls noticed that the shot in front of Mr. Clark had been spilled, although she did not see who spilled it. At that point, she became concerned that Mr. Clark was intoxicated and she removed his remaining drink from the bar. She also insisted that he not drive home and called him a cab even though he argued that he did not want her to.

When the cab arrived, the driver came inside but Mr. Clark would not leave the bar. When he finally left, Ms. Falls stood by the window to make sure he and his friend got into the cab and did not try to ride their motorcycles. She observed Mr. Clark appear to fall while he was talking to his friend in the parking lot.

Ms. Falls stated that she had once before witnessed Mr. Clark go from seeming perfectly fine to suddenly showing signs of intoxication. She said that this is what happened on May 4, and that it was almost like he had "hit a wall" and "his demeanor and everything" was suddenly different. When she cut him off, Mr. Clark was exhibiting slurred speech and, just before he left the bar, he had to be helped out.

Ms. Falls testified that, in total, she served Mr. Clark four drinks that night - two shots of tequila and two mixed drinks containing whiskey and soda. She stated that he only drank two drinks, however, since she took the last mixed drink away from him and one shot was spilled. She denied having consumed any alcoholic beverages herself that night.

In addition to her testimony, Ms. Falls issued two separate written statements. The first statement was given at Officer Pribble's request and was made after the bar closed on the night of Mr. Clark's death.<sup>13</sup> In this relatively brief statement, Ms. Falls indicated that Mr. Clark and his friend, Fritz, arrived at the bar at approximately 10:15 p.m. and that they each consumed two drinks and two shots. She further stated that "before too long," Mr. Clark showed signs of intoxication at which point she denied his request for more drinks, told him he needed to take a cab, and called for a taxi to pick him up.

The second written statement by Ms. Falls was more detailed and was made at Ms. Doyle's request on May 20, 2004, approximately two and one-half weeks following the incident. In this statement, Ms. Falls indicated that Mr. Clark arrived at approximately 9:30 p.m. with his friends, Fritz and Paul. She stated that initially Mr. Clark ordered his usual drink of whiskey and soda and that Fritz and Paul each ordered a beer. Fritz also ordered two shots of tequila to toast his birthday. Eventually, Fritz ordered another round of shots for him and Mr. Clark and others at the bar. According to this statement, Ms. Falls then noticed, "a little later" that Mr. Clark's shot had been spilled. She cleaned up the spilled shot and then served them each another drink as they requested. Ms. Falls stated that when she served that round of drinks, she noticed that Mr. Clark had "hit a wall," and she then removed the drinks and told them she was calling them a cab.

## V. DISCUSSION AND ANALYSIS

- A. Did Respondent, its agent, servant or employee, sell or deliver an alcoholic beverage to an intoxicated person to wit: Kevin Clark, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), on May 4, 2004?**

The statute at issue hinges upon but does not define the term "intoxicated person." Staff argued that the Texas Penal Code definition incorporated in the TABC rules regarding seller/server

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<sup>13</sup> Petitioner's Exhibit 3.

training should be used.<sup>14</sup> Under that definition, “intoxicated” means not having the normal use of mental or physical faculties by reason of the introduction of alcohol or other substance into the body or having an alcohol concentration of 0.08 or more.<sup>15</sup> Respondent did not contest this definition and the ALJ adopts it for purposes of this proposal.

Under this definition, since a bartender or server of alcoholic beverages is not able determine the exact alcohol concentration of any given customer while serving drinks, it is the determination as to whether a person has lost the normal use of his mental or physical faculties that is relevant in this context. According to the evidence in this case, the first sign of any behavior by Mr. Clark that could have reasonably been attributed to his intoxication was the brief argument he had with Ms. Falls about the strength of his first drink. The uncontested evidence shows, however, that he did not continue to argue, his speech was not slurred at that time, he appeared to be merely showing off in front of his friends by pushing for a stronger drink, and Ms. Falls did not add liquor as he requested. Additionally, the evidence shows that although being argumentative may be a sign of intoxication, it can also be consistent with the behavior of a person who is not intoxicated. There is nothing about Mr. Clark’s initial conversation with Ms. Falls concerning the strength of his drink to suggest that the use of his physical or mental faculties was diminished. If anything, his comments indicated that he was alert and paying attention to his surroundings enough to notice how she was pouring his drink.

Chronologically, the next possible indicator of Mr. Clark’s intoxication, according to the evidence presented, was his almost falling off the barstool. Although in isolation, this behavior could certainly indicate an impairment of one’s physical faculties, here the evidence of the circumstances surrounding Mr. Clark’s behavior does not establish that he was intoxicated.

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<sup>14</sup> 16 TAC §§ 50.1(1) and 50.2(a)(2).

<sup>15</sup> TEX. PENAL CODE § 49.01(2).

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The evidence shows that Mr. Clark's friend, while engaging in horseplay, kicked the stool on which Mr. Clark was sitting. That kick caused the stool to tip and Mr. Clark to almost fall. However, Mr. Clark did not fall. Instead, he was able to regain his balance by leaning on a nearby ledge and repositioning himself upright on the stool without falling down. The evidence includes an expert opinion that Mr. Clark's ability to catch himself and avoid falling could be consistent with the normal use of his physical and mental faculties and, therefore, a lack of intoxication.

The next possible indicator of Mr. Clark's intoxication, according to the evidence, is the point at which a shot in front of him was spilled. The evidence conflicts as to whether Ms. Falls cut off Mr. Clark from more alcohol as soon as she noticed that the shot in front of him had been spilled or whether she served an additional round of drinks following the spilled shot but very quickly removed them, and cut off Mr. Clark from any additional alcohol consumption.

The ALJ finds that under either scenario the evidence is insufficient to support the alleged violation. Certainly the more conservative approach would have been for Ms. Falls to refuse to serve Mr. Clark any additional alcohol after she noticed that the shot in front of him had been spilled. Ms. Falls testified, however, that she did not see who spilled the shot and that she merely assumed it was Mr. Clark because the shot glass was positioned near him on the bar. Even if Ms. Falls served Mr. Clark another drink after she cleaned the spilled shot and then removed it immediately upon noticing that he appeared to have "hit the wall" and become intoxicated, she did not commit a violation.

In this case, the preponderance of the evidence shows that, as soon as Ms. Falls was reasonably able to determine that Mr. Clark had lost the normal use of his mental and physical faculties, she discontinued his access to alcohol and arranged for a safe way for him to get home. Accordingly, the ALJ finds that the alleged violation has not been established.

- B. Did Respondent, its agent, servant or employee, sell, serve or provide an alcoholic beverage to Kevin Clark when he was obviously intoxicated, so that he presented a clear danger to himself and others and the intoxication was the proximate cause of the damages suffered?**

The threshold determination as to what constitutes intoxication under this statute appears to be even less stringent than that dictated by the definition used in section A above. Under this law, a server is not required to stop serving alcohol to a patron until that person is so obviously intoxicated as to present a clear danger to himself or others.

Because the evidence shows, as explained in section A above, that Ms. Falls stopped serving alcohol to Mr. Clark as soon as she was reasonably able to determine that the use of his physical and mental faculties had been impaired, the evidence does not establish a violation of the Code § 2.02(b) as alleged.

**C. Safe Harbor Affirmative Defense**

Since the ALJ finds that Respondent did not violate the laws as alleged, there is no need to address the issue of whether the requirements of the affirmative “safe harbor” defense were met.

## V. CONCLUSION

Staff failed to prove by a preponderance of the evidence that Respondent, on May 4, 2004, committed the alleged Code violations by serving an alcoholic beverage to Kevin Clark when he was intoxicated. Accordingly, the ALJ concludes that Respondent’s permits should not be canceled.

## VI. FINDINGS OF FACT

1. Nat’s Enterprises, L.L.C. d/b/a Nat’s Pub (Respondent) is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 1310 RR 620 South, Lakeway, Travis County, Texas.

2. On May 4, 2004, Kevin Clark, along with two friends, arrived at Nat's Pub at approximately 9:30 p.m.
  3. Prior to arriving at Nat's Pub, Mr. Clark had been at another bar, Big Dave's.
  4. When Mr. Clark arrived at Nat's Pub, he did not appear to be intoxicated and did not have slurred speech or visible trouble walking or balancing.
  3. Melissa Falls is a co-owner and bartender at Nat's Pub and was bartending on the night of May 4, 2004.
  4. Ms. Falls served Mr. Clark two tequila shots and two mixed drinks over approximately two hours.
  5. Ms. Falls observed Mr. Clark enter the bar and go to the restroom and noticed that he did not appear to be intoxicated.
  6. Mr. Clark watched Ms. Falls pour his first mixed drink and told her that it was not strong enough. He did not continue to argue with her when she refused to make it stronger unless she increased the price.
  7. At some point, after the first drink and shot had been served, Mr. Clark's friend, in the course of some ongoing roughhousing, kicked the barstool on which Mr. Clark was sitting, causing it to tip. Mr. Clark almost fell but was able to recover his balance and resume an upright position on the stool without falling.
  8. The second shot Ms. Falls served, which was positioned in front of Mr. Clark, was spilled but the evidence did not establish see who spilled it.
  9. Shortly after the shot was spilled and Ms. Falls served the last mixed drink to Mr. Clark, he seemed to have "hit a wall" and appeared to be intoxicated.
  10. Immediately upon observing Mr. Clark appear to be intoxicated, Ms. Falls removed his drink from his reach and insisted that he take a taxi home rather than ride the motorcycle on which he had arrived.
  11. Ms. Falls called for a taxi to pick up Mr. Clark at Nat's Pub even though Mr. Clark argued that he did not wish to take a cab.
  12. The taxi arrived at approximately 11:50 p.m. and Ms. Falls walked Mr. Clark to the door and watched from inside to make sure he got into the cab and did not try to ride his motorcycle.
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13. While in the parking lot of Nat's Pub, Mr. Clark fell and sustained a skull fracture which caused his death at the hospital several hours later.
14. At 1:06 a.m. on May 5, 2004, at the hospital, Mr. Clark's blood alcohol concentration (BAC) was between 0.260 - 0.319 gm%.
15. When Mr. Clark arrived at Nat's Pub at approximately 9:30 p.m. on May 4, 2004, his BAC was between 0.165 and 0.170 gm% and when he left at approximately 11:50 p.m. that night, his BAC was between 0.283 and 0.342 gm%.
16. Ninety percent of individuals with a BAC of 0.25 gm% would exhibit signs of intoxication to the degree that even an untrained person would know they were intoxicated. Such signs could include drowsiness, confusion, staggering, slurred speech, lack of motor coordination, inability to exercise good judgment, or a tendency to be argumentative.
17. Ms. Falls attended a TABC sponsored seller-server training course and was certified on May 4, 2004.
18. Ms. Falls removed Mr. Clark's drink and called him a cab as soon as it was evident that his physical or mental faculties seemed to be impaired.
19. On November 1, 2006, Staff sent its Notice of Hearing to Respondent. The notice contained the date, time and location of the hearing as well as a brief statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations made and the relief sought by TABC.
20. The hearing on the merits was convened on December 18, 2006, at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas, before Administrative Law Judge Ami L. Larson. TABC appeared by its staff attorney Judith L. Kennison. Respondent appeared with counsel, Brian W. Bishop. The record closed February 23, 2007, following the submission of written briefs by the parties.

## VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. On May 4, 2004, Respondent's employee did not sell or deliver an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), or to an obviously intoxicated person who presented a clear danger to himself and others, with the intoxication being a proximate cause of the damage suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02.
5. Based on Conclusion of Law No. 4, cancellation of Respondent's permits is not warranted.

**SIGNED April 20, 2007.**



**AMI L. LARSON**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**