

No. 325105



COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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DIVISION III  
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BEYONCE NIEVES,

Appellant,

vs.

WAL-MART STORES, INC.,

Respondent.

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APPELLANT'S REPLY BRIEF

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RICHARD D. WALL, #16581  
Attorney for Appellant

Richard D. Wall, P.S.  
505 W. Riverside Ave., Suite 400  
Spokane, WA 99201  
(509) 747-5646

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#### IV. ARGUMENT

**1. Plaintiff Substantially Complied with CR 50 by Objecting to the Shopkeeper's Instruction on the Grounds that the Conduct of Wal-Mart's Employee Constituted Assault as a Matter of Law.**

The goal of modern rules of civil procedure is to minimize procedural traps and to allow cases to proceed on the merits in the absence of serious prejudice to other parties *O'Neill v. Jacobs*, 77 Wn.App. 366, 370, 890 P.2d 1092 (1995). When the requirements of a court rule are procedural, substantial compliance may be sufficient to satisfy the rule. *Id.*, at 369-70. To the extent possible, rules should be applied in such a way that substance will prevail over form. *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 781-82, 613 P.2d 129 (1980).

CR 50(a)(2) states that a motion for judgment as a matter of law may be made any time before the case is submitted to the jury. However, once raised, such a motion can be renewed after the jury has returned its verdict. The purpose of the rule is to ensure that the court is given the opportunity to correct possible errors before the case is submitted to the jury. *See*, 4 Karl B. Tegland, *Washington Practice: Rules Practice*, CR 50 drafter's cmt. at p. 225 (6th ed. 2013).

Here, the trial court was clearly given an opportunity to correct its error prior to the case going to the jury. Due to the unavailability of the last witness to be called by the defendant, the trial judge asked counsel to address any issues relating to jury instructions prior to the close of evidence. Counsel for Plaintiff argued against the inclusion of the Shopkeeper's Privilege instruction on the grounds that the undisputed evidence showed Mr. Blackwell had initiated his contact with Plaintiff by committing an assault. CP 212-14. In doing so, counsel for Plaintiff acknowledged that the argument pertaining to the Shopkeeper's instruction was in essence an argument for a directed verdict on the assault claim. CP 214. Both defense counsel and the court were clearly aware of the issue that was being raised. In denying Plaintiff's objection to giving the Shopkeeper's instruction, the trial court specifically ruled that the evidence did not establish an assault as a matter of law and that the question of whether an assault had occurred would be submitted to the jury. CP 215.

Any further motion or argument by Plaintiff regarding a directed verdict or judgment as a matter of law as to the assault claim would have been futile, as the trial court had already made a definitive ruling on that issue. Thus, Plaintiff substantially complied with CR 50(a)(2) by placing the issue squarely before the court and obtaining a clear and unequivocal decision. A ruling by this Court that Plaintiff had waived her right to

move for judgment as a matter of law would elevate form over substance. The question whether Mr. Blackwell had committed an assault as a matter of law was timely raised prior to the case being submitted to the jury.

2. No Evidence Was Presented at Trial From Which a Reasonable Jury Could Conclude that Mr. Blackwell Did Not Commit an Assault Upon Ms. Nieves.

Wal-Mart argues that there was substantial evidence from which a jury could conclude that Mr. Blackwell did not commit an assault when he grabbed Ms. Nieves from behind as she was walking out of the store. Wal-Mart points to the testimony of Mr. Blackwell, Ms. Nieves, and Officer Donaldson, as well as the surveillance video as evidence supporting the jury's verdict.

The testimony of both Mr. Blackwell and Mrs. Nieves was consistent as to the means used to initially contact and restrain Ms. Nieves as she exited the store. Mr. Blackwell grabbed hold of her backpack from behind as Ms. Nieves was walking out into the parking lot. As this court has previously held, no reasonable jury could conclude that initiating contact with a person in that manner without consent is not, at a minimum, offensive. *See, State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007)

Officer Donaldson did not witness the incident, so his testimony neither adds to nor subtracts from the testimony of Mr. Blackwell and Ms. Nieves as to what occurred. The video and the still photographs from the video show even more clearly that Blackwell grabbed Nieves from behind without warning in order to physically restrain her as she was walking out of the store. Exhs. 101 - 108. There is nothing in the testimony or the video images from which a jury could conclude that the intentional grabbing of Ms. Nieves from behind was not harmful or offensive, or that it was done with consent. The evidence clearly establishes an assault as a matter of law.

3. The Giving of the Shopkeeper's Privilege Instruction Was Prejudicial.

Jury instructions are to be read as a whole. The effect of any one instruction must be viewed in light of all the other instructions given to the jury. *Nelson v. Mueller*, 85 Wash.2d 234, 238, 533 P.2d 383 (1975).

Under the facts of this case, there is an inherent conflict between the assault instruction and the instruction based on the shopkeeper's privilege. The jury was instructed that to prevail on her assault claim, Nieves had to prove each of the following:

- (1) That defendant directly or indirectly caused a harmful or offensive contact with plaintiff;
- (2) That defendant acted with intent to bring about the contact; and
- (3) That the plaintiff did not consent to the contact or the contact was not otherwise privileged.

CP 37 (Instruction No. 8)(emphasis added)

The jury was also instructed that a shopkeeper has a defense to any claim arising out of the detention of a person reasonably believed to have committed a theft on the premises if the person is detained in a reasonable manner and for a reasonable time. CP 41 (Instruction No. 12) The instruction does not define "reasonable manner." Thus, a jury could conclude that an assault had been committed in the process of detaining Nieves, but that the manner of restraint was nevertheless "reasonable" under the circumstances and that the contact, while not done with consent, was "otherwise privileged" under the law. If the jurors found the conduct of Mr. Blackwell to be privileged under Instruction No. 12, then they might also have concluded that no assault had occurred based on the definition of assault given in Instruction No. 8. In other words, the jury could have concluded that Blackwell's conduct amounted to an assault, but that it was reasonable under the circumstances to commit an assault as a means of detaining Nieves.



This Court should hold that, as a matter of law, the commission of an assault to detain a suspected shoplifter can never be reasonable or privileged. The consequences of allowing juries to decide when it okay to assault a suspected shoplifter and when it is not are too great. Innocent shoppers will be subjected to potential assault anytime they are suspected by a store employee of having committed a theft.

This is not a case where a suspected shoplifter was actively resisting reasonable, non-assaultive efforts to make contact and obtain voluntary compliance with a request to stop and be questioned. It is not disputed that Nieves was unaware Blackwell was behind her as she exited the store. There is no evidence that Nieves was aware she was suspected of shoplifting or that anyone from the store wanted to speak to her. Nieves also did not know that Blackwell was a store employee until after he had assaulted her from behind.

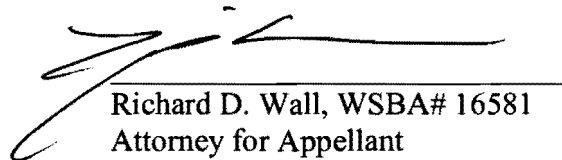
In order to justify allowing the jury to decide whether an assault was committed under these facts, this Court must determine what circumstances a jury could rationally consider in deciding no assault occurred. Would the fact that Nieves is African-American be relevant to whether Blackwell, who is white, had committed an assault. Would the fact that Nieves was wearing a sweat pants and a hoodie be relevant factors? Would the fact that Nieves is a large woman justify committing

an assault as a means of preventing her from walking out of the store?  
Unfortunately, these are exactly the kinds of circumstances a jury is likely  
to consider when the undisputed facts clearly show an assault was  
committed.

#### CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's  
ruling as to whether Defendant committed an assault as a matter of law  
and remand for further proceedings.


Respectfully submitted this 25 day of January 2015.

  
Richard D. Wall, WSBA# 16581  
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>st</sup> day of January 2015, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent via legal messenger to the following:

Troy T. Nelson  
RANDALL DANSKIN, P.S.  
1500 Bank of America Fin. Ctr.  
601 W. Riverside Avenue  
Spokane, WA 99201-0653

  
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Alyson Mahoe