

FILED

JUL 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No: 299279

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

TARI JANE ANDERSON

Appellant

v.

JANE M. HESSION

Respondent

RESPONDENT'S BRIEF

Dennis P. Hession
WSBA No. 9655
Attorney for Respondent
818 W. Riverside Ave, Suite 631
Spokane, WA 99201
(509) 838-4458

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INTRODUCTION

A review of the Appellant's Brief in this case and the Briefs filed at the District Court and to the Superior Court reveal that she believes this case to be about many things. But, the only thing this case is really about is whether the Appellant was able to sustain her burden of showing that on October 15, 2007, Respondent committed an intentional tort or is guilty of negligently causing damage to the Appellant.

ASSIGNMENTS OF ERROR

The Respondent does not assign error to either the decision of the trial court (District Court) or the initial appellate court (Superior Court).

Issues pertaining to Appellant's Assignments of Error

1. Whether the Appellant met the burden of proof by providing competent evidence of the requisite elements of the intentional tort of battery?
2. Whether the Appellant met the burden to prove the elements of negligence, and specifically the elements of breach of duty and proximate cause?
3. Whether the Trial Court and the Superior Court on Appeal abused their discretion by allowing the husband of the Respondent, Jane Hession to assist her in the defense of this matter?
4. Whether the Trial Court committed error in concluding that the Respondent at the time she was engaged by the Appellant, was acting in the management of community business or for the benefit of the community thus giving rise to potential community liability, and legally determining that her husband was a real party in interest and entitled to participate in the litigation?

STATEMENT OF THE CASE

This appeal is taken from a decision in the Superior Court of Spokane County, by the Honorable Allen C. Nielson, sitting by designation. Judge Nielson sat in this matter by designation in a special appellate capacity to hear the appeal of a Spokane County District Court action, Small Claims Division, in a decision by the Honorable Douglas B. Robinson also sitting by designation.

Judge Robinson ruled in favor of the Respondent, Jane Hession, finding against the Appellant Tari J. Anderson, dismissing all claims. RP p. 107-119. Judge Nielson, hearing the appeal by this Appellant of Judge Robinsons decision on de novo review, concluded that the Appellant did not sustain her burden to prove either intentional conduct or negligence and dismissed her claims, and entered Findings of Fact and Conclusions of Law and an Order of Dismissal, CP 381-388. This case is stated as follows.

On October 15, 2007, the Appellant and others from her neighborhood gathered at the intersection of Sprague Avenue and Lincoln Street in Spokane, Washington, to protest the decision by the Mayor of Spokane to transfer alley garbage collection to the front of citizen properties. RP 12.

On that day, the Respondent and her husband were walking south on the west side sidewalk of Lincoln Street approaching Sprague Avenue. RP 83-84. Her husband was going to the Bing Crosby Theater to participate in a Mayoral debate. RP 83-84 and 80.

The Appellant and her neighbors were carrying signs supporting their protest of the garbage issue and, in some cases, disparaging the Respondent's husband. RP 12.

In an effort to avoid the Appellant and other protestors, the Respondent left the sidewalk headed east into the crosswalk towards the northeast corner of the intersection. RP 84-85. As the Respondent tried to make her way with her husband into the crosswalk she encountered the Appellant who had positioned herself at the entrance to the crosswalk holding her protest sign. RP 84-85.

As the Respondent approached the crosswalk the Appellant moved toward the Respondent, limiting the ability of the Respondent to enter the crosswalk unimpeded. RP 85-86. In an effort to allow her to pass by and to keep the Appellant at bay, the Respondent moved her forearm into position and brushed up against the sign held by the Appellant. RP 85-86. The Respondent then proceeded with her husband along the crosswalk. RP 85-86.

The acts of the Respondent were merely defensive, protecting herself and her husband from the intrusion by the Appellant and only to such a degree reasonably necessary to allow them to pass by. RP 86.

At the time of the incident the Respondent was married to Dennis P. Hession, a lawyer licensed to practice in the State of Washington, who participated in the Small Claims District Court Action as a person who is a real party in interest in this matter. RP 39.

At the end of the Small Claims Proceedings, Judge Robinson made his decision by making certain observations about the applicable law:

The Courts of the State of Washington define the intentional tort of battery where a person acts intending to cause harmful or offensive contact, and such contact directly or indirectly results. RP 109.

Tari Anderson did not sustain her burden to show, nor do the facts presented at trial support the assertion that Jane Hession acted with intent to cause harmful or offensive contact, nor did such harmful or offensive contact occur. RP 113-114.

The action by Jane Hession in making contact with Tari Anderson, was reasonable under the circumstances. RP112. She had the right to pass in the public right of way and her actions in preventing such passing from being impeded by Tari Anderson were reasonable and lawful. RP 111 and RP 114.

In this state, an action for negligence requires the proof of four elements: (a) the existence of a duty, (b) the breach of that duty, (c) resulting injury and (d) proximate cause. RP 109-113.

Tari Anderson failed to establish that the conduct of Jane Hession was a breach of her duty to Ms. Anderson. RP 109-114. The actions of Jane Hession were reasonable to allow her to pass on the public right of way unimpeded by Ms. Anderson. RP 112-113.

Tari Anderson failed to introduce credible facts to support the element of negligence that the actions of Jane Hession were the proximate cause of her injuries. RP 109, RP 113, RP 118. Given the nature of the contact between the parties it could not be concluded that such contact was the proximate cause of Ms. Anderson's alleged injuries. RP 109, RP 113, RP 118.

The Trial Court permitted Mrs. Hession's husband to participate in the trial, as he did with the husband of Ms. Anderson. RP 10, RP 16, RP 34, RP 39 and RP 116. Pursuant to RCW 12.40.080, the decision to allow an attorney to participate in a Small Claims action is within the sound discretion of the trial court. RP 10.

The Trial Court Judge also permitted Mrs. Hession's husband to participate on the basis that he was a real party in interest in this matter. RP 10. The community comprised of Jane and Dennis Hession would have

to answer for any judgment rendered in this case, as torts committed by a member of the community in the prosecution of the business of the community are presumed to result in community liability. RP 10. Thus Dennis Hession is a real party in interest in this case. RP 10.

ARGUMENT

Summary of Argument

Over a period of two years, the Appellant attempted to convince the Spokane County Sheriff's Office and the Spokane County Prosecutor to file 4th degree assault charges against the Respondent Jane M. Hession. RP 52-53. In the process the case was reviewed at virtually every level of the Sheriff's Office RP 52-53 and by Brian O' Brien, Senior Deputy Prosecuting Attorney who, in concluding there was no intentional act, stated "... I have never seen a misdemeanor assault allegation so thoroughly investigated." RP 52-53; District Court (Small Claims) Administrative Record- Detective Michael Rickett's Report.¹ Unsatisfied, the Appellant brought this civil action and the matter was tried before the Honorable Douglas Robinson. RP 71. The nature of the cause of action is absent from the Notice of Small Claim, RP 6 but the Court treated the Notice as if she plead in the alternative under theories of intentional conduct (battery) and negligence. RP 6. The Trial Court found that the Appellant did not sustain her burden to prove that the Respondent

¹ This reference is to the Police (Sheriff) Report prepared by Detective Michael Ricketts of this incident. It was accepted by Judge Douglas Robinson and made part of the District Court (Small Claims) Administrative Record but was not assigned an Exhibit number. It consists of one hundred and one pages but the pages are not consecutively numbered. The first page is a Police Report Request Form. Hereafter, this part of the Administrative Record will be referred to as Detective Ricketts Report. (RAP 10.4 (f))

acted with intent, and failed to show that the Respondent's conduct was negligent. RP 114. On appeal to the Honorable Allen C. Nielson (Superior Court Judge) the Appellant complained that the District Court improperly refused to consider certain evidence she proffered. Sup Ct RP 20-21. The transcript reveals, however, that the District Court accepted the medical records submitted and even acknowledged that the Appellant was injured. RP 31 and RP 107-108. What the District Court did not accept was the acts of the Respondent were the legal cause of the Appellant's alleged injuries. RP 109, RP 113-114 and RP 118.

In the exercise of its clear discretion, the District Court determined that the participation at trial by the Respondent's husband, a lawyer, was appropriate given the prospect of community liability prompted by the Appellant's claim. RP 10. Judge Nielson heard the matter de novo on the District Court record. Sup. Ct. RP 20-21. He concluded also that the Appellant did not sustain her burden to show an intentional tort or negligence and entered Findings of Fact and Conclusions of Law and an Order of Dismissal. CP 381-388.

Argument

A. Appellant Failed to Meet Her Burden to Prove Respondent's Intentional Conduct and the Appellant Failed to Satisfy Her Burden to Prove Respondent's Conduct was Negligent.

At trial, the Appellant offered the testimony of only three witnesses to the incident including herself. Two live witnesses, Tari Anderson and Claudia Johnson, and one witness by Affidavit, Henry Valder. RP 11-14, RP 19-20, RP 94-95 and RP 112.

In her direct testimony the Appellant stated that the Respondent “pushed” her and that she was saved from falling by a person behind her. RP p. 12 line 14. She also described the damages she sustained, RP p. 12 line 18 et. seq., and quantified her medical expenses. RP p. 14 line 3. The other live witness to the incident was Claudia Johnson. Ms. Johnson acknowledges that she was present but did not see the contact between the parties. RP p. 20 line 7. The Appellant also offered a witness to the incident by affidavit. Over the Respondent's objection the Court considered the affidavit of Henry Valder but due to its emotional content which was clearly inconsistent with the volume of evidence, the Court gave it little weight. RP p. 112 line 6.

Based upon the evidence submitted by the Appellant regarding intent and causation, the Court determined that she had not met her burden. RP 113. Complimenting this failure to sustain her burden of proof,

the Respondent submitted the testimony of four live witnesses (three direct and one rebuttal) and offered evidence which contradicted and discredited the testimony of the Appellant's evidence. RP 39-96. One such witness was Detective Michael Ricketts of the Spokane County Sheriff's Office who was assigned to investigate the allegations by the Appellant. RP 40. Detective Ricketts Report. As part of his investigation he reviewed transcripts of interviews of the Appellant by the news media, and a videotape of only post-incident activities. RP p. 41 line 22 et. seq., and personally viewed and measured the scene where the incident occurred. RP p. 42 line 12. Detective Ricketts interviewed a number of witnesses, and with the exception of the Respondent and her husband, all of the witnesses' names were provided by the Appellant, Tari Anderson. RP p. 46 line 1. Detective Ricketts Report.

Although the witnesses were promoted by the Appellant, their testimony provides fertile ground for what actually occurred that evening, and provides evidence which specifically contradicts the testimony of Appellant. RP 39-79. Detective Ricketts' review of the interview of the Plaintiff by Mike Fitzsimmons, a local radio broadcaster, is particularly telling. RP 50-51. In describing the incident to Mr. Fitzsimmons, the Appellant states that the contact by the Respondent was with the sign she was holding. RP p. 50 line 12. Comparing this testimony with that she

provided to Detective Ricketts he concludes that the Appellant's testimony was not consistent. RP 54 line 3, but did find that the statements by the Respondent were consistent. RP p. 54 line 15. Detective Ricketts Report. When Detective Ricketts interviewed the Appellant, she stated that the Respondent made contact with the sign, RP p. 49 line 3, but later in the same interview said the contact was to her stomach, RP p. 49 line 11, and later said the contact was with her fingers. RP p. 50 line 3. Detective Ricketts Report. Detective Ricketts also reviewed the transcript of an interview of the Appellant by a KXLY TV reporter. In that interview the Appellant related that she was pushed hard enough that her "hand flung back". RP p. 51 line 11. Subsequently when interviewed by Detective Ricketts the Appellant described the contact much more benignly when she stated, "it wasn't like I was really going to fall back". RP p. 49 line 16. When Detective Ricketts interviewed Kathleen Binford, one of the Appellant's witnesses who was present that day, she stated that she did not see Tari Anderson's hands go up in the air as a result of the contact. RP p. 58 line 7. Detective Ricketts Report.

There are two other areas of inquiry by Detective Ricketts in his investigation of the allegations by the Appellant. Those areas are, the width of the corridor in which the Respondent and her husband traveled to get to the other side of Lincoln Street, and the nature

of the contact between the Respondent and the Appellant? Detective Ricketts Report. With regard to the size of the corridor, the Respondent testified at trial that she and her husband were trying to move into the crosswalk to get to the east side of Lincoln Street but that the protestors located at that corner left a very narrow corridor, RP p. 85 line 9, that the Appellant was obstructing their travel, RP p. 84 line 14, and that as they traversed that corridor the Appellant made that space even narrower by moving the sign she was holding toward the Respondent. RP p. 85 line 19. Respondent's husband corroborates that testimony. RP p.92 lines 8-19. Appellant's witness, Kathleen Binford, describes the corridor width to be between 2 and 2 ½ feet. RP p. 57 line 6. Another one of the Appellant's witnesses, Jill Jolly, stated that Tari Anderson "was impeding traffic somewhat". RP p. 59 line 16. A third witness for the Appellant, Patsy Dunn, stated that she believed that Tari Anderson "was in the personal space of Jane Hession". RP p. 62 line 11. Detective Ricketts, in response to the Court's question whether the Appellant was standing in the way where Jane Hession was progressing, or was in her way, said "Tari Anderson was in the area where pedestrians travel..." RP p. 75 line 11. And on further inquiry by the Court as to whether Jane Hession went out of her way to encounter the sign or Tari Anderson, Detective Ricketts stated "I don't have anything corroborating that; that indicates that she did

that.” RP p. 75 line 18. Detective Ricketts Report.

Appellant describes the nature of the contact with Respondent as a “push”. RP p. 50 line 9. Respondent describes it as a “nudge” of the sign held by the Appellant using her forearm. RP p. 85 line 11. The Respondent’s husband describes the contact as “incidental”. RP p. 92 line 21. As previously documented herein, the Appellant’s story of where and with what the contact was made was inconsistent. *Infra* at pp. 4-5. In contrast, the Appellant’s witnesses are overall consistent in their testimony regarding the nature of the contact. Kathleen Binford described it as “...it was more like a nudge, not a push as though she was trying to push someone down”. RP p. 58 line 14. Jill Jolly testified that she believed Jane Hession was provoked and that she didn’t believe Jane Hession “meant to be harmful to the Appellant”. RP p. 59 line 12, and that “Tari may be emotionally offended but was not harmed”. RP p. 60 line 22. Patsy Dunn stated that “Jane Hession only used her arm to get Tari Anderson out of her way,” RP p. 62 line 9, using her arm in a horizontal movement in order to have more room to proceed...” RP p. 62 line 14, and that “Jane Hession needed her space and probably felt threatened by Tari Anderson”. RP p. 63 line 5. From all the evidence gathered in his investigation Detective Ricketts had this to say about the nature of the contact:

As contact you have from reviewing my reports, talking with witnesses, being at the scene, and that you have a demonstrator holding up a sign that could be offensive to the person if it's about the person in the travel portion where people are going to travel across the street.

And to me it would not offend a reasonable person that kind of touching when you are trying to go through a crowd or through people and you do this. To me that does not constitute an assault. I believe people have the right to be secure in their space. I didn't have reason to believe that Tari was not assaulting Jane but Jane was not assaulting Tari neither. I think that if Tari would have been outside the pedestrian area where they're traveling and given them plenty of room and what I did have is like 2 ½ feet from the light post where the Hessions crossed through, I had a statement indicating that. If she would have been farther and actually outside the traveling portion or the zone where pedestrians travel if Mrs. Hession would have walked over and pushed her like that when she had plenty of room that would have been something different. But I didn't have evidence to support that so based on everything I had, I did

not believe that the touching, number one was unlawful and I don't believe it would have offended a reasonable person. RP p. 63 line 20 – RP P. 64 line 19. Detective Ricketts Report.

The Notice of Small Claim submitted by the Appellant is without specificity, but sounds in intentional conduct. RP 6. The Trial Court adapted that claim to countenance both intentional battery and negligence. RP 7 and RP 109-111. Logically, the focus of Detective Ricketts Investigation was on the intent element of 4th Degree Assault which was the subject of his responsibility and his investigation. RP 51-52. Detective Ricketts Report. This is a civil matter. The burden of proof is more stringent for criminal assault (beyond a reasonable doubt) than for civil battery (preponderance of the evidence). RP 7. Thus the value of the investigation lies in part with the determination by the investigating detective into the element of intent. RP 51-52. Detective Ricketts determined that the element of intent was lacking in his 4th degree assault investigation. RP 51-52. That conclusion was validated by virtually all of his superiors within the Sheriff's Office RP 52-53 and Brian O'Brien, RP 53 Senior Deputy Prosecuting Attorney, who commented, "I have never seen a misdemeanor assault allegation so thoroughly investigated." CP – Detective Rickett's Report. Because he was called to testify in this civil claim, Detective Ricketts utilized his investigation to relate those facts to

the civil claims. RP 55-56. Detective Ricketts' findings in the criminal investigation inform the Court's determination of the civil claim for battery. RP 52. Detective Ricketts Report.

The elements of the intentional tort of battery are set forth in the case of Garratt v. Dailey, 46 Wn. 2d 197, 279 P. 2d 1091, 1093 (1955) wherein the Court adopts the definition of the Restatement, as follows:

The rule that determines liability for battery is given in 1 Restatement, Torts, 29 sec. 13, as:

“An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other if

“(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and

“(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and

“(c) the contact is not otherwise privileged.”

See also Collier v. Momah, 2008 Wash App. Lexis 1529 (2008)

The Trial Judge does not spend a lot of time on the civil battery claim, concluding summarily, “The evidence does not support that.” RP 113. If you look at the elements of intentional battery, an independent assessment leads to but one conclusion, the Appellant did not satisfy her burden of proving those elements. There was simply no evidence that the act was done “with the intention of bringing about a harmful or offensive contact.” The overwhelming weight of the evidence was to the contrary.

Similarly, the Trial Court did not find sufficient evidence to support a claim for negligence.

“In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) the breach of that duty, (3) resulting injury, and (4) proximate cause.” *Ranger Ins Co. v Pierce County*, 164 Wn. 2d 545, 552, 192P.3d 886 (2008); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 914 P. 2d 728 (1996); *Tincani v. Inland Empire Zoological Society*, 124 Wn. 2d 121, 875 P. 2d 621 (1994). The definition is written in the conjunctive requiring all elements be satisfied. For these purposes the Respondent concedes the existence of a duty. But clearly the Trial Court found neither a breach of the duty or proximate cause.

The Appellant did not make a case for nor prove the elements of a claim of negligence, but if you concede the existence of a duty, and

assume that the duty requires all person to exercise reasonable care as they go about their daily lives and interact with others, then the Appellant did not prove by a preponderance of the evidence that the Respondent breached that duty. The Trial Court in its oral opinion found that the acts of the Respondent were consistent with what a reasonable person would have done under the same or similar circumstances. RP 112-114. The Court also found that the Respondent had the right to proceed in the crosswalk unimpeded and if crowded had the right to move the object to the side to allow her to pass. RP 109-113. The Court concludes that the contact was “incidental” due to the existing congestion. RP 112.

The Court goes on to declare that the Appellant failed to show that the Respondent’s conduct was the proximate cause of her damages. RP 113. Judge Robinson states in his findings “...but I don’t think it was the force exerted by Jane Hession that caused you to lose your balance.” RP p. 114 line 12. This finding is reasonable and supported by the consistent testimony of the Respondent and by the lack of consistent testimony offered by the Appellant and her witnesses. Not one of the people identified by the Appellant’s having knowledge of the incident could support the description of the incident as the Appellant described it. Even the Appellants own testimony and the description of the events of the day

were not internally consistent and was most certainly a factor in the Court's determination regarding proximate cause and breach of duty.

B. The Decision to Permit the Appearance of an Attorney in an Action Filed in the Small Claims Department of the District Court Lies Within the Sound Discretion of the Trial Judge.

RCW 12.40.080 provides in part:

“(1) No attorney-at-law, paraprofessional, nor any person other than the plaintiff and defendants shall appear or participate with the prosecution or defense of litigation in the small claims department without the consent of the judicial officer hearing the case...”

The Appellant, at the inception of the trial of this matter objected to the participation at trial by Dennis P. Hession, spouse of the Respondent Jane M. Hession, on the grounds that he is an attorney. The Court in response exercised its discretion and allowed Dennis P. Hession to participate. The Court afforded the same opportunity under the statute to the Appellant by allowing her husband (a non-party) to participate. RP p. 16 line 4. The foundation for the exercise of that discretion was that the Court determined that the community comprised of Jane and Dennis Hession would have to answer for any judgment rendered in this case and thus, albeit not named as a party, Dennis P. Hession is a real party in interest

and a proper party Defendant. RP p. 10 line 16; RP p. 39 line 18.

On matters that are determined by the Trial Court within its sound discretion, our Court of Appeals Division One in the case of Coggle v. Snow, 56 Wn. App 499, 784 P. 2d554 quoting from the case of State ex. rel. Carrol v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971) states:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously... Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

The Trial Court's reading of the law in this area is correct. In the seminal case of de Elche v. Jacobsen, 95 Wn. 2d 237, 622 P. 2d 835 (1980), the State Supreme Court overruled a number of cases and held that for torts not occurring in the management of community business or for its benefit, the separate property of the tort-feasor should be primarily liable. But if there is insufficient separate property then the tort-feasor's

half interest in the community property shall become liable.

This is also true, even in the area of intentional torts where a marital community can be liable for one spouse's tortious act if the act was committed by the spouse in the prosecution of the business of the community. Clayton v. Wilson, 168 Wn. 2d 57, 227 P. 3d 278 (2010).

For torts involving management of *community* business, however, we left our LaFramboise approach undisturbed.

"Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tortfeasor separately liable."

The spouse of the Mayoral candidate, her husband, accompanies him to support him and his candidacy at a debate which is part of the campaign. Can there be an act which could be said to be more for the benefit and in furtherance of the community business?

C. The Trial de Novo at the Superior Court also Validated the Factual Findings and Legal Conclusion of the Trial Court.

On December 6, 2010, the Honorable Allen C. Neilson heard the Appeal by the Appellant, Tari J. Anderson Sup Ct. RP 2 of the District Court ruling and essentially affirmed the decision of the Trial Court by a Trial de Novo review of the case on the record. Sup Ct RP 36-38. On that

date Judge Nielson also ruled in favor of the Respondent, Jane M. Hession by oral decision. Sup. Ct. RP 36-38. Subsequently, Findings of Fact and Conclusions of Law were entered and an Order of Dismissal CP 381-388 dismissing the claims and case of the Appellant. RP – Hearing on Presentment (April 22, 2011). Copies of the Findings of Facts and Conclusions of Law and the Judgment of Dismissal presented by the Respondent and adopted by the Court and are part of the record on Appeal. CP 381-388.

Findings of Fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair minded person the premise is true. If the standard is satisfied a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Sunnyside Valley Irr. Dist v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003). Legal conclusions of the trial court are reviewed de novo. Sunnyside Valley Irr. Dist (supra at 880; Proctor v. Huntington, 146 Wn. App 836, 192 P. 3d 958 (2008).

In her Appellate Brief, the Appellant suggests that she was somehow misinformed regarding the Trial de Novo and was prepared

only for an “Oral Hearing” and not a Trial de Novo. Appellant’s Brief at page 1. But the record reflects differently. Sup Ct. RP 20-21. Ms. Anderson brought with her, her husband Monte Anderson, witnesses Claudia Johnson and Donna McKeraghan and even Henry Valder who appeared only by affidavit at the first trial. She also brought other documents and photographs which she intended to introduce. However, Judge Nielson informed her that this was a Trial de Novo “on the record” and that other evidence would not be permitted. Sup Ct. RP 20-21.

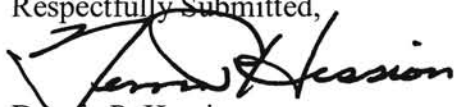
D. Supplemental Evidence Submitted for Consideration at the Court of Appeals.

The Appellant moved this Court for an Order to Supplement the Evidence on Review which was granted on January 27, 2012. Neither Judge Robinson who viewed the DVD at trial, nor Judge Nielson who consider the testimony of witnesses regarding matters which were discussed on the DVD considered the evidence to be noteworthy. Judge Robinson described it as having “limited relevance”, RP 26, and Judge Nielson said of the testimony, “This is of little relevance in my mind” and “. . . it is not particularly important, and it is not all together clear what happened there” Sup Ct. RP 30.

CONCLUSION

The evidence presented at trial and as reviewed on appeal to the Superior Court, simply does not support the Appellant's claims. The decisions of the District Court and the Superior Court dismissing these claims should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Dennis P. Hession". The signature is written in a cursive style with a large, prominent initial "D".

Dennis P. Hession
Attorney for Respondent
Jane M. Hession

ORIGINAL

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Appellant.

COA NO. 29927-9-III

SUPERIOR CT. NO. 2010-02-01417-3

CERTIFICATE OF SERVICE

I, Gregory S. Depue being over the age of 18, hereby certify under penalty of perjury under the laws of the State of Washington, that on the 9th day of July 2012, I caused to be served a true and correct copy of Respondents Brief, hand delivered at 504 W. Cleveland Ave, Spokane, Washington, the usual abode of Appellant Anderson, to Monte D. Anderson, a person of suitable age and discretion who resides therein.

Dated this 9th day of July, 2012.


Gregory S. Depue

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INTRODUCTION

A review of the Appellant's Brief in this case and the Briefs filed at the District Court and to the Superior Court reveal that she believes this case to be about many things. But, the only thing this case is really about is whether the Appellant was able to sustain her burden of showing that on October 15, 2007, Respondent committed an intentional tort or is guilty of negligently causing damage to the Appellant.

ASSIGNMENTS OF ERROR

The Respondent does not assign error to either the decision of the trial court (District Court) or the initial appellate court (Superior Court).

Issues pertaining to Appellant's Assignments of Error

1. Whether the Appellant met the burden of proof by providing competent evidence of the requisite elements of the intentional tort of battery?
2. Whether the Appellant met the burden to prove the elements of negligence, and specifically the elements of breach of duty and proximate cause?
3. Whether the Trial Court and the Superior Court on Appeal abused their discretion by allowing the husband of the Respondent, Jane Hession to assist her in the defense of this matter?
4. Whether the Trial Court committed error in concluding that the Respondent at the time she was engaged by the Appellant, was acting in the management of community business or for the benefit of the community thus giving rise to potential community liability, and legally determining that her husband was a real party in interest and entitled to participate in the litigation?

STATEMENT OF THE CASE

This appeal is taken from a decision in the Superior Court of Spokane County, by the Honorable Allen C. Nielson, sitting by designation. Judge Nielson sat in this matter by designation in a special appellate capacity to hear the appeal of a Spokane County District Court action, Small Claims Division, in a decision by the Honorable Douglas B. Robinson also sitting by designation.

Judge Robinson ruled in favor of the Respondent, Jane Hession, finding against the Appellant Tari J. Anderson, dismissing all claims. RP p. 107-119. Judge Nielson, hearing the appeal by this Appellant of Judge Robinsons decision on de novo review, concluded that the Appellant did not sustain her burden to prove either intentional conduct or negligence and dismissed her claims, and entered Findings of Fact and Conclusions of Law and an Order of Dismissal, CP 381-388. This case is stated as follows.

On October 15, 2007, the Appellant and others from her neighborhood gathered at the intersection of Sprague Avenue and Lincoln Street in Spokane, Washington, to protest the decision by the Mayor of Spokane to transfer alley garbage collection to the front of citizen properties. RP 12.

On that day, the Respondent and her husband were walking south on the west side sidewalk of Lincoln Street approaching Sprague Avenue. RP 83-84. Her husband was going to the Bing Crosby Theater to participate in a Mayoral debate. RP 83-84 and 80.

The Appellant and her neighbors were carrying signs supporting their protest of the garbage issue and, in some cases, disparaging the Respondent's husband. RP 12.

In an effort to avoid the Appellant and other protestors, the Respondent left the sidewalk headed east into the crosswalk towards the northeast corner of the intersection. RP 84-85. As the Respondent tried to make her way with her husband into the crosswalk she encountered the Appellant who had positioned herself at the entrance to the crosswalk holding her protest sign. RP 84-85.

As the Respondent approached the crosswalk the Appellant moved toward the Respondent, limiting the ability of the Respondent to enter the crosswalk unimpeded. RP 85-86. In an effort to allow her to pass by and to keep the Appellant at bay, the Respondent moved her forearm into position and brushed up against the sign held by the Appellant. RP 85-86. The Respondent then proceeded with her husband along the crosswalk. RP 85-86.

The acts of the Respondent were merely defensive, protecting herself and her husband from the intrusion by the Appellant and only to such a degree reasonably necessary to allow them to pass by. RP 86.

At the time of the incident the Respondent was married to Dennis P. Hession, a lawyer licensed to practice in the State of Washington, who participated in the Small Claims District Court Action as a person who is a real party in interest in this matter. RP 39.

At the end of the Small Claims Proceedings, Judge Robinson made his decision by making certain observations about the applicable law:

The Courts of the State of Washington define the intentional tort of battery where a person acts intending to cause harmful or offensive contact, and such contact directly or indirectly results. RP 109.

Tari Anderson did not sustain her burden to show, nor do the facts presented at trial support the assertion that Jane Hession acted with intent to cause harmful or offensive contact, nor did such harmful or offensive contact occur. RP 113-114.

The action by Jane Hession in making contact with Tari Anderson, was reasonable under the circumstances. RP112. She had the right to pass in the public right of way and her actions in preventing such passing from being impeded by Tari Anderson were reasonable and lawful. RP 111 and RP 114.

In this state, an action for negligence requires the proof of four elements: (a) the existence of a duty, (b) the breach of that duty, (c) resulting injury and (d) proximate cause. RP 109-113.

Tari Anderson failed to establish that the conduct of Jane Hession was a breach of her duty to Ms. Anderson. RP 109-114. The actions of Jane Hession were reasonable to allow her to pass on the public right of way unimpeded by Ms. Anderson. RP 112-113.

Tari Anderson failed to introduce credible facts to support the element of negligence that the actions of Jane Hession were the proximate cause of her injuries. RP 109, RP 113, RP 118. Given the nature of the contact between the parties it could not be concluded that such contact was the proximate cause of Ms. Anderson's alleged injuries. RP 109, RP 113, RP 118.

The Trial Court permitted Mrs. Hession's husband to participate in the trial, as he did with the husband of Ms. Anderson. RP 10, RP 16, RP 34, RP 39 and RP 116. Pursuant to RCW 12.40.080, the decision to allow an attorney to participate in a Small Claims action is within the sound discretion of the trial court. RP 10.

The Trial Court Judge also permitted Mrs. Hession's husband to participate on the basis that he was a real party in interest in this matter. RP 10. The community comprised of Jane and Dennis Hession would have

to answer for any judgment rendered in this case, as torts committed by a member of the community in the prosecution of the business of the community are presumed to result in community liability. RP 10. Thus Dennis Hession is a real party in interest in this case. RP 10.

ARGUMENT

Summary of Argument

Over a period of two years, the Appellant attempted to convince the Spokane County Sheriff's Office and the Spokane County Prosecutor to file 4th degree assault charges against the Respondent Jane M. Hession. RP 52-53. In the process the case was reviewed at virtually every level of the Sheriff's Office RP 52-53 and by Brian O' Brien, Senior Deputy Prosecuting Attorney who, in concluding there was no intentional act, stated "... I have never seen a misdemeanor assault allegation so thoroughly investigated." RP 52-53; District Court (Small Claims) Administrative Record- Detective Michael Rickett's Report.¹ Unsatisfied, the Appellant brought this civil action and the matter was tried before the Honorable Douglas Robinson. RP 71. The nature of the cause of action is absent from the Notice of Small Claim, RP 6 but the Court treated the Notice as if she plead in the alternative under theories of intentional conduct (battery) and negligence. RP 6. The Trial Court found that the Appellant did not sustain her burden to prove that the Respondent

¹ This reference is to the Police (Sheriff) Report prepared by Detective Michael Ricketts of this incident. It was accepted by Judge Douglas Robinson and made part of the District Court (Small Claims) Administrative Record but was not assigned an Exhibit number. It consists of one hundred and one pages but the pages are not consecutively numbered. The first page is a Police Report Request Form. Hereafter, this part of the Administrative Record will be referred to as Detective Ricketts Report. (RAP 10.4 (f))

acted with intent, and failed to show that the Respondent's conduct was negligent. RP 114. On appeal to the Honorable Allen C. Nielson (Superior Court Judge) the Appellant complained that the District Court improperly refused to consider certain evidence she proffered. Sup Ct RP 20-21. The transcript reveals, however, that the District Court accepted the medical records submitted and even acknowledged that the Appellant was injured. RP 31 and RP 107-108. What the District Court did not accept was the acts of the Respondent were the legal cause of the Appellant's alleged injuries. RP 109, RP 113-114 and RP 118.

In the exercise of its clear discretion, the District Court determined that the participation at trial by the Respondent's husband, a lawyer, was appropriate given the prospect of community liability prompted by the Appellant's claim. RP 10. Judge Nielson heard the matter de novo on the District Court record. Sup. Ct. RP 20-21. He concluded also that the Appellant did not sustain her burden to show an intentional tort or negligence and entered Findings of Fact and Conclusions of Law and an Order of Dismissal. CP 381-388.

Argument

A. Appellant Failed to Meet Her Burden to Prove Respondent's Intentional Conduct and the Appellant Failed to Satisfy Her Burden to Prove Respondent's Conduct was Negligent.

At trial, the Appellant offered the testimony of only three witnesses to the incident including herself. Two live witnesses, Tari Anderson and Claudia Johnson, and one witness by Affidavit, Henry Valder. RP 11-14, RP 19-20, RP 94-95 and RP 112.

In her direct testimony the Appellant stated that the Respondent “pushed” her and that she was saved from falling by a person behind her. RP p. 12 line 14. She also described the damages she sustained, RP p. 12 line 18 et. seq., and quantified her medical expenses. RP p. 14 line 3. The other live witness to the incident was Claudia Johnson. Ms. Johnson acknowledges that she was present but did not see the contact between the parties. RP p. 20 line 7. The Appellant also offered a witness to the incident by affidavit. Over the Respondent's objection the Court considered the affidavit of Henry Valder but due to its emotional content which was clearly inconsistent with the volume of evidence, the Court gave it little weight. RP p. 112 line 6.

Based upon the evidence submitted by the Appellant regarding intent and causation, the Court determined that she had not met her burden. RP 113. Complimenting this failure to sustain her burden of proof,

the Respondent submitted the testimony of four live witnesses (three direct and one rebuttal) and offered evidence which contradicted and discredited the testimony of the Appellant's evidence. RP 39-96. One such witness was Detective Michael Ricketts of the Spokane County Sheriff's Office who was assigned to investigate the allegations by the Appellant. RP 40. Detective Ricketts Report. As part of his investigation he reviewed transcripts of interviews of the Appellant by the news media, and a videotape of only post-incident activities. RP p. 41 line 22 et. seq., and personally viewed and measured the scene where the incident occurred. RP p. 42 line 12. Detective Ricketts interviewed a number of witnesses, and with the exception of the Respondent and her husband, all of the witnesses' names were provided by the Appellant, Tari Anderson. RP p. 46 line 1. Detective Ricketts Report.

Although the witnesses were promoted by the Appellant, their testimony provides fertile ground for what actually occurred that evening, and provides evidence which specifically contradicts the testimony of Appellant. RP 39-79. Detective Ricketts' review of the interview of the Plaintiff by Mike Fitzsimmons, a local radio broadcaster, is particularly telling. RP 50-51. In describing the incident to Mr. Fitzsimmons, the Appellant states that the contact by the Respondent was with the sign she was holding. RP p. 50 line 12. Comparing this testimony with that she

provided to Detective Ricketts he concludes that the Appellant's testimony was not consistent. RP 54 line 3, but did find that the statements by the Respondent were consistent. RP p. 54 line 15. Detective Ricketts Report. When Detective Ricketts interviewed the Appellant, she stated that the Respondent made contact with the sign, RP p. 49 line 3, but later in the same interview said the contact was to her stomach, RP p. 49 line 11, and later said the contact was with her fingers. RP p. 50 line 3. Detective Ricketts Report. Detective Ricketts also reviewed the transcript of an interview of the Appellant by a KXLY TV reporter. In that interview the Appellant related that she was pushed hard enough that her "hand flung back". RP p. 51 line 11. Subsequently when interviewed by Detective Ricketts the Appellant described the contact much more benignly when she stated, "it wasn't like I was really going to fall back". RP p. 49 line 16. When Detective Ricketts interviewed Kathleen Binford, one of the Appellant's witnesses who was present that day, she stated that she did not see Tari Anderson's hands go up in the air as a result of the contact. RP p. 58 line 7. Detective Ricketts Report.

There are two other areas of inquiry by Detective Ricketts in his investigation of the allegations by the Appellant. Those areas are, the width of the corridor in which the Respondent and her husband traveled to get to the other side of Lincoln Street, and the nature

of the contact between the Respondent and the Appellant? Detective Ricketts Report. With regard to the size of the corridor, the Respondent testified at trial that she and her husband were trying to move into the crosswalk to get to the east side of Lincoln Street but that the protestors located at that corner left a very narrow corridor, RP p. 85 line 9, that the Appellant was obstructing their travel, RP p. 84 line 14, and that as they traversed that corridor the Appellant made that space even narrower by moving the sign she was holding toward the Respondent. RP p. 85 line 19. Respondent's husband corroborates that testimony. RP p.92 lines 8-19. Appellant's witness, Kathleen Binford, describes the corridor width to be between 2 and 2 ½ feet. RP p. 57 line 6. Another one of the Appellant's witnesses, Jill Jolly, stated that Tari Anderson "was impeding traffic somewhat". RP p. 59 line 16. A third witness for the Appellant, Patsy Dunn, stated that she believed that Tari Anderson "was in the personal space of Jane Hession". RP p. 62 line 11. Detective Ricketts, in response to the Court's question whether the Appellant was standing in the way where Jane Hession was progressing, or was in her way, said "Tari Anderson was in the area where pedestrians travel..." RP p. 75 line 11. And on further inquiry by the Court as to whether Jane Hession went out of her way to encounter the sign or Tari Anderson, Detective Ricketts stated "I don't have anything corroborating that; that indicates that she did

that.” RP p. 75 line 18. Detective Ricketts Report.

Appellant describes the nature of the contact with Respondent as a “push”. RP p. 50 line 9. Respondent describes it as a “nudge” of the sign held by the Appellant using her forearm. RP p. 85 line 11. The Respondent’s husband describes the contact as “incidental”. RP p. 92 line 21. As previously documented herein, the Appellant’s story of where and with what the contact was made was inconsistent. *Infra* at pp. 4-5. In contrast, the Appellant’s witnesses are overall consistent in their testimony regarding the nature of the contact. Kathleen Binford described it as “...it was more like a nudge, not a push as though she was trying to push someone down”. RP p. 58 line 14. Jill Jolly testified that she believed Jane Hession was provoked and that she didn’t believe Jane Hession “meant to be harmful to the Appellant”. RP p. 59 line 12, and that “Tari may be emotionally offended but was not harmed”. RP p. 60 line 22. Patsy Dunn stated that “Jane Hession only used her arm to get Tari Anderson out of her way,” RP p. 62 line 9, using her arm in a horizontal movement in order to have more room to proceed...” RP p. 62 line 14, and that “Jane Hession needed her space and probably felt threatened by Tari Anderson”. RP p. 63 line 5. From all the evidence gathered in his investigation Detective Ricketts had this to say about the nature of the contact:

As contact you have from reviewing my reports, talking with witnesses, being at the scene, and that you have a demonstrator holding up a sign that could be offensive to the person if it's about the person in the travel portion where people are going to travel across the street.

And to me it would not offend a reasonable person that kind of touching when you are trying to go through a crowd or through people and you do this. To me that does not constitute an assault. I believe people have the right to be secure in their space. I didn't have reason to believe that Tari was not assaulting Jane but Jane was not assaulting Tari neither. I think that if Tari would have been outside the pedestrian area where they're traveling and given them plenty of room and what I did have is like 2 ½ feet from the light post where the Hessions crossed through, I had a statement indicating that. If she would have been farther and actually outside the traveling portion or the zone where pedestrians travel if Mrs. Hession would have walked over and pushed her like that when she had plenty of room that would have been something different. But I didn't have evidence to support that so based on everything I had, I did

not believe that the touching, number one was unlawful and I don't believe it would have offended a reasonable person. RP p. 63 line 20 – RP P. 64 line 19. Detective Ricketts Report.

The Notice of Small Claim submitted by the Appellant is without specificity, but sounds in intentional conduct. RP 6. The Trial Court adapted that claim to countenance both intentional battery and negligence. RP 7 and RP 109-111. Logically, the focus of Detective Ricketts Investigation was on the intent element of 4th Degree Assault which was the subject of his responsibility and his investigation. RP 51-52. Detective Ricketts Report. This is a civil matter. The burden of proof is more stringent for criminal assault (beyond a reasonable doubt) than for civil battery (preponderance of the evidence). RP 7. Thus the value of the investigation lies in part with the determination by the investigating detective into the element of intent. RP 51-52. Detective Ricketts determined that the element of intent was lacking in his 4th degree assault investigation. RP 51-52. That conclusion was validated by virtually all of his superiors within the Sheriff's Office RP 52-53 and Brian O'Brien, RP 53 Senior Deputy Prosecuting Attorney, who commented, "I have never seen a misdemeanor assault allegation so thoroughly investigated." CP – Detective Rickett's Report. Because he was called to testify in this civil claim, Detective Ricketts utilized his investigation to relate those facts to

the civil claims. RP 55-56. Detective Ricketts' findings in the criminal investigation inform the Court's determination of the civil claim for battery. RP 52. Detective Ricketts Report.

The elements of the intentional tort of battery are set forth in the case of Garratt v. Dailey, 46 Wn. 2d 197, 279 P. 2d 1091, 1093 (1955) wherein the Court adopts the definition of the Restatement, as follows:

The rule that determines liability for battery is given in 1 Restatement, Torts, 29 sec. 13, as:

“An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other if

“(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and

“(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and

“(c) the contact is not otherwise privileged.”

See also Collier v. Momah, 2008 Wash App. Lexis 1529 (2008)

The Trial Judge does not spend a lot of time on the civil battery claim, concluding summarily, “The evidence does not support that.” RP 113. If you look at the elements of intentional battery, an independent assessment leads to but one conclusion, the Appellant did not satisfy her burden of proving those elements. There was simply no evidence that the act was done “with the intention of bringing about a harmful or offensive contact.” The overwhelming weight of the evidence was to the contrary.

Similarly, the Trial Court did not find sufficient evidence to support a claim for negligence.

“In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) the breach of that duty, (3) resulting injury, and (4) proximate cause.” *Ranger Ins Co. v Pierce County*, 164 Wn. 2d 545, 552, 192P.3d 886 (2008); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 914 P. 2d 728 (1996); *Tincani v. Inland Empire Zoological Society*, 124 Wn. 2d 121, 875 P. 2d 621 (1994). The definition is written in the conjunctive requiring all elements be satisfied. For these purposes the Respondent concedes the existence of a duty. But clearly the Trial Court found neither a breach of the duty or proximate cause.

The Appellant did not make a case for nor prove the elements of a claim of negligence, but if you concede the existence of a duty, and

assume that the duty requires all person to exercise reasonable care as they go about their daily lives and interact with others, then the Appellant did not prove by a preponderance of the evidence that the Respondent breached that duty. The Trial Court in its oral opinion found that the acts of the Respondent were consistent with what a reasonable person would have done under the same or similar circumstances. RP 112-114. The Court also found that the Respondent had the right to proceed in the crosswalk unimpeded and if crowded had the right to move the object to the side to allow her to pass. RP 109-113. The Court concludes that the contact was “incidental” due to the existing congestion. RP 112.

The Court goes on to declare that the Appellant failed to show that the Respondent’s conduct was the proximate cause of her damages. RP 113. Judge Robinson states in his findings “...but I don’t think it was the force exerted by Jane Hession that caused you to lose your balance.” RP p. 114 line 12. This finding is reasonable and supported by the consistent testimony of the Respondent and by the lack of consistent testimony offered by the Appellant and her witnesses. Not one of the people identified by the Appellant’s having knowledge of the incident could support the description of the incident as the Appellant described it. Even the Appellants own testimony and the description of the events of the day

were not internally consistent and was most certainly a factor in the Court's determination regarding proximate cause and breach of duty.

B. The Decision to Permit the Appearance of an Attorney in an Action Filed in the Small Claims Department of the District Court Lies Within the Sound Discretion of the Trial Judge.

RCW 12.40.080 provides in part:

“(1) No attorney-at-law, paraprofessional, nor any person other than the plaintiff and defendants shall appear or participate with the prosecution or defense of litigation in the small claims department without the consent of the judicial officer hearing the case...”

The Appellant, at the inception of the trial of this matter objected to the participation at trial by Dennis P. Hession, spouse of the Respondent Jane M. Hession, on the grounds that he is an attorney. The Court in response exercised its discretion and allowed Dennis P. Hession to participate. The Court afforded the same opportunity under the statute to the Appellant by allowing her husband (a non-party) to participate. RP p. 16 line 4. The foundation for the exercise of that discretion was that the Court determined that the community comprised of Jane and Dennis Hession would have to answer for any judgment rendered in this case and thus, albeit not named as a party, Dennis P. Hession is a real party in interest

and a proper party Defendant. RP p. 10 line 16; RP p. 39 line 18.

On matters that are determined by the Trial Court within its sound discretion, our Court of Appeals Division One in the case of Coggle v. Snow, 56 Wn. App 499, 784 P. 2d554 quoting from the case of State ex. rel. Carrol v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971) states:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously...

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

The Trial Court's reading of the law in this area is correct. In the seminal case of de Elche v. Jacobsen, 95 Wn. 2d 237, 622 P. 2d 835 (1980), the State Supreme Court overruled a number of cases and held that for torts not occurring in the management of community business or for its benefit, the separate property of the tort-feasor should be primarily liable. But if there is insufficient separate property then the tort-feasor's

half interest in the community property shall become liable.

This is also true, even in the area of intentional torts where a marital community can be liable for one spouse's tortious act if the act was committed by the spouse in the prosecution of the business of the community. Clayton v. Wilson, 168 Wn. 2d 57, 227 P. 3d 278 (2010).

For torts involving management of *community* business, however, we left our LaFramboise approach undisturbed.

“Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tortfeasor separately liable.”

The spouse of the Mayoral candidate, her husband, accompanies him to support him and his candidacy at a debate which is part of the campaign. Can there be an act which could be said to be more for the benefit and in furtherance of the community business?

C. The Trial de Novo at the Superior Court also Validated the Factual Findings and Legal Conclusion of the Trial Court.

On December 6, 2010, the Honorable Allen C. Neilson heard the Appeal by the Appellant, Tari J. Anderson Sup Ct. RP 2 of the District Court ruling and essentially affirmed the decision of the Trial Court by a Trial de Novo review of the case on the record. Sup Ct RP 36-38. On that

date Judge Nielson also ruled in favor of the Respondent, Jane M. Hession by oral decision. Sup. Ct. RP 36-38. Subsequently, Findings of Fact and Conclusions of Law were entered and an Order of Dismissal CP 381-388 dismissing the claims and case of the Appellant. RP – Hearing on Presentment (April 22, 2011). Copies of the Findings of Facts and Conclusions of Law and the Judgment of Dismissal presented by the Respondent and adopted by the Court and are part of the record on Appeal. CP 381-388.

Findings of Fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair minded person the premise is true. If the standard is satisfied a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Sunnyside Valley Irr. Dist v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003). Legal conclusions of the trial court are reviewed de novo. Sunnyside Valley Irr. Dist (supra at 880; Proctor v. Huntington, 146 Wn. App 836, 192 P. 3d 958 (2008).

In her Appellate Brief, the Appellant suggests that she was somehow misinformed regarding the Trial de Novo and was prepared

only for an “Oral Hearing” and not a Trial de Novo. Appellant’s Brief at page 1. But the record reflects differently. Sup Ct. RP 20-21. Ms. Anderson brought with her, her husband Monte Anderson, witnesses Claudia Johnson and Donna McKeraghan and even Henry Valder who appeared only by affidavit at the first trial. She also brought other documents and photographs which she intended to introduce. However, Judge Nielson informed her that this was a Trial de Novo “on the record” and that other evidence would not be permitted. Sup Ct. RP 20-21.

D. Supplemental Evidence Submitted for Consideration at the Court of Appeals.

The Appellant moved this Court for an Order to Supplement the Evidence on Review which was granted on January 27, 2012. Neither Judge Robinson who viewed the DVD at trial, nor Judge Nielson who consider the testimony of witnesses regarding matters which were discussed on the DVD considered the evidence to be noteworthy. Judge Robinson described it as having “limited relevance”, RP 26, and Judge Nielson said of the testimony, “This is of little relevance in my mind” and “. . . it is not particularly important, and it is not all together clear what happened there” Sup Ct. RP 30.

CONCLUSION

The evidence presented at trial and as reviewed on appeal to the Superior Court, simply does not support the Appellant's claims. The decisions of the District Court and the Superior Court dismissing these claims should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Dennis P. Hession", written over a horizontal line.

Dennis P. Hession
Attorney for Respondent
Jane M. Hession