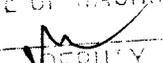


NO. 36596-1-II

FILED  
COURT OF APPEALS  
DIVISION II

08 MAY -7 PM 2:08

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

---

SHARON PANTALEO,

Respondent,

Vs.

KENNETH JOHNSON,

Appellant.

---

BRIEF OF RESPONDENT

---

SUBMITTED BY:

Thomas S. Olmstead  
Thomas S. Olmstead & Associates  
Attorneys for Respondent

20319 Bond Road NE  
Poulsbo, WA 98370  
Ph. (360) 779-8980

ORIGINAL

Table of Contents

	Page
I. COUNTER-STATEMENT OF ISSUES. . . . .	1
II. COUNTER-STATEMENT OF FACTS . . . . .	2
III. ARGUMENT . . . . .	.3
A. substantial evidence exists to show that Sharon Pantaleo's injuries were caused by Kenneth Johnson's tortuous conduct . . . . .	.3
B. Substantial evidence exists to show that Sharon Pantaleo's medical treatment was reasonable and necessary to treat her injuries from July 19 <sup>th</sup> , 2004. . . . .	.11
C. The trial court's Finding of Fact that Kenneth Johnson Committed "Assault" instead of "Battery" was a scrivener's error that did not materially affect the outcome of the case. . . . .	.15
IV. CONCLUSION. . . . .	.18

Appendix

- A Findings of Fact and Conclusions of Law dated June 22<sup>nd</sup>, 2007. (CP 59-61)
- B. Washington Practice Series V. 6B, Civil Jury Instruction Handbook, pp. 277-278 (2007-08 Edition)

## Table of Authorities

### Cases

<i>Brow v. Mutual of Omaha Insurance Co.</i> , 80 Wn.2d 701, 705, 497 P.2d 933 (1972) . . . . .	9
<i>Brown v. Superior Underwriters</i> , 30 Wn.App. 303, 305-306, 632 P.2d 887 (1980) . . . . .	8-9
<i>Hayes v. Wieber Enterprises</i> , 105 Wn. App. 611, 616-617, 20 P.3d 496 (2001) . . . . .	14
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 201-202, 937 P.2d 597 (1997) . . . . .	13
<i>Pilcher v. Department of Revenue</i> , 112 Wn.App. 428, 435, 49 P.3d 947 (2002) . . . . .	4

### Other Authorities

6 Washington Pattern Jury Instructions: Civil 30.07.01 . . . . .	15
Washington Practice Series V. 6B, Civil Jury Instruction Handbook, § 5.3, pp. 277-278 (2007-08 Ed.) . . . . .	17-18
W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, p. 46 (5th ed. 1984) . . . . .	17

I. COUNTER-STATEMENT OF ISSUES

Appellant's statement of issues mischaracterizes the evidence presented at trial and misapprehends the legal issues involved in this case. The Respondent asserts that the following issues more accurately characterize the legal questions presented in this appeal:

1. Whether substantial evidence was presented at trial that Sharon Pantaleo's injuries were proximately caused by Kenneth Johnson's tortuous conduct?
2. Whether substantial evidence was presented at trial that Sharon Pantaleo's medical treatment was reasonably related to the injuries inflicted upon her by Kenneth Johnson?
3. Whether the trial court's finding that Kenneth Johnson committed "assault" instead of "battery" upon Sharon Pantaleo was a scrivener's error that

did not prejudice the Defendant and had no material affect upon the final outcome of the case?

## II. COUNTER-STATEMENTS OF FACTS

On July 19<sup>th</sup>, 2004 Sharon Pantaleo received a telephone call from Kenneth Johnson. Mr. Johnson asked Sharon Pantaleo if he could come over to Ms. Pantaleo's house, and she said "no". (RP 111:13-19) Kenneth Johnson would not take no for answer, however, and went to Ms. Pantaleo's house later that same evening. (RP 111:20-112:8)

When he arrived uninvited to Ms. Pantaleo's house on the night in question, Mr. Johnson brought marijuana for Sharon to consume and an un-identified liquid in a Styrofoam cup for Sharon to drink. (RP 112:18-113:10) After drinking the un-identified liquid provided by Mr. Johnson, Ms. Pantaleo passed out for an unknown period of time. (RP 113:12) When Ms. Pantaleo awakened, Kenneth Johnson was dragging her up the stairs of her own house. Ms. Pantaleo saw blood

coming down her leg, and told Mr. Johnson that she was bleeding. Instead of offering to help Sharon, "He didn't say nothing. He ran out the front door." (RP 113:18) After Mr. Johnson fled the scene he never spoke with Sharon again. (RP 115:12-16) Ms. Pantaleo proceeded to crawl into the living room and called her friend, Bob Skuza, for assistance. (RP 114:7-10) Mr. Skuza arrived a short time later and drove Sharon to Tacoma General Hospital. (RP 77:22-78:6) Later that same evening, a Police photographer went to Ms. Pantaleo's hospital room and photographed her injuries. (RP 92:18-93:8; Exs. 18-31) This case proceeded to a bench trial on May 14<sup>th</sup>, 2007. At the close of the trial, the court awarded the Ms. Pantaleo \$28,000.00 in medical expenses and \$50,000.00 for pain and suffering. This appeal followed.

### **III. LEGAL ARGUMENT**

- A. Substantial evidence was presented at trial to show that Sharon Pantaleo's injuries were caused by proximately**

**caused by Kenneth Johnson's tortuous  
conduct. (Issue 1)**

The essence of Mr. Johnson's claim on appeal is that substantial evidence does not support the trial court's finding that Kenneth Johnson caused Ms. Pantaleo's injuries. However, even a cursory examination of this record demonstrates this claim to be spurious and without merit. It is clear that

"[C]hallenged findings will be binding on appeal if they are supported by substantial evidence in the record." *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000)). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Schoessler*, 140 Wn.2d at 385 (quoting *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

On appeal, we view the evidence in the light most favorable to the prevailing party. *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981). Under the substantial evidence standard, we "will not substitute our judgment for that of the fact finder. Instead, [this Court] accept[s] the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133-34, 990 P.2d 429 (1999), review granted, 141 Wn.2d 1011 (2000).

*Pilcher v. Department of Revenue*, 112 Wn.App.

428, 435, 49 P.3d 947 (2002). Appellant seems to be asking this court to substitute its judgment for that of the fact finder, and reach a different conclusion based upon the same facts

that were presented to the trial court. Only Sharon Pantaleo and Kenneth Johnson were present on July 19<sup>th</sup>, 2004 when Ms. Pantaleo was injured.

Both Mr. Johnson and Ms. Pantaleo testified at trial, although their recollection of events varied considerably. Mr. Johnson testified that Sharron Pantaleo called him at approximately 7:30 p.m. on the night in question before coming to her house. (RP 98:23-99:1) Ms. Pantaleo testified that she did not call Mr. Johnston or invite him over, but rather Mr. Johnson called her and asked if he could come over, and she said "No". (RP 111:9-19) Mr. Johnson testified that he entered Sharon's house through the front door (RP 99:6-7), but Ms. Pantaleo saw him enter through the back door. (RP 112:2-3)

Mr. Johnson claimed he had sex with Sharon Pantaleo within five minutes of arriving at her house on the night in question. (RP 99:12-15) Sharon maintained they did not have sex that night. (RP 112:9-12) According to Mr. Johnson,

he knew Sharon wanted to have sex because, "I think we just kind of read each other's mind, kind of a wink and nod." (RP 109:13-14) When asked to explain how they had sex within five minutes of his arrival, Mr. Johnson first testified Ms. Pantaleo was only wearing a robe when he arrived at her house. (RP 102:24-103:4) Mr. Johnson later changed his testimony, claiming Sharon was naked when he arrived. (RP 108:24-109:1) Sharon testified she wore pajamas that night, and did not wear a robe that evening. (RP 111:23-24)

Mr. Johnson also claimed he had sex with Ms. Pantaleo on four occasions leading up to the night in question. (RP 107:17-21) According to Ms. Pantaleo, however, she had intimate relations only once with Mr. Johnson, which occurred five years prior to the night in question. (RP 119:5-14)

Mr. Johnson claimed that right as he was leaving Sharon's residence, Sharon fell on her

porch and he heard a big noise. (RP 100:15-21)

Mr. Johnson claimed that Ms. Pantaleo tripped over the doggy door in the front doorway of her house, and received a bloody nose. (RP 100:22-101:5) When Mr. Johnson was shown photographs of Ms. Pantaleo's front doorway, however, he could not identify the mysterious doggy door. (RP 106:11-107:6; Exs. 5-6) Sharon Pantaleo testified there is no doggy door in her house. (RP 110:15-21) Ms. Pantaleo also testified she has lived in her house for 43 years (RP 110:9-12), that there was nothing in her house she could have tripped over that night, and that she could walk around her house completely blindfolded. (RP 117:6-10) Ms. Pantaleo further testified that she did not follow Mr. Johnson as he was leaving the residence. (RP 117:2-5)

Mr. Johnson claimed that after Ms. Pantaleo fell onto the porch, the porch light wouldn't work and he had to run into the living room to find a flashlight. (RP 100:22-101:5) However,

Ms. Pantaleo testified that the living room light and the porch light were both on. (RP 110:22-111:3) Robert Skuza, a friend Ms. Pantaleo's, also testified that Sharon always kept her porch light on. (RP 67:25-68:1)

According to the Appellant,

...there is no evidence that suggests that the injuries were more likely caused by a battery than a fall down the stairs by the drunken plaintiff. The hospital kept her there for a number of hours to assure that such an accident did not occur. In that the testimony suggests that plaintiff stopped drinking before the injuries after which she passed out, then awoke and called Skuza. The alcohol reading of .25 at the hospital was well after she stopped drinking. She likely had an ever higher BAC at the time of receipt of her injuries. The most likely cause of her injuries of the alcoholic plaintiff was a fall or falls related to her own drunken condition at the time.

*Brief of Appellant*, 11-12. The essence of Mr. Johnson's argument is that the trial court should have believed Mr. Johnson's testimony over Ms. Pantaleo's testimony because Ms. Pantaleo was an alcoholic. However, it is clear that

When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support them, an appellate court will not substitute its judgment even though it might have resolved the factual dispute differently. *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977). Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App.

695, 483 P.2d 880 (1971). Our examination of the record goes no further than to determine whether there is substantial evidence to sustain the trial court's findings. Stutz v. Moody, 3 Wn. App. 457, 476 P.2d 548 (1970).

*Brown v. Superior Underwriters*, 30 Wn. App. 303, 305-306, 632 P.2d 887 (1980) (emphasis added).

Although the testimony was hotly disputed, there was clearly substantial evidence presented at trial that Ms. Pantaleo's injuries were caused by Kenneth Johnson. Appellant seems to acknowledge that "[I]f the trial court weighs the evidence, a reviewing court will accept findings of fact supported by substantial evidence." *Brow v. Mutual of Omaha Insurance Co.*, 80 Wn.2d 701, 705, 497 P.2d 933 (1972).

Neither party disputes that Ms. Pantaleo was injured on the night in question. Indeed, Ms. Pantaleo's injuries were meticulously documented by police investigators right after the incident, and the photographs were admitted into evidence as Exhibits 18-31. These Exhibits show numerous injuries inflicted upon Ms. Pantaleo. Ms. Pantaleo testified that Mr. Johnson drug her up

the stairs of her house after she came to, and that she was bleeding. (RP 113:14-16) Ms. Pantaleo also testified that instead of trying to help, Mr. Johnson fled the scene without saying a word. (RP 113:17-20) Right after the incident, Ms. Pantaleo called a friend named Robert Skuza for assistance, and described the injuries inflicted upon her by Mr. Johnson. (RP 79:5-80:8) Mr. Johnson testified that Ms. Pantaleo's only injury was a bloody nose, which was caused by tripping over her doggy door. After considering all the evidence, the court rejected Mr.

Johnson's tale:

The medical evidence in this case is clear that the Plaintiff, Ms. Pantaleo, was severely beaten and dragged, had a laceration on her leg, and this was evidenced by Mr. Skuza when he was called to come to her aid. She did not have a specific memory of Mr. Johnson doing that to her, and indeed, it was proved at the hospital that she was found to be intoxicated, having both cannabis and valium in her system, besides alcohol. But at the same time, Mr. Johnson's explanation of only seeing her with a nose bleed does not counteract the prevailing medical evidence in this case. So I will be finding that there was an assault by Mr. Johnson and that he is liable to her for her medical damages in the amount of \$28,000.00 for the medical bills and an additional \$50,000.00 for pain and suffering. That would be a total of \$75,000.00. (RP 159:2-17) Based upon the court's oral ruling, it is clear that the court did not

believe Mr. Johnson was a credible witness, and that Mr. Johnson caused Ms. Pantaleo's injuries on the night in question. Because this finding is supported by substantial evidence this court should affirm the judgment below and dismiss this appeal.

**B. Substantial evidence exists to show that Sharon Pantaleo's medical treatment and bills were reasonable and necessary to treat her injuries from July 19<sup>th</sup>, 2004. (Issue 2)**

It is undisputed that Sharon Pantaleo received extensive injuries on the evening of July 19<sup>th</sup>, 2004. Dr. Leon described Ms. Pantaleo's injuries as follows:

- Q. Showing you what has been marked as Exhibit Number 18, do you recognize that photograph?  
A. Yes. The Picture shows Ms. Pantaleo.  
Q. Ms. Pantaleo?  
A. Yes.  
Q. And what injuries can you see on that particular photograph?  
A. She has significant bruising, ecchymosis, around the right eye and orbit, with bruising extending down to the mandible, and drop in her cheekbone and facial drop on the right side of her face.  
Q. What do you mean by facial drop?  
A. The muscles aren't able to maintain the normal tone because usually the cause is nerve damage. And there is also a drop from the bone fracture. (RP 14:12-15:1)

Dr. Leon also discussed the injuries to Ms. Pantaleo's left eye, shown at Exhibit 19. Dr. Leon opined that, "[I]t appears to be three centimeters of the intense swelling area, but then about five centimeters of bruising too." (RP 15:23-25) Dr. Leon also testified regarding injuries on the right side of Ms. Pantaleo's face:

- Q. Okay. And what injuries did the CT scan denote?  
A. The injuries that it found?  
Q. Yes.  
A. So there were, on the right side of the face—I'm going to read from the record, is what I normally do.  
Q. Sure.  
A. (Reading:) Anterior medial and lateral right maxillary sinus wall fractures.  
Do you want me to put that into more Layman's terms?  
Q. Yes.  
A. That's small bones around the - - next to the nose and the eye that were fractured in three different places. And fracture of the lateral and inferior lateral wall, which is the wall that encases the eye, the bones, and right nasal fracture. The right side of her nose was broken. (RP 16:14-17:4)(emphasis added)

Dr. Leon also testified that Ms. Pantaleo suffered from fractures to the left eighth rib and the third rib (RP 23:12-18), and a laceration on her shin or leg. (RP 23:19-23) The medical records and billings concerning Sharon Pantaleo's

treatment for her injuries received on July 19<sup>th</sup>, 2004 were admitted into evidence as Exhibit 32. Based upon all the testimony and evidence presented at trial, the court properly awarded Ms. Pantaleo damages for the medical treatment she received for the injuries inflicted by Kenneth Johnson on July 19<sup>th</sup>, 2004. As explained by our State's highest court,

Although there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages. The adequacy of a verdict, therefore, turns on the evidence. See *Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965) (no abuse of discretion to grant new trial where jury awarded nothing for pain and suffering but plaintiff experienced pain for at least 17 months after the accident); *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1961) (where "indisputable" that plaintiff sustained pain and suffering and jury failed to award general damages, new trial upheld); *Ide v. Stoltenow*, 47 Wn.2d 847, 850, 289 P.2d 1007 (1955) (no abuse of discretion to grant new trial where verdict of less than \$ 500 for general damages was "so inadequate as to shock the conscience of the court"); *Cleva v. Jackson*, 74 Wn.2d 462, 465, 445 P.2d 322 (1968) (new trial upheld where trial court found nominal amount for pain and suffering "clearly was unjustified under the evidence introduced at the time of trial").

*Palmer v. Jensen*, 132 Wn.2d 193, 201-202, 937

P.2d 597 (1997). The Appellant claims that the trial court erred in awarding Ms. Pantaleo \$28,000.00 for her medical expenses, because

there is not substantial evidence to show that the treatment was reasonably related to the injuries received on July 19<sup>th</sup>, 2004. However, there was clearly substantial evidence presented at trial that the medical treatment received by Sharon Pantaleo was directly related to the injuries she received on July 19<sup>th</sup>, 2004. The trial court reviewed the various medical records and billings, which were admitted into evidence as Exhibit 32. The court's award of \$28,000.00 was clearly reasonable, especially considering that

Plaintiffs in negligence cases are permitted to recover the reasonable value of the medical services they receive, not the total of all bills paid. *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). And the amount actually billed or paid is not itself determinative. The question is whether the sums requested for medical services are reasonable. 6 WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 30.07, at 39 (3d ed. Supp. 1994); *Patterson*, 84 Wn. App. at 543....trial courts exercise broad discretion when deciding evidentiary matters, and will not be overturned unless there was a manifest abuse of that discretion. *Cox*, 141 Wn.2d at 439. And a trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *Carroll*, 79 Wn.2d at 26.

*Hayes v. Wieber Enterprises*, 105 Wn. App. 611, 616-617, 20 P.3d 496 (2001). The court's award

of \$28,000.00 was based upon the numerous medical bills contained in Exhibit 32, all of which pertain to treatment for injuries received on July 19<sup>th</sup>, 2004. The standard jury instructions for economic damages define medical expenses for past damages as, "*The reasonable value of necessary medical care, treatment, and services received to the present time.*" 6 Washington Pattern Jury Instructions: Civil 30.07.01. Here, Dr. Leon testified that Ms. Pantaleo's treatment from the various providers documented in Exhibit 32 was reasonable and necessary. (RP 27:2-4; RP 29:1-2; RP 29:13-30:10) The defense did not call any medical witnesses to refute this testimony. Therefore, it was clearly appropriate for the court to award Ms. Pantaleo \$28,000.00 for the medical treatment relating to her injuries from July 19<sup>th</sup>, 2004.

- C. The trial court's finding that Kenneth Johnson Committed "assault" instead of "battery" was a scrivener's error that did not materially affect the outcome of the case. (Issue 3)**

The Appellant correctly points out that the trial court erred in finding that Kenneth Johnson committed "assault" instead of "battery". At the close of the trial the court found that, "there was an assault by Mr. Johnson and that he is liable to her for her medical damages in the amount of \$28,000.00 for the medical bills and an additional \$50,000.00 for pain and suffering."

(RP 159:13-17) The trial court's written findings of fact state in relevant part:

4. Mr. Johnson's testimony was not believable. He testified that he only saw injury to the Plaintiff's nose. At Tacoma General Hospital, the police photographed severe injuries to Plaintiff's right eye and leg which Mr. Johnson should have seen.
5. Mr. Johnson testified that Plaintiff received injuries from a single fall. Dr. Leon testified injuries to the Plaintiff's eyebrow required two to three blows.
6. Mr. Johnson testified that Plaintiff tripped over a doggie door, but that it was so dark in hallway he couldn't see anything. Defendant went out of the room first and did not trip over it. The Plaintiff had lived in the house for over 40 years and tripped over the unseen doggy door according to the Defendant. This explanation of Plaintiff's injuries is not plausible.

7. The testimony of Robert Skuza, the Plaintiff and Dr. Leon were all consistent, whereas Mr. Johnson's testimony was inconsistent with facts and was not credible.

See 06/22/07 Findings of Fact Nos. 4-7. (CP

60) The Respondent concedes that the trial court should have found that Mr. Johnson committed "battery" instead of "assault" upon Ms. Pantaleo. However, this finding was clearly a scrivener's error that did not prejudice the Appellant in any manner. Indeed, it is commonly understood that

In the ordinary case, both assault and battery are present; it is an assault when the defendant swings a fist to strike the plaintiff, and the plaintiff sees the movement; a battery when the fist comes in contact with the plaintiff's nose. The two terms are so closely associated in common usage that they are generally used together, or regarded as more or less synonymous. Loosely drawn criminal statutes, which make use of "assault" to include attempted battery, or even battery itself, have assisted in obscuring the distinction. It is not accurate to say that "every battery includes an assault," but in practice the difference between the two is often entirely ignored. W. Keeton, D. Dobbs, R. Keeton, & D. Owen,

Prosser and Keeton on Law of Torts § 9, p. 46

(5th ed. 1984) There is no Washington Jury

Instruction that even defines the civil tort of

assault and battery. However, the Civil Jury

Instruction Handbook proposes the following

definition of civil assault:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive, a touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

*Washington Practice Series V. 6B, Civil Jury*

*Instruction Handbook, § 5.3, pp. 277-278 (2007-08*

Ed.) (Appendix B) The written Findings of Fact and Conclusions of Law combined with the Court's oral ruling clearly demonstrate the trial court found that Kenneth Johnson intentionally caused Ms. Pantaleo's injuries. Although this court could remand for entry of new findings, it would be a fruitless exercise that would be of no benefit to the Appellant.

#### IV. CONCLUSION

A review of this record clearly shows that substantial evidence supports the trial court's finding that Kenneth Johnson caused Sharon Pantaleo's injuries of July 19<sup>th</sup>, 2004, and that the medical treatment and billings were reasonably related to the treatment for those injuries. Because the trial court's finding that

Mr. Johnson committed "assault" instead of "battery" upon Sharon Pantaleo was a scrivener's error that did not materially prejudice the Appellant, this court should affirm the judgment below and dismiss this Appeal.

Respectfully Submitted this 7<sup>th</sup> day of May 2008.

Thomas S. Olmstead & Associates



Thomas S. Olmstead WSBA # 8170

Attorneys for Respondent  
20319 Bond Road NE  
Poulsbo, WA 98370  
Ph. (360) 779-8980

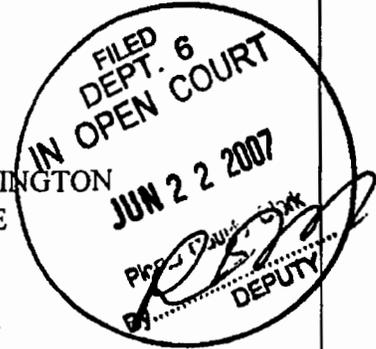
# **Appendix “A”**



05-2-09407-4 27730860 FNFL 06-25-07

Assigned Judge: Honorable Judge Buckner, Dept. 06

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

SHARON K. PANTALEO, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 KENNETH D. JOHNSON, )  
 )  
 Defendant. )

NO. 05-2-09407-4

FINDINGS OF FACT  
CONCLUSIONS OF LAW

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on Fact Finding; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following

FINDINGS OF FACT

1. The Plaintiff is a resident of Pierce County, Washington.
2. The Defendant is a resident of Pierce County, Washington.

LAW OFFICES OF  
THOMAS S. OLMSTEAD  
20319 Bond Rd. NE  
Poulsbo WA 98370  
(360) 779-8980  
Fax: (360) 779-8983  
lawoffice@tomolmstead.com

- 1 3. The Plaintiff proved beyond a preponderance of the evidence that an assault  
2 occurred.
- 3 4. Mr. Johnson's testimony was not believable. He testified that he only saw  
4 injury to the Plaintiff's nose. At Tacoma General Hospital, the police  
5 photographed severe injuries to Plaintiff's right eye and leg which Mr. Johnson  
6 should have seen.
- 7 5. Mr. Johnson testified that Plaintiff received injuries from a single fall. Dr. Leon  
8 testified injuries to the Plaintiff's eye required two to three blows.
- 9 6. Mr. Johnson testified that Plaintiff tripped over a doggie door, but that it was so  
10 dark in the hallway he couldn't see anything. Defendant went out of the room  
11 first and did not trip over it. The Plaintiff had lived in her house for over 40  
12 years and tripped over the unseen doggy door according to the Defendant. This  
13 explanation of Plaintiff's injuries is not plausible.
- 14 7. The testimony of Robert Skuza, the Plaintiff, and Dr. Leon were all consistent,  
15 whereas Mr. Johnson's testimony was inconsistent with facts and was not  
16 credible.

17  
18  
19  
20  
21 **CONCLUSIONS OF LAW**

- 22 1. This Court has jurisdiction over the parties and the assault as it occurred within  
23 the jurisdictional boundaries of that county.
- 24 2. Venue is proper in Pierce County, Washington.
- 25  
26

LAW OFFICES OF  
THOMAS S. OLMSTEAD  
20319 Bond Rd. NE  
Poulsbo WA 98370  
(360) 779-8980  
Fax: (360) 779-8983  
lawoffice@tomolmstead.com



# **Appendix “B”**

**WASHINGTON  
PRACTICE SERIES™**

**Volume 6B**

---

**CIVIL JURY  
INSTRUCTION  
HANDBOOK**

**2007-08 EDITION**

**THOMSON**  
★  
**WEST**™

*For Customer Assistance Call 1-800-328-4880*

Mat #40635508

tions or individuals. This means all corporations and individuals are to be treated in the same fair and unprejudiced manner.

◆ **Author's Commentary: WPI 1.07, "Corporations and Similar Parties."** This instruction may be given in those cases involving parties with different legal characteristics, such as corporations, government entities, and partnerships.

See 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.) for additional comment regarding this instruction.

#### INSTRUCTION NO. 8

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

◆ **Author's Commentary: WPI 21.01, "Meaning of Burden of Proof — Preponderance of the Evidence."**

This pattern instruction should be given in every case in which the burden of proof is "preponderance of the evidence." This is true even in cases where the only issue is the amount of damages. Its position in the package of instructions will vary.

See 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.) for additional comment regarding this instruction.

#### INSTRUCTION NO. 9

The plaintiffs claim that the defendant's security staff assaulted them. To find the defendant liable for assault, the plaintiffs must prove each of the following elements:

- (1) That on or about September 19 or September 20, 2004, the defendant's security staff assaulted the plaintiffs, and
- (2) That the assaults caused injury or damage to the plaintiffs.

If you find from your consideration of all the evidence that each of these propositions has been proved your verdict should be for the plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive, a

touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

A person who is acting in self-defense is not liable for assault. It is not necessary for the person acting in self-defense to be in actual danger so long as he or she has a reasonable belief that danger is imminent. A person acting in self-defense may only use the degree of force reasonably necessary to protect himself or herself.

The defendant has the burden of proving self-defense by a preponderance of the evidence.

◆ **Author's Commentary:** This is not a WPI instruction. Non-WPI instructions should be avoided whenever possible, but obviously, there is not a WPI for every situation. If used, Non-WPI instructions should follow the format of the WPI and be integrated within the pattern instructions for the final jury charge.

The above instruction was likely derived from case law. When Non-WPI instructions are submitted, some authority for the instruction should be cited for the court.

#### INSTRUCTION NO. 10

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting or failing to act, the defendant was negligent;  
Second, that the plaintiffs were injured;  
Third, that the negligence of the defendant was a proximate cause of the injuries to the plaintiffs.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiffs acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiffs were negligent;  
Second, that the negligence of the plaintiffs was a proximate cause of the plaintiffs' own injuries and was therefore contributory negligence.

◆ **Author's Commentary:** WPI 21.03, "Burden of Proof on the Issues — Contributory Negligence — No Counterclaim." A burden of proof instruction should be given as to each cause of action. WPI 21.03 may be used for any case in which negligence and contributory negligence is an issue.

This instruction should normally be used in conjunction

FILED  
COURT OF APPEALS  
DIVISION II

08 MAY -7 PM 2:08

STATE OF WASHINGTON  
BY M  
DEPUTY

1  
2  
3  
4  
5  
6  
7 **IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**  
**DIVISION TWO**

8 SHARON PANTALEO, )

9 Respondent, )

10 Vs. )

11 KENNETH JOHNSON, )

12 Appellant. )

) Case No. 05-2-09407-4

) COA# 36596-1-II

) DECLARATION OF SERVICE RE:

) RESPONDENT'S BRIEF

13 I, Nathan A. Randall, declare as follows:

- 14 1. I am over the age of 21 and competent to testify to the facts alleged herein.
- 15 2. I am employed as a paralegal at the office of Thomas S. Olmstead & Associates,  
16 20319 Bond Road NE, Poulsbo, WA 98370.
- 17 3. On May 7<sup>th</sup>, 2008 I caused service of true and correct copies of the  
18 document's listed below:
- 19 i. Respondent's Brief;
- 20 ii. Declaration of Service RE: Respondent's Brief.

21 to the following parties via the methods indicated below:

22

23

24

25

26 DECLARATION OF SERVICE RE:  
RESPONDENT'S BRIEF -1-

Thomas S. Olmstead & Associates  
20319 Bond Road NE  
Poulsbo, WA 98370  
Phone (360) 779-8980  
Fax (360) 779-8983

ORIGINAL

1 Via facsimile to (253) 471-2038 and first-class mailing:  
2

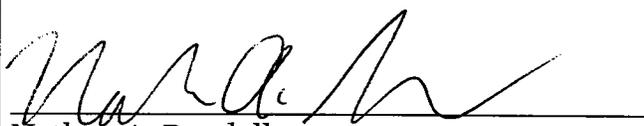
3 **William M. Wood Jr.**  
4 **Law Offices of William M. Wood, Jr.**  
5 **5611 76th. Street West**  
6 **Lakewood WA 98499**

7 Via hand-delivery:

8 **Washington State Court of Appeals**  
9 **Division Two**  
10 **950 Broadway, Suite 300**  
11 **Tacoma, WA 98402**

12 I declare under penalty of perjury under the laws of the State of Washington that the  
13 foregoing is true and correct.

14 Executed May 7<sup>th</sup>, 2008 at Poulsbo, Washington.

15  
16   
17 \_\_\_\_\_  
18 Nathan A. Randall

19  
20  
21  
22  
23  
24  
25  
26  
DECLARATION OF SERVICE RE:  
RESPONDENT'S BRIEF -2-

Thomas S. Olmstead & Associates  
20319 Bond Road NE  
Poulsbo, WA 98370  
Phone (360) 779-8980  
Fax (360) 779-8983