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NO. 66101-9-I

WASHINGTON STATE COURT OF APPEALS

DIVISION I

TANYA OSHATZ, appellant

vs.

GINSING, LLC, d/b/a THE WILD GINGER

and THE TRIPLE DOOR, respondents.

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CLERK OF COURT
JENNIFER L. HARRIS

Appeal from the King County Superior Court

RESPONDENT'S AMENDED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Appellant assigns no error to the trial court.

II. ISSUES PRESENTED

1. Was the trial court correct in dismissing appellant's Complaint when appellant could not establish any duty owed to her by the respondent on the public street outside the respondent's premises?
2. Does the entry of a default judgment against a co-defendant in the trial court, after the dismissal of the respondent in this appeal, have any effect on the issues raised by appellant?

III. STATEMENT OF THE CASE

Plaintiff was injured when Brad Crossen, co-defendant in the case below, assaulted her without warning or provocation, on a Seattle sidewalk, a short while after he had been ejected by GinSing LLC's employees for being visibly intoxicated and belligerent inside the Triple Door night club. GinSing owns the Triple Door and the Wild Ginger Restaurant, around the corner from the Triple Door. Plaintiff had earlier dined at Wild Ginger. She claimed in the trial court that GinSing had a duty to protect her against Crossen's assault, despite the fact that both were outside the Triple Door on the public sidewalk, either because the assault occurred near the Triple Door or because Triple Door employees had recently ejected Crossen from the premises, and appellant remained a "patron" of

GinSing because of her recent departure from Wild Ginger.

GinSing offered evidence to the trial court that Crossen was not observed to be under the influence of intoxicants upon entering the Triple Door, CP 63-64; he was not served alcohol while inside Triple Door, CP 56, 58, 60, 62; and he only became belligerent because he was refused an alcoholic beverage, CP 55, 57-58, 59, 61-62. At that point, employees immediately contained Crossen and escorted him outside, releasing him on the sidewalk where he walked back and forth for some time with a companion. CP 63-64. He was calm at that time, and showed no aggression. Even then, to one bartender, Crossen "did not seem intoxicated, just rude." CP 60, 61. He was observed for "a while" and was calm. CP 63-64. Crossen himself testified that he was in a good mood, not belligerent or assaultive, not in a fighting mood; he was in a "super happy" mood just before he accosted Appellant. CP 85, p. 15:21 – 16:20.

At the time she was assaulted, appellant had no intention of entering the Triple Door. CP 39-40, Interrogatory answer 36. She was headed to her car after leaving the Wild Ginger Restaurant (on Third Avenue), around the corner from Triple Door (on Union Street). She was standing "on the sidewalk just west of the Triple Door entrance." CP 39, Interrogatory answer 35.a. She never saw Crossen before he appeared in front of her. *Id.*, Interrogatory answer 35.b. He had been ejected from the

Triple door "minutes before," CP 41, Interrogatory answer 42; not "less than a minute" earlier, as appellant falsely claims. *Amended Opening Brief*, p. 3. Suddenly, and without any time to prevent it, Crossen picked appellant up and then fell over. She had no time to avoid this. *Id.*, Interrogatory answer 35.c. Appellant's shoulder was injured in the fall.

GinSing filed for summary judgment, arguing the absence of any duty on the part of GinSing to prevent a third party from harming another, CP 18-19; that GinSing had no duty to control Crossen's actions, CP 19-20; that GinSing had no duty to protect plaintiff, CP 20; that GinSing had no liability for Crossen's intention act under *Tegman v. Accident and Medical Investigations*, 150 Wn.2d 102, 75 P.3d 497 (2003), CP 21-23; and that Crossen's act was a superseding cause which broke the causal chain connecting GinSing to plaintiff's injury, CP 23-24.

Appellant responded with discussions of declarations as to Crossen's actions inside the Triple Door, CP 72-74, and seeking a CR 56(f) continuance to obtain discovery answers. CP 74-75. Her opposition to summary judgment contained citations to authorities, but no argument identifying disputed material facts that might defeat summary judgment. CP 65-77.

The trial court granted a continuance to permit appellant to obtain answers to then-pending discovery requests, allowing plaintiff "21 days to provide additional briefing on material issues raised thereby." CP120, ¶ 2.

Appellant exceeded the limits of the permitted additional briefing, submitting a Supplemental Memorandum and five declarations, CP 121-157, which had nothing to do with issues raised by the discovery requests, and which could and should have been filed in the initial motion response, if at all, as required by CR 56(e).

In her Supplemental Memorandum, plaintiff expressly argued that her action was **not** a premises liability claim, despite having cited to case law addressing liability of a landowner. Appellant stated, "This is a negligence action which focuses on the *conduct of persons*. This is not a premises liability action; it is a negligence action. The defendant's motion for summary judgment should be dismissed on that basis." CP 153, lines 6-9 [italics in original]. She went on to recite the elements of a negligence claim, but offered nothing to support the essential element of a duty owed by GinSing to Appellant. CP 154. She then argued once again that *Tegman* does not apply to the facts of this case. CP 155-56.

The trial court granted leave to file a supplemental reply. CP 120. GinSing did so, arguing that nothing in the supplemental papers or the authorities cited by Appellant established a duty owed by GinSing to a non-patron member of the public, outside the Triple Door on the public sidewalk, where the sidewalk is crossed by the adjacent alley. CP 158-86.

The Court granted GinSing's motion and dismissed plaintiff's claims

against GinSing. This appeal followed.

After the appeal was filed and initial appeal briefs were submitted by both appellant and respondent (i.e., after respondent's brief called attention to the flaws in appellant's brief), appellant sought and received a default judgment against Brad Crossen¹ and then sought leave to file amended briefs. The Court of Appeals granted appellant's request, with the amendment limited to "no more than an additional 10 pages addressing **what impact, if any, the entry of the default judgment has upon the assignments of error raised in the initial opening brief.**" Notation Ruling of Commissioner Verellen, dated June 6, 2011 (emphasis added). Respondent was also permitted an amended brief containing "no more than an additional 10 pages addressing any new appellant's argument relating to the default judgment." *Id.*

Viewing the revisions made to the *Appellant's Opening Brief*, it is now clear that the Commissioner's ruling is being used as a pretext to submit additional briefing which has nothing to do with the entry of the default judgment against Brad Crossen in the trial court, but rather to address legal arguments omitted from the initial Appellant's Brief and not presented to the trial court. This violates the explicit directions of

¹ Since appellant's claims against GinSing had already been dismissed, Ginsing did not participate in the proceedings against Crossen, and they have no effect on GinSing.

Commissioner Verellen, and the additional briefing contained in the Amended Appellant's Brief at pages 19,² 27 - 28³ and at pages 29 – 34⁴ should be disregarded and sanctions imposed against appellant's counsel for flagrantly violating the Commissioner's ruling.

IV. ARGUMENT

Because Appellant has offered up three different bases for liability at different times, it is difficult to address her appeal strictly on its own content, which appears to be limited to a liquor liability theory. After a very long recitation of facts in several sections, Appellant only provides argument regarding "apparent intoxication," which is an issue relevant only in liquor liability claims. *Amended Opening Brief*, p. 28-29, 34-40 (excluding amended portions objected to, as specified in footnotes 2-4).

Then, contrary to the evidence, or any reasonable inference therefrom, Appellant fabricates the "fact" that Brad Crossen assaulted "another customer" (Appellant), *Id.*, p. 40, in "less than one minute" after being ejected from the Triple Door. *Id.*, p. 3, 40. Appellant makes the conclusory assertion, without any support, that she remained a business

² The sentence beginning "If Crossen was an intentional tortfeasor..." in the first paragraph of p. 19, and footnote 6.

³ The final paragraph on page 27, through the end of section III on page 28.

⁴ From the middle paragraph on page 29, beginning "In the trial court..." to the end of section IV.A on page 34.

invitee of GinSing, *Id.*, p. 3, which - if it were correct - sounds like a premises liability argument. She makes this assertion despite having left the restaurant where she dined and walked part way around the block on public sidewalks, with no intention of re-entering Wild Ginger or Triple Door. About 8 feet west of the Triple Door, on the sidewalk or in an adjacent alley, she was assaulted. CP 39.

Appellant never raised a liquor liability argument against GinSing's summary judgment motion. Her arguments against summary judgment alternately raised premises liability and negligence arguments. Her liquor liability argument is a new one, raised for the first time on appeal. This court should decline to consider reversing the trial court on grounds not raised there. See, *Berry v. Crown Cork & Seal Co.*, 103 Wn.App. 312, 320, 14 P.3d 789 (2000). However, even if a liquor liability theory is considered, plaintiff has not offered evidence of any breach of GinSing's duty which results in any liability toward Appellant, as discussed below.

Having asserted in the trial court that summary judgment should be denied on the sole basis that hers is a negligence action, Appellant should not be heard to argue any other theory. However, under any theory of liability which Appellant seeks to impose on GinSing, she asserts duties which do not exist, and which should not be extended beyond the limits of existing case law. The trial court's dismissal of GinSing from Appellant's

lawsuit should be affirmed.

a. Respondent owed Appellant no duty of protection against Crossen's assault.

GinSing has no general duty to prevent one party from harming another. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). Even where a commercial seller of alcohol has a duty to take reasonable steps to protect others from a patron known to have a propensity to violence, that duty is not invoked unless that propensity is known at the time of service. *Cameron v. Murray*, 151 Wn.App. 646, 214 P.3d 150, 154 (2009). Liquor liability duties are primarily intended for the protection of innocent drivers against a drunk driver who has been over-served by a vendor. A criminal assault is not within the field of danger implicated in the duty not to furnish intoxicants to someone already under the influence. *Id.* Our Courts are "reluctan[t] to extend common law liability beyond well-recognized exceptions, especially in view of the extensive involvement of the legislature in making policy judgments about liability for the furnishing of alcohol. *Id.*, 214 P.13d at 156.

These authorities require Appellant to make some showing that Triple Door employees knew that Crossen had a propensity for violence, and that they served him with that knowledge. Appellant has offered nothing on either count. The evidence shows no known propensity for

violence and Crossen denied any. CP 86, p. 18:6-12. There is also no showing that Crossen was served any alcohol by any Triple Door employee; each employee who saw Crossen inside Triple Door denied serving him or seeing him with any alcoholic beverages in his possession. P 14, 56, 58, 60, 62. Both prerequisites for imposing any duty upon GinSing as to Crossen fail.

b. Even if a duty was owed by GinSing to Appellant, it is not liable for Crossen's intentional tort.

The definition of "fault" under RCW 4.22.015 excludes culpability for intentional acts. Thus, a merely negligent tortfeasor is not liable for injuries caused by an intentional tortfeasor. *Tegman, supra*. Crossen's assault was an intentional tort, regardless of whether Crossen intended to cause plaintiff's harm, and it was the exclusive cause of appellant's injury as she struck the ground in Crossen's grasp.

Plaintiff argued below, and asserts here, that Crossen's assault upon her was "reckless" rather than intentional, *Amended Opening Brief*, § III.F, thus removing this case from the purview of *Tegman*. But an assault is not defined by the perpetrator's intent to do harm. Plaintiff acknowledges that Crossen pled guilty to 3rd Degree Assault. *Amended Opening Brief*, p. 15-16. An assault can be predicated on an unlawful touching or on apprehension of harm, whether or not the actor intends or is capable of

inflicting that harm. *State v. Walden*, 67 Wn.App. 891, 894-94, 941 P.2d 81 (1992). A touching may be unlawful "because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive." *State v. Thomas*, 98 Wn.App. 422, 424, 989 P.2d 612 (1999). Similarly, in the civil tort context, the intent to do harm is not required in order for an act to be intentional, and it is that intentional act which invokes *Tegman*. See also, discussion and authorities at CP 21-23, 115-16. GinSing is simply not liable for damages caused by Crossen's intentional act of picking up plaintiff, whether or not he intended to harm her by doing so. And since all of plaintiff's injuries were caused by Crossen's act, GinSing cannot be liable to plaintiff for any damages.

Similarly, as discussed in GinSing's summary judgment pleadings, Crossen's action also constitutes an intervening cause which breaks the causal chain, if any, between any GinSing negligence and Appellant's injury. CP 23-24. Thus, under either of two valid defense theories, GinSing cannot be held liable for Appellant's damages even if it were found to be negligent in some way.

c. Appellant's liability theories before the trial court appear to have been abandoned.

In response to GinSing's Motion for Summary Judgment, appellant cited to *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192 (1997), a case

which discussed the duty of a landowner to a person entering the premises. CP 75. She asserted that "[t]he plaintiff in this action was a business invitee of the defendant." CP at 76 at line 2. But she had not entered the premises at the time of the assault, and did not intend to, distinguishing our case from *Nivens*.

She then argued that *Tegman* did not apply because Crossen did not intend harm to the appellant. *Id.*, lines 9-15. She concluded her argument by asserting that GinSing should be held liable because its employees "should have done more to remove the imminent threat of Brad Crossen, from the proximity of other customers," claiming that it was immaterial that appellant was outside the Triple Door rather than inside. CP 77. But Appellant offered no argument which identified material issues of fact, or explained how they warranted denial of GinSing's motion for summary judgment. She also failed to offer any authority supporting her assertion that she and other passers-by were "customers" or "business invitees" while outside on the public sidewalks or alleys.

Later, in her Supplemental Memorandum, Appellant discarded her premises liability argument, specifically asserted that hers was not a premises liability claim, but claimed that her status as a business invitee was still relevant, and argued that *Tegman* did not apply. CP 152-57. Beyond listing the elements of a negligence claim, Appellant offered no

argument that those elements were supported by evidence sufficient to defeat summary judgment. CP 154-56.

Appellant's *Amended Opening Brief* changes the theory of liability yet again, but still lacks any argument specifying material facts and explaining how they relate to the authorities and issues relied upon by Appellant. Briefs must contain argument in support of the issues asserted, citations to legal authority, and references to relevant parts of the record. RAP 10.3(a)(6). Without these, the Court may decline to consider the issues raised for appeal. *Save Columbia C.U. Committee v. Columbia Community C.U.*, 150 Wn. App. 176, 186, 206 P.3d 1272 (2009).

Since Appellant's *Amended Opening Brief* properly contains only argument regarding "apparent intoxication" and the application of liquor liability issues discussed in *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009), but no argument about the premises liability or negligence issues that her summary judgment opposition pleadings raised at the trial court, this Court is left to speculate on the nature and specifics of the errors that Appellant assigns to the trial court regarding its handling of the issues that were actually raised there. We can only conclude that the premises liability and negligence theories previously offered have been abandoned, since they have not been included in argument on appeal.

d. Appellant relies upon arguments not made before the trial court to

show Crossen's intoxication. Such arguments are both improper and irrelevant.

Appellant first argued against summary judgment on the basis of premises liability theories. CP 75-77. She then abandoned that argument, asserting that this is not a premises liability case, but instead a simple common law negligence case. CP 153-54. She now changes course again, claiming that her prior pleadings "mistakenly assert[ed]" that this is not a premises liability case. *Amended Opening Brief*, p. 25. And yet, Appellant **still** properly provides no authority or argument supporting a premises claim. She provided no argument in her *Opening Brief* supporting a premises liability claim, or why the trial court erred in accepting her own express repudiation of a premises liability theory of liability. Only in the *Amended Opening Brief* does appellant improperly attempt to insert such argument, rather than the argument for which leave was granted to amend the initial opening brief.

Instead, Appellant has offered argument regarding "apparent intoxication," speculating without any supporting evidence that Crossen must have been apparently intoxicated upon arriving at Triple Door, and that he was "served" more alcohol while there, giving rise to liability for Crossen's actions. *Amended Opening Brief*, p. 6-10. Besides improperly raising issues and authorities not raised at the trial court, Appellant's

argument based on liquor liability authorities is simply wrong.

Appellant argues, without any evidence in the trial court record, that Crossen's blood alcohol content must have been over a certain level before arriving at Triple Door, based on testimony of his previous consumption. *Amended Opening Brief*, p. 34-40. From this, Appellant implies that when he was served at Triple Door, he must have been visibly impaired. However, this argument misses the mark for two reasons. First, the only evidence in the record is that Crossen was not visibly intoxicated when he entered Triple Door. CP 63. Second, the case law specifically rejects such reasoning to make up for the absence of actual proof of observable intoxication.

The *Faust* case that Appellant relies upon is a drunk driving case. The *Faust* court ruled that "evidence on the record must demonstrate that the tortfeasor was 'apparently under the influence' by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter." Appellant suggests that observations of Crossen by Appellant and her mother at the time of the assault allow an inference that Crossen was visibly under the influence at some unknown earlier time. This reasoning is flawed. First, it assumes that Crossen was **served** by Triple Door employees while in the premises, while all evidence in the record is to the contrary. While Appellant is

entitled to reasonable inferences in her favor, she cannot claim the benefit of an inference that Crossen was served alcohol by Triple Door staff based on no evidence at all. Even Crossen testified that he had no memory of how he got any drinks, and he was later told that his friend bought them for him. CP 83-84, pages 9:7 to 10:2. This does not permit a reasonable inference that any Triple Door server overserved him; there is no evidence that they ever served him anything at all.

The second flaw in Appellant's reasoning is that she is not within the class intended to be protected by the liquor laws. Case law is well established that overserving a driver gives rise to liability for damages to a third party caused by that drunk driver. The *Faust* case is an example of such liability. But liability for a violent act committed by a patron requires a showing of knowledge of a propensity for aggression, and does not extend to the public at large. *Cameron v. Murray, supra*.

The third flaw in Appellant's reasoning is that liability for a criminal assault resulting from furnishing alcohol to an intoxicated patron requires knowledge of a propensity for violence *at the time of service of the alcohol*. See, e.g., *Christen v. Lee*, 113 Wn.479, 491, 780 P.2d 1307 (1989). The assault must be the foreseeable result of furnishing liquor to an already intoxicated person, based on knowledge on the occasion of the injury or on a previous occasion. *Id.* Mere happenstance is insufficient.

But even under the facts as alleged by Appellant, there is no evidence that any assaultive behavior by Crossen preceded service of any alcohol to him. All of the witnesses to his aggressive behavior agree that it occurred only after he was refused a drink, and he was immediately ejected. Other than the sworn declarations of Triple Door eyewitnesses, Appellant has only hearsay knowledge as to any of Crossen's actions inside Triple Door. CP 38, Interrogatory answers 30 – 32. Hearsay is inadmissible and could not be used to defeat summary judgment, even had it been raised below. Only competent, admissible evidence can raise an issue of fact. *King County Fire Prot. Dist. v. Housing Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Thus, *if* there were any fault for serving Crossen while he was already visibly under the influence, there is no evidence that GinSing was aware of any propensity for violence at that time; it cannot be held liable for a subsequent assault on Appellant because there is no evidence that GinSing served alcohol to Crossen *after* any assaultive behavior.

Appellant's discussion of studies and data sources regarding consumption of alcohol and related blood alcohol levels, *Amended Opening Brief*, p. 34-40, is objectionable both because it was never raised before the trial court; and because those sources fail to raise any genuine issues of fact. Appellant attempts to work backward from Crossen's

testimony about his consumption to establish both his appearance and his blood alcohol levels, relying on *Faust*. But *Faust* is not on point.

Faust held that BAC evidence can corroborate observations in order to establish a triable issue of fact regarding overservice. But Appellant wants to *assume* service, and then use testimony regarding consumption to argue what his appearance and BAC must have been at the time of the assumed service. Appellant lacks proof of any service of alcohol, and proof of Crossen's appearance at the time of any hypothetical service. It is grasping at straws to assert that "Crossen's blood alcohol level was over .30 before he ever arrived at the Triple Door." *Amended Opening Brief*, p. 38. Even if his BAC at another time were relevant, which it is not, Appellant's reliance on alleged "commonly available scientific data concerning blood alcohol rates" is misplaced. Appellant offers no expert evidence as to the validity of such data, or that such data is in fact "commonly available" and "scientific." Appellant's discussion of "typical" alcohol content in men and women lacks any showing that Crossen himself is "typical." But GinSing had no opportunity to object to any of this, and the trial court had no opportunity to rule on its inadmissibility, being raised for the first time on appeal.

Moreover, in *Purchase v. Meyer*, 108 Wn.2d 220, 737 P.2d 661 (1987), the Washington Supreme Court held that, "the settled rule in this

state ... is that a person's sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal." *Id.* at 226. The Court reasoned that it does not follow that a certain BAC level at one time means that a person was obviously intoxicated [visibly impaired is now the standard] when an intoxicating beverage was sold to that person. *Id.*

The *Purchase* court also noted that "the heavy drinker may still not appear intoxicated even with a blood alcohol level above .20%." Here, Crossen admitted to consuming 6-12 beers every day. CP 87, p. 23:18-23. Appellant has no evidence, and cannot merely speculate, at what level Crossen would display visible signs of intoxication, given his heavy daily consumption at that time. Even if it were properly raised, appellant's liquor liability theory simply raises no issues of fact warranting reversal of the trial court.

Triple Door employees did exactly what they were supposed to do upon observing a visibly impaired patron – they refused his request for a drink - and they dealt with the situation appropriately when that patron became aggressive toward another patron by ejecting him. GinSing fulfilled its statutory duty as a liquor vendor by refusing to serve Crossen after noting his visible intoxication, and it fulfilled its common law duty to protect its patrons by ejecting Crossen when he became angry at being

refused service.

e. Appellant's Assignments of Error are unsupported by argument or authority.

Appellant lists four assignments of error, but fails to relate the asserted errors to any specific portion of the record before the trial court. This is fatal to her appeal. Conclusory assertions that the trial court erred in various ways, without identification of how they warrant reversal, should not be considered. Mere argumentative assertions or speculation are insufficient to avoid summary judgment at the trial court. *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). They should not result in reversal on appeal.

Appellant claims that the trial Court disregarded "numerous factual disputes" in dismissing her claims against GinSing, *Assignment of Error 1*, but does not recite what those factual disputes are and how they defeat summary judgment. This court need not speculate as to what they are, when Appellant has not seen fit to devote any argument to them in her *Amended Opening Brief*.

Appellant also claims that the trial court erred in limiting analysis of GinSing's liability to appellant's alleged status as a business invitee. *Assignment of Error 2*. But once again, appellant offers no discussion showing that the trial court did limit its analysis in this manner, or of how

this constituted error, leaving the Court of Appeals to speculate. Appellant asserts, without any authority, that she was a business invitee at the time of her assault. Had some authority been offered, either below or in the *Amended Opening Brief*, this court might have reason to consider whether that status applied, and if so, whether it raised a duty owed by GinSing in favor of appellant. Without any facts or authority to support the bald allegation of this status, there is no basis to remand the issue to the trial court.

In *Assignment of Error 3*, appellant claims that the trial court erred in disregarding testimony from plaintiff's expert regarding GinSing's negligence. But the record reflects that the Naccarato declaration was in fact listed in the materials reviewed and considered by the trial court. CP 205. It is therefore appellant's burden to show how that declaration might defeat summary judgment, particularly in light of the fact that it is the court's task to determine the existence of a legal duty as a question of law. *Keates v. City of Vancouver*, 73 Wn.App. 257, 265, 869 P.2d 88, *review denied*, 124 Wn.2d 1026 (1994). An expert's declaration offering an opinion on a party's negligence is not determinative; the Court must first find the existence of a legal duty. The trial court expressly considered the Naccarato declaration, as this Court can, but neither court is bound to accept his opinion on the existence of a duty.

In *Assignment of Error 4*, appellant asserts that the trial court erred in concluding that there was no issue of fact regarding Crossen's intoxication. Again, appellant offers no argument supporting this assertion. Crossen's intoxication is not relevant to any material issue unless appellant first shows that GinSing owed a duty to her on the sidewalk outside the Triple Door. Unless that duty is established, and until it is shown that the duty depends in some way on Crossen's intoxication, the fact of Crossen's level of intoxication is not a material fact upon which the outcome of the litigation depends. If GinSing had no duty to protect appellant outside on the public street, then Crossen's intoxication is not material. No fact relating to Crossen's assault on plaintiff would be material without the requisite showing of a legal duty to protect her from it.

f. Appellant's "Issues Pertaining to Assignments of Error" are specious, and do not warrant reversal of the trial court.

Several of Appellant's stated issues are not germane to this appeal, because they relate to liquor liability issues which were not raised at the trial court by any of Appellant's pleadings. They should therefore be disregarded. RAP 2.5(a).

The "issues" stated are phrased in a misleading way, using conclusory terms and assuming alleged facts in appellant's favor as the foundation for the issues raised. An example is seen in appellant's first

stated issue: "Does the appellant's expert testimony present an independent basis for liability, with respect to the duty owed to a business invitee, once a danger becomes open and obvious?" *Amended Opening Brief*, p. 1. The question assumes that an expert's declaration can establish the existence of a duty when, as shown above, this is a question of law for the Court, not for an expert. ER 702 permits an expert's testimony where it "will assist the trier of fact to understand the evidence or to determine a fact in issue;" nothing in the evidence rules allows an expert to determine a question of law. This question also assumes that appellant had the status of a business invitee, and that the "danger" posed by Mr. Crossen was "open and obvious." The appellant's status, the danger posed by Crossen, and whether such danger was apparent are all facts in dispute. The phrasing of appellant's issue assumes them all while appellant has done nothing at the trial court level to address them. This is not a statement of an issue, it is pure argument, which belongs elsewhere in appellant's brief.

Each of the remaining issues stated by appellant is similarly presumptuous and flawed. They assert issues relating to liquor liability and *Faust*, which were not properly raised below ("Issues" 2, 3). They assert issues calling for extension of liability beyond the defendant's premises, or extension of liability for another's criminal act, contrary to case law cited by GinSing, without any discussion of contrary case law or

rationale supporting extension of existing law ("Issues" 4, 5, 6).

Finally, and astoundingly, "Issue" 7 asks whether this appeal may go forward in the absence of a co-defendant. Appellant questions the validity of her own appeal! This "issue" has nothing to do with any assignment of error, as required by RAP 10.3(a)(4). It has nothing to do with any issue before the trial court at summary judgment, and GinSing can think of no reason why Crossen's failure to defend himself would affect this appeal. But more to the point, it is puzzling why appellant would question whether this appeal may go forward when she filed the appeal. However, if appellant questions whether we can proceed because the remaining defendant, Crossen, has not defended himself and cannot be located, GinSing has no objection to dismissal of this appeal.⁵

g. Appellant's additional briefing violates Commissioner Verellen's ruling and should be stricken and disregarded, with sanctions imposed against appellant's counsel.

A comparison of appellant's initial opening brief with the amended version shows that the latter contains discussion and authorities not raised initially, at pages 29-34. But the new material does not address the limited issue for which leave to amend the initial opening brief was granted.

⁵ This may be the only "issue" actually affected by the entry of a default judgment against Brad Crossen by the trial court. That judgment removed any question of whether Crossen should be a party to the appeal, or whether proceedings were sufficiently final below to allow appellate review.

Further comparing the amended version with appellants briefing to the trial court in opposition to summary judgment shows that these arguments and authorities were not raised before the trial court. See, CP 65 - 77 and 152 - 157.

Appellant's amended brief thus contains argument and discussion which is improper and violates Commissioner Verellen's ruling. Amended briefing by appellant was to be limited solely to the impact of the default judgment on the assignments of error raised in the initial opening brief. Appellant has instead briefly discussed the entry of the default judgment in her Statement of the Case (at pages 27-28 of her *Amended Opening Brief*), but then added lengthy excerpts from various cases and a treatise on tort law, at pages 29-34, pertaining solely to premises liability.⁶ Nothing in the additional material relates in any way to the impact of the default judgment on appellant's assignments of error.

Commissioner Verellen specifically limited the scope or content of additional briefing that could be included in appellant's amended brief. Appellant has violated that limitation. Under RAP 10.7, "[t]he appellant court will ordinarily impose sanctions on a party or counsel for a party

⁶ Appellant has, of course, expressly stated that "this is not a premises liability action," CP 153-55, raising the question of why it was so important to amend the Appellant's Brief to add discussion and excerpts pertaining to premises liability cases, knowing that doing so would violate Commissioner Verellen's order.

who files a brief that fails to comply with these rules." Implicit in RAP 10.7 is its application to a violation of a Court Commissioner's ruling granting limited leave to amend the initial Appellant's Brief and exceed the page length limit of RAP 10.4(b).⁷ The limitation imposed was clear; it is equally clear that appellant's counsel flagrantly disregarded that limitation and took the opportunity to add several pages of argument and authorities apparently omitted in the original brief, but having nothing whatever to do with the entry of the default judgment at the trial court. As a result, an order imposing sanctions on appellant's counsel under RAP 10.7 is justified, and at a minimum should consist of payment of the time expended by respondent's counsel in reviewing, analyzing and responding to Appellant's *Amended Opening Brief*. If granted, respondent will file an appropriate affidavit regarding these fees in accordance with RAP 18.1(d).

Even if appellant had discussed how the entry of the default judgment might affect her assignments of error, such argument would not be properly considered by this Court. Review of a ruling on a motion for summary judgment is strictly limited to the record before the trial court at the time of the motion for summary judgment. RAP 9.12; *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849

⁷ See also, RAP 18.8 and 18.9 regarding waiver of rules and sanctions for violation of rules.

P.2d 1201 (1993). The record at that time did not contain any default order or judgment, so no issues could possibly be raised in this appeal by the entry of that judgment well after the trial court entered its order dismissing GinSing.

V. CONCLUSION

GinSing argued before the trial court that it had no duty which extended to appellant as a member of the public walking down the public sidewalk, to protect her against a criminal assault by Brad Crossen, even though it had ejected him from its night club several minutes earlier. The trial court agreed, and the order dismissing appellant's claim against GinSing was correct. The law imposes a duty on a vendor of alcohol to avoid overserving, for the protection of others who may be injured by a drunk driver. Protection of other patrons against assaultive behavior has been applied only within the vendor's premises, and only with foreknowledge of violent propensities, with rare exceptions not applicable here. Appellant does not even attempt to show why current law should be extended to the facts in our case. Crossen's assault happened so quickly that even appellant could not take any action whatever to avoid being grabbed and lifted off the ground. Yet, she seeks to impose a duty on GinSing to prevent the assault somehow, after he was ejected from the premises and was observed to be calm.

GinSing met its duty to other patrons when it identified Crossen as visibly under the influence and refused to serve him a drink. It met its duty when it ejected him after he became angry as a result. It met its duty when GinSing's employee continued to watch Crossen to prevent re-entry and a possible repeat confrontation inside the premises. GinSing had no duty to hold or restrain Crossen outside until police arrived – and arguably would have opened itself up to liability for false imprisonment or any resulting injury had it attempted to do so.

Appellant invited the court to disregard premises liability theories of liability, and should not claim error on appeal because the trial court found no duty under such a theory. No other theory of liability, whether under negligence or liquor liability, has been supported with any authority or evidence.

Appellant simply cannot support the existence of a duty owed to her by GinSing under the relevant facts of this case. And the entry of a default judgment against Brad Crossen, after all claims against GinSing had been dismissed, has no bearing on any issue raised in this appeal. Accordingly, the trial court's dismissal of her claim against GinSing was correct and should be affirmed.

* * *

* * *

Respectfully submitted on this 21st day of June, 2011.

WOOD SMITH HENNING & BERMAN, LLP



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No. 66101-9-I

**WASHINGTON STATE COURT OF APPEALS
DIVISION 1**

**TAYNA OSHATZ,
Appellant,**

vs.

**GINSING,LLC, dba THE WILD GINGER and
THE TRIPLE DOOR,**

Respondent(s)

**CERTIFICATE OF SERVICE
Of
RESPONDENT'S AMENDED OPENING BRIEF**

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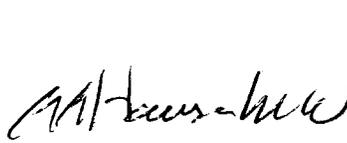
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DIVISION 1
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CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I mailed a true and accurate copy of Respondents ' Amended Opening Brief to the following:

Eugene Bolin
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Dated this 21st day of June, 2011, at Seattle,
Washington.



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