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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

JESSICA SIMPSON,

Appellant/Plaintiff,

v.

LINDA GIPSON and JOHN DOE GIPSON, husband and wife, and the marital community composed, thereof,

Respondent/Defendant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie Churchill

REPLY BRIEF OF APPELLANT

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A. <u>ARGUMENT</u>

Respondent argues in her Brief that Appellant was barred by res judicata from bringing a claim against Respondent Gipson because (1) Appellant's claim against Whidbey Island Hospital, Respondent's employer, was dismissed and (2) the jury in Respondent's criminal case found her not guilty. But Appellant's previous claim against Whidbey Island Hospital does not have preclusive effect here because Ms. Gipson stepped outside of the scope of her employment when she intentionally assaulted Appellant. Consequently, the previous ruling that Whidbey Island Hospital was not negligent does not bar Appellant from pursuing Respondent for her intentional tort. Similarly, the not-guilty verdict for Respondent in her criminal trial has no effect on her civil liability. In fact, the finding of probable cause for criminal assault points *towards* civil liability, not away from it. As a result, Appellant's claims are not barred by res judicata and the trial court should have allowed her time to prepare and conduct discovery before ruling on a dispositive motion.

1. <u>Respondent was acting outside of the scope of her employment in intentionally choking Appellant</u>

As Respondent admits, "the issue in the present case is one solely of law based upon plaintiff's very own pleadings." Resp't Br. 21. The Court should find, as a matter of law, that if Respondent was acting outside the

scope of her employment, Appellant has a viable cause of action. The previous cases dealing with these facts have no preclusive effect on this case, and Appellant should have had the opportunity to conduct discovery and investigation to prove it.

Generally, if an employee or agent is acting within the scope of employment when he or she commits a tort, both the employee and the employer are liable. Although the employer is responsible even if the employee disregards his instructions under *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), an employer avoids liability if the employee substantially deviates from his employment and acts for personal reasons instead. Such deviation is known as a "frolic." *See, e.g., State v. O'Neill*, 103 Wn.2d 853, 859, 700 P.2d 711 (1985). In the motor vehicle collision context:

> If the work of the employee creates the necessity for travel, he may be in the course of his employment though he is serving at the same time some purpose of his own; but if the work for the employer had no part in creating the necessity for travel, and the journey would have been made though no business was transacted for the employer, or would not have been made if the private purpose was abandoned, the journey may be regarded as personal and there would be no employer liability.

McNew v. Puget Sound Pulp & Timber, 37 Wn.2d 495, 499, 224 P.2d 627 (1950). An employee remains within the scope of his employment if he

would have taken the same course of action regardless of his personal needs and benefits. *Rahman v. State*, 170 Wn.2d 810, 246 P.3d 182, 185 (2011).

If an employee's actions benefit both himself *and* his employer, both will be held responsible "unless it clearly appears that the employee could not have been directly or indirectly serving his employer." *McNew*, 37 Wn.2d at 497-498. This rule is interwoven with the doctrine of respondeat superior, "which is characterized by a right of control." *Poundstone v. Whitney*, 189 Wn. 494, 500-501, 65 P.2d 1261 (1937). Because the employer derives benefits from the employee's actions, it is the employer who is held responsible for the results of those actions. However, as this Court explained in *Kuehn v. White*, 24 Wn. App. 274, 278, 200 P.2d 679 (1979):

> Where the servant's intentionally tortious or criminal acts are not performed in furtherance of the master's business, the **master will not be held liable as a matter of law even though the employment situation provided the opportunity for the servant's wrongful acts** or the means for carrying them out.

One poignant example of the line demarcating the scope of a personal frolic is *Kyreacos v. Smith*, 89 Wn.2d 425, 572 P.2d 723 (1977). In that case, a police detective killed a man he thought had interfered with the detective's investigation by himself murdering a witness. Despite the fact that the detective's employment provided the opportunity for the

murder to take place, and the fact that the detective would never have come in contact with the victim if not for his investigation for the City of Seattle, the court affirmed the dismissal of the plaintiff's claim against the City on summary judgment because the officer was acting for his own reasons.

This case has a similar fact pattern to *Kyreacos*, and should have the same outcome. Respondent Gipson, despite coming into contact with Appellant through her employment for Whidbey General Hospital, stepped outside of the scope of that employment by intentionally choking Appellant. Respondent committed this intentional tort for her own personal reasons, just like the detective in *Kyreacos* killed for his own reasons. As a result, just as the City could be dismissed in *Kyreacos* without absolving the detective of liability, so Whidbey General Hospital can be dismissed from the case without absolving Respondent Gipson of liability.

Unfortunately, Appellant did not have the opportunity to make this argument at the trial court level. The trial court did not allow time for briefing on the topic, nor oral argument, in the four days between when Appellant hired counsel and the case was dismissed on summary judgment. More importantly, Appellant never had the opportunity to conduct discovery and investigation into Respondent's mechanism and motive in choking her. Deposing Respondent Gipson or having her answer interrogatories or requests for admission would likely have produced

evidence sufficient for Appellant to overcome summary judgment. But Appellant was unable to make this argument at the trial court, which deprived her of her fundamental right "to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

The trial court should have allowed Appellant the opportunity to conduct this discovery and continued the case under CR 56(f).

2. **Respondent's not-guilty verdict in her criminal case has no bearing on her civil liability**

It should go without saying that a not-guilty verdict in a criminal case has no preclusive effect in a subsequent civil case on the same facts. The jury found Respondent not guilty of criminal assault in the fourth degree. This means that the jury did not find evidence that Respondent *criminally* assaulted Appellant *beyond a reasonable doubt.* Appellant's civil case were to go to the jury, the question would be whether it *is more likely than not* that Respondent committed *civil* assault, battery, and infliction of emotional distress. There is no logical inconsistency in holding Respondent civilly liable but finding her not guilty in a criminal case, even where the civil cause of action is intentional. Criminal liability does not include negligence, gross negligence, or intentional tortious

conduct that does not rise to the level of criminality.

Nor does the jury's special finding that Respondent's force was lawful have a preclusive effect because the issue in front of them was Respondent's criminal liability, not her civil liability. These are two different questions. Respondent attempts to tie Appellant to her position in her case against Whidbey General Hospital, which was that Respondent Gipson *was* acting within the scope of her employment when she choked Appellant. But Appellant's "argument should not be prejudiced because she asserted alternative theories of liability." *Woo v. Fireman's Fund Ins. Co.*¸161 Wn.2d 43, 164 P.3d 454, 474 (2007). Appellant should be allowed to assert and explore her alternative theory of liability, which is that Respondent acted in a way that was intentional and tortious but not criminal or within the scope of her employment. The trial court foreclosed her opportunity to do so, and that decision should be overturned.

B. <u>CONCLUSION</u>

Respondent contends that "we could have discovery for a hundred years and spend thousands of dollars and it would not make any difference!" Resp't Br. 19. Respondent's hyperbole is appreciated, however, ineffective – it overlooks the unavoidable importance of the need for discovery, and more importantly, the constitutional need for due process and effective assistance of counsel which are basic tenants of the Washington and U.S.

Constitutions. In our system of justice, cases are not dismissed for their appearances at the outset. If a plaintiff alleges a viable claim, she has the right to conduct discovery and investigation without having her claim dismissed. In this case, Appellant was denied the chance to conduct discovery.

The Island County Superior Court abused its discretion in granting Respondent's Motion for Summary Judgment while denying Appellant's request for a continuance. Neither Respondent's not-guilty verdict in her criminal trial nor a previous court's dismissal of Respondent's employer in a civil suit preclude Appellant from bringing a claim against Respondent for tortious conduct beyond the scope of her employment. The trial court should have continued the case and allowed Appellant the opportunity to conduct discovery of the facts surrounding Respondent's conduct.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

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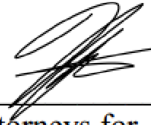

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