

63407-1

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No. 63407-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

NICHOLAS ENSLEY,

Plaintiff/Appellant,

v.

STEPHAN MOLLMANN, *et al.*,

Defendants,

and

TIMOTHY LYLE JOHNSON and "JANE DOE"
JOHNSON, husband and wife, and the marital community
composed thereof, dba RED ONION TAVERN,

Defendants/Respondents.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff/Appellant Nicholas Ensley (“Ensley”) was injured by a drunk driver in a tragic accident and filed a lawsuit to recover damages. He settled with all but one of the numerous defendants he named in his lawsuit. He has been trying to recover sums from the remaining defendant, Respondent Timothy Johnson d/b/a Red Onion Tavern (“Red Onion”), without success for almost four years. The only evidence offered by Ensley to suggest the driver was “apparently intoxicated”¹ was inadmissible hearsay. Therefore, the trial court properly dismissed Red Onion on summary judgment in April 2007.

Since that time, Ensley has filed an array of desperate motions (and even commenced a second lawsuit, which is pending on appeal in this Court) in belated attempts to assert new theories against Red Onion and its employee. The trial court even admonished and sanctioned Ensley’s counsel for asserting arguments not well grounded in fact nor supported by the law. CP 886-887.

Plaintiff had the choice to sue either Red Onion or its employee, or both. Plaintiff chose to sue Red Onion only, presumably for its “deep

¹ A commercial establishment can be held liable for damages caused by a drunk driver if there is evidence “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*.” *Faust v. Albertson*, --- Wn.2d ---, 211 P.3d 400, 403 (2009) (emphasis added).

pockets.” Ensley had a full and fair opportunity to come forward with evidence and legal theories against Red Onion, but was unable to do so.

For the reasons discussed herein, Red Onion respectfully requests that this Court affirm the summary judgment order, as well as the numerous additional orders Ensley identifies in his appeal.

II. STATEMENT OF THE CASE

A. The 2005 Motor Vehicle Accident and This Lawsuit in 2006.

Ensley and Rebecca Humphries (“Humphries”) spent the evening of March 30, 2005 drinking alcoholic beverages together. Shortly after leaving a third bar, during the early morning hours of March 31, 2005, Humphries drove her motor vehicle into two parked cars. CP 274. Ensley, who voluntarily chose to ride as a passenger in that vehicle, suffered injury in the accident. CP 274. On May 19, 2006, Ensley filed a lawsuit in an effort to collect damages from Humphries and the three commercial hosts: Impromptu Wine Bar (“Impromptu”); Red Onion; and Twilight Exit. CP 1-18.

Ensley alleged that the commercial hosts served alcoholic beverages to Humphries while she was apparently intoxicated. CP 35-47. Specifically, Ensley alleged that Red Onion was vicariously liable for its employee Clifford Pitcher’s (“Pitcher”) overservice of alcohol to Humphries. Even though Ensley’s theory against Red Onion centered

around Pitcher, Ensley did not name Pitcher as a defendant in the lawsuit. *See* CP 1-18.

It is undisputed that on the evening of the accident, Humphries was at Red Onion less than thirty minutes during which she consumed less than one alcoholic beverage. CP 272-273. Ensley was unable to produce any witness testimony that Humphries appeared apparently intoxicated at the time of service at Red Onion.

B. The Trial Court Strikes Inadmissible Evidence and Then Dismisses Ensley's Claims Against Red Onion.

Under Washington law, a commercial host must have notice of a patron's apparent intoxication in order for a third party injured in a drunk driving accident to prevail on an overservice claim. *See, e.g., Barrett v. Lucky 7 Saloon, Inc.*, 152 Wn.2d 259, 273, 96 P.3d 386 (2004). Red Onion moved for summary judgment dismissal of Ensley's claims based upon eyewitness testimony from Ensley, Impromptu employee Daniel Ahern ("Ahern"), multiple Red Onion patrons, and Pitcher, who all confirmed that Humphries was not apparently intoxicated at Red Onion. CP 92-110.

Ensley opposed Red Onion's summary judgment motion by relying upon portions of Ahern's deposition testimony regarding an alleged conversation between Ahern and Pitcher at least two days after the accident. CP 264-288. When asked by Ensley's counsel whether

Pitcher said Humphries “looked a little glassy eyed” and “was in a condition where he would not have served her a beer,” Ahern replied “yes.” *See* CP 274-275. Pitcher, however, denied having even had this conversation. CP 92-110.

Within four hours business hours of receiving Ensley’s opposition, Red Onion filed a motion to strike Ahern’s account of Pitcher’s alleged statements as inadmissible hearsay. CP 436-441. The trial court considered the motion to strike on shortened time, thereby resolving the evidentiary issues before the summary judgment hearing. CP 465-67. Ensley argued that Pitcher’s testimony did not constitute hearsay because Pitcher was a “speaking agent” of Red Onion. CP 438. After considering all of Ensley’s opposing arguments, the trial court concluded on April 2, 2007, that Pitcher’s alleged statements were inadmissible. CP 465-470.

On April 6, 2007, the trial court held a hearing on Red Onion’s summary judgment motion. After extensive oral argument from the parties, the trial court ruled as a matter of law that Humphries did not appear intoxicated to those around her at the time of Pitcher’s service at Red Onion and granted Red Onion’s motion for summary judgment. CP 478-480. Ensley filed a motion for reconsideration of the trial court’s April 2, 2007 evidentiary ruling as well as its April 6, 2007 summary

judgment ruling. CP 481-495. In that motion, Ensley argued, for the first time, that Pitcher's alleged statements were not hearsay, because they were not offered to prove the truth of the matter asserted, but rather to imply the beliefs of the declarant. CP 481-495. The trial court denied Ensley's motion in an April 17, 2007 order containing detailed, thoughtful analysis. CP 506-507. On April 27, 2007, Ensley sought discretionary review in this Court. CP 508-521. Commissioner James Verellen denied Ensley's motion on June 25, 2007.²

C. **Ensley's Numerous Attempts to Circumvent the Trial Court's Dismissal of Red Onion.**

After this Court declined to address the summary judgment dismissal of Red Onion on discretionary review, Ensley filed six motions in three different courts in an effort to collect damages from Red Onion despite the summary judgment dismissal. Over a span of two years following the April 2007 dismissal of Red Onion, Ensley sought various forms of relief from two different trial courts and from this Court.³ Ensley's numerous attempts to indirectly "undo" the trial court's summary judgment order are described below.⁴

² See Commissioner James Verellen's June 25, 2007 order, entered in *Ensley v. Red Onion*, Court of Appeals Cause No. 59918-6.

³ A timeline of these motions is attached hereto at the end of this brief.

⁴ Red Onion has attached as appendices A through G a copy of the docket and certified copies of orders entered in the second lawsuit, and asks this Court to take judicial notice of those lawsuits and developments related to this case that will assist in a fair

1. After Red Onion was Dismissed, Ensley Seeks to Join Red Onion's Bartender as a Defendant to the Lawsuit.

On November 21, 2007 – over two years after commencing his lawsuit against Red Onion, and just months before trial was scheduled to begin – Ensley asked the trial court for permission to amend his complaint to add Pitcher as a defendant to the lawsuit. Red Onion opposed such motion. CP 583-616; CP 624-633. Ensley offered no explanation as to why he elected not to name Pitcher as a defendant from the outset, or why he didn't move to amend his complaint earlier. On December 5, 2007, the Court denied Ensley's motion based on undue delay and out of fairness to the remaining defendants. CP 677-678.

2. Ensley Files a Separate Lawsuit Against Pitcher.

Two weeks after the trial court rejected Ensley's attempts to add Pitcher to this lawsuit, Ensley commenced a separate lawsuit against Pitcher only. CP 677-678; *see Ensley v. Pitcher*, King County Superior Court Case No. 07-2-39823-6 SEA (hereinafter "the second lawsuit" or

resolution of the issues on appeal. *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (explaining that appellate courts may take judicial notice of the record in proceedings "engrafted, ancillary, or supplementary to a pending case"); *see also* RAP 9.11(1) (allowing submission of evidence on appeal that will "fairly resolve the issues on review"). Should this Court wish to review briefing submitted in that matter, Red Onion will provide certified copies to this Court. Alternatively, that briefing has been designated in the clerk's papers of an appeal pending in this Court, *Ensley v. Pitcher*, Court of Appeals Cause No. 61537-8-I (consolidated with No. 61723-1-I).

“*Pitcher* lawsuit”).⁵ Remarkably, Ensley’s Complaint was identical to the one he was precluded from filing in the *Ensley v. Red Onion* lawsuit. Compare CP 35-47 (proposed amended complaint in this lawsuit), with Appendix B (complaint filed against Pitcher in second lawsuit).⁶

- a) The Trial Court Denies Pitcher’s Summary Judgment Motion, and This Court Grants Discretionary Review.

On January 15, 2008, Pitcher moved to dismiss Ensley’s claims as res judicata and/or barred by collateral estoppel, because the trial court in this case had already dismissed all claims against Red Onion with prejudice. Following oral argument on February 13, 2008, the trial court in the second litigation concluded that Ensley’s claims could go forward against Pitcher – despite the previous dismissal of Red Onion – because the evidence deemed inadmissible against Red Onion in the first lawsuit may be deemed admissible against Pitcher in the second lawsuit.⁷ On April 21, 2008, the trial court in that case certified its order for immediate appeal due to controlling questions of law as to which there is

⁵ See Appendix B.

⁶ See Appendix B.

⁷ See Appendix C.

substantial ground for a difference of opinion.⁸ On June 26, 2008, Commissioner James Verellen granted discretionary review.⁹

- b) The Trial Court in the *Pitcher* Lawsuit Declines to Add Timothy Johnson d/b/a Red Onion as a Defendant, and Ensley's Motion for Discretionary Review is Pending Before This Court.

On March 18, 2008, Ensley moved the trial court in the *Pitcher* lawsuit to add a new claim for vicarious liability against Timothy Johnson ("Johnson"), the owner and operator of Red Onion. Pitcher opposed the amendment on the basis that Ensley's claims against Red Onion were res judicata and/or barred by collateral estoppel. On March 31, 2008, the trial court in the second lawsuit denied Ensley's request for leave to amend the Complaint on the basis of res judicata and collateral estoppel.¹⁰ On April 10, 2008, Ensley filed a motion for reconsideration, which was denied on April 22, 2008.

Ensley then sought discretionary review of the trial court's order denying Ensley's motion to amend complaint and order denying reconsideration, pursuant to RAP 2.3(b)(1) and RAP 2.3 (b)(2). Commissioner Mary Neel heard oral argument on June 27, 2008. Via July 11, 2008 order, Commissioner Neel consolidated Ensley's motion

⁸ See Appendix D.

⁹ See Appendix E.

¹⁰ See Appendix F.

for discretionary review with Red Onion's motion for discretionary review and passed the decision to the panel.¹¹

- c) Oral Argument Took Place in This Court on June 8, 2009.

The parties submitted their briefs on the merits on the issues raised by Pitcher. A three-judge panel of this Court¹² heard oral argument on June 8, 2009.¹³ This Court's decision is currently pending.

3. Ensley Files Another Motion in This Case, and the Trial Court Admonishes and Sanctions Ensley's Counsel.

More than one year after the trial court dismissed Red Onion from the lawsuit in this case, on July 21, 2008, Ensley filed a CR 60(b) motion asking the trial court to vacate the order granting motion to strike, the order granting Red Onion's motion for summary judgment, the order denying Ensley's motion to amend complaint, and to grant his motion for a new trial date. CP 682-775. In Ensley's pleadings, he accused Pitcher and his counsel of misleading by omission, misrepresentation, and improper use of procedure. CP 682-775. Red Onion opposed such motion based on Ensley's failure to satisfy CR

¹¹ See Appendix G.

¹² The panel in *Ensley v. Pitcher* includes Judges Agid, Appelwick, and Lau.

¹³ This Court's oral argument recording in *Ensley v. Pitcher* is available at: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20090608 [last visited August 16, 2009]

60(b) and CR 11 requirements. CP 784-796. Red Onion also asked the trial court to impose sanctions. CP 784-796.

Via August 6, 2008 order, the trial court ruled that Ensley failed to satisfy CR 60(b) and that he had failed to produce evidence of the following: (1) misrepresentation and/or misconduct by Red Onion and/or its legal counsel under CR 60(b)(4); (2) a prospective judgment or “changed circumstances” under CR 60(b)(6); or (3) “extraordinary circumstances” under CR 60(b)(11). CP 842-844. On August 18, 2008, Ensley moved for reconsideration. CP 867-877. The trial court denied that motion on September 10, 2008. CP 1150-1151.

On September 11, 2009, the trial court imposed sanctions against Aaron Adee (“Adee”), Ensley’s counsel, because Ensley’s CR 60(b) motion was not well grounded in fact, nor supported by law. CP 886-887. Finding that there was no basis for Adee to accuse counsel for Red Onion of any lack of forthrightness or misrepresentation, the trial court admonished Adee concerning his responsibilities with respect to the court and opposing counsel as follows:

Lawyers are understandably, and appropriately sensitive when their integrity and professionalism is impugned. Defense counsel [for Red Onion] has a right to complain here and as a part of CR 11 sanctions, [Ensley’s] counsel is admonished concerning his responsibilities with respect to court and opposing counsel.

CP 886-887. The trial court also imposed \$500 in sanctions on Adee.

CP 886-887.

4. The Trial Court Affirms that the Summary Judgment Order Dismissed All Claims Against Red Onion.

On October 27, 2008, Ensley next moved to stay the underlying case pending the outcome of the *Pitcher v. Red Onion* appeal. CP 888-894. The trial court denied that motion on November 7, 2008. CP 938-939. Almost two years after Red Onion's summary judgment dismissal, Ensley inaccurately advised the trial court that claims remained against Red Onion and that the prior dismissal was only a partial summary judgment. CP 992-1023. Therefore, on December 1, 2008, Red Onion filed a motion to affirm summary judgment dismissal of Red Onion with prejudice. CP 940-945. Ensley opposed such motion. CP 992-1023. Via December 10, 2008 order, the trial court granted Red Onion's motion, affirming that no additional claims remained against Red Onion. CP 1084-1085.

D. Ensley Files the Current Appeal.

On March 31, 2009, over one year after Ensley and Humphries reached a settlement, Ensley dismissed Humphries, the remaining defendant. CP 1086-1088. On April 24, 2009, Ensley filed a notice of appeal to commence this direct appeal of the trial court's April 17, 2007 order granting Red Onion's summary judgment motion. CP 1089-1124.

Ensley also seeks review of eight other orders entered by the trial court.

See Opening Br. at 2-3.

III. ARGUMENT

A. Standards of Review.

Of the nine orders Ensley has appealed, most of them are discretionary trial court decisions that can be reversed on appeal only if Ensley demonstrates an abuse of that discretion.¹⁴ See, e.g., *Knies v. Knies*, 96 Wn. App. 243, 248, 979 P.2d 482 (1999). A trial court's decision constitutes an abuse of discretion only if it is "manifestly unfair, unreasonable, or untenable." *Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). This Court reviews *de novo* the order granting summary judgment, and any orders made in conjunction with that order. See *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. The Trial Court Properly Excluded Pitcher's Alleged Statements Because They are Inadmissible Hearsay.

1. Ensley Offered Only Out-of-Court Statements.

In response to leading questions by counsel for Ensley, at his deposition, Ahern claimed Pitcher made out-of-court statements, days

¹⁴ Ensley fails to even mention the standard of review, much less demonstrate abuse of discretion.

after the accident, regarding Humphries' physical appearance on the night of the subject accident. In an effort to avoid summary judgment, Ensley offered these statements to prove the truth of the matter asserted: that Humphries appeared intoxicated at the time of service at Red Onion. The trial court properly excluded Pitcher's alleged statements as hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless the proponent can identify an exception listed in ER 801(d). Here, Ensley concedes that Pitcher's alleged statements are out-of-court statements offered to prove the truth of the matter asserted, but alleges that an exception applies. As discussed herein, none of the cited exceptions allow a court to admit the hearsay statements as evidence.

2. ER 801(d)(2) Does Not Apply Because Pitcher Was Not a "Speaking Agent."

Initially, the only exception identified by Ensley was admission by a party opponent under ER 801(d)(2). Commonly known as the "speaking agent" rule, ER 801(d)(2)(iii) and (iv) provide that a statement is not hearsay, even though offered to prove the truth of the matter asserted, if it is offered against a party and is (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant acting within the scope of his authority to make the statement for the party. The party seeking to admit the

evidence bears the burden of establishing agency and the declarant's alleged authority to speak. *Paradiso v. Drake*, 135 Wn. App. 329, 339, 143 P.3d 859 (2006). Ensley failed to meet this burden.

Instead, Ensley incorrectly attempted to equate Pitcher's status as an agent of Red Onion, for the purposes of vicarious liability, with the status of a "speaking agent." As support for his argument, Ensley cites to *Lockwood v. AC&S*, 109 Wn.2d 235, 744 P.2d 605 (1987). At issue in *Lockwood* were notes written by an asbestos manufacturer's director of environmental affairs. The Court concluded that the notes qualified as admissions by a party opponent because it was reasonable to infer that the employee, as the manufacturer's health official, was authorized to make statements about asbestos health issues on the manufacturer's behalf. By contrast, Pitcher was a part-time bartender at the Red Onion. He was not an officer, a director, a shareholder, or an official. Rather, he served wine and beer, and had no authority as a speaking agent.

Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 618 P.2d 96 (1980) is instructive on this point. At issue in *Barrie* was an affidavit setting forth a telephone conversation in which a bar manager allegedly said that the patron appeared intoxicated and "smashed." The Supreme Court explicitly rejected the argument that the statement was an admission under ER 801(d)(2) because nothing in the record showed that

the bar manager was authorized to make the statement. *Barrie*, 94 Wn.2d at 644.

Given that there is nothing in the record to show that Pitcher was authorized to make statements on behalf of Red Onion, the trial court correctly determined that Pitcher's alleged statements did not fall under ER 801(d)(2), because Ensley failed to establish that Pitcher, a part-time bartender, was a "speaking agent" for Red Onion. CP 468-470.

3. Pitcher's Alleged Statements are Direct Assertions and Therefore Qualify as "Statements" Under ER 801.

In his motion for reconsideration, Ensley abandoned his "speaking agent" theory in favor of new theories raised for the first time on reconsideration.¹⁵ Ensley cited to *State v. Collins*, 76 Wn. App. 496, 886 P.2d 243 (1995) for the proposition that Pitcher's alleged statements are not "statements" under ER 801, but rather evidence of Pitcher's "implied belief." In *Collins*, the court reviewed telephone calls referencing what appeared to be cocaine transactions. One caller said he wanted to pick up something and the other said she needed a "half." In

¹⁵ CR 59 does not permit a party to propose new theories of the case that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). A motion for reconsideration does not provide litigants with an opportunity for a "second bite at the apple." *Id.* Ensley's "new" legal theories were available to him prior to the trial court's ruling on Red Onion's motion to strike and Red Onion's motion for summary judgment. Ensley was not entitled to set forth additional legal theories just because his first theory proved unsuccessful. Nevertheless, the trial court considered Ensley's new legal theories and ultimately deemed them unpersuasive.

Collins, the truth of the callers' statements, that they really did need or want something, was not at issue. However, implicit in the callers' statements was the belief that they could get the drugs through the defendant. The state of mind of the callers was relevant in *Collins*, because state of mind evidence is circumstantial evidence of drug traffic, or the intent of a person to deliver drugs. The *Collins* Court ruled that the callers' statements did not fall under the "state of mind" exception to the hearsay rule, but still admitted the statements because they were not direct assertions. *Collins* noted that a hearsay statement must include an assertion, and that the statements at issue in *Collins* did not, hence they were not hearsay.

The trial court properly concluded that *Collins* is inapplicable to the facts at hand, because Pitcher's statements are direct assertions and therefore "statements" under ER 801. *See* CP 506-507. Ensley submitted Pitcher's alleged statements to prove the content of the statement; *i.e.*, that Humphries had "glassy eyes" at the time of service at Red Onion. This statement had to be true in order to be relevant to the issues before the trial court. If a statement has to be true in order to be relevant, it is being offered to prove the truth of the matter asserted and is objectionable as hearsay. Under these circumstances, the trial court

properly excluded Pitcher's alleged statements as inadmissible hearsay.

CP 506-507.

4. ER 803(a)(3) Does Not Apply Because Pitcher's Alleged Statements Do Not Describe Then Existing Emotions or Feelings.

Ensley also argued for the first time in his motion for reconsideration that Pitcher's alleged statements were admissible as non-hearsay under ER 803(a)(3). Ensley relied exclusively upon the case of *State v. Crowder*, 103 Wn. App. 20, 11 P.3d 828 (2000), in support of his proposition. In *Crowder*, the Court admitted most of the contested statements under ER 803(a)(3), the "state of mind" exception to the hearsay rule. ER 803(a)(3) allows hearsay statements of "...the declarant's then existing state of mind... but not including a statement of memory of belief to prove the fact remembered or believed..."

The trial court addressed this issue as follows:

[I]t is clear that the bartender made the statement some days after the events. It is then not a statement of a "then existing state of mind." Rather it is a statement of memory or belief, and not admissible under ER 803(a)(3).

CP 507. As Pitcher's alleged statements were made too late in time after the subject accident to be anything other than statements of memory or belief, the trial court properly concluded that they were not admissible under the "state of mind" exception.

C. **The Trial Court Properly Dismissed Red Onion on Summary Judgment.**

1. Commercial Host Liability: Applicable Legal Standards.

The Washington State Supreme Court has adopted the common law rule that commercial hosts are not liable for overserving patrons or for torts committed by patrons who consume alcohol. *Estate of Kelly v. Falin*, 127 Wn.2d 31, 36, 896 P.2d 1245 (1995) (citing *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 762, 458 P.2d 897 (1969)). The Court recognizes only two limited exceptions to this rule: (1) when a commercial host furnishes a minor with alcohol, it may be sued for injuries resulting from the minor's intoxication; and (2) when a commercial host serves alcohol to an *obviously* intoxicated patron it may be liable if that patron then injures or kills an innocent third party bystander. *Estate of Kelly*, 127 Wn.2d at 36-37. The Court has repeatedly refused to broaden these exceptions. *See Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989); *Purchase v. Meyer*, 108 Wn.2d 220, 223, 737 P.2d 661 (1987); *Shelby v. Keck*, 85 Wn.2d 911, 915, 541 P.2d 365 (1975).

A commercial host may be held liable under the second exception if it serves alcohol to an *apparently* intoxicated patron and that patron then injures or kills a third party in a drunk driving accident. *Barrett v. Lucky 7 Saloon, Inc.*, 152 Wn.2d 259, 273, 96 P.3d 386 (2004); RCW

66.44.200(1). According to the Court, “unlike the determination of something obvious, determination of something apparent requires at least some reflection and thought.” *Id.* at 268. “Apparent” is defined as “readily perceptible to the senses” and “capable of being readily perceived by the sensibilities or understanding as certainly existent or present.” *Id.* Firsthand observations are most valuable, and whether a person is “apparently intoxicated” or not is to be judged by that person’s appearance at the time of service. *Purchase*, 108 Wn.2d at 223; *Christen*, 113 Wn.2d at 488.¹⁶

Recently, in *Faust v. Albertson*, --- Wn.2d ---, 211 P.3d 400, 403-04 (2009), the Washington Supreme Court affirmed that prior cases interpreting the evidentiary burden a plaintiff must carry to defeat a defense motion for summary judgment, such as *Purchase* and *Christen*, remain good law. Specifically, the Court stated 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

¹⁶ The rationale behind this rule is as follows: “Although the person to whom alcoholic beverages are sold knows how much alcohol he or she has had to drink before entering an establishment and making a purchase, the seller ordinarily has no way of knowing that unless and until the purchaser becomes ‘obviously intoxicated.’” *Purchase*, 108 Wn.2d at 225. Furthermore, “the outward signs of intoxication may vary from person to person...” and that a heavy drinker may not appear intoxicated even with a blood alcohol level well above the legal limit. *Id.* at 225-26 & n.12. For these reasons, as well as other medically recognized variables in the way alcohol may react on the human body, the well settled rule in Washington remains that a person’s sobriety must be judged by the way the person appeared to those around her. *Id.* at 225-26.

overservice or by reasonable inference deduced from observation shortly thereafter.” *Id.* at 403.

The Court rejected the application of a new standard that would lower the evidentiary burden and rejected the sufficiency of blood alcohol content evidence by itself to prove “apparent intoxication.”¹⁷

2. The Trial Court Properly Found No Evidence of Humphries’ Apparent Intoxication at Red Onion.

In order to prevail on his overservice claim, Ensley was required to prove that Red Onion had notice of Humphries’ alleged apparent intoxication. The trial court record confirms that Humphries did not appear intoxicated to anyone around her at the Red Onion. CP 92-110. At no time did she become loud, slur her words, spill her drink, exhibit a lack of physical coordination, cause a disturbance, or give any other indication that she may have been intoxicated at the time of service. To the contrary, all of the first-hand witnesses were deposed and confirmed that Humphries appeared sober and in full control of her faculties. CP 478-480. Accordingly, the trial court correctly determined that Ensley’s claims against Red Onion failed as a matter of law. CP 478-480, 506-507, 1084-1085.

¹⁷ The *Faust* decision is instructive in that it reaffirms preexisting caselaw, but has limited applicability to the present case, because Humphries refused a BAC. Further, nothing in the *Faust* decision indicates it applies retroactively.

3. The Trial Court Properly Refused to Consider Hearsay Testimony as Proof of Apparent Intoxication.

As discussed in detail above, the trial court properly excluded Ahern's deposition testimony regarding Pitcher's alleged statements to him a few days after the accident on the basis of hearsay. At his deposition, Pitcher testified, consistent with every other witness, that Humphries did not exhibit any signs of intoxication at the time of service at Red Onion. CP 92-110.

Even assuming *arguendo*, that the trial court improperly excluded Ahern's testimony, Pitcher's alleged statements are still not sufficient, in themselves to raise an issue of fact because they are not "direct observational evidence" at the time of, or shortly after, the alleged overservice. Ahern's testimony did not specify whether Pitcher's alleged statements referred to Humphries appearance before, or after service of alcohol at Red Onion. In fact, his testimony is devoid of any specifics regarding the timing her alleged appearance. CP 274-275. The testimony of a witness two days or more after the service is insufficient to prove apparent intoxication. Further, Pitcher specifically denied having had any such conversation with Ahern after the fact. CP 92-110.

Ensley's claims against Red Onion would have still failed, had the Court admitted Ahern's testimony for any purpose other than establishing that Humphries was apparently intoxicated at the time of

service at the Red Onion. Washington law is clear. A commercial host will not be held liable for overservice of an adult, absent admissible evidence that the patron appeared intoxicated to those around her at the time of service. In order to prevail on an overservice claim against Red Onion, Ensley was required to produce evidence that Humphries exhibited signs of apparent intoxication at the time of service. If Pitcher's alleged statements were not offered for the purpose of proving the truth of the matter asserted, there is no eyewitness testimony that Humphries appeared intoxicated to those around her and the trial court properly dismissed Ensley's claim against Red Onion. Ensley offered no case law, controlling or otherwise, in support of his position that evidence of a witness's reflective belief, offered days after the time of service, is sufficient to raise an inference of apparent intoxication at the time of service.

4. The Trial Court Properly Found that Humphries' Prior Actions and/or the Number of Drinks Consumed By Her Did Not Raise an Inference of Apparent Intoxication at Red Onion.

Ensley relied solely upon *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), a case deemed "factually unique" by the Washington Supreme Court, in support of his argument that Humphries' actions prior to the time of service raised an inference of apparent

intoxication upon which to base a material issue of fact. *Christen*, 113 Wn.2d at 491; *see Faust*, 211 P.3d at 404; *Purchase*, 108 Wn.2d at 227.

In *Dickinson*, a plurality of the Court held that the trial court should have considered evidence of the number of drinks the tortfeasor consumed in determining whether he was obviously intoxicated. *See Dickinson*, 105 Wn.2d at 465. Although Washington courts have routinely recognized that a host does not have the benefit of knowing how much alcohol a person has had to drink or what he has done before entering the establishment, the *Dickinson* Court reasoned that after serving the tortfeasor 15-20 cocktails over a three to four hour period, the host should have been on notice of the need to more carefully scrutinize the tortfeasor's behavior for signs of intoxication. *Id.*

In the present case, Ensley presented no evidence to suggest that Red Onion had notice of Humphries' alleged intoxication at the time of service at Red Onion. The fact that it was later learned that she had consumed alcohol before arriving at Red Onion does not change this. Humphries did not exhibit any signs of intoxication to the bartender, to her companions, or to other Red Onion patrons. Second, unlike the host in *Dickinson*, Red Onion served Humphries only one drink in a 30 minute period. CP 272. There is no suggestion in *Dickinson* that the trial court should have (or could have) considered evidence of the

number of drinks consumed by, or observations of the tortfeasor prior to his arrival at the host's establishment. The trial court, therefore, properly distinguished *Dickinson* from the present case.

5. The Trial Court Properly Found that Subsequent Observations of Humphries Did Not Raise an Inference of Apparent Intoxication at Red Onion.

Subsequent observations of Humphries do not raise an inference that she appeared intoxicated at Red Onion, especially considering that she drank hard alcohol after leaving Red Onion. CP 273. The trial court, in ruling on a motion for summary judgment, must consider whether the tortfeasor patron consumed any alcohol after and independent of the commercial host's alleged negligent service. *Dickinson*, 105 Wn.2d at 464. If this is the case, subsequent observations do not raise an inference of obvious intoxication upon which to base a material issue of fact. *Id.*

Here, the record shows that Humphries drank multiple alcoholic beverages after leaving the Red Onion. CP 273. Accordingly, per Washington case law, subsequent observations of Humphries' behavior do not raise an inference of apparent intoxication at the Red Onion upon which to base a material question of fact. Thus, the trial court correctly determined that evidence of subsequent observations is insufficient to avoid summary judgment in favor of the Red Onion.

6. The Trial Court Properly Found that Humphries' DUI Arrest Did Not Raise an Inference of Apparent Intoxication at Red Onion.

Humphries' DUI arrest does not raise an inference that she was apparently intoxicated at the time of service at the Red Onion.

Washington courts reject a strict liability standard that measures obvious intoxication in terms of blood alcohol content. *See Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982) (evidence of a 0.19 BAC did not raise inference of obvious intoxication when firsthand observers could not testify driver appeared intoxicated); *Shelby*, 85 Wn.2d at 915 (0.15 BAC did not raise inference of obvious intoxication when firsthand observers could not testify driver appeared intoxicated). This rule was recently reaffirmed by the Washington Supreme Court in *Faust* ("jurors are not permitted to make an inferential leap of the 'driver's BAC was X, so he must have appeared drunk' type"). *Faust*, 211 P.3d at 404.

Like BAC results, evidence that Humphries was arrested for DUI is immaterial to whether she appeared intoxicated at the time of service at the Red Onion. A DUI arrest does not mandate a finding that the person was "apparently intoxicated" at the time the alcohol was served to that person. *Purchase*, 108 Wn.2d at 226. Further, as set forth above, the arresting officer's subsequent observations cannot raise an inference

of apparent intoxication as in *Dickinson*, because Humphries consumed alcohol at another establishment after leaving Red Onion. CP 273.

In *Purchase*, which was decided after *Dickinson*, a minor patron was served three margaritas over the course of several hours. The patron's friend, who walked her to her car, did not believe she was intoxicated and permitted her to drive. Sometime thereafter, the patron was involved in a motor vehicle accident. When considering the commercial host's liability, the Washington Supreme Court refused to consider the results of the blood alcohol test, the expert's opinion based upon the results, or the investigating officer's testimony as to the patron's appearance at the scene of a motor vehicle accident. *Purchase*, 108 Wn.2d at 226-27. According to the Court, such evidence was immaterial to whether the patron appeared "obviously intoxicated" to those around her at the time of service. *Id.*

Similarly, evidence of Humphries' arrest is immaterial to whether she appeared intoxicated to those around her at Red Onion. Like the patron in *Purchase*, the sobriety of Humphries must be judged by those around her at the time of service. This proves especially true in a case like this where Humphries admitted to being a heavy drinker. CP 92-110.

In this case, the trial court properly found there was no evidence that Humphries was “apparently intoxicated” at the time the Red Onion served her with a single alcoholic beverage. Humphries did not appear intoxicated to the bartender, her companions, or to other Red Onion patrons. Accordingly, Ensley’s claims against Red Onion were properly dismissed by the trial court as a matter of law.

7. The Trial Court Properly Found that the Expert Testimony Offered by Ensley Did Not Raise an Inference of Apparent Intoxication at Red Onion.

a) Dr. Hlastala’s Conclusory Opinions.

Ensley produced no admissible evidence that Humphries appeared intoxicated at the time of service at Red Onion. Without such evidence, the opinions of Ensley’s toxicology expert, Dr. Hlastala, regarding Humphries’ BAC constituted nothing more than speculation and were insufficient to create a question of material fact for purposes of summary judgment. Apparent intoxication is judged by the way the patron appeared to those around her, not by what a blood alcohol test subsequently reveals. *Purchase*, 108 Wn.2d at 226.

In *Purchase*, the Washington Supreme Court refused to consider the results of the patron tortfeasor’s BAC or the plaintiff’s expert’s opinion based upon the patron’s BAC. *Id.* at 226-27. Specifically, the Court refused to consider the expert’s affidavit purporting to determine

the patron's BAC at the time of service and then from that conclusion, determine what he claimed was the "obviousness" of her intoxication at that time. The Court concluded that the expert's opinion was speculative, suffering from "the same legal infirmities" as the inadmissible BAC results. *Id.* This approach has been affirmed by the Washington Supreme Court in subsequent cases, including recently in *Faust*, 211 P.3d at 405.

Further, Dr. Hlastala acknowledged that there was no evidence that Humphries exhibited even one sign of intoxication to those around her at Red Onion. Nevertheless, he speculated that "it is reasonable to conclude" that she would have exhibited signs of intoxication at Red Onion. CP 277. The trial court considered evidence from five witnesses present at Red Onion on the night of the subject accident. CP 92-110. Not one of the witnesses testified that Humphries appeared intoxicated at Red Onion. The trial court therefore properly concluded that Dr. Hlasta's testimony did not raise an inference of Humphries' apparent intoxication at Red Onion.

b) Dr. Rutherford's Conclusory Opinions.

The only way to establish overservice is through eyewitness testimony that the patron tortfeasor appeared apparently intoxicated at the time of service. Ensley attempted to circumvent his burden of proof

by producing evidence relating to Red Onion's business practices and procedures. Dr. Rutherford, an expert offered by Ensley on the issue of industry standards, speculated that if Red Onion had different policies and procedures and/or if Pitcher had a MAST permit, Red Onion would have detected that Humphries was exhibiting signs of apparent intoxication. CP 278. Not only are Dr. Rutherford's statements speculative, they contradict the testimony of those around Humphries at Red Onion on the night of the accident, which confirms that no one saw Humphries exhibiting signs of intoxication.

The trial court properly found that Dr. Rutherford's testimony was more properly directed towards breach of the duty of care, not to establishing that Humphries appeared apparently intoxicated at the time of service at Red Onion and that his testimony did not raise an inference of Humphries' apparent intoxication at Red Onion.

8. Public Policy Supports the Dismissal of Ensley's Claims Against Red Onion.

By pursuing liability theories against Red Onion with no supporting evidence of apparent intoxication at the time of service, Ensley effectively asks this Court to adopt a theory of strict liability to be applied against Red Onion simply because Humphries was later involved in an auto accident. Ensley's request is equivalent to imposing a Dramshop Act on any bar that serves alcohol to a patron who is later

involved in an accident. The Washington Supreme Court has repeatedly rejected Ensley's theory of recovery.

Drunk driving is an unfortunate and costly problem facing our society. However, Washington courts should continue to stand steadfast in their refusal to sacrifice the concept of individual responsibility. As a general rule, commercial hosts are not liable for the actions of drunk drivers. The courts recognize certain limited exceptions to this rule, but must be careful not to let the exceptions overcome the rule. A rule to the contrary would absolve the real wrongdoer, the drunk driver, by spreading the risk and the costs to innocent business owners.

D. The Trial Court Properly Denied Ensley's Motion to Amend.

The standard of review of a trial court's denial of a motion to amend a pleading is manifest abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986). Pleadings may be amended only by agreement of counsel or by leave of court and the trial court has considerable discretion in determining whether amendment is proper. CR 15 (a).

In denying Ensley's motion to amend the complaint, the trial court considered several factors under CR 15, including but not limited to: (1) undue delay; (2) unfair surprise; (3) bad faith and/or dilatory motive on the part of the movant; (4) repeated failure to cure deficiencies

by amendments previously allowed; and (5) the futility of the amendment. *Caruso v. Local Union No. 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349-51, 670 P.2d 240 (1983). The trial court also considered the prejudice such amendment would cause the non-moving party. *Id.* at 350. Ultimately, the trial court denied Ensley's motion to amend stating:

This case has [been] before the court for a long time, there have been many motions including summary judgment motions and discovery issues-including trial continuances. It would not be fair to defendants who seek resolution of claims against them to extend this case for another round of discovery and motions this close to the trial date- which itself has been continued several times already.

CP 679.

1. The Trial Court Properly Found that the Amendment Would Have Caused Undue Delay.

A trial court has broad discretion to deny a motion to amend where a plaintiff causes undue delay in seeking an amendment. *See Del Guzzi*, 105 Wn. 2d at 888-89 (no abuse of discretion in denying motion to amend complaint where motion filed one week before summary judgment hearing); *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006) (no abuse of discretion in denying motion to amend complaint where plaintiff waited one month before summary judgment hearing and a year and a half after filing the initial complaint to amend);

Donald B. Murphy Contractors, Inc. v. King County, 112 Wn. App. 192, 49 P.3d 912 (2002) (no abuse of discretion in denying motion to amend complaint where motion filed one year after filing suit and 10 days before summary judgment hearing).

Further, when a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court must consider whether the motion could have been timely made earlier in the litigation. *Doyle v. Planned Parenthood*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982).

In this case, Ensley provided no explanation for his over two year delay in seeking to add Pitcher as a defendant to the trial court action, or for his decision to wait almost one year after Pitcher and Ahern's depositions to file the motion to amend. Ensley did not raise any personal claims against Pitcher prior to the April 2007 summary judgment hearing. Further, Ensley did not attempt to join Pitcher to the suit until eight months after Red Onion had been dismissed on summary judgment. Ensley should not be rewarded for his delay in seeking to amend the complaint for over two years.

The trial court agreed that there had already been many motions and trial continuances and that it would be unfair to extend the case yet again, where the trial date had already been continued several times. For

these reasons, the trial court properly exercised its discretion to determine that Ensley's motion to amend should be denied based on undue delay. CP 677-679.

2. The Trial Court's Denial of Ensley's Motion to Amend Can be Affirmed on Alternate Grounds.

In addition to undue delay, alternate grounds exist that warrant affirmance of the trial court's denial of Ensley's belated motion to amend the complaint. *See, e.g., State v. Sondergaard*, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997) (an appellate court may affirm on alternate grounds, as long as the record is sufficiently developed).

a) The Trial Court Could Have Found the Amendment Would Have Caused Unfair Surprise.

Unfair surprise results when a party who was previously aware of the factual basis for the proposed amendment raises new issues on the eve of trial. *Wilson v. Horsley*, 137 Wn.2d 500, 507, 974 P.2d 316 (1999). As discussed, Ensley had over two years from the original filing date and almost one year after Pitcher and Ahern's depositions to seek amendment to add Pitcher to the suit on a theory of his "personal liability." It would be unfair to have forced Pitcher and Red Onion to defend a case against Pitcher where the parties had proceeded all along on the basis that Pitcher was acting within the course and scope of his employment at Red Onion. In fact, Ensley's position throughout the

litigation had been that Red Onion was vicariously liable for the acts and/or omissions of Pitcher on the evening of the accident. Ensley should not have been allowed to surprise the parties with a new approach to the suit two months before trial and eight months after Red Onion had been dismissed as a matter of law (and had not participated in discovery or other pleading practice since that time). For these reasons, the trial court could have denied Ensley's motion to amend on the basis of unfair surprise.

- b) The Trial Court Could Have Found the Amendment was Made in Bad Faith and for Dilatory Motive.

Clearly, the trial court's granting of Red Onion's motion for summary judgment and the denial of Ensley's motion for discretionary review were the true reasons for Ensley's decision to file his request to amend to add Pitcher to the lawsuit. However, a party should not be allowed to amend simply because he received a prior adverse ruling.

Further, throughout the course of this matter, Ensley and his counsel have taken issue with the fact that Pitcher was being defended by counsel for Red Onion, alleging this resulted in an unspecified "conflict" situation. Red Onion suspected that Ensley hoped to create issues between Pitcher and Red Onion. Either or both of the above-mentioned motives were improper based upon the facts and the law in Ensley's

possession. The trial court, therefore, could have denied Ensley's motion to amend based on improper motive.

c) The Trial Court Could Have Found that Ensley Repeatedly Failed to Cure Deficiencies by Previous Amendments.

Ensley had already amended the complaint once before seeking to add Pitcher as a defendant. Ensley deposed Pitcher and Ahern almost one year before seeking amendment and could have sought to amend at that time. Ensley presented no factual or legal analysis suggesting that a claim for personal liability against Pitcher could not previously have been made, or that such claim was even appropriate given Pitcher's status as a Red Onion employee at the time of the alleged overservice. Thus, Ensley's motion to amend could have been denied by the trial court based on Ensley's failure to amend the complaint at an earlier time.

d) The Amendment was Futile.

A trial court need not allow an amendment that would not affect the result even if the amendment were allowed. *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 96 P.3d 413 (2004). On summary judgment, the trial court determined that Ensley had not proven that Humphries was apparently intoxicated while at Red Onion. This was a threshold determination which must be met prior to determining whether Pitcher was properly hired, trained, supervised or violated any

Liquor Control Board regulations. Because Ensley could not prove that Humphries appeared apparently intoxicated at the time of service at Red Onion, summary judgment was appropriate.

Red Onion opposed Ensley's motion to amend on the basis that if Ensley's claim against Pitcher was truly separate claim from those formerly made against Red Onion, a new round of discovery would be necessary, thereby resulting in prejudice to Red Onion. On the other hand, if Ensley was alleging that his "new" claims against Pitcher could be decided on the existing trial court record without additional discovery, then his motion to amend should have been denied based upon the futility of the proposed amendment, as all claims against Red Onion and its employees had already been dismissed. Therefore, the trial court could have denied Ensley's motion to amend based on futility.

- e) The Trial Court Could Have Found the Amendment Would Have Prejudiced Red Onion.

In determining whether prejudice exists, a court may consider any of the above-listed arguments. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). In this case, the amendment would have prejudiced both Red Onion and Pitcher because at the time of the amendment: (1) the trial date was only two months away; (2) the discovery cutoff was two weeks away; (3) a further trial continuance and a discovery extension would be warranted; (4) Red Onion had been

dismissed on summary judgment eight months earlier; and (5) Red Onion would have been required to incur fees and costs re-litigating the same facts and legal issues previously presented during the two years of litigation against Red Onion. Thus, the trial court could have denied Ensley's motion to amend based on clear and substantial prejudice to Red Onion and the remaining defendants to the suit.

E. The Trial Court Properly Granted Red Onion's Motion to Shorten Time.

1. Red Onion Demonstrated Good Cause for Shortened Time.

The trial court properly granted Red Onion's motion to shorten time because (1) Red Onion established good cause for the request to shorten time and (2) Ensley did not suffer any prejudice. *See* CP 465-467.

Where, as here, a plaintiff produces inadmissible evidence in response to a motion for summary judgment, the defendant may move to strike the inadmissible evidence at any time prior to the entry of the summary judgment order. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). In fact, motions to strike may be considered untimely if they are brought at the same time of the summary judgment hearing. Pursuant to CR 6(d), a trial court has discretion when ruling on a motion to shorten time. Red Onion demonstrated good cause

under LR 7(b)(9)(A) for its motion to shorten time; namely, that it would be more efficient for the trial court to rule on the motion to strike prior to Red Onion filing its reply in support of summary judgment. Early consideration of Red Onion's motion to strike ensured that the parties and the Court did not waste valuable resources analyzing inadmissible hearsay. The trial court correctly recognized that Red Onion should not be forced to use any of its limited five pages to respond to evidence that would be stricken from the record only two days later. The trial court's early ruling on the motion to strike allowed both parties to better direct their efforts at oral argument towards analysis of evidence which was admissible for purposes of summary judgment.

2. Ensley Did Not Suffer Any Prejudice.

In opposing a motion to shorten time, a party must establish that it would be prejudiced as a result. *See Zimny v. Lovric*, 59 Wn. App. 737, 801 P.2d 259 (1990). Prejudice in this context means a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to submit case authority or provide countervailing oral argument. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004).

Ensley failed to demonstrate any prejudice by Red Onion's request to shorten time. Red Onion properly filed its motion to strike

immediately after receiving Ensley's opposition to summary judgment. Red Onion served Ensley with its motion to strike less than four (4) business hours after it received Ensley's opposition to Red Onion's motion for summary judgment. In his opposition, Ensley did not argue that the motion caused him any undue hardship, time or cost. Instead, he took issue with the length of Red Onion's motion to strike and the fact that Red Onion did not "anticipate" that he would submit inadmissible evidence in support of his opposition.

Moreover, Ensley submitted timely responsive briefing to both Red Onion's motion to strike and Red Onion's motion to shorten time. Ensley claims for the first time on appeal that he had "only enough time to reference the arguments previously set forth within his response to Red Onion's motion for summary judgment." However, Ensley ignores that he submitted additional legal theories in his motion for reconsideration of Red Onion's motion to strike and that the trial court considered these additional legal theories. Accordingly, Ensley suffered no prejudice as a result of the trial court's order granting the motion to shorten time.

Finally, Ensley objects for the first time in his Opening Brief, to Red Onion's motion to shorten time on the basis of LR 7(b)(10)(C). Ensley did not raise this objection at to the trial court, thereby depriving

the trial court and Red Onion from addressing this issue. To the extent that this issue is even properly before this Court, Ensley cannot carry his burden of demonstrating an abuse of discretion by pointing to silence in the record on an issue he never raised. Accordingly, Ensley's LR 7(b)(10)(C)'s argument necessarily fails.

F. The Trial Court Properly Denied Ensley's Motion for Relief from Orders Because the Motion Lacked a Factual and Legal Basis.

1. Ensley's Motion For Relief From Orders Failed To Satisfy Basic CR 60(b) Requirements.

a) Motion to Vacate Standards.

If a dispositive motion is granted and a judgment is entered, the judgment shall be afforded the same measure of finality that would be associated with any other judgment. The law favors resolution of cases on their merits and, accordingly, favors their finality.¹⁸ *Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912, P.2d 1040 (1996).

b) Ensley's Motion to Vacate was Untimely

¹⁸ Page 37 of Ensley's Opening Brief states: "In considering whether to grant a motion to vacate, a trial court should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." Ensley attempted to mislead the trial court and now attempts to mislead this Court on standard to be applied. Washington courts apply this rule only when considering motions to vacate a *default judgment* -- not when considering a motion to vacate a judgment on merits. Proceedings before a trial court to vacate a default judgment are deemed "equitable in character." A court *must* apply different set of equitable factors when considering motion to vacate default judgment as opposed to motion to vacate judgment on merits. *Lane v. Brown & Haley*, 81 Wn. App. at 105-6. Ensley sought to vacate a judgment on the merits; accordingly, this standard does not apply.

All motions to vacate must be made within a reasonable time. CR 60(b). Ensley did not file his motion to vacate within a reasonable time; therefore, the trial court did not abuse its discretion by denying the motion. CP 842-844.

Ensley still has not offered any explanation as to why he waited to file his motion to vacate until (1) almost 16 months after the judgment and order striking the hearsay were entered; (2) seven months after the expiration of the time to request reconsideration of the order denying the motion to amend;¹⁹ (3) five months after he reached settlement with the last of the other defendants; (4) five months after the trial date had passed; and (5) eight months after he filed a separate suit against Pitcher. The trial court properly denied Ensley's motion to vacate because it was without merit and was not made within a reasonable time. Ensley (who has full knowledge of Pitcher's alleged role in this case) either made a strategic decision not to name Pitcher as a defendant in his initial complaint, or simply failed to do so. Red Onion's rights to finality and judicial economy support the trial court's decision to deny Ensley's untimely motion to amend.

¹⁹ This Court properly denied Ensley's motion to amend the complaint. If Ensley had a basis for seeking reconsideration of that order, he should have timely sought it within 10 days as provided by CR 59.

2. Ensley Presented No Evidence of Fraud, Misrepresentation or Misconduct.

Under CR 60(b)(4), a trial court may vacate an order or final judgment for fraud, misrepresentation or misconduct. As a motion to vacate a judgment pursuant to CR 60 is not a substitute for an appeal, Washington courts have consistently rejected efforts to use a motion to vacate as a vehicle for asserting errors of law. *Port of Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 790 P.2d 145 (1990).

Ensley failed to present any evidence of fraud, misrepresentation or misconduct on the part of Red Onion or Red Onion's counsel. There are nine essential elements of fraud, all of which must be established by clear, cogent, and convincing evidence.²⁰ See *Pedersen v. Bibioff*, 64 Wn. App. 710, 723, 828 P.2d 1113 (1992).²¹ Ensley's motion for relief from orders failed to identify, much less address, any of these elements.

The elements for misrepresentation are the same as fraud, except that in order to prevail, a plaintiff must present clear, cogent, and convincing evidence that the speaker knew the statement was false or was reckless in ascertaining the truth or falsity of the statement.

²⁰ Clear, cogent, and convincing evidence requires a degree of proof greater than a mere preponderance of evidence. *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962).

²¹ The elements of fraud are: 1. a representation of existing fact; 2. its materiality; 3. its falsity; 4. the speaker's knowledge of its falsity; 5. the speaker's intent that the falsity be acted upon by the person to whom it is made; 6. ignorance of its falsity on the person addressed; 7. reliance by the person addressed; 8. right to rely upon the falsity; and 9. consequent damage. See *Pedersen*, 64 Wn. App. at 723.

Swanson v. Solomon, 50 Wn.2d 825, 314 P.2d 655 (1957). Ensley failed to produce any evidence that Red Onion provided a false statement (Red Onion explicitly admitted that Pitcher was acting within the course and scope of his employment) much less that Red Onion knowingly or recklessly provided a false statement. Likewise, Ensley presented no evidence of misconduct by Red Onion or its counsel. As set forth above, Red Onion's position regarding Pitcher's status as an employee/agent (as opposed to a "speaking agent") has remained consistent.

Lastly, under CR 60(b)(4), the "fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense." *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). Ensley not only raised the issues of agency and the speaking agent hearsay exception, but fully briefed the issues as well. The fact that Ensley disagreed with the Court's rulings, is an issue that should not be raised in a CR 60 motion to vacate. The trial court's order denying the motion to vacate should be affirmed.

3. Ensley Presented No Evidence of Extraordinary Circumstances.

Ensley contend that the trial court abused its discretion by denying his motion to vacate under CR 60(b)(11), which grants the trial court discretion to vacate an order or final judgment for "[a]ny other

reason justifying relief.” CR 60(b)(11) is confined to situations involving extraordinary circumstances not covered by any other section of CR 60(b). *In re Marriage of Hammack*, 114 Wn. App. 805, 809, 60 P.3d 663 (2003). Ensley failed to produce any legal argument or authority to suggest that “extraordinary circumstances” warranted the vacation of the trial court’s orders.

G. Ensley Lacks Standing to the Appeal the Sanctions Order.

The Court should dismiss Ensley’s Appeal of the order granting Red Onion’s motion for sanctions because Ensley lacks standing to appeal the order. The trial court ordered sanctions against Attorney Aaron Adee – not Ensley. The appellant in this case is Ensley – not Adee.

Appellant standing requires that the party seeking review be aggrieved within the meaning of RAP 3.1. An aggrieved party is one who has a present, substantial interest in the subject matter, *i.e.*, one whose proprietary, pecuniary, or personal rights are substantially affected. *Breda v. B.P.O. Elks Lake City 1800-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004). A party cannot appeal decisions that solely affect his attorney because his rights are not affected by the ruling and he is not an aggrieved party under RAP 3.1. *Id.*

Upon close review of Ensley's motion for relief from orders, the trial court concluded that it was "neither well grounded in fact, nor supported by law" and awarded sanctions against Adee on these grounds. CP 886-887. The trial court further found that there was no basis for Adee to accuse opposing counsel, directly or by inference, of any lack of forthrightness or misrepresentation or improper use of procedure.

The order granting sanctions imposes sanctions against Adee, who is not a named party to this appeal. Ensley's proprietary, pecuniary, or personal rights were not substantially affected and or damaged by the sanctions imposed against his attorney. Ensley is not an aggrieved party to the attorney fees and cannot appeal the fees on behalf of Adee. Accordingly, this Court must affirm the order granting sanctions against Adee.

H. Red Onion's Request for Sanctions on Appeal.

1. The Court Should Award Sanctions Against Ensley or Aaron Adee, His Attorney.

The Court should award sanctions against Ensley or Adee for filing a frivolous appeal of the (1) order denying CR 60(b) motion; and (2) order granting sanctions. *See* CP 842-844; 886-887.

CR 11 provides that the signature of an attorney on a motion constitutes a certification by the party or attorney that: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.²² An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 754 P.2d 1243 (1988).

In his motion for relief from orders, Ensley wrongly accused Red Onion and its counsel of making misrepresentations and/or engaging in misconduct regarding Pitcher's status as an employee/agent of Red Onion. There was no basis for these serious accusations when Ensley filed the motion in July 2008, nor is there any basis for these allegations now. The trial court agreed and awarded CR 11 sanctions against Adee in the amount of \$500. As part of the CR 11 sanctions, the trial court admonished Adee concerning his responsibilities with respect to the court and opposing counsel. Despite this, Adee did not hesitate to

²² CR 11 is made applicable to appeals by RAP 18.9(a), which provides in part "The appellate court on its own initiative or on motion of a party may order a party or counsel... who uses these rules for the purpose of delay, files a frivolous appeal or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court."

reiterate the same baseless accusations and arguments when he signed the Opening Brief that he filed in this Court.

2. Ensley's Appeal of the Order Denying Motion for Relief from Orders is Frivolous.

a) Ensley's Appeal is Not Grounded in Fact.

The unfounded allegation that Red Onion or its counsel made misrepresentations to the Court and/or engaged in misconduct formed the crux of Ensley's motion to vacate. Likewise, this unfounded allegation now forms the basis for Ensley's appeal of that order. The trial court recognized that these are serious accusations and admonished Ensley's attorney accordingly. Nevertheless, Ensley brazenly makes these accusations once again, still without any credible evidence to back them up. Neither Pitcher, nor Red Onion has ever denied that Pitcher was working within the course and scope of his employment at the time of his service of a single glass of wine to Humphries. It was undisputed that Pitcher was working within the course and scope of his employment at the time each of the above-referenced orders was entered. There is still no basis in fact for Ensley's factual allegations, and therefore, it subject to sanctions.

b) Ensley's Appeal is Not Grounded in Law

There is no basis in law for Ensley's appeal of the order denying his CR 60 motion. Ensley's appeal of this order is based upon the

premise that an agent and speaking agent are one and the same. Ensley's appeal of this order is based upon a fundamental misunderstanding of the legal concepts of "agent," "speaking agent," and "vicarious liability."

It has been well over two years since the trial court dismissed Ensley's vicarious liability claim against Red Onion. The parties have briefed and argued their positions regarding each of these concepts to two trial court judges, two commissioners of this Court, and most recently to a three-judge panel of this Court. Ensley's contention that an agent and a "speaking agent" are one and the same is not a novel one. Ensley set forth this exact same argument almost 30 months ago. Since then, multiple courts have told Adee, Ensley's counsel, that there is a difference between an agent and a speaking agent. Neither Ensley, nor his attorney can continue to claim ignorance as to these legal concepts. Under these unique circumstances, it is appropriate for this Court to conclude that Adee and/or Ensley continue to pursue these arguments with full knowledge that they have no basis in law. Sanctions are therefore warranted.

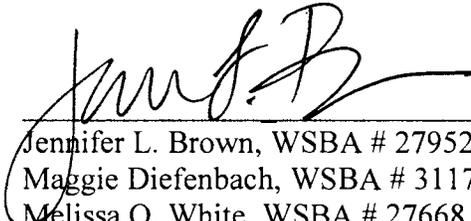
IV. CONCLUSION

The trial court properly dismissed Ensley's claims because there was no admissible evidence of Humphries' "apparent intoxication" at the time of service at Red Onion. For the reasons discussed herein, Red

Onion respectfully requests that this Court affirm all of the orders Ensley identified in his appeal.

RESPECTFULLY SUBMITTED this 17th day of August, 2009.

COZEN O'CONNOR



Jennifer L. Brown, WSBA # 27952
Maggie Diefenbach, WSBA # 31176
Melissa O. White, WSBA # 27668

COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
Telephone: (206) 340.1000
Attorneys for Respondent Red Onion
Tavern

DECLARATION OF SERVICE

Diane M. Finafrock states as follows:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 17th day of August, 2009, I caused copies of the foregoing RESPONDENT’S BRIEF to be served on the following parties as indicated below:

Parties Served	Manner of Service
Aaron L. Adee The Adee Law Firm, PLLC 705 2 nd Ave., Ste. 501 Seattle, WA 98104	() Via Legal Messenger () Via Facsimile (X) Via U.S. Mail

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

Executed at Seattle, Washington, this 17th day of August, 2009.


Diane M. Finafrock

Timeline After Red Onion Dismissal in April 2007

November 21, 2007 – Ensley files a belated motion to amend complaint to add Red Onion’s bartender, Clifford Pitcher. Motion denied on December 5, 2007.

December 18, 2007 – Ensley commences a separate lawsuit against Pitcher. The following events were in the *Pitcher* “second lawsuit”:

January 15, 2008 – Pitcher files a motion to dismiss..

April 21, 2008 – the trial court certifies its order denying Pitcher’s motion to dismiss for immediate appeal.

March 18, 2008 – Ensley files a motion to amend complaint in the *Ensley v. Pitcher* matter to add Timothy Johnson, the owner of Red Onion. The motion was denied on March 31, 2008.

April 10, 2008 – Ensley files a motion for reconsideration, which was denied on April 22, 2008.

June 3, 2008 – Ensley seeks discretionary review of the order denying his motion to amend.

June 26, 2008 – this Court grants discretionary review of the certified order denying Pitcher’s motion to dismiss.

July 11, 2008 – this Court passes to the panel considering Pitcher’s appeal on the certified issue of whether to grant Ensley’s motion for discretionary review of the order denying his motion to amend.

June 8, 2009, oral argument takes place in this Court on certified issue.

July 21, 2008 – Ensley files a CR 60(b) motion, asking the trial court to vacate summary judgment and other orders, which was denied on August 6, 2008.

August 18, 2008 – Ensley seeks reconsideration, which was denied on September 10, 2008.

September 11, 2008 – trial court admonishes and sanctions Ensley’s counsel.

April 24, 2009 – Ensley files notice of appeal to this Court.

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07-2-39823-6	Ensley, Nicholas	12-18-07	Plaintiff	Tort-Motor Vehicle	Docket Info Available
07-2-39823-6	Pitcher, Clifford	12-18-07	Defendant	Tort-Motor Vehicle	Docket Info Available

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Superior Court Case Summary

Court: King Co Superior Ct
Case Number: 07-2-39823-6

Sub	Docket Date	Docket Code	Docket Description	Misc Info
1	12-18-2007	SMCMP	Summons & Complaint	
2	12-18-2007	*ORSCS JDG0048	Set Case Schedule Judge Laura Inveen, Dept 48	06-08- 2009ST
3	12-18-2007	CICS LOCS	Case Information Cover Sheet Original Location - Seattle	
4	01-02-2008	AFSR	Affidavit/dclr/cert Of Service	
5	01-11-2008	NTAPR	Notice Of Appearance /def	
6	01-11-2008	AFML	Affidavit Of Mailing	
7	01-15-2008	NTAPR	Notice Of Appearance /def	
8	01-15-2008	MTDSM	Motion To Dismiss /def	
9	01-15-2008	DCLR	Declaration /jennifer Brown	
10	01-15-2008	NTHG	Notice Of Hearing /dismiss	01-24- 2008
10A	01-15-2008	AFSR	Affidavit/dclr/cert Of Service	
11	01-16-2008	MT	Motion To Strike Hearing Date /pla	
12	01-16-2008	MT	Motion To Shorten Time /pla	
13	01-16-2008	NTHG	Notice Of Hearing/d dismiss	01-25- 2008
14	01-18-2008	OR	Order Re Mtn For Default /extending Time	02-13- 2008
15	02-01-2008	OB	Opposition To Mtn To Dismiss/pltf	
15A	02-01-2008	DCLR	Dclr Aaron Adee In Supp Mtn Dismss	
16	02-04-2008	NTHG	Notice Of Hearing /sanctions	02-13- 2008
17	02-04-2008	DCLR	Dclr Jennifer Brown In	

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18	02-04-2008	MT	Support Cr11 Motion For Cr11 Sanctions/def	2) Do not guarantee that info most current form;
19	02-11-2008	RPY	Reply To Pltf Opp To Mtn Dismiss/df	3) Make no representations r identity of any person whose on these pages; and
20	02-11-2008	OB	Opp To Defs Mtn For Cr11 Sanction/p	4) Do not assume any liabilit the release or use of the info
21	02-13-2008	SMJHRG JDG0048	Summary Judgment Hearing Judge Laura Inveen, Dept 48	Please consult official case re court of record to verify all information.
22	02-13-2008	ORDYMT	Order Denying Motion/petition	
23	02-13-2008	ORDYMT	Order Denying Motion/petition	
24	02-22-2008	MTRC	Motion For Reconsideration	
25	02-22-2008	AFSR	Affidavit/dclr/cert Of Service	
25A	02-22-2008	NTHG	Notice Of Hearing /reconsideration	03-04- 2008
26	02-25-2008	ANAFDF	Answer & Affirmative Defense	
27	02-28-2008	NTHG	Notice Of Hearing /strike	03-11- 2008
28	03-07-2008	DCLR	Declaration Jennifer Brown	
29	03-07-2008	OB	Opp To Mtn To Strk Aff Defenses/df	
30	03-10-2008	NTHG	Notice Of Hearing/mt To Strike	03-18- 2008
31	03-12-2008	ORDYMT	Order Denying Mtn For Reconsideratn	
32	03-17-2008	RPY	Surreply In Opp To Pltf Mtn To Strk	
33	03-20-2008	MT	Motion To Amend Complaint	
34	03-20-2008	NTHG	Notice Of Hearing /leave To Amend	03-28- 2008
35	03-21-2008	ORGMT	Order Granting Mtn To Strike Affirm Defenses	
36	03-26-2008	DCLR	Declaration Of Maggie Peterson	
37	03-26-2008	AFSR	Affidavit/dclr/cert Of Service	
38	03-26-2008	OB	Opp To Mtn To Amd Complnt/def	
39	03-27-2008	ORCJ	Order For Change Of	

		JDG0024	Judge Judge Michael J. Fox, Dept 24	
40	03-27-2008	RPY	Reply/mt To Amend The Complaint/pla	
41	03-27-2008	MT	Motion To Strike Affirm Def/pltf	
42	03-28-2008	NTHG	Notice Of Hearing /sanctions	04-07- 2008
43	03-28-2008	AFSR	Affidavit/dclr/cert Of Service	
44	03-28-2008	DCLR	Declaration Maggie Peterson In Supp	
45	03-28-2008	MT	Motion For Cr11 Sanctions/def	
46	03-31-2008	ORDYMT	Order Denying Motion To Amend Cmplt	
47	04-03-2008	OB	Opposition To Def Mtn	
48	04-03-2008	RPY	Reply/plntf Mo To Str Aff Defenses	
49	04-03-2008	RPY	Reply/plntf Re Mo To Strike Aff Def	
50	04-03-2008	RPY	Reply/plntf Mo To Str Aff Defenses	
51	04-04-2008	RPY	Reply In Supp Of Mtn For Cr11/def	
52	04-04-2008	DCLR	Declaration Of Jennifer L Brown	
53	04-04-2008	AFSR	Affidavit/dclr/cert Of Service	
54	04-07-2008	AFSR	Affidavit/dclr/cert Of Service	
55	04-07-2008	NTHG	Notice Of Hearing /certificatn	04-14- 2008
56	04-07-2008	MT	Motion For Certification Of Ct Ord	
57	04-07-2008	DCLR	Declaration Of Franceska Jones	
58	04-07-2008	OB	Objection / Opposition /pltf	
59	04-08-2008	ORDYMT	Order Denying Motion For Sanctions	
60	04-08-2008	NTHG	Notice Of Hearing /deny S/j	04-16- 2008
61	04-08-2008	MT	Motion Fr Certif Deny Mt To Dismiss	
62	04-08-2008	AFSR	Affidavit/dclr/cert Of Service	

63	04-10-2008	MT	Motion/pltf/reconsideration	
64	04-10-2008	NTHG	Notice Of Hearing /amend	04-18-2008
65	04-11-2008	NTDRCA	Nt Of Discr. Review To Ct Of Appeal	
-	04-11-2008	\$AFF	Appellate Filing Fee	250.00
66	04-14-2008	OB	Opp To Mtn For Cert&req For Snctn/p	
67	04-14-2008	AFSR	Affidavit/dclr/cert Of Service	
68	04-15-2008	RPY	Reply Spprt Certification Mtn/deft	
69	04-15-2008	AFSR	Affidavit/dclr/cert Of Service	
70	04-15-2008	DCLR	Declaration Of Melissa Oloughlin	
71	04-21-2008	ORCR	Order Confirming Ruling	
72	04-22-2008	ORDYMT	Order Denying Mtn To Stay/dismiss	
73	04-23-2008	AFSR	Affidavit/dclr/cert Of Service	
74	04-23-2008	NTDRCA	Nt Of Discr. Review To Ct Of Appeal /amended	
75	05-19-2008	NTDRCA	Nt Of Discr. Rvw To Ct Of Appeal/pl	
-	05-19-2008	\$AFF	Appellate Filing Fee	250.00
76	06-16-2008	ORTSC ACTION	Order To Show Cause No Cj Filed	07-17-2008JS
77	07-17-2008	HSTKIC JDG0051	Hearing Stricken: In Court Other Judge John Erlick, Dept 51	
78	07-17-2008	ORSTAC	Order On Status Conference/on Track	
79	07-17-2008	PNCA	Perfection Notice From Ct Of Appls /coa# 61537-8-i	
80	07-25-2008	DSGCKP	Designation Of Clerk's Papers 61537-8/brown/pgs 1-962 Trans Coa 10/01/08	
81	07-25-2008	AFSR	Affidavit/dclr/cert Of Service	
82	08-04-2008	INX	Index Cks Pprs Pgs 1-962	
-	08-04-2008	\$CLPR	Clerk's Papers - Fee Received 701960-cp/brown/pd 09/16/08	506.00

83	08-12-2008	AFSR	Affidavit/dclr/cert Of Service	
84	08-12-2008	DSGCKP	Designation Of Clerk's Papers/supl 61537-8/brown/pgs 963-971 Trans Coa 09/03/08	
84A	08-14-2008	DSGCKP	Designation Of Clerk's Papers Trans Coa 09/24/08 61537-8/adee/pgs 972-1122	
85	08-19-2008	INX	Index Cks Pprs Pgs 963-971	
-	08-19-2008	\$CLPR	Clerk's Papers - Fee Received 702007-cp/brown/pd 08/28/08	29.50
86	08-29-2008	NOTE	Cks Pprs Pgs 963-971	
87	09-02-2008	INX	Index Cks Pprs Pgs 972-1122	
-	09-02-2008	\$CLPR	Clerk's Papers - Fee Received 702030-cp/adee/pd 09/19/08	100.50
88	09-18-2008	NOTE	Cks Pprs Pgs 1-962	
89	09-22-2008	NOTE	Cks Pprs Pgs 972-1122	
90	11-13-2008	NTHG	Notice Of Hearing /shorten Time	11-19-2008
91	11-13-2008	NTHG	Notice Of Hearing /stay Case	11-19-2008
92	11-13-2008	MT	Motion To Shorten Time / Pla	
93	11-13-2008	MT	Motion For Relief From Stay / Pla	
94	11-17-2008	DCLR	Declaration Of Maggie Diefenbach	
95	11-17-2008	RSP	Response To Mtn /pitcher	
96	11-18-2008	RPY	Reply To Mtn For Relief/n Ensley	
97	11-18-2008	RPY	Reply To Mtn To Shorten Time/ Nicholas Ensley	
98	11-21-2008	ORDYMT	Order Denying Motion /stay Relief	

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Case Number	Person Name	File Date	Participant Code	Review Type	Contact Information
615378	Ensley, Nicholas	04-18-08	Petitioner	Notice of Discretionary Review	Coa, Division I 600 University St One Union Square Seattle, WA 98101-1176 Map & Directions [Office Email] 206-464-7750[Clerk's Office] 206-389-2613[Clerk's Office Fax]
615378	Ensley, Nicholas	04-18-08	Unknown	Notice of Discretionary Review	
615378	Pitcher, Clifford	04-18-08	Unknown	Notice of Discretionary Review	
615378	Pitcher, Clifford	04-18-08	Petitioner	Notice of Discretionary Review	This information is provided for use as reference material and is <u>not</u> the official court record. The official court record is maintained by the court of record . Copies of case file documents are not available at this website and will need to be ordered from the court of record .
615378	Pitcher, Jane Doe	04-18-08	Unknown	Notice of Discretionary Review	The Administrative Office of the Courts, the Washington State Courts, and the Washington State County Clerks :
615378	Pitcher, Jane Doe	04-18-08	Petitioner	Notice of Discretionary Review	1) Do not warrant that the information is accurate or complete; 2) Do not guarantee that information is in its most current form;

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Appellate Court Case Summary

Case Number: 615378
Filing Date: 04-18-2008
Court: COA, Division I

Event Date	Event Description	Action
04-16-08	Case Received and Pending	Status Changed
04-18-08	Notice of Discretionary Review	Filed
04-23-08	Motion to Extend Time to File	Filed
04-24-08	Ruling on Motions	Filed
04-25-08	Court's Mot to Dismiss for Fail to file	Filed
05-05-08	Affidavit of Service	Filed
05-09-08	Notice of motion	Filed
05-09-08	Motion for Discretionary Review-C/a	Filed
06-09-08	Answer to motion	Filed
06-11-08	Reply to Response	Filed
06-13-08	Motion Heard	Status Changed
06-13-08	Set for Motion Calendar	Status Changed
06-16-08	Notice of Appearance	Filed
06-27-08	Ruling on Motions	Filed
07-11-08	Consolidation	Recorded on Case
07-15-08	Perfection Letter	Sent by Court
07-25-08	Designation of Clerks Papers	Filed
07-25-08	Statement of Arrangements	Filed
08-12-08	Supplemental Designation of Clerk's Papers	Filed
08-15-08	Supplemental Designation of Clerk's Papers	Filed
08-20-08	Motion to Strike	Filed
09-03-08	Supplemental Clerk's Papers	Filed

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Contact Information

Coa, Division I
 600 University St
 One Union Square
 Seattle, WA 98101-1176
Map & Directions
 [Office Email]
 206-464-7750[Clerk's Office]
 206-389-2613[Clerk's Office Fax]

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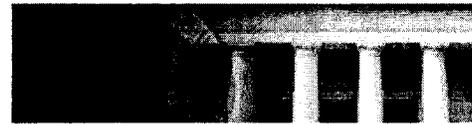
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1) Do not warrant that the information is accurate or complete;

09-05-08	Ruling on Motions	Filed	2) Do not guarantee that information is in its most current form;
09-09-08	Appellants brief	Filed	
09-24-08	Supplemental Clerk's Papers	Filed	3) Make no representations regarding the identity of any person whose name appears on these pages; and
10-01-08	Record Ready	Status Changed	
10-01-08	Clerk's Papers	Filed	4) Do not assume any liability resulting from the release or use of the information.
10-09-08	Respondents brief	Filed	
10-09-08	Ready	Status Changed	Please consult official case records from the court of record to verify all provided information.
10-13-08	Invoice	Sent by Court	
11-06-08	Invoice	Sent by Court	
11-12-08	Appellants Reply brief	Filed	
11-20-08	Screened	Status Changed	
12-17-08	Invoice	Sent by Court	
01-23-09	Oral Argument Setting Letter	Sent by Court	
01-27-09	Motion to Continue	Filed	
01-27-09	Notice of Unavailability	Filed	
01-30-09	Ruling on Motions	Filed	
02-04-09	Response to motion	Filed	
03-09-09	Oral Argument Hearing	Cancelled	
04-23-09	Oral Argument Setting Letter	Sent by Court	
04-23-09	Set on a calendar	Status Changed	
06-08-09	Heard and awaiting decision	Status Changed	
06-08-09	Oral Argument Hearing	Scheduled	

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Appellate Court Case List

Directions: Below are cases associated with your search criteria. If the case was filed in Superior or Appellate Court, there may be docket information available. Docket information is not available for Municipal & District Court Cases at this time.

To get directions or information about a Court in this list, view the **Washington Court Directory**.

There are 3 public non-sealed cases that match your search criteria.

About Lists of Cases

You are viewing a list of cases. Each court level has a different case numbering system. Docket case information is available when the Case Status is open.

If the Case Status field indicates that the case has been archived, docket case information is not available.

To view the case details for an archived or closed, **contact the court or record** directly. The court will attempt to obtain information for you.

Case Number	Person Name	File Date	Participant Code	Review Type
617231	Ensley, Nicholas	05-19-08	Petitioner	Notice of Discretionary Review
617231	Pitcher, Clifford	05-19-08	Respondent	Notice of Discretionary Review
617231	Pitcher, Jane Doe	05-19-08	Respondent	Notice of Discretionary Review

Contact Information

Coa, Division I
 600 University St
 One Union Square
 Seattle, WA 98101-1176
Map & Directions
 [Office Email]
 206-464-7750[Clerk's Office]
 206-389-2613[Clerk's Office Fax]

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Appellate Court Case Summary

Case Number: 617231
Filing Date: 05-19-2008
Court: COA, Division I

Event Date	Event Description	Action
05-19-08	Notice of Discretionary Review	Filed
05-21-08	Case Received and Pending	Status Changed
06-03-08	Motion for Discretionary Review	Filed
06-03-08	Motion to Dismiss (untimely Filg Appeal)	Filed
06-23-08	Response to motion	Filed
06-25-08	Reply to Response	Filed
07-11-08	Other Ruling	Filed
07-11-08	Consolidation	Recorded on Case
07-17-08	Motion - Other	Filed
07-22-08	Ruling on Motions	Filed
10-01-08	Record Ready	Status Changed
10-09-08	Ready	Status Changed
11-20-08	Screened	Status Changed
04-23-09	Set on a calendar	Status Changed
06-08-09	Heard and awaiting decision	Status Changed

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Appendix B

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

**CERTIFIED
COPY**

LAURA C. INVEEN

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

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the
marital community composed thereof,

Defendants.

0) 7 - 2 - 39823 - 6 SEA

) No.

) SUMMONS [20 DAY]

TO SAID DEFENDANTS:

A lawsuit has been started against you in the above-entitled Court by plaintiff Nicholas Ensley. Plaintiff's claims are stated in the written Complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and serve a copy upon the person signing this Summons within 20 days after the service of this Summons, excluding the date of service, or a Default Judgment may be entered against you without notice. A

SUMMONS - 1

THE ADEE LAW FIRM, PLLC
705 SECOND AVENUE, SUITE 501
SEATTLE, WASHINGTON 98104
(206) 859-6811
FACSIMILE (206) 447-0115

ORIGINAL

1 Default Judgment is one where the plaintiff is entitled to what he or she asks for
2 because you have not responded. If you serve a Notice of Appearance on the
3 undersigned person, you are entitled to Notice before a Default Judgment may be
4 entered.
5

6 You may demand that the plaintiff file this lawsuit with the Court. If you do
7 so, the demand must be in writing, and must be served upon the person signing
8 this Summons. Within 14 days after you serve the demand, the plaintiff must file
9 this lawsuit with the Court, or the service on you of this Summons and Complaint
10 will be void.
11

12 If you wish to seek the advice of an attorney in this matter, you should do so
13 promptly so that your written response, if any, may be served on time.
14

15 THIS SUMMONS is issued pursuant to Rule 4 of the Superior Court Civil
16 Rules of the State of Washington.

17 DATED this 18th day of December, 2007.

18 THE ADEE LAW FIRM, PLLC

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21 Aaron L. Adee, WSBA No. 27409
22 Attorney for Plaintiff Nicholas Ensley
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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

LAURA C. INVEEN

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

NICHOLAS ENSLEY,
Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the
marital community composed thereof,
Defendants.

)
) No. 2 - 39823 - 6 SEA
)

) COMPLAINT FOR PERSONAL
) INJURIES

COMES NOW plaintiff NICHOLAS ENSLEY, by and through his attorney,
Aaron L. Adee of The Adee Law Firm, PLLC, and complains and alleges against
the above named defendants as follows:

I. PARTIES

1.1 Plaintiff NICHOLAS ENSLEY, is a resident of Seattle, King County,
Washington, and resided in Seattle, King County, Washington at all times
relevant and material to this Complaint.

ORIGINAL

1 duties as agents and/or employees, served Rebecca Humphries intoxicating
2 beverages until she became apparently under the influence of alcohol and then
3 continued to serve Rebecca Humphries with intoxicating beverages. Daniel
4 Ahern later joined plaintiff NICHOLAS ENSLEY and Rebecca Humphries for
5 alcoholic beverages at the bar.
6

7 3.2 At approximately 12:30 a.m., plaintiff NICHOLAS ENSLEY,
8 Rebecca Humphries and Daniel Ahern left Impromptu Wine & Art Bar and
9 walked across the street to Red Onion Tavern, located at 4210 E Madison
10 Street, Seattle, Washington, and owned and operated by sole proprietor Timothy
11 Lyle Johnson. Defendant CLIFFORD PITCHER was the only Red Onion Tavern
12 employee working while plaintiff NICHOLAS ENSLEY, Rebecca Humphries and
13 Daniel Ahern were patrons that evening. Despite previously admitting to
14 Washington State Liquor Control Board agents on July 14, 2004 that he did not
15 have a Class 12 mixologist permit during a premises check of Red Onion
16 Tavern, which resulted in the issuance of a violation warning notice to Timothy
17 Johnson, Defendant CLIFFORD PITCHER neither possessed a Class 12
18 mixologist permit nor underwent Mandatory Alcohol Server Training as required
19 by law. Even though Rebecca Humphries was apparently under the influence of
20 alcohol on arrival at Red Onion Tavern, defendant CLIFFORD PITCHER, while
21 acting within the course and scope of his duties as a bartender at Red Onion
22 Tavern, served Rebecca Humphries intoxicating beverages. At no time did
23 defendant CLIFFORD PITCHER intervene to stop Rebecca Humphries from
24
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1 consuming intoxicating beverages by either taking beverages away from
2 Rebecca Humphries or by refusing service of beverages to Rebecca Humphries.

3
4 3.3 At approximately 12:45 a.m., plaintiff NICHOLAS ENSLEY,
5 Rebecca Humphries and Daniel Ahern left Red Onion Tavern and drove in
6 Rebecca Humphries's 1992 Mercedes Benz 190E to The Twilight Exit, formerly
7 located at 2020 E Madison Street, Seattle, Washington, owned and operated by
8 sole proprietor Stephan Mollmann. Despite the fact that Rebecca Humphries
9 was apparently under the influence of liquor on arrival, the agents and/or
10 employees of The Twilight Exit, while acting within the course and scope of their
11 duties as agents and/or employees, served Rebecca Humphries intoxicating
12 beverages and continued to serve her until approximately 1:30 a.m. on
13 Thursday, March 31, 2005.

14
15 3.4 At approximately 1:30 a.m. on Thursday, March 31, 2005, within
16 minutes of leaving The Twilight Exit, while severely under the influence of
17 alcohol, Rebecca Humphries operated a motor vehicle for approximately one
18 and three quarter miles and, at high speed, collided with two parked cars located
19 at or near 1826 McGilvra Boulevard E, Seattle, Washington. As a result of the
20 collision, plaintiff NICHOLAS ENSLEY, a passenger in the rear seat of Rebecca
21 Humphries's vehicle, suffered severe, disabling and permanent spinal injuries as
22 more fully set forth below. Rebecca Humphries was cited for and later convicted
23 of driving under the influence of alcohol. Rebecca Humphries admits that she
24
25
26

1 was under the influence of alcohol at the time of the crash and that her
2 intoxication caused the crash.

3
4 3.5 After the crash, Daniel Ahern spoke with defendant CLIFFORD
5 PITCHER at Red Onion Tavern. During the conversation with Daniel Ahern,
6 defendant CLIFFORD PITCHER admitted that Rebecca Humphries's eyes were
7 "glassy" and that she was in such a condition that he should not have served her
8 an alcoholic beverage.

9 **IV. NEGLIGENCE AND PROXIMATE CAUSE**

10 4.1 Duties of Defendant CLIFFORD PITCHER: At all times relevant
11 and material to the incidents set forth in paragraphs 3.1 through 3.5, above,
12 defendant CLIFFORD PITCHER, owed certain duties to all Red Onion Tavern
13 patrons and the general public, including Rebecca Humphries and plaintiff
14 NICHOLAS ENSLEY, which included but were not limited to the following:
15

- 16 (a) To actively observe patrons and look for signs of intoxication;
17 (b) To refrain from selling, furnishing and/or otherwise providing
18 alcoholic beverages to persons apparently under the influence of alcohol;
19 (c) To adhere to responsible business practices with respect to the
20 service of alcoholic beverages to patrons;
21 (d) To refrain from encouraging intoxicated persons to consume
22 alcoholic beverages;
23 (e) To refrain from serving alcoholic beverages to patrons in a
24 continuous and excessive manner;
25
26

1 (f) To attend a Mandatory Alcohol Server Training course from an
2 authorized trainer, pass a written examination and possess a valid Class 12
3 mixologist permit at all times;

4
5 (g) To avoid creating unreasonable risks of physical harm to patrons;

6 (h) To refrain from consuming alcoholic beverages other intoxicants
7 while serving alcoholic beverages;

8 (i) To follow a server intervention program including, but not limited to,
9 refusing to serve alcoholic beverages, slowing down service of alcoholic
10 beverages, suggesting nonalcoholic beverages, cutting off the service of
11 alcoholic beverages, and assisting patrons to safely reach their final destination
12 when it become apparent that they are under the influence of alcohol; and

13
14 (k) To otherwise act as a reasonably prudent bartender in the service
15 of alcoholic beverages.

16 4.2 Duties Owed to Public: The duties of defendant CLIFFORD
17 PITCHER, including those set forth in paragraph 4.1, were for the safety and
18 benefit of the general public, including plaintiff NICHOLAS ENSLEY and all other
19 patrons.

20
21 4.3 Breach of Duties: Defendant CLIFFORD PITCHER, breached all
22 duties, as set forth in paragraphs 4.1 and 4.2, in a negligent, careless and
23 unlawful manner by serving alcoholic beverages without a valid Class 12
24 mixologist permit to Rebecca Humphries while he knew or should have known
25 that she was apparently under the influence of alcohol.
26

1 5.5 As a direct and proximate result of the negligence alleged herein,
2 plaintiff NICHOLAS ENSLEY has lost past and future income and has suffered a
3 loss of future earning capacity.
4

5 5.6 Plaintiff NICHOLAS ENSLEY is entitled to reasonable attorneys'
6 fees.
7

8 5.7 Plaintiff NICHOLAS ENSLEY is entitled to prejudgment interest on
9 all medical and other out-of-pocket expenses directly and proximately caused by
10 the negligence alleged in this complaint.
11

12 5.8 Plaintiff NICHOLAS ENSLEY is entitled to costs and disbursements
13 herein.
14

15 **VI. WAIVER OF PHYSICIAN/PATIENT PRIVILEGE**
16

17 6.1 Plaintiff asserts his physician/patient privilege for 88 days following
18 the filing of this Complaint. On the 89th day following the filing of this
19 Complaint, the Plaintiff hereby waives the physician/patient privilege.
20

21 6.2 The waiver is conditioned and limited as follows: (1) The Plaintiff
22 does not waive his constitutional right to privacy; (2) The Plaintiff does not
23 authorize contact with any of his health care providers except by judicial
24 proceeding authorized by the Rules of Civil Procedure; (3) Defendants'
25 representatives are specifically instructed not to attempt ex parte contacts with
26 Plaintiff's health care providers; and (4) Defendants' representatives are
specifically instructed not to write letters to Plaintiff's health care providers
telling them that they may mail copies of records to the Defendants.

1 In the case of Loudon v. Mhyre, 110 Wn.2d 676, 756 P.2d 138 (1988), the
2 Supreme Court dealt very simply with the issue of ex parte contact with the
3 Plaintiff's physicians:
4

5 The issue presented is whether defense counsel in a personal injury
6 action may communicate ex parte with the Plaintiff's treating
7 physicians when the Plaintiff has waived the physician/patient
8 privilege. We hold that defense counsel may not engage in ex parte
9 contact, but is limited to the formal discovery methods provided by
10 court rule.

11 Loudon, at 675-676.

12 Wherefore, Plaintiff prays for judgment against all above named
13 Defendants, jointly and severally and prays for relief as follows:

14 **VII. RELIEF SOUGHT**

15 7.1 Special damages for Plaintiff in such amounts as are proven at
16 trial.

17 7.2 General damages for Plaintiff in such amounts as are proven at trial.

18 7.3 Costs including reasonable attorneys' fees for Plaintiff as are proven
19 at trial.

20 7.4 Prejudgment interest on all liquidated damages.

21 7.5 For such other and further relief as the court deems just, equitable
22 and proper for Plaintiff at the time of trial.

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DATED this 18th day of December, 2007.

THE ADEE LAW FIRM, PLLC



Aaron L. Adee, WSBA No. 27409
Attorney for Plaintiff Nicholas Ensley

Appendix C

**CERTIFIED
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Hon. Laura Inveen

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KING COUNTY

FEB 13 2008

SUPERIOR COURT
BY DEBRA BAILEY TRAIL
DEPUTY

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

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the
marital community composed thereof,

Defendants.

No. 07-2-39823-6SEA

ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS

ORDER

THIS MATTER came on duly and regularly for hearing with oral argument at 3:30 p.m. on Wednesday, February 13, 2008 on Defendant's CR 12(b)(6) Motion to Dismiss/Defendant's Motion for Summary Judgment. The Court considered the following:

A. Defendant's CR 12(b)(6) Motion to Dismiss/Defendant's Motion for Summary Judgment;

B. Declaration of Jennifer L. Brown in Support of Motion to Dismiss;

ORDER DENYING DEFENDANT'S MOTION
TO DISMISS - 1

THE ADEE LAW FIRM, PLLC
705 SECOND AVENUE, SUITE 501
SEATTLE, WASHINGTON 98104
(206) 859-6811
FACSIMILE (206) 447-0115

ORIGINAL

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C. Plaintiff's Opposition to Defendant's Motion to Dismiss;

D. Declaration of Aaron L. Adee in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss;

E. Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss/Defendant's Motion for Summary Judgment;

F. _____;

G. _____;

H. _____; and

I. The documents and pleadings contained in the Court's file.

Having considered the foregoing submissions, documents, pleadings, oral argument of counsel and other evidence, the Court makes the following factual findings:

A. Plaintiff's claims against defendant Clifford Pitcher are neither res judicata nor barred by collateral estoppel;

B. ~~The rights and interests of defendant Clifford Pitcher were adequately represented in this matter by the attorneys for Red Onion Tavern; and~~

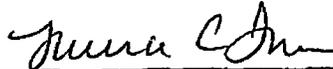
C. ~~By its own admission, Red Onion Tavern is vicariously liable for the actions of Clifford Pitcher which give rise to Plaintiff's claims against Clifford Pitcher.~~

ged

ORDERED, ADJUDGED AND DECREED that Defendant's CR 12(b)(6) Motion to Dismiss/Defendant's Motion for Summary Judgment is DENIED with prejudice.

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SO ORDERED this 13 day of February, 2008.



HON. LAURA INVEEN

Presented by:

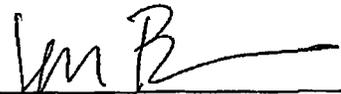
THE ADEE LAW FIRM, PLLC



Aaron L. Adee, WSBA No. 27409
Attorney for Plaintiff NICHOLAS ENSLEY

Reviewed by:

COZEN O'CONNOR



Jennifer L. Brown, WSBA No. 27952
Maggie Peterson, WSBA No. 31176
Attorneys for Defendant Clifford Pitcher

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ORDER DENYING DEFENDANT'S MOTION
TO DISMISS - 3

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705 SECOND AVENUE, SUITE 501
SEATTLE, WASHINGTON 98104
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Appendix D

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THE HONORABLE JUDGE J. P. INSEEN
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KING COUNTY

APR 22 2008

SUPERIOR COURT
BY DEBRA BAILEY TRAIL
DEPUTY

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

NICHOLAS ENSLEY,
Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the marital
community composed thereof,
Defendants.

Cause No.: 07-2-39823-6 SEA

~~PROPOSED~~ AMENDED ORDER (1)
DENYING DEFENDANT'S MOTION TO
DISMISS, (2) CERTIFYING ISSUES FOR
APPEAL AND (3) STAYING CASE
PENDING RESOLUTION OF
APPELLATE PROCEEDINGS

THIS MATTER having come on duly and regularly before the undersigned Judge of
the above entitled Court upon Defendant's Motion for Certification of the Court's Order
Denying Defendant's Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
Judgment and the Court having considered the following:

1. Defendant's Motion for Certification of the Court's Order Denying Defendant's
Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;
2. Plaintiff's Opposition to Motion for Certification of the Court's Order Denying
Defendant's Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;
3. Defendant's Reply in Support of Motion for Certification of the Court's Order
Denying Defendant's Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
Judgment;

~~PROPOSED~~ AMENDED ORDER DENYING DEFENDANT'S MOTION TO
DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 1

LAW OFFICES OF
COZEN O'CONNOR
A PROFESSIONAL CORPORATION
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1201 THIRD AVENUE
SEATTLE, WASHINGTON 98101-3071
(206) 340-1000

ORIGINAL

1 4. and the Court's file and records therein,
2 and the Court otherwise deeming itself fully advised; concludes that Defendant's
3 Motion for Certification of the Court's Order Denying Defendant's Motion to Dismiss
4 Pursuant to CR 12(b)(6)/Motion for Summary Judgment must be GRANTED. The Court
5 hereby makes the following written findings, which confirm that this Order involves
6 controlling questions of law as to which there is substantial ground for a difference of opinion
7 and that immediate review of the order may materially advance the ultimate termination of the
8 litigation, and is therefore appropriate for immediate appeal under RAP 2.3(b)(4).

9 The threshold issue in this case is the potential application of res judicata and/or
10 collateral estoppel where the scope of evidence presented in successive lawsuits may
11 potentially differ. At issue are significant public policy issues critical to a defendant's right to
12 finality following a dismissal and a plaintiff's right to present a case. There are substantial
13 grounds for differences of opinion on these important issues, as reflected in the arguments and
14 case law submitted by the parties in this case. This is an issue of first impression in
15 Washington. Immediate interlocutory review by the Court of Appeals will allow for
16 immediate dismissal of this action, without the need for potentially unnecessary development
17 of this case.

18 On February 13, 2008, this Court denied Defendant's Motion to Dismiss Pursuant to
19 CR 12(b)(6)/Motion for Summary Judgment, and on March 13, 2008, this Court denied
20 Defendant's Motion for Reconsideration. Attached hereto as Exhibits A and B are true and
21 correct copies of those Orders, the contents of which are hereby expressly incorporated into
22 this Amended Order.

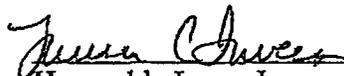
23 IT IS HEREBY ORDERED that Defendant's Motion for Certification of the Court's
24 Order Denying Defendant's Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
25 Judgment is GRANTED; Defendant's Motion to Dismiss is DENIED; this Order is hereby
26 CERTIFIED for immediate appeal under RAP2.3(b)(4); and all trial court proceedings are

~~PROPOSED~~ AMENDED ORDER DENYING DEFENDANT'S MOTION TO
DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 2

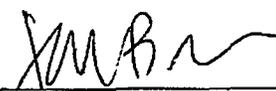
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WASHINGTON MUTUAL TOWER
1201 THIRD AVENUE
SEATTLE, WASHINGTON 98101-3071
(206) 340-1000

1 hereby STAYED until appellate proceedings have concluded.

2
3 DONE IN OPEN COURT this 21 day of April, 2008.

4
5
6 
Honorable Laura Inveen

7 Presented by:
8 COZEN O'CONNOR

9
10 By: 
11 Jennifer L. Brown, WSBA No. 27952
12 Maggie Peterson, WSBA No. 31176
Attorneys for Defendant Clifford Pitcher,
an employee of Red Onion

13 Approved as to Form:
14 THE ADEE LAW FIRM

15
16 By: _____
17 Aaron L. Adee, WSBA No. 27409
18 Attorney for Plaintiff Nicholas Ensley

19 SEATTLE699754\1 180108.000

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26 ~~PROPOSED~~ AMENDED ORDER DENYING DEFENDANT'S MOTION TO
DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 3

LAW OFFICES OF
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(206) 340-1000

Hon. Laura Inveen

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

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the
marital community composed thereof,

Defendants.

No. 07-2-39823-6SEA

ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS

ORDER

THIS MATTER came on duly and regularly for hearing with oral argument at 3:30 p.m. on Wednesday, February 13, 2008 on Defendant's CR 12(b)(6) Motion to Dismiss/Defendant's Motion for Summary Judgment. The Court considered the following:

A. Defendant's CR 12(b)(6) Motion to Dismiss/Defendant's Motion for Summary Judgment;

B. Declaration of Jennifer L. Brown in Support of Motion to Dismiss;

ORDER DENYING DEFENDANT'S MOTION
TO DISMISS - 1

THE ADEE LAW FIRM, PLLC
705 SECOND AVENUE, SUITE 501
SEATTLE, WASHINGTON 98104
(206) 859-6811
FACSIMILE (206) 447-0115

ORIGINAL

1 C. Plaintiff's Opposition to Defendant's Motion to Dismiss;

2 D. Declaration of Aaron L. Adee in Support of Plaintiff's Opposition to
3 Defendant's Motion to Dismiss;

4 E. Reply to Plaintiff's Opposition to Defendant's Motion to
5 Dismiss/Defendant's Motion for Summary Judgment;

6 F. _____;

7 G. _____;

8 H. _____; and

9 I. The documents and pleadings contained in the Court's file.

10
11 Having considered the foregoing submissions, documents, pleadings, oral
12 argument of counsel and other evidence, the Court makes the following factual
13 findings:
14

15 A. Plaintiff's claims against defendant Clifford Pitcher are neither res
16 judicata nor barred by collateral estoppel;

17 B. ~~The rights and interests of defendant Clifford Pitcher were adequately~~
18 ~~represented in this matter by the attorneys for Red Onion Tavern; and~~ *ged*

19
20 C. ~~By its own admission, Red Onion Tavern is vicariously liable for the~~
21 ~~actions of Clifford Pitcher which give rise to Plaintiff's claims against Clifford~~
22 Pitcher.

23 ORDERED, ADJUDGED AND DECREED that Defendant's CR 12(b)(6)
24 Motion to Dismiss/Defendant's Motion for Summary Judgment is DENIED with
25 prejudice.
26

ORDER DENYING DEFENDANT'S MOTION
TO DISMISS - 2

THE ADEE LAW FIRM, PLLC
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SEATTLE, WASHINGTON 98104
(206) 859-6811
FACSIMILE (206) 447-0115

1 SO ORDERED this 13 day of February, 2008.

2
3 
4 HON. LAURA INVEEN

5 Presented by:

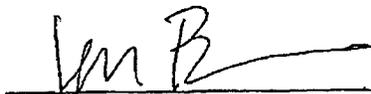
6 THE ADEE LAW FIRM, PLLC

7 

8
9 Aaron L. Adee, WSBA No. 27409
Attorney for Plaintiff NICHOLAS ENSLEY

10
11 Reviewed by:

12
13 COZEN O'CONNOR

14 

15
16 Jennifer L. Brown, WSBA No. 27952
Maggie Peterson, WSBA No. 31176
17 Attorneys for Defendant Clifford Pitcher

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ORDER DENYING DEFENDANT'S MOTION
TO DISMISS - 3

THE ADEE LAW FIRM, PLLC
705 SECOND AVENUE, SUITE 501
SEATTLE, WASHINGTON 98104
(206) 859-6811
FACSIMILE (206) 447-0115

MAR 13 2008

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

ENSLEY

Plaintiff

v.

PITCHER

Defendant

NO. 07-2-39823-6SEA

ORDER DENYING
DEFENDANT'S MOTION FOR
RECONSIDERATION

The above-entitled Court, having considered Defendant's Motion for Reconsideration of order denying defendant's motion to dismiss summary judgment, hereby DENIES the motion for reconsideration.

DATED this 12 day of MARCH 2008

[Illegible signature]
JUDGE BRUCE C. WILSON

ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION

ORIGINAL

Nicole K. MacInnes, Judge
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206)296-9210

212

Appendix E

difference of opinion and that a prompt appeal would advance the termination of the litigation. The trial court's certification supports discretionary review.

FACTS

Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars early in the morning. Ensley sued Humphries and the owners of the Red Onion and two other businesses that served alcohol to Humphries the night before the collision. The Red Onion moved for summary judgment based on the evidence that Humphries was at The Red Onion for less than 30 minutes, she consumed less than one drink at that location, others present at the Red Onion observed that Humphries was not apparently intoxicated when she was at the Red Onion, and she consumed several additional drinks after leaving the Red Onion before the collision.

Ensley opposed summary judgment relying in part on the deposition of Daniel Ahern, who spoke with the bartender Cliff Pitcher at the Red Onion a couple of days after the collision. Ahern recalled that Pitcher acknowledged that Humphries had kind of glassy eyes and that he should not have served her. The Red Onion moved to strike Ahern's testimony as hearsay. Ensley argued that Pitcher was a speaking agent for the Red Onion and thus the testimony was admissible as a statement against interest, and that Pitcher's statements to Ahern revealed his state of mind. The trial court struck Ahern's testimony as inadmissible hearsay, granted partial summary judgment dismissing Ensley's claims against the Red Onion and denied reconsideration.

I denied Ensley's motion for discretionary review of the summary judgment dismissing the owners of the Red Onion. (No. 54727-5-1).

Ensley moved the trial court to amend his complaint to include claims against Pitcher. The motion to amend was filed just weeks before the discovery cutoff and two months before the scheduled trial, and Ensley had known of Pitcher's alleged statements to Ahern for almost ten months. The trial court denied the motion to amend noting that it would not be fair to the defendants to delay the case so close to the scheduled trial date.

Ensley then filed this new lawsuit naming Pitcher as the defendant for negligent service of alcohol to Humphries at the Red Onion Tavern. Pitcher moved to dismiss arguing that the summary judgment in favor of the owners of the Red Onion Tavern in the first lawsuit bars the new lawsuit. The trial court denied the motion to dismiss, and Pitcher's motion for reconsideration. But the court granted a certification under RAP 2.3(b)(4) with a statement explaining the reasons for the certification:

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant's right to finality following a dismissal and a plaintiff's right to present a case. There are substantial grounds for differences of opinion on these important issues, as reflected in the arguments and case law submitted by the parties in this case. This is an issue of first impression in Washington. Immediate interlocutory review by the Court of Appeals will allow for immediate dismissal of this action, without the need for potentially unnecessary development of this case.

Petitioner's Motion for Discretionary Review at Appendix A-2.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

In the first lawsuit, the trial court excluded Ahern's testimony of Pitcher's statements as hearsay. For purposes of ER 801(d)(2), a bar manager is not necessarily a speaking agent for admitting key facts related to liability, even in an overservice case.¹ The state of mind hearsay exception under ER 803(a)(3) is limited to a person's "then existing state of mind...but not including a statement of memory or belief" and Pitcher's statement a couple of days after the collision was a statement of memory or belief.

In the current lawsuit, Pitcher is the defendant and likely his statements to Ahern are admissible as a statement of a party opponent. Therefore, based on Ahern's testimony, it is possible that Ensley's claims against Pitcher individually may survive a summary judgment.

¹ Barrie v Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980).

“Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.” Landry v. Luscher, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999). Res judicata bars such claim splitting if the claims are based upon the same cause of action. “Since the purpose of the res judicata doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Landry, 95 Wn. App. at 783. The determination whether the same causes of action are present includes the factor whether the evidence presented in the two actions is “substantially the same[.]” Landry, 95 Wn. App. at 784.

The trial court rejected Pitcher’s argument that the two lawsuits involved substantially the same evidence even though Ahern’s testimony may be admissible in the new lawsuit against Pitcher as a statement of a party opponent. But the court recognized in its RAP 2.3(b)(4) certification that such a change in the scope of evidence presents an issue of first impression. I accept the trial court’s certification as a proper basis for discretionary review.

I note one concern is the res judicata/collateral estoppel requirement that the first lawsuit has been resolved by a final judgment. Ensley’s claims against Humphries are still pending in the first lawsuit, although a settlement has been reached with Humphries. Ensley contends that the settlement is complicated and a final dismissal remains in doubt. Pitcher contends that Ensley has been in

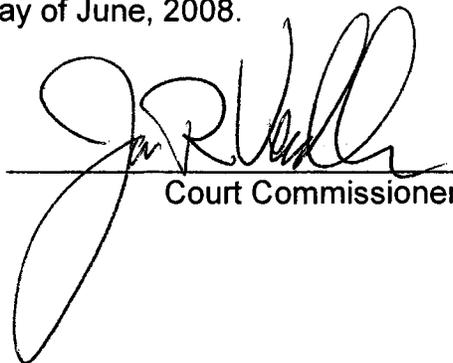
possession of the final settlement documents for more than two months and may be delaying the entry of the final judgment in the first lawsuit for a tactical advantage in the second lawsuit. The trial court did not base its ruling on the "final judgment" requirement. It would be troublesome to deny discretionary review if the delayed entry of the final judgment is a manipulation by Ensley. Generally, either a summary judgment or a judgment after trial is a valid basis for application of res judicata or collateral estoppel.² And there is at least some authority that even a summary judgment as to limited issues may be adequate.³

Based upon the trial court's certification under RAP 2.3(b)(4), I accept discretionary review.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted.

Done this 26th day of June, 2008.



Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 26 AM 9:08

² DeYoung v. Cenex Ltd., 100 Wn. App. 885, 892, 1 P.3d 587 (1978).

³ See Estate of Black, 153 Wn.2d 152, 171, 102 P.3d 796 (2004) (where the trial court limited the issues considered in deciding whether to admit a lost will to probate, res judicata applied to bar relitigation of the issues considered in that limited summary judgment but not to claims of competency or undue influence not addressed in that summary judgment.)

Appendix F

**CERTIFIED
COPY**

THE HONORABLE LAURA INVEEN
Date of Hearing: March 28, 2008

FILED

KR
ON

MAR 31 2008

SUPPL...
BY DEBRA BAILEY TRAIL
DEPUTY

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

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the
marital community composed thereof,

Defendants.

Cause No.: 07-2-39823-6 SEA

**ORDER DENYING PLAINTIFF'S MOTION
TO AMEND COMPLAINT**

[PROPOSED]

THIS MATTER having come on duly and regularly before the undersigned judge of the above entitled Court upon Plaintiff's Motion to Amend Complaint, the parties appearing by and through their respective attorneys of record, the Court having considered the following:

1. Plaintiff's Motion to Amend Complaint;
2. Defendant's Opposition to Motion to Amend Complaint,
3. Declaration of Maggie Peterson, with exhibit, in Support of Defendant's Opposition to Plaintiff's Motion to Amend Complaint;
4. Plaintiff's Reply to Defendant's Opposition to Motion to Amend Complaint;

ORDER DENYING PLAINTIFF'S MOTION TO AMEND
COMPLAINT - 1

[ORIGINAL]

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SEATTLE, WASHINGTON 98101-
3071

1 5. The pleadings and other records on file, including those filed in *Ensley v.*
2 *Red Onion*;

3 6. n/a; and

4 7. n/a;

5 and the Court otherwise deeming itself fully advised;

6 IT IS HEREBY ORDERED that Plaintiff's Motion to Amend Complaint is
7 DENIED.

8 DATED this 28 day of March, 2008.

9
10
11 
12 The Honorable Laura Inveen

13 Presented by:

14 COZEN O'CONNOR

15
16 By: 
17 Jennifer L. Brown, WSBA No. 27952
18 Maggie Peterson, WSBA No. 31176
19 Attorneys for Defendant Clifford Pitcher,
20 employee of Red Onion

21 SEATTLE 69599511780108.000
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ORDER DENYING PLAINTIFF'S MOTION TO AMEND
COMPLAINT - 2

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SEATTLE, WASHINGTON 98101-
3071

Appendix G

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

NICHOLAS ENSLEY,)	
)	
Petitioner,)	No. 61723-1-I
)	
v.)	
)	
CLIFFORD PITCHER and "JANE DOE" PITCHER, husband and wife, and the marital community composed thereof,)	COMMISSIONER'S RULING ON MOTION FOR DISCRETIONARY REVIEW
)	
Respondent.)	
)	

Nicholas Ensley seeks discretionary review of the March 31, 2008 trial court order denying his motion to amend his complaint and the April 22, 2008 order denying reconsideration. For the reasons stated below, the motion for discretionary review is referred to the panel of judges that considers the appeal in Ensley v. Pitcher, No. 61537-8-I.

In March 2005 Ensley suffered serious injuries in a car accident. Ensley was riding in the back seat when the driver, Rebecca Humphries, crashed into two parked cars. Ensley sued Humphries and the owners and operators of three bars that served Humphries alcoholic beverages before the crash, including the Red Onion Tavern. Clifford Pitcher was the bartender at the Red Onion the night of the accident. The Red Onion moved for summary judgment based on evidence that Humphries was at the Red Onion for less than 30 minutes, she consumed less than one drink there, others present observed that

No. 61723-1-1/2

she was not apparently intoxicated, and she consumed several additional drinks after leaving the Red Onion. Ensley opposed summary judgment, relying in part on the deposition of Daniel Ahern, an employee of one of the other bars. According to Ahern, in a conversation a couple of days after the accident, Pitcher said that Humphries looked glassy-eyed and that he should not have served her. Over Ensley's objection, the trial court struck Ahern's testimony as inadmissible hearsay and granted partial summary judgment dismissal of Ensley's claims against the Red Onion. Ensley sought discretionary review, which a commissioner of this court denied in Ensley v. Red Onion, No. 59918-6-1 (June 25, 2007).

In November 2007, Ensley filed a motion to amend his complaint to add Pitcher as a defendant. Red Onion opposed the motion, and the trial court denied the motion to amend on the ground that the trial date was too close.

Subsequently, Ensley filed a new lawsuit against Pitcher. Pitcher filed a motion to dismiss on the ground that the actions and/or claims were barred by principles of res judicata and/or collateral estoppel. The trial court denied the motion to dismiss and Pitcher's motion for reconsideration. But the court certified the matter for discretionary review under RAP 2.3(b)(4):

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant's right to finality following a dismissal and a plaintiff's right to present a case.

No. 61723-1-I/3

Recently a commissioner of this court granted review. Ensley v. Pitcher, No. 61537-8-I.

In the meantime, Ensley had filed a motion to amend his complaint in Ensley v. Pitcher to add a claim of vicarious liability against the Red Onion. The trial court denied the motion to amend and subsequently denied reconsideration. It is these two orders that are the subject of the current motion for discretionary review. Ensley seeks review under RAP 2.3(b)(1), obvious error that renders further proceedings useless, and (b)(2), probable error that substantially alters the status quo or substantially limits a party's freedom to act. Ensley argues that the Red Onion is vicariously liable for Pitcher's acts in serving Humphries and that the proposed amendment to his complaint is not barred by res judicata or collateral estoppel. Pitcher opposes discretionary review.

I am not persuaded that Ensley has met the strict criteria to grant discretionary review. However, because the court has granted review on a related issue in Ensley v. Pitcher, No. 61537-8-I, I will consolidate review in this matter, No. 61723-1-I, under No. 61537-8-I and refer Ensley's motion for discretionary review to the panel that considers No. 61537-8-I on the merits. The parties may brief the issues raised by Ensley's motion for discretionary review of the trial court orders denying Ensley's motion to amend his complaint to add a vicarious liability claim against the Red Onion.

No. 61723-1-1/4

Now, therefore, it is

ORDERED that Ensley's motion for discretionary review in No. 61723-1-1 is consolidated under No. 61537-8-1; and it is

ORDERED that Ensley's motion for discretionary review is passed to the panel in No. 61537-8-1.

Done this 11th day of July, 2008.

Mary A. Neel

Court Commissioner

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STATE OF WASHINGTON
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