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NO. 65927-8-I

COURT OF APPEALS, DIVISION ONE OF THE STATE OF
WASHINGTON

PAULETTE WESTON

Appellant

v.

BERNARD JOSEPH HARRIGAN, a single man and CARLOS D.
BENAVIDERZ and KINDRA BENAVIDEZ, husband and wife and their
marital community and WASHINGTON LIQUOR CONTROL BOARD,
a Division of the State of Washington,

Respondents

REPLY BRIEF OF APPELLANT

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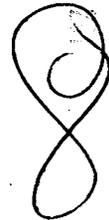


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II. ARGUMENTS IN REPLY

A. Res Judicata bars the defense of the State's Claim that Weston sold alcohol to a minor, the only act that caused her employer to terminate her and the difference in the burden of proof in this instance does not remove the preclusion.

Paulette Weston claims the WSLCB and its agents acted by improper means under state law to charge her in her position of employment at Albertsons store No. 410 on September 29, 2005 with selling alcohol to a minor, a crime under state law and that this action constituted the tort of intentional interference. She was fired by her employer because of this accusation one and a half days later. The WSLCB accusation was filed as a criminal complaint in King County District Criminal Court and Weston appeared on March 8, 2006 (CP at 599) in King County District Court prepared to enter her plea of not guilty and defend the charge. But before she could enter the plea, the Prosecuting Attorney asked that the case be dismissed and Judge Kato confirmed Weston's presumed innocence and what became adjudicated as an acquittal by dismissing the charge with prejudice without having been given a reason as required by CrRLJ8.3(a) but clearly stated that the State's case was dismissed with prejudice as reflected on the District Court Docket. (CP at 129-130). No argument has been made by Respondents to counter that of Weston that a

dismissal with prejudice is an adjudication based on all evidence presumed to have been presented in the case whether actually presented or not (See the holding in *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P. 2d 365 (Div. 1, 1995) and an adjudication on the merits. *Wagner v. McDonald*, 10 Wn. App. 213, 516 P. 2d 1051 (Div. 1, 1973).

1. The District Court Docket speaks for itself that the dismissal of the criminal charge against Weston was with prejudice.

The Respondents argue that this finding by the District Court was not with prejudice because of a hearsay objection raised the first time on appeal; or a speculative hypothetical error by the Court staff. The Plaintiff submitted the District Court Docket as an Exhibit to the Original Motion for Partial Summary Judgment, no objection as to its admissibility on hearsay grounds was raised by Respondents and such objection cannot be considered on appeal. *State v. Hultenschmidt*, 87 Wn. 2d 212, 214, 550 P. 2d 1155 (1976). As to the speculation that an error was made by the Clerk, the burden was on the State to set forth the reasons for a dismissal requested by it under CrRLJ 8.3(a), and no reasons were offered that made it to the docket as required by the rules of criminal procedure to assist the court so that problem should be laid at the feet of the Party now complaining about the accuracy of

that record made by those in privity to the State Prosecutor and responsible for bringing the charge against Weston, the Respondent WSLCB herein. The State had 30 days to appeal Judge Kato's ruling but chose not to appeal. The Trial Court joined in the Respondents' speculation in deciding that the res judicata effect did not bar the WSLCB from now claiming that Weston sold alcohol to a minor, even though the charge was determined to have been false in the District Court criminal dismissal with prejudice as a matter of law.

2. The Respondents mistakenly rely for their argument on case law in Washington that the mere difference in the burden of proof prevents the application of the res judicata effect to preclude the WSLCB from proving its defense that Weston sold alcohol to a minor.

Respondents rely on the holding in *Young v. The City of Seattle*, 25 Wn. 2d 888, 172 P. 2d 222 (1946) in support of their argument but neglect to mention that the drunk driving case that was dismissed was not barred by res judicata as the Court stated at page 893, "One does not have to be drunk to be guilty of actionable negligence". The same cannot be said for selling alcohol to a minor. There is either a sale on which Weston could be prosecuted for as a crime or a sale that when accused of it led to her termination. Unlike drunk driving and negligence one of which requires a showing of intoxication while driving, and the other merely the breach of the

duty of driving as a reasonable person under the circumstances. With the sale of alcohol to a minor there is no such separation of conduct. *Young v. The City of Seattle, Id*, is easily distinguished and not a basis to deny the application of res judicata. The bright line rule based on the difference in the burden of proof was not adopted. The Supreme Court of Washington in that case was unwilling to follow *Coffey v. United States*, 116 U.S. 436, 29 L. Ed. 684, 6 S. Ct. 437 (1886) as persuasive authority in support of Young, the driver making the civil claim, because the acts in each case (drunk driving and negligence) were so dissimilar and not for its lack of persuasive authority generally. *Young v. The City of Seattle, Id* at page 895. That is not the case here.

None of these cases hold that the burden of proof difference alone rules out the requirement that when the acts determined in the criminal case and the civil case are the same, the rule of res judicata precludes making that claim again. There is simply no authority offered to prevent the application of the res judicata effect when as in this case, the sale of alcohol that would cause a criminal conviction was identical to the act of selling alcohol to a minor which the WSLCB and its agents would have to prove in their defense to Weston's claim for tortuous interference.

Respondents' reliance on the holding in *State v. Jones*, 110 Wn. 2d 74, 750 P.2d 620 (1988) for that proposition is also misplaced for a different reason. The case was decided on collateral estoppel grounds and not res judicata at all. That case is simply not on point.

The Respondents seize on language in *Ang. V. Martin*, 118 Wn. App. 553, 76 P. 3d 787 (Div. 2, 2003) where the Court discussed the burden of proving innocence in fact in a legal malpractice civil claim against an attorney defending in a previous criminal case and turn that language the Court used in discussing the unique policy principles applicable in a legal malpractice action into an argument that res judicata cannot ever apply in a civil case of any kind where the burden of proof is different is not supported by that case. The case again is not on point to the argument Respondents make. The act the WLCB and its agents accused her of committing, selling alcohol to a minor, was adjudicated against them by the dismissal with prejudice as a matter of law. *Wagner v. McDonald*, 10 Wn. App. 213, 516 P. 2d 1051 (Div. 1, 1973). Since the charge by the State that Weston sold alcohol to a minor was ruled as false as a matter of law in King County District Court and by the application of res judicata, the Respondents cannot now prove otherwise in their

defense to Weston's claim for tortious interference. Without that defense, Weston need only prove her damages.

3. Coffey v. United States remains good law as persuasive authority for the application of res judicata in this case.

In *Coffey v. United States*, 116 U.S. 436, 29 L. Ed. 684, 6 S. Ct. 437 (1886), Coffey was charged with an attempt to defraud the government and was acquitted. The government's attempt to bring an in rem action against the acquitted defendant's property was barred on res judicata grounds. The Supreme Court stated "But upon this record, as we have already seen, the parties and matter in issue were the same". Respondents argue in their brief that Coffey was overruled in 1984 in *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed 2d 361 (1984) and therefore not good Law thereafter. However that is not actually true as to res judicata where the issue in that case was whether the civil action following a criminal acquittal was remedial in nature, (See Page 359 of the opinion) that is to make the government whole for a financial loss it suffered; and whether a punishment in a civil case by the government in that regard would cause double jeopardy. See the case of *Ferguson v. U.S.*, 911 F. Supp. 424, 427(1989) where that distinction is discussed. In that case, the Court pointed out at

page 427 that even as whether a civil action was remedial or punitive, five years later, the Supreme Court reversed course and held in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d (1989) that the label attached to a civil proceeding did not matter and looked instead to the character of the actual sanctions before deciding whether double jeopardy applied, an issue not pertinent here. That court pointed out that even on the remedial test, in *U.S. v. One Assortment of 89 Firearms*, Id. at page 361, the Supreme Court made it clear that *Coffey v. U.S.* was disapproved only for collateral estoppel or double jeopardy purposes so as to bar a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges and not overruled. No such civil proceeding is involved in this case and *Coffey v. United States*, remains unchallenged to be applied as persuasive authority in this case where the parties and matter in issue were the same especially, as in this case, where the act of selling upon which the criminal charge was based is identical to the act of selling upon which the WSLCB must base its defense. Respondents in effect concede the prosecutor and the WSLCB were the same party for purposes of their defense to Weston's res judicata arguments, if not the individual agents. See Respondents' Brief, footnote 106, page

27-28). Without that charge that Weston sold alcohol to a minor, they could never justify claiming that their conduct was not intentional for tortious interference purposes, especially where the measure of intent for establishing a prima facie case of intent is that the conduct was improper and not the purpose to harm standard. *Pleas v. City of Seattle*, 112 Wn. 2d 794, 800, 774 P. 2d 1158 (1989). Since res judicata applies, they can no longer make that defense. That case was concluded against them. What the State had to prove in criminal court was the act that Weston committed for the criminal charge purpose was identical to the act they have to prove Weston committed in their defense, that she sold alcohol to a minor. That defense should forever be barred. Without that defense, no justification of making the false charge of selling alcohol to a minor can be shown. By holding that it could, the trial court committed error and the Order denying Plaintiff's Motion for Summary judgment should be reversed and the matter set for trial as to damages.

B. The rule of collateral estoppel does not bar a re-litigation of facts decided in the Federal Court litigation in this case

1. In order for the rule that issues decided in another case among the same parties or parties in privity with each other, the issues decided must be identical.

Initially it must be stated that the decisions in the Federal Courts made no findings or decisions on Weston's state intentional interference claims as in this appeal because Weston's state court claims were only dismissed without prejudice on discretionary jurisdictional grounds not on the merits.

In addition and more importantly for this appeal, the decisions of the Federal Courts, no matter how similar the facts, were decided only on the issue of qualified privilege of state actors under the Federal law standard that was a different standard for even qualified privilege under state law. The issue of qualified privilege under state standards was not even considered by the Trial Court. The U.S. District Court Judge predicated his findings on the standard that intent to harm was applicable and the Ninth Circuit affirmed on that same ground. (Respondents' Brief, pages 15 (District Court); page 16, 9th Circuit) The Ninth Circuit in deciding that qualified immunity precluded Weston's

Federal claims in measuring all inferences against the standard for qualified immunity, found that the conduct of the state officials did not rise to the level to “shock the conscience” of the Court.

The Circuit Court in affirming Judge Martinez’s finding of qualified immunity under Federal law, similarly evaluated inferences from the disputed evidence presented under the deliberate indifference subset of the “shocks the conscience” standard for determining qualified immunity and found it did not meet that standard to disqualify the immunity either. What this Court should consider is that under neither version of the Federal law shocks the conscience standard (deliberate indifference or intent to harm) for qualified immunity purposes, does it rule out a state law claim for intentional interference where the standard for establishing a prima facie case of intentional interference (not qualified immunity at all) is either intent to harm or the use of improper means measured by the test of reasonableness of the state agents. *Pleas v. City of Seattle*, 112 Wn. 2d 794, 804, 774 P. 2d 1158 (1989). What makes matters worse for Respondents’ collateral estoppel argument,

is that under both subsets of the federal standard, the threshold determination is that the conduct must “shock the conscience” of the Court before the state officials are qualifiedly exempt. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); *Porter v. Osborn*, 546 F. 3rd 1131, 1137 (9th Cir. 2008). Collateral estoppel applies only if the issues sought to be precluded were identical. *Barr v. Day*, 124 Wn. 2d 318, 325, 879 P. 2d 912 (1994) They were in no sense identical to the issues before the District Court or Ninth Circuit so collateral estoppel cannot apply to the deterministic facts in the Federal cases on Weston’s claims there. (See Appellant’s argument B 3 herein).

2. The determination of qualified privilege which under state law is a question of fact was not yet considered by the trial court in any of the decisions to be reviewed on appeal so the issues in the Federal Court and the Trial Court below could not be identical.

A prima facie case for intentional interference is met if Plaintiff establishes: (1) The existence of a valid contractual relationship; (2) that Defendants intentionally induced or caused a breach or termination of that relationship for an improper purpose or by using improper means; and (3) that

the Defendants' interference was the proximate cause of the claimed damages. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn. 2d 120, 137, 139, 839 P. 2d 314 (1992); *Calbom v. Knudtson*, 65 Wn. 2d 157, 396 P. 2d 148 (1964).

Only If Weston establishes a prima facie case, does the burden shift to the defendant to prove justification or privilege.

Pleas v. City of Seattle, 112 Wn. 2d 794, 804, 774 P. 2d 1158 (1989). Even if qualified privilege under state law had been in issue, that too would have been a question of the

reasonableness of the conduct of the agents and a question of fact. The test for state qualified immunity under state law is whether the official acts reasonably. *McKinney v. City of Tukwila*, 103 Wash. App. 391, 13 P. 3d 631 (Div. 1 2000).

Reasonableness is a question of fact and the facts presented if reasonable inferences are accepted as they must for the purposes of a summary judgment motion, the test is whether there are disputed issues of fact as to reasonableness for qualified immunity purposes. *Lesley v. State*, 83 Wash. App. 263, 275, 921 P. 2d 1066(1996). But that issue under state law, unlike in Federal Court has not been litigated.

3. Respondents incorrectly argue that collateral estoppel under Washington law precludes re-litigation of determinative facts as well as issues that have actually been litigated and necessarily determined in an earlier proceeding.

Respondents rely heavily for their argument on the case of *Christensen v. Grant County Hospital District No. 1*, 152 Wn. 2d 299, 306, 96 P. 3d 957 (2004) that any facts decided in a prior decision cannot be re-litigated even if the issues were different. The language seized upon by Respondents that was used by the *Christensen* Court from the case of *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn. 2d, 887,894, 435 P. 2d 654 (1967) is on page 306 of *Christensen v. Grant County Hospital District No. 1*, Id where that Court stated “collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation”, . The Court in *Luisi* where that principle was extracted however went on to state at page 894, “the party asserting either doctrine has the burden of proof to show that the determinative issue was litigated in the former proceedings.” The Court in *Christensen* after having made the comment about determinative facts, went on to hold by stating at page 307, “Collateral estoppel may be applied to

preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding.” The Court confirmed the long established requirement that identical issues are required for the first element before collateral estoppel can be applied to the determinative facts. *Christensen v. Grant County Hospital District No. 1*, 152 Wn. 2d 299, 307, 96 P. 3d 957 (2004) Respondents have taken the out of sequence statement by the Court to try to establish a new rule that any fact decided in a dispute between the same parties in a prior proceeding is forever established between them no matter how different the issue contrary to the long established rule in Washington . If this new rule were applied that any facts decided in the earlier proceeding regardless of the difference in issues determined, this Court would be asked to decide facts in summary judgment proceedings when those facts shaping issues are reserved for a jury to determine, thus denying Weston her right to a fair trial of those disputed facts.

For example, Respondents argue that the Federal Courts determined the fact that the State Officers were not shown to have known in advance Weston would lose her job as they applied the purpose to harm standard for federal law purposes. This determination was not that the conduct was proper under the

improper means alternative test under Washington law for tortious interference and she would be denied the right to show that it was improper. Respondents' argument fails to consider that the Officers knew she was employed (CP at 178, 1-4), were aware ahead of time that Albertsons had a no tolerance policy regarding the sale of alcohol to a minor (CP at 527, 1-5) and they had to have known as they used an altered ID and engaged in harassing, frightening and intimidating conduct, on the way to falsely charging her with the crime of the sale of alcohol to a minor, that Weston would sell alcohol to the female agent with the loss of her job was a likely consequence. She need only show under community standards that the conduct was improper and that is a question of fact. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002). Collateral estoppel does not bar this right.

In addition, the issue must have been fully litigated for collateral estoppel to even apply. The Court in *Shuman v. Department of Licensing*, 108 Wn. App. 673, 32 P. 3d 1011 (Div. 3, 2001) held that the question may turn on whether the parties actually recognized the issues as important and they were sufficiently foreseeable. Weston could not be expected to have

foreseen in a summary judgment proceeding in Federal Court to be determined on the issue of qualified privilege and being denied her right to present testimony and documents in an evidentiary hearing for the state standard of showing a prima facie case of tortious interference, that she would have foreseen those facts were being forever established. This is true particularly where those state claims containing those very different issues were dismissed without prejudice on jurisdictional grounds.

Washington Courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question so as not to work an injustice. *Nielson v. Spanaway general Medical Clinic, Inc.*, 135 Wn. 2d 255, 265, 956 P. 2d 312 (1998); *Neff v. Allstate Insurance Company*, 70 Wn. App. 796 (Div. 1, 1993 citing, *Sullivan v. American Airlines*, 613 F. Supp. 226, 230 (S.D. N.Y., 1985) Weston was denied her right to present her facts to a jury in criminal court where she could have proved her innocence but is deemed so anyway by res judicata, she was denied that right in Federal Court on different issues, was denied that right in the trial court and now Respondents are urging this Court to develop a new rule of law and deny her that right once again.

C. Respondents have not challenged whether Weston's arguments and authorities that the agents' conduct was improper in the means by which it was conducted is a question of fact and the Order for Summary Judgment of Dismissal should therefore be reversed.

Respondents offer no argument to rebut Weston's assertion that the use of improper means as determined by a regulation or recognized rule of common law is an equal and alternative basis from purpose to harm in deciding whether a prima facie case of tortious interference has been shown. *Pleas v. City of Seattle*, 112 Wn. 2d 794, 800, 774 P. 2d 1158 (1989)

Nor have the Respondents rebutted Weston's argument that the test has been met that it is up to the jury to decide if the conduct met community standards of what was proper. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002). Instead, they rely solely on a collateral estoppel argument that that decision has already been litigated. Not even the Federal Courts made any finding or conclusion of law that the harassing and intimidating conduct of the state officers and the use of an altered license based on circumstantial evidence, did not happen the way Weston stated it did. They only decided that the

Officers did not intend to harm her. The District Court Judge found that this conduct did not purpose an intent to harm (See Respondents brief, page 14) The Ninth Circuit only concluded that the evidence established as a matter of law that the conduct of the Officers did not evidence a purpose to harm. (See Respondents Brief page 16). At worst under common law, there was a disputed issue of material fact under the summary judgment rule that every reasonable inference must have been given to Weston or the facts are assumed as true. *Wilson v. Steinbach*, 98 Wn. 2d 434,437, 656 P. 2d 1030 (1982). Collateral estoppel has never been applied to deny the retrial of facts, even the same facts supporting a different issue, and when the Trial Court in this case made such a finding, that error of law should justify a reversal for a trial on the merits of whether the conduct was improper. Weston is entitled to her day in court to prove that this conduct was improper. Only then may the Respondents argue that their conduct was privileged and that issue is decided as a question of fact . *Lesley v. State*, 83 Wash. App. 263, 275, 921 P. 2d 1066(1996). On the other hand, if this Court finds that the false charge of selling alcohol to a minor is no longer available as a defense to Weston's prima facie case for tortuous interference, then in that event only a trial of damages is required.

D. The proximate cause of Weston losing her job would not have happened but for the agents' conduct using improper means and that question is one solely of fact which is in dispute so that the trial court's summary judgment of dismissal should be reversed.

Respondents' latest claim is that Weston was not fired because of the officers' alcohol charge but because Albertsons did their own investigation and fired her. (Respondents' Brief, at pages 26 and 27). Had the Officer not charged her in the presence of her employer, neither Weston nor her employer would have known the birth date she entered in the computer was anything other than that of a 98 year old person eligible to purchase alcohol in Washington? (See Appendix B for the transaction report run at 11:38 on 9/30/2005, the day after the alleged violation, CP at page 358 and Weston's Statement CP at page 359). And from Weston's statement, after omitting what she was told by the Officer, there was no evidence in front of the employer to show they would have known that date was the date Carey would turn 21. But for the false charge by the Officer, Weston would not have been fired. The only evidence other than the Officer's charge was the transaction report and Weston's statement, neither said Weston sold alcohol to a minor.

The “but for” standard is applicable for causation in fact determinations. *Hartley v. State*, 103 Wn. 2d 768, 777, 698 P. 2d 77(1985). Proximate cause is a question of fact unless decided as a matter of law for policy reasons, not even suggested here ,and a matter for the jury to decide not the Court. *Everest v. Rieken*, 26 Wn. 2d 542, 174 P. 2d 762 (1946).

Respondents try to bypass this difficulty by now claiming that Albertsons was solely responsible for Weston losing her job without documentation or testimonial evidence to support their claim. Weston’s assertions are entitled to be presented to a jury that she was frightened and harassed by the agents as she was entering the false birth date from Carey’s I.D. into the computer (CP at 544, 1-26) and that she had a twenty- three year history of always entering the birth date (CP at 540, 17-23). Also she is entitled to show, that the size of the birth date numerals of 12-05-1985 on the license was twice the size of the turn 21 on date of 12-05-2006 made it virtually impossible to confuse the dates. (See Appendix A for actual size of license issued to Louise Carey, and illustrating this fact in dispute ;Exhibit D in Excerpt No. 1 to Declaration of Kathryn Battuello, CP at 161). These facts and the contradictory evidence of how the sales slip got into Officer

Harrigan's hands based on the contradictory reports he prepared at the time (CP at 183, and 188, Exhibits 1, and 4 (See Appendix A for a copy of the reports); and the contradictory statements of Officer Benavidez (CP at 575-576), (See Appendix A for Officer Benavidez's statement in that regard in deposition) leaves only disputed facts for trial. Also that his time of arrival at Albertsons Number 410 documented by his work travel log (CP at 185, Exhibit 3) could not possibly have allowed him time to witness the sale when he said he did (CP at 506, 20-22). Therefore, there could be no legal justification for finding as a matter of law that Weston could not establish causation in fact. Even circumstantial evidence is permitted for summary judgment purposes. *Poorte v. Evans*, 66 Wash. App. 358, 365, 832 P. 2d 105 (1992). All of this direct and circumstantial evidence is relevant to determine proximate cause and a trial is necessary for that determination, unless the Court finds that the false charge made by the WSLCB agents to Weston's employer to establish a prima facie case of tortious interference, then, in that case, only the issues of damages would be determined at trial.

E. Weston was entitled to have the benefit of all the evidence that was not compelled when the trial court denied her motion and Granted Respondents' and consequently did not have the full

opportunity to make her case of a prima facie showing of the tort of intentional interference.

Respondents try to avoid their own failure to comply for over four months with the discovery rules on two grounds. First, they argue that Weston filed her motion to compel shortly before her Motion for Partial Summary Judgment as a matter of law so, they argue, she could not have needed a response to support that motion. However, this argument neglects to consider that the Motion to Compel Discovery was made necessary to respond to the Defendant's Motion for Summary Judgment of Dismissal. The actual license used by agent Carey was necessary to respond to that motion and prove whether it had been altered and had been promised when her deposition was taken long before and specifically requested in this case. (CP at 632). Given that the actual license used by agent Carey and the sales receipt having a birth date of 12-05-06 being in dispute by circumstantial evidence and the witnesses credibility, was never made available for use by Weston in defending Respondents' summary judgment motion, failing to order its production in order to properly and fully prepare that defense was prejudicial to Weston's case, the loss of benefits she was entitled to under CR 26 and a denial of the right to a fair

presentation of her case. The second argument is based once again on the Respondents' misuse of the collateral estoppel rule and as shown herein, no authority is offered from a Washington case to prevent the retrial of facts that may have been decided in a prior proceeding unless the legal issues were identical. *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn. 2d, 887,894, 435 P. 2d 654 (1967). Neither argument justifies the refusal of the Trial Court to compel the production of the license and the other materials requested and not produced.

F. Respondents' claim for attorneys fees pursuant to RAP 18.1 is misplaced because no determination was made in Federal Court that Weston could not establish by competent evidence that the conduct of the State Officers was improper under state law for a prima facie showing of tortuous interference.

Respondents seek an award of their attorneys fees if successful in defending this appeal under RAP 18.1 on the grounds that assertions of misconduct by Weston against the State Officers was determined not to have been supported by competent evidence based on the findings in the Federal litigation. This argument fails to consider that Judge Martinez only found that the agents' conduct was not so egregious to demonstrate a purposeful intent to harm. (Respondents Brief page 14 referencing CP at 447

II.11-16). Similarly, the Circuit Court only found as a matter of law that the Officers' conduct did not evidence a purposeful intent to harm in deciding whether a qualified privilege applied (Respondents Brief page 14 referencing CP at 454-55). Neither Court was asked to consider the state law alternative under the issue of whether a prima facie showing of improper means under community standards was found. Under Washington law, this question is for the jury. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002). Even if Respondents are the prevailing party on this appeal, the grounds for their argument for attorneys fees under RAP 18.1 simply do not exist.

III. CONCLUSION

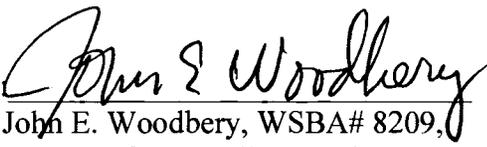
The case against Weston in King County District Court was adjudicated by a dismissal with prejudice. The essence of Respondents' defense is that Weston made such a sale in violation of the criminal law and as a result her employer fired her. That defense against her claim for damages is now barred by the application of the doctrine of res judicata. Asserting that defense would be attempting to establish what was previously determined as a matter of law is a false charge

In the alternative, since collateral estoppel cannot apply because the issues in the Federal litigation were not the same, those disputed facts may be presented at trial where the issues are different. The facts Respondents claim are barred are clearly material and in dispute to establish a prima facie case for tortious interference on the alternative state standard of improper means being employed. Based on the authorities for the common law rule stated herein, that determination is a question of fact for the jury to decide, not the court.

The Trial Court erred by assuming Judge Kato's Criminal Court ruling was without prejudice and denying Weston's motion for summary judgment as to liability or in granting Respondents' motion for summary judgment of dismissal where in effect, facts were decided by the court, inappropriate under CR 56 and Washington case law and abusing its discretion in denying Weston's Motion to Compel Discovery, justifying reversal.

Respectfully submitted this 19th day of May, 2011.

JOHN E. WOODBERY, P.S.

By 
John E. Woodbery, WSBA# 8209,
Attorney for Appellant Paulette Weston

CERTIFICATE OF SERVICE

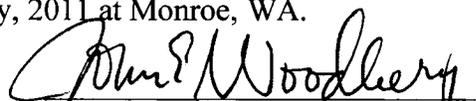
I hereby certify under penalty of perjury in accordance with the laws of the State of Washington that filed the original and one copy of the preceding Reply Brief of Appellant with Appendices A and B and this Certificate of Service in Division I of the Court of Appeals, and a replacement original and copy by mail to the Court of Appeals and to the following persons at the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And, that I served a copy of the preceding Reply Brief of Appellant and this certificate of service on counsel for Respondents at the address below:

Robert M. McKenna
Attorney General
Kathryn M. Battuello
Catherine Hendricks
Assistant Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188

DATED this 19th day of May, 2011 at Monroe, WA.


John E. Woodbery, WSBA# 8209

APPENDIX A:

Exhibits 1 and 4 to Deposition of Harrigan CP at 183, 184 and 188

Excerpt of Deposition Testimony of Benavidez CP at 575 and 576

Exhibit D in Excerpt No. 1 to Declaration
of Kathryn Battuello CP at 152 and 161

ORIGINAL



WASHINGTON STATE LIQUOR CONTROL BOARD
CASE REPORT

CITY: SEATTLE
DATE: OCTOBER 25, 2005
VIOLATION:
CODE: RCW: 66.21.370 (1) - FURNISHING LIQUOR TO A PERSON UNDER 21 YEARS OF AGE.
DATE: SEPT. 29, 2005
TIME: 1920 HOURS
LOCATION: ALBERTSON'S FOOD CENTER #410,
13030 AURORA AVENUE NORTH
SEATTLE, WA. 98133

CASE NO: 2A5572B
CITATION NR: C-8930

DEFENDANT
NAME: WESTON, PAULETTE N.
DOB: 06-24-1963
ADDRESS: 6300 15TH AVENUE NE #105
SEATTLE, WA. 98115
TELEPHONE: 206-528-1841
WSOL: WESTOPN35714 - EXPIRES 2007

SUMMARY

ON THE ABOVE DATE AND TIME, OFFICER BENAVIDEZ AND I CONDUCTED A LIQUOR COMPLIANCE CHECK UTILIZING A [REDACTED] YEAR-OLD FEMALE UNDERAGE OPERATIVE AT ALBERTSON'S FOODS CENTER #410, A LICENSED LOCATION IN THE CITY OF SEATTLE. THE MINOR WAS IN POSSESSION OF HER VALID WASHINGTON STATE DRIVER'S LICENSE (DATE OF BIRTH OF [REDACTED]) AND A MARKED \$20 BILL WHICH I HAD PROVIDED HER. THE MINOR WHO IS YOUTHFUL LOOKING, ENTERED THE STORE FIRST. OFFICER BENAVIDEZ AND I FOLLOWED HER INSIDE TO WITNESS THE COMPLIANCE CHECK. THE OPERATIVE SELECTED A 750ML BOTTLE OF KENDALL JACKSON CHARDONNAY WINE FROM THE BEVERAGE DISPLAY SECTION AND PROCEEDED TO THE CASH REGISTER AREA WITH THE WINE. I WAS STANDING IN LINE DIRECTLY BEHIND THE OPERATIVE. OFFICER BENAVIDEZ WAS STANDING NEAR BY IN THE STORE AISLE AREA FROM WHERE HE WITNESSED THE COMPLIANCE CHECK. THE CASHIER CLERK LATER IDENTIFIED AS MS. PAULETTE WESTON ASKED THE MINOR FOR HER IDENTIFICATION WHICH SHE PROVIDED TO HER. MS. WESTON LOOKED AT THE LICENSE AND ENTERED INFORMATION FROM THE LICENSE INTO THE STORE'S POINT OF SALE SYSTEM. MS. WESTON HANDED THE LICENSE BACK TO THE OPERATIVE. SHE COLLECTED THE MARKED \$20 BILL FROM THE OPERATIVE, RANG UP THE SALE FOR THE WINE (PURCHASE PRICE \$18.31), GAVE THE MINOR THE CHANGE FROM THE SALE (\$3.69), BAGGED THE BOTTLE OF WINE WITH A RECEIPT AND HANDED IT TO THE MINOR. THE OPERATIVE HANDED ME THE WINE AND THE CHANGE FROM THE PURCHASE. SHE THEN LEFT THE STORE. OFFICER BENAVIDEZ AND I THEN IDENTIFIED OURSELVES TO MS. WESTON AND INFORMED HER THAT SHE HAD FURNISHED LIQUOR TO A MINOR. I ASKED FOR AND RECEIVED BACK FROM MS. WESTON THE MARKED \$20 BILL USED BY THE OPERATIVE TO PURCHASE THE WINE. THE BOTTLE OF WINE/RECEIPT WERE RETAINED AS EVIDENCE AND STORED AT THE SEATTLE ENFORCEMENT EVIDENCE ROOM. I PREPARED AN INVENTORY AND RECEIPT FORM LISTING THE BOTTLE OF WINE AND THAT THE CHANGE FROM THE PURCHASE WAS RETURNED TO THE STORE ASSISTANT MANAGER MS. SEDOWSKY. A LIQUOR COMPLIANCE CHECK SALE FORM WAS PREPARED REFERENCE THIS INCIDENT.

WITNESSES: MS. LOUISE CAREY - UNDERAGE OPERATIVE - OFFICER CARLOS BENAVIDEZ
4401 EAST MARGINAL WAY SOUTH 4401 EAST MARGINAL WAY SOUTH
SEATTLE, WA. 98134 SEATTLE, WA. 98134
206 484-8094 206-389-3965

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

In the City of Seattle

AGENT'S NAME: Bernard Harrigan

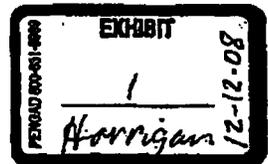
PHONE: (206) 464-6097

BADGE NO: 487

AGENT'S SIGNATURE: *Bernard J. Harrigan*

DATE: 10-25-05

Ex 12



91900004

14

Washington State Liquor Control Board
 Enforcement Division
 3000 Pacific Avenue
 PO Box 43094
 Olympia, WA 98504-3094

CASE NO: 2A5272B

TYPE OF ADMINISTRATIVE ACTION: VIOLATION WARNING NOTICE

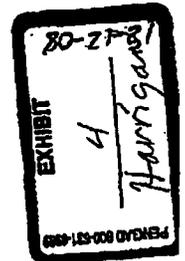
LICENSEE ALBERTSON'S INC		LICENSE NR: 080767-2A CLASS: Grocery Store-BEER/WINE	
Trade Name ALBERTSON'S FOOD CENTER #410			
Address of Business: 13050 AURORA AVENUE NORTH		City SEATTLE, 98133	County KING
Violation RCW 66.44.270 (1) FURNISHING LIQUOR TO A PERSON UNDER 21 YEARS OF AGE.			
		Observed <input checked="" type="checkbox"/>	Referred <input type="checkbox"/>
Served On <i>Michelle McDonald</i>	Position <i>Manager</i>	Date & Time <i>10/1/05 - 12:15 PM</i>	
Date & Time of Violation SEPT. 28, 2005 1920 HRS	Liquor Control Agent (Print) Bernard Hamigan	Liquor Control Agent (Signature) <i>Bernard Hamigan</i>	

INVESTIGATIVE SUMMARY

ON THE ABOVE DATE AND TIME, OFFICER BENAVIDEZ AND I CONDUCTED A LIQUOR COMPLIANCE CHECK UTILIZING A 19-YEAR OLD FEMALE INVESTIGATIVE AIDE AT THE ALBERTSON'S FOOD CENTER #410, A LICENSED LOCATION IN THE CITY OF SEATTLE. THE MINOR WAS IN POSSESSION OF HER VALID WASHINGTON STATE DRIVER'S LICENSE WHICH SHOWED HER DATE OF BIRTH OF 12-5-1985. POSING AS A CUSTOMERS, OFFICER BENAVIDEZ AND I ENTERED THE STORE AFTER THE MINOR. WE POSITIONED OURSELVES IN THE STORE SO AS TO OBSERVE WHETHER OR NOT A SALE WOULD BE MADE. THE MINOR WHO IS YOUTHFUL LOOKING, SELECTED A 750 ML BOTTLE OF KENDALL JACKSON CHARDONNAY WINE FROM THE BEVERAGE COOLER AND PROCEEDED TO THE REGISTER TO PAY FOR THE WINE. THE CASHIER CLERK IDENTIFIED AS MS. PAULETTE WESTON ASKED THE MINOR FOR HER IDENTIFICATION. MS. WESTON THEN KEYED IN WHAT WAS LATER DETERMINED TO BE INCORRECT INFORMATION FROM THE MINOR'S LICENSE INTO THE CASH REGISTER. THE CLERK THEN SOLD THE ALCOHOL TO THE MINOR. THE MINOR LEFT THE IMMEDIATE AREA WITH THE PURCHASE. OFFICER BENAVIDEZ AND I THEN IDENTIFIED OURSELVES TO MS. WESTON AND INFORMED HER OF THE VIOLATION OF FURNISHING LIQUOR TO A MINOR. THE "BUY" MONEY USED BY THE MINOR WAS RECOVERED; THE CHANGE FROM THE PURCHASE WAS RETURNED TO THE SELLER. THE BOTTLE OF WINE WAS TAKEN INTO EVIDENCE. THIS IS THE FIRST REPORTED LIQUOR VIOLATION INVOLVING A MINOR WITHIN THE PAST TWO YEARS AT THIS PREMISES.

A LIQUOR COMPLIANCE CHECK SALE FORM REFERENCE THIS INCIDENT WAS PREPARED/ SIGNED BY THE MINOR AND MYSELF.

"RCW 66.44.270 Furnishing liquor to minors--Possession, use--Penalties--Exhibition of effects--Exceptions. (1) It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.



19

1 A. Yes.

2 Q. "... Officer Harrigan identified himself and
3 informed her of the violation..."

4 That would be Ms. Weston, the clerk --

5 A. Yes.

6 Q. -- right? The, "...her of the violation selling
7 alcohol to a minor."

8 Then the next sentence, "I went to the front of the
9 registers and retrieved the alcohol and change from the IA. I
10 then proceeded to the checkstand with Officer Harrigan."

11 My question is, do you recall today where you went
12 to retrieve the alcohol and change from the IA in the store?

13 A. In front of the checkout stands, but I can't recall
14 if it was just in front or by the door.

15 Q. Could have been by the door?

16 A. Could have been by the door. Could have been
17 closer to the checkout stands.

18 Q. And you retrieved the alcohol she had purchased?

19 A. Correct.

20 Q. And the change that she had gotten back from the
21 transaction?

22 A. Correct.

23 Q. Anything else?

24 A. No.

25 Q. Then you say, "I then proceeded to the checkstand

Excerpt of Record, Vol. 2, Page 76

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Q. You did not observe that?

A. I can't recall if I did or not.

Q. Can you recall seeing a sales receipt that night at all?

A. No, I can't remember.

Q. I didn't find any reference to it in your report; did I read that carefully enough?

A. If it's not in there, then I can't say.

MS. BATTUELLO: There's a reference to the receipt.

THE WITNESS: There is one.

Q. (By Mr. Woodbery) Is there?

A. Yeah.

Q. Could you point it out to me?

A. Second paragraph on the bottom -- or second, excuse me -- line.

Q. Second line from the bottom?

A. Un-huh.

Q. Okay, "he" there, that's referring to Harrigan?

A. Correct.

Q. "... returned the change from the sale and a receipt for the change and the alcohol that was seized as evidence"; right?

A. Correct -- well, no. That receipt --

Q. Yeah, that's a different receipt.

A. Yeah, that's a different receipt. That's not the

4

WASHINGTON
DRIVER LICENSE

LIC # CAREYLA152RE
EXP 12-05-2006
CAREY, LOUISE A
1229 SW 720th St
SEATTLE WA 98146-0000
CDL RES
ISSUE DATE SEX HT WT EYES
04-08-2004 F 5-02 108 GRN

DOB
12-05-1985



AGE 21 ON
12-05-2005

PIC #: CAREYLA152RE
Control #: 33040993N1144
Name: CAREY, LOUISE A
Production status: Mailed
Issue date: 4/8/2004
Mailed date: 4-12-2004
Photo Verification v 0.4 ©2002 Digimarc Corporation

WASHINGTON
DRIVER LICENSE

LIC # CAREYLA152RE
EXP 12-05-2006
CAREY, LOUISE A
1229 SW 720th St
SEATTLE WA 98146-0000
CDL RES
ISSUE DATE SEX HT WT EYES
04-08-2004 F 5-02 108 GRN

DOB
12-05-06



AGE 21 ON
12-05-2005

PIC #: CAREYLA152RE
Control #: 33040993N1144
Name: CAREY, LOUISE A
Production status: Mailed
Issue date: 4/8/2004
Mailed date: 4-12-2004
Photo Verification v 0.4 ©2002 Digimarc Corporation

EXHIBIT

Excerpt of Record, Vol. 2, Page 8

APPENDIX B:

Exhibit 4 to Deposition of Dochow

CP at page 358

Exhibit 6 to Deposition of Dochow

CP at page 359

ORIGINAL

09/30/2005 11:30 2853558888

PAGE 04

Electronic Journal Report - Detail

Page 1

Reported at: 09/29/05 20:32
Current Period:

Terminal: 7 Trans No: 0155 Operator: 140 09/29/05 19:21

----- CASH RECEIPT -----
ALBERTSONS #00410 (206) 306 - 8780
STORE DIRECTOR - HOWARD D.

9/29/05 19:21 0410 07 0155 140
BIRTHDATE = 120506
K JACKSON 14.99 T
*** TAX 1.32 BAL 16.31
CASH 20.00
CHANGE 3.69
Total Number of Items Purchased - 1

ALBERTSONS. HELPING MAKE
YOUR LIFE EASIER.

----- SUMMARY JOURNAL -----
9/29/05 19:21 0410 07 0155 140
BIRTHDATE = 120506, AGE = 98 (18,18,21
*** TAX 1.32 BAL 16.31
CASH 20.00
CHANGE 3.69

Exh. No. 4
Date: 12-17-08
Name: H. Dochow
M & M Court Reporting

Exh 21

20100013

109

09/30/2005 11:38 286265888

PAGE 53

This is a statement of what happened on September 29th at 7:30 P.M.

I was checking and a woman came in my line and she had one bottle of wine. I asked her for some ID, after scanning it and the check ID signal appeared on the screen, I looked at the ID, and checked the picture. Then I punched in the date she would be 21, and it approved. There was a man pressuring her and me next in line the whole time. She also got some cigarettes, I was sure the computer would be correct. The liquor board man said that he saw me check the ID, and put it in the system. He agreed that the computer should have caught it!

This was absolutely unintentional on my part. I did key in 12 05 06 and the computer accepted it. Pauline

Exh. No.	6
Date	12-17-08
Name	H. Dochow
M. M. Court Reporting	

Exh # 12

10100037

110