

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR	2-3
Assignments of Error	
No. 1	2
No. 2	2
No. 3	2
No. 4	2
No. 5	2-3
No. 6	3
Issues Pertaining to Assignments of Error	
No. 1	3
No. 2	3
No. 3	3
No. 4	3
II. Statement of the Case	3-6
A. Procedural History	3-4
B. Fact Statement	4-6
III. Argument	6-11
A. The Court's Finding Of Fact That An Assault Occurred Was Not Supported By Substantial Evidence	8-9
B. The Court's Conclusion Of Law As To Causation On The Issue Of The Plaintiff's Injuries And Damages Is Not Supported By Substantial Evidence	9-11
IV. Conclusion	11

TABLE OF AUTHORITIES

Table of Cases

<u>Adler v. University Boat Mart</u> , 63 Wash.2d 334, 339, 387 P.2d 509 (1963)	9
<u>Arnold v. Sanstol</u> , 43 Wash.2d 94, 99, 260 P.2d 327 (1953)	10
<u>Grobe v. Valley Garbage Serv.</u> , 87 Wash.2d 217, 225-26, 551 P.2d 748 (1976).	10
<u>Isla Verde Intern. Holdings, Inc. v. City of Camas</u> , 146 Wash.2d 740, 752, 49 P.3d 867 (2002)	8
<u>Lamphiear v. Skagit Corp.</u> , 6 Wash.App. 350, 357, 493 P.2d 1018.	10,11
<u>Matter of Estate of Eubank</u> , 50 Wash.App.611, 617-618,	

749 P.2d 691 (1988)	8
McKinney v. City of Tukwila , 103 Wash.App. 391, 408, 13 P.3d 867 (2002)	8
Nejin v. City Of Seattle , 40 Wash.App. 414, 698 P.2d 615	10
Pilcher v. State , 112 Wash.App. 428, 435, 49 P.3d 947, 951 (2002).	8
Ruff v. Fruit Delivery Co. , 22 Wash.2d 708, 720, 157 P.2d 730 (1945).	11
Wilson v. Northern Pac. R. Co. , 44 Wash.2d 122, 128, 265 P.2d 815 (1954)	9,10
Omeitt v. Department of Labor & Indus. , 21Wn.2d 684, 686, 152 P.2d 973 (1944).	9
Reynolds Metals Co. v. Electric Smith Const. & Equipment Co. , 4 Wn.App. 695, 483 P.2d 880 Wn.App., 1971.	9

Other Authorities

PROSSER AND KEETON ON TORTS § 9 , at 39 (5th ed.1984).	7-8
---	-----

I. Assignments of Error

Assignments of Error

1. The trial court erred in entering a finding of fact that the plaintiff proved beyond a preponderance of the evidence that an assault occurred.
2. The trial court erred in entering a conclusion of law that the defendant intentionally assaulted the plaintiff.
3. The trial court erred in entering a conclusion of law that the defendant caused the plaintiff's injuries.
4. The trial court erred in entering a conclusion of law that the plaintiff's medical bills were incurred as a result of the defendant's actions.
5. The trial court erred in entering a conclusion of law that the

plaintiff is entitled to an award of special damages in the amount of \$28,000.

6. The trial court erred in entering conclusions of law that the plaintiff is entitled to an award of general damages, costs and statutory attorney's fees.

Issues Pertaining to Assignments of Error

1. Given that the plaintiff had no memory of any interaction with the defendant which caused any of her injuries, the defendant denied any such interaction and no other witnesses testified to such an interaction, whether the court could find proof of civil assault, which is defined as an act of such a nature that causes apprehension of a battery, and award damages therefore? (Assignments of Error 1, 2, 5 & 6.)

2. Whether the court could conclude that injuries described as resulting from blunt trauma--likely, blows (and medical expenses related thereto), were caused by acts of such a nature that caused apprehension of battery? (Assignments of Error 3, 4, & 5.)

3. Whether the defendant can be held liable for special damages where no findings of fact were made: (a) that the plaintiff incurred expenses; (b) as to the amount of expenses incurred by the plaintiff; or (c) that expenses, if incurred, were related to the defendant's actions? (Assignments of Error 4 & 5.)

4. Where there is a failure of proof as to causation and liability for injuries described as resulting from blunt trauma, where the plaintiff has no memory of any tortious interaction with the defendant and where no competent psychological testimony was offered, whether general damages may be awarded to the plaintiff? (Assignments of Error 6.)

II. STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed a Complaint against Mr. Johnson on July 1, 2005

alleging assault and battery. Mr. Johnson filed his Answer on August 11, 2005 denying the allegations. A bench trial was held before the Honorable Rosanne Buckner on May 14, 2007. On June 22, 2007, the court awarded Judgment against Mr. Johnson in favor of the plaintiff in the amount of \$80,160.38, of which \$28,000 was for special damages and \$50,000 was for general damages. Mr. Johnson filed Notice of Appeal on July 20, 2007.

B. Fact Statement

One Sunday during the summer of 2004, Kenneth Johnson and the plaintiff attended a picnic at the Elks club and encountered one another. RP p. 97, l. 9-17, . They had known each other eight or nine years. RP p. 96, l. 25 – p. 97, l. 1-2. At the picnic, the plaintiff offered Mr. Johnson her phone number, RP p. 109, l. 9-10, and he called her the next day. RP p. 98, l. 13-15. The next night, at about 7:30 pm., Mr. Johnson visited the plaintiff at her home. RP p. 98, l. 23-24. They had sex. RP p. 99, l. 13. Sex between them was not uncommon. RP p. 107, l. 17-24.

When Mr. Johnson arrived at the plaintiff's residence, she was drinking alcohol, RP p. 102, l. 10-12. She also smoked marijuana while he was there. RP p. 108, l. 6-8. Although she had an active prescription for Valium, she could not recall whether she had taken

any that day. RP p. 117, l. 16-20. By the time Mr. Johnson left, the plaintiff was slurring her words. RP p. 112, l. 21-23.

Mr. Johnson remained until approximately 10:30 or 11:00 pm. and got up to leave. RP p. 100, l. 10-12. As Mr. Johnson was leaving, he heard a loud noise behind him and saw that the plaintiff had fallen. RP p. 100, l. 15-23. He helped her up, accompanied her to the couch and helped clean up her bloody nose. RP p. 101, l. 7-10. Then he departed. RP p. 101, l. 13.

Sometime later that night, plaintiff called on-again/off-again boyfriend, Robert Skuza, and told him she was injured. Skuza came over, saw the plaintiff was injured and drove her to the hospital. He noted that the light was on at the top of the stairs.

When the plaintiff arrived at the hospital a toxicology screen was performed, and the results showed the presence of benzodiazepine (Valium), cannabis (marijuana) and a significantly high blood ETOH (alcohol) level. RP p. 30, l. During the remainder of her stay she was subjected to a series of blood alcohol tests until 8:50 in the morning. RP p. 54, l. 10-12. The purpose of this course of procedure is to assure that alcohol levels drop to acceptable levels for the patients safety, RP p. 54, l. 10-16—to assure that the patient is not intoxicated when they leave so they do not hurt

themselves again. RP p.54, 20-22. The alcohol level on the first toxicology screen was .25. RP p. 50, l. 4-5.

Dr. Leon, the plaintiff's family practice doctor, testified that the plaintiff's injuries were caused by multiple blows that could have been of a fist. RP p. 23, l. 3-9. Her doctor also testified that alcoholics tend to be clumsier than the average person. RP p. 45, l. 4-11. He also acknowledged that was aware of the AMA's advisory that when injuries present to doctor related to a possible fall, the patient should be asked about alcohol use for that reason. RP p. 44, l. 22-25; RP p.45, l. 1-3. Dr. Leon also testified that valium, alcohol and marijuana cause memory loss. RP p. 40, l. 17-25; p. 41, l. 1-15.; p. 42, l. 15-17

III. ARGUMENT

The essence of the plaintiff's claim is this: Mr. Johnson, who had been at her house earlier in the evening, must have beaten her up, because when she woke up from her alcohol, benzodiazepam and marijuana induced stupor, she had injuries to her face, ribs and shin. She, however, had no memory of any assault, any battery or any other cause of her injuries.

The court made no findings of fact or conclusions of law regarding the alleged battery. The court instead entered a finding of

fact (number 3) that, “The Plaintiff proved beyond a preponderance of the evidence that an assault occurred.” The court made no findings of fact related to injuries allegedly suffered by the Plaintiff or medical bills allegedly incurred by the Plaintiff.

Based on the limited findings of fact, the court entered conclusions of law including the following:

3. Plaintiff’s medical bills were incurred as a result of Defendant’s actions
4. The Defendant intentionally assaulted the Plaintiff causing her injuries.
5. Plaintiff is entitled to an award of special damages of \$28,000.
6. The Plaintiff is entitled to general damages for pain and suffering in the amount of \$50,000.
8. The Court determined the tort of assault had occurred and awarded judgment to the plaintiff.

Plaintiff filed her initial pleadings providing notice to Mr. Johnson of her complaint for “Assault and Battery.” The appellate court has defined those terms for the purpose of tort actions as follows:

A **battery** is [a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 9, at 39 (5th ed.1984). An **assault** is any act of such a nature that causes

apprehension of a battery. See KEETON § 10, at 43.

McKinney v. City of Tukwila, 103 Wash.App. 391, 408, 13 P.3d 631, 641 (2000)(emphasis added).

A. The Court's Finding Of Fact That An Assault Occurred Was Not Supported By Substantial Evidence.

In order to conclude that substantial evidence supports the factual findings, there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true. *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 752, 49 P.3d 867 (2002). Under the substantial evidence standard, we “will not substitute our judgment for that of the fact finder. Instead, [this Court] accept[s] the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences.” *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wash.App. 127, 13334, 990 P.2d 429 (1999), review granted, 141 Wash.2d 1011, 10 P.3d 1071 (2000) (citation omitted). *Pilcher v. State*, 112 Wash.App. 428, 435, 49 P.3d 947, 951(2002). However, the determination must be made in light of the degree of proof required. *Matter of Estate of Eubank*, 50 Wash.App. 611, 617-18, 749 P.2d 691 (1988).

“Substantial evidence' is meant that character of evidence

which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Omeitt v. Department of Labor & Indus.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944). In matters of proof the existence of facts may not be inferred from mere possibilities. *Wilson v. Northern Pac. R. Co.*, 44 Wash.2d 122, 128, 265 P.2d 815 (1954). *Reynolds Metals Co. v. Electric Smith Const. & Equipment Co.* 4 Wn. App. 695, 483 P.2d 880 Wn. App., 1971.

The record in the present case is devoid of any evidence supporting the court’s finding that an assault occurred.

B. The Court’s Conclusion Of Law As To Causation On The Issue Of The Plaintiff’s Injuries And Damages Is Not Supported By Substantial Evidence.

Proximate cause may be adduced as an inference from other facts proven. *Adler v. University Boat Mart*, 63 Wash.2d 334, 339, 387 P.2d 509 (1963). However,

[w]here causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

95 Wash.2d 593, 599, 627 P.2d 1312 (1981)(citing *Arnold v.*

Sanstol, 43 Wash.2d 94, 99, 260 P.2d 327 (1953)). *Nejin v. City Of Seattle*, 40 Wash.App. 414, 698 P.2d 615. Likewise, proximate cause must be proved by evidence, whether direct or circumstantial, not by speculation or conjecture or by inference piled upon inference. *Wilson*, supra at 130, 265 P.2d 815. *Nejin v. City Of Seattle*, 40 Wash.App. 414, 698 P.2d 615.

The imposition of liability does not rest upon speculation or conjecture when

[t]he facts relied upon to establish a theory by circumstantial evidence [are] of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.

Grobe v. Valley Garbage Serv., 87 Wash.2d 217, 225-26, 551 P.2d 748 (1976); *Arnold*, supra. However,

[w]hen the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact.

Lamphiear v. Skagit Corp., 6 Wash.App. 350, 357, 493 P.2d 1018 (1972) (quoting *Ruff v. Fruit Delivery Co.*, 22 Wash.2d 708, 720, 157 P.2d 730 (1945)). Liability may be imposed upon a defendant only where a theory of liability is supported by sufficient circumstantial evidence from which reasonable minds could conclude that a greater probability existed that the plaintiff

sustained injury through the defendant's action or inaction for which the defendant would be liable than that he was injured by a means for which the defendant would not be liable. *Lamphiear*, supra, 6 Wash.App. at 356-57, 493 P.2d 1018.

Here, in our case, the court made no findings of fact as to injuries suffered by the plaintiff or what her damages were. Moreover, the nature of the injuries she presented with at the hospital were those caused by coming in contact with something. By its very nature, assault involves psychological injuries, battery involves physical injuries. The court made no findings or conclusions that Mr. Johnson committed the tort of battery. And as the Court's conclusion that that Mr. Johnson's assault caused the plaintiff's injuries, there is no substantial evidence to support it.

Moreover, even if the court made a finding that a battery occurred, there is no evidence that suggests that the injuries were more likely caused by a battery than a fall down the stairs by the drunken plaintiff. The hospital kept her there for a number of hours to assure that such an accident did not occur. In that the testimony suggests that the plaintiff stopped drinking before the injuries after which she passed out, then awoke and called Skuza. The alcohol reading of .25 at the hospital at the first reading was well after she

stopped drinking. She likely had an even higher BAC at the time of receipt of her injuries.

The most likely cause of her injuries of the alcoholic plaintiff was a fall or falls related to her own drunken condition at the time.

IV. CONCLUSION

Based on the foregoing, the Court of Appeals should enter a finding in favor of the defendant, Mr. Johnson.

DATED this 7 Day of March, 2008

Respectfully submitted,



WILLIAM M. WOOD, JR.,
Attorney for Appellant
WSBA# 11330

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUBSCRIBED AND SWORN to before me this 7 day of March, 2008



Notary Public in and for the State
of Washington, residing at UP, Wa
My commission expires 11/24/08.