
No. 63407-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NICHOLAS ENSLEY,

Plaintiff/Appellant,

v.

TIMOTHY LYLE JOHNSON and "JANE DOE" JOHNSON, husband and wife,
and the marital community composed thereof, d/b/a RED ONION TAVERN,

Defendants/Respondents.

Appeal from the Superior Court for King County
The Honorable Richard D. Eadie

**APPELLANT NICHOLAS ENSLEY'S APPEAL BRIEF AND ASSIGNMENTS
OF ERROR**

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I. INTRODUCTION

Plaintiff/appellant Nicholas Ensley (hereafter "Ensley") assigns error to nine orders entered by the trial court. The orders involve issues separable into four groups. The first group concerns the shortening of the time to hear defendant/respondent Timothy Lyle Johnson d/b/a Red Onion Tavern's (hereafter "Red Onion") motion to exclude evidence from six days to three. The second group centers around whether Red Onion bartender Clifford Pitcher (hereafter "Pitcher"), the sole employee of Red Onion working on the night in question, is either an agent of Red Onion or a party so that Pitcher's admission to Daniel Ahern (hereafter "Ahern") that he overserved alcohol to Rebecca Humphries (hereafter "Humphries") is admissible against Red Onion. The third group arises from Red Onion's request for summary judgment on Ensley's overservice of alcohol claims and whether, with or without Pitcher's admission, there is an issue of fact to preclude summary judgment. The fourth group concerns whether Ensley should have been permitted to amend his Complaint to add claims directly against Pitcher.

II. ASSIGNMENTS OF ERROR

Ensley assigns error to the following orders:

1. The entire Order Granting Motion to Shorten Time on Motion to Strike Declarations Submitted in Support of Plaintiff's Opposition to Red Onion Tavern's Motion for Summary Judgment entered on April 2, 2007 (CP 465-467);

2. The entire Order Granting Motion to Strike Declarations Submitted in Support of Plaintiff's Opposition to Red Onion Tavern's Motion for Summary Judgment entered on April 2, 2007 (CP 468-470);

3. The entire Order Granting Defendant Timothy Johnson, d/b/a The Red Onion Tavern's Motion for Summary Judgment entered on April 6, 2007 (CP 478-480);

4. The entire Order Denying Motion for Reconsideration entered on April 18, 2007 (CP 506-507);

5. The entire Order Denying Plaintiff's Motion to Amend the Complaint entered on December 5, 2007 (CP 677-679);

6. The entire Order Denying Plaintiff's Motion for Relief from Orders entered on August 6, 2008 (CP 842-844);

7. The entire Order Denying Plaintiff's Motion for Reconsideration of Order Denying Relief from Orders entered on September 10, 2008 (This order is docketed and was designated

by Ensley, but not transmitted by the Clerk. It is attached as Exhibit 1.);

8. The entire Order Granting Red Onion's Motion for Sanctions Re: Plaintiff's Motion for Relief from Orders entered on September 11, 2008 (CP 886-887); and

9. The entire Order Granting Defendant Timothy L. Johnson d/b/a Red Onion Tavern's Motion to Affirm Summary Judgment Dismissal with Prejudice of all Claims Against Red Onion entered on December 10, 2008 (CP 1084-1085).

III. STATEMENT OF THE CASE

A. The actors and the events on the night of the crash.

1. Ensley.

Ensley, a University of Washington student, was taking his last class in his final quarter before graduation. CP 266. In the early evening of March 30, 2005, Ensley had tentative plans to meet his friend, Emily Lubinski (hereafter "Lubinski"), to watch the Sonics game near her home in lower Queen Anne. CP 266. As Ensley drove from Madison Park to Queen Anne, he called Lubinski on the way. CP 266. Lubinski told Ensley that she could not meet him so Ensley turned around and drove back to Madison Park. CP 266. Ensley parked his car on Madison Street across the street

from Red Onion. CP 266. After eating dinner at The Attic, Ensley walked across the street to talk to Impromptu Wine and Art Bar (hereafter "Impromptu") bartender Stacey Jones (hereafter "Jones") about his upcoming photography show at Impromptu. CP 266.

2. Humphries.

On March 30, 2005 at around 6:15 p.m., Humphries arrived at her apartment in Madison Park after work. CP 265. Humphries learned that day that a former boyfriend had married a woman Humphries knew and the couple had a child together. CP 265. The news was disturbing to Humphries so she decided to go out. CP 265. She drove her car a few blocks down the street to Impromptu and parked. CP 265.

3. Events at Impromptu.

Impromptu is located in Madison Park at the end of Madison Street across the street from Madison Park beach. CP 267. It has nine tables for customers and five stools at the bar. CP 267. The capacity is 25 patrons. CP 267. The entire floor of Impromptu, with the exception of the kitchen, a small corner by the entrance and the bathrooms, is visible from behind the bar. CP 267.

Humphries arrived at Impromptu at around 8:30 p.m. CP 267. She sat down in a bar stool on the far left side of the bar. CP

267. Humphries ordered a Negroni from Jones. CP 267. A Negroni is equal parts gin, Campari and sweet vermouth and was served in a large martini glass. CP 267. The glass was six ounces and the Negroni served to Humphries filled the glass to the rim. CP 267. Humphries ordered a Negroni because she wanted something bitter. CP 267.

Humphries told Jones that she was really upset. CP 267. She and Jones talked about the news she received and commiserated about past heartaches. CP 267. Humphries began to cry in front of Jones. CP 267.

Humphries finished drinking her first Negroni. CP 267. At around the same time as Humphries was served her second Negroni, Ensley arrived at Impromptu. CP 268. On his way in, Ensley stopped to look at the art on display. CP 268. He walked up to bar and stood behind a bar stool. CP 268. He spoke with Jones for a few minutes about his photography show. CP 268. Jones asked Ensley to sit down and have a drink. CP 268. Ensley sat in the second chair from the right end of the bar. CP 268. Two chairs separated Ensley and Humphries. CP 268.

Jones asked Ensley if he would have his usual drink of Maker's Mark bourbon, neat. CP 268. Ensley replied, "Why not."

CP 268. Ensley noticed Humphries sitting at the bar. CP 268. Ensley also noticed that Humphries did not seem upbeat, was hunched down a bit in her seat and gave the appearance of a person who had not had a good day. CP 268. Jones served Ensley his drink. CP 268.

After Ensley finished his drink, Jones asked him if he wanted another. CP 268. Humphries was served another Negroni about the same time Ensley was served his second Maker's Mark bourbon. CP 268.

While sitting at the bar, Humphries apologized to Jones for being drunk. CP 269. Humphries thought she was causing a scene. CP 269.

Ensley went outside with Humphries, Impromptu cook Ahern and Jones to smoke cigarettes. CP 269. By that time, Humphries's mood had improved. CP 269. However, before they went outside, Humphries finished her Negroni. CP 269. Jones poured herself a glass of wine and started drinking. CP 269. She also poured Ahern a glass of wine. CP 269. Both Jones and Ahern drank their wine on the patio. CP 269. While on the patio, Humphries's mood again changed as she became emotional; she became visibly upset, her eyes watered and her voice cracked. CP 269. While

outside on the patio, Humphries finished Ensley's second bourbon. CP 269.

The four went back inside. CP 269. Ahern went into the kitchen and continued to work. CP 269. Ensley ordered a third Maker's Mark bourbon, neat, and was served another large drink. CP 269. Then, Jones poured a drink, lit it on fire with a long handled lighter, and presented it to Humphries. CP 269. The drink was Bacardi 151 proof rum. CP 269. Humphries asked Ensley what to do with the drink and he said to put the flame out. CP 269. As Humphries put the flame out, she spilled the drink. CP 269. The glass went over the back of the bar and broke. CP 269-270. The alcohol spilled on Humphries's lap. CP 270. Jones cleaned up the broken glass. CP 270. Then, Jones poured Humphries another shot and lit it. CP 270. This time Humphries drank the shot. CP 270. After the flaming shot Humphries's mood seemed to improve again. CP 270. Humphries appeared more relaxed and she looked happy. CP 270.

Humphries then began drinking wine. CP 270. Ensley saw Humphries finish at least one glass of wine. CP 270. A serving of wine at Impromptu is a five ounce pour. CP 270. At some time, Jones refilled her own glass of wine. CP 270. While Jones

stepped away from the bar, Ahern went behind the bar and poured himself a Jamison whiskey. CP 270. He also poured Ensley another Maker's Mark bourbon. CP 270.

Nicole Bahr ("Bahr") was a patron at Impromptu with her friend Laura Bright on March 30, 2005. CP 270. They sat at a table near the front door. CP 270. Bahr noticed that the people at the bar were unusually loud. CP 270. In particular, she remembers one woman at the bar with her back to her as being loud. CP 270. Bahr left Impromptu after she signed her credit card receipt at 11:20 p.m. CP 270. When she left, the people at the bar were the only patrons still at Impromptu. CP 270.

Ahern asked Jones for a second glass of wine. CP 271. Later, Ahern sat at the bar in the seat to the left of Ensley. CP 271. Ahern drank a third glass of wine. CP 271. Jones's sister, Deborah Jones, arrived at Impromptu and sat in the seat to the right of Ensley at the right end of the bar. CP 271. Deborah Jones drank a glass of wine. CP 271.

Humphries and Ahern both wanted to go to The Twilight Exit (hereafter "Twilight"). CP 271. Ensley wanted to stay in the neighborhood and go to Red Onion. CP 271. When asked, Jones and her sister did not want to go with Humphries, Ensley and Ahern

to Red Onion. CP 271. The time stamp on Ensley's credit card receipt is 12:24 a.m. on Thursday, March 31, 2005. CP 271. Ahern has no reason to believe the time stamp is inaccurate. CP 271. Humphries, Ensley and Ahern left Impromptu and walked across the street to Red Onion. CP 271. Ahern was "buzzed" when he left Impromptu. CP 271.

4. Events at Red Onion.

On the night of the crash, bartender Pitcher was working alone at Red Onion. CP 271-272. Also, Pitcher was working without the requisite alcohol server's license even after being caught serving alcohol without one by the Liquor Control Board. CP 278. The entire front of the house is visible from behind the bar at Red Onion. CP 272. Humphries, Ensley and Ahern walked up to the bar at Red Onion. CP 271. Ensley ordered a twelve ounce bottle of Budweiser Select. CP 272. Ahern was served a sixteen ounce Mac and Jacks draft. CP 272. Pitcher claims that Humphries ordered a drink from him. CP 272. However, Humphries believes someone ordered a drink for her and that she never spoke to Pitcher. CP 272. In any event, Pitcher and Humphries communicated no further. CP 272. It is Pitcher's practice is to check for the signs of intoxication of every patron by

having a conversation with them and by checking their eyes. CP 272. Ahern did not observe Pitcher make an assessment of Humphries's level of intoxication and, according to Ahern, Pitcher did not ask Humphries any questions to determine whether she was under the influence of alcohol. CP 272.

While at Red Onion, Ensley stood to the left of Humphries and Ahern with his back to them as they stood close to the bar. CP 272. At Red Onion, Ensley spoke with Linda McGill ("McGill") and Kristin Atkinson ("Atkinson"). CP 272. McGill and Atkinson left Red Onion at around 12:45 a.m. CP 272. McGill and Atkinson left Red Onion before Ensley. CP 272. Humphries and Ahern were anxious to go to Twilight. CP 272. The three got into Humphries's car and made the short drive to Twilight. CP 273.

5. Events at Twilight.

Adam Heimstadt (hereafter "Heimstadt") was tending bar at Twilight. CP 273. On the night of the crash, like Pitcher at Red Onion, Heimstadt was the only employee working at Twilight. CP 274. Humphries, Ensley and Ahern walked into Twilight and right up to bar. CP 273. Ensley ordered one round of shots. CP 273. Heimstadt admits he did nothing to determine whether Humphries was under the influence of alcohol on the night of the crash. CP

273. Humphries, Ensley and Ahern all drank a shot. CP 273. Ensley ordered a second round of shots for the group. CP 273. Ensley then paid Heimstadt for the two rounds of shots. CP 273.

Humphries and Ahern continued to drink after the two shots. CP 273. Humphries ordered a Jack Daniels whiskey and diet cola. CP 273. Ahern ordered a beer. CP 273.

With her drink, Humphries got up from her barstool and went to the jukebox. CP 273. Both she and Ahern selected some music to play. CP 273. Humphries finished her drink. CP 273. While dancing with Ahern to the music they selected, Humphries fell down. CP 273. Back at the bar, Humphries asked Heimstadt if he saw her fall. CP 273. Humphries ordered and was served another Jack Daniel and diet cola. CP 273. Ensley and Humphries started kissing. CP 273. Humphries finished her second Jack and diet cola while sitting at the bar. CP 273.

Humphries, Ensley and Ahern left Twilight after last call as bar was closing. CP 274. Last call at Twilight was at around 1:15 a.m. CP 274.

6. The crash, Ensley's injuries, and Humphries's DUI.

At around 1:30 a.m. on Thursday, March 31, 2005, Humphries crashed her car into two parked cars on McGilvra Boulevard in the

Madison Park. CP 274. The crash occurred when Humphries failed to turn at a bend in the road. CP 274. Ensley was seated in the back of the car. CP 274. Ensley broke his neck in the crash and is now quadriplegic. Humphries was later convicted of DUI. CP 274.

B. Procedural history of the case.

1. Ensley files suit.

Ensley filed suit against Humphries and the owners and operators of the three bars that served Humphries alcoholic beverages before she crashed her car. CP 1-18. Ensley's claims against Red Onion and the other defendants are set forth within Ensley's First Amended Complaint for Personal Injuries, filed on May 19, 2006. CP 35-47. While many of Ensley's negligence claims relate to the overservice of alcohol to Humphries, Ensley identified other theories of negligence. CP 41-42. For example, Ensley set forth claims for negligently hiring, training, supervising and controlling alcohol servers. CP 42. Another theory is based on a violation of the Washington Administrative Code section 314-17-030 which required bar owners to ensure that their alcohol servers possess the requisite license required by Revised Code of Washington section 66.20.310. CP 42. Pursuant to Revised Code

of Washington section 66.44.090, any person serving alcohol without a license is guilty of a gross misdemeanor.

2. Red Onion's Answer.

In its Answer, Red Onion denied that it was vicariously liable for the actions of its agents and/or employees. CP 51. Additionally, Red Onion denied that it owed any duties vicariously through its agents and/or employees. CP 52. Red Onion denied all other allegations of liability. CP 51.

3. Red Onion requests summary judgment on Ensley's overservice of alcohol claim.

On March 9, 2007, Red Onion requested summary judgment on Ensley's overservice of alcohol claim. CP 92-110. Red Onion argued that there was no issue of fact as all evidence showed that Humphries did not appear under the influence of alcohol while served alcohol by Pitcher at Red Onion. CP 103-110. No other issues were raised in Red Onion's summary judgment motion.

4. Ensley offers direct and indirect evidence of Humphries's apparent intoxication at Red Onion.

a. Pitcher's admission.

On March 26, 2007, Ensley filed and served his opposition to Red Onion's motion for summary judgment. CP 264-288. Included in Ensley's opposition was an excerpt of the deposition testimony of

Ahern in which he recalled a conversation he had with Pitcher a couple of days after the crash. CP 274-275. According to Ahern, Pitcher admitted to him that Humphries appeared under the influence of alcohol and that he should not have served Humphries a drink. CP 274-275. Ahern testified:

Q Since the crash who have you talked to about the facts of that night?

A I've discussed it with Chris, Stacy, Cliff the owner, and Cliff [Pitcher] the bartender at the Red Onion.

Q What did you and Cliff at the Red Onion discuss?

A I was just asking -- I just kind of wanted to get a sense of what he saw from that -- from that night, and just if - - how everybody looked. And I just kind of wanted to get -- just to get a sense of that.

Q When did this conversation take place?

A A couple days after the accident.

Q At the Red Onion?

A Yes.

Q Were you drinking at the time?

A No. I just stopped in after work and was on my way home.

Q What did Cliff the bartender at Red Onion tell you?

A **He said Rebecca looked a little glassy-eyed**, and I don't remember what he said about Nick.

Q From your -- well, do you remember anything else about that conversation?

- A No.
- Q Did he say how you looked?
- A He said I looked a little glassy, but not enough that he wouldn't serve me a beer.
- Q **Did he say that Rebecca looked in a condition where he wouldn't serve her a beer?**
- A **He said she looked a little more glassier than us, but...(Pause.)**
- Q **So –**
- A **Yes.**
- Q **-- did he say that Rebecca was in a condition where he would not have served her a beer?**
- A **Yes. I believe so, yes.**

CP 274-275 (emphasis added).

b. Humphries's admission of intoxication at Red Onion.

In her Answer to Ensley's Complaint, Humphries admits that she exhibited signs of intoxication while at Red Onion. CP 276. Additionally, Humphries did not deny Ensley's request for admission that she was under the influence of alcohol at Red Onion. CP 276-277. Also, while at Impromptu, Humphries apologized to Jones for being drunk. CP 277. Nonetheless, Humphries continued to consume several more drinks after the apology to Jones while still at Impromptu. Ensley argued that it

logically follows that Humphries was even more drunk when she later crossed the street to Red Onion. CP 277.

c. Michael Hlastala, Ph.D. opines that Humphries exhibited signs of intoxication.

Michael Hlastala, Ph.D. is an expert in the fields of toxicology and physiology. CP 277. Based upon his review of the evidence, Dr. Hlastala determined that Humphries exhibited multiple signs of intoxication at Impromptu including mood swings, spilling a drink, that she was loud and disturbing to other patrons, and her self-assessment of intoxication. CP 277. Further, according to Dr. Hlastala, Humphries consumed the equivalent of 15.8 standard drinks at Impromptu. CP 277. When she left Impromptu, Humphries's BAC was 0.24 and rising. CP 277.

Based on generally accepted scientific principles, Humphries was exhibiting signs of intoxication minutes later upon arrival at Red Onion. CP 277. A person exhibiting signs of intoxication, as Humphries was at Impromptu, cannot simply pull themselves together and stop exhibiting the signs. CP 277. In fact, a person with a BAC of 0.24 has at least a 95% chance of appearing "drunk" to a casual observer. CP 277.

Also, just minutes after Humphries left Red Onion, Dr. Hlastala identifies recognizable signs of intoxication that Humphries exhibited at Twilight including falling down, lack of inhibitions, and rapid consumption of alcohol *on arrival*. CP 277. The nature of the signs Humphries exhibited at Twilight show that Humphries was under the influence of alcohol on arrival and, thus, exhibited signs of intoxication while at Red Onion just minutes before. CP 278.

d. Denney Rutherford, Ph.D. opines that Red Onion fell below industry standards for the service of alcohol.

Denney Rutherford, Ph.D. is an expert in the generally accepted industry standards for the service of alcoholic beverages. CP 278. Dr. Rutherford found that Impromptu, Red Onion and Twilight all fell below the generally accepted industry standard for the safe service of alcohol on the night of the crash. CP 278. The breaches by all three bars caused them to operate in a substandard manner on the night of the crash and directly led to the service of alcohol to Humphries while she was apparently under the influence of alcohol. CP 278. With respect to Red Onion, Dr. Rutherford cites specific acts and omissions of Pitcher and Red Onion owner Timothy Lyle Johnson (hereafter "Johnson").

First, Pitcher did not have a Class 12 server's permit as required by law on the night of the crash and was even warned by a Liquor Control Board agent to get his permit over eight months earlier. CP 278. A check with the Liquor Control Board showed that Pitcher did not obtain his Class 12 server's permit until January 18, 2006. CP 278-279. Thus, Pitcher had no formal training in identifying the signs of intoxication. CP 279. This is further compounded by testimony that Pitcher is an inattentive bartender and marijuana smoker. CP 279.

Second, even though Pitcher had no formal training, he testified that his practice was to talk to every patron and look in their eyes before he served them to check for signs of intoxication. CP 279. Pitcher's familiarity with Humphries (she dated a Red Onion bartender) put him in an excellent position to judge her sobriety. CP 279. Notwithstanding, he violated his own policy by not having a conversation with Humphries to check for signs of intoxication on the night of the crash. CP 279. By his own standard, Pitcher failed to assess whether Humphries was under the influence of alcohol on the night of the crash. CP 279. He made no effort to determine if she was drinking before arriving at Red Onion. CP 279. He made no effort to determine where

Humphries was going or ensure she arrived safely. CP 279. He did not refuse service to Humphries or take her drink away. CP 279-280. His actions fell below the generally accepted industry standard for the safe service of alcohol. CP 280. Pitcher's failure to act as reasonably prudent bartender allowed Humphries to continue drinking at Twilight and led to the car crash. CP 280.

Third, Pitcher served a drink to Rebecca Humphries even though her eyes were glassy. CP 279. A patron with glassy eyes is exhibiting a classic sign of being under the influence of alcohol. CP 279. He even admitted that he knew he should not have served her any alcohol. CP 279.

Finally, Johnson failed to take any interest in ensuring the safe service of alcohol at Red Onion. CP 280. In particular, Dr. Rutherford cited Red Onion's lack of policies for the safe service of alcohol, employees serving alcohol without licenses, a hiring process which led to substandard employees including employees with no formal training, improper in-house training and inadequate supervision and guidance from ownership. CP 280.

5. On shortened time, Red Onion seeks Pitcher's admission excluded.

On March 27, 2007, Red Onion moved to strike Pitcher's admission as "textbook" hearsay and the opinions of Ensley's experts which relied on the testimony. CP 436-441. Red Onion argued that Pitcher was not its agent and that Pitcher's admission was inadmissible. CP 438. Red Onion also sought an order shortening the time to hear the motion from six days to three. CP 442-445. On March 28, 2007, Ensley filed and served his response to Red Onion's motion to shorten time and Red Onion's motion to strike. CP 448-456. Ensley had no time to prepare a response to Red Onion's motion to strike. CP 452-456. On March 29, 2007, Red Onion filed its replies in support of its motion to shorten time and motion to strike. CP 457-464. The trial court entered orders granting Red Onion's motion to shorten time and motion to strike on April 2, 2007. CP 465-470. Ensley assigns error to both of these orders. On April 2, 2007, Red Onion also filed and served its reply in support of its motion for summary judgment. CP 471-477.

6. Summary judgment in Red Onion's favor.

On April 6, 2007, the parties appeared before the Honorable Richard Eadie for oral argument on Red Onion's motion for summary

judgment. Without considering Pitcher's admission against Red Onion, Judge Eadie granted Red Onion's motion for summary judgment and dismissed Ensley's overservice claim. CP 478-480. Again, no other claims were addressed. Ensley assigns error to this order.

7. Reconsideration denied.

On April 9, 2007, Ensley filed and served a motion for reconsideration of the order striking Pitcher's admission and the order granting Red Onion's motion for summary judgment. CP 481-495. On April 13, 2007, without a specific request of the Court to do so, Red Onion responded to Ensley's motion. CP 496-501. Ensley filed and served his reply in support of the motion for reconsideration on April 16, 2007. CP 502-505. On April 18, 2007, the trial court denied Ensley's motion for reconsideration. CP 506-507. Ensley assigns error to this order.

8. Ensley's request for discretionary review denied.

On May 14, 2007, Ensley requested discretionary review of the trial court's order striking Pitcher's admission, the order granting Red Onion's motion for summary judgment, and the order denying Ensley's request for reconsideration (Court of Appeals Cause No. 59918-6-I). CP 508-521. Red Onion answered on June 18, 2007

and Ensley filed his reply two days later. In a ruling entered on June 25, 2007, Ensley's request was denied.

9. Ensley's request for entry of final order denied.

On June 18, 2007, while Ensley's request for discretionary review was still pending, Ensley requested an order for entry of final judgment on the order granting Red Onion's motion for summary judgment on Ensley's overservice claim pursuant to CR 54(b) so that Ensley could immediately appeal. CP 524-537. Red Onion opposed Ensley's request. CP 540-547. On June 25, 2007, Ensley filed his reply in support of his request for entry of final judgment. CP 548-553. Following a request from the trial court, the parties submitted supplemental briefing. CP 554-570. On July 25, 2007, the trial court denied Ensley's request. CP 571-572.

10. Ensley's request for leave to amend his Complaint to add Pitcher is denied.

On November 21, 2007, Ensley requested leave to amend his Complaint to add Pitcher as a defendant. CP 583-616. Red Onion opposed the motion, but did not do so on the basis of either res judicata or collateral estoppel. CP 624-633. Instead, Red Onion essentially argued that it would be unfair to add Pitcher as a party so close to the trial date. (Red Onion had previously

requested a continuance of the trial date and the request was granted by the trial court. CP 1125-1128.) Red Onion also requested sanctions against Ensley on shortened time. CP 617-623. Ensley filed his reply on December 3, 2007. CP 658-663. While another continuation of the trial date would have cured any prejudice to Red Onion, the trial court denied Ensley's request on the basis that the trial date was too close. CP 677-678. Ensley assigns error to this order. One month later, the trial court continued the trial date and subsequently continued the trial date yet another time. CP 1144-1149.

11. Ensley filed a second lawsuit directly against Pitcher.

To preserve his claims directly against Pitcher and to avoid being barred by the statute of limitations, Ensley filed a new lawsuit against Pitcher (King County Superior Court Cause No. 07-2-39823-6SEA). In that lawsuit, Red Onion's counsel appeared on behalf of Red Onion to represent Pitcher. CP 687.

On January 16, 2008, Pitcher/Red Onion requested that all claims be dismissed on the bases that they were res judicata and/or barred by collateral estoppel by the prior order granting Red Onion's request for summary judgment on the overservice claim. CP 687. In the motion, Pitcher/Red Onion acknowledged that *at all*

times material hereto, Pitcher was acting within the course and scope of his employment for Red Onion and that Pitcher was the only Red Onion employee present on the night of the crash. CP 689 Essentially, Pitcher/Red Onion admitted that Red Onion was vicariously liable for the actions of Pitcher for the very first time.

Pitcher/Red Onion went on to discuss vicarious liability and outright admitted that Red Onion is vicariously liable for the actions of Pitcher:

Vicarious liability is legal responsibility by virtue of a legal relationship. The doctrine of vicarious liability allows the negligence of the actual wrongdoer to be imputed to another who otherwise has no direct participation in the tort. In contrast to direct liability, which is liability for breach of one's own duty of care, vicarious liability is liability for the breach of someone else's duty of care. *Phillips v. Kaiser Aluminum & Chemical Corp.*, 74 Wn. App. 741, 875 P.2d 1228 (1994). Vicarious liability extends the liability for that breach to another, possibly deeper pocket. *Prosser & Keeton on Torts*, §69.

Holding an employer liable for the torts of an employee is the most common example of vicarious liability. To establish vicarious liability, the plaintiff must meet two criteria: (1) the relationship must be that of employer-employee; and (2) the tort must be committed "within the scope of his or her employment and in furtherance of the master's business." *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979). Here, it is undisputed that Pitcher was an employee of the Red Onion and that he was acting within the scope of his employment, as a bartender, at the time the alleged tort was

committed. **Accordingly, vicarious liability applies.**

CP 689 (emphasis added).

Pitcher/Red Onion then stated that the injured party has a choice of who to sue since the employer and employee are *jointly and severally liable* for the acts of the employee:

In a vicarious liability action, an injured party may sue both the employer and the employee or either separately, since the employer and employee are jointly and severally liability for the actions of the employee. *Cordova v. Holwegner*, 93 Wn. App. 955, 971 P.2d 531 (1999), *citing Orwick v. Fox*, 65 Wn. App. 71, 828 P.2d 12 (1992).

CP 690. Pitcher/Red Onion went on to admit that, "Pitcher and Red Onion are jointly and severally liable for the acts of Pitcher." CP 690.

Finally, Pitcher/Red Onion admitted that this lawsuit was, for all intents and purposes, a lawsuit against Pitcher and that the two are one and the same:

In *Ensley v. Red Onion*, Red Onion's liability was premised entirely on the actions of Pitcher, its employee. Specifically, Plaintiff argued that Pitcher negligently served an intoxicating beverage to Humphries while she was apparently intoxicated. *The suit against Red Onion was essentially a suit against Pitcher*, its employee. In other words, whether Red Onion breached a duty of care to Plaintiff turned on Pitcher's conduct. Having defended that suit, Red Onion acted as Pitcher's

representative, protecting his interest in the first suit.
*Red Onion and Pitcher must therefore be viewed as
one and the same.*

CP 690 (emphasis added). As with all pleadings, the motion to dismiss and the reply were signed by counsel pursuant to CR 11. CP 775.

On February 1, 2008, Ensley filed his opposition. Ten days later, Pitcher/Red Onion replied. On February 13, 2008 the Honorable Laura Inveen denied Pitcher/Red Onion's request to dismiss the lawsuit and subsequently denied Pitcher/Red Onion's request for reconsideration. Pitcher/Red Onion filed a Notice of Discretionary review on the basis of error and also requested certification of the matter for immediate appellate review. Judge Inveen granted Pitcher/Red Onion's request for certification and Pitcher/Red Onion's request for discretionary review was granted based on the certification of the trial court. Pitcher/Red Onion's appeal is pending. (Court of Appeals Cause No. 61537-8-I).

12. Ensley's request to vacate prior orders is denied.

On July 21, 2008, based on Red Onion's prior efforts to distance itself from Pitcher in this case and then subsequently argue that they are one and the same in seeking to dismiss the claims against Pitcher, Ensley sought to revisit the order excluding

Pitcher's admission, the order granting Red Onion's request for summary judgment, and the order denying Ensley request or leave to amend the Complaint to add Pitcher as a named party. CP 682-775. On July 25, 2008, Red Onion responded that a complete "do over" was unwarranted and that a CR 60 motion is not a substitute for an appeal. CP 784-796. Ensley replied on July 28, 2009. CP 797-802. Red Onion again requested sanctions against Ensley. CP 827-841. On August 6, 2008, the trial court denied Ensley's request. CP 842-844. Ensley assigns error to this order. On August 18, 2008, Ensley requested reconsideration. CP 867-877. On August 25, 2008, Red Onion responded at the specific request of the trial court. CP 878-885. On September 10, 2008, the trial court denied Ensley's request for reconsideration. (Again, this order is missing and attached as Exhibit 1.) Ensley assigns error to this order. Additionally, the trial court entered an order granting terms against Ensley on September 11, 2008 on the bases that Ensley's request was neither well grounded in fact nor supported by law. CP 886-887. Ensley assigns error to this order.

13. Ensley's request for a stay of this matter is denied.

On October 27, 2008, Ensley requested a stay of this matter pending the outcome of the appeal in *Ensley v. Pitcher*. CP 888-894. This request was also denied. CP 938-939.

14. The trial court grants Red Onion's request to dismiss all of Ensley's claims.

On December 1, 2008, Red Onion sought an order that all of Ensley's claims against Red Onion were dismissed by the order granting summary judgment in favor of Red Onion. CP 940-945. In response, Ensley argued that Red Onion had only raised the overservice of alcohol claim when requesting summary judgment. CP 992-1023. Nevertheless, on December 10, 2008, the trial court entered an order that all claims against Red Onion were dismissed. CP 1084-1085. Ensley assigns error to this order.

15. Ensley appeals.

On March 31, 2009, an order dismissing Humphries was entered and this matter became appealable.¹ CP 1086-1088. Ensley filed his notice of appeal on April 24, 2009. CP 1089-1124.

¹ Ensley had previously settled his claims against both Impromptu and Twilight and both were dismissed. CP 522-523; CP 680-681.

IV. ARGUMENT

A. Time should not have been shortened to three days.²

A request to hear a motion on less notice than the six days required by LCR 7(b)(4)(A) must be accompanied by a showing of good cause. LCR 7(b)(10)(A). Presumably, a showing of good cause would amount to some showing of need. Additionally, as soon as the party requesting shortened time is aware that it will seek shortened time, it must contact the opposing party to give notice in a manner most likely to provide actual notice of the forthcoming motion to shorten time. LCR 7(b)(10)(C). The party requesting shortened time then *must* show the efforts undertaken to provide this notice via declaration. *Id.*

Here, Red Onion sought an order shortening the time to hear a motion to strike critical evidence including Pitcher's admission. The good cause cited by Red Onion is that "Red Onion should not be forced to use any of its limited five pages (of its reply in support of its motion for summary judgment) to respond to evidence" and that "early consideration...will ensure that the parties and the Court do not waste valuable resources analyzing inadmissible hearsay."

² Albeit, this is a lesser issue, but it is significant nonetheless as it was the first in a cascade of errors by the trial court.

CP 444. Regardless, the timing of the hearing of Red Onion's motion to strike in no way limited the number of pages allotted to Red Onion's reply brief. Moreover, the parties and the Court would have spent the same amount of time on the matter regardless of when it was decided. Thus, Red Onion offered no good cause to shorten time. Absent good cause, there was no basis for the trial court to shorten time and the motion should have been denied.

In its reply, the true reason for Red Onion's request to shorten time is revealed. In it, Red Onion acknowledges that deciding the motion to strike at the time of the summary judgment hearing would "allow Plaintiff additional time." CP 458. Clearly, the request to shorten time was a tactical effort to reduce Ensley's time to prepare a response. In fact, Ensley had only a matter of hours to prepare a response; only enough time to reference the arguments previously set forth within in his response to Red Onion's motion for summary judgment. On a matter as critical as the admissibility of evidence, this was not only extremely prejudicial to Ensley, but an outright denial of Ensley's right to notice pursuant to the Rules.

Finally, there is no record that Red Onion made any effort to contact Ensley prior to requesting shortened time. Most importantly, there is no declaration to show the efforts undertaken

to provide Ensley with notice as required by LCR 7(b)(10)(C). Thus, Red Onion failed to fulfill a prerequisite mandatory for the trial court to issue an order shortening time.

B. Pitcher's admission should not have been excluded.

1. Pitcher's admission is not hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). A statement is not hearsay if it is offered against a party and is made by either a party or an agent or servant of the party. ER 801(d)(2). ER 801(d)(2) states:

A statement is not hearsay if –

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (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 the authority to make the statement for the party...

For such a statement to satisfy the requirements of ER 801(d)(2), the declarant must be authorized to make the particular statement at issue on behalf of the party. *Lockwood v. A C & S, Inc*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987). Absent express

authority to make the statement at issue, the overall nature of the declarant's authority to act for the party may determine whether they are a speaking agent. *Id.* An agent may have what is termed "apparent" authority when the principal (1) knowingly permits the agent to perform certain acts, (2) holds him out as possessing certain authority, or (3) places the agent in such position that persons would believe and assume that the agent has certain authority and deal with him on reliance of that assumption. *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951). A trial court deciding whether a particular agent was authorized to speak on behalf of a particular principal makes that decision according to a preponderance of the information presented. *Condon Bros. v. Simpson Timber Co.*, 92 Wn. App. 275, 289, 966 P.2d 355 (1998).

A commercial server of alcohol is required by law to assess whether patrons are under the influence of alcohol. RCW 66.44.200. Thus, as the only server at Red Onion on the night of the crash, that duty was Pitcher's and Pitcher's alone. Effectively, Red Onion placed Pitcher in *the* position of authority over the service of alcohol at Red Onion. To carry out his duty, Pitcher was required to interact with patrons and communicate his assessments. Clearly, by the overall nature of his job and that he

worked alone, not only was Pitcher granted speaking authority by Red Onion to communicate whether a patron appeared to be under the influence of alcohol, he was required to communicate his assessment by law.

In seeking the exclusion of Pitcher's admission, Red Onion relied exclusively on *Barrie v. Hosts of America*, 94 Wn.2d 640, 618 P.2d 96 (1980) for the proposition that, "The mere fact that Mr. Pitcher was employed as a bartender at Red Onion at the time of the alleged statements is insufficient to establish that he was a speaking agent of Red Onion." CP 439. In *Barrie*, certain incriminating statements allegedly made by the bar manager of an establishment accused of overservice of alcohol to the attorney for the injured person were deemed hearsay. *Id.* at 644-45. Without any explanation other than one sentence that there was no evidence of authorization in the record, the Court in *Barrie* excluded the testimony.³ *Id.* at 645. *Barrie* is a conclusion without any

³ Although not expressly stated in *Barrie*, it is clear that the court had concerns about evidence obtained by an attorney through an agent or employee of a defendant business entity. (See generally *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984) for an analysis of the concerns.) There is no such concern with respect to Pitcher's admission to Ahern since Ahern is not a hostile attorney and was, in fact, an employee of co-defendant Impromptu.

analysis. Absent analysis, *Barrie* offers no guidance and little precedential value.

After *Barrie*, the Supreme Court addressed the same issue in *Lockwood v. A C & S, Inc*, 109 Wn.2d 235, 744 P.2d 605 (1987). In *Lockwood*, an asbestosis case, plaintiff Lockwood sought to introduce three documents prepared by defendant Raymark's medical director. *Id.* at 261. The Court looked at the overall nature of the declarant's authority to determine whether the declarant was authorized to make the statements within the documents. *Id.* at 262. The Court held that health officials were authorized to make statements about health issues by the nature of their job. *Id.* Thus, the statements were not hearsay. *Id.*

In this matter, Pitcher is a bartender and Pitcher's admission concerned the service of alcohol. By the nature of his job, Pitcher is not only authorized, but required by law to assess patrons and make statements to communicate that assessment. Clearly, Pitcher's admission is not hearsay. The only possible issue is whether it makes any difference that Pitcher's admission came a few days after the crash. *Restatement (Second) of Agency* § 288 (1957) addresses when an agent has the authority to make statements and was long ago adopted by Washington. *Kadiak Fisheries Co. v. Pacific Supply Co.*, 70

Wn.2d 153, 162, 163, 422 P.2d 496 (1967). Comment D to § 288

reads:

Under the rule stated in this Section, the statements of an agent may be admissible although they are not made at the time of, or during the course of the transaction to which they relate. If the statements are operative facts, they are of course part of the transaction.

Restatement (Second) of Agency § 288 (1957). Pitcher's admission was derived from and relates to the operative facts of an authorized transaction; the service of alcohol. Thus, by Comment D, that Pitcher's admission occurred a few days later is immaterial.

Additionally, statements not offered to prove the truth of the matter asserted, but to imply beliefs of the declarant are not hearsay. *State v. Collins*, 76 Wn. App. 496, 498-499, 886 P.2d 243 (1995). In *Collins*, two callers left messages on an answering machine while the police were executing a search warrant at the home of an alleged drug dealer. The first caller stated that they "needed to pick something up" and the second stated that they needed "a half." *Id.* at 499. The statements were admitted because implicit in both was a belief of the caller that they could get drugs from the person on the other end of the telephone line when they called. *Id.* The Court in *Collins* held that the admissibility of

the statements is consistent with the advisory committee's notes to Federal Rule of Evidence 801 and in accord with the majority of federal circuits dealing with this issue. *Id.* at 499-500. Citing *Collins*, the Court reached a similar decision in finding six out-of-court statements to not be hearsay in *State v. Crowder*, 103 Wn. App. 20, 26-27, 11 P.3d 828 (2000). The Court allowed all six statements to show the state of mind of the declarant. *Id.*

In this matter, Ahern testified that Pitcher told him Humphries's eyes were "glassy" and that he should not have served her. The statement is not offered to prove that Humphries's eyes were glassy on the night of the crash. Instead, as in *Collins*, the statement is offered to implicitly show Pitcher's belief that Humphries was apparently under the influence of alcohol at Red Onion on the night of the crash. Further, as in *Crowder*, the statement goes to Pitcher's state of mind. Thus, the statement is not hearsay and should have been admitted by the trial court.

2. The order excluding Pitcher's admission should have been vacated.

Any order or judgment may be vacated by the trial court pursuant to CR 60. The rule reads, in relevant part, as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On

motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(4) Fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(11) Any other reason justifying relief from the operation of judgment.

CR 60. 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. *Vaughn v. Chung*, 119 Wn.2d 273, 278, 279, 830 P.2d 668 (1992). CR 60 gives trial courts a broad measure of equitable power to grant parties relief from judgments or orders. *Id.* at 280.

Relief from judgment under CR 60(b)(4) requires the movant to show misconduct that prevented it from fully and fairly presenting its case. *Dalton v. State*, 130 Wn. App. 653, 668, 124 P.3d 305 (2005). The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. *Id.* For this

reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense. *Id.* CR 60(b)(6) allows the trial court to address problems arising under a judgment that has continuing effect where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment. *Pacific Security Cos. v. Tangelwood, Inc.*, 57 Wn. App. 817, 820, 790 P.2d 643 (1990). The use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule. *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985). The circumstances must relate to irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings. *Id.*

a. Misrepresentations and other misconduct of Red Onion.

In seeking to dismiss the lawsuit directly against Pitcher, not only did Red Onion declare that its vicariously liability for the actions of its “agent” Pitcher was “undisputed,” but that it was also jointly and severally liable with Pitcher. CP 689-690. However, when previously seeking the exclusion of Pitcher’s admission, Red Onion argued that Red Onion could not be held accountable for the words out of

Pitcher's mouth because Pitcher was not Red Onion's agent. CP 438. Therefore, Red Onion's denial of agency was, by definition, a denial of both vicarious liability and joint and several liability. Red Onion's subsequent admissions of vicarious liability and joint and several liability are proof of Pitcher's agency. If Red Onion is vicariously liable for Pitcher, then Pitcher is Red Onion's agent and Pitcher's admission is admissible. It also means that Red Onion is vicariously liable for Pitcher's admission.

By previously misrepresenting the nature of its liability for the actions of Pitcher, Ensley was prevented from fully and fairly presenting evidence, namely Pitcher's admission, which would have precluded summary judgment. Red Onion's subsequent position that vicarious liability is "undisputed" is inconsistent with and mutually exclusive to Red Onion's bases for excluding Pitcher's admission. Therefore, the order should have been vacated by the trial court pursuant to CR 60(b)(4).

Moreover, Red Onion subsequently argued that the suit against Red Onion was essentially one against Pitcher and urged the Court to view Pitcher and Red Onion as "one and the same." CP 690. Since Red Onion is vicariously liable for the actions of Pitcher and they are one and the same, Pitcher must be considered a party

to this action for all intents and purposes. If Pitcher is a party, then his admission is not hearsay. ER 801(d)(i). Accordingly, the trial court had a second basis to grant Ensley relief from the order excluding Pitcher's admission.

b. Red Onion's change in position made it no longer equitable to exclude Pitcher's admission.

Red Onion's change in the way in which it asked the Court to view its relationship with Pitcher was, most certainly, a change in circumstances. By Red Onion's new position, the circumstances which caused the exclusion of the Ahern testimony are clearly inequitable. Accordingly, the trial court should have granted Ensley relief from the order excluding the testimony of Ahern based on the true nature of the relationship between Red Onion and Pitcher.

c. The extraneous actions of Red Onion call the regularity of the exclusion into question.

Ensley's lawsuit directly against Pitcher is extraneous to his lawsuit directly against Red Onion. However, the position taken by Red Onion in defending the action against Pitcher is in direct conflict with the position taken in the defense of this matter which directly lead to the dismissal of Red Onion. Thus, the inconsistent and conflicting positions created an irregularity. Clearly, Red Onion cannot have it both ways. Accordingly, the trial court should have

granted Ensley relief from the order excluding Pitcher's admission based on the true nature of the relationship between Red Onion and Pitcher.

d. Ensley should not have been sanctioned.

The signature of an attorney on any pleading certifies that the pleading (1) 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 (2) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. CR 11. The rule is intended to deter baseless filings and to curb abuses of the judicial system. It is also designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Matters which are "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. *Id.* at 219, 220. However, CR 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Id.* at 219. Moreover, CR 11 sanctions are not appropriate even if a filing's factual basis ultimately proves deficient

or a party's view of the law proves incorrect. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 142, 64 P.3d 691 (2003). To avoid being swayed by the benefit of hindsight, the Court should impose sanctions only when it is patently clear that a filing has absolutely no chance of success. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996). The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

The factual and legal bases in support of Ensley's request to vacate the prior order are explicit above. Ensley's request was well grounded in fact and warranted by existing law. In light of Red Onion's arguments it was appropriate to revisit this issue. Moreover, Red Onion opened Pandora's Box in the first place. Further, in requesting responsive briefing from Red Onion to Ensley's motion for reconsideration, the trial court indicated that granting Ensley's request was a consideration. Presumably, the trial court would not have requested a response from Red Onion if Ensley's motion was baseless. Accordingly, Ensley's request was not baseless and terms were unwarranted.

C. Summary judgment should not have been granted.

Evidence sufficient to submit the issue of negligent overservice of alcohol to a jury may be either direct or circumstantial and evidence of BAC can be used to corroborate evidence of appearance and support an inference that the drinker appeared under the influence of alcohol. *Faust v. Albertson*, ___ Wn.2d ___ (July 16, 2009). Pitcher's admission is direct evidence of overservice. If admitted, Pitcher's admission would create a genuine issue of fact which would preclude summary judgment in favor of Red Onion. Notwithstanding, other circumstantial evidence was presented to the trial court to create issues of material fact.

1. The signs of intoxication shown by Humphries and the 15.8 drinks she consumed before arriving at Red Onion raise an inference as to her appearance.

RCW 66.44.200(1), which forbids the selling of alcohol "to any person apparently under the influence of liquor," defines the minimum standard of conduct for commercial hosts whose alleged overservice causes a drunk driving accident injuring a third party. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 273, 96 P.3d 386 (2004). Commercial hosts have been under this same statutory obligation for 70 years. *Barrett*, at 274. Unlike the determination of something obvious, determination of something

apparent requires at least some reflection and thought. *Barrett*, at 268. The relevant inquiry is who had the authority to deny further service of alcohol when the intoxication became apparent. *Dickinson v. Edwards*, 105 Wn.2d 457, 466, 716 P.2d 814 (1986). The amount of liquor consumed may raise an inference of apparent intoxication upon which to base a material question of fact as to (1) whether the drinker would have displayed signs of apparent intoxication and (2) whether a person in the position of the bartender knew or should have known in the exercise of reasonable care that the drinker apparently under the influence of alcohol. *Dickinson*, at 465 incorporating *Barrett*, at 273.

In *Dickinson*, the drinker consumed between 10 and 15 drinks within a 3½ hour period. *Id.* The Court held, “A logical consequence, i.e., an inference, from this fact, is that Mr. Edwards could have at the very least appeared obviously intoxicated to those who furnished the drinks.” *Id.* Subjective observations of the signs of intoxication made close in time proximately to the period of alcohol consumption may raise an inference of apparent intoxication upon which to base a material question of fact. *Id.* at 464. While the *Dickinson* court expressed some concerns about subsequent observations if subsequent drinking occurred or there

was a gap in time, there are no such concerns with prior observations made close in time. *Id.*

Even if Pitcher's admission is taken away, the fact remains that Humphries consumed a minimum of 15.8 standard drinks in the four hours before her arrival at Red Onion and exhibited multiple signs of intoxication. CP 277. Given her consumption, subjective observations of Humphries, and other factors, including Humphries's self-assessment, there is circumstantial evidence that Humphries appeared under the influence of alcohol at Red Onion. Dr. Hlastala's assessment that Humphries's BAC was 0.24 and rising when she entered Red Onion corroborates the inference that she appeared under the influence of alcohol. At the very least, there is a material issue of fact as to whether Pitcher should have recognized Humphries's intoxication. Based on generally accepted science, Dr. Hlastala concludes that Humphries would have exhibited signs of intoxication that were visible to at least 95% of the general public, let alone a trained bartender. CP 277. As pointed out by Dr. Hlastala, it is generally accepted that a person cannot show diminished signs of intoxication if they continue drinking; the only factor in becoming sober is time. CP 277. Further, Dr. Rutherford points out that Pitcher failed to exercise the

care of a reasonably prudent, well trained and attentive bartender on the night of the crash. CP 278-280. In fact, Pitcher was unlicensed and untrained.

This Court should not turn a blind eye as Pitcher and the trial court did. Humphries's behavior before arriving Red Onion and ongoing alcohol consumption raises an inference that Humphries appeared or should have appeared under the influence of alcohol while at Red Onion; an inference which raises a material question of fact to preclude summary judgment.

2. The signs of intoxication shown by Humphries immediately after leaving Red Onion raise an inference as to her appearance.

Subsequent observations of a person who appears to be under the influence may raise an inference that the person appeared under the influence when previously furnished alcohol. *Id.*

Within minutes of her arrival at Twilight, Humphries exhibited additional recognized signs of intoxication. CP 277. That Humphries exhibited signs of intoxication within minutes of leaving Red Onion raises an inference that she exhibited signs of being under the influence of alcohol at Red Onion; an inference which raises a material question of fact precluding summary judgment.

3. Humphries admits that she appeared under the influence.

By her own admissions, Humphries exhibited signs of being under the influence of alcohol at Red Onion. CP 276-277. The admissions in and of themselves raise a material question of fact. Moreover, within less than 45 minutes of leaving Red Onion, an intoxicated Humphries crashed her car and was convicted of DUI. CP 274.

4. The trial court had no basis to dismiss all claims.

The only claim that Red Onion asked the trial court to dismiss via summary judgment was Ensley's overservice claim. CP 92-110. The record is devoid of any argument let alone any basis to support a dismissal of any other claim. Focusing solely on actions and events that occurred after entry of the order dismissing Ensley's overservice claim against Red Onion, Red Onion sought an order that all of Ensley's claims were dismissed. CP 940-945. However, any event occurring after entry of the April 6, 2007 order has no bearing on that order. In fact, that would be the subject of a separate dispositive motion. Essentially, without briefing any substantive issue and on six days notice, an order granting summary judgment in favor of Red Onion was entered by the trial court.

D. Ensley should have been allowed to amend his complaint.

A party may amend a pleading by leave of the court, which shall be freely given when justice so requires. CR 15(a). CR 15 has been construed by the Washington Supreme Court to mean that leave should be granted “unless it appears **to a certainty** that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim.” *Adams v. Allstate Ins. Co.*, 58 Wash.2d 659, 672, 364 P.2d 804 (1961) (emphasis added). In reversing the trial court’s decision to deny plaintiff’s motion to amend, the *Adams* court, quoting a federal case, stated: “No matter how likely it may seem that a plaintiff may be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to prove it.” *Id.* (citations omitted). Here, Red Onion denied that it was liable for Pitcher’s actions and sought exclusion of Pitcher’s admission. Thus, Ensley should be permitted to add Pitcher as a party to this lawsuit.

1. Red Onion would not be prejudiced by the amendment.

The Supreme Court has held that the factors a court may consider in determining prejudice include delay, unfair surprise, the likelihood of jury confusion, and the introduction of a remote issue.

Herron v. Tribune Publishing Co., 108 Wn.2d 162, 166, 736 P.2d 249 (1987). Conclusory assertions do not rise to the level of showing actual prejudice. *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988). In its order denying Ensley's request for leave, the only basis cited by the trial court is delay. CP 677-679.

2. Delay was not a proper basis for the trial court to deny Ensley leave.

The purpose of pleadings is to facilitate a proper decision on the merits and not to erect formal and burdensome impediments to the litigation process. *Caruso v. Local 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). Delay on the part of the movant in proposing the amendment constitutes grounds to deny a motion to amend only where such delay works undue hardship or prejudice upon the opposing party. *Id.* Delay, excusable or not, in and of itself is not sufficient reason to deny a motion to amend the pleadings. *Id.* Courts have allowed amendments to complaints made five or six years after filing the original complaint. *Id.* at 350. A court may grant leave to amend a complaint even after a judgment of dismissal has been formally entered. *Tagliani v. Colwell*, 10 Wn. App. 227, 234, 517 P.2d 207 (1973).

In this case, Red Onion claimed the prejudice caused by delay was that it was too close to the trial date. The fact of the matter is that there was no actual prejudicial to Red Onion because the trial date could be moved. As was the case in *Caruso*, Red Onion could cite no actual hardship or prejudice as a result of the delay.⁴ Thus, delay was not a valid reason to deny Ensley's request for leave to amend the Complaint. The trial court's subsequent continuances of the trial date, including the continuance granted just one month later, further prove this point.

V. CONCLUSION

For the foregoing reasons, Ensley respectfully requests that this Court reverse the nine orders of the trial court. Ensley further requests that this Court remand the case to the trial court for adjudication on the merits.

Respectfully submitted this 16th day of July, 2009.

THE ADEE LAW FIRM, PLLC



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

⁴ The *Caruso* court found an insufficient showing of actual prejudice and held that a delay of 5 years and 4 months in and of itself did not rise to the level of prejudice required. *Caruso*, at 350-1.

DECLARATION OF SERVICE

I, Aaron L. Adee, declare, under penalty of perjury under the laws of the State of Washington that on July 16, 2009 I caused the following document(s) to be served on the person(s) listed below in the manner shown:

**DOCUMENT(S) SERVED: APPELLANT NICHOLAS
ENSLEY'S APPEAL BRIEF AND ASSIGNMENTS OF ERROR**

Jennifer L. Brown
Maggie Peterson
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
Telephone: (206) 340-1000
Attorneys for
Defendant/Respondent

- United States Mail, Firsts Class
- By Legal Messenger
- By Facsimile
- By Federal Express

SIGNED at Seattle, Washington this 16th day of July, 2009.



Aaron L. Adee

FILED
COURT OF APPEALS, 5th DIV., #1
STATE OF WASHINGTON
2009 JUL 16 PM 3:58

EXHIBIT 1

1 THE HONORABLE RICHARD D. EADIE

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

9 NICHOLAS ENSLEY,

10 Plaintiff,

11 v.

12 STEPHAN MOLLMANN and "JANE DOE"
13 MOLLMANN, husband and wife, and the
14 marital community composed thereof, dba
15 THE TWILIGHT EXIT; BROADWAY BOY
16 VENTURES, LLC, a Washington limited
17 liability company, dba IMPROMPTU ART &
18 WINE BAR; TIMOTHY LYLE JOHNSON and
19 "JANE DOE" JOHNSON, husband and wife,
20 and the marital community composed
21 thereof, dba RED ONION TAVERN;
22 REBECCA HUMPHRIES and "JOHN DOE"
23 HUMPHRIES, wife and husband, and the
24 marital community composed thereof; jointly
25 and severally,

26 Defendants.

NO.: 05-2-29484-1 SEA

^{RE}
~~PROPOSED~~ ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
DENYING RELIEF FROM ORDERS

20 THIS MATTER comes before the Court on Plaintiff's Motion for
21 Reconsideration of the Court's August 6, 2008 Order Denying Plaintiff's Motion for
22 Relief from Orders.

23 The Court, having reviewed the pleadings and other records on file, including
24 the following:

25 1. Plaintiff's Motion for Reconsideration of Order Denying Relief from
26 Orders;

ORDER DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION - 1

ORIGINAL

LAW OFFICES OF
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2. Red Onion's Opposition to Plaintiff's Motion for Reconsideration;

3. NO REPLY WAS RECEIVED;

4. _____;

5. _____; and

6. _____

The Court otherwise deeming itself fully advised;

IT IS HEREBY ORDERED that Plaintiff fails to satisfy CR 59 requirements. Specifically, Plaintiff fails to establish (1) an irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (2) misconduct of prevailing party or jury; (3) that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; (4) that an error in law occurred at the trial; or (5) that substantial justice has not been done. **ACCORDINGLY,**

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of August 6, 2008 Order Denying Plaintiff's Motion for Relief from Orders is **DENIED**.

DONE IN OPEN COURT this 10th day of September, 2008.

Richard D Eadie
Honorable Richard Eadie

Presented by:
COZEN O'CONNOR
JMB
Jennifer L. Brown, WSBA No. 27952
Maggie Peterson, WSBA No. 31176
Attorneys for Defendant Timothy L. Johnson
d/b/a Red Onion Tavern