

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.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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Appeal from the Superior Court for King County  
The Honorable Richard D. Eadie

**APPELLANT NICHOLAS ENSLEY'S REPLY BRIEF**

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## I. SUMMARY OF REPLY

Appellant Nicholas Ensley (“Ensley”) submits the following in reply:

1. Multiple issues of material fact sufficient to defeat respondent Red Onion Tavern’s (“Red Onion”) motion for summary judgment were presented to the trial court. Thus, the trial court erred in granting the motion. Moreover, Red Onion does not even address the fact that the trial court had no basis to dismiss all claims against Red Onion.

2. Pitcher’s admission is not hearsay and should have been considered against Red Onion. There was no good cause to shorten the time to consider the motion and had no authority to grant the motion. Further, the order should have been vacated after Red Onion argued an inconsistent position vis-à-vis Pitcher’s relationship with Red Onion in the matter directly against Pitcher.

3. The trial court abused its discretion by denying Ensley’s request for leave to amend his Complaint to add Pitcher as a party on the basis cited.

4. In reviewing the authority presented by Red Onion, it appears that Ensley has made a procedural error concerning the appeal of the order granting sanctions in favor of Red Onion that

cannot be cured at this late date. Therefore, Ensley withdraws his assignment of error to the 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).

## II. ARGUMENTS IN REPLY

### A. Summary judgment should not have been granted.

Summary judgment is only appropriate when there are no issues of material fact. CR 56(c). A material fact is one in which the outcome of the litigation depends. *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 364, 324 P.2d 113 (1958). A genuine issue of fact exists, thus precluding summary judgment, when reasonable minds could reach different factual conclusions after considering the evidence. When reasonable minds could differ, a motion for summary judgment should be denied. *Linke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256, 257, 616 P.2d 644 (1980). All reasonable inferences must be made in favor of the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The burden of showing that there are no issues of material fact is on the moving

party. Here, multiple factual issues preclude summary judgment in favor of Red Onion.

**1. Humphries's admission of intoxication.**

Corroborated admissions of a party may constitute substantial evidence of any fact in issue. *Faust v. Albertson*, 166 Wn.2d 653, 662, 211 P.3d 400 (2009). BAC evidence is relevant as corroborative and supportive of the credibility of firsthand observations. *Id.*

Here, Humphries began drinking alcohol at Impromptu Wine and Art Bar ("Impromptu") hours before drinking at Red Onion. While still at Impromptu, Humphries self-assessed her own intoxication and apologized to Impromptu bartender Stacey Jones for being drunk. CP 277. Even so, Humphries continued to be served and consume alcohol. CP 277. In her answer to the complaint, Humphries admitted that she appeared under the influence of alcohol when served alcohol at Red Onion. CP 276. Nowhere in Red Onion's briefing are these facts contested let alone addressed. Moreover, Humphries's admission that she appeared under the influence of alcohol is corroborated by the unchallenged and unrebutted computation by forensic expert Michael Hlastala,

Ph.D. that her BAC at the time she walked through the door at Red Onion was 0.24 *and rising*. CP 277.<sup>1</sup>

The undisputed facts on the record and the corroboration by Dr. Hlastala are substantial evidence that Humphries was apparently under the influence of alcohol when served at Red Onion. Therefore, it was error to grant summary judgment in favor of Red Onion.

**2. Prior eyewitness observations of Humphries's intoxication.**

Observations regarding the pre-service sobriety are sufficient to present a factual issue as to whether the drinker was under the influence of alcohol. *Young v. Caravan Corp.*, 99 Wn.2d 655, 659, 663 P.2d 834 (1983).

In the course of drinking at Impromptu, Humphries self-assessed her own intoxication, she took drinks out of others' hands, she spilled a drink, she exhibited a lack of coordination, she exhibited wild mood swings, and she disturbed other patrons with her loud behavior. By itself, the eyewitness testimony of Impromptu patron Nichole Barr establishes that Humphries appeared under the

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<sup>1</sup> Red Onion implicitly acknowledges that the opinions of Dr. Hlastala are relevant and sufficient to defeat Red Onion's motion for summary judgment when used to corroborate evidence that Humphries appeared under the influence of alcohol. Respondent's Brief at 27.

influence of alcohol. CP 270. Nonetheless, Humphries continued to be served and consume alcohol. It is undisputed that Humphries consumed the equivalent of 15.8 standard drinks at Impromptu.

While Red Onion may not have had direct knowledge of Humphries's appearance at Impromptu, the reasonable inference which may be drawn from Humphries's behavior at Impromptu is that she continued to appear under the influence of alcohol at Impromptu and subsequently appeared under the influence of alcohol at Red Onion. Based on generally accepted scientific principles, Dr. Hlastala opines that persons exhibiting multiple signs of intoxication, as Humphries was at Impromptu, cannot pull themselves together and simply stop exhibiting those signs. CP 277. Moreover, it is well within the realm of common knowledge that it is physiologically impossible for a drinker exhibiting apparent signs of being under the influence to cease exhibiting signs of intoxication if they continue to drink. According to Dr. Hlastala, the only factor in appearing sober is time. CP 277. Again, none of these facts are addressed by Red Onion.

Again, there is sufficient evidence to establish a factual issue as to the appearance of Humphries while at Red Onion. Therefore,

the trial court erred in granting Red Onion's motion for summary judgment.

**3. Pitcher admitted that Humphries appeared under the influence of alcohol.**

Direct observational evidence at the time of the service of alcohol that the drinker was apparently under the influence of alcohol will defeat a motion for summary judgment. *Faust*, at 658-59. If considered, the admission of Pitcher is direct eyewitness testimony on the record that Humphries was under the influence of alcohol at the time of service at Red Onion. Thus, the facts are sufficient to defeat Red Onion's motion for summary judgment. The admissibility of Pitcher's admission is discussed later.

**4. Subsequent eyewitness observations of Humphries's intoxication.<sup>2</sup>**

Subsequent observations of a person who appears to be under the influence of alcohol may raise an inference that the person appeared under the influence when previously furnished alcohol. *Dickinson v. Edwards*, 105, Wn.2d 457, 464, 716 P.2d 814 (1986). In *Dickinson*, the testimony of the responding police officer

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<sup>2</sup> The Court may take judicial notice that the trial court made a factual finding that Humphries appeared under the influence of alcohol while at Twilight. CP 1152-1154.

in addition to the driver's admission constituted sufficient evidence to defeat a motion for summary judgment. *Faust*, at 660.

Within minutes of leaving Red Onion, Humphries exhibited a sign of intoxication when she ordered and consumed multiple drinks immediately upon arrival at The Twilight Exit ("Twilight"). Moreover, Humphries fell to the floor just minutes later. Red Onion does not deny that Humphries exhibited signs of intoxication within minutes after leaving Red Onion. Instead, Red Onion argues that the subsequent observations of an intoxicated Humphries at Twilight *cannot* be considered by the Court because of the subsequent drinking by Humphries. However, in citing *Dickinson*, Red Onion substitutes the word "do" for the word "may."<sup>3</sup> Respondent's Brief at 24. By changing one word, Red Onion misstates law and, in doing so, creates a much stricter standard. Instead, any subsequent consumption of alcohol is to be considered and weighed along with all other evidence. When considered with the other available evidence, that Humphries

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<sup>3</sup> "[T]he trial court, in ruling on the motion for summary judgment, must consider whether the drinker had consumed any alcohol after and independent of the defendants' furnishing or whether any time remained unaccounted for between the last furnishing by the defendants and the subsequent observations. In either of these cases, the subsequent observations *may* not raise an inference of obvious intoxication upon which to base a material issue of fact." *Dickinson*, at 464 (emphasis added). In this matter, there is no evidence that any time is unaccounted for.

consumed additional alcohol at Twilight is not sufficient to eliminate an issue of fact as Humphries exhibited a sign of intoxication upon arrival.

However, this argument also cuts against Red Onion. By Red Onion's logic, subsequent consumption of alcohol will cause a drinker to appear under the influence. This logic enhances the argument that Humphries's appearance at Impromptu coupled with her subsequent drinking made her appear even more apparently under the influence of alcohol at Red Onion.

Red Onion also argues that five persons observed that Humphries did not appear under the influence of alcohol at Red Onion. This is inaccurate. It is more correct to say that five persons were asked about the appearance of Humphries at Red Onion. Four could not say one way or the other because they were not paying attention to Humphries or did not know her. The fifth, Pitcher, provided self-serving testimony about Humphries appearance. Even so, Pitcher's testimony is impeached by his admission to Ahern and testimony that he failed to make any assessment of Humphries sobriety before serving her alcohol.

**B. Red Onion does not even address Ensley's argument that not all claims were dismissed.**

Red Onion does not deny that 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 clear in the absence of any argument let alone any basis to support a dismissal of any other claim. Nevertheless, Red Onion sought and the trial court granted an order that all of Ensley's claims were dismissed. CP 940-945. 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. This is a clear error and should be reversed by this Court.

**C. The trial court abused its discretion in denying Ensley's request for leave to amend his complaint.**

As pointed out by Red Onion, the trial court's denial of Ensley's request for leave to amend his complaint is reviewed for an abuse of discretion.<sup>4</sup> In this matter, the record establishes that the trial court expressly identified the nature of the prejudice that formed the trial court's basis for denying Ensley's request for leave to amend. Namely, the trial court cited the prejudice caused by the

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<sup>4</sup> Nevertheless, that does not stop Red Onion from proceeding with a full de novo review.

close proximity of the trial date. While Red Onion may have argued other grounds for the trial court to deny Ensley's motion, the trial court made a clear record of the basis for its decision. Thus, the issue on appeal is whether the trial court's denial of Ensley's request for leave to amend his complaint on the basis that the trial date was too close was manifestly unfair, unreasonable, or untenable.

It is undeniable that the trial court could have simply continued the trial date to alleviate any possible prejudice. Instead, the trial court outright denied Ensley's motion. One month later, the trial court granted the first of two subsequent continuances. The trial court's subsequent continuances of the trial date, including the continuance granted only one month later, is clear evidence that the decision of the trial court to deny Ensley's request on that basis alone was manifestly unfair, unreasonable, and untenable. Thus, the trial court abused its discretion.

**D. Pitcher's admission is not hearsay.**

The question at hand is whether Pitcher was authorized to speak about his observations of Humphries on the night of the crash. Absent express authority to make a particular statement at issue, the overall nature of the declarant's authority to act for a

party may determine whether they are a speaking agent. *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987). An agent may have authority when the principal (1) knowingly permits the agent to perform certain acts, (2) hold him out as possessing certain authority, or (3) places the agent in such a 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).

Instead of addressing the information presented, such as the general duties of every alcohol server and that Red Onion permitted an unlicensed and untrained Pitcher to work alone, Red Onion continues to rely exclusively on *Barrie v. Hosts of America*, 94 Wn.2d 640, 618 P.2d 96 (1980). Again, *Barrie* is a conclusion without any analysis. Absent analysis, *Barrie* offers no guidance to answer the question at hand and little precedential value. Moreover, *Barrie* has been superseded by the decision in *Lockwood*. However, Red Onion seems to agree that Pitcher has

speaking authority if he is an officer, director, shareholder or official of Red Onion. Respondent's Brief at 14.

Red Onion acknowledges that Pitcher's job was to serve alcoholic beverages to Red Onion patrons. As a server of alcohol, Pitcher was required by law to make an assessment of patrons and to communicate that assessment. By permitting Pitcher to work alone, Red Onion authorized Pitcher to make all decisions regarding the service of alcohol on behalf of Red Onion. Pitcher presided over the establishment from an exclusive position of authority. It was clear to every Red Onion patron that Pitcher was the only person serving alcohol. All requests for alcohol went through Pitcher and Pitcher alone. That Pitcher only worked at Red Onion on a part-time basis is immaterial. Had an agent of the Liquor Control Board or the Seattle Police Department walked into Red Onion, Pitcher is the only person with whom they would have dealt. On the night of the crash, Pitcher was Red Onion's official for the service of alcohol. Thus, by Red Onion's own argument, Pitcher's admission is that of a duly authorized speaking agent of Red Onion.

Moreover, 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, 498-99, 866 P.2d 243 (1995). Citing *Collins*, the Court reached a similar decision when it admitted six out-of-court statements to show the declarant's state of mind. *State v. Crowder*, 103 Wn. App. 20, 26-7, 11 P.3d 828 (2000).

Here, the statement is not offered to prove that Humphries's eyes were glassy on the night of the crash as argued by Red Onion. Instead, the statement is offered to implicitly show Pitcher's then existing belief or state of mind that Humphries appeared to be under the influence of alcohol at red Onion on the night of the crash. Thus, the statement is not hearsay and should have been admitted by the trial court.

**E. The trial court should not have shortened time.**

As pointed out by Red Onion, the prejudice in shortening time is that the responding party has less time to consider and formulate a response.<sup>5</sup> Thus, 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). Additionally, as soon as the party requesting shortened time is

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<sup>5</sup> This prejudice is exhibited by Ensley's inability to prepare a thorough response to Red Onion's motion.

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.*

Red Onion offered no good cause to shorten time. Red Onion's briefing does not explain the nature of Red Onion's good cause. Red Onion does not deny that the purpose behind the motion to shorten time was to prejudice Ensley by unfairly depriving Ensley of additional time. Instead, Red Onion seems to shift the burden to Ensley to establish prejudice. Not only does Red Onion establish the prejudice, Red Onion puts the cart before the horse. Absent a showing of good cause, there was no need for Ensley to establish prejudice. Also, without any established record to show the efforts undertaken to provide Ensley with notice pursuant to 7(b)(10)(C), the trial court had no authority to grant Red Onion's motion. Red Onion's motion should have been denied.

**F. The trial court should have vacated the order excluding Pitcher's admission based on the inconsistent positions of Red Onion.**

In this matter, Red Onion took the positions that (1) Pitcher was not a party and that (2) Red Onion could not be held

responsible for what Pitcher said. Essentially, Red Onion drew a distinction between itself and Pitcher for the purpose of excluding critical evidence to establish liability. Based upon this distinction, Red Onion persuaded the trial court to strike the admission of Pitcher.

In the subsequent case directly against Pitcher, counsel for Red Onion appeared in its capacity as counsel for Red Onion and defended Pitcher. Almost immediately, Pitcher/Red Onion claimed that the subsequent case directly against Pitcher was either res judicata or barred by collateral estoppel. An essential element of both res judicata and collateral estoppel is that the party against whom the preclusion doctrine is asserted is either a party or in privity with a party to the prior adjudication. Pitcher/Red Onion argued that this lawsuit against Red Onion was, for all intents and purposes, a lawsuit against Pitcher. Pitcher/Red Onion urged the trial court to view Pitcher and Red Onion as “one and the same.” CP 690. Thus, Red Onion took the position that Pitcher was a party to this lawsuit.

In two separate matters, Red Onion attempted to argue both sides of the coin. However, Red Onion cannot have it both ways as the two positions are mutually exclusive. Either Pitcher is a party to

this matter or he is not. Since Red Onion subsequently argued that this lawsuit was against Pitcher and that Red Onion and Pitcher should be considered one and the same, the Court should accept Red Onion's argument and consider Pitcher a party to this action. If Pitcher is a party, then his admission is not hearsay. ER 801(d)(i).

As pointed out by Red Onion, equitable factors are considered on a motion to vacate.<sup>6</sup> The inconsistencies between the two positions taken by Red Onion warranted a revisitation of the order excluding Pitcher's admission. Since only one position regarding Pitcher's status as a party can be true, the order excluding Pitcher's admission could be a misrepresentation (CR 60(b)(4)), a material change in circumstances making the order no longer equitable (CR 60(b)(6)), or an irregularity in an extraneous matter (CR 60(b)(11)). Accordingly, the trial court should have granted Ensley equitable relief from the order excluding Pitcher's admission based on the position subsequently taken by Red Onion on the nature of the relationship between Red Onion and Pitcher.

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<sup>6</sup> Red Onion claims that Ensley attempts to mislead the Court as to the "standard to be applied" for a CR 60 motion to vacate. While Red Onion agrees that a CR 60 motion is equitable in nature, it cites no other standard.

### III. CONCLUSION

To reiterate, Ensley respectfully requests that this Court reverse the eight 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 17<sup>th</sup> day of September, 2009.

**THE ADEE LAW FIRM, PLLC**

A handwritten signature in black ink, appearing to read "Aaron L. Adee", written over a horizontal line.

Aaron L. Adee, WSBA No. 27409

Attorney for Appellant Nicholas Ensley

**DECLARATION OF SERVICE**

I, Aaron L. Adee, declare, under penalty of perjury under the laws of the State of Washington that on September 17, 2009 I caused the following document(s) to be served on the person(s) listed below in the manner shown:

**DOCUMENT(S) SERVED:                      REPLY      BRIEF      OF**

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SIGNED at Seattle, Washington this 17<sup>h</sup> day of September, 2009.

  
\_\_\_\_\_  
Aaron L. Adee

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