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65927-8  
NO. ~~62927-8-T~~

COURT OF APPEALS, DIVISION ONE OF THE STATE OF  
WASHINGTON

PAULETTE WESTON

Appellant

v.

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

Respondents

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BRIEF OF APPELLANT

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## II. ASSIGNMENTS OF ERROR

The Trial Court's only written findings as to the reasons for denying Plaintiff's motion for Partial Summary Judgment and granting Defendants Motion for Summary Judgment of Dismissal, which Orders are assigned as error were stated in the Order Denying Plaintiff's Motion for reconsideration , and in it made the following errors of law:

1. The Trial Court erred in denying Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion for Reconsideration in the following particulars:

a. Judge Richard Eadie stated in his Order Denying Plaintiff's Motion for Reconsideration that the Order by Judge Eileen Kato in King County District Criminal Court on March 8, 2006 "was not clear that the criminal charge made by the WSLCB agents was Dismissed with or without prejudice", and in so doing failed to acknowledge the criminal charge was dismissed with prejudice as stated on the Court's Docket.

b. By failing to acknowledge the criminal court ruling was with prejudice , the Trial Court erred in not considering that the Plaintiff was innocent of the offense of selling alcohol to a minor, the charging her with that caused her to lose her job.

c. The Trial Court further erred by failing to make the following undisputed findings of fact or conclusions of law which would have precluded denying Plaintiff's Motion for Partial Summary Judgment of Liability:

(1) That the WSLCB Agents intended to charge the Plaintiff with the crime of selling alcohol to a minor if she sold alcohol to the female agent who claimed to be over 21 and presented a picture ID in support of that claim;

(2) That the Plaintiff was presumed innocent which was confirmed by the District Court dismissal of the criminal charge with prejudice when the State Prosecutor after considering all the evidence accumulated for over five months chose to withdraw the charge.

(3) That the dismissal with prejudice was not appealed and became final in thirty days;

(4) That the claim by the defendants that Weston sold alcohol to a minor cannot be used by the Defendants as a defense to Plaintiff's claim for damages and Plaintiff had no burden to prove her innocence of the charge;

(5) That the Plaintiff has no burden to prove the conduct of

the agents in bringing a dismissed criminal charge against her as a defense was improper because that conduct as a defense had been adjudicated and was prima facie improper; and

(6) It was the burden of the State to prove beyond a reasonable doubt the charge was true, which they chose not to do

d. The Trial Court also erred in rejecting the doctrine of res judicata by concluding that because there was no trial or evidence presented, the doctrine did not apply when the doctrine only requires that the court must consider all evidence available to the prosecutors.

e. The Trial Court also erred by failing to apply res judicata to preclude the defense that a sale by Plaintiff of alcohol to a minor occurred on the grounds that the burden of proof in a criminal case is higher than a civil case when no authority exists for the courts to apply a “bright line” rule to exclude the application of res judicata in a civil case solely on the different burden of proof when the act is identical in the crime and the civil incident.

2. The Trial Court erred in failing to grant Plaintiff’s Motion to Compel Discovery that would have assisted Plaintiff in making a prima facie showing of intentional interference in the following particulars:

a. The failure to answer Interrogatory Number 6

which would have shown the detailed phone logs of Officer Blaker leading to proof of the motives of Officers Harrigan and Benavidez compared to the five year old recollection of the witness and a showing of improper means.

b. The failure to completely answer Interrogatory 13 which could have supported Plaintiff's theory of an altered license as employing improper means in the conduct of the sting.

c. The failure to produce the actual license Louise Carey claimed to have used at the time which was necessary to support Plaintiff's theory of an altered license as employing improper means in the conduct of the sting.

d. The failure to provide Plaintiff's right to fair procedural due process by denying the Motion to Compel Discovery before ruling on the Defendants' Motion for Summary Judgment to Dismiss.

3. That even if Weston's innocence of the crime she was charged with had not been established in Criminal Court, and assuming the Trial Court had the authority to adjudicate Weston's alleged criminal offense, then the Trial Court was still in error in denying Plaintiff's Motions and Granting Defendants' Motions in the following particulars:

a. That the Trial Court erroneously found in the Order

Denying Reconsideration and ruling as a matter of law that conduct by the Officers would have been improper to rise to level of a prima facie showing for intentional interference if and only if the conduct had compelled Plaintiff to make a sale of alcohol to a minor and nothing less was improper.

b. That the trial Court erroneously decided as a matter of law that the conduct of the officers in harassing and intimidating Plaintiff while engaged in her responsibility to verify the proper age of a customer and by refusing to consider the circumstantial evidence supporting an inference that an altered IS was used, was insufficient to make a prima facie showing of intentional interference when the Washington common law requires such matters be decided as questions of fact unless the conduct is so extreme to be considered as contrary to community standards as a matter of law.

c. That the performance rules of the Defendant Department for conducting alcohol compliance checks that the Officers merely observe and protect the underage operatives were not violated by harassing and intimidating conduct or by the use of an altered ID could be disregarded in ruling in the Order Denying Reconsideration as a matter of law that their conduct was proper.

4. Furthermore assuming the Trial court acted by legal authority

to grant Defendants' Motion for Summary Judgment of Dismissal, it was further error for the Trial Court to not accept the following evidence as true for summary judgment purposes which would have raised material issues of disputed fact that the alleged sale of alcohol to a minor on September 29, 2005 which was supplied to Albertsons and was the only basis for which she was fired:

a. That there was no evidence the sales slip, Defendants claim proves there was an illegal sale, was generated at the time of the witnessed sale.

b. That Plaintiff had a 23 year history of habitually entering the date of birth into the Albertsons point of sale computer and that there is no physical evidence to support the Defendants' claim that the date of birth on the ID presented was not 12-05-06 which was the same birth date entered on the receipt.

c. That the date of birth numerals on under age drivers licenses are nearly twice as large as the AGE 21 ON numerals the Defendants claim the Plaintiff accidentally entered into the computer, and that a jury could conclude it more likely that the date of birth on the license had been altered in order to trap the Plaintiff and that the harassing and intimidating conduct by the agents during the transaction

was done to keep the plaintiff from detecting the license had been altered.

d. That even if the Plaintiff made the claimed mistake, the harassing and intimidating conduct Plaintiff said she received during the transaction could be considered by a jury as improper conduct causing a mistake.

e. That based on the Defendants own evidence as to the maximum time to complete the sting sale of ten minutes and the time they were at the store of 25 minutes supports a reasonable inference that there was a dispute whether the sale occurred at the time that they testified.

f. That the female operative with Defendants purchased cigarettes contrary to department policy for such compliance checks but the purchase never appeared in the transaction record on which defendants rely on for proof that a violation occurred, raising a reasonable inference that the alleged sale transaction for which she was fired, never occurred when the Defendants witnesses said it did.

g. It was error for the Trial Court to disregard that the Defendant agents knew in advance the employer had a no tolerance policy, a fact shown to have been in their knowledge prior to the incident and a jury could conclude she was indeed selected for their sting, raising a reasonable inference and a question of fact as to improper

conduct by the Defendants, contrary to the reasons given by the Trial Court that there was no such evidence.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the King County District Court's dismissal with prejudice of the criminal charge against Plaintiff of selling alcohol to a minor precludes a later court from allowing the use of that charge to serve as a defense to the intentional interference claim that the sale contrary to law caused her to be fired? (Assignments of Error 1-a )

2. Whether the Trial Court erred in assuming the King County District Court's dismissal of the charge was without prejudice and based its decision on that false assumption? (Assignment of error 1-b)

3. Whether an actual trial is necessary for res judicata to preclude a later defense of the conduct of making the charge or is a dismissal with prejudice an adjudication of all issues on evidence available to the prosecution? (Assignments of Error 1-b and 1-c)

4. Whether the lower burden of proof in a civil case when the act leading to the violation of a crime and the act leading to the violation of a policy against that same conduct resulting in damages from intentional interference is identical as a matter of a "bright line" distinction? (Assignments of Error 1-d)

5. Whether the failure to answer a motion to compel discovery prior to a motion for summary judgment is reversible error if the evidence available but not produced could have supported the Plaintiff's burden to show a prima facie case of tortious interference? (Assignments of Error 2)

6. Whether any conduct less egregious than compelling a sales clerk to violate the law against selling alcohol to a minor supports a prima facie showing of tortious interference and would it be reversible error to apply that much higher standard in granting a Defendants' motion for summary judgment? (Assignments of Error 3-a)

7. Whether evidence of harassing and intimidating conduct and circumstantial evidence of the use of an altered ID employed by agents of the State in a liquor compliance check is a question of fact for the jury to determine community standards for conduct employing improper means? (Assignments of Error 3 b )

8. Whether the rules for the conduct of a liquor compliance check that require mere observation and protection of underage operatives as the proper means to conduct such checks would be a professional standard violated and improper for a prima facie showing of improper means if evidence of harassing and intimidating conduct and circumstantial evidence of the use of an altered ID was employed? (Assignments of Error 3 c)

9. Whether proof of a sale in violation of the State's liquor laws occurred at time different than all reasonable inferences from the evidence say it did be an improper means employed by asserting false evidence as to time of occurrence? (Assignments of Error 4 a)

10. Whether Weston's 23 year habit of entering only the date of birth of a young customer into the sales computer and her claim the date of birth on the purchaser's license must have been altered to read 12-05-06, the same date that was on the receipt, the age 21 on date on the license the agents claim Weston accidentally entered into the computer is nearly half the size of the date of birth and hard to read, the discrepancy of the time of the sales receipt from the actual time of the sting, the lack of the cigarettes on the receipt indicating the receipt was produced during a test purchase prior to the sting purchase, the pressuring, harassing and intimidating conduct by the officers during the sting to keep Weston from recognizing the alteration of the date of birth or the entry of the wrong date because of the harassment and the proof of the prior knowledge of the employer's policies, raise disputed issues of material fact that the officers employed improper means for Plaintiff's showing that she made a prima facie case for intentional interference? (Assignments of Error 4 b, c, d, e &f)

11. Whether the establishment of evidence of prior knowledge of

Plaintiff's employment conditions raises a reasonable inference from the evidence so as to create a disputed material issue of fact as to whether an improper purpose or means occurred in the commission of the tort?

(Assignments of Error 4-g)

#### **IV. STATEMENT OF THE CASE**

**A. Proceedings in the Trial Court:** Weston filed her Complaint for damages for intentional interference in King County Superior Court under cause number 09-2-13951-2, (CP pages 1-23) and filed a Motion for Summary Judgment as to liability and to dismiss Defendants' counterclaims (CP pages 36-51) claiming the charge of selling alcohol to a minor made by Defendants to her constituted tortious interference and damages for the loss of her employment, a charge for which she was adjudicated as innocent on March 8, 2006 by Judge Eileen Kato in King County District Court by dismissing the charge with prejudice on the Prosecutor's request,. (CP pages 129-130) Defendants filed a counter Motion for Summary Judgment of Dismissal. (CP pages 135-145) Plaintiff submitted interrogatories and requests for production of documents on November 11, 2009 to which Defendants responded four months later on March 8, 2010 but failed to fully answer the requests. Plaintiff filed a motion to compel discovery including a request for the production of the actual license used by Agent Carey in the sting that had

not been answered and was still pending on the date of the hearing. (CP pages 627-633) The Trial Court denied Weston's Motions including the Motion to Compel Discovery and granted Defendants' Motion for Summary Judgment of Dismissal on April 16, 2010 without explanation. (CP pages 749-751) Weston filed a timely Motion for Reconsideration of the Orders under CR 59 (CP pages 792-802) and the Motion was denied on May 7, 2010 (CP pages 815-816) with reasons for the decision being given in the order which serve as the basis for this appeal. The Defendants Counterclaims were still pending at that time and the case was not final. The Plaintiff filed a timely Motion for Discretionary Review under RAP 5.1(a). Appellant's Motion for Discretionary review was denied on July 30, 2010. Subsequently, The Parties Stipulated in the Trial Court to an Order Dismissing Defendants' Counterclaims without prejudice and the case became final for an appeal as a matter of right. Appellant filed her timely Notice of Appeal on August 26, 2010 and the record has been perfected. (CP pages 817-819)

**B. Statement of the Facts:** Paulette Weston worked for Albertsons Grocery Stores for 23 years starting at age 17. (CP page 538, line 24) She worked as a grocery checker clerk and the last four years of her employment she opened the store at 6:00AM and worked until 2:30

PM. On September 29, 2005 she went to work at twelve noon to work the afternoon shift . (CP page 595, Exh 16 pages 2) She had returned a few days prior from vacation and was informed her shift was changed to the afternoon one starting September 29<sup>th</sup>. (CP page 595 Exh 16 page 2). On that evening of September 29, 2005 at the time of the incident, three agents of the Washington State Liquor Control Board performed an alcohol compliance check at the Albertsons store where Plaintiff Paulette Weston, was stationed. (CP page 502, lines 5-24) There were only two check lines open at the time, one near each end of the lines. A female customer entered Weston's check stand at a time in dispute with a bottle of wine, presenting herself as a customer old enough to legally purchase alcohol and presented on Weston's request, a driver's license in support of her age 21 or above claim. (CP page 174, lines 13-20) Before checking it, the customer ordered a pack of cigarettes which Weston left the stand to obtain. (CP page 541, lines 11-21) The underage operatives are not permitted to buy but one item in a sting. (CP page 528, lines 9-17; CP 317 page123, lines 12-23)

A man, later determined to be Defendant Benavidez, was standing behind Weston's check stand in a closed area and while she left to get the cigarettes, moved around behind the female customer in the adjoining empty check stand line. (CP page 545, lines 1-9) Weston having

returned from retrieving the cigarettes, asked the customer for her age identification and the woman presented a Washington State drivers license that was not produced as evidence.(CP page 523, lines 13-18) Weston checked the expiration date, compared the picture to the female customer and entered the date of birth from the license as was her habit. (CP page 540, lines 17-23). The record shows that the Defendants knew Weston was an employee of Albertsons on duty that night (CP page 178, lines 1-4) and that the agents were aware ahead of time that Albertsons had a no tolerance policy regarding the sale of alcohol to a minor. (CP page 527, lines 1-5).

The computer was programmed to receive only the last two digits of the year of birth. (CP page 537, lines 7-16) The computer did not reject the sale. CP page 537, lines 7-10) The computer system only reported to the checker acceptance or rejection and did not disclose the age of the customer it had calculated. (CP page 125, lines 11-12) It allowed only the last two digits of the year of birth to be entered with the programmed assumption the licensee was born in the 20<sup>th</sup> century. (CP page 548, lines 19-24; CP page 550, lines 12-14 ) Relying on the computer as Weston had been trained to do, she completed the sale even though an older man later determined to be Defendant Bernard Harrigan standing in line behind the customer was making harassing and distracting movements that

frightened Weston with the fear she was about to be robbed and also made the customer nervous. (CP page 544, lines 1-26) That reaction by the customer made no suggestion to Weston what she later learned was that the three individuals were together as agents for the WSLCB. (CP page 554, lines 1-6). The record shows that guidelines for enforcement agents stated they were to only observe the sale to the underage operative. (CP page 774). The log of Harrigan shows he arrived at the scene at 7:20PM. (CP page 185, Exhibit 3). The sales slip offered as proof of a violation showed the time of the transaction as 7:21 PM, a feat impossible; and no evidence was shown that either the computer internal clock or Harrigan's watch were not accurate. The 7:21 PM sales slip did not contain the cigarettes ordered and delivered by Weston. (CP page 332, Exhibit 31) There was no evidence that Weston's transaction at 7:21PM was the last of the day. (CP page 585, lines 7-19 on page 62 of transcript)

In spite of agents' distracting and harassing conduct, Weston completed the sale in her duty to the customer and to get the customer out away from the area as soon as possible, she handed the customer the wine, her driver's license, the change from the cash purchase and the receipt whereupon the customer immediately left the store with her purchase. (CP page 552-553). The agent's post sale reports were conflicted with each other on this point. (CP page 513-514, Exhibits 1 and

2; CP 575-576) Just as the female customer was leaving the check stand with her purchase, the older man Harrigan who had been frightening and distracting Weston, pushed a badge in Weston's face and charged her that she had just sold alcohol to a minor (CP page 549, lines 19-26). Weston explained to the agent that she had entered the date of birth from the driver's license presented to her by the customer into the computer and the computer did not reject the sale. (CP page 537, lines 8-10) The agent told Weston she had made a mistake by entering the wrong date into the computer, the date the customer would turn 21 instead of the date of her birth. (CP page 537, lines 16-20) At this point Weston called out for her supervisor, Dawn Sedowski who came over to her check stand. Harrigan repeated the charge to Sedowski. As proof of this charge, the agent held so Weston and her supervisor could see it but not hold it, an Albertsons store receipt for the purchase of a bottle of wine that had on it the birth date of 12-05-06. Sedowski then made several trial entries on Weston's computer using the birth date of 12-05-06 shown on the sales slip and the computer accepted the entries each time. (CP pages 537-538). Although in shock, Weston believed what she had been told she had done. (CP page 539, lines 16-23). The agent told Weston she was going to court for a violation of that criminal statute. (CP page 267, lines 15-25) In the mean time, agent Benavidez returned with the wine and the change having

retrieved if from the female agent at the store entrance.(CP page 575, lines 6-24)

Dawn Sedowski received back from the agent the change and a receipt for the wine taken as evidence and returned back the money given by the female agent for the purchase (CP pages 263-264) and, according to Harrigan's Journal and both agents' case reports both agents left the store at 7:45 PM. (CP page 185, Exhibit 3) Harrigan stated in deposition that it took no less than 5 and no more than 10 minutes to complete a sting when an alcohol purchase is made by an underage operative, indicating the witnessed purchase happened between 7:35 and 7:45 PM.(CP page 506, lines 20-22)

Dawn Sedowski then took Weston to the Store Manager's office where the assistant store manager on duty, Craig Rowland, after checking by phone with his superiors directed her to make a statement on the manager's computer as to what had happened. (CP page 209) Dawn Sedowski assisted Weston in making a statement as she had been told by the agent she had done. (CP page 209) Rowland told Weston she was suspended so she left the store. (CP page 320, lines 4-10 ) Weston included in the statement that she had been distracted and pressured by the agents. CP page 332, Exhibit 12)

The following day Weston received a phone call from her Manager, Howard Dochow, requesting that she report to the office the next morning, Saturday, October 1, 2005. (CP page 583, lines 10-13) At that meeting, Mr. Dochow informed Weston that she was fired because of the charge made by the WSLCB agents that she had violated the state criminal liquor law by selling alcohol to a minor which was also a violation of Albertsons' policy. (CP page 548, lines 13-26)

On October 10, 2005, eleven days after the sting and following several phone conversations with the Plaintiff's father, Lt. Blaker, the Defendants' supervising officer made a premises check at the Albertsons store where Plaintiff had been employed. (CP page 179, lines 1-20) The Plaintiff's father in a letter to Lt. Blaker dated October 29, 2005, formalized the complaints his daughter had discussed with him and he had discussed with Lt. Blaker by phone, that the agents had harassed her as she was making the sale at approximately 7:35 PM, that the female agent had purchased cigarettes that were not on the receipt placed in the record by Harrigan that also had a time of 7:21PM, approximately 14 minutes prior to Plaintiff's recollection, and that the female agent had possibly used an altered driver's license with a date of birth of 12-05-06, the same date of birth that showed on the receipt. No action was taken on the letter that

was signed by her father and Plaintiff only to verify the harassment. (CP page 597, Exhibit 16, pages 1-4)

Albertsons Store Number 410 where the sting occurred had a video surveillance system in place that could have shown Lt. Blaker whether the accusations by Ms. Weston were accurate. (CP page 583) Howard Dochow, the store manager, stated in his deposition that a female investigator who he did not know, reviewed the surveillance tapes of the sting in his presence but neither he nor the investigator leaving any record or report indicated what they observed. (CP pages 584-585)

A receipt for the purchase of a bottle of wine was placed on record by Officer Harrigan that he claims was generated in the sting with a time of sale on it of 7:21 PM which was one minute after Officer Harrigan's log stated he had arrived at the site at 7:20PM. (CP page 219, lines 3-18) That receipt had no cigarettes on it as purchased. (CP page 332, Exhibit 31) The same receipt showed an entered date of birth of 12-05-06 which was the same date Officer Harrigan had told Paulette Weston was the "age 21 on" date from the license she had accidentally entered into the computer when the state agents claimed they witnessed the sting. (CP page 332, Exhibit 31))

Paulette Weston never received a criminal citation for the alleged crime but five months after the sting, Weston received a summons to

appear in King County District Court for her arraignment on the single charge that she had sold alcohol to a minor on September 29, 2005 in violation of RCW 66.44.270(1) for the same incident the WSLCB agents had reported to her employer for which she had been fired. (CP page 599), On March 8, 2006, Weston appeared in criminal court to plead not guilty to this charge and defend her innocence. (CP page 599)

When Weston's name was called she was prepared to plead not guilty and stand on her constitutional right to a trial by jury, being presumed innocent until proved guilty in a court of law and as she approached the bench, the Deputy prosecuting attorney stated that the State was dropping the charge and asked the Court to dismiss it without giving a reason as required by law. (CP page 129-130) Judge Eileen Kato whereupon dismissed the charge for Weston's alleged violation of RCW 66.44.270(1) on September 29, 2005 with prejudice. (CP page 129-130) The State chose not to proceed with the following evidence available :(1) That Ms. Weston had typed a written statement based on what she had been told she had done by Officer Harrigan, the State's principal witness, that alleged she had sold alcohol to a minor and unintentionally entered the date the underage purchaser would turn 21 and not her birth date(CP page 209, Exhibit 12); (2) That Officer Harrigan had presented to Ms. Weston and her supervisor immediately after the sale, a sales slip as proof

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of an illegal sale with a birth date on it of 12-05-06(CP page 219, lines 19-24); (3) That Agent Carey was available to testify that she used a driver's license with a birth date on it of 12-05-1985; (4) A receipt for the wine purchased(CP pages 263-264); (5) The testimony of Officer Benavidez was available as another officer participating in the sting; and (6) That the Officers were prepared to testify that Ms. Weston had simply made an unintentional mistake in entering the incorrect birth date from the license into the point of sale computer that cleared the purchase . The State Prosecutor also had available the following evidence favoring Weston, evidence also available to the complaining State Liquor Control Board: (1) Weston had worked for Albertsons since age 17 as a grocery checker for 23 years(CP page 538, line 24); (2) For four years preceding September 29, 2005, she had worked the early morning shift starting at 6:00AM but on the date of the sting it was changed without explanation to the noon to 8:00PM shift(CP page 597, Exhibit 16); (3) that there was evidence the witnessed sting took place between 7:30 and 7:45PM not 7:21PM as the state agents claimed (CP page 534-535); (4) that Weston was fired a day and a half after being charged by Defendant Officer Harrigan of selling alcohol to a minor(CP page 599); (5) that even though she argued she had entered the date of birth and the computer had accepted the sale, Officer Harrigan produced a sales receipt for the purchase of a bottle of wine only

with no cigarettes that had on it the date of birth of 12-05-06 on it (CP page 334, Exhibit 31); the date agent Carey would turn 21 or the birth date of a 98 year old person and a time of 7:21PM; to try to prove to Weston and her supervisor that she had made a mistake and entered the Age 21 ON date instead of the date of birth as Weston claimed (CP pages 263-264); (6) that receipt time of 7:21PM was only one minute after the state agent's log and the case reports said they arrived at the store (CP page 506, lines 20-22); (7) that Officer Harrigan testified that the sting would take no less than five and no more than ten minutes to complete but the log and receipt showed it was done as they claimed in one minute (CP page 506, lines 12-22); (8) that Lt. Blaker had made a premises check with the opportunity to investigate these charges and view the video surveillance tapes maintained by Albertsons (CP page 268, lines 1-20); (9) that Mr. Weston's charges of improper conduct were formalized in his letter to Lt. Blaker on October 29, 2005 (CP page 597, Exhibit 16); and (10) that the state had available to it the Officer's case reports (CP 513, 514 and 518, Exhibits 1,2, & 4);

In face of all this incriminating evidence and Defendant's evidence against them, the State Prosecutor chose to have the criminal charge dismissed and Judge Kato adjudicated it as a dismissal with prejudice.

(CP pages 129-130)The Order was never appealed and became final thirty days after entry.

During the Federal Court litigation that preceded this action, Plaintiff submitted interrogatories and requests for production of documents including a request for the actual drivers license used by Agent Carey in the sting. In response, Defendants' submitted two documents. One was a black and white photo of a reproduction of the license issued to Louise A. Carey on 4.08-2004. The second document was a black and white photo copy of a liquor compliance check form that contained a copy of the same driver's license as the first document. Both documents identified Louise Carey's name but both concealed by redaction of the date of birth and the date on which Carey would turn 21. (CP page 155). Plaintiff's Counsel requested from the Department of Licensing a copy of the license actually issued to Agent Carey which was first refused on grounds of privacy but relented after discovering that Defendants Counsel had obtained a copy. (CP page 155) Only after Plaintiff disclosed her color copy of the license in December 2008 in the deposition in the federal case of Agent Carey, did Defendants disclose their unredacted copies of the license and form. The original license was also requested for examination in the present case but has never been produced. (CP page

632) The Motion to Compel production of it and other evidence not produced was denied. (CP page 752).

## V. ARGUMENTS

**A. The Trial Court erred in denying Plaintiff's Motion for Partial Summary Judgment and her Motion for Reconsideration by failing to apply the res adjudicata effect of the dismissal with prejudice of the criminal charge against Plaintiff of selling alcohol to a minor so as to preclude Defendants defense to Plaintiff's intentional interference claims.**

A summary of the argument follows:

The standard of review for the denial or granting of summary judgment motions in the Court of Appeals is de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wn. 2d 788, 794, 64 P. 3d 22 (2003). The standard of review of failing to grant discovery motions is an abuse of discretion. *Wash. State Physicians Ins. Exchange v. Fisons Corp.* 122 Wn. 2d 299, 388, 858 P. 2d 1054 (1993) Judge Richard Eadie stated in his Order Denying Plaintiff's Motion for Reconsideration (See a copy of the Order in Appendix A pages 823-824) that the Order by Judge Eileen Kato in King County District Criminal Court on March 8, 2006, "was not clear that the criminal charge made by the WSLCB agents was Dismissed with or without prejudice", and in so doing failed to acknowledge the criminal charge was dismissed with prejudice as stated on the Court's Docket. (CP

pages 129-130) By failing to acknowledge the criminal court ruling was with prejudice , the Trial Court erred in even considering the charge that the Plaintiff had “sold alcohol to a minor”, which is the same charge the Defendants are using in their defense and that caused Plaintiff to lose her job.

The Trial Court further erred in disregarding the with prejudice ruling as related in the following points: (1)That the WSLCB Agents intended to charge the Plaintiff with the crime of selling alcohol to a minor if she sold alcohol to the female agent who claimed to be over 21 and presented a picture ID in support of that claim; (2) That the Plaintiff was presumed innocent of the charge until proven guilty in a court of law and that the WSLCB agents knew or with the exercise of reasonable diligence should have known when they intentionally charged her with a crime which could result in her being fired and in fact did; (3) That the Plaintiff’s innocence was confirmed by the District Court dismissal of the criminal charge with prejudice when the State Prosecutor after considering all the evidence accumulated for over five months chose to withdraw the charge; (4) That the dismissal with prejudice was not appealed and became final in thirty days; (5)That the criminal charge made by the agents was presumed false until Weston was proved guilty of the charge in a court of law and since Weston was ruled innocent of that charge by a

dismissal with prejudice, that charge will remain forever false. (6) That the act upon which the intentional criminal charge was based, could not be used by the Defendants as a defense to Plaintiff's claim for damages and Plaintiff had no burden to prove her innocence of the charge; and (7) That the Plaintiff had no burden to prove the conduct of the agents in bringing a dismissed criminal charge against her as a defense was improper because that conduct as a defense had been adjudicated, was prima facie improper and barred by res judicata. The particulars of the arguments follows:

**1. The Order of Dismissal with prejudice was plain and clear on its face and the elements of res judicata were clearly established.**

The Trial Court failed to recognize that plainly stated on the face of the docket, the District Court Judge had dismissed the charge of Weston's selling alcohol to a minor was with prejudice contrary to what the Trial Court stated in its Order denying Weston's Motion for Reconsideration. (CP pages 823-824) See a copy of the King County District Court Docket in the Appendix B, pages 129-130 . That error was obvious on its face and having made it, and basing conclusions on it, brings the denial of the application of the rule in a civil case into question.

Res judicata requires four identities all met in this case: (1)

Persons and parties; (2) Causes of action; (3) Subject matter and (4) the quality of persons against whom the claim is made. *Rains v. State*, 100 Wn. 2d 660, 663, 674 P. 2d 165 (1983); *Ensley v. Clifford*, 152 Wn. App. 891, 899, 222 P. 3d 99 (Div. 1, 2009). Res judicata operates on the grounds that a matter has been litigated or where there was an opportunity to do so as the Defendants through their party in privity obviously had in that case. *Ensley v. Clifford* Id at page 902. Defendants have argued there was no adjudication on the merits in that case but offered no authority for that proposition. In marked contrast, Plaintiff has shown by the holding in *Wagner v. McDonald*, 10 Wash. App. 213, 516 P. 2d 1051 (Div. 1, 1973) that a dismissal with prejudice is an adjudication on the merits. The State Defendant and its agents were in privity with the Prosecuting attorney who dismissed the charges as officers of the same governmental unit. *Sunshine Anthracite Coal Co. v. Adkins*, 310 US 381, 402, 60 S. Ct. 907, 84 L. Ed 1263 (1940). The cause of action and the defense now asserted were and are the same as to whether Ms. Weston violated RCW 66.44.270(1). The analysis elements for cause identity are: (1) would the right established in the prior judgment be impaired; (2) was the evidence substantially the same; (3) did the actions involved, infringe the same right and (4) Did the actions arise out of the same nucleus of facts. *Rains v. State*, 100 Wn. 2d 660,664, 674 P. 2d 165 (1983); *Ensley v.*

*Clifford*, Id at page 902. All four are met. Her acquittal in the dismissal is impaired because defendants raise it again as a violation justifying their actions in the defense of her claim for tortious interference. The prosecution and the claim of defense infringe her same right to be free from interference in her chosen profession. The evidence and facts were identical.

**2. All evidence available to the prosecutor who dropped the charge are presumed to have been submitted when a dismissal with prejudice is entered whether actually presented or not and Defendants can no longer assert the defense that the offense of the identical event ever occurred.**

The rules applicable to res judicata assume all evidence was presented whether actually submitted or not. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120,897 P. 2d 365 (Div. 1, 1995). The State chose not to present the evidence they had or which was available by the exercise of reasonable diligence, including the following incriminating evidence against Ms. Weston: That Ms. Weston had typed a written statement based on what she had been told she had done by Officer Harrigan, the State's principal witness, that alleged she had sold alcohol to a minor and unintentionally entered the date the underage purchaser would turn 21 and not her birth date; (CP page 209, Exhibit 12) That Officer Harrigan had presented to Ms. Weston and her supervisor immediately after the sale, a

sales slip as proof of an illegal sale with a birth date on it of 12-05-06; (CP page 219, lines 19-26) That Agent Carey was available to testify that she used a driver's license with a birth date on it of 12-05-1985; A receipt for wine purchased; (CP page 264, lines 10-14) The testimony of Officer Benavidez was available as another officer participating in the sting; and that the Officers were prepared to testify that Ms. Weston had simply made an unintentional mistake in entering an incorrect birth date from the license presented into the point of sale computer that cleared the purchase. In addition, the Prosecutor had most of the evidence Weston would have used in her defense and after five months of considering all the evidence, they chose to withdraw the charge at Weston's arraignment in criminal court without explanation. The dismissal with prejudice states loudly that the state had no case then and has no defense now claiming she violated the statute, the charge for which caused her to be fired. If res judicata is applied, the state agents have no defense to their improper conduct and the jury must get the opportunity to establish the amount of damages only. Denying Weston's Motion for Partial Summary in disregard of the doctrine of res judicata is reversible error.

**3. The Trial Court erred by applying the collateral estoppel rule for issue preclusion which requires that the identical issue must have been litigated as opposed to res judicata which presumes all issues were litigated.**

Whereas collateral estoppel requires that the issues and evidence be actually litigated on the merits, res judicata precludes re-litigating claims that either were or should have been litigated. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120,897 P. 2d 365 (Div. 1, 1995). By ruling that because the dismissal was prior to trial, that no evidence was given by either side and stating that it was not shown on the record whether the dismissal was with or without prejudice when the docket plainly showed the dismissal to be with prejudice, this was error because it applied the collateral estoppel rule rather than res judicata. The Court's Order of dismissal with prejudice was an adjudication on the merits as a matter of law. See the holding in *Wagner v. McDonald*, 10 Wn. App. 213, 516 P. 2d 1051 (Div. 1, 1973); *Ensley v. Clifford*, 152 Wn. App. 891, 216 P. 3d 1048 (Div. 1, 2009) where parties in privity are so bound if as here the action arose out of the same transactional nucleus of facts. The act of violation of the sale to minors statute also violated Albertsons' policy the accusation of which resulted in Weston's termination so the transaction offense was identical. The adjudication on the merits in a criminal case is res judicata to a later, even civil litigation for the same conduct as in *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1886) where a fraud acquittal in a criminal prosecution barred a later civil in rem action on the same fraud allegation. Fraud was fraud for either litigation

as sale of alcohol to a minor is the same for purposes of the Defendants claims of defense in this case and it may not be re-litigated.

**4. As a matter of first impression in this state, by not making a careful analysis of the nature of the act charged in a criminal proceeding adjudicated by a dismissal with prejudice as is always done in such cases, shows that the Trial Court erroneously applied a bright line rule that since the burden of proof is different, res judicata could not apply.**

The Trial Court ruled that because the burden of proof in a criminal case is higher than in a civil case thus the res judicata effect did not apply in the civil proceeding as in *Young v. City of Seattle*, 25 Wn. 2d 888, 172 P. 2d 222 (1946) where the dismissal of a drunken driving misdemeanor did not preclude a later claim on the same facts for negligence. But the difference here is the act of selling alcohol to a minor is the same for the crime and the policy violation of Albertsons whereas negligence could be committed even if the case for conduct had been dismissed as a crime. The Court makes a careful analysis of the difference in the nature of the conduct before rejecting res judicata in the civil context. If this analysis is not required and a bright line rule is applied such as the Trial Court did in this case, why would the appellate courts bother with the analysis? The answer is that a case where the act is the same in the criminal adjudication and the civil case has just not come along in Washington as it did in the fraud case of *Coffey v. United States*,

116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1886) . The identical or quality of persons test for res judicata is met in this case even though the County Prosecutor was not the WSLCB. Where the issues in the separate actions is the same, the fact that the parties are not identical is not necessarily fatal since the identity test is not form but substance and where there is privity between officers of the same government, for identity purposes in legal effect for res judicata purposes they are the same. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 1263 (1940). The prosecuting Attorney brought the charge against Weston based on the unserved citation executed by Officer Harrigan for the WSLCB and he was the witness designated on the Court's Docket. (CP pages 129-130) The parties were in privity to each other and res judicata applies because they were officers of the same government prosecuting this charge which was dismissed with prejudice. The Trial Court relied on the editorial writer in 14A Wash. Prac. Section 35.50 for its authority in ruling that the burden of proof standard in a criminal case being higher, res judicata does not preclude in this instance the defense that the criminal charge occurred. That editorial source relied principally on the holding in *Ang v. Martin*, 118 Wash. App. 553, 76 P. 2d 787(Div. 2, 2003) that the burden of proof difference precludes claim preclusion in a subsequent civil case. Again, this analysis of the nature of the conduct in the criminal

adjudication or as applicable here, policy reasons are considered before res judicata is rejected in a subsequent civil case. *Ang v. Martin, Id* is distinguished for the special policy reasons given in a legal malpractice committed by an attorney in a criminal case that innocence in fact must be proved by a preponderance of the evidence. No such policy reasons apply by any common law rule requiring that unique application of the res judicata rule in a case for tortuous interference as in this case and the identical nature of the act of selling alcohol to a minor in both the Albertsons policy and the criminal statute demands that res judicata apply and bars the assertion of the defense that Weston violated the law and Albertsons' policy, for which according to the Trial Court there is no defense unless a sale does not occur. Weston urges the Court to clarify this rule as a matter of first impression and reverse the Trial Court's decision by making the appropriate analysis and holding that in fact Weston was innocent of the charge until proved guilty in a court of law and her innocence was adjudicated by the dismissal with prejudice, and that no illegal sale occurred.

**B. The Trial Court should have compelled Defendants to respond to Plaintiff's discovery motion before granting Defendants' Summary Judgment.**

The standard for review of an order denying discovery is abuse of discretion. *Wash. State Physicians Ins. Exchange v. Fisons*

*Corp.* 122 Wn. 2d 299, 388, 858 P. 2d 1054 (1993). The Trial Court evidently thought the discovery issue was moot. (RP page 61). Plaintiff was denied the opportunity to demonstrate an issue of fact by examining the actual license used by the female operative in support of her theory that the license had been altered based on the circumstantial evidence of the difference in the size of the numerals on the date of birth and the turn 21 on date , the undisputed fact of her 23 year history of habitually entering only the date of birth and to raise reasonable issues of fact in the face of the strained argument that in the face of harassing and intimidating conduct by the state agents that she made a mere mistake in the date of birth entry before ruling on the Defendants' motion. That ruling was manifestly unreasonable and on untenable grounds impairing Plaintiff's ability to show disputed material issues of fact. *Wash. State Physicians Ins. Exchange v. Fisons Corp.* Id. p. 339.

**C. Even if Plaintiff's innocence of a crime had not been established in criminal court, the Trial Court erred in setting a higher standard for establishing a prima facie case of intent that the offending state agents must compel her to make a sale of alcohol to a minor before their conduct is compensable.**

To rule as stated in the Order Denying Reconsideration

of the Order Granting Summary Judgment (See Appendix A) that Weston must show she was compelled to violate the law without any authority for that position because there is none, is an error of applying the law and the conduct she described by the Defendants could logically cause her to enter the birth date she did under the pressure and threats of the moment. If the new standard of “compel” is the only conduct for which a remedy is available in civil law as the Order implies, then the Judicial System would be saying that a crime by the Defendants in this instance must be committed and proven before a sales clerk has a civil remedy from the consequences of any errors induced by the improper conduct of the agents. For example R.C.W. 10.14.080(3) permits the entry of a civil anti-harassment order if a person knowingly in a course of conduct however brief directed at a specific person which seriously alarms, annoys, harasses or is detrimental to a person and serves no legitimate or lawful purpose (qualified privilege in this case must yet be shown). *Shinaberger v. LaPane*, 109 Wash. App.304, 307-308,34 P. 3d 1253 (Div. 1, 2001). This statute surely expresses a community standard for judging unacceptable conduct similar to that of the state agents here. If the Trial Court’s ruling is allowed to stand then before a sales clerk like Weston would have a remedy

from the consequences of the egregious conduct of frightening her in the process of a test of a violation of the liquor laws and thereby losing her job, the Plaintiff clerk must prove the agents committed a crime such as criminal harassment under R.C.W. 9A.46.020 or the use of a false ID before relief could be granted. Her statements are accepted as true for summary judgment purposes which means the acts constituting that crime are presumed to have occurred. *Wilson v. Steinbach*, 98 Wn. 2d 434,437, 656 P. 2d 1030 (1982) Requiring the Plaintiff Clerk must prove the agents committed a crime is an unacceptable application of the law and a mischaracterization of the breach of the duty of non-interference according to *Pleas v. City of Seattle*, 112 Wn. 2d 794, 800, 774 P. 2d 1158 (1989), which is shown by improper means and the community standard of what is acceptable conduct is a question of fact to be decided by a jury. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002). Weston has shown below that the harassing and intimidating conduct of the State Agents went beyond the reasonable permissible limits of their own guidelines or it is up to a jury to decide whether the conduct was improper. The Trial Court's excusing that conduct that would even constitute the crime of harassment (R.C.W.

9A.46.020) as a matter of law and further, insisting that compelling her to accept an illegal sale was the only excuse, stretches the law's application beyond reason and common sense.

**D. Even if Plaintiff's innocence of a crime had not been established in criminal court, the Trial Court still erred in deciding as a matter of law that the State Agents' conduct was proper.**

**1. The State Agents own rules were violated proving their conduct was improper.**

The Trial Court failed to correctly apply the standard of establishing a duty of non-interference including improper means for purposes of establishing a prima facie case of intentional interference as established in *Pleas v. City of Seattle*, Id. In that case, the requirement for a prima facie showing of tortious interference is considered "wrongful" by reason of a statute or other regulation, a recognized rule of common law or an established standard of a trade or profession. The Trial Court failed to recognize that the evidence showed that the profession of enforcement officers of the Liquor Control Board had guidelines that called for them to merely observe the compliance check, logically only for evidentiary purposes and for the safety of the underage operative. (CP page 774). The Compliance Check Guidelines in effect at the time for Off Premise Locations required the undercover officers to enter the premises before the underage operative, observe the sale, attempt to overhear any

conversation between the operative and the seller and contact the seller after the underage operative leaves and that is all. (CP page 774). That guideline is clearly an “industry standard” by analogy or in any event a rule by which they were supposed to operate supported also by the testimony of the very experienced underage operative who testified the officers never engaged in conduct of harassment of the target subject.(CP page 529, lines 1-4).

**2. It is a question of fact under common law whether a given Conduct violates community mores and is therefore improper and cannot be decided as a matter of law on summary judgment.**

As to common law as a basis for the establishment of wrongful conduct for a prima facie showing of intent, the case of *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002) controls the facts in this case. That case involved interference with a business in violation of a non compete clause and shows why there is a recognized rule of common law that reveals the error of the Trial Court in deciding facts on a summary judgment motion in this case. This Court in *Newton* acknowledged the rule citing the Restatement (Second) of Torts Section 767, cmt. 1 when it stated at page 159:

“As with negligence, when there is room for different views, the determination of whether interference was improper or not is

ordinarily left to the jury, to obtain the common feel for the state of community mores and for the manner in which they would operate upon the facts in question.”

However on the facts in that case, the court also stated at the same

page citing the Restatement (Second) of Torts 767:

“Under certain circumstances, however, “identifiable standards of business ethics or recognized community customs of acceptable conduct” have developed, such that “the determination of whether interference was improper should be made as a matter of law, similar to negligence per se. Interference with a business expectancy in violation of a contract not to compete is such a case.” Citing *Goodyear Tire v. Whiteman Tire, Inc.*, 86 Wn. App. 732,746, 935 P. 2d 628 (1997)

This rule of law stated by this Court in *Newton* suggests that only if such community customs have developed as recognizable in law such as intentionally breaching a non compete agreement, the Court may take that matter away from the jury’s right to establish community mores and hold as a matter of law that the interference is compensable. Anything less recognized would require that a jury decide because it is a question of fact. No case has been cited by anyone to date that using an altered ID or harassing and intimidating conduct by state Agents in a liquor sting is improper as a matter of law preventing the application of the rule in *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, Id that such questions are for the jury to decide, as it had for intentionally violating a known agreement not to compete. *Goodyear Tire v. Whiteman Tire, Inc.*, 86 Wn. App. 732,746, 935 P. 2d 628 (1997) .

Weston in this case has not suggested that the trial Court should have decided as a matter of law, without a res judicata holding as requested herein and grant judgment to her, but rather has suggested only that absent such an authority or holding that the conduct was improper as a matter of law, the question should have been reserved for the jury. That is the clear meaning of the holding in *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002). It cannot be reasonably argued that the prima facie tests for intentional interference as held in *Newton*, Id do not apply to government agent's conduct because no case in Washington has so held.

It should not take a Sunday Sermon to convince anyone of the common feel for the state of community mores that the harassment and the instillation of fear in a sales clerk or by using an altered ID while trying to do her duty of entering the proper date of birth into a computer to check its validity for the sale of alcohol to a young customer that a robbery was about to take place by two thugs bracketing the customer showing nervousness herself, was wrongful conduct and improper. What license to engage in this conduct makes any moral sense? At worst under common law, there was a disputed issue of material fact under the summary judgment rule that every reasonable inference must have been given to Weston or the facts

are assumed as true. *Wilson v. Steinbach*, 98 Wn. 2d 434,437, 656 P. 2d 1030 (1982); *Pierson v. United States*, 527 F. 2d 459 (9<sup>th</sup> Cir. 1975); *Dubois v. Assn. of Apt. Owners*, 453 F.3d 1175, 1180 (9<sup>th</sup> Cir. 2005) . An inference is the process of reasoning by which a fact or proposition to be established is deduced as a logical consequence from other facts, or a state of facts already proved or established. *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wash. App. 1, 11, 776 P. 2d 721 (1989). The inference here that is reasonable is that the conduct of the state agents right at the precise moment she is required to do her duty and determine the date of birth and enter it into her computer, which facts are established without conflict, it is logical at least to expect from such pressure and intimidation an error of entry, though not conceded, as the state agents contend happened. If so, they must take responsibility for their conduct. There is not even a hint in that agency directive that harassing and interfering conduct or worse yet using an altered ID is permitted by the guidelines and by a huge implication of omission, no reasonable officer would think he should engage in such conduct because of those guidelines. What possible objective would be accomplished by harassing and frightening the sales clerk and using an altered ID to accomplish an illegal sale except to force

such a mistake as entering the wrong birth date? Didn't they have enough sales clerks who just didn't bother to check licenses at all to fill their quotas for violators? Or was Louise Carey correct in her statement that the Officers preferred not to have a sale violation because it was less paperwork suggesting or adding support to the Plaintiff's argument that this transaction was really out of the ordinary and improper? CP page 529, lines 11-15) Would such a scenario ever likely be expected to happen in normal selling and purchasing of alcohol by the public so that the State Liquor Control Board would be protecting the public from illicit sales requiring so much hostile conduct for a sale to occur so that a test of such a scenario would be a reasonable law enforcement objective? Can we the people in search of truth, justice and the American way protect our law enforcement personnel at all cost by giving judges this authority to decide or can we trust the American jury to weigh this conduct and do justice as this Court has decided once in *Newton*, when there is no precedent, as here, clearly granting the Trial Court that authority. The Trial Court doing just that without authority committed error on which this decision should be reversed.

**3. The Trial Court incorrectly decided that there was no issue of fact as to whether Plaintiff was selected for the improper conduct of the State Agents and relied to some extent on that decision to find as a matter of law no improper conduct was employed.**

The Trial Court Order on Plaintiff's Motion for Reconsideration stated that Weston did not show that the Defendants selected her out of all possible persons to conduct their compliance check that night (CP pages 815-816). The prior knowledge of the agents to Albertsons no tolerance policy infers some matter of selection. (CP page 527, lines 1-5) This ruling disregards the law of what is required for a Plaintiff to prevail on a claim for intentional interference. The elements a Plaintiff must prove are three: (1) the existence of a valid contractual relationship agreement or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor (3) intentional interference and (4) resultant damage. *Calbom v. Knudzton*, 65 Wn. 2d 157, 396 P. 2d 148(1964). Only after the elements are established does the defendant have the burden of showing the defense of privilege. *Pleas v. City of Seattle*, 112 Wn. 2d 794, 800, 774 P. 2d 1158 (1989). However, qualified privilege is a question of fact under State law. *McKinney v. City of Tukwila*, 103 Wash. App. 391, 13 P. 3d 631(2000); *Lesley v. State*, 83 Wash. App. 263, 275, 921 P. 2d 1066 (1996). Even an employment at will in Washington is a protected interest from interference. *Eserhut v. Heister*, 52 Wash. App. 515, 519, 762 P. 2d

157 (Div. 1, 1992). And the intent element is satisfied by a showing of improper means and not the objective of harming which implies some predetermined purpose directed at this subject rather than a duty of non-interference which may be satisfied by a showing of improper means. *Pleas v. City of Seattle*, Id. at page 804. So by requiring, as the Trial Court seemed to do, that Weston must have been selected out before the conduct could even be considered improper, is an error because it misapplies the law by finding that there must be shown intent to have an intent which is a logical absurdity. If the Trial Court believed this selecting out fact must be established, he erroneously granted the Defendants' Motion in part by finding as absent from Plaintiff's prima facie showing something not even required.

**4. It is a disputed issue of fact as to whether the Specific conduct of the State Agents was improper by using false evidence as to the time of occurrence that led to her termination**

The Defendants contend the sales slip of 7:21PM was the transaction that the State agents witnessed and supplied to Albertsons as proof of a violation which set in motion a series of events that caused her to lose her job. *Johnson v. Duffy*, 588 F. 2d 740, 744 (9<sup>th</sup> Cir. 1978)

The evidence presented by Defendants own documents clearly shows it was impossible for that transaction to have occurred at the time the sting went down. They could not possibly arrive at 7:20 PM in the parking lot, send Agent Carey in to try to purchase wine, follow her in and “observe” by their intimidating and harassing conduct in a process by their own testimony that took between five and ten minutes to conduct and in the process mysteriously produce a sales slip with a 7:21 PM time stamp on it. There was no evidence produced to show there was any discrepancy between the officer’s watch and the Albertsons computer. The conflict in the officer’s testimony with their own reports of the incident raises serious questions as to their credibility that the sale they claim they witnessed at 7:21PM could have even been produced when they said it did. By their own written reports, the evidence is clear that the sales slip left with Agent Carey from the premises. But Plaintiff claims Harrigan immediately showed it to Plaintiff in a way she was unable to read it (CP). He could not recall whether he presented a sales slop or not (CP)and the contradictory case reports show this is truly in dispute. (CP) Officer Harrigan’s log also shows that they did not depart the store until 7:45 PM and there was just too much time for a one sale transaction to occur. If a

reasonable person, giving Plaintiff's evidence for purposes of this motion every reasonable inference, including that the watch and computer clock time was the same, then the agents presented false transaction evidence as to the time of the violation. In the process they harassed, frightened and intimidated her, as determined by circumstantial evidence, using an altered ID in order to trap her. The Trial Court erred in failing to find that the Defendants have not carried their burden to show no genuine issues of fact are in dispute to prevail on summary judgment. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P. 2d 182 (1989); CR56.

In addition, the difference in the size of the numerals for birth and turn 21 on dates, the Plaintiff's 23 year history of always entering the top date, the date of birth, and the extreme improbability that without interference she would accidentally enter the smaller turn 21 on date contrary to her habit, raises a reasonable inference that the license presented by Louise Carey was not the authentic original license issued to her by the Department of Licensing. Since circumstantial evidence is permitted in summary judgment proceedings, an issue of fact based on it should not have been decided on summary judgment. *Poorte v. Evans*, 66 Wash. App. 358, 365, 832 P. 2d 105 (1992). The Trial Court in deciding as

a matter of law that the conduct of the agents was proper when aspects of their specific conduct was disputed, making it proper or not would mean that summary judgments for the Defendants should have been denied. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002).

In addition, these facts whether now disputed or not were all a part of the case that should have been presented in the criminal case in King County District Court and are deemed to have been adjudicated as a matter of law whether actually presented or not. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120,897 P. 2d 365 (Div. 1, 1995); *Wagner v. McDonald*, 10 Wn. App. 213, 516 P. 2d 1051 (Div. 1, 1973). So the Trial Court should be reversed for making factual rulings *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002), or by failing to apply res judicata to bar any defense for liability at all. *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1886).

## VI. CONCLUSION

The errors in the Trial Judge's decisions started with his misreading

the very clear statement in the criminal court docket that the charge of selling alcohol to a minor was dismissed by the King County District Court at the request of the Prosecutor, with prejudice, meaning the charge is false and cannot be used by Defendants in their defense for damages suffered by the Plaintiff. (See Appendix B, page 129) He then went on to apply the collateral estoppel rule that the evidence must have actually been litigated rather than presumed adjudicated as on a dismissal with prejudice. The error by the Trial Judge was compounded by his stretching to justify that the conduct of the state agents was proper as a matter of law by creating a new standard that Plaintiff was not compelled to enter the wrong date or altered date so was without excuse and by ignoring the agency's own rules that the agents were merely to observe the transaction and not as they did, harass and intimidate plaintiff as she was doing her duty. The errors kept getting worse by the Trial Court' ignoring the case law that whether conduct is improper for purposes of determining prima facie intent is clearly an issue of fact. *Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wash. App. 151, 52 P. 3d 30 (2002).

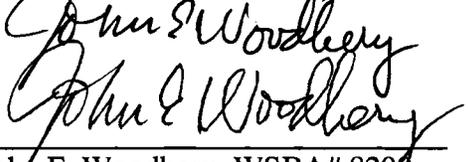
But those errors could have been avoided had the trial Court not disregarded the rule of res judicata by creating as matter of first impression , contrary to existing law, that the burden of proof difference

between criminal and civil cases decided on the same identical facts without making an analysis of those facts, and instead, established a bright line rule to always reject res judicata, regardless of the identical facts and circumstances available as evidence. The Trial Court's bright line rule has never been the law of Washington.

This case should go back for trial before a jury as to damages only if the error of denying Plaintiff's Motion for Summary Judgment of Liability is corrected or on all issues following this Court's ruling that whether the conduct of State Officers is improper is a question of fact for the jury to decide. The Trial Court should in that case be directed to grant Plaintiff's Motion to Compel Discovery.

Respectfully submitted this 24<sup>th</sup> day of January 2011.

WOODBERRY LAW GROUP, P.S.

By:   
John E. Woodbery, WSBA# 8200,  
Attorney for Plaintiff Paulette Weston

# APPENDIX A:

Order Denying Plaintiff's Motion for Reconsideration

CP823-824

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IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY

PAULETTE WESTON,  
  
Plaintiff,  
  
v.  
  
BERNARD JOSEPH HARRIGAN, et al.,  
  
Defendants.

NO. 09-2-13951-2 SEA  
  
ORDER DENYING MOTION FOR  
RECONSIDERATION

This matter is before the court on Plaintiff's motion for reconsideration of the court's order granting summary judgment to Defendants on Plaintiff's claim for tortious interference with a contract relationship. There is no issue of fact regarding Plaintiff's sale of alcohol to a minor (see Plaintiff's motion for partial summary judgment pages 2- 3), and as a matter of law there was no improper purpose involved in Washington State Liquor Control Board Agents performing compliance checks. Further the parties concede that there is no evidence that the Liquor Control Board Agents targeted Plaintiff as an individual. To the contrary, the only evidence is that the Agents randomly selected the check-out stand where the sale was made.

Plaintiff claims she was distracted and intimidated by the Agents during the course of the sale, and that these actions of the agents were improper means as that term is used in the law of Tortious Interference with Contract. However, the conduct of the agents, as described by Plaintiff, was insufficient to support a finding that Defendants used improper

Judge Richard D. Eadie  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104

EXHIBIT  Appendix p. 4

1 means. There is no evidence that the conduct of the agents was "improper" in the sense  
2 of a violation of rules or laws, and there is no evidence, or reasonable inference from the  
3 evidence, that the conduct of the agents described by Plaintiff, compelled her to make the  
4 sale of alcohol to the minor.

4 Plaintiff also claims that the King County District court's dismissal of the citation  
5 issued to Plaintiff for selling alcohol to a minor determined, as a matter of law, that Plaintiff  
6 did not make a sale to a minor. While it is not clear in the record why the citation was  
7 dismissed in District Court, it is clear that the dismissal was prior to trial and that no  
8 evidence was given by either side, and it is not shown in the record whether the dismissal  
9 was with or without prejudice, or could be considered a judgment on the merits. Further  
10 the standard of proof in the criminal action being higher than in this civil action, even an  
11 adjudication on the merits and a finding of not guilty, based on a standard of proof of  
12 "beyond a reasonable doubt", would not preclude a finding that the sale was made when  
13 adjudicated in a civil action applying a burden of proof of "preponderance of evidence" as  
14 in a slayer's act case where a homicide, though not proved beyond a reasonable doubt,  
15 may be tried in a civil action applying the standard of proof of "preponderance of the  
16 evidence". See, generally, 14A Washington Practice Sec. 35.50 et seq.

14 Plaintiff's motion for reconsideration is DENIED.

16 DATED this 7th day of May, 2010.

18 **RICHARD D. EADIE**

19 \_\_\_\_\_  
20 RICHARD D. EADIE, JUDGE

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Appendix p. 5

Judge Richard D. Eadie  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
66296-9095

# APPENDIX B:

King County District Court Docket

Case: C00008930

CP 129-130

DD7Q20SX SZP  
02/10/2006 1:39 PM

KING COUNTY DISTRICT COURT  
D O C K E T

PAGE: 1

DEFENDANT  
WESTON, PAULETTE N  
6500 25 NE 105  
SEATTLE WA 98115

CASE: C00008930 LIQ  
Criminal Non-Traffic  
Agency No.  
5245702

AKA No aliases on file.

OFFICER  
00487 LIQ HARRIGAN, B

CHARGES  
Violation Date: 09/29/2005 DV Plea Finding  
1 56.44.270.1 SUPPLY LIQUOR/PREMISES TO M Dismissed W/Preju

TEXT

S 02/15/2006 Case Filed on 02/15/2006 SZP  
DEF 1 WESTON, PAULETTE N Added as Participant  
OFF 1 HARRIGAN, B Added as Participant  
U FORMAL COMPLAINT AND WITNESS LIST FILED BY DPA  
CASE FILED IN SEATTLE  
CRIMINAL ACCIDENT/INCIDENT REPORT FILED (DCORAUTO) ECR

S 02/16/2006 ARR Set for 03/01/2006 08:45 AM SZP  
in Room 301 with Judge  
U Notice Issued for ARR on 02/16/2006 08:45 AM  
02/23/2006 DEF CALLED - REQUESTING AN ARRANGEMENT CONTINUANCE: OUT OF SDD  
TOWN. TRANSFERRED TO SEATTLE DIVISION AT DEF'S REQUEST.  
ONE TIME CONTINUANCE ALLOWED-CASE TO BE RESET SZP

S ARR Rescheduled to 03/08/2006 08:45 AM  
in Room 301 with Judge EAK.  
02/24/2006 Notice Issued for ARR on 03/08/2006 08:45 AM CAS  
03/08/2006 ARR: Held SZP

U Proceedings Recorded on Tape No. 301 9:41  
BEFORE JUDGE EILEEN A KATO  
RS: KIMBERLY FREDERICK FOR STATE  
DEFENDANT PRESENT PRO SE  
PD: MARY WOLNEY  
REPRESENTATIVE FROM DPA MOVES TO DISMISS CASE AT THIS TIME-  
MOTION GRANTED, CASE WILL BE DISMISSED WITH PREJUDICE  
S Charge 1 Dismissed W/Prejudice : Court's Motion  
Case Heard Before Judge KATO, EILEEN A  
Case Disposition of CL Entered

ADDITIONAL CASE DATA  
Case Disposition  
Disposition: Closed

03/08/2006

Docket continued on next page

EXHIBIT B

DD7D205X SZP  
03/10/2006 1:39 PM

KING COUNTY DISTRICT COURT  
D O C K E T

PAGE: 2

DEFENDANT  
WESTON, PAULETTE M

CASE: C00008930 LIQ  
Criminal Non-Traffic  
Agency No.

ADDITIONAL CASE DATA - Continued

Personal Description

Sex: F Race: W DOB: 06/24/1965  
Dr.Lic.No.: WESTOPN357L4 State: WA  
Employer:  
Height: 5 4 Weight: 130 Eyes: BRO Hair: BRO

Hearing Summary

Held ARRAIGNMENT

ON 03/08/2006 AT 08:45 AM IN ROOM 301 WITH EAK

End of docket report for this case

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

PAULETTE WESTON

Plaintiff,

V.

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

Defendants.

NO. 65927-8-I

PROOF OF SERVICE OF  
APPELLANT'S OPENING BRIEF

COMES NOW the undersigned and certifies as follows:

PROOF OF SERVICE OF  
APPELLANT'S OPENING BRIEF

1

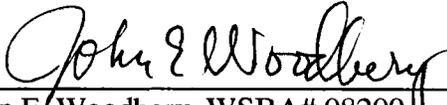
**Woodbery Law Group, P.S.**  
800 Bellevue Way, NE, Ste.  
400  
Bellevue, WA 98004  
Telephone (425) 637-3012  
Facsimile (425) 637-3014

1 On January 24, 2011, I filed Appellant Paulette Weston's Opening Brief and copy of  
2 the proof of Service and served by delivery a copy to Counsel for Respondents whose  
3 names and addresses are stated below:

4 Robert M. McKenna  
5 Attorney General  
6 Kathryn M. Battuello  
7 Catherine Hendricks  
8 Assistant Attorney General  
9 800 Fifth Ave., Suite 2000  
10 Seattle, WA 98104-3188

11 Dated this 24th day of January 2011.

12 WOODBERY LAW GROUP, P.S.

13 By:   
14 John E. Woodbery, WSBA# 08209  
15 Attorney for Paulette Weston, Appellant  
16  
17  
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22

23 PROOF OF SERVICE OF  
24 APPELLANT'S OPENING BRIEF

25 2

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