101829-1

NO. 83348-1

SUPREME COURT
OF THE STATE OF WASHINGTON

BROOKS ABEL, an individual

Appellant,

v.

GRANT COUNT PUBLIC UTILITY DISTRICT,

Respondent.

APPELLANT BROOKS ABEL'S PETITION FOR REVIEW

Sumeer Singla, WSBA #32852
Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph: (206) 628-6600
Fx: (206) 628-6611

Counsel for Brooks Abel

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I. IDENTITY OF PETITIONER

Petitioner is an Individual, Brooks Abel ("Abel"), Appellant in the Court of Appeals under Cause No. 83348-1 and Plaintiff in the Superior Court for King County, Cause No. 20-2-07874-3 SEA

II. CITATION TO COURT OF APPEALS

Abel seeks review of the Division One published opinion *Abel v. Grant County Public Utility District*, 2023 WL 2132183. (Appendix A).

III. ISSUES PRESENTED FOR REVIEW

1. The trial court erred, and the appellate court affirmed, when it instructed the jury on the standard for incapacity and tolling.

2. The trial court erred, and the appellate court affirmed, when it permitted the admission and use of collateral source hearsay by PUD to dispute capacity.

3. The trial court erred, and the appellate court affirmed, when it permitted the admission and use of evidence

that Abel consumed alcohol when PUD could not establish any impairment and declined a curative instruction.

4. The trial court erred, and the appellate court affirmed, when it permitted PUD to assert recreational immunity despite its CR 30(b)(6) representative admitting, unequivocally, that it lacked authority to open and close the land at issue. The trial court then further erred, and the appellate court affirmed, when it did not permit Abel to even argue PUD's lack of authority as a factual issue at trial.

IV. STATEMENT OF THE CASE

A. PUD And Its "Shotgun Marriage" With Recreation.

The Federal Water Power Act of 1920, as later amended by the Federal Power Act of 1935 (FPA), authorized the Federal Energy Regulatory Commission (FERC) to regulate non-federal hydroelectric projects. FERC specifically requires certain recreation on its projects.[1] Here, FERC's guidance specifically

[1] https://www.ferc.gov/sites/default/files/2020-04/smpbook.pdf (last visited July 21, 2022) at 11-13; *see also* CP 1695 (Article 5).

confirms that providing recreational opportunities is not "optional" for licensees, like PUD.[2] So PUD, like any FERC licensee, was *required* to open and maintain recreational opportunities for the public.[3]

B. The Sandbar

One of the mandatory amenities on PUD's hydroelectric project land is the Quilomene Dune—also known by locals as "the Sandbar." It is a piece of land jutting out into the Columbia river, known for warm weather, boating, and hard partying:[4]

[2] https://www.ferc.gov/sites/default/files/2020-04/smpbook.pdf (last visited July 21, 2022) at 11-13.
[3] CP 493.
[4] CP 1708-1709.

According to PUD, "the site receives extreme recreational use," including "large gatherings of boats and serious partying on holiday weekends and during concerts at the Gorge Amphitheater."[5] In a given year, PUD estimates that almost 30,000 people visit the site.[6]

The Sandbar is not a public service magnanimously provided by PUD; it is open because FERC requires it to be open. Even PUD's own Recreation Facility Inventory identifies it as a "FERC approved (required) amenity."[7] PUD's CR 30(b)(6) witness admitted that PUD lacked any authority to close the Sandbar, even if it wanted to.[8]

C. The Dangerous Water Fluctuations At The Sandbar

As part of its hydroelectric operations, PUD dramatically raises and lowers water levels. PUD's CEO testified that it

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[5] CP 1707.
[6] CP 1678.
[7] CP 1707; CP 1717 (message to investors that "one of our main responsibilities is to provide public access and recreation along our project lands.").
[8] CP 1676.

operates on a "ten foot band," meaning that it would not be unusual for the water to be at a certain level in a particular location one day, and at the same location the next day—it would be perhaps 8-feet (and possibly 10-feet) shallower.[9] Consequently, that same person might dive into deep water one day, and then, unwittingly, shallow water the next. There was no meaningful dispute that this was a "man-made change" to a natural condition.[10]

PUD has known that this was a hazard and a problem for decades. In 2000, it surveyed local residents about their "potential issues or concerns" about the project reservoirs, and "reservoir pool level fluctuations" were at the very top of the list.[11] PUD took no action.[12]

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[9] VRP 2074:25-2076:16.
[10] VRP 2196:2-2197:23; 2198:4-2198:18; 2219:7-22 (PUD representative testimony).
[11] CP 1840; *See* CP 1849
[12] CP 1684-85 (responding to 30(b)(6) topic requesting to know "everything PUD has done to effectuate safety at the Sandbar").

The same problem was reiterated over and over again in 2015 when PUD surveyed visitors at the Sandbar about their experience. The feedback once again included complaints about changing water levels.[13] Again, PUD took now action.[14] Indeed, despite decades of awareness, surveys, FERC mandates, and robust policies PUD admitted that it has done **nothing whatsoever** to effectuate safety at the Sandbar.[15]

D. The Injury And Aftermath

Given the PUD knew that it was causing a danger at a property known for big crowds and significant recreation, and that it did nothing to fix it, an injury like Abel's was inevitable.

Abel had been to the Sandbar several times prior to May 1, 2016—including the week before, when he visited with friends.[16] He dove in the same area, and had seen others do the

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[13] CP 1857-CP 1931 (multiple surveys).
[14] CP 1683.
[15] CP 1656; *see also* CP 1658 (admitting that "nobody" at PUD is "responsible for ensuring that the Sandbar remains safe for public use").
[16] VRP 1687:13-1689:15.

same.[17] No part of Abel even touched the bottom of the river during those previous dives.[18] The only signage about water levels was at the Vantage Boat Launch (miles away), facing the wrong direction, which nobody recalled the substance of.[19]

It turns out that PUD rapidly drained the river in the week preceding Abel's May 1st trip to the Sandbar. Witnesses recalled that the water was much shallower on May 1st.[20] Abel had no idea that things were so different, however.[21] The water was murky, making the change invisible from the boat.[22] Abel dove in, thinking it was deep (as it had always been), but instead landed on his head.[23] The 1.9 foot difference in depth, since the week before, was likely the difference between walking away—and quadriplegia.[24]

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[17] *Id.*
[18] *Id.*
[19] VRP 2215:1-19; VRP 773:9-13; 861:6-13.
[20] *See* VRP 1300:23-1301:3.
[21] VRP 1719:17-25.
[22] VRP 830:20-831:3.
[23] VRP 1979:16-1980:1; VRP 1215:17-1216:9.
[24] *Id.*

When Abel awoke, his legs no longer functioned; his friends had to drag him out of the water.[25] Doctors at Harborview diagnosed Abel with a cervical spine injury.[26] Unfortunately, the physical disability was only part of Abel's harm. The nature of his injuries rendered him helpless and dependent on his family for food, housing, medical care, and virtually every other basic need.[27] Abel had to essentially re-learn how to live, while, during the first year or two, struggling with paranoia and severe depression.[28] He attempted suicide several times and could not keep thoughts straight or focus on a single thing at a time, nor control his emotions.[29] Emergency medical services were called repeatedly to stop Abel from killing himself.[30]

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[25] VRP 880:1-21.
[26] VRP 1215:17-1216:9.
[27] VRP 1605:14-1606:6; VRP 1606:7-1607:7.
[28] *Id.*
[29] *Id.*; VRP 2106:16-2107:15; 2108:21-2109:1 (mother detailing suicide attempts and ending up at the fire station "out of desperation to ask them how long a person could go without food or water…")
[30] *Id.*

Abel spent the vast majority of this time in a "fog," during which he could not plan, consider the future, engage with others, or think beyond his depression.[31] He lost most of his friends, because he could not focus or engage.[32] If the subject matter during a discussion became too complex or forward looking, he would get overwhelmed and shut down. Even now, gaps in memory and recall plague Abel.[33]

Given this, it was not hard for two different experts to conclude that, for at least a year after his injury, Abel lacked capacity to evaluate his legal rights and remedies, retain counsel, and assist in the prosecution of his claims. Neuropsychologist, Dr. Martha Glisky, concluded that the severe mental, emotional, psychological and cognitive impacts of plaintiff's brain and spine injuries made it impossible for Abel to engage in the level of thinking that required evaluate whether a wrong occurred,

[31] VRP 1605:14-1606:6; VRP 1606:7-1607:7.
[32] VRP 2102:11-25.
[33] VRP 1752:9-1753:6.

understand civil proceedings, search out and retain an attorney competent to handle a case like his, and adequately assist in its investigation and prosecution. He was not cognitively or psychologically competent to perform these tasks until, at least, January 2018.[34]

Dr. Olson added, given Abel's ongoing suicidality and tunnel vision, "it would be unreasonable to expect someone like Mr. Abel given his then-mental health and physical limitations" to engage in the "higher level planning and thought required to enforce his legal rights following his injury.[35] Subtracting 12 months of incapacity, Abel started this lawsuit within the three year statutory period.[36]

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[34] VRP 1615:25-1616:2.

[35] VRP 1231:3-1232:21 ("especially if they're struggling with accepting what's happening and coping, that it's hard to appreciate consequences or forward thinking or things like that, and they can get very focused on just what's right there directly in front of them.")

[36] According to the expert testimony, plaintiff was competent to participate in legal proceeding on November 1, 2017. The lawsuit was filed in April 2020, after 60 days of additional tolling associated with claim filing under RCW 4.96.

E. Procedural Posture

Unfortunately, Abel's case was gutted on the courthouse steps. Following briefing and argument, on the capacity question, the trial court created a "chess clock" type instruction; Abel would have to prove his *lack* of capacity by clear, cogent and convincing evidence; and then the burden would shift to PUD to prove capacity by a preponderance of the evidence.[37] This was an instruction, predicated on a 1916 case which neither side advocated for.[38]

Over objection, PUD was allowed to controvert this issue with hearsay medical opinions, from a DSHS worker who neither testified nor was amenable to foundation that her work had anything to do with medical diagnosis or treatment (as opposed to collateral source benefits).

The trial court, even worse, let alcohol into the case, despite the manifest lack of impairment evidence. The fact is that

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[37] CP 3340-42.
[38] *See* VRP 207:23-208:7; CP 3507.

drinking was admitted at trial, even though there was *zero* evidence it had anything to do with the accident itself. Mr. Abel's BAC was .03. The reason: Abel did not remember the day of his injury—because of how badly he was hurt—and the trial court viewed this as a "functional denial" of drinking:[39] So, PUD could ask Abel about prejudicial and irrelevant alcohol use, open its own door, and then "impeach" Abel with an expert because he was too injured to recall one way or the other. Predictably, in closing, PUD used the evidence to attack Abel's *judgment*, not his memory.[40]

The trial court next found recreational use immunity applied, as a matter of law, despite PUD's documentary and deposition admissions that it lacked authority to open and close the Sandbar.[41] Abel could not even dispute the issue factually,

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[39] VRP 37:15 to 37:22; CP 3502-03. (Order at 1).
[40] VRP 2878:6 to 2878:15.
[41] Before PUD became educated on RCW 4.24.210, it was staking out the legal and factual position that it had *no* lawful possession or ownership of the Sandbar. That changed midway through summary judgment—when suddenly PUD became a

and thus, he could not put on his negligence case. He could not even use the word "negligence," as the Court limited PUD's duty to "posting a conspicuous sign."

V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Multiple grounds exist in this case and Abel submits that review should be accepted pursuant to its arguments below.

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possessor, and suddenly produced a number of documents supporting its new theory of the case, which it had previously hidden in service to its old theory.

A. The Appellate Court Conflicted with a Supreme Court Decision By Affirming An Elevated Competency Burden And the Issue Involves a Substantial Public Interest.

The tolling statute based upon personal disability, RCW 4.16.190, is silent regarding the specific standard by which such disability or incapacity should be decided. Instead, the statute states that incompetency or disability may be determined according to Guardianship Act, RCW 11.130 et. seq. For over a decade, this Court has held, in *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 270, 189 P.3d 753 (2008), that the Guardianship Act "provides the substantive definition of disability or incapacity for the purposes of tolling. In other respects the statutes [the tolling statute and the Guardianship Act] act independently." The appellate court, disagrees with this Court's decision, and broadens the reach of the Guardianship Act. (Slip Opinion at 3).

The appellate court does exactly what this Court stated it could not do in *Rivas* – it extends the procedural requirements outlined in the Guardianship Act and adopts the clear and

convincing standard. *Id*. The appellate court specifically acknowledged that *Rivas* "did not address the Guardianship Act's burden of proof provision," yet it chose to essentially adopt the clear and convincing standard from the Guardianship Act.(Slip Opinion at 4). It ignored this Court's specific instruction that those Guardianship Act provisions "***act independently.***" The appellate court is simply wrong – either the issue of the standard of proof to establish disability or incompetence is a matter of first impression, or the appellate court departed from the decade-long precedent that Guardianship Act does not establish the burden of proof for the tolling statute.

Next, the appellate court incorrectly rationalized that the burden of proof is a substantive aspect of a claim, not a procedural rule, citing *Spratt v. Toft*, 180 Wn. App. 620, 636, 324 P.3d 707 (2014). However, that case dealt with the Anti-Slapp Statute, RCW 4.24.525, which this Court found to be unconstitutional in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). Nevertheless, the *Toft* Court was analyzing a statute that

specifically outlined the burden of proof for each party – initial burden to show by preponderance of evidence that the claim targeted a protected activity (former RCW 4.24.525(4)(a)); and, the burden shifting to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim (former RCW 4.24.525(b)). *Spratt*, 180 Wn. App. at 628-629. Yet, the appellate court cherry-picked this one outlier case in which it stated that the burden of proof as outlined in a statute was a substantive aspect of the claim. Here, the tolling statute does not specifically outline any burden shifting procedure. And that is exactly what this is – a statutory procedure.

The appellate court is incorrect in summarily dismissing Abel's position that this Court's decision in *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 160 P. 965 (1916) is outdated. The appellate court's rationale is that since two subsequent cases *Grannum v. Berard*, 70 Wn.2d 304, 422 P.2d 812 (1967) – now sixty years old, and *Page v. Prudential Life Ins. Co of America*, 12 Wn.2d 109, 120 .2d 527 (1942) – now eighty years old,

mentioned *Roberts* in the context of analyzing competency to execute contracts, the burden shifting framework in *Roberts* is somehow still good law. The appellate court mistakenly states that Abel did not explain the distinction between *Page and Grannum* versus his case. The distinction is obvious – competency to enter into contracts is much different than competency to assess whether a quadriplegic person with severe depression and suicidal ideations can be competent to assert his claims.

This is an issue of substantial public interest because a person trying to void a contract is much different than a person trying to establish that he was injured in a life-altering manner that causes him to try to kill himself to this day. The stakes are obviously much higher. Put in another way, under RCW 10.77 a Court determines by a lower standard – preponderance of the evidence – whether a person is competent to stand trial and possibly face imprisonment for the rest of their life. But, a person has to show a higher standard – clear and convincing evidence –

to be able to access the court after being rendered quadriplegic and suicidal as a result of the injury. There is no legal or policy-based rationale that requires disabled people to prove their disabilities to the same standard as actual fraud[42] or terminating parental rights.[43] This cannot be justice, or at the least, the Supreme Court needs to tell Abel that this is his lot in life.

B. The Appellate Court Agreed that the Trial Court Erred in allowing the contents of DSHS Assessment Records for Impeachment of Plaintiff's Expert, But Deviated from Well-Established Law in Finding that Error was Harmless.

The Appellate Court correctly ruled that PUD's impeachment of Dr. Glisky's opinion by reading the contents of the DSHS assessment was not authorized by ER 703 and 705. (Slip Opinion at 9). Yet, it inexplicably found that this error was somehow harmless. Even worse, the Court held that the same evidence that was inadmissible during cross-examination

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[42] *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001).
[43] *In re Dependency of K.S.C.*, 137 Wn.2d 918, 931, 976 P.2d 113 (1999).

because it violated ER 703 and 705 was somehow admissible under the same evidence rules for Dr. McClung.

Here, this error did in fact change the outcome of the trial. Dr. Glisky should never have been cross-examined with the assessments scores, but that mistake was made it was hard to unring that bell. Compounding that error was introduction of Dr. McLung's statements which relied upon complete and impermissible hearsay.

Under ER 705, this evidence may *not* be used as it was here because it was "a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion." *State v. Anderson,* 44 Wn. App. 644, 652, 723 P.2d 464 (1986). "While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence...." *State v. Martinez,* 78 Wn. App. 870, 879-80, 899 P.2d 1302

(1995) (internal quotes omitted); *see also Washington Irrig. and Dev. Co. v. Sherman*, 106 Wn.2d 685, 724 P.2d 997 (1986) (abuse of discretion to allow expert to offer opinions of other non-testifying doctors, which were not in evidence); *State v. Martinez*, 78 Wn. App. 870, 879-80, 899 P.2d 1302 (1995) (expert precluded from testifying to statements of third parties; besides being hearsay, it would have been "misleading and confusing").

Admitting unreliable hearsay content through an expert is precisely the reason hearsay medical conclusions are inadmissible. Testifying witnesses are subject to scrutiny; Ms. Magcalas was not. Ms. Magcalas was therefore (falsely) painted as a benevolent healer, who even-handedly generated cognitive assessments following lengthy examinations.[44] These

[44] Of course, PUD could never lay legitimate foundation for this. Even the jury had no idea what "qualifications or formal education" were required to generate a CPS score. PUD's expert simply waived off the question. VRP 2437:12-16 ("I'm not aware…").

assessments had all the imprimatur of credibility, being "medical records" and her obvious bias (*i.e.*, limiting the state's funding obligation) would open the door and prejudice Abel. Effectively, Ms. Magcalas offered expert opinions without pretrial disclosure, discovery, or cross-examination.

Making matters worse, much of what PUD said in closing was just a lie to the jury—which could not be corrected, because it is hearsay about government benefits. This was a caseworker responsible for allocating government benefits, not someone responsible "for planning Mr. Abel's care," as PUD suggested. This, by itself, is grounds for reversal and remand.

C. The Appellate Court Improperly Skirted the Issue of the Trial Court Error's in Letting Alcohol Into The Case and Ignored Supreme Court and its Own Rulings in the Process.

Appellate courts have been very consistent on the permissibility of admitting alcohol consumption evidence absent evidence of actual impairment. This is because—quite rightly—painting a party as an irresponsible drinker, absent evidence of causal relevance to the event, is deeply prejudicial "to the case

as a whole." *See Needham v. Dreyer*, 11 Wn. App.2d 479, 498, 454 P.3d 136 (2019).

In *Needham*, the appellate court found error in introduction of alcohol into the case because of relevance, but because the probative value was substantially outweighed by such "highly prejudicial evidence." *Id.*at 497 (citing *Kramer v. J.l. Case Mfg. Co*., 62 Wn. App. 544, 815 P.2d 798 (1991)). In explaining how the error was "not harmless for several reasons," the *Needham* court emphasized that the topic of alcohol "was discussed throughout the trial" (as in our case). *Id.* at 498. Thus, the plaintiff—like Abel—had to spend his own case, including voir dire,[45] "addressing the concern about alcohol." *Id.* Nor did it matter that the plaintiff lost on liability, which did not turn on alcohol. *Id.* at 498.

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[45] VRP 597:10-24 (several prospective jurors volunteering that "if there's going to be evidence of alcohol," regardless of drunkenness, they would find fault "almost 100 percent of the time.").

Similarly, in *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 120-127, 471 P.3d 181 (2020), this Court rejected the vague opinions offered by the defense experts, and found that there was no legitimate evidence that alcohol had "anything to do with the actual accident," and thus it was just prejudicially speculative. *Id.* Specifically, "the fact of intoxication does not prove a person was acting in any particular way" and that such evidence is highly "likely to stimulate an emotional response rather than a rational decision," and infers that *this* plaintiff was "making risky decisions." *Id.* at 124. The risk is exacerbated when such claims are delivered by experts. *Id.*

The appellate court incorrectly tried to draw a distinction between *Needham* and this case stating that Mr. Needham admitted to alcohol use and Abel did not. This is simply not true. Abel did not remember consuming alcohol because he had suffered a traumatic injury, but the trial court somehow found this "a distinction without a difference" and deemed it

"tantamount to a denial of drinking on the day of the incident." *Id.*

So PUD was allowed to impeach a man who lacked memory of the event with evidence of alcohol consumption—introduced through an expert toxicologist. None of this had anything to do with "impeachment." It was always about weaponizing the fact of alcohol to convey to the jury that Abel was a reckless drunk—as PUD's closing argument.[46]

Despite the appellate court's reasoning, the record shows that Abel's testimony was pivotal to establishing his disability and competency, and having the jury believe that he was an irresponsible drunk diminished his credibility on this issue. It may be easy to separate these matters during the cold review of the record on appeal, but this brand of Abel was pervasive during the heat of trial.

[46] VRP 2878:6 to 2878:15 (PUD Closing Argument).

Further, the appellate court simply refused to acknowledge this Court's ruling in *Gerlach*; it did not even cite to it. This is because this Court held that excluding speculative evidence about alcohol use, even if minimally probative, may be too unfairly prejudicial when matters of credibility are at issue. *Gerlach*, 196 Wn. 2d at 123-124. Reversal is warranted on this basis, too.

D. The Supreme Court Should Still Rule on Trial Court's Incorrect Ruling on the Recreational Immunity Issue.

The Court should reach this issue, not just because it will arise on remand, but also because it effectively negated Abel's negligence case and jaundiced the jury's overall view of him.[47] Other jurisdictions refer to this type of unquantifiable error, which effectively deprives a party of its very theory of the case, as "structural error." *Sullivan v. Louisiana*, 508 U.S. 275, 282

[47] The only duty he could prove was breached was to post a sign under RCW 4.24.210(4)(a). CP 3507-08. This was a qualitatively less meaningful case to the jury than what Abel could have presented through PUD's own policies, financial incentives, and overall callousness.

(1993); *Conde v. Henry*, 198 F.3d 734, 740-741 (9th Cir. 1999); *United States v. Sarno*, 73 F.3d 1470, 1485 (9th Cir. 1485)[48] As here, it would be naïve to believe that a jury—which rightly expects a showing of wrongdoing—would not punish a plaintiff who (by dint of pretrial rulings) cannot even prove irresponsibility.[49] Either way, this error should be addressed.

According to this Court, PUD must show that it can close the Sandbar without permission to avail itself of the recreational

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[48] In *In re Detention of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011), two concurring justices and three dissenting justices declined to apply "structural error" to the civil context—and in other cases, *see, e.g.*, *In re Det. of Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015), reiterated that this was a "majority" holding. This should be reconsidered in light of the practical realities of jury trials. As discussed above, it is presumed that evidence on one issue can and does prejudice other issues. *See Needham v. Dreyer*, 11 Wn. App.2d 479, 498, 454 P.3d 136 (2019) (alcohol evidence offered on causation affected medical standard of care case). This is the foundation for the entire body of law contemplating a remittitur. *See Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985) ("damages so excessive as to unmistakably indicate that the verdict must have been the result of passion *or prejudice*") (emphasis added).

[49] When, as discussed above, such evidence does exist, in spades.

immunity affirmative defense. *See Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 696, 317 P.3d 987 (2014). According to its sworn CR 30(b)(6) testimony, PUD lacked authority to close the property. As a matter of law, the defense should have been stricken. At a minimum, Abel should have been allowed to offer evidence on this issue and present a negligence case.

As part of reversal and remand, this Court should clarify the contours of the liability case, permitting Abel to earnestly prove PUD's wrongdoing through a negligence case.

VI. CONCLUSION

For the reasons set forth herein, Abel submits that it is entitled to a reversal of the appellate court's decision and a new trial. Review should be accepted.

RESPECTFULLY SUBMITTED this 22nd day of March, 2023.

I certify, this document contains 4,986 words pursuant to RAP 18.17.

s/Sumeer Singla

Sumeer Singla, WSBA #32852
Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph: (206) 628-6600
Fx: (206) 628-6611

Counsel for Brooks Abel

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that, on the date indicated below, a copy of the foregoing document was forwarded for service upon counsel of record in the manner indicated below:

Attorneys for Respondent Grant County Public Utility District:

Bryan Scholnick, WSBA #42741 ☑ Via ECF
Tracy Duany, WSBA #32287
TYSON & MENDES, LLP
811 First Avenue, Suite 260
Seattle, WA 98104
Ph: 206-420-4267
Fax: 206-420-4375
Email: bschlonick@tysonmendes.com
Email: tduany@tysonmendes.com

Mark Wilner, WSBA #31550 ☑ Via ECF
Jeffrey M. Thomas, WSBA #21175
John D. Cadagan, WSBA #47996
GORDON TILDEN THOMAS & CORDELL LLP
600 University Street, Suite 2915
Seattle, WA 98101
Ph: 206-467-6477
Fax: 206-467-6292
Email: mwilner@gordontilden.com
Email: jthomas@gordontilden.com
Email: jcadagan@gordontilden.com
Email: jlucien@gordontilden.com

DATED this 22nd day of March, 2023.

s/Tony Dondero
Tony Dondero
Legal Assistant to Sumeer Singla

APPENDIX

A1-A21	*Abel v. Grant County Public Utility District, et al*, Unpublished Opinion, No. 83348-1-I, 2/21/2023.

Appendix A

FILED
2/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BROOKS ABEL, Appellant, v. GRANT COUNTY PUBLIC UTILITY DISTRICT, KITTITAS COUNTY, STATE OF WASHINGTON, Respondent.	No. 83348-1-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — Brooks Abel appeals the dismissal of his personal injury claim against the Grant County Public Utility District (District) after a jury found no factual basis to toll the statute of limitations, rendering his claim untimely. Abel contends the trial court erred in instructing the jury on the applicable burden of proof on competency and challenges its evidentiary ruling relating to certain cognitive assessments that the Washington Department of Social and Health Services (DSHS) conducted of Abel during the statute of limitations period.

We conclude the trial court correctly instructed the jury that Abel had to prove incompetency by clear, cogent and convincing evidence. We also conclude the trial court did not abuse its discretion in permitting the District to question Abel's expert and its own expert about the contents of the DSHS cognitive assessments. We therefore affirm.

FACTS

The Quilomene Dune, also known as the Sandbar, is a state-owned undeveloped recreational site on the shore of the Columbia River. Grant County Public Utility District (the PUD) owns and operates the Priest Rapids Hydroelectric Project several miles downriver under a license issued by the Federal Energy Regulatory Commission (FERC). The hydroelectric project includes Wanapum and Priest Rapids Dams and is defined by a boundary that includes all lands and waters necessary for the operation and maintenance of the project, as well as other project purposes, including public recreation and protection of environmental and cultural resources. The Sandbar lies within this project boundary and the PUD has an easement from the State providing it access and control of the Sandbar for hydroelectric project recreational area purposes, consistent with its FERC license.

On May 1, 2016, Abel and several others visited the Sandbar on a boat owned by Abel's friend. The group anchored near the Sandbar and some of the group, including Abel, jumped off the side of the boat and waded to shore. The water was, at most, chest deep at the location the group anchored. A short while later, Abel returned to the boat and dove headfirst off the side. After he dove in, Abel's friends noticed he was floating face down in the water. When they went to his aid, they found him unresponsive, pulled him to shore, and attempted to resuscitate him. Abel was airlifted to Harborview Medical Center (Harborview) soon after.

As a result of this incident, Abel suffered a severe cervical spine injury that left him with decreased sensitivity and motor function from the chest down. He

stayed at Harborview for approximately two months and is now completely dependent on his family to care for his basic needs.

Abel filed his original complaint for negligence against the PUD on April 16, 2020, more than three years post-accident. The PUD raised, as an affirmative defense, that Abel's claims were barred by the statute of limitations. Abel alleged, however, that because of his "medications, intensive rehabilitation and the emotional trauma of his disabilities," his mental incapacity prevented him from understanding or appreciating "the nature of these legal proceedings" for approximately one year following his accident. Abel contended that the applicable three-year statute of limitations tolled during this period of incapacity under RCW 4.16.190.

At trial, a jury found that Abel failed to prove that he lacked the capacity to understand the legal proceedings by clear, cogent, and convincing evidence for the requisite period. The trial court accordingly entered a judgment upon the verdict dismissing the case as time-barred.

Abel appeals.

ANALYSIS

Abel does not dispute that his negligence claim is subject to the three-year statute of limitations contained in RCW 4.16.080(2) and that he filed this suit more than three years following his injury. He contends, however, that the trial court erred in instructing the jury on the correct standard for establishing incapacity to toll the statute of limitations, and that the trial court impermissibly allowed the PUD to elicit expert testimony about the contents of DSHS cognitive assessments. We reject both arguments.

Burden of Proof under RCW 4.16.190

Abel first argues that the trial court erred in instructing the jury that he must establish his lack of capacity to understand the legal proceedings by "clear, cogent and convincing evidence." He contends that the appropriate burden of proof under the tolling statute, RCW 4.16.190, is the preponderance of the evidence standard. We disagree.[1]

RCW 4.16.190(1) provides

> if a person entitled to bring an action . . . [is] at the time the cause of action accrued . . . incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.130 RCW . . . the time of such disability shall not be a part of the time limited for the commencement of action.

The burden of proving events justifying the tolling of the statute of limitations rests upon the party asserting it. *Cannavina v. Poston,* 13 Wn.2d 182, 190-91, 124 P.2d 787 (1942).

Jury instruction no. 8 provided:

> A plaintiff is presumed competent.
> A plaintiff has three years from the date of an injury to commence a lawsuit. This is known as the three-year statute of limitations.
> This three year time period to bring a lawsuit may be interrupted or stopped if a person is incompetent.

[1] We reject the PUD's argument that Abel waived this assignment of error by consenting to the jury instruction and verdict form containing the "clear, cogent, and convincing" standard. Under CR 51(f), a party that fails to adequately support an objection to a jury instruction may still preserve its appeal if the court is "clearly apprised" of the points of law in dispute. *Falk v. Keene Corp.*, 113 Wn.2d 645, 658, 782 P.2d 974 (1989). Similarly, this court may exercise its discretion to review any issue "arguably related" to issues raised before the trial court. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007). The parties engaged in extensive argument and briefing below concerning the correct standard for proving incompetency. Abel clearly objected to the clear, cogent and convincing burden of proof and argued that the correct burden for the affirmative defense is preponderance of the evidence. Although Abel did not subsequently object to the final burden of proof instruction, he adequately preserved the burden of proof issue for appeal through his pretrial briefing.

> A plaintiff has the burden of proving by clear, cogent, and convincing evidence that he became incompetent to such a degree that he could not understand the nature of the proceedings for which he claims the statute of limitations should be tolled.
>
> If you find this burden has been met, then the time for calculating the statute of limitations stops.
>
> Once the time for calculating the statute of limitations stops, a defendant may prove by a preponderance of the evidence that a plaintiff has regained capacity, such that he was no longer incompetent.

Abel argues this instruction misstated the law under RCW 4.16.190(1) because he should have been required to prove his incompetency by a preponderance of evidence standard generally applicable to civil actions. He contends that while RCW 4.16.190(1) requires a plaintiff to prove incompetency "as determined according to chapter 11.130 RCW," this language should be interpreted as not incorporating that statute's burden of proof standard. Abel maintains that under *Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261, 189 P.3d 753 (2008), the tolling statute's reference to chapter 11.130 RCW, the Guardianship Act, incorporates only that act's definition of incompetency and not its provision relating to burden of proof.

Although we disagree with Abel's reading of *Rivas*, we conclude that even if the Guardianship Act's burden of proof provision does not apply to RCW 4.16.190, our common law does. Under our well-established common law, the law presumes competence and the burden of proving incompetency is proof by clear, cogent and convincing evidence.

We review the trial court's interpretation of RCW 4.16.190 and the Guardianship Act de novo. *Rivas*, 164 Wn.2d at 266. "When engaging in statutory interpretation, our goal is to ascertain and carry out the intent of the legislature."

State v. Barbee, 187 Wn.2d 375, 382, 386 P.3d 729 (2017). To determine legislative intent, we first look to the statute's plain meaning. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). If the plain meaning of the statute is ambiguous, we may also determine legislative intent by reviewing legislative history. *Barbee*, 187 Wn.2d at 383.

RCW 4.16.190(1) provides that incompetency or disability is to be "determined according" to the Guardianship Act. Under the Guardianship Act, an adult is presumed competent and a court may appoint a guardian only for someone whose competency is established "by clear and convincing evidence." RCW 11.130.265(1)(a); RCW 11.130.310(1)(a). Under the plain language of RCW 4.16.190(1), to prove incompetency for the purpose of tolling the statute of limitations, a party must prove incompetency as one would be required to prove it under the Guardianship Act—with clear, cogent and convincing proof.

Our interpretation of RCW 4.16.190(1) is consistent with its legislative history as well. The statute was first enacted in 1854 when the territorial assembly passed a law providing that if one was "insane" at the time a cause of action accrued, the duration of that disability would not count in the running of the statute of limitations. LAWS OF 1854, § 11, at 364. The current version of the statute, passed in 1977, replaced the "outdated and offensive language, procedures and assumptions that have previously been used to identify and categorize mentally, physically, and sensory handicapped citizens." LAWS OF 1977, 1st Ex. Sess., ch. 80, § 1. The legislature explained:

> It is legislative belief that use of the undefined term "insanity" be avoided in preference to the use of a process for defining incompetency or disability as fully set forth in [the Guardianship Act];

> that language that has allowed or implied a presumption of incompetency or disability on the basis of an apparent condition or appearance be deleted in favor of a reference to necessary due process allowing a judicial determination of the existence or lack of existence of such incompetency or disability.

Id. (emphasis added). The "process for defining incompetency" under the Guardianship Act involves the presentation of clear, cogent and convincing evidence to overcome the statutory presumption of competency.

Abel argues that our Supreme Court rejected this interpretation in *Rivas*. We disagree. In that case, a plaintiff filed a medical malpractice claim three years and one day after a medical procedure that caused her injuries. 164 Wn.2d at 265. She argued that she was incapacitated in the intensive care unit after her surgery and thus entitled to have the statute of limitations tolled for that period of time. *Id*. The court of appeals, in interpreting the phrase, "as determined according to [the Guardianship Act]," referred to the procedural requirements of the statute, including the requirement that the ward be given at least 10 days' notice of the petition, to hold that RCW 4.16.190(1) required the plaintiff to establish that her incapacity was of sufficient duration to permit a court to appoint a guardian and a four-day period of incapacity was too short in duration to toll the statute of limitations as a matter of law. *Rivas v. Eastside Radiology Associates*, 134 Wn. App. 921, 928-30, 143 P.3d 330 (2006).

The Supreme Court rejected the court of appeals' interpretation of RCW 4.16.190(1) and held that the temporal and procedural requirements for filing a guardianship petition and conducting a guardianship hearing were not relevant to determining whether the statute of limitations tolled. *Rivas*, 164 Wn.2d at 270. Instead, it held, the Guardianship Act "provides the substantive definition of

disability or incapacity for the purposes of tolling. In other respects, the statutes act independently." *Id.* It concluded that Rivas "was entitled to the benefit of former RCW 4.16.190 if she can persuade the trier of fact that she was incapacitated to the extent that she could not understand the nature of her cause of action when it accrued as determined under the substantive standards of the guardianship act." *Id.* at 271.

Abel argues that under *Rivas*, the Guardianship Act's burden of proof provision is "procedural" and thus inapplicable to RCW 4.16.190(1). Abel's reading of *Rivas* is unpersuasive for two reasons. First, that case did not address the Guardianship Act's burden of proof provision. Where a legal theory is not discussed in a case's opinion, that opinion is not controlling in future cases where the legal theory is properly raised. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). The only legal issue addressed in *Rivas* was whether a period of incapacity of four days was long enough to toll the statute of limitations, given the Guardianship Act's 10-day notice requirement for petitions filed under that statute.

Second, while *Rivas* rejected the notion that the "temporal and procedural requirements" of the Guardianship Act were incorporated into RCW 4.16.190(1), the burden of proof is considered a substantive aspect of a claim, not a procedural rule. *Spratt v. Toft*, 180 Wn. App. 620, 636, 324 P.3d 707 (2014). We are unconvinced that the Guardianship Act's burden of proof provision can be equated with the act's notice requirements.

But even if the Guardianship Act's burden of proof provision does not apply to RCW 4.16.190(1), we must nevertheless refer to common law "to fill interstices

that legislative enactments do not cover." *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783, 812 P.2d 500 (1991) (citing RCW 4.04.010).[2] Under well-established common law, the burden of proof required to overcome the presumption of competency in civil cases is that of clear, cogent and convincing evidence. *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967); *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 109, 110, 120 P.2d 527 (1942); *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 288, 160 P. 965 (1916).

Abel argues that *Roberts* should not apply because the case is too old to be reliable and its holding is inconsistent with *Rivas*. Abel further contends that *Grannum* and *Page* are distinguishable because those cases arose in the context of one's capacity to execute a contract rather than one's incapacity for statute of limitations purposes under RCW 4.16.190.

In *Roberts*, a lineman working for the telephone company fell from a telephone pole, sustaining significant injuries. 93 Wash. at 276. The plaintiff brought suit four months after the expiration of the statute of limitations. *Id.* He argued that he was "insane" for a significant period of time after he was injured, spending four months in an asylum, and that his lawsuit was timely. The trial court instructed the jury that

> [A] person is presumed to be sane until he is proved to be otherwise, and that the burden is upon the person claiming insanity to prove it by clear and convincing evidence; but that when insanity of a fixed and settled nature is once established by such evidence, it is presumed to continue until it is overturned by proof of sanity. You

[2] RCW 4.04.010 provides:

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

> are, therefore, instructed that, if plaintiff established that he became and was insane on the day of the alleged injury, and such insanity was of a fixed and settled nature, it would be presumed that he continued insane until proven to be sane, and the burden would be upon the defendant to establish his subsequent sanity. Even though the plaintiff may have been insane on the day when injured, if it were established that he became and was sane on any subsequent day prior to January 14, 1911, then this action would be barred by the statute of limitations.

93 Wash. 286-87. The Supreme Court affirmed this instruction as a correct statement of Washington law. *Id.* at 287-88.

Roberts, despite its age, is directly on point and is thus binding on this court. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("A decision by this court is binding on all lower courts in the state"). Abel points to no case other than *Rivas* to suggest the Supreme Court has departed from the standard laid out in *Roberts.* But *Rivas* did not explicitly overrule *Roberts* and our Supreme Court does not overrule binding precedent sub silentio. *MP Medical Inc. v. Wegman*, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

Moreover, our Supreme Court has relied on *Roberts* in much more recent cases. In *Page*, the executrix of a decedent's estate sued to collect proceeds from the decedent's life insurance policies. 12 Wn.2d at 102. The insurer presented evidence that the decedent had contacted the insurer and requested to cash out his life insurance policies before his death. *Id.* at 104. The estate alleged the decedent lacked the capacity at the time of this request and the insurer was aware of his diminished mental capacity. *Id.* at 105. The court, citing to *Roberts,* stated:

> The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the

> transaction occurred, that everyone is presumed sane; and that this presumption is overcome only by clear, cogent and convincing evidence.

Page, 12 Wn.2d at 109 (citations omitted).

And in *Grannum*, a plaintiff suing a physician for performing an allegedly unauthorized surgical procedure, claimed he was mentally incompetent at the time he gave his oral consent and signed the surgery consent form. 70 Wn.2d at 364. The Supreme Court, again relying on *Roberts*, held that the evidence that the plaintiff was depressed and heavily medicated was insufficient to overcome the presumption of competency and failed to establish incompetency by clear, cogent and convincing evidence. *Id.* at 309.

While Abel argues that *Page* and *Grannum* arose in the context of a plaintiff's competency to execute a contract rather than a plaintiff's incompetency to bring a lawsuit, he does not explain why this distinction is meaningful; in both contexts the plaintiff sought or seeks to overcome the legal presumption of competency in order to avoid the legal consequences of the plaintiff's action (signing a contract) or inaction (failing to file a lawsuit within the statute of limitations). We see no basis for imposing the clear, cogent and convincing burden of proof to void a contract because of one's incompetence and imposing a lower burden of proof to overcome the statute of limitations because of one's incompetence. The trial court did not err in giving jury instruction no. 8.

Admissibility of DSHS Assessments

Abel next argues that we should reverse the jury's verdict because the trial court erred in excluding evidence that DSHS had performed several cognitive assessments following his accident, in which it deemed him to have no cognitive

impairment. We conclude that to the extent there was any error in impeaching Abel's expert about the content of these assessments, it was harmless.

Before trial, the PUD identified six exhibits it intended to offer reflecting evaluations that DSHS performed to assess Abel's eligibility for long term care benefits and services. Abel sought to exclude any reference to the DSHS assessments on three grounds: they were generated for the purpose of determining Abel's eligibility for collateral source benefits, the documents were not statements made for purposes of medical diagnosis and treatment under ER 803(a)(4) but to determine eligibility for government benefits, and the evidence was unfairly prejudicial and thus inadmissible under ER 403. During argument on the admissibility of the records, Abel raised the additional concern of "an expert bootstrapping someone else's conclusions, which goes to . . . ER 703." The PUD argued that it could question its own expert about the content of the assessments if he relied on them in forming his opinions on Abel's competency and it could ask Abel's experts if they considered the information in forming their opinions.

The trial court granted Abel's motion in part, allowing the PUD to elicit testimony about the assessments through the parties' respective experts, but requiring the PUD to remove any reference to insurance or third-party payment of benefits before offering the exhibits.

The PUD did not offer the exhibits as substantive evidence at trial. Instead, it used the records to cross examine Abel's expert, Dr. Martha Glisky. Dr. Glisky, a neuropsychologist, testified that for the first year after Abel's injury, he was cognitively and psychiatrically impaired to such an extent that he did not have "the cognitive bandwidth to understand and participate in legal proceedings." Dr. Glisky

relied on the fact that initially, he was so heavily medicated that he was unable to process anything for the first month after his injury. After he left the hospital, Dr. Glisky stated, he became depressed and actively suicidal. His severe depression, in her opinion, rendered Abel incapable of participating in and understanding legal proceedings.

On cross examination, Dr. Glisky acknowledged that during that same year, Abel was capable of consenting to various medical procedures and treatment, and was able to understand the information his medical providers provided him about his condition. She also admitted that when Abel was discharged from Harborview in July 2016, two months after the accident, his medical records indicated he scored a "7" on a cognitive assessment using a "Functional Independent Measure" in which a "1" meant in need of total assistance and a "7" meant complete independence. He received a similar score for problem solving, memory and social interactions. Dr. Glisky also agreed that Abel had been assessed when he began rehabilitation and his psychological assessment concluded that he was cooperative, engaged, alert, attentive, with no memory deficits.

At that point, the PUD asked Dr. Glisky about the assessments of Abel's cognition performed by DSHS. Dr. Glisky acknowledged she had been provided copies of assessments performed on July 6, 2016, January 4, 2017, March 20, 2017, July 7, 2017, and July 20, 2019. She testified that each document contained a "cognitive performance scale" or CPS score of zero. She acknowledged that this score, according to the key in the documents, corresponded to the assessment that Abel had exhibited no problems with decision-making abilities, making himself understood, or recalling recent events.

On redirect, Dr. Glisky explained that while she has seen and used these documents with her own patients, the CPS scores did not change her opinion about Abel because the scores are "a very basic screening measure" that evaluates "basic interactions and conversations." And she did not know the credentials or educational experience of the individual who performed Abel's assessments.

In the PUD's case in chief, it called Dr. Mark McClung to testify about his assessment of Abel's ability to understand the nature of legal proceedings during the same period of time. Dr. McClung, a forensic psychiatrist, testified that for the first two months of Abel's hospitalization, he was not competent to make decisions about initiating a lawsuit because of the level of pain he was experiencing and pain medications he was taking. But, Dr. McClung said, by mid-July 2016, there was nothing in Abel's medical records to suggest he was experiencing any cognitive impairments or having difficulties making decisions.

Dr. McClung walked the jury through Abel's Harborview occupational and physical therapy records and discharge summary, the October 2016 rehabilitation psychological evaluation, and the medical records from his primary care provider from January 2017. In each of these medical records, Dr. McClung opined that Abel demonstrated his ability to participate fully in therapy, was highly motivated to succeed, was doing an excellent job in retaining the information his care team provided regarding his spinal cord injury, was able to communicate his wishes and needs and was comfortable doing so.

Dr. McClung then discussed the CPS scores contained in the DSHS assessments. He explained:

> A CPS score is a – is a brief scoring tool. It's mainly done by observation, more than questionnaire, looking at whether someone can make themselves understood, whether or not they can make decisions and that appears – and if their short-term memory is intact.
>
> . . . .
>
> It's primarily done by observation. There can be a short – there can be a short questionnaire that specifically looks at someone's ability to remember, say, a list of words or numbers after a few minutes. But my understanding, from the way that [it] is used, it's primarily a score based on observations of the patient.

Dr. McClung testified that the lower a CPS score, the less impairment that is present and the higher the score, the more problems are seen with verbal communication, memory or decision-making. And a score of zero, according to Dr. McClung, suggests there is no impairment seen by the provider.

Dr. McClung disagreed with Dr. Glisky's opinion that Abel's mental health rendered him incapable of understanding or participating in legal proceedings:

> I'd say overall my disagreement [with Dr. Glisky] is that she appears to be asserting that Mr. Abel's symptoms of anxiety, depression, and suicidality, you know, rendered him incompetent, unable to – unable to think, unable to cognitively function about a conversation regarding potential litigation or legal issues.
>
> And, again, I would go back to what I had talked about before; that those symptoms change someone's willingness. It changes someone's resilience. It changes someone's ability to stick to – focus and stick to things for an extended period of time. But it would not render him absolutely unable to do that by any means.
>
> . . . .
>
> And given – again, given the scores I see and the clinical observations from July of 2016 on, no one is describing – none of the clinicians or caregivers who work with him are describing any observable difficulties with his communication, with his memory, with his ability to communicate a preference or make decisions. And that's – and that's during periods when he was significantly depressed, during periods when he was frequently suicidal.

Abel argues the trial court erred in allowing the PUD to question the two experts about the CPS scores because it effectively permitted the PUD to offer the

hearsay opinions of a nontestifying expert. We review the trial court's evidentiary rulings for abuse of discretion. *Kirk v. Wash. State Univ.,* 109 Wn.2d 448, 459, 746 P.2d 285 (1987).

ER 703 permits experts to base their opinions on facts not otherwise admissible if they are of a type reasonably relied on by experts in the particular field. *In re Detention of Marshall,* 156 Wn.2d 150, 162, 125 P.3d 111 (2005). "Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence." *Id.* In addition, ER 705 grants the trial court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his or her expert opinion, subject to appropriate limiting instructions. *Id.* at 163.

Abel contends that, while ER 703 may permit an expert to express an opinion based upon facts or data that are not themselves admissible into evidence, a party may not question an opposing party's expert about the contents of reports authored by nontestifying witnesses. He relies on *Washington Irrigation and Development Co. v. Sherman*, 106 Wn.2d 685, 724 P.2d 997 (1986) for this argument.

In *Sherman*, an injured worker filed a disability claim based on an on-the-job back injury. The Department of Labor and Industries (Department) found that Sherman had a permanent partial disability. *Id.* at 686. Sherman subsequently sought to reopen his claim, alleging that his injury had worsened. *Id.* The Department denied the application, but the Board of Industrial Insurance Appeals (Board) found that Sherman's condition had become so aggravated that he was

permanently and totally disabled. *Id.* at 686-87. At a trial in superior court, a jury reversed the Board's decision.

On appeal, Sherman challenged the trial court's ruling allowing the Department to introduce evidence, through the cross examination of Sherman's medical expert, on the fact that Sherman's medical providers had noted degenerative changes in his spine that would have existed before his industrial injury. *Id*. at 687. Sherman argued the evidence was inadmissible hearsay because the author of the report did not testify. *Id.* The Department argued that discussion of the medical reports was properly allowed under ER 703 and 705.

The Supreme Court held that the medical records were hearsay under ER 802 and questioning the worker's expert about the contents of medical records on which that expert did not rely in forming their opinion was improper under ER 703 and 705 because it "improperly put before the jury both a diagnosis of Sherman's condition and an inference that his condition was not causally related to the industrial injury." *Id.* at 687. "Until defendant established that plaintiff had relied on the report of the other doctor, it was improper for the defendant to read from that report in cross-examining plaintiff's witness." *Id.* at 689. It determined that the error was not harmless because the inadmissible evidence went to the "central issue" of the case—the cause and extent of the worsening of Sherman's condition." *Id.* at 690.

Since *Sherman*, this court has recognized that it is improper to impeach an expert witness's testimony with the contents of a nontestifying professional's report that the witness had seen but not relied on in formulating opinions. *State v. Hamilton*, 196 Wn. App. 461, 477-78, 383 P.3d 1062 (2016).

The PUD contends that it is sufficient under *Sherman* for an expert to have seen the medical records and points to the fact that Dr. Glisky had not only reviewed the DSHS assessments but she testified she had used similar assessments as a basic screening tool with her own patients in the past. But the testifying expert witnesses in *Sherman* and *Hamilton* had both seen and reviewed the otherwise inadmissible reports. 106 Wn.2d at 687. The courts nevertheless concluded that the proponent of the evidence had not established that the experts had relied on them to form their opinions.

In this case, the PUD did not establish that Dr. Glisky relied on the DSHS evaluations in formulating any of her opinions on Abel's incapacity. While she testified she had seen them, she clearly testified that she believed the screening was too superficial to have any value. The only inference we can draw from Dr. Glisky's testimony is that she did not rely on the DSHS documents because she deemed them unreliable. Under *Sherman*, the PUD's mode of impeaching Dr. Glisky's opinion—by reading the contents of the DSHS assessment—was not authorized by ER 703 or 705.

Nevertheless, unlike *Sherman*, we conclude the error was harmless because the evidence was admissible through Dr. McClung. Error in the inclusion of hearsay evidence is harmless unless it was reasonably probable that it changed the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The PUD established that Dr. McClung relied on these records in forming his opinions. Unlike Dr. Glisky, Dr. McClung listed the DSHS evaluations as among the materials he used to formulate his opinion on Abel's capacity. Under ER 703 and 705, nothing prohibited the PUD from asking Dr. McClung about the

content of these assessments and the impact of them in formulating his opinions. The trial court did not abuse its discretion in allowing the PUD to question Dr. McClung about the content of these evaluations. *See In re Det. of P.K.*, 189 Wn. App. 317, 324-25, 358 P.3d 411 (2015) (trial court did not abuse its discretion in permitting an expert witness social worker to testify to the contents of patient's medical records that were not entered as substantive evidence and were used as a basis for the social worker's opinion on the patient's mental state). This case is distinguishable from *Sherman* because, here, the contents of the objectionable records were properly admitted through the defense expert, Dr. McClung.

Given that the content of the assessments was admissible to explain the basis of Dr. McClung's opinions, cross examining Dr. Glisky about the same information did not change the outcome of this trial. Any error in the PUD's method of cross-examining Dr. Glisky was therefore harmless.

Admissibility of Abel's Alcohol Consumption

Abel next argues that the trial court erred in admitting evidence that he had consumed alcohol on the day of his accident, thereby tainting the jury and causing prejudice to the case as a whole, including the jury's verdict that he had failed to establish incompetency. We conclude that the evidence, even if inadmissible, was harmless.

Abel relies on *Needham v. Dreyer*, 11 Wn. App. 2d 479, 454 P.3d 136 (2019), a medical negligence case, in which this court held that the trial court erred in allowing a defense expert to testify that the plaintiff suffered from chronic alcoholism and his alcohol use on the day of the doctor visit at issue could have caused his injuries. We reversed the jury verdict that no breach of the standard of

care had occurred because the expert testimony was so pervasive and inflammatory that it likely affected the jury's perception of the plaintiff. Id. at 495-97.

The *Needham* case is distinguishable because the plaintiff freely admitted his alcohol consumption, whereas Abel did not. Moreover, the PUD expert described Abel's blood alcohol level as 0.03 mg/DL, a level well below the legal limits. While there was lay testimony that Abel and his friends were drinking alcohol, the witnesses all testified Abel was not inebriated and showed no signs of impairment, such as slurred speech or impaired balance. The record here was not "replete with prejudicial discussion" of Abel's alcohol use, as it was in *Needham*. 11 Wn. App. 2d at 498. Instead, the trial court limited the expert testimony here to Abel's blood alcohol content when he arrived at the hospital.

Finally, the jury decided this case on statute of limitations grounds, an issue with no logical connection to the fact of Abel's consumption of alcohol on the day of the accident.

We thus conclude that any error in the admission of evidence that Abel consumed alcohol on the day of his accident was harmless.

Recreational Use Immunity Ruling

Finally, Abel challenges the trial court's decision that RCW 4.24.210, the recreational use immunity statute, applied as a matter of law. He contends this ruling constituted "structural error" in his trial. But our Supreme Court has held that the doctrine of structural error is strictly limited to criminal trials. *In re Det. of Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015). And Abel draws no connection between the court's ruling on the recreational use immunity statute and the jury's

verdict on statute of limitations. The trial court's decision that the PUD met the elements of recreational use immunity as a matter of law cannot reasonably be said to have affected the jury's verdict on the statute of limitations and any error is the trial court's ruling on recreational use immunity was also harmless.

Affirmed.

Andrus, C.J.

WE CONCUR:

Chung, J.

Coburn, J.

WILLIAMS KASTNER

March 22, 2023 - 4:34 PM

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- dbrown@williamskastner.com
- dbulis@wkg.com
- jcadagan@gordontilden.com
- jlucien@gordontilden.com
- jthomas@gordontilden.com
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