NO. 92675-1

(Court of Appeals, Division II No. 45575-7)

SUPREME COURT OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Respondent.

RESPONSE AND CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

This case arises from an accident caused by Petitioner Deborah Peralta (Peralta) who, while heavily intoxicated, crossed a pitch black street so she could deliberately position herself in front of the headlights of a vehicle she assumed was driven by her brother, Jorge Peralta. But Peralta did not walk in front of Jorge's vehicle. Instead, Peralta emerged from the darkness directly in front of a fully marked Washington State Patrol (WSP) vehicle driven by Trooper Ryan Tanner (Tanner). Peralta's sudden appearance and her determination to get in front of his vehicle eliminated any chance to avoid the resulting accident.

At trial Respondent/Cross Petitioner WSP advanced two defenses: (1) contributory negligence and (2) the statutory "alcohol defense" in RCW 5.40.060(1). This statutory defense bars a plaintiff from recovering damages in a civil action if she was: (1) under the influence of intoxicating liquor at the time her accident, (2) the intoxication was a proximate cause of her injury, and (3) she was more than 50 percent at fault. The jury was instructed on both defenses. CP at 350, 362-63. Based on Peralta's CR 36 admission that she was under the influence of intoxicating liquor at the time of her accident, Instruction 20 reflected that Peralta admitted the first element of the alcohol defense, and the jury

found the two remaining elements.[1] CP at 363, 388. The trial court determined the legal effect of these three established findings, applied RCW 5.40.060(1), and entered judgment for WSP. CP at 496-97.

The Court of Appeals reversed and remanded this matter for a new trial. *Peralta v. State*, No. 45575-7-II, 2015 WL 9315558, at *1 (Wash. Dec. 23, 2015). The court held, incorrectly, that it was reversible error to reflect Peralta's CR 36 admission in Jury Instruction 20. However, the Court of Appeals rejected Peralta's "law of the case" argument, holding that the trial court did not err by determining the legal effect of the jury's special verdict findings, which demonstrated Peralta's claim was barred by the alcohol defense. *Id.* at 7-9.

The WSP supports review of this case, but not on the issue raised by the Petition. As shown below, the Court of Appeals' conclusion that it was error to include Peralta's admission on her intoxication in Instruction 20 presents a significant question of public importance with

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[1] Instruction 20 provided:

> To establish the defense that the plaintiff was under the influence, the defendant has the burden of proving each of the following propositions: First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. *Plaintiff admits this element.* Second, that this condition was a proximate cause of the injury; and: Third, that the person injured was more than fifty percent at fault. If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

CP at 363 The italicized portion is the only part that differs from the instruction Peralta proposed. *See* CP at 328.

regard to admissions and their effect. Moreover, reflecting the admitted intoxication in Instruction 20 is harmless in light of other instructions that admissions are to be treated as proven fact, and in light of the overwhelming evidence that Peralta was, in fact, heavily intoxicated.

On the other hand, the issue raised by Peralta's Petition does not meet RAP 13.4(b) standards for review by this Court. Relying on the post-verdict declarations of four jurors, Peralta contends the contributory negligence jury instructions and special verdict form allow her to evade the alcohol defense instructions (Instructions 19 and 20). She concludes that RCW 5.40.060(1), while generally the law in Washington and a lawful basis for denying her claim, was not the law of this case because some jurors provided after the fact declarations expressing their belief that the verdict findings would result in a monetary judgment for Peralta. Petition for Review (Pet. Review) at 6-7, 13. Peralta's arguments are inconsistent with established law, and do not merit review under RAP 13.4(b)(1)-(2).

II. COUNTERSTATEMENT OF THE ISSUES

1. Where Peralta did not qualify, amend or withdraw her CR 36 admission that she was under the influence of intoxicating liquor at the time of her accident and where Washington Pattern Instructions treat Peralta's admission as proven fact which the jury must accept as true, does

that admitted fact conclusively establish the first element of RCW 5.40.060(1) in this litigation?

2. Did Instructions 19 and 20 properly instruct the jury on the alcohol defense, RCW 5.40.060(1)?

3. Where Peralta admitted she was under the influence of intoxicating liquor, and the jury found her intoxication was a proximate cause of the accident and that Peralta was more than 50 percent at fault, did the trial judge correctly determine the legal effect of the verdict findings and enter judgment accordingly?

III. COUNTERSTATEMENT OF THE CASE

While drinking beer at a bar, then 21 year old Peralta was invited to a party by her best friend, Christina Price.[2] RP at 815. Peralta did not know the people at the party, nor was she familiar with the area where the party took place. RP at 862, 1345. Once at the party, Peralta consumed more alcohol. RP at 870-71, 1344. Then, in her intoxicated state, Peralta got into an argument with people at the party that she just met. RP at 862, 1143. Not knowing where she was and without informing Christina, who drove Peralta to the party and planned to drive her home, Peralta abruptly left the party and started aimlessly walking around the Hazel Dell area of

[2] A friend also gave Peralta two small bottles of vodka at the bar. RP at 936-37. At the time of her accident, only one partial bottle remained. RP at 1335-36.

Vancouver.[3] RP at 816, 1145.

Lost, drunk, and crying, Peralta called her brother Jorge to pick her up. RP at 862-63. But Peralta did not know where she was and could not direct Jorge to her location. Jorge had Peralta *read* him the name on the street sign where she stood. Peralta misread the street sign, which caused Jorge to drive to the wrong location. Realizing his sister's error, Jorge called and had Peralta *spell* the street name at her then location. Again, Jorge told Peralta he would pick her up at that location. RP at 864-66, 1427. Unfortunately, without telling her brother, Peralta left the street she had just given to Jorge and started walking down an entirely different street. RP at 872-73, 865-66. After again not finding Peralta at the location she provided, Jorge called his sister on her cell phone. Without telling him she was on a different street, Peralta told Jorge she was walking "down the hill now." RP at 871. Still on the street Peralta had spelled for him, Jorge drove down the hill, and directed his sister to remain on the phone. RP at 873. Peralta reported seeing the headlights of Jorge's vehicle traveling down the hill towards her. RP at 873. Jorge told Peralta that he did not see her, and asked his sister to walk into the street. RP at 874. Jorge did not know that Peralta was on NW 78th Street, while several blocks away, he was driving down Anderson Street. RP at 871-73.

[3] Significantly, Peralta told Deputy Taylor that she knew she was too intoxicated to drive when she left the party, an admission her hospital blood test confirmed. RP at 1347.

NW 78th Street had no street lights or other illumination, and witnesses testified the street was "pitch black." RP at 237, 295, 1417-19. Dressed in brown boots, blue jeans and a black sweater, Peralta crossed the bike lane, two eastbound lanes and the center turn lane on NW 78th Street in an attempt to deliberately position herself directly in front of the headlights of the westbound vehicle she saw coming down the hill towards her. RP at 1350. Still speaking with Peralta by phone, Jorge again told his sister he did not see her. Peralta responded that she was right in front of Jorge's car and the two cars behind him.[4] RP at 875. Jorge responded his was the only car driving down the hill. He then heard a scream and the cell phone connection with Peralta ended. RP at 876.

Peralta had purposefully walked directly in front of the headlights of the fully marked patrol car driven by Trooper Tanner. Tanner was on his way to assist Sergeant Rhine who had previously stopped a driver with an outstanding misdemeanor warrant. RP at 1091. Tanner did not have his emergency lights turned on, nor did he need to. RP at 1097. Although Tanner did not look at his speedometer, he estimated his speed at approximately 40 m.p.h., or 5 m.p.h. above the posted speed limit. RP at 1143-44. As he drove down the NW 78th Street hill, Tanner

[4] Jorge did not own a car, and borrowed a friend's car to pick up his sister. Peralta had no idea what kind of car he was driving. Without knowing or asking Jorge, Peralta assumed that he was in the first of the three vehicles she saw driving towards her. RP at 866.

suddenly saw a pair of blue jeans appear out of nowhere moving slowly from his left to his right directly in front of his patrol car. RP at 1101-02. Tanner applied his brakes and turned sharply, but was unable to avoid Peralta. RP at 1104-05. Tanner stopped his patrol car in the center turn lane, turned on his emergency lights and called for medical assistance. RP at 1102, 1106. Peralta was taken to Southwest Medical Center.

The hospital blood test taken less than 30 minutes after her arrival established that Peralta had a 0.167 serum blood alcohol level.[5] CP at 158; RP at 1239. From this blood test Dr. Tac Lam, an expert toxicologist calculated to a 67 percent mathematical certainty that Peralta's blood alcohol concentration (BAC) reached between 0.13 to 0.16, or 1 ½ to 2 times greater than the legal limit of .08.[6] RP at 1234, 1242.

The Clark County Sheriff's Department arrived minutes after Tanner's call for aid. RP at 1114-15. Because the accident involved one of its troopers, WSP asked, and Clark County agreed, to investigate the accident. The matter was assigned to Clark County Deputy Ryan Taylor. RP at 1304. Deputy Taylor documented the accident scene and physical evidence. His subsequent investigation also included interviews of Tanner,

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[5] Peralta submitted the results of this blood test in her ER 904 submission, asserting it was both "authentic and admissible." CP at 11. WSP agreed, and the trial court admitted the blood test results into evidence. CP at 15-19, 385; RP at 1073, 1140-41, 1144, 1238-39. Peralta did not assign error to the admission of this blood test result.

[6] Taking the same mathematical formula out two standard deviations, Dr. Lam testified, *to a 95 percent certainty*, that Peralta's BAC was at least 0.11. RP at 1258.

Christina, Jorge, and Peralta herself. RP at 1302, 1306, 1339-50. Sometime after Clark County finished its investigation, several individuals came forward. Each said when they looked up the NW 78th Street hill *after the accident* Tanner's headlights were off. *See* RP at 220, 279, 318, 943. These witnesses' assertions stood in sharp contrast to the statements of *the only individuals who actually witnessed the accident*: Trooper Tanner and Peralta. Both Tanner and Peralta agreed the headlights of Tanner's patrol car were on at the time of the accident. RP at 818 (Peralta told Christina Price she saw the vehicle headlights), 875 (Peralta told Jorge she saw the vehicle headlights), 1099 (Tanner testified the lights on his vehicle were on), 1351 (Peralta and Tanner told Deputy Taylor the patrol vehicle's headlights were on at the time of the accident).

IV. REASONS REVIEW SHOULD BE GRANTED

The "law of the case" issue presented by Peralta does not present an issue that warrants this Court's review under RAP 13.4(b). First, as this Court just affirmed, jurors' post-verdict declarations that complain about not understanding jury instructions and purport to explain the intent behind answers to the special verdict questions, inhere in the verdict and cannot be considered on appeal. *Long v. Brusco Tug & Barge*, No. 90976-8, 2016 WL 743926, *1-2 (Feb. 25, 2016). Second, the trial court correctly instructed the jury on both defenses. RCW 5.40.060 works

within Washington's comparative fault scheme. The assertion of one defense does not render the other meaningless or support Peralta's strained arguments that the instructions "establish" that she should be compensated contrary to RCW 5.40.060. Thus, Instruction 19 properly informed the jury about the elements of the alcohol defense. Then, as the Court of Appeals correctly held, the trial court properly determined the legal effect of the special verdict findings. The Court of Appeals ruling presents no conflict with prior cases or any reason for this Court to rehear Peralta's "law of the case" argument about these instructions.

WSP's cross-petition, however, raises an issue that does warrant review under RAP 13.4(b) standards. WSP seeks to affirm the trial court's determination that Peralta's CR 36 admission fulfilled the first element of the alcohol defense. *See* CP at 363 (Instruction 20). The Court of Appeals erroneously required compliance with RCW 46.61.502(1), a statutory standard used to prove a person was under the influence. But in this case that fact was conclusively established for all purposes in this litigation by Peralta's unqualified CR 36 admission. The Court of Appeals error improperly limits CR 36 admissions in a way that is inconsistent with the plain language and purpose of this rule, and interjects doubt about the extent that trial judges, litigants and juries should treat such admissions at trial. This is a matter of substantial public importance warranting review

by this Court.[7] RAP 13.4(b)(4).

A. The Issue in Peralta's Petition Does Not Warrant this Court's Review

1. The Juror Declarations Peralta Relies on Inhere in the Verdict and Cannot Be Considered on Appeal

Peralta does not allege jury misconduct.[8] But she relies on post-verdict declarations of four jurors to support her claims that the jury misunderstood the jury instructions, and that the judgment entered was inconsistent with the jury's true intent. From this she argues that the trial court erred by applying the statutory alcohol defense to the verdict, claiming that pure apportionment of damages became the "law of the case." Pet. Review at 6-8, 14. Because Peralta's petition is premised on post-verdict juror declarations which cannot be considered, Peralta cannot satisfy the requirements of RAP 13.4(b)(1)-(2), and review should be denied.

As this Court recently affirmed, facts linked to a juror's motive, intent, or belief, or which describe their effect upon the jury, inhere in the

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[7] After making its decision to remand, the Court of Appeals addressed three pre-trial evidentiary issues not necessary to its decision. The Court of Appeals did not determine if any of these evidentiary errors were harmful, because it was already remanding, but WSP briefing demonstrated they were harmless. Respondent's Brief at 39-50. If the Court accepts review of WSP's cross petition and holds that Peralta's admission satisfied the first element of RCW 5.40.060 or that the instructions were otherwise harmless error, this Court could then determine the harmlessness of these other evidentiary issues or remand to the Court of Appeals to address that point. RAP 13.7(b).

[8] Peralta incorrectly asserts that the trial judge dismissed the jury *after* speaking to them at length about their verdict outside the presence of counsel. Pet. For Review at 6-7. As the record plainly reflects, the trial judge dismissed the jurors after the verdict was announced and the jurors were polled. Only then did he speak to the jurors outside the presence of counsel. RP at 1990-91.

verdict and cannot be considered.[9] *Long*, 2016 WL 743926, *1-2 (citing *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)).

> Thus, courts may consider only such facts asserted in the affidavits of jurors which relate to the claimed misconduct of the jury and do not inhere in the verdict itself. The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, *are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.*

Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515, 519-20 (1967) (emphasis added).

Furthermore, the juror declarations do not lead to the result Peralta advocates. The e-mails and declarations do not state or suggest that any of the four jurors would have altered how they answered the verdict form had they understood the alcohol defense barred Peralta's recovery of damages. At best, the four juror declarations suggest that one or more of them simply misunderstood the instructions and their legal effect. Again, that misunderstanding also inheres in the verdict and cannot support the relief Peralta seeks here. *Ayers By & Through Ayers v. Johnson & Johnson Baby Products Co.,* 117 Wn.2d 747, 769, 818 P.2d 1337, 1348 (1991).

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[9] The declarations also purport to describe the intent and motivation of other, unidentified jurors. Those hearsay statements cannot be considered by this Court. *See* ER 802, 805.

2. The Court of Appeals Correctly Determined the Legal Effect of the Jury's Findings and Properly Rejected Peralta's "Law of the Case" Theory

Once a jury renders a verdict, the trial court must declare its legal effect and enter a judgment upon it. *McRae v. Tahitian, LLC*, 181 Wn. App. 638, 644, 326 P.3d 821 (2014); *Minger v. Reinhard Distrib. Co.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *Dep't of Highways v. Evans Engine & Equip. Co.*, 22 Wn. App. 202, 205–06, 589 P.2d 290 (1978).

Peralta's petition depends on a flawed theory that instructions must inform the jury of the effect of every statute that may influence the legal effect the trial judge (or appellate court) might impose based on the verdict findings. Taking Peralta's argument to its conclusion, a fault free plaintiff could not enforce joint and several liability against multiple defendants unless an instruction specifically informed the jury of the legal effect of joint and several liability under RCW 4.22.070(1)(b). That is not the law in Washington. *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 626, 146 P.3d 444 (2006), *recon. denied, review denied*, 161 Wn.2d 1011 (2007). The trial court, not the jury, determines the legal effect of the verdict findings. *McRae*, 181 Wn. App. at 644.

Furthermore, Peralta's petition fails to present a significant issue for review because it ignores how Instruction 19 did inform the jury about the effect of the alcohol defense. That instruction provided:

> It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person was more than fifty percent at fault.

CP at 362.

This instruction correctly listed the three elements of RCW 5.40.060(1) and properly informed the jury that finding all three elements constituted a defense to the "*action* for damages" itself. CP at 324. Of course, Peralta was free to review and explain the impact of the alcohol defense in the two opportunities she had to address the jury in her closing argument. She simply chose not to. *See* RP at 1917-32, 1966-75.

Moreover, Peralta offered the proposed instruction that was later adopted as Instruction 19. CP at 324, 362. She also offered WPI 21.09, which listed the elements of the alcohol defense. Except for the inclusion noting her admission to the first element of this defense, Peralta's proposed instruction was identical to Instruction 20. *Cf.* CP at 328, 363. These instructions correctly reflect the elements and effect of RCW 5.40.060(1). Thus, both the instructions and the normal application of RCW 5.40.060(1) are the law of this case, not the misinterpretation of the law advanced by Peralta. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (citing *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (the law of the case includes instructions that are not objected to).

Another reason that Peralta's Petition should be rejected is that she did not object to Instruction 19, and unpreserved objections cannot be considered on appeal. *Ryder's Estate v. Kelley-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978) (citing *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975)); *see also* CR 51(f). Similarly, under the invited error doctrine, Peralta cannot challenge the adequacy of the instruction that she, herself, proposed. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358, 360 (2000).

Peralta attempts to avoid the explicit legal effect of the alcohol defense by ignoring Instructions 19 and 20 in her petition and focusing on the contributory negligence instructions. Pet. Review at 3-6. This also fails to show that the Petition presents a significant or colorable legal theory for this Court's review. By taking the contributory negligence instructions out of context, Peralta suggests they somehow negated the alcohol defense instructions. However, WSP was not required to choose between these two defenses at trial, nor does the contributory negligence instructions render Instructions 19 and 20 meaningless. A defendant may submit multiple defenses to the jury where, like here, those defenses are justified by the totality of the evidence. *Amrine v. Murray*, 28 Wn. App. 650, 654-55, 626 P.2d 24 (1981); *see also* CR 8(e)(2). Additionally, RCW 5.40.060 works within Washington's comparative fault scheme, and does not elevate one

defense over the other. *Morgan v. Johnson*, 137 Wn.2d 887, 895, 976 P.2d 619 (1999); *Hickly v. Bare*, 135 Wn. App. 676, 689-90, 145 P.3d 433 (2006).

Lastly, although Peralta claims the judgment entered by the trial court is inconsistent with the verdict findings, she failed to raise that issue after the jury reached its verdict but before it was discharged. Challenges to alleged inconsistent findings are waived unless raised prior to the discharge of the jury. *See Mears v. Bethel School Dist. No. 403*, 182 Wn. App. 919, 928, 332 P.3d 1077 (2014). For this reason as well, the issue in her petition should be denied.

In short, the jury was properly instructed on the alcohol defense, and trial court correctly determined that the legal effect of the verdict finding required the dismissal of Peralta's suit pursuant to RCW 5.40.060(1). Because Peralta failed to identify any conflict between the Court of Appeals ruling on these issues and established appellate precedent, review under RAP 13.4(b) is not warranted and Peralta's Petition should be denied.

B. The Cross-Petition Should Be Granted because Peralta's CR 36 Admission Satisfied The First Element Of RCW 5.40.060(1)

Peralta admitted, under oath, she was under the influence of intoxicating liquor at the time of her accident. CP at 72. As a matter of

law, that unqualified admission is "conclusively established" for all purposes in this litigation, and the trial court properly included Peralta's admission in Instruction 20. CP at 363; CR 36(b).

The Court of Appeals, however, held that Peralta's unqualified CR 36 admission did not establish the first element of the alcohol defense.

> WSP's request for admission was much broader than the language of RCW 5.40.060(1). It merely asked whether Peralta was under the influence of intoxicating liquors at the time of the collision. It did not define "under the influence" as that phrase is used in RCW 5.40.060 and RCW 46.61.502. Standing alone, the phrase "under the influence" is susceptible to different interpretations.

Peralta, 2015 WL 9315558 at 7.

Respectfully, the Court of Appeals improperly analyzed Peralta's unqualified admission, and its holding is contrary to the plain language and purpose of CR 36. Indeed, CR 36 would have little or no meaning or benefit if, as Peralta argues here, a party could admit a material fact in response to a request for admission, wait two years until trial, and then suddenly offer testimony that qualified and rebutted her earlier admission.

The Court of Appeals correctly points out that RCW 5.40.060(1) defines how a party can prove the first element of the alcohol defense when that issue is actually in dispute. *Id.* ("The standard for determining whether a person was under the influence of intoxicating liquor...shall be the same standard established for criminal convictions under

RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such a person was under the influence of intoxicating liquor or drugs.").

But that element was not at issue, and WSP was not required to separately establish the standard in RCW 46.61.502. Peralta admitted, without objection or qualification, that she was "under the influence of intoxicating liquor" at the time of her accident. CP at 72. Peralta's admission "conclusively established" that fact "for the purposes of the pending litigation." CR 36(b).

> Conclusively established means that the admission cannot be contradicted or rebutted at trial, and the factfinder must accept the admission as accurate and proven.

3 Karl B. Tegland, *Washington Practice*: *Rules Practice CR 36* (7th ed. 2003).

Inclusion of Peralta's admission in Instruction 20 is also consistent with the purpose of CR 36 to "eliminate from controversy matters which will not be disputed." *Lakes v. Vondermehden*, 117 Wn. App. 212, 218, 70 P.3d 154 (2003), *review denied*, 150 Wn.2d 1036 (2004). Such admissions:

> [P]romote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting

> evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements.

Lakes, 117 Wn. App. at 218 (quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure,* § 2252 at 522 (1994).

Peralta's CR 36 admission relieved WSP from the burden of proving she was under the influence of intoxicating liquor at the time of her accident. That fact was conclusively established for all purposes in this litigation, and thus, as a matter of law, satisfied the first element of the alcohol defense. CR 36(b).

Significantly, there was no confusion about the purpose or meaning of the plain language of WSP's request for admission here. WSP raised RCW 5.40.060 as an affirmative defense in its answer before it sent Peralta the request for admission. CP at 8. In addition, the request mirrored the first element of RCW 5.40.060(1). *Cf.* CP at 72 and RCW 5.40.060(1). Moreover, Peralta's admission and its relationship to RCW 5.40.060(1) were the subject of multiple motions leading up to trial. CP at 94, 117.

Peralta also expressed no confusion about the meaning or purpose of her CR 36 admission, as evidenced by how she responded to it. Had she

been unable, in good faith, to admit or deny the truth of WSP's request, "the party ***shall*** specify so much of it as is true *and qualify* or deny the remainder." CR 36(a) (emphasis added). Although she qualified her answers to other requests, Peralta never qualified her admission about being under the influence of intoxicating liquor at the time of her accident. CP at 72-3. Further, if Peralta truly believed the "merits of the action" would be "subserved" by allowing her admission to stand, she could have moved the trial court to withdraw or amend her admission. CR 36(b). She never brought such a motion, and, indeed, just before trial, Peralta confirmed she did not want to withdraw her admission. RP at 84, 86.

Finally, the jury was required to accept Peralta's unqualified admission as true, whether it was included in Instruction 20 or in a separate stand-alone instruction.[10] *See* WPI 6.10.02 ("The [plaintiff] has admitted that certain facts are true. You must accept as true the following fact: [admitted fact]"). Thus, Peralta suffered no prejudice by the inclusion of her admission in Instruction 20. *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 322, 284 P.3d 749, 771 (2012), *review denied*, 176 Wn.2d 1014, 297 P.3d 707 (2013) (error is not prejudicial unless it "presumptively affects the outcome of the trial"). The trial court

[10] WSP attempted to introduce Peralta's admission into evidence as an exhibit. *See* RP at 83, 1679. However, Peralta convinced the trial court to instead include her admission in the final instructions to the jury. RP at 1682.

exercised sound discretion to instruct the jury based on Peralta's admission "conclusively establishing" that she was under the influence of intoxicating liquors at the time of her accident, and the jury was required to accept this fact as true. CR 36(b). Instruction 20 correctly included Peralta's admission to the first element of the alcohol defense, and the Court of Appeals erred when it reversed the trial court on this basis.

The Court of Appeals' published decision should be reviewed because it defies the law regarding admissions, and improperly casts doubt on the ability of parties to rely on clear, unqualified admissions like Peralta's here. The resulting uncertainty will force litigants to introduce additional evidence to prove facts that were already "conclusively established" through an earlier admission. This undermines the rule's purpose, and presents an issue of substantial interest that warrants review by this Court. RAP 13.4(b)(4).

V. CONCLUSION

For each of these reasons stated, WSP respectfully asks this Court to deny Peralta's Pet. Review. The Court, however, should grant WSP's cross-petition, hold that Peralta's CR 36 admission satisfied the first element of RCW 5.40.060(1), and hold that Instruction 20 was not an abuse of discretion or reversible error.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury in accordance with the laws of the state of Washington that on the undersigned date the preceding document was filed in the Washington State Court of Appeals, Division II according to the Court's Protocols for Electronic filing.

That on the undersigned date the preceding document was filed in the Washington State Supreme Court according to the Court's Protocols for Electronic filing, as a PDF e-mail attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov)

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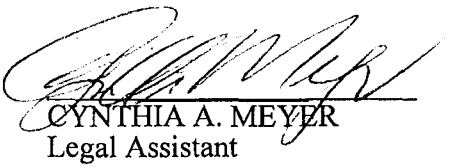
DATED this 21st day of March, 2016, at Tumwater, Washington.



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Attached for filing with the court is State of Washington's Response and Cross-Petition for Review

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