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No. 70761-2

King County Superior Court No. 10-2-34403-9SEA

COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

CHANNARY HOR,
Appellant

v.

CITY OF SEATTLE,
Respondent

BRIEF OF RESPONDENT/CROSS-APPELLANT CITY OF SEATTLE

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I. INTRODUCTION

This case involves a tragic collision caused solely by Omar Tammam. Although named as a defendant, Tammam never appeared during any of the proceedings below, and despite his centrality to the events at issue and this lawsuit, he is not party to this appeal. This appeal instead follows a three-week jury trial during which Appellant Channary Hor advocated that respondent City of Seattle negligently contributed to the collision that injured her. A King County jury disagreed.

The jury found that the City's police officers, which contacted both Ms. Hor and Tammam after hours, in a high-crime local park, did not act negligently with regard to this incident. Rather, Tammam's flight from the park – fueled by ecstasy and marijuana – resulted in his driving a stolen Cadillac DeVille at an exceptionally high speed into a rock barrier. Tammam's actions alone were the exclusive cause of Ms. Hor's injuries.

This was a heavily litigated case, and has a complex procedural background. Ms. Hor raises myriad alleged defects arising primarily from the jury trial and related motions, all of which fail for the reasons discussed below. There is no basis for reversing the well-supported jury verdict, reached after thoughtful consideration.

The City also conditionally cross-appeals two issues, which this Court need not address unless a new trial follows. In that unlikely event, the cross-appeal focuses on the trial court's error, as a matter of law, that Ms. Hor's improper, ineffective, and untimely efforts to serve Tammam

adequately brought him within the its jurisdiction.[1] The singular effect of Tammam's "service" was to subject the City to joint and several liability. Ms. Hor's prosecution of this case cannot be reconciled with the good faith and timeliness standard of *Sidis v. Brodie/Dorhmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), or the applicable Civil Rules, case scheduling order, or Rule of Professional Conduct 1.3. If remanded, Tammam should be dismissed from this action.

Because Tammam was not a proper party to the lawsuit, the trial court compounded its error by improperly admitting his statements during trial as a party opponent. In particular, it erroneously permitted Ms. Hor to testify, under the guise of admissions of a party opponent, to Tammam's speculative "mutterings" that "I'll stop if they stop," which served as Ms. Hor's primary causation theory against the City.

Ms. Hor has waived numerous issues that she raises for the first time in appeal. Further, the trial court did not abuse its discretion on any evidentiary matters, properly instructed the jury, and properly denied Ms. Hor's motion for a new trial. This Court should affirm the trial court's rulings and uphold the verdict.

II. COUNTER STATEMENT OF ISSUES AND ASSIGNMENTS OF ERROR ON CONDITIONAL CROSS APPEAL

A. MS. HOR'S ASSIGNMENTS OF ERROR

1. When Ms. Hor did not object to Jury Instructions 21, 23,

[1] Judge Ramsdell, the trial judge, was not assigned to the case at the time of this ruling.

and 24, and did not take exception to the court's failure to give her proposed Jury Instruction 18, did she waive any challenges relating to those instructions on appeal? (App.'s Assignment of Error Nos. 4-7);

2. Did the trial court err as matter of law in giving Jury Instructions 17, 26, 27, 21, 23, and 24, which allowed each party to argue its theory of the case, adequately informed the jury of the law, and did not mislead on any point? (App.'s Assignments of Error Nos. 1-6);

3. Assuming that Ms. Hor preserved any challenge to proposed Instruction 18 – the "basic speed" rule – did the trial court commit reversible error or prevent her from arguing her theory of the case by issuing this same instruction, Court's Instruction No. 16, which omitted only the speed limits? (App.'s Assignment of Error No. 7);

4. Did the trial court abuse its discretion by removing Officers Grant and Thorp from the caption and special verdict form under Civil Rule 21, to reflect that the City was the true defendant in interest, and both officers undisputedly acted within the scope of their employment in all respects? (App.'s Assignment of Error No. 8);

5. Did the trial court properly exercise its discretion by permitting defense expert, Dr. Saxon, to testify about Tammam's impairment by ecstasy (MDMA) and marijuana (both found in his bloodstream post-arrest), an alternative explanation for his actions, particularly when the trial court admitted Tammam's alleged statements about stopping "if they stop?" (App.'s Assignment of Error Nos. 11 and 12);

6. Did the trial court abuse its discretion admitting expert testimony by defense accident reconstruction experts Mr. Neale and Mr. Rose to assist the jury in evaluating the physical evidence, derived in part from a data recorder in Tammam's vehicle, and provided in response to appellant's accident reconstruction expert, Mr. Stockinger? (App.'s Assignment of Error Nos. 13 and 15);

7. Did the trial court properly exercise its discretion by permitting defense expert economist William Partin to testify about future costs based upon variable wage values (over Ms. Hor's expected lifespan), and the methodology by which he calculated the present day value of future costs, after cross examination that included articles about accepted practices in the field? (App.'s Assignment of Error No. 14);

8. Did the trial court abuse its discretion in denying Ms. Hor's motion for a mistrial and/or a new trial under Civil Rule 59, when she failed to contemporaneously object to defense counsel's opening statement, no comments referenced "insurance" or "deep pockets," and were otherwise responsive only to Mr. Barcus' request that the jury find a "shared responsibility" between the City and Tammam? (App.'s Assignment of Error Nos. 9-10);

B. CITY'S ASSIGNMENTS OF ERROR ON CONDITIONAL CROSS-APPEAL

1. Did the trial court err as a matter of law by failing to dismiss Tammam for lack of proper service, because plaintiff failed to personally serve him or employ any alternative methods of service under

RCW 4.16 *et seq.* before the first trial date, and she attempted to serve Tammam via the Secretary of State in violation of RCW 46.64.040 only four weeks before the then-scheduled trial?

2. Did the plaintiff comply with the "good faith and in a timely manner" standard articulated in *Sidis v. Brodie/Dorhmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), when she purportedly served Tammam more than two years after the already-tolled statute of limitations had expired, and for the sole operative effect of subjecting the City to joint and several liability for Tammam's criminal acts?

3. Did the trial court abuse its discretion by admitting Tammam's statements via Ms. Hor that "I'll stop if they stop," when Tammam did not properly constitute a party opponent and no other exception to the hearsay rule applied?

III. STATEMENT OF THE CASE

A. OFFICER GRANT AND OFFICER THORP'S INITIAL CONTACT WITH MS. HOR AND TAMMAM AT SEWARD PARK.

On May 18, 2006, shortly after midnight, Seattle Police Officer Adam Thorp observed a Cadillac DeVille parked in Seward Park. (RP v. 22 pp. 3-5; CP 4019-22.) Because the park was closed, Officer Thorp parked near the Cadillac and tapped on the driver's side window. *Id.* He observed Omar Tammam and a younger female passenger named Channary Hor. (RP v. 17, p. 16-17; CP 4019-22.) Tammam immediately turned on the vehicle, backed up, then turned while moving forward. (RP

v. 22 pp. 8-9; CP 4019-22.) Seeing headlights coming at him, Officer Thorp jumped out of the way. The Cadillac then sped past. (RP v. 22 pp. 8-9; CP 4019-22.)[2]

As Officer Thorp attempted to contact Tammam, Officer Aaron Grant also entered the park. (RP v. 26, pp. 142-44.) Officer Thorp observed Grant swerve to avoid a collision as Tammam departed. (RP v. 22, pp. 12-13.[3]) After Tammam sped by, Officer Grant activated his emergency lights; Tammam did not stop. Officer Grant made a three-point turn and headed towards the entrance to the park. (RP v. 26, p. 154.)

At this juncture, the parties' versions of events radically diverge. The jury's verdict reflects that it must have rejected Ms. Hor's theory that the officers negligently engaged in a high speed pursuit of Tammam, in violation of the police department's vehicle pursuit policy, traveling just feet behind Tammam, with full lights and sirens, effectively "pushing" him up the hill until he collided at approximately 65 miles per hour with a rock barrier. Contrary to the self-serving characterizations of the trial testimony and evidence offered by Ms. Hor, however, this Court should review the following:

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[2] As Ms. Hor explained, she met Tammam a day before the crash when he approached her, told her she was pretty, and asked for her number. Later, he called her and asked to hang out. He picked her up that evening and they drove first to South Seattle, then to Seward Park, where they parked. She had never been to Seward Park before. Two or three minutes after they parked, an officer approached. When the officer "banged" on the window, Tammam "panicked and he put his car in reverse and sped out." (RP v. 44 pp. 2-8.)

[3] Ms. Hor's statement that Officer Grant had been "driving along the outside edge of the park observing the above activity," (App.'s Br. at 17) is incorrect. *See* (CP 3465-68; RP v. 26, pp. 153-55.)

1. The Officers' Statements and Testimony

The officers testified, consistent with reports they submitted contemporaneously with the incident, that they lost sight of the Cadillac once it sped out of the park. (RP v. 22, pp. 13-14; v. 26, pp. 155-56; CP 3889-90; CP 3465-68; Supp. CP, Ex. 36, 37.) While standing outside his vehicle, Officer Thorp observed the Cadillac turn left up Juneau Street. (RP v. 22, pp. 7-9.) Officer Grant, in the process of executing a three-point turn, did not see the Cadillac turn left, but turned in that direction on a hunch. (RP v. 26, p. 156.)

The main entrance to Seward Park is at the east end of South Juneau Street ("Juneau"), which slopes steeply uphill to an intersection with Seward Park Avenue South. (RP v. 27, p. 178.) Upon reaching the intersection of Juneau and Seward Park Avenue, Officer Grant stopped near the stop sign. (RP v. 26, p. 155.) He inched into the intersection to gain a better view and saw taillights some distance ahead, which disappeared around a bend to his left. (RP v. 26, p. 158.) He did not know whether those tail lights were Tammam's, but turned left (southbound) onto Seward Park Avenue, with Officer Thorp trailing. (RP v. 26, pp. 158-159.)

In conjunction with this lawsuit six years later, Officer Grant could not recall his precise speed traveling southbound on Seward Park Ave. (an uphill grade) to the point where it tops out and intersects Wilson Ave. S. However, he was neither attempting to catch up to nor keep pace with the vehicle that had disappeared. (RP v. 26, pp. 118, 158-59.) Having no

vehicle in view, Officer Grant turned off his emergency lights. (RP v. 27, p. 167.)

As Officer Grant crested the hill, about half a mile after he turned left, he saw that the Cadillac had crashed into a rock retaining wall on private property near the southwest corner of the intersection of Seward Park and S. Morgan, passed the intersection with Wilson. (RP v. 27, pp. 178-79.) At this point he activated his emergency equipment to clear Wilson, and continued towards the scene. He parked in the intersection and got out of his car to tend to Ms. Hor, who was pinned in the wrecked Cadillac. (RP v. 27, pp. 179-81.) He did not recall observing Tammam. *Id.*

Officer Thorp watched Tammam take off from the park while he got back in his police car. He then proceeded out of the park some distance behind Officer Grant. (RP v. 22, pp. 11-14; CP 4019-22.) He too stopped to clear the intersection of Juneau and Seward Park Avenue, before turning left behind Officer Grant. (RP v. 22, pp. 15-16; CP 4019-22.)

As Officer Thorp crested the hill, he saw Tammam emerge out of the vehicle and begin running uphill on S. Morgan Street. (RP v. 23, p. 34; CP 4019-22.) He continued towards the intersection, parked, and attempted to run after Tammam on foot before realizing he could not catch up. (RP v. 23, p. 35; CP 4019-22.) He returned to the crash and assisted Officer Grant and fire personnel on scene. (RP v. 23, pp. 35-36; CP 4019-22.)

A K9 officer responded and tracked Tammam to a partially open garage a block and a half away. Tammam told the arresting officer, Darryl D'Ambrosio, that he fled because he had outstanding arrest warrants. (RP v. 48, pp. 88-89, 93.) Officers transported Tammam to the South Precinct, where drug recognition screening showed Tammam to be under the influence of cannabis and MDMA. (RP v. 9, pp. 41-42; CP 3473-89.)

En route to Harborview for a mandatory blood draw, Tammam told an ambulance technician that he had taken Ecstasy a couple of hours before the crash and that he smokes marijuana daily. (CP 3469-72, RP v. 48, p. 117.) Tammam remembered "waking up with dust and smoke around him, that he heard the police getting close, and that he took off running because he knew that he had warrants." (RP v. 48, p. 125.) At trial, EMT McCandless testified that this was medically significant because it indicated Tammam lost consciousness before awakening to the sound of the arriving officers. (RP v. 48, pp. 125, 144-145.)

Ms. Hor testified twice as to her version of events, first via declaration for summary judgment, and later via deposition that the City published at trial. (CP 3537-49, 4220-57; RP v. 42, pp. 78-80.) She testified that as Officer Thorp began walking towards their car, Tammam "for some unknown reason . . . reacted in fear, panicked, started his car, put it into reverse" and "accelerat[ed] to high speed as he left the park."

(CP 3537-49 at ¶ 7; RP *Id.*)[4]

In her declaration, Ms. Hor testified that as Tammam sped out of the park, Officer Thorp "jumped back into his car and raced after us with his emergency lights and siren activated." *Id.* In her deposition, she admitted that she did not actually see what Officer Thorp did, but was "sure he did like any officer would if someone pulled off like that." (CP 4220-57; RP v. 42, pp. 78-80.) She elaborated: "It's police nature. If someone pulled off fast, first thing to you is, why are they going off fast and chase them." (CP 4220-57.)

Ms. Hor also declared that she saw Officer Grant enter the park while Officer Thorp was confronting them, that Grant was the first to chase them out of the park, and that the officers were right behind them on Juneau with "lights flashing and sirens blasting." (CP 3537-49 at ¶ 9.) In her deposition, she could not recall whether Officer Grant was in the park, at the entrance to the park, or already at the intersection of Seward Park Avenue and Juneau when they flew past that location. (CP 4220-34 at pp. 91-94; CP 4235-57 at pp. 67-75).

Ms. Hor testified that Tammam "drove quickly but methodically," (CP 3537-46 at ¶ 12) and that the officers remained directly behind Tammam at the same rate of speed. (*Id.* at ¶11.) Tammam did not slow for any stop signs and continued accelerating the entire way up Seward Park Ave. (CP 4235-57 at pp. 74-75) She testified that "a couple blocks

[4] She did not know Tammam before that night. (RP v. 44, p. 7.)

after turning [south on] Seward," "a few seconds" before reaching Wilson, she heard Tammam "muttering under his breath" (or "under his voice") that "I'll stop if they stop" and "I can't lose them." (CP 3537-46 at ¶ 16.)

She recalled Tammam's vehicle "cresting at the top of the incline where Seward Park Ave. S. intersects Wilson and flying over the triangular ridge curb" with the "cruisers' flashing lights right behind us." (CP 3537-46 at ¶ 17). In her deposition, she testified with "confidence" that Officer Grant was "two to three car lengths" behind the Tammam vehicle and parked behind them. (CP 4220-57.) She testified that one to two seconds after impact Tammam, who like her had not been wearing a seat belt, jumped out of the car and began running away. (CP 3537-46 at ¶ 18.)

Data obtained from the airbag control module ("black box") from the vehicle Tammam drove indicated that five seconds prior to the crash, Tammam was traveling approximately 86 mph. (RP v. 39, pp. 76-77.) Tammam hit the rock wall at 61 mph.[5] (RP v. 39, pp. 76-77.) There are no known independent eyewitnesses who observed events transpire and could accordingly testify as to the officers' positions relative to Tammam throughout this four block stretch up Seward Park Avenue to the point of the crash. There are, however, four independent sources of information that corroborate the officers' statements and show Ms. Hor's story, with respect to both the officers' positions and Tammam's "mutterings," to be

[5] Tammam pled guilty to charges of vehicular assault/reckless driving under RCW 46.61.533(1)(A) and hit and run under RCW 46.52.020(5). (CP 3424-28.)

impossible under basic principles of physics.

2. Accident Reconstruction Expert Testimony.

At trial, Ms. Hor's accident reconstructionist, Mr. Stockinger, struggled to explain the basis for his assumption that Officer Grant was a mere 300 feet behind the accelerating Tammam vehicle, and never farther than 700 feet at the greatest. On cross-examination he admitted that plaintiff's counsel orchestrated his amended opinion.[6]

By contrast, the City's accident reconstructionist Nathan Rose testified without objection about: (1) the accident scene from photographs and on-scene measurements (RP v. 33, pp. 20-33, 38, 45); (2) the vehicles involved and their relative weights and speeds (RP v. 33, pp. 34-35, 54-55); (3) the data retrieved from the Cadillac's "black box" (RP v. 33, pp. 40-44); and (4) how he applies the laws of physics to test different versions of events utilizing a computer modeling program called PC Crash. (RP v. 33, pp. 66-99.)

Without objection, Mr. Rose (an engineer) opined that Ms. Hor's explanation of the distance between the Cadillac and the lead police car was physically impossible in light of the significant difference in acceleration rates of the two vehicles. (RP v. 33, pp. 99-100.) He further

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[6] Mr. Stockinger testified: "Well, to be straight, what I was repeating on here was what I was directed by Mr. Barcus. All right. I had met with Mr. Barcus and he requested some changes. This was based on, again, my guesstimate of the three to four hundred from the first. I had still not done any work having to do with the police cars. So this was a directive to just put the cars roughly that distance. They will move in and out, you know, like a spring or something of that nature, just put the cars in that area. That's where we were at this point." (RP v. 13, p. 29.)

concluded, without objection and on a more probable than not basis, that the officers' version of events was physically possible and likely. (RP v. 34, p. 101.)

Next, Mr. Rose narrated the contents of two animations prepared to distinguish the scenarios explained based on the physical evidence. (RP v. 34, pp. 101-11.) Finally, he rebutted Mr. Stockinger's testimony about how long it took Tammam to get out of the car post-crash based on the separation between the vehicles and Mr. Stockinger's flawed assumption that the acceleration capacities of the two vehicles was identical. Mr. Rose's tests of exemplar vehicles showed they were not identical by a significant margin.[7] (RP v. 34, pp. 112-114.)

Ms. Hor's attorney engaged in several hours of cross-examination and re-cross examination of Mr. Rose, challenging every aspect of his opinions. (RP v. 34, pp. 115-182; v. 35, pp. 1-80; v. 36, pp. 81-121,156-160; v. 37, pp. 161-171; v. 37, 28-34, 40-41.) At no time during the examination did plaintiff seek to have any of Mr. Rose's testimony stricken.[8]

William Neale, a visualization expert, then testified about his work

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[7] Counsel objected on grounds of relevancy and "argumentative" to Mr. Rose testifying about his opinions concerning Mr. Stockinger's approach, which were overruled. (RP v. 34, p. 112.) He made no other objections.

[8] During the direct exam of Mr. Neale, who followed Mr. Rose as a witness, Ms. Hor's counsel made a motion for a mistrial based on court-approved examination of Mr. Rose on redirect (RP v. 37, pp. 1-19), concerning Mr. Rose's evaluation of Mr. Stockinger's calculations. The court invited Ms. Hor to submit a brief outlining the basis for the motion (RP v. 38, pp. 159-160), which the trial court denied after further argument (RP v. 38, pp. 160-165). Ms. Hor has not assigned any error on appeal to this testimony or denial of a mistrial on that basis.

with Mr. Rose to digitally map the entire site (a process called photogrammetry) and to measure the acoustical characteristics of police sirens at this identical location. He testified, using illustrations, to his evaluation of the site lines acoustical qualities present at the scene. (RP v. 38 pp. 71-72.)

During Mr. Neale's direct examination relating to his opinions about whether a siren would have been audible over the engine noise of the Cadillac, opposing counsel objected for lack of foundation. (RP Vol. 38, p. 104, 106.) After the court allowed him to voir dire Mr. Neale, it overruled the foundation objection and allowed Mr. Neale to present his sound pressure decibel measurements taken on the scene, which contrasted engine noise with the decibel level of a speaking voice (recalling that Ms. Hor testified that Mr. Tammam was muttering his statements "under his breath"). (RP v. 38, pp. 109-118.) Ms. Hor never moved to strike any of Mr. Neale's testimony, opting instead to cross-examine Mr. Neale on all of his testimony, including that Tammam's comment would be inaudible at normal tones given the ambient noise of the engine. (RP v. 38, pp. 118-157.)

3. Evidence Concerning Tammam's Intoxication.

Mr. Tammam admitted in a pretrial declaration that he had ingested illegal drugs shortly before the encounter with the police and the crash. Specifically, he testified: "Before picking Channary up that night, I had smoked marijuana and taken ecstasy." (CP 2878-2880 at ¶ 6; Pltf/Pet Ex. 241 at p. 3.) Opposing counsel moved pretrial in limine to

exclude evidence of intoxication based on speculation and conjecture "either as to what did happen or as to what would have happened but for events that did not in fact, transpire." Judge Middaugh granted in part and denied in part this motion:[9] "The Court has allowed the statements of defendant Tammam [over defense objection] that the plaintiff said he made (that he would stop if they would stop chasing him) and the Court has also allowed in the drug use of the defendant Tammam . . . It will be us [sic] to the jury to decide based on all the evidence before it whether the defendant Tammam would have stopped driving fast and if so when. However, no expert or lay person may opine as to what defendant Tammam would have done." (CP 1944-1959 at p. 4.)

At trial the City called Dr. Andrew Saxon. Following extensive argument about the proffered scope of his testimony, the trial court permitted opposing counsel to voir dire the witness away from the jury. (RP, v. 12, pp. 1-18.) Dr. Saxon, a psychiatrist at the VA Puget Sound Health Care System, has expertise in the effects of MDMA, also known as ecstasy, the drug that Tammam admitted taking at about 10:00 p.m., a couple of hours before the crash. (RP v. 12, pp. 19, 28-29.) He testified on direct that MDMA is a psycho-stimulant that increases heart rate and blood pressure, causing hyper-arousal and potential disturbances in perception. (RP, v. 12, p. 21.) Peer reviewed articles and studies support his testimony about the effects of MDMA generally on cognition and

[9] Judge Middaugh was the assigned judge immediately preceding the assignment to Judge Ramsdell for trial.

behavior, and based upon studies regarding uptake and dosage – that he would have been impaired. (RP, v. 12, pp. 22-23.)

B. PROCEDURAL HISTORY.

The crash at issue occurred on May 18, 2006. (CP 592-595.) Ms. Hor reached the age of majority on October 30, 2007. The statute of limitations, tolled during her minority, was October 30, 2010. On May 8, 2009, she filed a Claim for Damages with the City. (CP 60-65.) Sixteen months later, on September 29, 2010, Ms. Hor filed her Complaint. (CP 592-595.) On that same date, the court issued its order setting the case schedule. (CP 4258-4263.)

Ms. Hor served the City with her Complaint on October 8, 2010, naming the City, Officers Thorp and Grant, and Omar Tamman (sic) as defendants. (CP 60-62.) On November 16, 2010, the City served Ms. Hor with its First Interrogatories and Requests for Production, asking in part for each person with knowledge relating to the claim and a description of that knowledge. (CP 60-62, 66-80.) Three months later, Ms. Hor responded, but did not describe her knowledge as to the incident. She did not report any statements purportedly issued by Tammam over the course of the four-block flight, as she would later offer. *Id.*

On March 8, 2011 – over four months after the already-tolled statute of limitations expired – Ms. Hor filed her Confirmation of Joinder, stating: "Plaintiff has been unable to locate defendant Omar Tammam as of March 8, 2011. Plaintiff is continuing her efforts to locate and serve defendant Omar Tammam." (CP 3990-91.)

On May 6, 2011, the City served Ms. Hor with a second set of discovery requests. She did not respond. (CP 3856-57, 3879-85.) On September 23, 2011, the City served a third set of discovery requests, asking for expert reports relating to her alleged damages. Again, Ms. Hor did not respond. (CP 60-62, 82-89.)[10]

On January 30, 2012, the discovery cutoff expired without Ms. Hor taking or requesting any depositions. *Id.* On February 12, 2012, the City filed its motion for summary judgment, citing her lack of evidence to support her claims. (CP 3399-3493, 3992-4022.) On February 21, 2012, Ms. Hor filed her opposition to the City's motion, claiming the officers were in "hot pursuit."

She averred that as she was screaming at Tammam to stop she heard him "mutter under his breath" that "I'll stop if they stop" and "I can't lose them." Ms. Hor attached a declaration from her expert opining that the officers had violated department policy by pursuing Tammam and citing research to support that Tammam's "muttered" statements must be true. (CP 3500-3831.)

On February 23, 2012, the City moved to strike Ms. Hor's late-disclosed Declaration, the hearsay statements of Tammam, and her expert's conclusory opinions under ER 702. (CP 3832-3899.) On February 27, 2012, the City filed its Reply. (CP 3900-3905.) The City also moved to bifurcate liability and damages issues. With trial just a few

[10] The deadline to change the trial date pursuant to KCLR 40(e)(2) was December 12, 2011. Neither party sought such relief. (CP 4258-4263.)

weeks away, the trial court denied the City's motion for summary judgment but explicitly reserved, for motions in limine, the objections the City had raised under CR 56(e). (CP 3969-3970.)

On February 28, 2012, Ms. Hor filed a Joint Confirmation of Trial Readiness that stated: "Omar Tammam has not been served and has not appeared." (CP 4036-38.) On March 7, 2012, consistent with her representation that Tammam had not been served, the City moved to amend the caption to remove in name the officers personally and Tammam, as a party against whom no judgment could be entered. (CP 4039-56.) Later that day, Ms. Hor moved for "emergency relief of a continuance" based on representations that (1) her health would not allow her to withstand the stress of trial; (2) counsel had just discovered that a retained expert had passed away; and (3) a treating physician was unavailable for live testimony. (CP 4047-56.) On March 8, 2012, the City filed its opposition, noting that Ms. Hor's expert passed away two years before the crash even took place. (CP 4057-68.)

On March 14, 2012, Ms. Hor responded to the City's Motion to Amend the Caption by advising that she had served Tammam by way of the Secretary of State pursuant to RCW 46.46.040 on February 16, 2012, which was two weeks before she affirmed that Tammam had *not* been served. (CP 4094-4126.)

On March 15, 2012, the court ordered the parties to appear on March 26, 2012 for motions in limine. (CP 4145-47.) Trial was scheduled to commence on March 19, 2012, but did not begin. (CP 4258-

63.) On March 20, 2012, Ms. Hor's counsel emailed the court that they were not available on March 26, 2012, needed additional time, and requested that motions in limine be delayed until a new trial date was issued. (CP 60-62, 111.)

On March 22, 2012, over the City's objection, the court issued: (1) an order continuing the trial to February 2013; (2) a new case schedule allowing for the discovery Ms. Hor declined to previously conduct; and (3) also struck the hearing on motions in limine. (CP 4148-53.) The evidentiary issues the City had raised on summary judgment but which the court deferred to motions in limine remained, accordingly, unaddressed. (CP 3969-70.)

On March 23, 2012, the City moved the court for an order determining that liability, if any, against the City could be several only. The City argued that because plaintiff had not served Tammam either in person or by any alternative means available under RCW 4.16, and because Ms. Hor's "service" on the Secretary of State was untimely and improper under the plain language of that statute, the court thus lacked jurisdiction to enter any judgment against Tammam for which the City could be jointly and severally liable.[11] On April 5, 2012, the court denied

[11] The City argued that because Ms. Hor had plainly not proceeded with her case against the City "in a timely manner as required by the court rules," she could not avail herself of the Court's construction of the admittedly "clumsy" language of RCW 4.16.170, as articulated in *Sidis v. Brodie/Dorhmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), to excuse her failure to timely bring Tammam into the case. (CP 37-131.)

the City's motion without prejudice.[12]

On November 15, 2012, the City of Seattle renewed its motion. (CP 184-499, 500-25.) Judge Middaugh denied it and instead granted Ms. Hor's motion asking the court to find her fault-free as a matter of law, such that, were the jury to find City fault, that fault would be joint and several with that of Tammam. (CP 526-27, CP 4264-4274.)

IV. ARGUMENT

A. MS. HOR IS NOT ENTITLED TO A NEW TRIAL.

(1) Ms. Hor Waived Any Appeal to Jury Instruction Nos. 21, 23 and 24 by Failing to Take Exception to Those Instructions (App.'s Assignment of Error Nos. 4-6; App. Br. at 36-38).

Under Washington law, "jury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *Peterson v. Littlejohn*, 56 Wn. App. 1, 12, 781 P.2d 1329 (1989). This rule is "so well established that the assembling of the cases is unnecessary." *Peters v. Union Gap Irrig. Dist.*, 98 Wn. 412, 413, 167 P.1085 (1917). Ms. Hor failed to take exception to Jury Instructions Nos. 21, 23 and 24 and, in so doing, waived any right to appeal the court's giving of those Instructions.[13] (RP v. 52, 13-16.) This Court should thus

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[12] The court ruled as follows: "So long as Plaintiff can demonstrate good faith efforts and due diligence in attempting personal service on Defendant Tammam, substitute service via the Secretary of State under RCW 46.64.040 is valid personal service as required by RCW 4.16.170. *Martin v. Triol*, 121 Wn.2d 135 (1993)." (CP 181-83.)

[13] Ms. Hor confusingly cites and discusses instruction 21 through 25, although she failed to explicitly assign any error to the trial court's giving of Jury Instruction No. 25. *Compare* (App.'s Br. Assignments of Error 4-6 *with* App.'s Br. at 36-38). To the extent

decline to address any alleged errors assigned to these instructions.

(2) The Jury Instructions, Including Numbers 21-25, Allowed Each Party to Argue Its Theory of the Case, Adequately Informed the Jury of the Law to be Applied, and Were Not Misleading.

In general, this Court reviews jury instructions de novo for errors of law. *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Jury instructions are proper if, when taken as a whole, they inform the trier of fact of the applicable law, do not mislead, and allow each party to argue its theory of the case. *Id.* at 633. A trial court "need not include specific language in a jury instruction, so long as the instructions as whole correctly state the law." *Id.* (internal citation omitted).

A party is entitled to a jury instruction if it has offered substantial evidence to support the instruction. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2 194 (1996). But appellate courts review a trial court's decision to submit jury instructions for an abuse of discretion. *Id.* Under this standard, an instruction that is legally accurate may also not be given because it is misleading. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001) (internal citation omitted). And even if an instruction is misleading, the moving party must further establish "consequential prejudice." *Id.* (citing *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 1265 (1994)).

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that Ms. Hor also attempts to assign error to Jury Instruction No. 25, she also failed to take exception that instruction. (RP v. 52, 13-16.) Although counsel discussed submitting written exceptions to the court during trial, none were filed.

To the extent that this Court does review Instructions 21 through 25, argument that they were "inherently misleading" misses the mark. (App.'s Br. at 37). Ms. Hor identifies no legal error or misplaced word that would lead to confusion. "Overemphasizing" the City's theory of the case is neither a fair characterization of the instructions, nor is it a basis for appeal on the current record. On appeal, Ms. Hor ignores the admonishment that instructions must be taken as a whole, and instead claims a nebulous confusion between whether Tammam was "reckless or negligent." (App. Br. at 37.)

However, both Jury Instruction 2 and the special verdict form make abundantly clear that Tammam was a negligent party, and the jury cannot hypothetically misunderstand what it is not permitted to decide.[14] A question for the jury was whether the City was *also* negligent, whereupon Jury Instruction 30 applied. Cumulatively these instructions were not confusing, and there is no basis beyond conclusory arguments to determine otherwise. Ms. Hor is not entitled to a new trial.

a. Jury Instruction No. 17

Ms. Hor originally proposed Jury Instruction 17, although she now challenges it as "unsupported by the evidence, misstat[ing] the applicable law, and only serv[ing] to encourage juror confusion." (*Compare* RP v.

[14] She also overlooks that Tammam's conviction was supported by substantial evidence in the record and that these instructions accurately convey the legal significance of his conviction. A party is entitled to a jury instruction if it has offered substantial evidence to support the instruction. *Stiley*, 130 Wn.2d at 498-99.

52, p. 12 *with* App.'s Br. at 28). However, this instruction correctly follows RCW 46.61.035, which served as the source of Ms. Hor's theory of municipal liability – a high speed pursuit by police vehicles with disregard for the safety of the public, namely Ms. Hor. At trial, Mr. Lindenmuth stated that "*I don't disagree with the language as appropriate language . . . .*" (RP v. 52, p. 14) (emphasis added).

Ms. Hor's reliance on *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 804 P.2d 659 (1991), is thus off base because there is evidence in the record regarding a "pursuit." Indeed, her argument to the jury was that the officers' "pursuit," and alleged violation of RCW 46.61.035, caused Tammam to drive into the rock barrier thereby causing injury. She testified about "lights flashing and sirens blasting" – the alleged chase. (CP 3537-49 at ¶ 9.) Her current objection to this instruction arises because the City argued at trial that the officers were not in pursuit at all and had no emergency equipment on as they drove up Seward Park Avenue to the crash site. (App.'s Br. at 29.)

Jury instructions are proper if they allow *both* sides to argue their theory of the case, which includes Ms. Hor. She took every advantage of Jury Instruction 17 by extensively arguing to the jury that the officers drove recklessly in a "dangerous" manner, *i.e.*, without due regard for the safety of others and in violation of the rules of the road. (RP v. 52, 60-61.) The absence of WPI 71.06 did not prejudice her theory or argument. The jury rejected simply rejected it.

Ms. Hor's arguments regarding Jury Instruction 17 fail to account

for a standard that bears repeating: jury instructions are proper if, when taken as a whole, they inform the trier of fact of the applicable law, do not mislead, and allow each party to argue its theory of the case. *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000). *Id.* Because this instruction meets this standard, the trial court did not abuse its discretion and Ms. Hor is not entitled to a new trial.

b. Jury Instructions No. 26 and 27 (App.'s Assignment of Error Nos. 2-3).

Ms. Hor assigns error to the trial court's instruction that the City had no duty to control Tammam's actions. She concedes that while this is "generally true," it was both legally and factually inaccurate under these facts. (App.'s Br. at 34.) She cites no cases that stand for the proposition that police owe a duty to control a third-party criminal driver.[15] Ms. Hor confuses the duty to drive with due care as articulated in RCW 46.61.035 (and Jury Instruction 17) with a distinct non-existent duty to separately control Tammam.

The primary dispute at trial was whether the police conducted a "pursuit" at all, which, among other things, required the jury to determine what actions or omissions the police took. Had the trial court instructed the jury as Ms. Hor advocates, it would have essentially ruled as a matter of law that the City should be held liable for affirmative conduct that it

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[15] Although this Court has held that a bus driver, who affirmatively provides the instrumentality of foreseeable injury from a criminal passenger, may be held liable for those damages. *Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007). However, that is not this case.

factually disputed. This was not an abuse of discretion, and it did not prevent Ms. Hor from arguing her theory notwithstanding.

Ms. Hor's citation to *Tao v. Li*, 140 Wn. App. 825, 166 P.3d 1263 (2007), is inapposite because *Tao* hinges exclusively on an agency relationship between the driver of one vehicle and a second driver compelled to keep up. There is no special relationship and certainly no agent-principal relationship here between the police and Tammam. Imposing a duty to control a fleeing suspect would also ignore the U.S. Supreme Court's observations about the inability of police to control the actions of fleeing suspects. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769 (2007).

Simply put, it would have been a legal error to instruct the jury on a legal duty that does not exist. The jury was instructed about a duty to drive with due care. The trial court did not abuse its discretion in declining to follow Ms. Hor's arguments. Ms. Hor fully advocated her theory of liability – essentially that the City should be held liable for Tammam's actions – and Jury Instructions 26 and 27 are correct statements of the law, not grounds for a new trial.[16]

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[16] Ms. Hor assigns error to the trial court's failure to give her proposed instruction 18 regarding the "basic speed rule." (App.'s Br. at ii (Assignment of Error No. 7).) However, she fails to address this argument, cite any case law on point, or explain this assignment in the body of her brief. This Court should therefore treat her failure to address this issue as a waiver of any argument. To the extent that this Court addresses this issue, the trial court gave Jury Instruction 16, which mirrors Ms. Hor's proposed instruction and omits only the speed limits. This was neither a legal error nor an abuse of discretion; and it did not prejudice Ms. Hor's ability to argue her theory of the case because the speed limits were testified to during the course of trial.

(3) The City is the Real Party in Interest and the Trial Court Properly Removed Officers Grant and Thorp Under Civil Rule 21 (App.'s Assignments of Error 8).

Civil Rule 21 permits the trial court on motion of any party, or on its own, to drop a party from the action on such terms as are just. The application of CR 21 is "within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a manifest abuse of that discretion." *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (internal citations omitted).

Civil Rule 17 also provides that civil actions are to be prosecuted by and against the real parties in interest. As even the case law cited by Ms. Hor observes: "several courts have held that the employee is a proper party but not a necessary party in a respondeat superior action against the employer." *Orwick v. Fox*, 65 Wn. App. 71, 81, 828 P.2d 12 (1992) (citing *Cobbin v. County of Denver*, 735 P.2d 214, 217 (Colo. App. 1987)).

Unlike claims of employer negligence separate from the conduct of its employees, any City liability here derived solely from the alleged negligence of Officers Grant and Thorp within the scope of their employment. *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 47-48, 929 P.2d 420 (1997); *Kuehn v. White*, 24 Wn. App. 274, 277-78, 600 P.2d 679 (1979). Because there was no dispute as to whether Officers Thorp and Grant acted entirely within the scope of their employment, and the City was thus the real party in interest with respect to Ms. Hor's claims, the trial court did not abuse its discretion in dismissing the officers at

trial.[17]

The trial court also did not abuse its discretion because Ms. Hor was not prejudiced in any way. The jury instructions explained the extent to which the City could be held liable *only* via the alleged negligence of its employees: Ms. Hor must show "that the co-defendant City of Seattle, *through its employees*, acted or failed to act . . . and in so acting . . . was negligent." (CP 2913 (Jury Instruction 6 (emphasis added)); *see also* CP 2909-2910 & 2920 (Jury Instructions 2-3 & 13).) Because there was no confusion on behalf of the jury, the trial court did not abuse its discretion in removing two officers as named defendants.

Ms. Hor attempts to fashion a due process violation regarding this dismissal, but misunderstands the standard of review and the process by which the trial court released Officers Grant and Thorp. Ms. Hor also advocates in favor of a fault allocation against both officers (App.'s Br. at 41), but forgets that the jury found the City was not negligent for their conduct. Without negligence and proximate cause, a jury never reaches fault allocation.

Having thus been instructed that the City was responsible for the officers' actions, and having determined that the City was not negligent, the jury could not have found otherwise had the officers been named individually. As the jury verdict informs, they never reached that point with the City or, by definition, the officers acting on the City's behalf.

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[17] See CP 4118-4126 (Pl.'s Am. Resp. to City's Mot. to Am. Case Caption); CP 4142-43 (Or. Granting City's Mot. to Am. Case Caption).

Ms. Hor is not entitled to a new trial on this basis.

(4) Dr. Saxon's Testimony Regarding Marijuana and Ecstasy Was Properly Admitted (App.'s Assignment of Error Nos. 11-12 & 15).

Under ER 401, 403, 702, and 703, plaintiff challenges the admissibility of Dr. Saxon's expert testimony. Admission of expert testimony falls within the trial court's sound discretion, which should also not be disturbed absent an abuse of that discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004); *Reese v. Stroh*, 128 Wn.2d 300, 307-310, 907 P.2d 282 (1995). The trial court must consider whether an expert could opine to "a reasonable probability rather than mere[ly] conjecture . . . ." *Davidson v. Munip. of Metro. Seattle*, 43 Wn. App. 569, 571, 719 P.2d 569 (1986).

Ms. Hor asserted that Tammam would have ceased to run if only the officers had stopped. She introduced a sworn statement from Tammam (an improper party opponent), although it was purely speculative what Tammam would have done. However, during her opening statement Ms. Hor also introduced information about Tammam's consumption of marijuana and ecstasy (MDMA) prior to driving. (RP v. 4, pp. 27.)

To rebut plaintiff's speculative theory and demonstrate the lack of a proximate cause link between the officers' driving and Tammam's conduct, the City introduced testimony via Dr. Saxon about marijuana and ecstasy. Dr. Saxon testified that ecstasy causes hyper-arousal, as well as

memory, concentration, and cognitive impairment, and can cause anxiety and irritability. (RP v. 12, p. 21.) He testified on cross examination that: "I think that knowing that the blood level of MDMA [ecstasy] in his [Tammam's] body at the time of the taken, I can say with a very great degree of medical certainty that he would have been too intoxicated and impaired to drive a motor vehicle safely at the time that he was driving a motor vehicle." (RP v. 12, p. 51.)[18]

Under ER 401, relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ms. Hor did not contemporaneously object to testimony from Dr. Saxon regarding ecstasy generally, which was relevant to the jury assessing the reliability and credibility of Tammam's alleged statements made while fleeing up Seward Park Ave. moments before hitting the rock wall. (RP v. 12, p. 21.) If Tammam consumed ecstasy and was impaired during the short flight, then his statement about what happened would be discredited.

Washington law also permits a jury to "look at *all* of the proximate causes of the collision and its consequences" rather than ignoring, as Ms. Hor advocates, "how much more responsibility for the injury [to plaintiff] was attributable to the defendant who might have been intoxicated or speeding." *Amend v. Bell*, 89 Wn.2d 124, 130-31, 570 P.2d 138 (1977) (holding defendant attorney could not simply admit that failure to yield as

[18] Ms. Hor's counsel elicited this answer in cross-examination and did not object or move to strike it from the record. He cannot complain about this testimony now.

cause of collision, thereby precluding plaintiff from introducing evidence of intoxication) (emphasis added). Ms. Hor asks this Court to only allow her evidence of what Tammam allegedly said and keep the jury from hearing evidence relevant to his state of mind while fleeing. Judge Middaugh rejected this approach at the argument on motions in limine. The trial court rejected it as well. Admitting Dr. Saxon's testimony was not an abuse of discretion.

Even the authority she relies upon, however, observes that individuals who drive while under the influence may be held civilly liable for damages caused by that driving. *Purchase v. Meyer*, 108 Wn.2d 220, 224, 737 P.2d 661 (1987) (citing *Burget v. Saginaw Logging Co.*, 197 Wn. 318, 321-22, 85 P.2d 271 (1938)); *cf. Lubliner v. Ruge*, 21 Wn.2d 881, 884-85, 153 P.2d 694 (1944); RCW 46.61.506(1) & (2)(c). ER 102 also importantly reminds that the Rules of Evidence shall be construed "to secure fairness in the administration, . . . and promotion of growth and development of the law of evidence to the end that the truth be ascertained and proceedings justly determined."

Expert testimony under ER 702 also applies a basic two-step inquiry, both of which have been met: whether a witness qualifies as an expert and her testimony would be helpful for the trier of fact, *i.e.*, outside the expertise of laypersons. *Reese v. Stroh*, 128 Wn.2d 300, 305-306, 907 P.2d 282 (1995).[19] This Court has also long held that an expert may opine

[19] Ms. Hor does not appear to challenge Dr. Saxon's qualifications or that laypersons would lack knowledge regarding the effects of taking ecstasy and marijuana.

regarding the quantity of a foreign substance in the body at the time of driving and its importance to that persons alleged impairment. *City of Seattle v. Personeus*, 63 Wn. App. 461, 464-65, 819 P.2d 821 (1991) (holding trial court erroneously excluded criminal defendant's expert on the rate of alcohol burn off).

Ms. Hor instead challenges that Dr. Saxon lacked a basis to testify about Tammam's intoxication from ecstasy and marijuana, which relied on three pieces of evidence: (1) Tammam's statement to EMT McCandless that he consumed ecstasy around 10 p.m.; (2) his blood draw at 4:08 a.m. indicating a significant marijuana and ecstasy still in his blood stream; and (3) the rate of uptake of ecstasy. ER 703. However, Ms. Hor articulates no reason why Dr. Saxon could not reach his opinions beyond conclusory evidentiary assertions – she proffered no expert to rebut this conclusion.

Ms. Hor instead claims that Dr. Saxon should not be permitted to rely on a peer-reviewed study regarding ecstasy uptake – consistent with other prior studies – to determine that Tammam consumed considerably in excess of 100 milligrams of ecstasy prior to driving. (RP v. 12, pp. 28:4-29:25.) This dosage was more than adequate to impair his ability to drive. (RP v. 12, p. 21:19-7.) However, Ms. Hor fails to identify any flaw with the underlying science, and Dr. Saxon's reliance on peer-reviewed literature does not constitute a novel scientific approach. *Cf. Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 919-20, 296 P.3d 860 (2013).

Furthermore, this case is distinguishable in multiple respects from

the biomechanical study at issue in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), which involved studies and testimony about everyday G-forces that was likely to mislead by creating an implied threshold for injury. Ms. Hor's reliance on *State v. Lewis*, 141 Wn. App. 367, 388-89, 166 P.3d 786 (2007), is also misplaced because it involved another drug, methamphetamine, and a criminal defendant's theory that the dosage at issue would make a victim would more likely to be the "aggressor" or "act violently" for purposes of a self-defense claim. The issue in *Lewis* was not whether the victim would have been safe to operate a car, which almost certainly he was not. *Id.* at 387-88 (expert opined that "[t]here's a lot of methamphetamine in there.").

Similarly, Ms. Hor reliance on *Madill v. Los Angeles Seattle Motor Exp., Inc.*, 64 Wn.2d 548, 392 P.2d 821 (1964) ("more than one bottle of beer is conceivable") and *Bohnsack v. Kirkham*, 72 Wn.2d 183, 432 P.2d 554 (1967) (consumption of one or more drinks "some" hours before collision, but with only the "stale" smell of alcohol) falls equally flat. Whether one or two drinks *hours* in advance of driving caused impairment is vastly different than whether the quantity of ecstasy *and* marijuana actually found in Tammam's bloodstream, calculated based on the time of consumption and the time of blood draw, was sufficient to impair his driving at the time of collision. *Personeus*, 63 Wn. App. at 464-65. The quantity was sufficient and Dr. Saxon's testimony, including that elicited on cross-examination, stands unchallenged in the record.

The trial court exercised its sound judgment to permit the jury to

consider competing theories about the significance of these drugs. Tammam's intoxication while driving also implicates his recollection, as well as the full scope of Tammam proximate causation of Ms. Hor's injuries. There is no support for the position that the jury gave this information undue weight, and Ms. Hor is not entitled to a new trial.

(5) The Trial Court Properly Admitted the Testimony of Reconstructionists Neale and Rose (App.'s Assignment of Error Nos. 13 & 15).

Although Ms. Hor argues otherwise, Washington courts have a long history of admitting testimony from qualified accident reconstruction experts. *See, e.g.*, *State v. Phillips*, 123 Wn. App. 761, 767-68, 98 P.3d 838 (2004); *State v. Quiros*, 78 Wn. App. 134, 136, 896 P.2d 1158 (1995); *State v. Hanna*, 123 Wn.2d 704, 707-708, 817 P.2d 135 (1994).

Two Washington Courts of Appeal have likewise considered use of the accident reconstruction software at issue here, PC-CRASH, one validating use of the software for single-impact crash analysis, *see Phillips*, 123 Wn. App. at 767-68, but excluding its use for a multi-impact collision regarding interior-occupant movement, and based on a different version of the software: *State v. Sipin*, 130 Wn. App. 403, 419-20, 123 P.3d 862 (2005) (holding specific version of software not accepted in the scientific community at that time).[20]

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[20] Ms. Hor relies on generic arguments that are contrary to *Phillips*, and draw no parallel to *Sipin* or its discussion of a *different* program (or the general acceptance of PC-CRASH in the field since 2004). *See, e.g.*, *Hiropoulos v. Juso*, No. 2:09-CV-307 JCM (RJJ), 2011 WL 3273884, at *1-3 (D. Nev. July 29, 2011) (admitting PC-Crash analysis relying on event-data recorder); *Moon v. United States*, No. 08-Civ-1990(FM), 2011 WL 181741, at

This case involves the former scenario of a single-impact collision of a car-to-rock-barrier, rather than the latter involving the impact of a car-to-a-pole-to-a-tree. Ms. Hor, however, again fails to even discuss *Phillips*, or account for its guidance. The admission of testimony from Mr. Neale and Mr. Rose did not amount to an abuse of discretion.

Moreover, despite reversing the criminal conviction in *Sipin*, this Court approved of the approach (from persuasive jurisdictions) that the admissibility of computer-generated models requires a sufficient showing that: (1) the computer functioned properly; (2) the input and underlying equations are sufficiently complete (and provided for challenge); and (3) the program is generally accepted in the appropriate community of scientists. *Sipin*, 130 Wn. App. at 415-16. On appeal, however, Ms. Hor does not argue that these conditions have not been satisfied. She likewise does not argue that the testimony by Mr. Neale and Mr. Rose would not aid the jury, or that they were somehow unqualified. ER 702.

Ms. Hor instead asserts that under ER 703 the opinions offered were "inherently unreliable" because of a multitude of random variables. She cites *Solis v. So. Cal. Rapid Transit Dist.*, as persuasive authority for this proposition, although she fails to account for progress in technology since 1980 or Solis' expert who watched a speedometer as the basis for his speed variable. 105 Cal. App. 3d 382, 389-90 (1980). Unlike *Solis*,

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*4-6 (S.D.N.Y. Jan. 13, 2011); *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113, 1118 (D. Utah 2007); *Balderas v. Starks*, 138 P.3d 75, 81-83 (Utah Ct. App. 2006).

however, this case involves a Cadillac with an in-car black box system to monitor Tammam's vehicle speeds and other critical information. Mr. Rose and Mr. Neale's failure to measure the parking lot is of no moment, and cannot fairly be characterized as a "random variable" of any significance.

Despite being provided a trove of data to challenge Mr. Rose and Mr. Neale's calculations and testimony, Ms. Hor again identifies no miscalculations. She points out no flawed data entries. Rather, she attempts to distinguish her own expert's testimony, Mr. Stockinger, who stunningly admitted that he had performed no calculations as to officer speeds but rather crafted his opinions to counsel's versions of events. (RP v. 13, p. 29.)

Ms. Hor's efforts are an effort to undo the extent to which her own accident reconstrutiontist's analysis lacked a mathematical, physical, or sound methodological basis. Moreover, even absent testimony from Mr. Neale and Mr. Rose, there was still ample evidence from which the jury could conclude that it was more probable than not that Tammam was out of sight of the officers while fleeing. As with Dr. Saxon, admitting testimony from Mr. Neale and Mr. Rose did not constitute an abuse of discretion and does not warrant a new trial.

(6) The Trial Court Did Not Abuse its Discretion in Admitting Mr. Partin's Testimony About Blended Portfolios, Future Costs, or Discount Rates (App.'s Assignment of Error Nos. 14-15).

Ms. Hor challenges the expert testimony of economist Bill Partin, which is again governed by Evidence Rules 702 and 703. As with the prior experts, she does not challenge Mr. Partin's qualifications or assistance to the jury, but instead challenges that his discount rate calculations do not comply with a methodology "reasonably relied upon by experts in the particular field in forming [his] opinions or inferences upon the subject . . . ." ER 703.

Ms. Hor relies on *Barth v. North*, 36 Wn. App. 400, 674 P.2d 1265 (1984), which granted a new trial on after-the-fact discovered evidence central to the risks of sodium pentothal. That case and its analysis bear no resemblance to this case. By contrast, Ms. Hor cross-examined Mr. Partin about the article he cited supporting the position that forensic accountants routinely use his method of calculating a discount rate portfolio by using a component of conservative stocks such as those found in the S&P 500. (RP v. 47, pp. 40:19-45:4.)

Even Ms. Hor's post-trial submitted declaration from Neil Beaton admits possessing at least a "faint recollection that a few economists . . . may have used corporate bond returns in discounting such losses . . . ." (CP 2986.) This is a far cry from the "clearly erroneous" and uncorrected testimony in *Barth*, and hardly supports the conclusion that Mr. Partin's methodology falls short of reasonable experts in the field. 36 Wn. App. at

405 (additionally holding court failed to instruct that there was no informed consent as a matter of law).

Ms. Hor further argues that Mr. Partin testified about matters outside the scope of his expertise when performing future medical cost calculations, which depended on the wages (and the growth of those wages) over Ms. Hor's expected lifespan. Aside from an initial objection regarding the foundation for Mr. Partin's testimony on this issue, however, which the City cured, Mr. Partin testified at length without objection. (*Compare* RP v. 45, pp. 49:12-50:23 *with* RP v. 45, pp. 50:25-60:24.) Her arguments are thus waived.

To the extent that this issue may have even been adequately preserved, modern trial practice "clearly envision[s] experts' reliance on hearsay," and leaves it to cross examination to explore "the full burden . . . of the facts and assumptions underlying the testimony . . . ." *Cornejo v. State of Washington*, 57 Wn. App. 314, 325-26, 788 P.2d 554 (1990) (holding no abuse of discretion in permitting economist to testify regarding annuities) (citing 5A K. Tegland, Wash. Pract., *Evidence* § 306, at 453 (1989)).

When a plaintiff's "objection to the evidence presented . . . appears to be primarily that it conflicts with the opinion of [her] own expert," a trial court does not abuse its discretion in permitting a jury to hear the evidence. *Id.* at 328. This instance is no exception, and Ms. Hor is not entitled to a new trial on the basis of Mr. Partin's testimony.

(7) Ms. Hor Failed to Timely Object to Counsel's Opening Statement, Which Properly Stated the Law, and Does Not Amount to Misconduct (App.'s Assignment of Error Nos. 9-10).

Under Civil Rule 59(a)(2), misconduct of a party is grounds for a new trial if the misconduct materially affects the substantial rights of the moving party. *Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 993 P.2d 856 (2000) (further noting that in civil cases, "where life and liberty are not at issue," this standard "more generally upholds trial courts decisions"). The moving party must establish that the "conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record . . . ." *Id.* at 539 (internal citation and quotation omitted). Critically, the moving party must contemporaneously object to the misconduct at trial, the remarks must have been substantially likely to affect the jury's verdict, and the misconduct must not have been curable by a court instruction. *Id.*; *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521-22, 105 P.3d 400 (2004).

As closer review of cases cited by Ms. Hor reveals, contemporaneous objections are paramount because "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153, 156 (1960) (internal citation omitted). If no objection was made, the misconduct must be so flagrant that no admonishment to disregard could

suffice to remove the harm. *Carabba v. Anacortes Sch. Dist. 103*, 72 Wn.2d 939, 954, 435 P.2d 936 (1967); *Bellingham*, 125 Wn. App. at 521-522.

In a case specifically considering the alleged injection of "insurance" into a trial, the Washington State Supreme Court reviewed the trial court under the abuse of discretion standard: "[t]he trial court is given the discretion to determine whether appellant has been deprived of a fair trial by reason of the injection of an immaterial issue." *Church v. West*, 75 Wn.2d 502, 505-506, 452 P.2d 265 (1969). Because "[t]he trial judge is in the courtroom and can evaluate first hand the statements made and what effect, if any, they have on the jury . . . the absence of a showing of abuse of such discretion" is not a basis for a for a new trial. *Id.* at 506 (citing *Baxter v. Greyhound Corp.*, 65 Wash.2d 421, 397 P.2d 857 (1964)).

Church is instructive here because it involved no explicit use of the term "insurance" or "deep pockets," but rather an off-handed introduction by the trial court that one attorney was on "offense," while the other "defense." 75 Wn.2d at 505. On appeal, it was argued that this reference and mention of the defendant's employment prejudicially "injected the issue of insurance" into the case. *Id.* The Court rejected that reasoning, however, observing that Washington law requires "deliberate or wanton injection [of insurance] . . . for purposes of prejudicing a jury is grounds for mistrial." *Id.* at 505-506 (citing *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966)); *see also King v. Starr*, 43 Wn.2d 115, 117-18, 260 P.2d 351 (1953) (granting a new trial where defendant directly commented

in opening statement that "[t]he defendants have no insurance.").

However, this Court observed in another case involving opposing counsel, Mr. Barcus, that even if another attorney injects "insurance" into a case, "a prompt objection and subsequent instruction could have cured the error." *Elsemore v. Grenell*, 140 Wn. App. 1030, 15 (2007) (distinguishing *King, supra*, and holding that even if opposing counsel committed misconduct, and assuming plaintiff did not raise inferences of insurance in lawsuit involving Safeco, contemporaneous objection and a curative instruction was proper remedy, *i.e.*, such conduct was not so willful, wanton, or egregious as to warrant a new trial); *see also Williams v. Hofer*, 30 Wn.2d 253, 265, 191 P.2d 306 (1948) (observing that the fact of a defendant carrying insurance is "is essentially prejudicial to the defendant").

Ms. Hor asserts that the City attempted to introduce "insurance," or its "deep pocket," or joint-and-several liability during opening statement. (App.'s Br. at 57.) However, review of the plain record reveals that the only reference to "joint" liability may be traced to Mr. Barcus' opening statement: "So we are going to ask you to assess joint responsibility." (RP v. 4, p. 30 (emphasis added).) Mr. Barcus then spoke about finding that the City has a "shared responsibility" with Tammam, and that it should be apportioned a percentage of fault. (*Id.*)

In response to this, however, the City correctly summarized the law: before allocating percentages of responsibility, "you have to find, and that what this case is about, 100 percent negligence on the part of the

City." (RP v. 4, pp. 47-48.) In short, without complete negligence there is no apportionment of damages of any type; the jury should not begin with a premise of simply dividing the pie between Tammam and the City. The word "insurance" is nowhere to be found. And neither is the term "deep pocket."

Equally absent from the passage cited by Ms. Hor as gross misconduct is her contemporaneous objection, which she failed to make. Ms. Hor thus asks this Court to hold that the trial court abused its discretion in failing to grant a mistrial based upon the absence of the words "insurance" or "deep pocket," when she failed to object and was the only party that introduced the concept of "joint responsibility" in opening statement. She also fails to address Jury Instruction 32 that explicitly told the jury that insurance "has no bearing on any issue that you must decide." (CP 2940.) Ms. Hor's argument cannot withstand scrutiny.

Defense counsel's advocacy did not constitute a willful and wanton injection of facts outside of evidence into this case.[21] Although Ms. Hor moved for a mistrial rather than awaiting an advantageous verdict, the trial court did not abuse its discretion in denying her motion

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[21] Ms. Hor's attempts to stretch this case to the ambit of *Riley v. Dep't of Labor & Indus.*, 51 Wn.2d 438, 443-44, 39 P.2d 549 (1957), is misguided, as are her parallels to the due process rights of criminal defendants during closing argument. *Riley* does did not involve injecting insurance into the proceeding, but rather a style of argument in closing that was not objectionable for a specific statement, but the implication that plaintiff would be better off if the jury decided against her and in her employer's favor (rather than in her favor per se). 51 Wn.2d at 443-44. Such an argument was not "curable" by admonishment. *Id.* Subsequent cases that counsel has even participated in, including *Elsemore*, make it clear that contemporaneous objections are necessary (as are curative instructions), and Ms. Hor offers no explanation for why she failed to timely object. *Elsemore*, 140 Wn. App. 1030, 15 (2007).

for a new trial. When raised at trial, Judge Ramsdell gave the argument full consideration, viewed the comments as having been invited, and determined that they were of no moment. (RP v. 14, pp. 88-93.) Ms. Hor is not entitled to a new trial.[22]

B. On Cross Appeal, Because Ms. Hor Did Not Timely Serve Tammam or Comply With Applicable Court Rules, the Trial Court Lacked Jurisdiction to Enter a Verdict Against Him.

A court cannot enter judgment against a defendant over whom it lacks jurisdiction. *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938). A superior court does not have jurisdiction over a defendant until a plaintiff satisfies the service requirements in RCW 4.28.080 and CR 4. *In re Marriage of Logg*, 74 Wn. App. 781, 784, 875 P.2d 647 (1994). Service must be both timely *and* proper. RCW 4.16.005; RCW 4.28.080; CR 4.

Under RCW 4.16.080, an action for personal injury must be commenced within three years of the injury. RCW 4.16.190 tolls this period until a claimant reaches the age of majority, which occurred here on October 30, 2007. Ms. Hor thus had until October 30, 2010 to commence her action against the City and Tammam.

In general, an action commences when, within the periods prescribed by RCW 4.16 *et seq.*, a plaintiff serves a defendant under RCW

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[22] Ms. Hor's brief makes other references to statements of opposing counsel, but there is no corresponding assignment of error. (App. Br. at 61) She raised only a single objection during closing argument, which she does not cite here as a basis for her appeal. (RP v. 53, pp. 128-129.) As such, she has waived all other alleged "misconduct" challenges, particularly given the trial court's admonishment and instruction to the jury that the argument of counsel does not constitute evidence.

4.28.080. If he or she is a private person, a defendant must be served "personally or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." RCW 4.28.080(15). Where a "defendant cannot be found within the state," RCW 4.28.080(16) provides for service by first class mail.

Where a defendant has left the state to avoid the service of summons or keeps himself concealed within the state, RCW 4.28.100 alternatively allows for service by publication. Ms. Hor had until October 30, 2010 (three years past the age of majority) to serve Tammam either personally under RCW 4.28.080(15), by mail pursuant to RCW 4.28.080(16), or by publication pursuant to RCW 4.28.100. She failed to do so, and without reasonable excuse.

Ms. Hor confirmed at Trial Readiness on February 28, 2012, more than a year later, that Tammam had not been served. She then relied on purported February 16, 2012 service on the Secretary of State to establish personal jurisdiction over Tammam. This is a perversion of the intent and application of the service statutes.

Provisions like RCW 46.64.040 are in derogation of the common law. *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 377, 534 P.2d 1036 (1975). As a statutory creation, such service must be strictly pursued and result in substantial compliance. *Martin v. Meier*, 111 Wn.2d 471, 478-79, 760 P.2d (1988); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 351 (1965); *see also Lutkens v. Young*, 63 Wn. 452, 115 P. 1038 (1911); *but see First Fed. Sav. & Loan*

Ass'n of Walla Walla v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d 129 (1980).

Under CR 4, service pursuant to RCW 46.64.040 is deemed to be personal service if made "as provided" therein. RCW 46.64.040 provides corresponding but separate limits from those codified in RCW 4.16 *et seq.*, which sets a three-year limitations period for effecting service on the Secretary of State, *after which RCW 46.64.040 can no longer serve as a viable alternative to RCW 4.28.080 for service* (a period that expired on May 18, 2009). *See Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993) (three-year time limit provided in RCW 46.64.040 corresponds with the three-year statute of limitations).

Even if construed in conjunction with the tolling provisions of RCW 4.16.190(2), the three-year statute of limitations for serving Tammam via the Secretary of State expired on October 30, 2010. There is no valid reason why Ms. Hor could not have served Tammam pursuant to RCW 4.16.080(15) or (16), *before* October 30, 2010, nor did she put forth any valid reason for why at *any* point prior to February 16, 2012, she failed to deliver to the Secretary of State the Summons and Complaint.

Ms. Hor relied significantly on *Sidis v. Brodie/Dorhmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), and RCW 4.16.170 to argue that, having timely served the City, such service tolled the statute of limitations as to Tammam until February 2012. Because RCW 46.64.040 does not authorize the Secretary of State to operate as an agent for service beyond the limitations period, however, untimely service on the Secretary of State

cannot be proper. Regardless, *Sidis* does *not* toll the statute of limitations as to un-served defendants where a plaintiff has not proceeded "in a timely manner as required by the court rules . . . ."[23] *Sidis* does not stand for the proposition that a plaintiff, as here, may sit on her rights and mechanisms of service on a known defendant as prescribed by RCW 4.28.080(15) & (16) and RCW 46.64.040, while repeatedly representing to the trial court and her opposing party that the defendant had *not* been served before the scheduled trial. Indeed, the Supreme Court expressly adopted a timely-manner inquiry.[24]

Although statutes of limitations contain no tolling provisions contingent on a party's degree of diligence (and affirmatively provide viable options for timely service where, as here, a defendant purportedly cannot be found), Ms. Hor's late service on the Secretary of State in 2012 violates the public policy underlying statutes of limitations, and the integrity of the court rules, to the detriment of the City. For at least eight months following the crash and intermittently thereafter, Tammam was incarcerated. Ms. Hor was represented by counsel as early as May 8, 2009, when she filed her claim

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[23] In *Sidis*, the plaintiff brought suit against, and timely served, a stove manufacturer (Brodie/Dohrmann) within two years of his injury. Two additional defendants were brought into the action by means of a third party complaint within three years, but were not served during that time period. Acknowledging the statute's "clumsy" language, the Supreme Court held that service on Brodie/Dorhmann was sufficient under RCW 4.16.170 to toll the statute of limitations as to the other two later-served defendants.

[24] While it is true that RCW 4.16.170, literally read, tolls the statute of limitation for an unspecified period, that period is not infinite, as the court implied. "Plaintiffs must proceed with their cases *in a timely manner* as required by courts rules, and must serve each defendant in order to proceed with the action against that defendant." *Sidis*, 117 Wn.2d at 329 (emphasis added).

against the City. At that point (1) the statutory window for service on the Secretary of State pursuant to RCW 46.64.040 was open through May 18, 2009; and (2) Ms. Hor's option to serve Tammam pursuant to RCW 4.28.080(15) was available through October 30, 2010 – as was Ms. Hor's option to serve Tammam *either* by first-class mail pursuant to RCW 4.28.080(16) or by publication pursuant to RCW 4.28.100. None of these events occurred.

The term "good faith" is not defined in the statutes governing forms of service, but has otherwise been defined as:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, (4) absence of intent to defraud or to seek unconscionable advantage.

Black's Law Dictionary 713 (8th ed. 2004).[25]

Ms. Hor's original attorney conceded that he did not even *begin* his efforts to locate Tammam until August 2010, two months shy of the statute of limitations period and well over a year after filing a claim with the City, at which point he clearly anticipated filing a lawsuit. Regardless of whether counsel could personally locate Tammam, RCW 4.28 *et seq.* and RCW 46.64.040 both afforded alternative means for service that could have been effected within the statutory period. As to "diligence," a licensed attorney in

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[25] "Diligence" has similarly been defined as: "A continual effort to accomplish something. [Or] Care; caution; the attention and care required from a person in a given situation." Black's Law Dictionary 488 (8th ed. 2004).

Washington is expected to know (or have the ability to research) and comply with court rules and statutes necessary to establish jurisdiction. *See* RPC 1.1. A licensed attorney is expected to proceed with "diligence and promptness." *See* RCP 1.3. Rule of Professional Conduct 1.3, Comment 3, specifically notes:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.

See also Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006); *Matson v. Weidenkopf*, 101 Wn. App. 475, 3 P.3d 805 (2000); RPC 3.2 & cmt. 1.

With respect to "good faith," the question necessarily turns not only on whether counsel's omissions with respect to service were "honest" mistakes, but whether the same can be said with respect to outright, false representations to the court. Procedurally, after failing in any so-called "initial efforts" at service, Ms. Hor first attempted service on the Secretary of State on February 16, 2012. This was one month before the then-scheduled trial. Twelve days later (on February 28, 2012), she filed the Joint Confirmation of Trial Readiness wherein Ms. Hor failed to advise the court (or the City) as to her recent service on the Secretary of State, and she instead she affirmatively *denied* that Tammam had been served. (CP 4036-4038) ("Omar Tammam has not been served.")

On March 2, 2012, counsel stood before the court and represented

that they were "ready to go" to trial, without mentioning her purported service on the Secretary of State. On March 7, 2012 (12 days before then-scheduled trial), Ms. Hor moved to continue the trial *in part* on purported grounds that her health had deteriorated among other reasons. The fact that plaintiff had never even *contacted* this witness in this litigation – *despite disclosing him as a testifying witness and representing to the court his availability to testify at trial* – cannot be contradicted insofar as this witness died two years before this crash happened (a fact plaintiff ultimately conceded but did not disclose). This record cannot conform to the type of "diligence" that the *Sidis* Court contemplated in predicating, on "clumsy" statutory language, minimally late service. Ms. Hor failed to proceed "in a timely manner under the court rules." The trial court lacked jurisdiction over Tammam, and if this Court orders a new trial (which it should not), Tammam should be dismissed for lack of proper service.

C. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ADMITTING TAMMAM'S PURPORTED STATEMENTS THAT "I'LL STOP IF THEY STOP" AND "I CAN'T LOSE THEM."

Hearsay, as a general rule, is not admissible. ER 801(c); ER 802. Because Tammam was not a proper party, his purported "mutterings under his breath" are out of court statements offered to prove the truth of the matter asserted, *i.e.*, that the officers were "in pursuit" and that Tammam intended to stop if the police gave up. The statements do not meet any of the hearsay exceptions under ER 804(b). *See also State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999) (if an out-of-court admission by a party

is self-serving and is offered for the truth of the matter asserted, such a statement is not admissible under the admission exception to the hearsay rule).

Rather, the statements were offered to prove that but for the officers' presence, Tammam would not have crashed. The statements say nothing about *when* Tammam would have stopped, and admitting the statements invited the jury to improperly speculate that, if the City had abandoned its alleged pursuit over this 6/10 of a mile event, Tammam immediately would have begun driving safely. Particularly in light of the Supreme Court's guidance in *Scott v. Harris*, 550 U.S. 372, 385, 127 S. Ct. 1769 (2007), the prejudice of these speculative statements far outweighed any probative value. The trial court erred by admitting them.

(1) Tammam's Statement Was Not a Present Sense Impression.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). Critically, the offered statement does not describe or explain an event or condition. It is a statement of abstract or contingent intent, and it was an abuse of discretion to admit it against the City.

(2) Tammam's Statement Was Not an Excited Utterance.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). Both ER 803(a)(1) and (2) are narrowly interpreted to avoid admitting evidence where

particularized factors guaranteeing trustworthiness are not present. *State v. Ryan*, 103 Wash.2d 165, 173-74, 691 P.2d 197, 204 (1984).

Adequate indicia of reliability must be found for an out-of-court statement. "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Id.* (quoting *Huff v. White Motor Corp.,* 609 F.2d 286, 292 (7th Cir. 1979)).

A hearsay statement qualifies as an excited utterance under ER 803(a)(2) if (1) a startling event or condition occurred, (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the event or condition. *State v. Davis*, 141 Wn.2d 798, 843-845, 10 P.3d 977 (2000). To be admissible, the proponent must demonstrate, among other elements, that the statement was a spontaneous or instinctive utterance of thought and not the product of premeditation, reflection, or design. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 369-371, 966 P.2d 921 (1998) (citing *Beck v. Dye,* 200 Wn. 1, 9-10, 92 P.2d 1113 (1939)).

Tammam's purported statement, "I'll stop if they stop," does not meet the criteria of an excited utterance. Rather, as Ms. Hor explains it, his statement was muttered in response to her telling him to stop and: "What are you doing?" (CP 4227.) At best the statement reflects contemplation as to what he would do in contingent circumstances.

(3) Tammam's Statement Was Not a Then-Existing Mental Condition.

Under ER 803(a)(3), a statement of intent may be admissible under limited circumstances. "The existence of a plan or design to do a specific act is relevant to show that the act was probably done as planned, and the design or plan may be evidenced circumstantially by the person's own statements as to its existence." *Ford v. United Broth. of Carpenters & Joiners of Am.*, 50 Wn.2d 832, 836-837, 315 P.2d 299, 302 (1957) (citing Wigmore on Evidence, 3d ed., Vol. I § 102 & Vol. VI § 1725)).

Typically, the application of 803(a)(3) is limited to the conduct of a victim of a crime, an insured person, an injured person, or the stated intent of a criminal to commit a crime. *State v. Smith*, 85 Wn.2d 840, 854, 540 P.2d 424 (1975). To be admissible, the statements must be of a present existing state of mind, and must appear to have been made in a natural manner and not under circumstances of suspicion. *Id.*

In both *Ford* and *Smith,* the declaration offered under ER 803(a)(3) regarded the victim's statement of intent to go to a particular place at a particular time, and were offered to prove that the victim did go to those places at those times. Here, the statement is not offered to prove what *did* happen. The statement is offered to prove what *might have* happened.

Moreover, it is made under suspicious circumstances. The declarant does not relay his plan in an ordinary conversation. The alleged statement occurs while Tammam is actively attempting to evade the police. It cannot be offered to prove that, but for the officers' driving,

Tammam would not have crashed, and is thus inadmissible hearsay. The trial court abused its discretion in allowing in the statements over objection. If this Court grants a new trial, which it should not, these hearsay statements should be excluded.

V. CONCLUSION

To the extent that plaintiff has preserved the errors raised in this appeal, they generally fall into two categories: (1) challenges to jury instructions that properly state the law; and (2) challenges to the admissibility of expert testimony. She cannot overcome the standard of review for each of these categories of assigned error. The instructions are proper and gave both sides the ability to argue their theories of the case. The trial court did not abuse its discretion by admitting, almost entirely without objection, the testimony of the experts Saxon, Neale, Rose, and Partin. Further, the challenge to two sentences in counsel's opening statement was waived, invited, and in no way improper. The jury verdict in favor of the City, following nearly a month of a thoroughly tried case by experienced counsel, should stand as the final disposition of this case.

In the unlikely event the Court reaches the conditional cross appeal issues, Tammam was never a proper defendant, having never been timely served. Keeping him in as a party defendant was error, setting up joint and several liability and providing an arguable basis for Ms. Hor to testify to his alleged statements made in the car as those of a party opponent. If the case is returned for a new trial, Tammam should be removed from the case and his hearsay statements ruled to be inadmissible.

Respectfully submitted this 12th day of November, 2014.

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