92208-0

Supreme Court No.:

Court of Appeals State of Washington Division I - No.: 707612

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

CHANNARY HOR,

Petitioner,

vs.

CITY OF SEATTLE,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Channary Hor – a quadriplegic – the Plaintiff before the Trial Court, and Appellant before Division One of the Washington State Court of Appeals, seeks review of the Court of Appeals' decision which affirmed an adverse verdict and judgment in favor of the City of Seattle. Below, Petitioner asserted claims relating to a negligent police pursuit. The Court of Appeals affirmed despite the fact that the Trial Court, *inter alia*, violated the Petitioner's "inviolate" right to a jury trial guaranteed by the Washington State Constitution, Article 1, § 21, by refusing to include in the verdict form two individually named Seattle police officer defendants, who were involved in the police pursuit, without a determination of the merits of Petitioner's claims against them.

The Court of Appeals erred in not only failing to find that the Trial Court's actions had violated Petitioner's constitutional right to a jury trial, but also by not providing her relief due to profound and prejudicial instructional error.

This Petition for Review presents to this Court a significant question of law under the constitution of the State of Washington, and involves issues of substantial public interest, relating to governmental misconduct and the government's obligation to maintain public safety when engaging in law enforcement. The Court of Appeals opinion in this

matter, broadly conflicts with decisions of this Court as well as other Courts of Appeal decisions. See Rules of Appellate Procedure 13.4(b)(1), (2), (3) and (4).

II. THE COURT OF APPEALS DECISION

The Court of Appeals decision was filed on August 3, 2015 and is attached hereto as Appendices 1 through 32. The excerpts of the Trial Court's instructions to the jury are attached hereto as Appendices 33-41. (CP 2905-2943) The special verdict form which did not include the individually-named police officer defendants, is attached hereto as Appendices 42-44 (CP 2944-46). Plaintiff's proposed jury instruction No. 27 is at Appendices 45-46 and excerpts from the Trial Court's combined order on the parties' motions in limine are attached hereto as Appendices 47-52, (CP 1944,).

III. INTRODUCTION TO ISSUES PRESENTED FOR REVIEW

On May 17, 2006 Petitioner, then 16 year old, Channary Hor, was rendered a quadriplegic when a vehicle in which she was a passenger, crashed at a high rate of speed into a rockery wall, as a result of being pursued by Seattle police officers Grant and Thorp.

On September 29, 2010, Ms. Hor filed this lawsuit seeking damages not only against Omar Tammam, the driver of the vehicle in which she was a passenger, but also the City of Seattle and the two police

officers who were involved in the May 17, 2006 police pursuit, Officers Grant and Thorp. (CP 592-595).[1]

As a matter of fair mindedness, at the request of defense counsel Petitioner's counsel agreed to the entry of a stipulated order allowing the individual named officers to be removed from the case caption, only. The stipulated order was to ensure that during the pendency of the lawsuit the individual officers would not be negatively impacted with respect to their creditworthiness or effect their personal finances. (CB 2608-2611).

As developed in the course of pretrial and trial proceedings, it was undisputed that the Seattle Police Department, at the time in question, maintained a "restrictive pursuit policy" which precluded the initiation and/or continuation of a high speed pursuit for minor offenses. (Ex. 13) Under SPD policy the crime of "eluding," standing alone, cannot justify a high speed pursuit.[2] During the course of pretrial proceedings, the City and its officers, consistently in its pleadings and during the course of

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[1] As Ms. Hor was a minor at the time of the motor vehicle collision the statute of limitation was tolled until her 18th birthday. RCW 4.16.190. She had 3 years from the date she reached the age of majority to file this lawsuit. RCW 4.16.080.

[2] See, *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975). It is well recognized that high speed police pursuits are highly dangerous and when they go bad, which happens often, they have devastating consequences to innocent members of the public. See, *Seide v. State*, 875 A.2d 1259 (R.I. 2005); *Staley v. City of Omaha*, 73 N.W.2d 457 (Neb. 2006). Restrictive pursuit policies, such as those employed by the City of Seattle, have their origin in a study performed by Professor Geoffrey Alpert, Ph.D., *The Constitutional Implications of High Speed Police Pursuits under a Substantive Review Process Analysis; homeward Through the Haze, 27 U. Mem. L. REV. 599, 600 (1997) (Alpert); Day v. State 989 P.2d 1171, 1177 (Utah 1999).*

discovery, denied that they were pursuing the vehicle within which Ms. Hor was a passenger. Based on the City's unequivocal litigation position, Judge Middaugh, the initially assigned trial judge, granted plaintiff's motion in limine precluding the City and its officers from claiming a statutory privilege applicable to emergency vehicles operating with emergency lights and/or sirens, which is codified in RCW 46.61.035.[3] (Appendices 51)

Despite the City's litigation position that there was no pursuit, and that the officers had abided by the City's pursuit policy, it was established before the Trial Court that Officer Thorp first encountered Omar Tammam and Ms. Hor in a parking lot within Seward Park and was investigating for nothing more than a park curfew violation. In response to Officer Thorp banging on Mr. Tammam's window with a flashlight, a startled Mr. Tammam put his car into gear and began rapidly driving away from

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[3] As pointed out at Page 6 of the Court of Appeals' opinion, the Trial Court's ruling on this motion in limine was predicated on "estoppel principles". Generally the doctrine of judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking advantage by taking a clearly inconsistent position. See, *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.2d 13 (2007). Contrary to the Court of Appeals' observation on the same page, the fact that the judge who entered this ruling was not the actual trial judge is not a relevant consideration. See *Teter v. Deck,* 174 Wn.2d 207, 216 n.7 247 P.3d 336 (2012). Citing to *Shepard v. Gove*, 26 Wn. 452, 454, 67 P. 256 (1901). There was nothing tentative about Judge Middaugh's ruling on Petitioner's motion in limine and no further objection was required. See, *State v. Kelly*, 102 Wn.2d 188, 192-93, 685 P.2d 564 (1984) (parties not required to make further objections to preserve error when the court's ruling on motion in limine is unequivocal and non-tentative) Judge Middaugh's ruling addressed the City's pretrial actions, and nothing occurred during trial to warrant it's revision. Judge Ramsdell provided no rationale for disregarding the prior order of Judge Ramsdell.

the officer. Officer Thorp immediately jumped back into his patrol car and began a pursuit, which was joined in by Officer Grant who was patrolling near the park entrance in a second patrol vehicle. Though denying they pursued, both officers admitted they had initially engaged their emergency lights. (RP Vol. 17, p. 16-17).

Despite feigning a lack of recollection during the course of his deposition, Officer Thorp admitted to one of the defendant's accident reconstructionists that he was travelling between 60 to 65 miles per hour as he travelled **behind Officer Grant** southbound on Seward Park Avenue, (a residential street), while attempting to catch up with the Tammam vehicle. (Ex. 298, p. 5). According to the defense litigation position the officers were not engaged in a "pursuit", but were rather engaging in an "area search", supposedly without lights and sirens, within a residential neighborhood, while travelling between 60 to 65 miles per hour, in a 35 mile per hour zone.

Confronted with such information SPD Deputy Chief Kimmerer, who was the City's representative at trial, and a quasi-defense expert, testified that police officers have the legal authority to violate the rules of the road and disobey speed restrictions, even when they are operating without their lights and sirens, as required for the availability of the statutory privilege set forth within RCW 46.61.035. (RP Vol. 43,

p. 45-47). Defense counsel, during the course of his opening statement, asked the jury to rely on their personal experience where they may have observed police vehicles operating over the speed limit, even when it did not have their lights and sirens on. (RP Vol. 4, p. 46-47).[4]

Thus, even without considering Judge Middaugh's estoppel-based motion in limine ruling, the Court of Appeals' failed to recognize that under the unique factual posture of this case, Petitioner's proposed Instruction No. 27, (WPI 71.06), was not only supported by the facts, but necessary in order to dispel the defenses misleading and confusing misstatements of law, perpetrated by Chief Kimmerer and defense counsel during opening.[5]

After Mr. Tammam's car impacted the rockery, causing Ms. Hor's catastrophic injuries, he fled the scene. He was subsequently apprehended and evaluated by SPD Drug Recognition Officer Michl, who interviewed Mr. Tammam in the back of his patrol car, which had an operational internal video and audio recording system. (CP 40). Because such video

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[4] Ms. Hor testified that the police officers had their lights on the entire time. Richard Harvey, who resided at the location of the accident, testified that immediately after hearing the crash, he was able to observe from his window the police officers approaching the accident site with their emergency lights on. Thus, given the undisputed facts the Court of Appeals' observation that the police officers merely "followed Tammam's car" is factually inaccurate. (Slip. Op. 2).

[5] A need for the Plaintiff's Proposed Instruction No. 27 (WPI 70.06), was fully explained within Appellant's Briefing before the appellate court, and at the time of oral argument. Thus, the Court of Appeals' observation that such a position was an unexplained "bald assertion" is puzzling. (Slip. Op. 6).

and audio would have provided substantial evidence regarding Mr. Tammam's level of impairment, at or around the time of the collision, Petitioner repeatedly demanded the production of such video, which, without plausible explanation, was never produced by the City. Plaintiff was precluded at time of trial from discussing such evidence, despite the fact that the defense was able to present to the jury the testimony of a drug expert, who over Petitioner's objection was able to opine with regard to Mr. Tammam's alleged impairment. Mr. Tammam was never convicted nor pled guilty to any drug related offenses arising out of his misconduct on May 17, 2006.

Similarly, on May 17, 2006, both Officers Thorp and Officer Grant's vehicles were equipped with dash cams. Despite repeated demands, such dash cam videos of the events were never produced by the City. Again Petitioner was precluded from discussing the vanished videos before the jury.

As part of his investigation, Officer Michl completed a "probable cause" affidavit, based on information gathered at the scene, including information provided by Officers Thorp and Grant (Appendice 58). Despite the clear factual issues in this case, in part framed by the City's litigation position that there was supposedly no pursuit and thus no violation of City's no pursuit policy, the Trial Court excluded the affidavit

of probable cause, which provided an initial determination that Mr. Tammam had committed the crime of "eluding a police vehicle" by refusing to stop despite being chased by "marked Seattle Police cars with emergency lights on". (Ex. 42). Under the City's policy, eluding alone cannot justify a pursuit.

Trial on this matter commenced on June 4, 2013 and concluded on June 28, 2013, with the entry of a jury verdict against Mr. Tammam only.

In anticipation of case completion, on June 25, 2013 the trial court took "preliminary exception to jury instructions". (Appendice No. 52 - Clerk's Minutes p. 31).

On June 27, 2013, after the noon hour recess, the Trial Court took **additional exception to the jury instructions, which occurred under the circumstances where Petitioner's counsel was given the Hobson's choice of either making detailed exceptions and using up allotted time available for closing arguments, which according to the trial judge, had to be completed that day, despite the fact the time remaining in the day was already deficient given that the trial was complex, and 4 weeks in length. Literally at the time exceptions were being taken, only 2 hours remained in the Court day.**

Given the June 25, 2015 "preliminary exceptions" taken by Petitioner's counsel, it is puzzling that the Court of Appeals concludes that

the trial judge was not fully acquainted with plaintiff's full exceptions to instructions ,(and the reasons therefore), which **were not limited to, those exceptions which were taken on June 27, 2013 under prejudicial circumstances.**

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court violate Petitioner's "inviolate" right to a jury trial, under Washington State Constitution Article 1, § 21, by refusing to include the individually named officer defendants on the verdict form, when Petitioner's claims against them had not been dismissed on the merits, and when such non-inclusion was tantamount to a dismissal of meritorious claims under our laws and Constitution that should have been resolved by the jury?

2. Did the Court of Appeals apply the wrong standard of review to Petitioner's claim that her right to a jury trial had been violated by the non-inclusion of the individual defendants on the verdict form by requiring that the Petitioner established prejudice, when it has been previously recognized that when such a violation occurs, prejudice must be presumed, unless it is affirmatively show that there was no prejudice?

3. Did the Appellate Court err in its analysis of instructional error, by failing to give due consideration to the particular facts and issues in this case, when under the unique facts of this case, such errors served to

deny the Petitioner the ability to argue her theory of the case, (if not undermining the same), and resulted in instructions which were misleading and confusing and which overemphasized the defense's case?

V. STATEMENT OF THE CASE

As discussed above, Channary Hor, who was found by the Trial Court to be a fault-free Plaintiff, was horrifically and catastrophically rendered a quadriplegic in an incident where there clearly is a question of fact as to whether or not the individually named police officer defendants were concurrently negligent, and whether such negligence was a proximate cause of her horrendous injuries.[6] This innocent 16 year old victim, was provided an inherently flawed trial which undermined her quest for justice against the City of Seattle and two of its police officers. Video evidence, which would have gone a long way toward resolving factual disputes in this case were unavailable, and at least in one instance, the Michl video, was unavailable without any plausible explanation. SPD internal documentation which either refuted or served to impeach the government's litigation position, that there was no pursuit and/or violation of SPD pursuit policy, was also rendered inadmissible. The individual officers, whom the jury should have been allowed to allocate fault within its verdict, were removed from the case for all intents and purposes,

[6] See *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975).

without any proper jury determination of the merits of the Petitioner's claims against them. The instructions of the trial court were incomplete, an overemphasized the defense theory of the case and in many instances served to undermine the Petitioner's core theory of liability against the City and its defendant officers.

In response, the Court of Appeals issued an opinion which was equally as flawed, and which apparently misapprehended a number of Petitioner's arguments. The Court of Appeals, dismissively underestimates the likely impact the Trial Court errors had on the jury in this case.

As a result, Petitioner respectfully submits the following grounds for review by the Supreme Court of this case.

VI. REASONS WHY REVIEW SHOULD BE ACCEPTED

A. The Trial Court Denied Petitioner's Right to a Jury Trial by Refusing to Place the Individual Defendant Police Officers' Names on the Verdict Form Despite the Fact that She had Meritorious Claims Pending Against Them.

Article 1, § 21 of the Washington State Constitution provides under the heading of "Trial by Jury":

> The right of trial by jury shall remain inviolate, when the legislature may provide for a jury of any number less than 12 in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The right to trial by jury is inviolate and may not be impaired by either legislative or judicial action. See *Wilson v. Olivetti North America, Inc.*, 85 Wn.App. 804, 808, 934 P.2d 1231 (1997), citing to *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

As recently and forcefully found by this Court in the case of *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), any legislative or judicial act which prevents a jury from resolving issues of disputed material facts, on meritorious, non-frivolous claims, is violative of Article 1, § 21. As indicated in *Davis,* at Page 288, "the term inviolate connotes deserving of the highest protection and indicates the rights must remain the essential component of our legal system that it has always been." Here, it is simply undisputed that Petitioner, within her complaint brought valid claims of negligence against not only the City of Seattle, but also both of the individual named officers. It was and is undisputed, that at no time were such claims dismissed on the merits against the individual officers, and the case resolved by way of a jury trial against them.

It is well-established that even when respondent superior principles apply, the plaintiff, at his or her election, may sue the employer or employee **or both**. See *Orwick v. Fox*, 65 Wn.App. 71, 80, 828 P.2d 12 (1992), citing, *James v. Ellis*, 44 Wn.2d 599, 605, 269 P.2d 573 (1954).

When judicial action has resulted in a denial of the right to a jury trial to a party who is adversely affected by such error "Prejudice [is] presumed unless it affirmatively appeared that there was not, and could not have been, any prejudice." *Jones v. Sisters of Providence in Washington, Inc.*, 141 Wn.2d 112, 118-19, 994 P.2d 838 (2000), citing to *State v. Cuzick*, 85 Wn.2d 146, 150, 530 P.2d 288 (1975). A "harmless error" is an error which is trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." See *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995). Generally when a prejudicial error has occurred, and there is no way of knowing how it may have impacted and/or affected the jury in its deliberations it will not be deemed harmless. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.2d 583 (2010).

Here, quite plainly the Court of Appeals mistakenly presumed that the Petitioner had the burden of showing prejudice by the omission of the named individual defendant officers from the verdict form. (See *Slip.Op.* 15). The Court of Appeals was far too quick to assume that the jury's determination of non-liability on the part of the City overcame the above-referenced presumption of harm. Jury deliberations are a dynamic process and there is no way of telling what value this particular jury may have

placed on individual responsibility, as compared to entity liability. This is particularly so when it is undisputed that the City of Seattle had, "on paper", a detailed and well-thought-out pursuit policy. In contrast a reasonable juror, if afforded the opportunity to focus squarely on the individual accountability of the involved defendant officers, may very well have determined to impose liability against them, particularly considering that the jury could conclude that the officers were less-than candid with respect to the degree in which they pursued the Tammam vehicle and on the question of whether they abided and followed an otherwise proper pursuit policy.

Given the fact that the Trial Court, without any rational justification and/or excuse, failed to include the individual defendant officers on the verdict form, there is simply no way of knowing how such non-inclusion affected the jury's deliberation and the ultimate result. Given the absence of any way of discerning such impact, the presumption of prejudice simply cannot be overcome.

B. The Trial Court's Refusal to Give Petitioner's Proposed Instruction No. 27 (WPI 71.06) Under the Facts of This Case Was Prejudicial Error.

The Court of Appeals recognized that the propriety of any particular instruction is governed by the facts of the particular case, but unfortunately did not apply such principles. See *Fergen v. Sestero*, 182

Wn.2d 794, 803, 346 P.3d 708 (2015). (*Slip Op.* p. 3-4). The Appellate Court failed to apprehend that under one of the individual officer's version of events they were following the Tamman vehicle up Seward, reaching speeds up to 60-to-65 miles an hour, without lights and sirens on. Without Instruction No. 27, which provided a correct statement of law, (particularly given statements made by defense counsel and Deputy Chief Kimmerer), the jury was left with a false impression that such actions on the part of a police officer is completely permissible. WPI 71.06 is to the contrary and provides:

> At the time of this occurrence, [defendant's] vehicle did not qualify to be operating as an emergency vehicle. Accordingly, the driver of the vehicle was governed by the same rules and standards as applied to the operators of motor vehicles generally.[7]

The trial court's failure to give Proposed Instruction No. 27 denied the Petitioner an opportunity to argue her theory of the case and, given the evidence and argument presented below, the giving of Court's Instruction No. 17, (WPI 71.01) resulted in a set of instructions which were misleading and incomplete. See *Keller v. City of Spokane*, 145 Wn.2d 237, 249, 44 P.3d 845 (2002) (misleading instructions are grounds for

[7] Under the terms of RCW 46.61.035 an authorized emergency vehicle is only entitled to the benefit of the emergency vehicle privilege statute when using lights and/or sirens. See *Lakoduk v. Cruger*, 48 Wn. 2d 642, 296 P.2d 690 (1956).

reversal).[8] As is apparent, given the facts of this particular case, the giving of such instruction was clearly supported by the facts.

C. The Trial Court Erred by Giving Court's Instructions No. 26 and 27 Which Under the Facts of this Particular Case Undermined Petitioner's Theory of Liability.

In analyzing these two instructions it is suggested that the Appellate Court was overly concerned with legal niceties as opposed to the real and likely impact such instructions had on the jury when considering Petitioner's theory of liability in this case. (*Slip.Op.* Page 7-11)

The fundamental premise of the "science" applicable to high-speed police pursuits, is the notion that should a police officer discontinue a pursuit, the individual who is being pursued will stop fleeing and/or speeding, thus ending potential danger to members of the community. See, e.g., *The Constitutional Implication of High-Speed Pursuits*, 27 U.Mem. L.REV. 599, (1997) (Alpert) *Suwanski v. Village of Lombard*, 794 N.E.2d 1016 (L Ill. App. 2003). By informing the jury that the police had "no duty to control Mr. Tammam", Instruction No. 26 confusingly suggested to the jury that the involved officers had no duty to cease actions which foreseeably would influence Mr. Tamman's behavior.

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[8] Such error exists regardless of whether or not the trial court had a valid basis for revising the earlier trial court's motion in limine decision which precluded the City from taking advantage of RCW 46.61.035.

Under the circumstances of a police pursuit, police are **obligated** and have a duty to control and/or influence Mr. Tammam's behavior by ceasing to engage in the stimulus which was causing such behaviors. Beyond being misleading, confusing, and undermining Petitioner's case, Instruction No. 26 was absolutely unnecessary because no party in the case was asserting that a duty to control existed beyond the notion that police could foreseeably "control" Mr. Tammam's behavior by ending the pursuit. The cornerstone of Petitioner's theory of liability was that they were and could control Mr. Tammam's behavior by ceasing the pursuit and were negligent by failing to do so.

Instruction No. 26, not so subtly, suggested to the jury that Petitioner's theory of liability was legally unworthy of consideration. The instruction was an outcome determinative prejudicial error, and evidentially amounted to a directed verdict in favor of the City.

The same is true with respect to Instruction No. 27. While it is a general truism that "defendant City of Seattle owed plaintiff Chanary Hor no duty to protect her from Omar Tammam's criminal acts." It is doubtful that a reasonable jury would discern the subtle nuance that the police actually had "a duty to avoid negligently exacerbating danger", as being anything different. (*Slip Op.* P. 10) Again beyond being misleading and

confusing, this instruction otherwise served no purpose other than to undermine Petitioner's case.

D. The Court's Instructions to the Jury Detrimentally and Prejudicially Over-Emphasized the Defendant's Theory of the Case and Potentially Skewed the Allocation of Fault Between the City of Seattle and Co-defendant Omar Tammam.

The purpose of CR 51(f) (exceptions to instructions) is to assure the Trial Court is sufficiently apprised of any alleged error in the instruction so that it is afforded an opportunity to correct any mistake, thus avoid the inefficiency of a new trial. See *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000). In that regard, with due respect to the Court of Appeals, there is nothing within the terms of CR 51(f) which indicates any specific timing for the taking of exceptions, and it was error for the Appellate Court to assume that the preliminary exceptions taken on June 25, 2013 were in any way substantively or procedurally inadequate, or that the Trial Court was not fully apprised of Petitioner's objections.

Implicit in the terms of CR 51(f) is that it is mandatory for the Trial Court to provide adequate time for the taking of exceptions, "Counsel should be afforded an opportunity ...". When a court fails to provide adequate time or discourages the taking of detailed exceptions, appellate courts will nevertheless review instructions. See generally,

Ouimett v. E.F. Hutton and Co. Inc., 740 F.2d 72 (1st Cir. 1984); indeed, an appellate court from another jurisdiction held that when a Trial Court fails to give adequate time for the taking of exceptions, that all instructions must be viewed as being subject to exception and reversible. See *Grzadzielewski v. Walsh County Mut. Ins. Co., 297* N.W.2d 780, 783 (M.D. 1980), see also, 35 A.L.R. Fed. 727 (1977), at §6, (which provides that when a Trial Court fails to provide an adequate opportunity for a party to take exceptions, the rule does not apply).

In any event, it is humbly submitted that the Court of Appeals' analysis of Petitioner's exceptions, unduly placed form over substance and assumed, without a basis, that all exceptions to instructions must be taken at a singular point within trial court proceedings. There appears to be no such rule.

As correctly pointed out by the Court of Appeals, the Court's Instruction No. 2 informed the jury that it had already been determined as a matter of law that co-defendant Omar Tammam was negligent. With respect to Tammam's liability that is where the Court's instruction should have ended. Court's Instructions No. 23, 24 and 25, prejudicially and unduly emphasized the City's theory of the case to the prejudice of Petitioner. When crafting jury instructions, a trial court should take great care to take into account the dangers of unduly emphasizing any portions

of testimony, or one side's theory of the case. *State v. Monroe*, 107 Wn. App. 637, 27 P.3d 1249 (2001). When a court's instruction unduly emphasizes the facts or law in favor of one party, the other party has been deprived of a fair trial. *Samuelson v. Freeman*, 75 Wn. 2d 895, 454 P.2d 406 (1969).

Petitioner was found by the Trial Court to be fault-free. Thus, beyond the determination of damages, the issues which remain for the jury were the City's negligence and the allocation of fault. On the allocation issue, Instruction Nos. 23, 24 and 25 clearly overemphasized the City's theory of the case and prejudicially skewed the analyses by informing the jury that not only was Mr. Tammam negligent, but that he engaged in "vehicular assault" and that he behaved in a "reckless manner". Instruction No. 2 had already informed the jury that Mr. Tammam's negligence was a proximate cause of Petitioner's injuries. Instruction No. 25 was repetitious and stated a heightened degree of culpability compared to that of the City - "reckless driving".

Given the terms of Instruction No. 2, these instructions were absolutely unnecessary and only served to overemphasize the City's theory of the case and suggest that it was the opinion of the Court that Mr. Tammam's misconduct was substantially greater than that of the City, essentially commenting on relative culpability. Given the inflammatory

language within the instructions, it is respectfully suggested that such instructions were an improper comment on the evidence. See *Ketchum v. Overlook Hospital Medical Center*, 60 Wn. App. 406, 804 P.2d 408 (1991).

The court instructions made it a virtual impossibility for Petitioner to acquire a favorable result on her claims against the City and its defendant officers.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Supreme Court accept review of this case, which clearly meets the standards set forth without RAP 13.4(b)(1) – (4).

Dated this 2nd day of September, 2015.

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DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this 2ND Day of September, 2015, I caused to be served delivered to the attorney for the Respondents, a copy of **PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Supreme Court of the State of Washington, via the Court of Appeals, Division I, via legal messenger (original and one copy, plus filing fee of $200.00) to:

Court of Appeals, Division I
600 University St.
Seattle, WA 98101-1176

These documents were provided to Respondents' attorneys, via email and delivery via ABC Legal Messenger:

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DATED this 2ND day of September, 2015, at Tacoma, Pierce County, Washington.

Tiffany Dixon, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

Appendices

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHANNARY HOR, Appellant/ Cross Respondent, v. THE CITY OF SEATTLE, a Washington municipal corporation, Respondent/ Cross Appellant, OMAR TAMMAM, Defendant.	)	No. 70761-2-I DIVISION ONE UNPUBLISHED FILED: August 3, 2015

Cox, J. — Channary Hor appeals the judgment on an adverse jury verdict in this personal injury action. The trial court did not abuse its discretion in either giving its jury instructions or in refusing to give Hor's proposed instructions. Further, the trial court did not abuse its discretion in admitting the expert evidence that she challenges. Finally, the court did not abuse its discretion in denying her mistrial motion based on alleged misconduct of the City's counsel during opening statements. We affirm.

This action arose from a tragic accident on May 17, 2006. Before the accident, Hor was a healthy 16 year old. While riding as a passenger in a car

driven by Omar Tammam, she was rendered quadriplegic. Tammam crashed into a rockery after failing to negotiate a turn at a high rate of speed. Shortly before this crash, Tammam had sped away from a police officer who approached the car where he was seated with Hor in Seward Park.

Because the park was closed at the time, Officer Adam Thorp left his vehicle, approached Tammam's car on foot, and knocked on its window. Rather than speaking with Officer Thorp, Tammam sped away with Hor in the car.

Officer Aaron Grant, who was outside Seward Park in his vehicle, observed Tammam speed past Officer Thorp. Officer Grant turned his car around and followed Tammam's car. Officer Thorp returned to his vehicle and followed the other two cars.

Tammam, after speeding from Seward Park, turned left onto Juneau Street and followed that road uphill to its intersection with Seward Park Avenue South. Tammam then turned left on Seward Park Avenue South and continued on that street until he reached the top of the hill. At the top of the hill, Tammam crashed into a rock wall, severely injuring Hor. Seconds before the crash, the car reached 86 miles per hour.

Hor sued both Tammam and the City of Seattle. She alleged the City and its officers were negligent by engaging in a high speed pursuit of Tammam as he fled.[1] Specifically, she claimed their actions violated the Seattle Police Department's internal pursuit policies. She claimed their negligence was a cause

[1] Appellant's Opening Brief at 23-26.

of her damages. The City denied liability, claiming Tammam's negligent driving was the sole cause of Hor's damages.

At trial, the jury rendered a defense verdict as to the City. The court entered judgment on the verdict and denied Hor's motion for a new trial.

Hor appeals. The City cross-appeals.

JURY INSTRUCTIONS

Hor argues that the court abused its discretion in giving certain jury instructions. We hold that the court did not abuse its discretion in giving its instructions.

This court reviews legal errors in jury instructions de novo.[2] If a jury instruction correctly states the law, we review for abuse of discretion the trial court's decision to give the instruction.[3] We also review for abuse of discretion the trial court's refusal to give an instruction.[4] "Whether to give a particular instruction" is also within the court's discretion.[5] "Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law."[6] Whether a jury instruction is appropriate is "governed by the

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[2] Fergen v. Sestero, 182 Wn.2d. 794, 803, 346 P.3d 708 (2015).

[3] State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136, review denied, 335 P.3d 940 (2014).

[4] Id.

[5] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

[6] Fergen, 182 Wn.2d at 803.

facts of the particular case."[7]

Instruction 17 & Proposed Instruction 27

Hor argues that the court abused its discretion by giving instruction 17 and declining to give her proposed instruction 27. We disagree.

Instruction 17 deals with emergency vehicles. The instruction, based on WPI 71.01 and RCW 46.61.035, reads:

> A statute provides that:
>
> The driver of an emergency vehicle, when in the pursuit of an actual or suspected violator of the law shall use visual signals, and audible signals when necessary, to warn others of the emergency nature of the situation. The driver of an emergency vehicle may exceed the maximum speed limit so long as life or property is not endangered.
>
> The driver of an emergency vehicle has a duty to drive with due regard for the safety of all persons under the circumstances. The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under the circumstances. A driver of an emergency vehicle shall be responsible for the consequences of his disregard for the safety of others.[8]

Hor initially proposed this instruction. But when the court took formal exceptions to its proposed instructions to the jury, she excepted to this one. She asked, instead, that the court substitute her proposed instruction 27 for instruction 17.

Her proposed instruction, based on WPI 71.06, reads:

> At the time of this occurrence, Officer Thorp's and Officer Grant's vehicles did not qualify to be operated as emergency vehicles. Accordingly, the officers[']] vehicles were governed by the

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[7] Id.

[8] Clerk's Papers at 2924.

> same rules and standards as apply to the operators of motor vehicles generally.[9]

The notes to WPI 71.06 state that "[t]his instruction should be used in those instances in which an emergency type of vehicle is involved, but the court decides as a matter of law that it failed to qualify as such."[10]

The court declined to substitute Hor's proposed instruction 27 for its instruction 17 and gave the latter to the jury.

Hor claims that instruction 17 is unsupported by the evidence, misstates the applicable law, and serves to encourage juror confusion. She is mistaken in all respects.

Instruction 17 is supported by evidence in the record of Hor's theory of the case. Hor presented evidence at trial that the officers were negligent by engaging in a high speed pursuit of Tammam's car with their vehicles when he sped away from Seward Park. And she argued this theory to the jury during closing.

Moreover, this instruction was a correct statement of the law. The jury had been instructed that they could consider the violation of a statute as evidence of negligence. Instruction 17 informed the jury that it was a violation of a statute for the driver of an emergency vehicle to endanger life or property by exceeding the speed limit. It also informed the jury that "[t]he driver of an emergency vehicle has a duty to drive with due regard for the safety of all

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[9] Clerk's Papers at 2901.

[10] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 71.06 (6th ed. 2012).

persons under the circumstances."[11] Thus, the instruction was appropriate to the facts of the case, as it informed the jury about the scope of the emergency vehicle privilege and the duty that drivers of emergency vehicles owe to others.

We see nothing in either this instruction or the record that supports the assertion there was any jury confusion based on this instruction. And Hor does not explain this bald assertion. Thus, we do not further address this contention.

The court also properly refused to give Hor's proposed instruction 27. It simply does not apply to this case. First, the usage note for the instruction states that it should be given when the court decides as a matter of law that a vehicle is not an emergency vehicle.[12] There was no such ruling here.

Hor argues that the trial court's ruling on a motion in limine was such a conclusion. But she is incorrect. The judge who ruled on the motion in limine was not the trial judge. The court ruled that, due to the City's answers to discovery, it could not claim that the officers' cars were privileged to speed because they were acting as emergency vehicles. This ruling was based on estoppel principles—the officers denied using their lights or sirens, thus the court determined that they could not later claim that they were privileged to speed as emergency vehicles.

But the court did not rule as a matter of law that the officers were not operating their cars as emergency vehicles. Hor testified that the officers pursed Tammam's car with their lights and sirens turned on. They denied doing so.

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[11] Clerk's Papers at 2924.

[12] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 71.06 (6th ed. 2012).

Thus, there was a question of fact whether the officers were driving emergency vehicles. The fact that the City was estopped from changing its position is not a ruling that the officers were not driving emergency vehicles as a matter of law. Accordingly, giving the proposed instruction would have been incorrect.

Second, giving such an instruction, where the factual issue whether the police vehicles were operating as emergency vehicles was contested, would likely have been a comment on the evidence. This is an additional reason why giving such an instruction would have been erroneous under the facts of this case.

Instruction 26

Hor next argues that the court abused its discretion by giving instruction 26. Specifically, she claims this instruction misstates the law, is misleading and confusing, is a comment on the evidence, and served to undercut her valid theory of liability. She is again mistaken.

Instruction 26 stated that "Defendant City of Seattle had no duty to control Omar Tammam's acts."[13]

Hor correctly concedes that this statement of the law is "generally true." One does not generally have any duty to control another absent special circumstances. But she argues that under her theory of the case, this instruction was inappropriate. We disagree.

[13] Clerk's Papers at 2933.

First, she argues that her theory of liability was that the two police officers were "controlling" Tammam's actions by pursuing him at high speed. This theory is without support in any of the cases on which she relies.

Hor cites three cases for the proposition that police officers control the actions of a fleeing driver. First, she cites Suwanski v. Village of Lombard.[14] Hor relies on the following statement by the Appellate Court of Illinois:

> A police pursuit is unique in the sense that it can occur only if two vehicles are involved, the car that is fleeing and the car that is chasing. It is essentially symbiotic; both vehicles are necessary to have a chase. Thus, from the standpoint of causation in fact, it is difficult, if not impossible, under the facts of this case, to separate the two in terms of causation. Of course, a jury may very well conclude that both drivers were the proximate cause of the harm.[15]

This statement does not stand for the proposition that police officers control the actions of a fleeing driver. It merely states that both a police officer and a fleeing driver may jointly be the proximate cause of harm.

Second, Hor cites Mason v. Bitton.[16] But that case merely states that police officers may be concurrently negligent if a pursued vehicle harms a third-party.[17]

Finally, she cites Yong Tao v. Heng Bin Li.[18] But that case is

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[14] 342 Ill. App. 3d 248, 794 N.E.2d 1016 (2003).

[15] Id. at 255-56.

[16] 85 Wn.2d 321, 534 P.2d 1360 (1975).

[17] Id. at 326-27.

[18] 140 Wn. App. 825, 166 P.3d 1263 (2007).

distinguishable because it is based on an agent/principal relationship.[19] There, the plaintiff was injured after the van he was riding in crashed.[20] The van had been the second vehicle in a three-vehicle caravan.[21] The lead driver instructed the other drivers to follow him and drove "too fast for the road conditions."[22] "According to the lead driver, the second driver was under the lead driver's control and direction on the journey."[23]

Division Three of this court held that those circumstances "support a finding of both control and consent."[24] Thus, whether the lead driver and the second driver had an agency relationship was a question of fact for the jury.[25]

Here, there was no agency relationship between the officers and Tammam. Thus, Hor has failed to establish that the officers controlled Tammam's actions. Consequently, it was appropriate for the court to instruct the jury that the City had no duty to control Tammam.

Hor also argues that this instruction was a comment on the evidence, instructing the jury to disregard Hor's theory of the case. Hor is mistaken.

As we noted, there is no support for the proposition that police officers control the actions of a pursued driver. Moreover, the instruction did not state the

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[19] Id. at 828.

[20] Id.

[21] Id.

[22] Id. at 829.

[23] Id.

[24] Id. at 831

[25] Id.

City had no effect on Tammam's actions, or that they did not in fact control him. Instead, it stated that the City had no ***duty*** to control him. Thus, this instruction was not a comment on the evidence.

Instruction 27

Hor also argues that the court abused its discretion by giving instruction 27. Specifically, she contends this instruction is both factually and legally erroneous. She is wrong.

Instruction 27 stated, "Defendant City of Seattle owed Plaintiff Channary Hor no duty to protect her from Omar Tammam's criminal acts."[26]

This statement of law is correct, and Hor fails to make a persuasive argument that any exception applies in this case. She argues that because the officers had a duty not to negligently enhance the danger she faced, this instruction was inappropriate. But a duty to avoid negligently exacerbating danger is not the same thing as a duty to protect Hor from criminal acts.

Instructions 23, 24, and 25

Hor argues that the trial court abused its discretion by giving instructions 23, 24, and 25. We disagree.

Under CR 51(f), when excepting to jury instructions, a party "shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." "This objection allows the trial court

[26] Clerk's Papers at 2934.

to remedy error before instructing the jury, avoiding the need for a retrial."[27] If a party fails to except to a jury instruction at trial, the party cannot raise the issue on appeal.[28]

We first note that Hor formally excepted to the court's instructions 17, 19, 26, 27, 29, and the jury verdict form. She did not except to the court's instructions 23, 24, or 25, as CR 51(f) requires.

When the court took exceptions to its instructions, it ruled that Hor could submit additional exceptions in writing. But she did so after the case had gone to the jury with the court's instructions, and the jury had rendered a defense verdict.

Hor did challenge instructions 23, 24, and 25 in a footnote to her motion for a new trial. Thus, she has preserved this issue for review, but only with respect to whether the trial court abused its discretion in denying the motion for new trial. Having failed to except to these instructions prior to the case going to the jury, as CR 51(f) requires, we see no basis for overturning the court's instructions on that basis.

Instruction 23 states that "Omar Tammam was guilty of vehicular assault for the manner in which he drove on [the date of the accident]."[29] Instruction 24 defines vehicular assault as "driv[ing] any vehicle in a reckless manner and

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[27] Washburn v. City of Federal Way, 178 Wn.2d 732, 746, 310 P.3d 1275 (2013).

[28] Id. at 747.

[29] Clerk's Papers at 2930.

caus[ing] substantial bodily harm to another."[30] And Instruction 25 states that "Omar Tammam's reckless driving was a proximate cause of [Hor's] injuries."[31]

Hor argues that these instructions confused the jury by using the word "reckless," because the jury was instructed to allocate fault between negligent parties. She states: "[N]owhere within the [court's] instructions is there any indication that it had already been determined as a matter of law, (due to the entry of a default order), that Mr. Tammam had been found 'negligent.'"[32]

But this statement is false. The court's second instruction told the jury that "[i]t has already been established, and it should be accepted by you, that Co-Defendant Omar Tammam was negligent and that his negligence was a proximate cause of injury and damage to the plaintiff."[33] Thus, the court's instructions, as a whole, adequately informed the jury that Tammam had been found negligent and that his negligence was a cause of Hor's injuries.

Hor also argues that the instructions overemphasized the City's theory of the case. Not so. The court's instructions as a whole properly instructed the jury on the duties that the officers owed to Hor. Instruction 12 provided the general duty of care that drivers owe to avoid placing others in danger. And instruction 17 stated that "[t]he driver of an emergency vehicle has a duty to drive with due regard for the safety of all persons under the circumstances" and "[a] driver of an

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[30] Id. at 2931.

[31] Id. at 2932.

[32] Appellant's Opening Brief at 36.

[33] Clerk's Papers at 2909.

emergency vehicle shall be responsible for the consequences of his disregard for the safety of others."[34]

Accordingly, the instructions did not overemphasize the City's theory of the case. The trial court did not abuse its discretion in denying the motion for a new trial based on the challenges to these three instructions after verdict.

Instruction 21

For the first time on appeal, Hor argues that the trial court abused its discretion by giving instruction 21. Because she did not except to this instruction below, she cannot do so for the first time on appeal.

As just discussed, Hor formally excepted to the court's instructions 17, 19, 26, 27, 29, and the jury verdict form. At the taking of exceptions, the court permitted Hor to later submit additional exceptions in writing. In her reply brief on appeal, she identifies her motion for a new trial as the document in which she excepted to instructions 21, 23, 24, and 25. But while Hor objected to instructions 23, 24, and 25 in a footnote, her motion for a new trial is silent on instruction 21. Accordingly, we deem any challenge to this instruction to have been abandoned.

At oral argument of this case, Hor argued that she preserved for appeal exceptions to the court's instructions by challenging them prior to the court taking formal exceptions. That argument is not well-taken.

First, as CR 51(f) makes clear, the point of formal exceptions is to alert the court of any and all challenges to the court's instructions so that alleged errors

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[34] Id. at 2924.

may be either corrected or preserved for appeal. That is our proper focus for purposes of review, not informal discussions between the court and counsel.

Second, in this case, a review of the record does not clearly show what material was before the court and counsel during discussions prior to the taking of formal exceptions. Thus, there was no preservation for appeal of issues then discussed.

Proposed Instruction 18

Hor also assigns error to the court's failure to give her proposed instruction 18. Because she neither excepted to this failure below nor argues this matter in her opening brief, we do not reach this issue.

As we previously discussed, CR 51 requires a party to timely except to the failure to give a proposed instruction. This record fails to show that Hor did so below.

Further, "A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment."[35] Hor's opening brief contains no argument on this assignment of error.

For both of these reasons, we deem this claim of error abandoned.

Verdict Form

Hor argues that the court abused its discretion by omitting the names of the individual officers from the verdict form. It is uncontested that the form retained the name of the City of Seattle. She characterizes this omission as a

[35] Brown v. Vail, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010).

"de facto dismissal" of the officers as defendants in this action. This characterization is inaccurate and the claim has no merit.

This court reviews special verdict forms under the same standard as jury instructions.[36] "Essentially, when read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner."[37]

We first note that Hor fails in her burden to show prejudice by the omission of the names of the individual officers from the verdict form. That is because the only reason she advances for including their names is for the purpose of apportioning liability. But the jury verdict rendered apportionment of liability among the City defendants moot because the jury determined there was no liability of the City. Because it was uncontested that the officers were acting within the scope of their employment, the City was the ultimate source of Hor's claim for damages. Absent liability, there simply was no claim for damages.

Even if Hor could overcome this barrier and show prejudice, her characterization of the omission of the individual officers' names from the special verdict form as a "de facto dismissal" is simply a mischaracterization of the record. The record reveals that Hor agreed to omit the names of the officers from the caption of the case, provided they remained as defendants. We find nothing in the record to evidence that they were ever dismissed as defendants to this case.

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[36] Capers v. Bon Marche, 91 Wn. App. 138, 142, 955 P.2d 822 (1998).

[37] Id.

Next, when read with the jury instructions, the special verdict form fairly and adequately presented the issues to the jury. Instruction 3 informed the jury that "[a] City can act only through its employees. The knowledge gained and the acts and omissions of city employees while acting within the scope of their authority are deemed to be the knowledge, acts and omissions of the City."[38]

Additionally, instruction 4 informed the jury that "[t]he law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner."[39]

Thus, the jury was informed that the City could only be negligent through the acts and omissions of its officers. In this case, there were no allegations that the officers were acting outside the scope of their employment. Thus, the jury could not find that the officers were negligent but the City was not. Additionally, the jury was instructed to treat the City as it would an individual. Accordingly, the special verdict form adequately presented the issue to the jury. There was no error.

EXPERT WITNESS TESTIMONY

Hor argues that the trial court abused its discretion by permitting speculative expert testimony. We disagree.

"Under ER 702, the court may permit 'a witness qualified as an expert' to provide an opinion regarding 'scientific, technical, or other specialized

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[38] Clerk's Papers at 2910.

[39] Id. at 2911.

knowledge' if such testimony 'will assist the trier of fact.'"[40] Admissibility under this rule involves a two-part analysis: "'(1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact.'"[41]

Expert testimony requires adequate foundation:

> Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading. It is the proper function of the trial court to scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue.[42]

We review a trial court's decision on expert witness testimony for abuse of discretion.[43] This court will overturn the trial court's rulings only if its decision was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.[44] A decision is manifestly unreasonable if "it falls 'outside the range of acceptable choices, given the facts and the applicable legal standard.'"[45]

Accident Reconstruction Testimony

Hor argues that the court abused its discretion by admitting the testimony of the City's two accident reconstruction experts. Specifically, Hor argues that

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[40] State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007) (quoting ER 702).

[41] State v. McPherson, 111 Wn. App. 747, 761, 46 P.3d 284 (2002) (quoting State v. Guilliot, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001)).

[42] Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 357, 333 P.3d 388 (2014).

[43] Id. at 352.

[44] State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

[45] Id. (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

the experts' testimony lacked adequate foundation and was essentially speculation. We disagree.

Here, adequate foundation supported the expert testimony on accident reconstruction. Hor does not challenge the expert witnesses' qualifications, only whether their testimony is "speculation."

The City first presented the testimony of Nathan Rose. Rose testified that he reconstructed the accident to determine the distance between the Cadillac Tammam was driving and the patrol cars during the period before the accident. He and his partner measured the roads where the alleged pursuit happened. They also performed detailed tests on the car models involved, including their acceleration capabilities. Rose stated that he also used data recovered from the Cadillac's "black box" to determine how fast the Cadillac was going in the five seconds before impact.

Using this data, Rose and his partner created a computer model of the scene and the vehicles involved. Rose then used this model to evaluate the witnesses' different versions of events. Specifically, he varied the speed that the cars were going to determine how it affected the separation distance. Based on these simulations, he concluded that "the officers' description is physically possible and reasonable. Ms. Hor's is not."

The City also presented the testimony of William Neale, Rose's partner. Neale's role in the accident reconstruction involved visualization—"anything that deals with visibility, lighting, computer animations, computer graphics and alike." Neale testified that he studied the scene of the accident, taking "a lot of data

points[,] photographs, video and a survey of the area." He also compared the scene to photographs from the time of the accident to make sure there were no significant differences. Based on this data, Neale calculated the lines of sight on the roadway.

Neale then used Rose's simulations to determine the separation between the vehicles during the alleged pursuit. With this data, Neale determined the vehicles' lines of sight. According to Neale, Tammam would not have been able to see the officers after he turned from Juneau Street to Seward Park Avenue South.

Neale also testified that he conducted acoustic tests to determine whether Tammam would have been able to hear the officers' sirens. He measured the decibel level of the sirens from various locations. He took the decibel readings in a variety of ways, including while being inside a car with the windows rolled up and with the windows rolled down. Neale also calculated the amount of noise Tammam's car likely made, taking readings from a similar car. Neale took decibel readings while driving the car at a variety of speeds. Using this information, Neale testified that Tammam would not have been able to hear the officers' sirens for 15 to 18 seconds before the crash.

In sum, both Rose and Neal gave detailed descriptions of the data that they relied on. They also described the methods by which they gathered that data. Accordingly, it was not an abuse of discretion for the trial court to rule that adequate foundation supported their testimony and it was not speculation.

Hor argues that Rose failed "to take into consideration the random variables of speed, the driver's experience and skill, etc." But Rose testified that given the speed of the Cadillac before impact, the location of the alleged pursuit, and the physical capabilities of the cars, it was "physically impossible for the officers to keep up with the Cadillac." Because Rose testified that it was physically impossible, he was testifying that it was impossible under any set of variables. Thus, his testimony was not dependent on variables such as driving skill and experience. Accordingly, the fact that Rose did not account for certain variables is not material.

Hor argues that Rose's simulation "was primarily, if not exclusively, based on the false premise that if a car is capable of driving faster than another car, it will do so." Hor argues that Rose assumed that Tammam drove faster than the police cars merely because the Cadillac was capable of doing so. This is an inaccurate characterization of Rose's testimony. Rose testified that the Cadillac's "black box" revealed that it was going 86 miles per hour five seconds before the crash. Based on this data, he "assum[ed] that [Tammam] is going as much throttle that he needs to, in order to reach that 86 miles per hour, five seconds prior to the impact." Thus, Rose's testimony was not improperly speculative.

Hor also argues that Neale's line of sight evidence resembles a line of sight video that was excluded in an out-of-state case. In Lorenz v. Pledge, the Illinois Court of Appeals ruled that a line of sight video was inadmissible because the party failed to "demonstrate that the essential conditions of the line-of-sight

evidence offered by their expert were substantially similar to the conditions" at the time of the accident.[46] But that case is distinguishable.

In Lorenz:

> [T]he pursuit involved speeds in excess of 100 miles per hour, while the SUV and squad car in the video were driving at 40 miles per hour. The vehicles in the experiment were in a different lane than the SUV and [the defendant's] vehicle, and standing traffic is visible in the video that was not present when the accident occurred. The SUV's lights were on in the video, contrary to the pursued SUV, which had turned off its lights during the pursuit. The video was taken from a static position in the left-turn lane, while the evidence at trial suggests [the plaintiff's] minivan was consistently moving through the intersection.[47]

Thus, in Lorenz, the video was significantly different from the events that transpired.

In contrast, here, Neale's testimony establishes that he reasonably replicated the conditions of the accident. Thus, there was a showing that the conditions were substantially similar to the conditions at the time of the accident.

Hor argues that the software Rose used for his simulations, PC-CRASH, is unreliable, making his testimony "inherently speculative." Hor relies on State v. Sipin for this argument.[48] That reliance is misplaced.

In that case, the State used a version of the PC-CRASH software to try to prove that Michael Sipin had been driving a car.[49] Sipin and his friend were both

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[46] 2014 IL App (3d) No. 130137, ¶ 21, 12 N.E.3d 550, appeal denied, 21 N.E.3d 714 (2014).

[47] Id. at ¶ 20.

[48] 130 Wn. App. 403, 123 P.3d 862 (2005).

[49] Id. at 405-06.

inside a car when it crashed and were both ejected from the car.[50] The State attempted to use PC-CRASH to demonstrate that based on the physical evidence, Sipin had been in the driver's seat at the time of the collision.[51]

Sipin challenged this evidence under the test announced in Frye v. United States[52] for the admissibility of novel scientific evidence.[53] At the Frye hearing, the State's expert witness relied on two studies validating PC-CRASH.[54] One study "showed a comparison between staged collisions of vehicles that measured tire marks, speed, and direction, and PC–CRASH simulations, and found that the computer simulations predicted speeds in car crashes that were in agreement with 'real world' results."[55] The other study was a validation of PC-CRASH's model of collisions between vehicles and pedestrians.[56]

But no validation studies supported the specific use of PC-CRASH involved in that case—simulating the movement of bodies within a vehicle.[57] The expert admitted that "no studies currently existed that validated PC–CRASH for use in simulating the interaction between a person and the interior surfaces of a

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[50] Id. at 407.

[51] Id. at 408.

[52] 293 F. 1013 (D.C. Cir. 1923).

[53] Sipin, 130 Wn. App. at 408.

[54] Id. at 408-09.

[55] Id. at 409.

[56] Id. at 410.

[57] Id.

vehicle during an accident."[58] The trial court allowed the expert to testify over Sipin's objection.

After the jury convicted Sipin, he moved for a new trial. Sipin submitted three studies that arguably undermined the validity of using PC-CRASH to simulate the movement of occupants within vehicles.[59] He also submitted an assessment of the State's PC-CRASH simulation from PC-CRASH's North American distributor.[60] The distributor stated that the "program had not been validated for use in modeling the interaction of occupants within the vehicle interior, and that [the State's] use represented 'an overextension of the capabilities of the model.'"[61]

On appeal, after conducting additional, independent review of scientific materials, this court held that the State's use of PC-CRASH had not been accepted by the scientific community.[62] The Sipin court carefully limited its holding to that expert's specific use of PC-CRASH.[63] It noted that in State v. Phillips,[64] Division Two of this court had held that PC-CRASH is generally accepted by the scientific community.[65] But the Sipin court noted that in Phillips

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[58] Id.

[59] Id. at 412.

[60] Id. at 413.

[61] Id.

[62] Id. at 420.

[63] Id. at 421.

[64] 123 Wn. App. 761, 98 P.3d 838 (2004).

[65] Sipin, 130 Wn. App. at 420-21.

"the PC–CRASH program was used to predict movement of the vehicle in a single-impact crash, and the relevant scientific community of accident reconstructionists agreed that the computer program was reliable for that purpose."[66]

Hor argues that the present case is analogous to Sipin. She argues that because the Sipin court did not allow PC-CRASH to be used to simulate the movement of multiple bodies within a vehicle, this court should not allow PC-CRASH to be used to simulate the movement of multiple vehicles over a distance. This argument is untenable.

First, in this case, the City's accident reconstruction experts did not use PC-CRASH for an unsupported use, such as simulating the movement of bodies within a car. Instead, they used the program to simulate the movement of vehicles, calculating how far behind the officers' vehicles were from Tammam's car. Hor fails to cite anything indicating that this is not an accepted use of PC-CRASH.

Second, in Sipin, the court was presented with evidence that the State's use of PC-CRASH was not accepted in the scientific community. Here, Hor has failed to present any evidence showing that it is not accepted in the scientific community that PC-CRASH can be used to simulate the relative positions of multiple vehicles. Rose testified that PC-CRASH is "widely used in the industry" and has been "heavily tested, [and] published about." Hor does not controvert this with any evidence.

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[66] Id. at 421.

Economic Expert Testimony

Hor also argues that the testimony of the City's economic expert was "false and misleading." Specifically, she argues that the expert used a discount rate that was contrary to industry standards. This claim is without merit.

We note again that Hor raises an issue without meeting her burden on appeal to show prejudice. Specifically, this claim attacks a basis for the determination of damages. The jury assessed damages solely against Tammam, not the City. Accordingly, the challenged testimony may adversely affect Hor's claims against Tammam. But there simply is no showing it has anything to do with the City.

In any event, there is no merit to this claim. At trial, the City's expert witness William Partin stated that 5.98 percent was an appropriate discount rate to apply to the award of damages. Partin testified that the appropriate discount rate in this case was based on the use of a "blended portfolio." That would mean investing one third of the award in "short-term treasury bills, a third in the AAA rated bond fund . . . and one third in an S&P 500 Index fund." Partin testified that the discount rate that this method produced was in the middle of the range of discount rates that economists use.

Hor objected to the use of this blended portfolio method, arguing that it was not accepted by economists. The trial court and counsel questioned Partin on his methodology outside the presence of the jury. Partin testified that other economists use the same methodology and cited a journal article that supported

his views. The trial court ruled that Hor's objections went to the weight of Partin's testimony rather than to its admissibility.

This was not an abuse of discretion.

Hor relies on Barth v. Rock.[67] But that case is not analogous. In Barth, an expert witness testified that the plaintiff had died from an allergic reaction to sodium pentothal.[68] To support his opinion, the witness cited a study that purportedly showed 55 documented cases of this type of allergic reaction.[69] The witness did not have a copy of the study but gave the name of its author and the textbook in which it was published.[70]

When counsel later obtained a copy of the study, he learned that the 55 cases in the study were not allergic reactions to sodium pentothal, but to "barbiturates in general."[71] Additionally, "[o]ther expert witnesses testified that an allergic reaction to sodium pentothal was an event so rare there are only nine reported cases out of billions of surgeries over a period of 40 years."[72]

This court held that because the witness's testimony misled the jury, and because of "the speculative nature of the theory of allergic reaction to sodium pentothal," the trial court did not abuse its discretion by ordering a new trial.[73]

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[67] 36 Wn. App. 400, 674 P.2d 1265 (1984).

[68] Id. at 403.

[69] Id. at 403-04.

[70] Id. at 404.

[71] Id.

[72] Id.

[73] Id. at 404-05.

Barth is not analogous to the present case. In Barth, the expert witness gave patently false testimony. Here, Hor's expert economic witness simply disagreed with Partin. Hor submitted a declaration by its economic expert that disagreed with Partin. The declaration stated:

> I have not come across any economist or forensic accountants (other than Mr. Partin in this case) that have used corporate stock returns as a component for discounting future losses for personal injury or wrongful death claims. I have a faint recollection that a few economists (other than Mr. Partin) may have used corporate bond returns in discounting such losses, but that is not my practice.[74]

Thus, this case is not analogous to Barth.

Additionally, in Barth, the expert witness was not able to be effectively cross-examined at the time of his testimony because counsel did not have the book on which the expert relied. In contrast, Hor was able to extensively cross-examine Partin on his discount rate. Further, Hor's own expert witness was able to testify about his disagreement with Partin's methods. Thus, Hor is not entitled to a new trial.

Hor also argues that the court should not have permitted Partin to "provide an opinion regarding [Hor's] future medical care needs."

Partin testified that he had relied on a care plan created by Dr. Craig Lichtblau, who also testified at trial, to determine the medical care that Hor needed. He used this information to calculate the price of the needed services.

Partin testified that experts in his field "gather information by contacting actual care providers to see what kind of care they actually deliver in a market."

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[74] Clerk's Papers at 2986.

He further testified that he contacted four health care providers. Based on the information he received from these agencies, he calculated the cost of providing the services Hor required.

This was not inappropriate opinion testimony. Partin did not provide expert testimony on Hor's medical needs. Instead, he estimated the cost of her anticipated medical needs based on a doctor's care plan.

Drug Expert

Hor next argues that the court abused its discretion by allowing speculative expert testimony about Tammam's drug usage on the night of the accident. We disagree.

Dr. Andrew Saxon testified that Tammam's toxicology report showed that Tammam tested positive for marijuana and MDMA, also known as "ecstasy," on the night of the accident. Based on the amount of MDMA in Tammam's blood, Saxon testified that "we can say with quite a bit of certainty that he ingested considerably in excess of 100 milligrams [of MDMA]." He also stated that, based on studies, 100 milligrams was "sufficient to produce impairment with respect to perception, cognition, and behavior."

Thus, adequate foundation supported Saxon's testimony that Tammam was impaired.

Hor cites several cases to argue that the City failed to lay proper foundation for the proposition that Tammam was impaired, but none are helpful.

In Bohnsack v. Kirkham, the supreme court held that the fact that a driver "had consumed one or more drinks some hours before the accident" was

insufficient to create an issue of contributory negligence when there was undisputed evidence that the driver was "mentally alert and not under the influence of alcohol."[75] Here, there is no undisputed evidence that Tammam was "mentally alert" and not under the influence of drugs.

In Purchase v. Meyer, a restaurant was sued for serving alcohol to an "obviously intoxicated" person.[76] For this cause of action, "'a person's sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal.'"[77] Thus, a blood alcohol content test was not competent evidence that the patron was obviously intoxicated.[78] But the present case does not involve that cause of action, or its requirement that the person appear "obviously intoxicated."

In State v. Lewis, the defendant sought to introduce testimony that the murder victim had methamphetamine in his body, to support his theory of self-defense.[79] Division Two held that it was not an abuse of discretion to exclude this testimony, when the defense's expert witness "had no opinion" on the effect of the drug on the victim's behavior.[80] In contrast, in the present case, Dr. Saxon

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[75] 72 Wn.2d 183, 192-93, 432 P.2d 554 (1967).

[76] 108 Wn.2d 220, 223, 737 P.2d 661 (1987).

[77] Id. at 226 (quoting Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

[78] Id. at 226-27.

[79] 141 Wn. App. 367, 387-88, 166 P.3d 786 (2007).

[80] Id.

was able to testify that the MDMA in Tammam's blood was "sufficient to produce impairment with respect to perception, cognition, and behavior."

Thus, these cases are not analogous to the present case.

MISCONDUCT

Hor argues that the trial court abused its discretion by denying her mistrial motion based on the City's counsel's alleged misconduct during opening statements. There was no abuse of discretion in denying the motion.

Under CR 59(a)(2), misconduct by the prevailing party can be grounds for a new trial. To obtain a new trial, the misconduct must "materially affect[] the substantial rights of the losing party."[81] Additionally, the losing party must have properly objected to the misconduct.[82] The trial court should grant a new trial only if "'nothing the trial court could have said or done would have remedied the harm [caused by the misconduct].'"[83]

We review a trial court's denial of a motion for a new trial for abuse of discretion.[84]

During opening statements, Hor's counsel stated:

> But there is more than one cause of this crash. The fuel to the fire was the police chasing Mr. Tammam. So we are going to ask you to assess joint responsibility.[85]

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[81] Teter v. Deck, 174 Wn.2d 207, 222, 274 P.3d 336 (2012).

[82] Kuhn v. Schnall, 155 Wn. App. 560, 576-77, 228 P.3d 828 (2010).

[83] Id. (internal quotation marks omitted) (quoting A.C. ex rel. Cooper v. Bellingham School Dist., 125 Wn. App. 511, 522, 105 P.3d 400 (2004)).

[84] Hickok-Knight v. Wal-Mart Stores, Inc., 170 Wn. App. 279, 324, 284 P.3d 749 (2012), review denied, 176 Wn.2d 1014 (2013).

[85] Report of Proceedings Vol. 4 (June 6, 2013) at 30.

In response, the City's counsel stated:

> There was a mention by Mr. Barcus of sharing responsibility or allocating responsibility between the two of these. In order to allocate responsibility by one percentage point, you have to find and that is what this case is about, 100 percent negligence on the part of the city.[86]

Hor did not object to counsel's statements when made. Days later, she argued in her mistrial motion that she was entitled to relief based on these statements by the City's counsel.

On appeal, she contends the statements of the City's counsel violated the in limine order regarding "joint and several liability" and the City as a "deep pocket" defendant. We disagree.

The in limine order provides, in part, for the exclusion of:

> [E]vidence or argument about City's Insurance/"Deep Pockets"/Joint and Several Liability.[87]

There simply was no mention of either insurance or "deep pockets" in counsel's statement. So counsel did not violate these two terms of the in limine order.

In ruling on the motion, the trial judge made several observations. First, the court observed that counsel's reference to "shared" responsibility was likely invited by opposing counsel's reference to "joint" responsibility. We agree.

Second, the judge observed that it was unlikely that the jury would remember these passing references or know of their legal significance by the time deliberations started. We again agree. In any event, we note that this

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[86] Id. at 47-48.

[87] Clerk's Papers at 1956.

passing reference to "shared" responsibility is hardly the type of statement that "materially affects" the substantial rights of Hor, as CR 59(a)(2) requires. This is particularly true in view of the fact that the court properly instructed the jury with respect to the law before its deliberations. And the jury is presumed to follow the court's instructions.

Finally, the judge offered to add additional instructions to address the point, provided its instructions to the jury were not adequate to address this problem. There is no evidence in this record that Hor pursued this offer.

For these reasons, we conclude that the trial court did not abuse its discretion by denying the mistrial motion. There was no error in this respect.

CROSS-APPEAL

The City characterizes its cross-appeal as conditional. The City states that we need not address the issues on cross-appeal unless a new trial follows. Because we affirm the judgment, we conclude that it is unnecessary to address the cross-appeal.

We affirm the judgment on the jury verdict and the order denying the motion for a new trial. We decline to address the issues on cross-appeal.

COX, J.

WE CONCUR:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Channary Hor, Individually,

Plaintiff,

vs.

City of Seattle, a Municipal Corporation, and Omar Tammam,

Defendants.

NO. 10-2-34403-9 SEA

COURT'S INSTRUCTIONS TO THE JURY

DATE: June 27, 2013

JUDGE JEFFREY M. RAMSDELL

ORIGINAL

Instruction No. 2

It has already been established, and it should be accepted by you, that Co-Defendant Omar Tammam was negligent and that his negligence was a proximate cause of injury and damage to the plaintiff, Channary Hor.

The following is a summary of the claims of the parties before you, provided solely to assist you in understanding the remaining issues in the case. You are not to take this summary as either evidence or a comment upon the evidence. You must decide, based on the evidence admitted during the trial, which, if any, propositions have been proved.

The plaintiff, Channary Hor, claims that the co-defendant, City of Seattle, was negligent in the initiation, continuation and failure to terminate a police pursuit of the car driven by co-defendant Omar Tammam, in which plaintiff, Channary Hor, was a passenger. Ms. Hor claims that such negligence was a proximate cause of injury and damage to her.

The co-defendant City of Seattle denies that there was a police pursuit. The co-defendant City of Seattle further denies that any such conduct was a proximate cause of the Plaintiff's injury and damage. Co-Defendant City of Seattle further claims that Omar Tammam's conduct was the sole proximate cause of Ms. Hor's injuries.

Instruction No. 17

A statute provides that:

The driver of an emergency vehicle, when in the pursuit of an actual or suspected violator of the law shall use visual signals, and audible signals when necessary, to warn others of the emergency nature of the situation. The driver of an emergency vehicle may exceed the maximum speed limit so long as life or property is not endangered.

The driver of an emergency vehicle has a duty to drive with due regard for the safety of all persons under the circumstances. The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under the circumstances. A driver of an emergency vehicle shall be responsible for the consequences of his disregard for the safety of others.

Instruction No. 23

You are instructed that Omar Tammam was guilty of vehicular assault for the manner in which he drove on May 16, 2006.

Instruction No. 24

A statute provides:

A person is guilty of vehicular assault if he or she operates or drives any vehicle in a reckless manner and causes substantial bodily harm to another.

Instruction No. 25

You are instructed that Omar Tammam's reckless driving was a proximate cause of plaintiff's injuries.

Instruction No. 26

You are instructed that Defendant City of Seattle had no duty to control Omar Tammam's acts.

Instruction No. 27

You are instructed that Defendant City of Seattle owed Plaintiff Channary Hor no duty to protect her from Omar Tammam's criminal acts.

Instruction No. 30

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the Plaintiff. The Court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include only the named defendants in this action. You are not to consider, in apportioning fault, any action or inactions on the part of Channary Hor's parents, Channary Hor, or any other non-named party. It has already been determined as a matter of law that no actions or inactions on the part of these individuals caused or contributed, in any way, to the injuries sustained by Channary Hor, and/or their own injuries or damages.

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHANNARY HOR, individually, Plaintiff, v. THE CITY OF SEATTLE, a Washington Municipal Corporation, and OMAR TAMMAM, Defendants.	NO. 10-2-34403-9 SEA SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: **Were any of the defendants negligent?**

(Answer yes or no after the name of each defendant.)

Defendant: CITY OF SEATTLE NO (Yes or No)

Defendant: OMAR TAMMAM Yes (Yes or No)

INSTRUCTION: If you answered yes to Question 1 as to any defendant, answer Question 2.

ORIGINAL

QUESTION 2: **Was such negligence a proximate cause of injury or damage to the plaintiff?**

(Answer yes or no after the name of each defendant found negligent by you in Question 1.)

Defendant: CITY OF SEATTLE _____ (Yes or No)

Defendant: OMAR TAMMAM ___Yes___ (Yes or No)

QUESTION 3: What do you find to be the plaintiff's amount of damages?

ANSWER:

1. Past Medical (undisputed):	$574,052.26
2. Past medical care, treatment and Services not already compensated In #1 above:	$ $294,000
3. Past economic damages:	$ $133,000
4. Future economic damages:	$ $3,100,000
5. Past and future non-economic damages:	$ $3,000,000

INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.

QUESTION 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant:	CITY OF SEATTLE	0 %
Defendant:	OMAR TAMMAM	100 %

TOTAL: 100%

(INSTRUCTION: Sign this verdict form and notify the Bailiff.)

DATE: 6/28/2013

SIGNED: _____
Presiding Juror

The Honorable Jeffrey M. Ramsdell
Trial Date: June 3, 2013

FILED
KING COUNTY, WASHINGTON

JUN 27 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHANNARY HOR, individually, Plaintiff, v. THE CITY OF SEATTLE, a Washington Municipal Corporation; ADAM THORP; ARRON GRANT; and OMAR TAMMAM, Defendants.	NO. 10-2-34403-9 SEA PLAINTIFF'S THIRD SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

DATED this 26 day of June, 2013.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, P.L.L.C

Ben F. Barcus, WSBA # 15576
Paul A. Lindenmuth, WSBA #15817
Colleen M. Durkin, WSBA # 45187
Attorney for Plaintiffs
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444

INSTRUCTION NO. 27

At the time of this occurrence, Officer Thorp's and Officer Grant's vehicles did not qualify to be operated as emergency vehicles. Accordingly, the officers vehicles were governed by the same rules and standards as apply to the operators of motor vehicles generally.

WPI 71.06 (modified)
Order on Plaintiff's Motion in Limine 5.37

The Honorable Laura Gene Middaugh
Trial Date: June 3, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CHANNARY HOR, individually, Plaintiff, vs. THE CITY OF SEATTLE, a Washington Municipal Corporation, and OMAR TAMMAN, Defendants.	No. 10-2-34403-9SEA COMBINED ORDER RE: DEFENDANT CITY OF SEATTLE'S AND PLAINTIFF'S MOTIONS IN LIMINE [CLERK'S ACTION REQUIRED]

THIS MATTER having come before the above-entitled court on defendant City of Seattle's Motions in Limine and the Plaintiff's Motions in Limine, the court being fully advised in the premises, and the court having considered the following pleadings and documents:

1. Defendant City of Seattle's Motions in Limine and attachments thereto;
2. Declaration of Rebecca Boatright and exhibits attached thereto;
3. Plaintiff's Response to the City's Motions in Limine;
4. Plaintiff's Primary Motions in Limine and Supporting Memorandum;
5. Declaration of Ben Barcus in Support of Plaintiff's Primary Motions in Limine and Supporting Memorandum;

6. Plaintiff's Motion in Limine to Exclude Evidence of Omar Tammam's Drug Use and to Give the Jury an Adverse Inference Instruction Due to Spoliation of Evidence;

7. Declaration of Ben Barcus in Support of Plaintiff's Motion in Limine to Exclude Evidence of Omar Tammam's Drug Use and to Give the Jury an Adverse Inference Instruction Due to Spoliation of Evidence;

8. Plaintiff's Motion in Limine Re: Golden Rule; Jury Nullification; Personal Opinion;

9. Plaintiff's Memorandum and Points of Authority in Support of Motion in Limine Re: Exclusion of Pre-Collision and Post-Collision Unrelated Medical Treatment or Conditions [Harris Motion];

10. Plaintiff's Motion in Limine and Supporting Memorandum to Exclude Hypothetical/Speculative Questions or Witnesses and Testimony;

11. Plaintiff's Motion in Limine Re: Statement of Damages;

12. City's Consolidated Response to Plaintiff's Motions in Limine;

13. Plaintiff's Reply to City's Response to Plaintiff's Motions in Limine was not considered by the Court since it was not received by the Court in time to be considered. ;

14. Declaration of Colleen Durkin and attachments thereto (not considered. See above); and,

15. City's Reply to Plaintiff's Response to City's Motions in Limine.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows regarding Defendant City of Seattle's Motions in Limine:

1. Investigative acts or omissions by Officers Grant or Thorp with respect to patrolling Seward Park or approaching Tammam;

__x__ Granted as follows:

Argument or evidence that the manner in which the officers approached or investigated Seward Park or Defendant Tammam or his car was not correct or was inappropriate are

exclude. This does not exclude factual descriptions as to what was done or the perceptions of the people involved, if otherwise admissible.

2. Exclude evidence and argument about the Officers' decisions with respect to whether to start following the Tammam vehicle

__X__Granted. The court has already ruled that there is no liability for the decision to initial a stop. However, this does not preclude evidence about the events of that night or argument as to when a stop occurred and/or a pursuit began.

2. Evidence regarding investigation acts or omissions by the Seattle Police Department after this incident (i.e., whether the Department should have conducted any investigation or after-action report concerning any officer's conduct, including whether the Seattle Police Department should have investigated this incident as a "pursuit").

__X__Granted as follows:

This does not preclude evidence that the Police department did not investigate this incident as a pursuit since it has been the position of the Police department all along that this was not a pursuit and therefor they had no responsibility to investigate it as a pursuit. Nor does it preclude inquiry into what factors were considered when the Police Department made the determination that it was not a pursuit.

3. Documentation or other evidence of other incidents that were reviewed as "vehicle pursuits";

__X__Granted as follows:

This does not preclude evidence of what the pursuit policy was, and what training officers Grant and thorp received or should have received. Nor does it preclude evidence of definitions that have been applied to other pursuits if there is evidence that directly contradicts the testimony of the defendant, i.e. if it impeaches the testimony of a defendant from the police department. However, introduction of specific examples of other pursuits are excluded unless they are sufficiently similar as to be controlling or impeachment. This will, of necessity, have to be determined by the trial judge.

4. Exclude Evidence regarding the availability (or lack thereof) of in-car video or real-time audio;

__X__ Granted

See below for ruling on spoliation evidence. While Officer Michl's video would have been relevant, it is no longer available. Evidence that it was taken and lost would provide no probative evidence and would be highly prejudicial. Even though Officer's Thorp and Grant may have had the ability to records, evidence established that they did not do so. Therefore evidence that they could have is more prejudicial than probative.

5. 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;

___x_ Granted and __x___ Denied as follows:

The Court has allowed the statements of Defendant Tammam 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 and the relationship between the defendant Tammam and the Plaintiff. It will be us to the jury to decide based on all the evidence

___x_Granted as to all parties: agreed.

5.33: Order that the defense must adhere to the Definition of Pursuit In Effect at the Time of the Collision

__X __Granted as follows:

Neither party shall argue or present evidence that a police definition of "pursuit" other than that contained in the Seattle Police department policies in effect at the time of the accident applies to this case. However, this does not preclude either party from arguing interpretation of this policy

5.34: Exclude evidence about the Health of Plaintiff's Expert Witnesses

__x__Granted

5.35: Exclude evidence of Suicidal Ideations of plaintiff.

__x___Denied see 5.1 above

5.36: Exclude References to an Order of Default Against Co-defendant Omar Tammam

__X__Granted as to all parties: agreed.

5.37: Bar the defendant from claiming Privileges Under RCW § 41.61.035

__X__Granted

However, the Court is not ruling or finding whether any of the officer's actions violated the rules of the road or were a proximate cause of plaintiff's injuries or the crash of Tammam's car

The Court does not find that there was sufficient evidence to establish the basis for a spoliation instruction.

c. Exclude Hypothetical/Speculative Questioning of Witnesses and Testimony

__X__ Reserved to trial Judge, except as to those issues which have already been addressed above

d. Exclude evidence or argument about Statement of Damages

__X__ Granted as to all parties: Agreed

Defendant is hereby ordered to refrain from making any argument, questioning, allusion, mention, reference other manner of pointing attention to any of those designated areas in this case.

Defendant's counsel is hereby ordered to convey the contents of this order and its scope to each and every witness, the client and search every exhibit to remove any reference to those matters. Non-compliance with this order may result in the imposition of terms and sanctions, the type and amount to be determined at the time according to the circumstances.

DONE this 24 day of MAY, 2013.

HONORABLE LAURA GENE MIDDAUGH

CLERK'S MINUTES

SCOMIS CODE: JTrial $JFA 12 Person

Judge: Jeffrey M. Ramsdell
Bailiff: Kenya Hart
Court Clerk: Kirstin Grant
Reporter: Dolores Rawlins
Digital Record:

Dept. 09
Date: 6/3/2013

KING COUNTY CAUSE NO.: 10-2-34403-9 SEA

Channary Hor vs. The City of Seattle and Omar Tammam

Appearances:

Plaintiff appearing through counsel, Ben Barcus, Paul Lindemuth and Colleen Durkin. Defendant City of Seattle appearing through counsel, Rebecca Boatright and Robert Christie.

MINUTE ENTRY

This cause having come on for Jury Trial.

Plaintiff's Motion re: the allegations of missing videotapes.

Arguments are heard.

The Court excluded testimony regarding missing videotapes.

Plaintiff's Motion to Exclude Testimony Regarding Sexual Behavior of Plaintiff is granted.
Plaintiff's Motion to Exclude Testimony of any Sexually Transmitted Diseases of Plaintiff is granted.

The Court excluded paragraph #6 of Andrew Saxton's declaration.

Court discussion re: juror questionnaire

The Court reserved ruling on Dr. Saxton's report regarding Ecstasy conclusions.

Channary Hor vs. The City of Seattle and Omar Tammam
King County Cause No. 10-2-34403-9

Cross Examination.

Jury absent.

Jury present.

The Cross Examination of William Partin continues.

Officer D'Ambrosio is sworn and examined on behalf of the Defendant - City of Seattle.

Defendant's Exhibit 336 is OFFERED AND ADMITTED.

Aaron McCandless, Seattle Fire Department, is sworn and examined on behalf of the Defendant - City of Seattle.

Defendant's Exhibit 337 is OFFERED AND ADMITTED.

Cross Examination.

Plaintiff's Exhibit 338 is OFFERED AND ADMITTED.

The Re-Direct of Mr. Partin resumes.

Defendant's Exhibit 335 is OFFERED AND RESERVED
Re-Cross

Jury absent.

The Court takes preliminary exceptions to the jury instructions.

Court continued to Thursday, June 27, 2013 at 9:00 a.m.

Channary Hor vs. The City of Seattle and Omar Tammam
King County Cause No. 10-2-34403-9

Re-Cross
Defendant rests.

The Video Deposition of Channary Hor is played.

Jury absent.

Court discussion re: jury instruction and scheduling issues.

Plaintiff's Motion to Strike Testimony of Defendant's Accident Reconstructionists Mr. Rose and Mr. Neale is denied.

Court and counsel review admitted exhibits.

Defendant's Exhibit 335, 332, 333 and 296 are OFFERED AND REFUSED.

Jury absent.

The exceptions to the jury instructions are taken.

Jury present.

The Court instructs the Jury.

Plaintiff's Closing Arguments.

Recess

Jury present.

The Court makes a correction to the jury instructions.

Defendant - City of Seattle's Closing Arguments.

Plaintiff's Rebuttal Closing Arguments.

The Court excused Juror #2 Christopher Galbraith from further deliberation on this cause.
At 4:50 p.m. the jury is excused for the evening.
Deliberations to begin on Friday, June 28, 2013 at 9:00 a.m.

Date: 6/28/13

Channary Hor vs. The City of Seattle and Omar Tammam
King County Cause No. 10-2-34403-9

Judge: Jeffrey M. Ramsdell
Bailiff: Kenya Hart
Court Clerk: Kirstin Grant
Reporter: Dolores Rawlins
Digital Record:

Continued from: 6/27/2013

MINUTE ENTRY

At 9:05 the jury commences deliberations.

At 11:50 the jury takes lunch recess.

At 1:05 the jury resumes deliberations.
COURT REPORTER>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>> Dolores Rawlins

Plaintiff appearing through counsel, Ben Barcus
City of Seattle appearing through counsel Rebecca Boatright and Robert Christie.

At 1:55 the jury returns to open court with the following verdicts.

Question 1: Were any of the defendants negligent?

Defendant: CITY OF SEATTLE --- Answer: NO
Defendant: OMAR TAMMAM --- Answer: YES

Question 2: Unanswered.

Question 3: What do you find to be the plaintiff's amount of damages.

ANSWER:

1. Past Medical (undisputed): $574,052.26

2. Past medical care, treatment and services not already compensated in #1 above: $294,000.

3. Past economic damages: $133,000.

4. Future economic damages: $13,400,000.

5. Past and future non economic damages: $3,000,000.

Question 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the injury to the plaintiff: Your total must equal 100%.

ANSWER:

Defendant: CITY OF SEATTLE	None
Defendant: OMAR TAMMAM	100%.

The Court polled the jury as to whether the verdicts were their individual verdicts and were the verdicts of the jury as a whole.

Question 1: 10 agree and 2 disagree.
Question 3: Unanimous on all questions.

The jury is excused and thanked regarding this cause.

The Special Verdict is received and filed.

Court adjourned.

SUSPECT NAME: TAMMAM, [illegible]ar Amin

CASE NUMBER: 06-198791

NON DRUG CRIME PROBABLE CAUSE

STATEMENT OF PROBABLE CAUSE: NON-VUCSA

CONCISELY SET FORTH FACTS SHOWING PROBABLE CAUSE FOR EACH ELEMENT OF THE OFFENSE AND THAT THE SUSPECT COMMITTED THE OFFENSE. IF NOT PROVIDED, THE SUSPECT WILL BE AUTOMATICALLY RELEASED. INDICATE ANY WEAPON INVOLVED. (DRUG CRIME CERTIFICATE BELOW.)

ON 5/18/2006 (DATE) AT 0030 (TIME), WITHIN THE City of Seattle (CITY/UNINCORP. AREA OF CO.), COUNTY OF KING, STATE OF WASHINGTON.

Omar Tammam committed the crime of Eluding a Police Vehicle as follows; Two uniformed Seattle Police Officers approached a vehicle occupied by Tammam in its drivers seat and a female passenger because they were in a city park after closing time. Tammam fled driving the vehicle refusing to stop after being ordered to do so and nearly running over one of the officers. Officer followed in marked Seattle Police cars with emergency lights on. Tammam crashed the car left the scene on foot leaving behind his 16 year old female passenger who as of this writing is now paralyzed from the neck down. Tammam was located a short distance away identified. I took custody of Tammam and was able to detect the strong odor of Marijuana on his person. Mammam did cooperate with drug influence evaluation and a blood sample was obtained. The results are pending. He also admitted to an ambulance technician that he ingested an Extasy pill earlier. Tammam was found to have three outstanding arrest warrants.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATE AND PLACE 5-18-06 Seattle, WA SIGNATURE/AGENCY Seattle Police Department

REQUEST 72-HOUR RUSH FILE? YES ☐ NO ☐

ANTICIPATED FILING DATE

DRUG CRIME CERTIFICATE

DRUG CRIME CERTIFICATE

Part I: On (Date)_____ the Suspect (Suspect's Name)_____

☐ DELIVERED ☐ POSSESSED WITH INTENT TO DELIVER/MANUFACTURE ☐ POSSESSED what the undersigned Officer (Officer's Name)_____ based on training and experience, believes to be (approximate quantity and type of controlled substance)_____. Approximate street value of the controlled substance is (value of drugs) _____

Part II: FACTS INDICATING THE SUSPECT ☐ DELIVERED ☐ POSSESSED WITH INTENT TO DELIVER/MANUFACTURE or ☐ POSSESSED THE CONTROLLED SUBSTANCE:

On _____ (date) at _____ (time) within the City of Seattle (city/unincorp. area of co.), County of King, State of Washington,

My source of information about this crime (e.g., myself, other person with firsthand knowledge)_____

☐ Other Facts _____

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date and Place _____ Signature/Agency _____ Seattle Police Department

REQUEST 72-HOUR RUSH FILE? YES ☐ NO ☐	SODA ZONE Yes ☐ No ☐	DRUG FREE ZONE? Exact Location Required: Yes ☐ No ☐
ANTICIPATED FILING DATE	LAB WORK REQUESTED? (Date/Type)	

OBJECT TO RELEASE

LAW ENFORCEMENT OBJECT TO RELEASE? Y/N. IF YES, EXPLAIN WHY SAFETY OF INDIVIDUAL OR PUBLIC WILL BE THREATENED IF SUSPECT IS RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY, DRUG DEALING, DOCUMENTED GANG MEMBER, FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY). INCLUDE FARR GUIDELINES. DESCRIBE TYPE OF WEAPON. BE SPECIFIC.

TIES TO COMMUNITY (MARITAL STATUS, TIME IN COUNTY, ETC.)_____

CONVICTION RECORD:_____

☐ SUBJECT ARMED/DANGEROUS ☐ SUSPECT IDENTITY IN QUESTION ☐ WARRANT(S) FOR FTA

☐ HISTORY OF FTAs (LIST)_____

DPA

PRELIMINARY APPEARANCE DATE	JUDGE		BAIL AMOUNT $	
RETURN DATE	CONDITIONS	P.R. Y/N	RETURNED Y/N	EXCUSED Y/N

SEA 00043