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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

No. 707612

CHANNARY HOR,

Appellant,

v.

**THE CITY OF SEATTLE, a Washington Municipal Corporation,
and OMAR TAMMAM,**

Respondents.

**APPELLANT'S
OPENING BRIEF**

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3. The Trial Court erred by giving Court's Instruction No. 27, which instructed the jury that the City of Seattle owed Plaintiff, Channary Hor, no duty to protect her from Omar Tammam's criminal acts, when under the circumstances of this case, the giving of such instruction was inherently misleading and confusing to the jury and negated the defendant's duty. (Appendix No. 1 (DD)) (CP 2934). . . . 2

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2. Whether the trial court's admission of expert testimony, which was impermissibly speculative, misleading and without adequate foundation, warrant reversal and remand for a new trial.

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4. Should the Court reverse and remand the case for a new trial due to cumulative errors occurring during trial, which served to deny Plaintiff a fair trial?

III. STATEMENT OF FACTS

1. Factual Background of the Case.

On May 17, 2006, a healthy 16 year-old Channary Hor, went to Seward Park in Seattle with a new acquaintance, Omar Tammam. Less than an hour later, she was rendered quadriplegic. (RP Vol. 44, P. 2 3) Earlier that evening, Mr. Tammam had invited Ms. Hor out on a first date. They spent the earlier part of the evening driving around and ultimately found their way to Seward Park where Mr. Tammam parked (in a parking lot near the tennis courts), to continue their conversation. (*Id.*, P. 7). Neither Ms. Hor, nor Mr. Tammam realized that there was a park curfew and did not observe any notice that the park had closed prior to their arrival. There were open gates into the park, and there were other vehicles parked in the parking lot at the time. (CP 3972).

While Ms. Hor and Mr. Tammam were parked and talking, Seattle police officers Thorp and Grant, (in separate cars), were on patrol in and around Seward Park. Observing the Tammam vehicle, (a Cadillac), parked in Seward Park after hours, Officer Thorp approached Mr. Tammam's vehicle, turned on his emergency overhead lights, and

illuminated his spotlight onto Mr. Tamnan's parked car. He got out of his cruiser and walked toward Mr. Tammam's car from the rear. (RP Vol. 17, P. 16; Vol. 18, P. 44 46). Officer Thorp abruptly confronted Ms. Hor and Mr. Tammam by aggressively banging on the driver's window with his flashlight. (Id.). Based on his observations at the scene, Officer Thorp had a clear description of Mr. Tammam and Ms. Hor, later noting that he was a "B/M [black male] driver" and that he had a female passenger in his passenger seat. (RP Vol. 17, P. 16). It is undisputed that Officer Thorp knew that Ms. Hor was in the car. (RP Vol. 17, P. 16, 17). In the meantime Officer Grant's vehicle was located at the park entrance near Juneau Street.

Frightened and startled, in response to Officer Thorp's aggressive approach, Mr. Tammam started his car and began driving out of the park. Officer Thorp immediately got back into his patrol car and began to pursue Mr. Tammam. (RP Vol. 17, P. 27). Officer Grant observed Mr. Tammam rapidly leave the parking lot in the opposite direction. He immediately activated his emergency lights, spun his patrol car around, and began pursuing Mr. Tammam. (RP Vol. 23, p. 97; 102 105).¹ After Mr. Tammam passed him, Officer Grant was able to quickly perform a 3-

¹ Unknown to the police officers at the time, Mr. Tammam apparently had misdemeanor warrants, which may at least in part explains how he responded to his encounter with Officer Thorp.

point turn so he could pursue him. This resulted in the Tammam vehicle in the lead, Officer Grant second, with the Thorp vehicle following. (RP Vol. 18, P. 145) (RP Vol. 24, P. 111; 115 24).²

The only individual who observed Mr. Tammam's driving and the level of control of his vehicle prior to the crash during the entirety of the events was Ms. Hor. Both officers either denied seeing the Tammam vehicle after he exited the park, or were equivocal about their observations in that regard. (RP Vol. 18 at P. 145) (RP Vol. 24, P. 111; 115 124.)³ Ms. Hor observed emergency lights on both patrol vehicles and heard police sirens as Mr. Tammam exited the park. She stated that Mr. Tammam went up Juneau Street, (the small connector road to Seward Park Avenue S. and turned left onto Seward Park Avenue S.) (CP 3973-74). According to Ms.

² Officer Grant had no knowledge of any criminal activity by Mr. Tammam (RP Vol. 17, P. 17-18). Officer Grant admitted that he did not see the initial contact with Officer Thorp and the Tammam vehicle (RP Vol. 23, P. 95-96). Additionally, he had no information beside the fact that the Cadillac was driving past him, indicating that any kind of crime had been committed. In fact, both Officer Thorp and Officer Grant admitted that they did not know, or suspect, Mr. Tammam or Mr. Hor of any major crimes or felonies at the time they began their pursuit. Prior to the pursuit, no officer reported the presence of any drugs or alcohol in the Tammam vehicle, nor were any found subsequently at the crash scene. (RP Vol. 17, P. 17-18). Mr. Tammam spoke no words to either officer prior to the pursuit. *Id.* Therefore, other than quickly leaving or fleeing the park in a panic when confronted abruptly and aggressively by Officer Thorp, the only potential crime at issue would have been that of an alleged park curfew violation.

³ Officer Grant's testimony and sworn declaration filed in pretrial proceedings conflicted with his statement prepared at the time of the incident in which he stated: "S/Tammam proceeded westbound onto S. Juneau St., then continued southwest onto Seward Park Avenue S. At this point, I was on S. Juneau St. and Seward Park Avenue S. and observed the suspect vehicle approximately 600 feet southwest of the listed intersection on Seward Park Avenue S." (Ex. 318).

Hor, the police cruisers pursued with lights flashing and sirens activated. In response Mr. Tammam accelerated to a high speed in an attempt to pull away from the pursuing police vehicles.

Officer Grant admitted that he observed Mr. Tammam's tail lights as he crested Juneau Hill and as the Tammam vehicle was disappearing around the curve of Seward Park Avenue S. (RP Vol. 24, p. 121). Both Officers Grant and Thorp admitted activating their emergency lights and sirens at the park but Officer Grant indicated that he turned his lights and sirens off as he crested the Juneau Hill. *Id.* Both officers also admitted that they turned off their lights and sirens on as they approached the collision scene discussed below.

Surprisingly, none of the report generated by Officers Thorp or Grant, or others involved in the post-accident investigation make any reference to the speed the vehicles were traveling as these events occurred. (Exhibit 36, 37, 49 52, 299, 312, 318).

Defense expert, Nathan Rose, opined at trial that the maximum speed of the Cadillac driven by Mr. Tammam would have been traveling under 40 miles per hour as it exited the park, traveling at speeds of 24, 27 and 37 mph in a 35 mile-per-hour zone. (RP Vol. 35, p. 147). It was not until after Mr. Tammam turned onto Seward Park Ave. S. that his speed increased above the posted speed limit. The manner in which Mr.

Tammam drove after turning left on Seward Park Ave. S. was directly in response to the pursuing police vehicles, who were admittedly traveling at 60-65 mph in a 30 mph residential zone.

As Ms. Hor testified, both officers engaged in the pursuit of Mr. Tammam's vehicle, keeping up with him at a high rate of speed with emergency lights flashing and with sirens activated. (RP Vol. 44 p. 9 11). Further, Mr. Tammam reached a speed Ms. Hor estimated to be at least two or three times the regular speed limit, or 60 to 80 mph. She also confirmed that the officers correspondingly increased their speed as well.

Pretrial, Officer Thorp represented to defense expert Rose that he believed he was traveling between 60 to 65 mph as he traveled behind Officer Grant, southbound on Seward Park Ave. S., while attempting to catch up to the Tammam vehicle. (Exhibit 298, p. 5). Mr. Rose modified his factual position at the time of trial by testifying that Thorp said that it "may" have been as fast as 60 mph. (RP Vol. 33, p. 81).

Seward Park Ave. S., near its intersection with Juneau Street, has a curve, but straightens out into an uphill straightaway leading to a stop sign at its intersection with Morgan Street. Tragically, at the top of Seward, Mr. Tammam's Cadillac failed to stop at a stop sign, failed to negotiate a left-hand turn onto Morgan Street, and violently collided with a large rockery in front of the residence of Mr. and Mrs. Harvey. (Mr. Harvey was a

witness at time of trial). (CP 3981-89). As a result of violently colliding with the Harveys' rockery, Mr. Tammam's Cadillac was destroyed.

According to defendants who have analyzed Mr. Tammam's airbag control module, (or "black box), his speed was approximately 85 mph at its peak, and 61 mph just before impacting with the rockery. (RP Vol. 33, p. 44). Plaintiff was stunned as to how the officers were able to keep up with Mr. Tammam despite his high rate of speed. Given Ms. Hor's estimations, Officers Grant and Thorp had to have been driving at approximately the same speed as Mr. Tammam in order to keep pace with his vehicle. (CP 3973-3975)

An independent witness, a Mr. Harvey, who resided at the crash site (6503 Seward Park Avenue, Seattle, Washington 98118), (CP 3982), was sleeping and awakened at approximately 12:30 a.m. on May 18, 2018 by a loud explosive sound outside his bedroom window. (CP 3983)

Ms. Hor, who never lost consciousness, testified that within a second or two after the impact Mr. Tammam ran from his car. (RP Vol. 44, p. 11). Officer Thorp, who was behind Officer Grant at the crash scene, was close enough to observe Mr. Tammam extricate himself from the Cadillac. (RP Vol. 23, p. 34). At this point, Officer Thorp continued his pursuit of Mr. Tammam on foot. (RP Vol. 23, p. 35). Mr. Harvey saw

the police vehicles approaching and heard the first police car arriving shortly after the crash while looking out his bedroom window.

Despite these facts, the officers testified that they were not in pursuit and did not have to abide by the SPD pursuit policies, but rather claimed to have been conducting an area search, (at upwards of 60 mph+, in a residential neighborhood, after they supposedly turned off their lights and sirens).⁴ Obviously, if Officer Grant could see Mr. Tammam as he rounded the curve on Seward near its intersection with Juneau, Mr. Tammam also would have been able to see Officer Grant, particularly since at that point in time he still had his emergency lights on.

Ms. Hor remained in the Cadillac until extricated by emergency personnel. As referenced above, as a result of the violent crash, she was rendered a quadriplegic and suffered other very serious injuries. Mr. Tammam, who fled the scene, was apprehended approximately 30 minutes later after being tracked to a residential garage by a police dog.

After his apprehension, (following a half hour where his actions and activities were unaccounted for), Mr. Tammam was placed in the back of a patrol car driven by a City drug/alcohol recognition specialist, Officer Eric Michl, who questioned Mr. Tammam (CP 40). The interview of Mr.

⁴ Both defense counsel and the City's "in-house" expert, Former Deputy Chief Kimerer, asserted that police have the authority to speed without emergency equipment activated. (RP Vol. 43, p. 45-47). However, said argument and opinions is contrary to RCW 46.61.035 and WPI 71.06

Tammam in the patrol car was videotaped, and such recording would have provided significant evidence regarding Tammam's level of impairment at or around the time of the collision, as well as potential explanation as to why he fled the police at such speed.⁵

For unexplained reasons, and despite Plaintiff's repeated demands for the production of the initial video/audio recording of Mr. Tammam, no such recording was ever produced. (RP Vol. 1, p. 3; 22 23 (CP 1947). The Court ruled in limine that the Plaintiff could not referenced the missing recording of Mr. Tammam

2. Procedural History.

This lawsuit was timely filed on September 29, 2010.⁶ (CP 592-595) Mr. Tammam, who was elusive, was initially served by way of

⁵ Mr. Tammam, who had just been in a horrific accident, was transported directly to a police station where he was subject to additional drug and alcohol testing. After a protracted period of time, he was transported to the hospital and was found to have suffered serious injuries. (RP Vol 19, p. 40-41) Blood tests taken hours after the accident revealed that Mr. Tammam had marijuana and ecstasy in his system. (RP Vol 19, p.42) Nevertheless, Mr. Tammam was not cited for any drug or alcohol offenses and the "under the influence" prong of the vehicular assault statute was not utilized in the guilty plea into which he ultimately entered. See, RCW 46.61.522.

This may have been based on the fact that one of the two vials of blood which had been extracted from him at the hospital was not properly preserved, and the unexplained suppression of the Michl video. (Ex 40, p. 2) (RP Vol 1, p. 18-19) Although the initial paperwork generated by SPD indicated that the crime that Mr. Tammam was suspected of committing included eluding a police officer, no such charge was ever brought against him. (Ex 42; Ex 45).

⁶ As Ms. Hor was a minor at the time of the motor vehicle collision, the statute of limitation was tolled until her eighteenth birthday. See, RCW 4.16.190. She had three years from the date she reached the age of majority to file this lawsuit. See, RCW 4.16.080.

Secretary of State service. (CP 1495) Additionally, service by publication also was achieved. On November 12, 2012, Plaintiff was also able to personally serve Mr. Tammam with a copy of the Summons and Complaint, while he was incarcerated in an unrelated matter. Mr. Tammam failed to answer, and an Order of Default was entered. (CP 644-45).

On March 15, 2012, the Trial Court entered a stipulated order allowing only for the names of the individual officers to be removed from the case caption. The rationale behind this was Plaintiff's counsel's fair-mindedness and a desire that the pendency of this lawsuit should not serve to impact the individual officers' in matters such as creditworthiness. (CP 2608-2611)

The purposes of this Order became a matter of controversy at time of trial. At no time was there ever an Order entered dismissing the individual officers from this case with or without prejudice.

The City filed repetitive summary judgment motions primarily arguing an absence of duty. The City had limited success before Judge Middaugh, who determined that the scope of the City's duty under the terms of *Mason*, and its progeny, did not include the officers' decision to

initiate the pursuit.⁷ Ultimately, Judge Middaugh revised this order and clarified that the duty did not extend to the decision to initiate contact with the Tammam vehicle.⁸ (CP 1942-43)

Plaintiff also filed motions for partial summary judgment on a variety of issues. Judge Middaugh granted summary judgment with respect to the Plaintiff's past medical bills and on the issues of whether or not the Plaintiff's claim was barred by the "public duty doctrine" and "discretionary immunity." The Trial Court dismissed the affirmative defenses of contributory fault and "empty chair" asserted by the defense. (CP 1934-1937) Both parties conducted extensive discovery in this case. During the course of discovery, it became apparent that both Officers Thorp and Grant's police cruisers had been equipped with dash-cam video cameras at the time of the May 18, 2006 event. (CP 1960-61) Despite repeated demands, these videos were never produced.

Both parties filed extensive and exhaustive motions in limine. (CP 1445-1494) Judge Middaugh entered a combined order on the parties'

⁷ See, *Mason v. Bitton*, 85 Wn.2d 321, 334 P.2d 1360 (Wash. 1975).

⁸ Plaintiff at no time disputed the concept that Officer Thorp was justified in making contact with the Tammam vehicle, given that it was located in a closed city park. Substantial out-of-state authority supports the concept that the decision to initiate a pursuit is part and parcel of the "driving," which is subject to regulation under the terms of RCW 46.61.035, and similar statutes, which have been passed in other states. See, *Robbins v. City of Wichita*, 172 P.3d 1187, 1194 (Kan. 2007); *Haynes v. Hamilton County*, 883 S.W. 2d 606 (Tenn1994). See also, *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975).

motions in limine on May 24, 2013. Plaintiff was precluded from inquiring why the department failed to investigate what transpired that evening, including a determination as to whether it was, or was not, a “pursuit.” Judge Middaugh’s rationale for such ruling appears to be based on the fact that the City had denied the existence of a pursuit. (CP 1946)

Plaintiff was also precluded from asking any questions with respect to the missing Officer Michl video/audio recording. (CP 1947). A request for a spoliation instruction was also denied. Judge Middaugh, over Plaintiff’s objection, permitted the City to place before the jury evidence regarding Mr. Tammam’s drug use and, in stark contrast, precluded Plaintiff’s police practices and procedures expert, who has extensive practical experience and particularized expertise in the area of police pursuit, from opining that had the officers not pursued, the accident would not have happened. (CP 1948-1954) This ruling was ultimately interpreted by the Trial Judge, (The Honorable Jeffrey M. Ramsdell, who took over the trial for Judge Middaugh), as foreclosing any evidence regarding studies, which form part of the rationale and basis for restrictive pursuit policies such as the SPD’s.

Judge Middaugh also excluded “probable cause” certifications created by Officer Michl and Detective Norton, based on information provided by defendants Thorp and Grant, in support of the criminal

investigation into Mr. Tammam's actions. (CP 1949). Within such forms, the crime of "eluding" was part of the initial focus of the investigation, and was amongst the charges used to justify his jailing. (Ex 42, 43, 44 and 45). (This is significant because Seattle's internal pursuit policy expressly directs that the act of eluding cannot be a basis for the initiation of a pursuit. (Ex 13)).

Judge Middaugh also entered an order in limine excluding any reference to insurance, and the ability to pay or lack thereof. (CP 1952, 1953, 1956) Similarly, by agreement, she also specifically excluded evidence regarding "the defendant's pockets" and excluded "evidence or argument about the City's insurance\deep-pockets\joint and several liability."

Finally, as will be discussed below, Judge Middaugh significantly indicated that given the defense position that there was not a "pursuit," the City was precluded from "claiming privilege under RCW 41.61.035." [sic RCW 46.61.035]. (CP 1957); (CP 1934-1937) She denied Plaintiff's motion to exclude on foundation, speculation and prejudice, any reference to Mr. Tammam's drug use, as well as the testimony, and animations created by defense accident reconstruction experts Rose/Neale. (CP 1954; 1958)

During the course of the first two days of trial, and throughout the trial, a number of Judge Middaugh's pretrial evidentiary rulings were revisited.

3. Trial.

Defense counsel's opening statement violated a number of Judge Middaugh's orders in limine. During the course of his opening defense counsel Mr. Christie stated:

There was a mention by Mr. Barcus of sharing responsibility or allocating responsibility between the two of these [defendants]. 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.⁹ (RP Vol 4, p. 47-48).

(RP Vol 4, p. 71-72) (CP 3250-3275) Then during trial, defense expert Andrew J. Saxon MD was allowed to testify regarding the properties of "ecstasy," even though he could not say on a more probable than not basis

⁹ It appears such comments were cleverly crafted in order to skirt a number of the Trial Court's orders in limine. To illustrate the point, one only needs to substitute the words "if you find one percentage point of fault on the part of the City it will have to pay 100 percent of the damages," as opposed to "...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."

If that was not the true message which was intended to be sent, the statement was, (and is), legally nonsensical because it is an obvious misstatement of the law. Given the fact that Plaintiff was/is "fault free" under the terms of RCW 4.22.070, (and the joint and several liability principles are preserved when there is a fault-free plaintiff), the jury was/is required to allocate fault amongst the defendants, and there is no requirement that the jury find the City "100 percent" responsible in order to have a determination that the City was negligent and had a shared responsibility under concurrent negligence principles. See generally, WPI 41.04 and WPI 45.24, which sets forth the method and manner in which the jury is obligated to allocate fault in a case where there are multiple defendants and a fault-free plaintiff.

how the drug specifically impacted Mr. Tammam on the night in question, other than that he was “impaired.”

The defense also called accident reconstruction experts, Rose and Neale, despite Plaintiff’s vehement objections that their testimony should be excluded because it was speculative and unsupported by an adequate factual foundation. Plaintiff further objected to the presentation of animation exhibits through these experts, which served to allegedly illustrate their conclusions that, as a matter of science, it was a factual impossibility that the events occurred as recounted by the Plaintiff and Mr. Tammam could have occurred.¹⁰ (CP 3197)

Due to the testimony of the defense experts, Plaintiff again moved for a mistrial. (RP Vol 38, p. 159-60) (CP 2893-2899) The motion was denied. Thereafter, both orally and in writing, Plaintiff moved to strike the

¹⁰ The foundation for their opinions was the assumption that the Tammam vehicle was capable of achieving faster speeds than the police cruisers. (RP Vol 33, p. 35) In order to illustrate this point, these experts created approximately 16 animations, only two of which were presented at time of trial. Within the animations presented to the jury was a built-in assumption that the Tammam vehicle was traveling at its maximum speed on Seward, thus, the police vehicles would have been left far behind and would not have been observable by Mr. Tammam, particularly while he was on Seward Park Avenue. However, there was no factual basis for such an assumption and was belied by Officer Grant’s, (the lead pursuing vehicle), admission that he observed the Tammam vehicle as it rounded the corner on Seward. Plaintiff also had developed an animation to illustrate her point, but ultimately did not present it to the jury because the factual scenario presented too many random variables to accurately illustrate what transpired. The defense animations were manufactured by a computer program known as “PC Crash” which, over the years, as discussed below, has been subject to substantial controversy.

testimony of Rose and Neale and requested a curative instruction in that regard. These motions were also denied. (RP Vol 44, p.38).

Also, relevant to this appeal is the testimony provided by Deputy Chief Kimmer, who was the defense representative at trial. He 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 46.61.035.¹¹ (RP Vol 43, p.45-47).

Finally, with respect to the testimony provided by the defense experts, despite Plaintiff's vehement objections, defense economist William Partin was permitted to testify regarding the medical issue of what necessary medical care Plaintiff would need in the future. He also testified regarding a discount rate for reduction of present cash value purposes, which according to Plaintiff's expert, and another CPA highly familiar with such issues, was not in accordance with industry standards.¹² (CP 2984-2998; 2999-3045)

¹¹ Despite the clear letter of the law, and no statutory or case law authority supportive of such a position, Mr. Christie, during the course of his opening, asked the jury to rely on their personal experience where they may have observed police vehicles operating above the speed limit, even when they do not have their lights and/or sirens on. (RP Vol 4, p. 46-47) Such a proposition is not supported by the law, RCW 46.61.035, and as indicated within WPI 71.06, when a police officer is not availing himself to the statutory privilege, he is required to follow the rules of the road just like every other citizen.

¹² Plaintiff not only orally objected, but also filed a memorandum of points and authorities seeking to preclude such testimony. (CP 289) As the case approached its end,

On June 26, 2013 the trial court held a preliminary instruction conference, during which Judge Ramsdell announced that he was not going to include the individual named defendants in the caption of the jury instructions, or have them subject to apportionment of liability within the verdict form. (See, RP Vol. 49, Page 178 – 237), (*Id.* at 226). It was also again pointed out to the trial court that the defendants were not entitled to the statutory privilege set forth in RCW 46.61.035, based on their denials to requests for admissions and Judge Middaugh’s prior ruling. The Court agreed, and essentially invited Plaintiff’s counsel to draft and submit an appropriate instruction addressing the unavailability of the statutory privilege given Judge Middaugh’s previous rulings. (*Id.*)

The following morning, June 27, 2013, there was a continuation of the instructional conference, as well as the taking of formal exceptions. (RP Vol. 50, Page 4) (RP Vol. 52, Page 9 – 24). Prior to the taking of formal exceptions, Plaintiff’s counsel tendered to the Court WPI 71.06. (*Id.*, page 13). Despite the fact that the instruction was clearly “on point,” the trial court nevertheless instructed the jury regarding the statutory privilege, which had previously been found, as a matter of law, to have no application. Following the making of exceptions, the case was argued to

the parties had an instructional conference with the judge. (RP Vol 50, p.4) Preliminary exceptions were taken on June 26, 2013. (RP Vol 49, p. 178-327)

the jury, which in turn rendered a verdict that failed to include a finding that the City of Seattle was negligent. (CP 2944-46)

Thereafter, on July 24, 2013, Plaintiff filed a Motion For a New Trial, arguing many of the points currently encompassed by this appeal. On August 9, 2013, without oral argument, the trial court denied Plaintiff's Motion for a New Trial. This timely appeal followed. (CP 3336-3337).

IV. ARGUMENT

A. Factual Issues Regarding Officers Thorpe and Grant's Violation of SPD's Internal Pursuit Policies Upon Initial Pursuit and Continuation of a High-Speed Pursuit.

Under SPD's pursuit policy, the main factor to be considered before initiating a high-speed chase is whether there was an initial major crime in progress or recently committed, e.g., arson, kidnapping, homicide, serious assault or rape. (Ex 13). Under the policy in effect at the time of the May 18, 2006 events, high-speed pursuits were not permitted for non-major crimes or misdemeanors. The operative SPD policy (1.141) states that "pursuits are permissible only when the need for immediate capture outweighs the danger created by the pursuit itself." "Immediate capture shall apply to only the most serious incidents." "The circumstances justifying the decision to pursue must exist at the time of

initiation.” “The suspected crime of eluding will not, without additional circumstances, justify a pursuit.”

SPD’s policy 1.141 further mandates that it is SPD’s “goal to save lives while enforcing the law. Pursuits present a significantly increased risk of injury... to civilians[.]” and with the change to the policy in 2003, are only to be engaged in when the immediate need for apprehension outweighs the risk inherent in the pursuit. (Seattle PD Policy 1.141.) (Ex 13)

Pursuant to the policy, examples of extraordinary circumstances include, but are not limited to, display of a weapon, any situation in which the suspect creates a clear danger to others. *Id.* “The circumstances of justifying the decision to pursue must exist at the time of initiation.” “The extraordinary circumstances must be present prior to the time that a pursuit is initiated.” *Id.* “The crime of eluding will not, without additional circumstances, justify a pursuit.” *Id.* SPD’s policy clearly states that, prior to the initiation of any pursuit, the officer must consider the “seriousness of the originating offense and whether the identity of the suspect is known.” Here, there was no need to engage in a high-speed pursuit because the offense, if any, of being in a park past closing “hours” was minor, and the suspect could be apprehended later. (Ex 13)

Further, under SPD's policy, the officers are to terminate the chase when the fleeing driver presents an unacceptable hazard to passengers of the pursued vehicle. *Id.* They did not do so. Instead, both officers continued to "attempt to locate" Mr. Tammam's vehicle at speeds exceeding 60 mph.

Based on these facts, a reasonable jury should have concluded that the co-defendant, City of Seattle, through its police officers, violated the common law and statutory standards of care applicable to the use of the roadways in the State of Washington. A reasonable jury should have also decided that any number of actions of Officer Thorp and/or Grant were affirmative actions, i.e., turning on lights and sirens, chasing out of the park, continuing to chase at the intersection of Juneau and Seward, chasing at up to 60+ mph well in excess of the 30 mph residential posted speed limit, etc. As eluding cannot be part of the pursuit justification, the only apparent infraction was a park closing violation. As was shown at trial, the City's own internal pursuit policies are consistent with modern standards. See, WPI 60.03; RCW 5.40.050; see also, *Joyce v. DOC*, 155 Wn.2d 306, 119 P.3d 825 (2005). Similarly, such internal police policies are based on nationally recognized "industry standards," and could be used in determining whether or not the SPD's actions conformed to the applicable standards of care. See, *Andrews v. Burke*, 55 Wn. App. 622, 79

P.2d 740 (1989); see also *DeWolf and Allen* 16 WAPRAC § 1.51("evidence of negligence - industry custom") (3d Ed. 2012). (RP Vol 4, p. 52-55)

The "industry standards" applicable to police pursuits are based on studies performed by the Defendant's own expert Geoffrey Alpert. (CP 1944-1959) According to influential studies conducted by Mr. Alpert, and cited by the FBI, it is recognized that if an individual is fleeing from the police, and the police do not pursue him, or if the police do pursue him and the pursuit is terminated, the person fleeing will slow down in a distance of, at most two blocks according to suspects, and less than two blocks according to police officers. Mr. Alpert's studies form a large part of the rationale for modern police department pursuit policies, which are discussed above and within Chief Van Blaricom's report. Yet, at trial, Plaintiff was barred from presenting proof regarding Professor Alpert's work, which would have aided in explaining to the jury the rationale for restrictive pursuit policies like the SPD's, and the common knowledge among police professionals of the dangerousness of such activities, and avoiding them, despite the fact the criminal will get away, (at least in the short term). (CP 1948) (RP Vol 5, p. 94).

B. The Law Applicable To Jury Instructions.

A trial court's decisions regarding jury instructions are viewed de novo if, based upon a matter of law, or for abuse of discretion, based upon a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. See, *Thompson v. King Feed Nutrition Serv., Inc.*, 152 Wn.2d 447, 453, 105 P.3d 378 (2005). Giving an instruction which contained an erroneous statement of the applicable law is reversible error when it prejudices a party. *Thompson*, 153 Wn.2d at 453. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 420, 58 P.3d 292 (2002). Instructions which are misleading can be grounds for reversal if they cause prejudice. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A jury instruction is deemed to be prejudicial if it substantially affects the outcome of the case. See, *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn.App. 265, 278, 135 P.3d 955 (2006). When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial and it furnishes a ground for reversal unless it affirmatively appears that it was harmless. *Mackay v. Acorn Custom*

Cabinetry, Inc., 127 Wn.2d 302, 311, 898 P.2d 284 (1995). This is particularly so when it affects the burden of proof. *Id.*

Here, the Court's instructional errors, as reflected in the above assignments of error, warrant reversal and remand for a new trial.

C. The Giving Of Court's Instruction No. 17, And The Failure To Give Plaintiff's Proposed Instruction No. 27 Was An Inexplicable Prejudicial Error Warranting The Grant Of A New Trial.

The trial court's decision to give Instruction No. 17, (WPI 71.01), despite the fact that Judge Middaugh had previously ruled that the defendants were not entitled to the statutory privileges set forth within RCW 46.61.035 is inexplicable. As previously discussed, Judge Middaugh, based in part on the City's denials in response to Plaintiff's Requests For Admission and the evidence presented to the Court pretrial, ruled as a matter of law that the City was not entitled to the privileges set forth within RCW 46.061.035 under the circumstances of this case. The instruction given was unsupported by the evidence, misstated the applicable law, and only served to encourage juror confusion.

This is particularly so in light of the adoption of WPI 71.06, which was specifically designed to apply when, as here, it had already been determined as a matter of law that the police vehicles did not qualify as "emergency vehicles" within the meaning of RCW 46.61.035. In light of Judge Middaugh's ruling removing such an issue from the case, there was

no legal or factual basis for an instruction on the privilege set forth in RCW 46.61.035. Both officers testified that they were not in pursuit of Mr. Tammam's vehicle, at least by the time it had arrived at the crest of Juneau at its intersection with Seward, and they had turned off their lights and sirens. Thus, their actions, as explained by them, would not have qualified under the terms of RCW 46.61.035 for the privileges otherwise set forth within the statute. (Absent qualifications for the exercise of the statutory privilege, as indicated within WPI 71.06, these police officers were obligated to comply with the rules of the road, including the posted speed limit).

Yet, despite such substantial limitations in a police officer's authority to violate the rules of the road, both Mr. Christie in his opening statement, and Deputy Chief Kimerer in his testimony, indicated that police officers nevertheless could speed apparently whenever they desired. (RP Vol 4, p. 46-47); (RP Vol 43, p.45-47) Repeated erroneous statements of law, alone, can be a basis for a mistrial. See, *Kahn v. Schnall*, 155 Wn.App 560, 576, 228 P.3d 828 (2010), WPI 71.06 is not only a correct statement of the law, but in this case, also would have been curative.

Thus, the need for Instruction No. 71.06 not only was necessary in order to support Plaintiff's theory in the case, (based on the defendant's

version of the facts), but also to dispel any confusion created by such misstatements of the law.¹³ Additionally, the City, having taken the legal position that there was “no pursuit,” would be “equitably estopped” from changing that position at time of trial, given Plaintiff’s reliance on such assertions when developing her trial evidentiary presentation. See, *Lybbert v. Grant County*, 41 Wn.2d 29, 1 P.3d 1124 (2000), setting forth the elements of equitable estoppel). Alternatively, judicial estoppel would preclude the City from taking inconsistent positions within court proceedings. See, 16 WAPRAC § 10:8 (3d ed. 2013). One of the primary bases for the trial court’s determination that the City was not entitled to the benefit of the privilege statute was its answers to Plaintiff’s Requests for Admission, which were never subject to retraction and/or modification.

In sum, the trial court, by giving the emergency vehicle privilege instruction, which had already been determined to not apply to the facts of this case, was both an error of law and was unsupported by the evidence. It served to only create jury confusion, and was misleading to the extent that, without the clarification provided by WPI 71.06, the instruction failed to explain to the jury that the officers, (based on their own admissions), were not operating as a “emergency vehicle,” and were otherwise obligated to

¹³ Misstatements of the law made by counsel for the party in whose favor a verdict is rendered, in and of itself constitutes “misconduct,” warranting the grant of a new trial. See, *Kuhn v. Schnall*, 155 Wn.App. 560, 577, 228 P.3d 828 (2010).

follow the rules of the road. The officers admitted that during the course of their actions following their initial encounter with Mr. Tammam, they were not following the “rules of the road” and were traveling 60+ mph in a residential neighborhood, which has a far lower 30 mph speed limit. Such a violation of the law, with the guidance provided by the clarification provided within WPI 71.06, could have been viewed as evidence of negligence for the jury’s consideration. See generally, WPI 60.01; RCW 5.40.50, *Joyce v. DOC*, 155 Wn.2d 306, 119 P.3d 825 (2005) (violation of statute regulation and/or internal governmental policies can be used by the jury as “evidence of negligence”).

A party is prejudiced by an instruction that permits the jury to act on a theory for which there was no proof in evidence. *Cocoa v. Armstrong Corp., Inc.*, 60 Wn.App. 466, 804 P.2d 659 (1991). Here, the fact that the prior trial judge had already ruled as a matter of law that the City was not entitled to the statutory privilege, speaks volumes to the absence of evidence and other justifications for not giving such instruction. The Trial Court’s *sua sponte* decision to reinsert the statutory privilege into the case was erroneous and prejudicial.

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- D. Court's Instruction No. 26, Which Instructed The Jury That The City Of Seattle "Had No Duty To Control Omar Tammam's Acts," Was An Erroneous Misstatement Of The Law, Misleading And Confusing, A Comment On The Evidence, And Served To Undercut Plaintiff's Valid Theory Of Liability.

In this case, and no doubt likely in nearly any other case involving a police pursuit, the basis for liability is the notion that the police, by pursuing a fleeing driver, are "controlling" that driver's behavior. As stated in *Suwanski v. Village of Lombard*, 794 N.E.2d 1016, 1022 (Ill. App. 2003):

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 a 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 conclude that both drivers were the proximate cause of harm." (Citations omitted).¹⁴

Indeed, the whole predicate for liability under Washington law, as explored in *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2 1360 (1975), is that the police actions in pursuing a suspect can be viewed as independent concurrent negligence for which the police officer, and its employer can be held liable. In other words, by engaging in a pursuit, given the "symbiotic" relationship between the pursuer and pursued, the police are

¹⁴ As indicated in *Suwanski* a reasonably prudent police officer is "chargeable with the knowledge that it was probable that the suspect would act in a negligent or even illegal manner and that the officer's conduct could be found to be a proximate cause of the plaintiff's injuries," citing to *Sudin v. Hughes*, 246 N.E.2d 100 (Ill App. 1969).

in fact, (at least in part), controlling the actions of fleeing drivers, such as Mr. Tammam. It defies common sense to conclude otherwise.

Additionally, it has previously been recognized in Washington the actions of one driver can “control” that of another driver, even when a lead driver is asserting control. *Yong Tao v. Heng Bin Li*, 140 Wn.App 825, 166 P.3d 1263 (2007).

Given the context of this case, and Plaintiff’s theory of liability, it was particularly damaging for the Court to give such a no-duty-to-control instruction. Such an instruction served to undercut and negate Plaintiff’s theory of liability, served to comment on the evidence, and created contradiction and confusion within the instructions.

It was also an instruction that in the context of the case, was unsupported by the evidence. This is because if Plaintiff’s proof was believed to be true by the jury, the police officers were indirectly controlling Mr. Tammam’s actions by pursuing him. By the same token, had the pursuit been not initiated and/or more promptly discontinued, the police also would have been asserting “control” over Mr. Tammam’s actions, because he no longer would have had a motivation to continue to drive at a high rate of speed. Either way it is viewed, the police officers did, under Plaintiff’s theory of the case, partially control Mr. Tammam’s actions. Thus, for the Court to state that there was “no duty to control,”

while generally true, was both legally and factually inaccurate under the particular facts of this case and the claim at issue, and was a comment by the trial court indirectly informing the jury to reject Plaintiff's theory of the case.

E. The Court's Instruction No. 27 Was Both Legally And Factually Erroneous.

The Court's Instruction No. 27 told the jury that the City of Seattle owed no duty to protect Plaintiff from Omar Tammam's "criminal acts." While such a proposition is generally true, in the context of this case, and the claim which was being brought, the instruction, at a minimum, was a misstatement of the law, negating the applicable duty and a comment by the Court indicating to the jury that it should reject the Plaintiff's theory of the case. As indicated within the seminal *Mason* opinion, the purpose of statutes such as RCW 46.61.035 and the law surrounding negligent police pursuits is that such pursuits are inherently dangerous due to their high risk of causing catastrophic harm to innocent members of the public. As discussed in *Mason*, the purpose underlying such statute is that the police should provide for "the safety of all persons and property from all consequences resulting from negligent behavior of the enforcement officers." *Mason*, 85 Wn.2d at 324-25. Given the law addressing negligent "police pursuits," police can be found concurrently negligent

where they contribute, prolong, or exacerbate the dangers faced by innocent third parties, such as passengers within a vehicle being pursued.

¹⁵ *Robb v. City of Seattle*, 176 Wn.2d 427, 435, 295 P.3d 212 (2013) (Liability can be imposed under Restatement Second of Tort § 302B when "an affirmative act" ... "creates or exposes another to a situation of peril"); see also, *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (Indicating that government can be held legally accountable, even under 42 U.S.C. § 1983, when it either creates or exacerbates the risk of harm).

Given the legal underpinnings of the negligence theory applicable to Plaintiff's case, the Court's instruction that the City had no duty to protect Ms. Hor from Mr. Tammam's criminal acts is an erroneous statement of the law. Although the police officer's duty to protect Ms. Hor is limited to those dangers which it either contributed to or enhanced, nevertheless, under the law and facts of this case a limited duty to protect did exist. Again, such an instruction was also misleading, confusing, a comment against Plaintiff's theory of liability, and served to negate the duty owed by the City and its employees to the Plaintiff under the facts of this case.

¹⁵ See, *DeWolf and Allen* 16 WAPRAC § 1517 (third edition (2013)), "It is erroneous to apply the public duty doctrine to situations where the government action created or increased the risk to the plaintiff," citing to *Afoa v. Port of Seattle*, 176 Wn.2d 460 296 P.3d 800 (2013).

Further, the Court's Instruction No. 26 and 27, along with the Court's Instruction Nos. 21, 22, and 23, inappropriately and prejudicially overemphasized the defendant's theory of the case, i.e., that Mr. Tammam was solely responsible for the accident, when such an inference does not necessarily follow from the fact that Mr. Tammam was found criminally guilty of vehicular assault.

F. Court's Instructions No. 21, 23 Through 25 Were Improper And Served To Mislead And Confuse The Jury, While At The Same Time Overemphasizing The Defendant's Theory Of The Case.

Instructions No. 21, 23 through 25 must be considered in the context of the "whole" instructions provided by the Court. If one reviews the instructions provided by the Court, nowhere within the 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." Further, under the terms of Court's Instruction No. 30, the allocation instruction, the jury was informed that it was to allocate negligence amongst the named defendants, (City of Seattle and Mr. Tammam). What is to be allocated under the terms of Instruction No. 30 is "negligence," and there is no reference with the instructions that Mr. Tammam's "negligence" would be synonymous with the "reckless" conduct of which he was criminally convicted. In other words, absent additional instructions addressing the fact that Mr. Tammam has also been

found to be negligent in this action, the inclusion of Instructions 23 through 25 create substantial confusion as to whether or not Mr. Tammam can be allocated fault because he was found to be "reckless," as opposed to negligent.¹⁶

Further, the inclusion of such instructions, given context, was inherently misleading and confusing to the jury. This is because whether or not Mr. Tammam's actions are characterized as either negligent and/or reckless, he nevertheless could be subject to fault allocation under the terms of RCW 4.22.015, (definition of fault), and RCW 4.22.070. Further, by including the concept of "recklessness," it invites the jury to assign a greater amount of factual fault to Mr. Tammam when cause in fact is a separate issue which is not necessarily anchored to any particular characterization of the conduct as being either reckless or negligent. In other words, simply because Mr. Tammam was criminally convicted, it does not necessarily follow that he has greater responsibility for this collision than he otherwise would have due to simple negligence.

Also, the inclusion of such instructions served no purpose because there was no factual issue for the jury to decide regarding the criminal conviction, and such an issue was extraneous to Plaintiff's claims and the issues the jury had to decide.

¹⁶ Plaintiff's proposed Instruction No. 7, which was not given specifically informed the jury that Mr. Tammam had been found negligent as a matter of law.

Such instructions were also highly prejudicial because the fact that Mr. Tammam was criminally convicted was not the basis for the entry of a default against him, and prejudicially, (without foundation), infers that he engaged in greater culpable conduct without an adequate anchor to the question of causation. Further, the fact that Mr. Tammam was criminally convicted should have been viewed as irrelevant, save for the fact that it served to establish that he was at least negligent for the purpose of fault allocation. Beyond that, such conviction should have been excluded under ER 609, because it does not involve a crime of dishonesty, and its probative value clearly was outweighed by its prejudicial effect, and an attack on his credibility in a manner not authorized by ER 608.

G. The Trial Court Erred By Entering A De Facto Order Of Dismissal Of Individual Defendants Grant And Thorp By Removing (Not Including) Their Names From The Verdict Form For Allocation Of Fault Purposes.

It is exceedingly troubling that the Court made the decision to remove Grant and Thorp as individual defendants in this case. (RP Vol. 49, p. 225-226) There had been no previous order dismissing either Grant or Thorp from the case, only a determination that their names, for benevolent purposes, would be removed from the caption of the case. (CP 2608-2611) (CP 3051-3142) While the Court expressed some concern that both Thorp and Grant were not present throughout the course of the

trial, the issue was brought on by the officers themselves, given the fact that Plaintiff had served both with notices to attend trial, which they ignored. (RP Vol. 5, p. 72, 119-112) (CP 3133-3136) Alternatively, it should not be a burden placed on the Plaintiff to ensure that these individual defendants appear at trial, and it is not Plaintiff's obligation to ensure the defendants fully understand prior Court orders. The individual defendants should not be rewarded for not regularly attending trial with an order dismissing them as parties for the suit. (CP 3051-3142)

The law is clearly established in Washington that when someone is injured by someone operating within the scope of their employment, they have the option of suing either the employee, or the employer, or both. *Orwick v. Fox*, 65 Wn.App. 71, 80, 828 P.2d 12 (1992); *James v. Ellis*, 44 Wn.2d 599, 605, 269 P.2d 573 (1954).

A personal injury lawsuit is a substantial property right protected by both the state and federal Constitution. See, *Hunter v. North Mason School*, 85 Wn.2d 810, 814 539 P.2d 845 (1975). Lawsuits, in many instances, involve matters relating to the fundamental well-being of the injured person and their ability to continue to live a "decent life." One also has a Constitutional right to a jury trial for the determination of the amount of damages which are due and owing. See, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 635, 771 P.2 711 (1989). Given the fact that a personal

injury lawsuit is a valuable property right, it cannot be denied without due process of law, and without implicating and/or negatively impacting an individual's right to a jury trial. The Court's *sua sponte* decision to remove the two individual officers from the case did exactly that and was both arbitrary and capricious.

Plaintiff was fault-free in this case, thus, the duty of the jury was to compare and allocate fault to the individual defendants who remained on the verdict form. As such, the task the jury was to perform was very similar to a determination as to whether or not the party bringing suit was contributorily and/or comparatively at fault. Under such circumstances, as discussed in *Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (1977), the Court was obligated to place before the jury all of the evidence relating to the proximate causes of the accident, including actions of both Officers Grant and Thorp. The fact that the City, under *respondeat superior* principles, and RCW 4.22.070, would have to pay any judgment entered against the individual officers, (due to joint and several liability principles), is irrelevant. Plaintiff had the right to have an allocation of fault against all individuals and entities potentially responsible to her under the law. By not having Grant and Thorp on the verdict form, it denied Plaintiff an instrument which required the jury to analyze the evidence in a more individualized and particularized fashion. Such an allocation is

particularly beneficial when one of the entities potentially subject to liability is a governmental entity, given the natural biases of jurors as "taxpayers," (indirectly negatively impacting their own self-interests), and to dispel potential bias against lawsuits targeted at "deep pockets." It also permits the jury to access personal accountability when there could be a reluctance to hold an entity responsible.¹⁷

Further, the Court's removal of the individual defendants was directly contrary to the law of the State of Washington as embodied in the *Orwick* decision, cited above, which clearly indicates that the Plaintiff has the right to sue both the employer and the employee, even when *respondeat superior* principles apply.

The predominant issue in this case was the allocation of fault amongst various entities and individuals. We have no way of knowing how such an error impacted the jurors' deliberation and how this case was ultimately determined. Therefore, a new trial is necessary. See, *Thomas v. French*, 99 Wn.App. 95, 105, 659 P.2d 1097 (1983). Further, as the error was of a Constitutional magnitude, it is respectfully suggested that the

¹⁷ See, *Ramon v. City of Los Angeles*, W11492412 (Cal. App. 2012) (Upholding trial court's grant of a new trial due to juror misconduct which included among other things statements by a juror regarding the "deep pockets" of the defendant as being one of the reasons it was sued); *Garcia v. CONMED Corp.*, 240 Cal. App.4th 144 (2012) (it was misconduct of counsel to indicate that it was sued simply because it had "deep pockets" and the jury was obligated to send a message). It was respectfully suggested that such risky arguments would not be made by defense attorneys if there was not currently a recognized bias involving lawsuits against "deep pockets."

burden should be placed on the defense, who benefited by such ruling, to establish that it was harmless. See, *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868 (2000).

H. The Trial Court Erred by Permitting Prejudicial Evidence Regarding Mr. Tammam's Drug Usage and Speculative Expert Testimony on that Subject Matter.

Over Plaintiff's vehement objections, the trial court permitted testimony regarding Mr. Tammam's drug usage on the night of the accident. Several hours after the accident, a blood draw was performed at a hospital which was positive for marijuana and ecstasy. (Ex 244) Within the investigative and charging paperwork completed by SPD, it was indicated that Mr. Tammam had allegedly disclosed to an EMT named McCandless that he had taken ecstasy sometime around 10:00 p.m. the evening before the accident. Mr. McCandless was called during trial. Mr. McCandless indicated that he was interviewed by SPD Detective Norton, despite his concerns that speaking to the police would be violative of Mr. Tammam's privacy interest. (RP Vol. 48, p. 126-130) He only did so because he was directed to, or he was compelled to do so, by his management.¹⁸ Significantly, EMT McCandless unequivocally denied

¹⁸ Detective Norton interviewed Mr. McCandless without a warrant, a subpoena, or a HIPPA compliant release of information, arguably, in violation of Mr. Tammam's statutory and common law medical privacy rights. See, generally, RCW 70.02. et. seq.; *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001). As an alternative to utilizing statutory proceedings, police personnel can utilize compulsory process in order to gather

that he ever told Detective Norton that Mr. Tammam had told him that he had taken ecstasy at 10:00 p.m. on the day before the accident. Mr. McCandless clarified that, although Mr. Tammam had confessed to him to using both marijuana and ecstasy, he at no time indicated when he actually took the drugs. (RP Vol. 48, -. 125; 137)

Beyond the fact that hours after the accident blood tests revealed that Mr. Tammam had substances within his system, (following a period of time when his whereabouts were unaccounted for), there was no evidence presented at time of trial, or during pretrial proceedings, evidencing that he appeared or acted in any way “impaired.” (Ex 40, p. 2) This is significant because, generally, a jury is not permitted to consider whether or not someone is impaired by intoxicating substances absent a proper foundation of “impairment.” *Bohnsack v. Kirkham*, 72 Wn.2d 181, 193, 432 P.2d 554 (1967); *Madill v. Los Angeles Seattle Motor Express*, 64 Wn.2d 548, 392 P.2d 821 (1964). (Holding that “where there was a complete absence of any evidence that such driver was under the influence of alcohol, it was error to permit the jury to consider whether the driver was under the influence of, or affected by, intoxicating liquor even though there is evidence...that she had consumed some alcohol prior to the accident.”); *White v. Peters*, 52 Wn.2d 824, 829 P.2d 471 (1958).

healthcare information regarding a suspect. *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454 (2011). Apparently, Detective Norton did neither.

The case of *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007), is also instructive. In *Lewis*, the Court of Appeals found that the trial court did not abuse its discretion by excluding expert testimony concerning the effects of drugs on individuals in general when an expert could not offer an opinion as to how the drugs found within the person's system affected him in particular. The Court found that such evidence was subject to exclusion because it in no way assisted a jury, and as such was irrelevant and speculative. *Id.*

Such a proposition is consistent with well-recognized principals that have been applied in a civil case, where intoxication of one form or another is an issue. For example, in the case *Purchase v. Meyer*, 108 Wn.2d 220, 226, n. 12, 737 P.2d 661 (1987), the Court refused to allow plaintiff to extrapolate, based on alcohol levels, how an individual may or may not have appeared or acted when the question was whether or not the defendant driver was "obviously intoxicated." As stated in footnote 12 of the *Purchase* opinion, there are far too many random variables on how drugs and/or alcohol may affect any particular individual at any particular point in time.

A person's sobriety must be judged by the way they appeared to those around them, and not by a blood alcohol test, or what a blood alcohol test may subsequently reveal. Here, there was no evidence

presented as to how Mr. Tammam appeared and/or acted prior to the accident which would be indicative of any level of significant impairment as a result of his drug intake. See, *Weber v. Budget Truck Rental, LLC*, 162 Wn. App. 5254 P.3d 196 (2001).

It is also well-established that an expert may not testify and provide opinions when there is insufficient evidence to remove it from being outside the realm of conjecture and speculation. See, *Miller v. Likins*, 109 Wn. App. 104, 149, 34 P.3d 835 (2001); see also, *State v. Kilpatrick*, 107 Wn. App. 757, 761-62, 27 P.3d 246 (2011); see also, *Halls v. Walls*, 84 Wn. App. 156, 165, 926 P.2d 339 (1996). Under the terms of ER703, conclusory or speculative expert opinions lacking in adequate foundation will not be admitted. See, *Miller v. Likins*, 109 Wn. App. at 147. When ruling on the admission of expert testimony, courts must always be mindful of the danger that the jury may be overly impressed with the witness possessing an aura of expertise. *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012).

As the *Stedman* opinion indicates, generalized and conclusory expert testimony, unconnected to the actual facts of any particular case, is generally deemed not helpful to the finder of fact. As indicated by *Lewis*, generalized testimony about the effects of drugs is unhelpful to the finder of fact when such generalities cannot be appropriately connected to the

individual at issue. Further, it is suggested that without testimony providing a causal link between an individual and how such substances actually affected behavior based on reasonable medical probability/certainty, such evidence is irrelevant because the proponent of the evidence cannot lay the foundation that such drug usage in any way was “a proximate cause” of any matter at issue. See, *Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250 (2008). When there is no evidence, (based on medical testimony), regarding a causal link between the medical condition and any matter at issue in the case, such evidence does not meet the basic test of relevancy. *Id.* at 142 Wn. App. at 566, 567; ER401 and ER402.

Dr. Saxon’s testimony regarding the use of ecstasy was based on a study that had only eight participants, (RP Vol. 12, page 9-10), and he acknowledged, even with respect to these eight individuals, a variety of factors could affect the drug’s metabolism. Even if eight persons would be sufficient to show what an average person might experience, there was no showing that Mr. Tammam was “average.” See, *Boeing v. Heidy*, 147 Wn.2d 78, 81, 51 P.3d 780 (2002) (holding that what a person “on average” would experience is not relevant without a showing that the person is “average”). Dr. Saxon did not know the dosage of the drugs taken, and the basis for his opinion that Mr. Tammam would have had

peak drug levels at around the time he was driving, was based on a blood draw taken at 4:08 a.m. which assumed an erroneous 10:00 ingestion time. (*Id.*, p. 11) (CP 3177). He could not state, based on reasonable probability, that Mr. Tammam in fact was at peak blood levels at the time of the accident. (*Id.*, Page 13). Dr. Saxon further admitted that the effect of such substances could vary widely depending on the individual. (*Id.*, Page 29).

There was indication within the records that Mr. Tammam was a daily marijuana user. (*Id.*, page 30-31). Dr. Saxon conceded that people can develop tolerances to such drugs. Dr. Saxon conceded that beyond Mr. Tammam's alleged statement, and the blood draw taken hours later, there were no outward signs that Mr. Tammam was under the influence, or impaired by the drugs found within his system. In fact, Dr. Saxon conceded that the physical examination taken of Mr. Tammam, while he was in custody, was inconsistent with what one might expect of a person who is high on these particular drugs: (*Id.*, 35-38).

What is noticeably absent is any testimony that Mr. Tammam, based on reasonable medical probability, would or would not have acted any differently without the drugs, or that the accident was proximately caused by such drug use. Thus, even if Dr. Saxon's testimony is taken at face value - that Mr. Tammam was likely "impaired" at the time of the

accident - is insufficient to establish a causal link between any such impairment and anything that occurred that evening which is relevant to this case. Absent a causal link, Dr. Saxon's testimony was no better than that which was disapproved the *Stedman* case. As in *Stedman*, what is absent is any testimony establishing a causal link between what an average person would experience, versus what actually transpired in this case. See also, RCW 5.40.060; *Boeing v. Heidy, supra*.

Even if the Court assumes that the drug testimony had some limited evidentiary value, such value clearly was far outweighed by its prejudicial potential and the impact of such evidence, (even in context of the alcohol defense, proximate cause must be established), particularly given the issues in this case. As recently observed by our Supreme Court in *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380 (2013), evidence regarding drug and alcohol use can be "explosive." At the time of trial, no evidence was presented how, if at all, any intoxication and impairment impacted the events. Given such a lack of foundation, such evidence should have been deemed inadmissible because it would be nothing more than "bad acts evidence" barred by ER403 and ER404(b). See, *Kramer v. J. I. Case Manufacturing Company*, 62 Wn.2d 544, 815 P.2d 789 (1981).

It has long been recognized that the improper admission of evidence regarding alleged intoxication is so prejudicial that it can be a basis for the grant of a new trial. See, *Leavitt v. Deyoung*, 43 Wn.2d 701, 707, 263, 592 (1953); *Bohnsack v. Kirkham*, *supra*.

Mr. Tammam's negligence was an established fact throughout the trial. What was at issue in this case was whether or not the City of Seattle and its officers were concurrently negligent, and how such concurrent negligence, together with that of Mr. Tammam's, resulted in catastrophic injuries to Plaintiff.

Even if such evidence had minimal probative value, nevertheless, it should have been excluded because such probative value was "substantially outweighed by its danger of unfair prejudice." See, ER403; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 631, 230 P.3d 583 (2010). When evidence is likely to stimulate an emotional response, rather than a rational decision, a danger of unfair prejudice exists. *Id.* As indicated by the Jones opinion, such evidence has the potential to being "explosive." As the *Salas* case indicates, where there is a risk of prejudice, and there is no way of knowing what value the jury placed upon the improperly-admitted evidence, a new trial is required. *Id.* The admission of such prejudicial, explosive evidence justifies the grant of a new trial in this case.

I. The Trial Court Committed Reversible Error by Permitting Conclusory and Speculative Testimony Without an Adequate Foundation from the Defense Accident Reconstruction Experts and Erred by Refusing to Strike Such Speculative Testimony.

There is probably no other type of expert testimony more likely to fall into the realm of conjecture and speculation than the testimony provided by accident reconstructionists or so-called human factor experts. See, *Miller v. Likins, supra*; *Stedman v. Cooper, supra*; *Davidson v. Seattle*, 43 Wn.App. 569, 719 P.2d 569 (1986).

ER 703 provides that an expert opinion may be based upon facts or data "received by or made known to the expert at or before the hearing." However, an expert may not base his/her opinions on speculation or conjecture. *Miller v. Likins, supra*.

In this case, based on what purported to be "scientific" principles, defense experts Rose and Neale testified that it was "physically impossible" for the events to have transpired in the manner described by the Plaintiff. (RP Vol. 33, p. 95) (CP 3197) Such conclusions were based on the notion that the vehicle driven by Mr. Tammam was faster than the vehicle driven by the police officers. (RP Vol. 33, p. 71, 95, 100) (CP 3196) Beyond that, apparently these experts' testimony was based on

various simulations run through a "PC Crash" program that otherwise has dubious values.¹⁹ *Id.* (RP Vol. 33, p. 63-68)

Unfortunately, what is absolutely obvious with respect to the analysis provided by Rose/Neale, is the fact that, even if we assume *arguendo*, that the Tammam vehicle is faster than that vehicle driven by the police, (a somewhat dubious proposition), their analysis wholly fails to take into consideration the random variables of speed, the driver's experience and skill, etc. Simply because one car can go faster than another does not mean that it was driven in such a fashion, or that it was always driven at maximum acceleration throughout the entire pursuit route. Mr. Rose conceded the range was angular from 75 to 100 percent of full throttle. (Vol. 35, p. 134)

Without taking into account such "random variables," the analysis provided by Rose/Neale is nothing more than conjecture and speculation, which is admissible, even under the liberal terms of ER 703. See, *Myers v. Harter*, 76 Wn.2d 772, 780, 459 P.2d 25 (1969). Expert testimony also cannot be based on assumptions, stacked upon other assumptions.

¹⁹ In performing their analysis, neither Rose nor Neale actually measured the parking lot in which the pursuit arguably began, nor Lake Washington Boulevard, which formed part of the pursuit route. (RP Vol. 35, p. 123-125) In addition, unlike the analysis provided by Mr. Stockinger, Plaintiff's accident reconstructionist, the Rose/Neale analysis had a beginning point, (Officer Grant's observance of the Tammam vehicle rounding the curve on Seward), but did not have any meaningful endpoint from which to anchor their analysis. Mr. Stockinger used the fact-based proposition that Mr. Tammam rapidly alighted from his vehicle after the crash, and was seen fleeing by Officer Thorp as he came onto the scene as the end anchor for his analysis.

Davidson v. Seattle, 43 Wn.App. at 575. Here, the Rose/Neale testimony was primarily, if not exclusively, based on the false presumption that if a car is capable of driving faster than another car, it will do so. Simply because a car can go faster does not mean that at all times it was driven faster, that there was not braking, or that the speed was not variable.²⁰ It is also telling that Rose/Neale engaged in at least 16 simulations utilizing a PC Crash program in order to develop their opinions in this case, but only presented three to the jury. (RP Vol. 34, p.102; Vol 35, p. 121) Washington Appellate Courts have previously recognized that utilization of a PC Crash program can often have questionable evidentiary validity. See, *State v. Sipin*, 130 Wn.App. 403, 123 P.3d 862 (2005) (granting a new trial upon finding that the use of PC Crash program information, which was admitted at time of trial was erroneous and prejudicial).

What was at issue in this case was the operation of three motor vehicles over a significant distance, (at least 6/10 of a mile). Any simulation under such circumstances, given the multitude of variables is

²⁰ As both the defense police practices and pursuits experts Van Blaricom and Noble verify, the assessment of whether or not a "pursuit" has occurred must be, at least in part, based on what the fleeing driving was likely to have perceived with respect to the actions of the police. In this case, it was undisputed that Officer Grant was able to see the Tammam vehicle as it rounded a bend on Seward. Thus, it can be presumed that if Officer Grant could see Mr. Tammam, Mr. Tammam also could see him. It was also undisputed at the time he arrived at the top of the hill that Officer Grant had his emergency lights activated. (RP Vol. 35, p. 121) Thus, whether or not ultimately Mr. Tammam could have seen the police vehicles as he proceeded up the remainder of Seward is a "red herring" and not dispositive as to whether or not a pursuit actually occurred.

inherently speculative. In *Sipin*, the Court rejected that PC Crash could be utilized to predict with any accuracy the movement of multiple bodies within the vehicle. The same observation could be made with respect to PC Crash when it comes to the movement of multiple vehicles over a distance. *Id.*

At a minimum, the defendant should have been required to lay a proper evidentiary foundation regarding the use of a PC Crash program in a case like this. Plaintiff moved to strike Rose/Neale's testimony based on the same principles set forth above. The Court denied such a motion. It is respectfully suggested that, it has to be presumed that the admission of such speculative testimony was prejudicial, thus warranting a grant of a new trial.

Recently, the Illinois Appellate Court in the case of *Lorenz v. Pledge*, – N.E.3d – 2014WL 468239 (Ill. App. 2014) found that a trial court erred in admitting a “line of sight video,” similar to the simulations manufactured by the defense experts in this case. As noted in *Lorenz*, typically the foundational requirements for the admission of such experimental or test evidence is a showing that the “essential conditions” or “essential element” of the experiment are substantially similar to the conditions at the time of the accident. *Lorenz*, *supra*, citing to *Brennan v. Wisconsin Central Ltd.*, 59 N.E.2d 494 (Ill. App. 1992). If an experiment

is presented as a re-enactment, the proponent must establish the test was performed under conditions closely duplicated in the accident. *Id.*

As stated in *Lorenz*, citing to *Hernandez v. Schitteck*, 713 N.E.2d 203 (Ill. App. 1999), the admission of demonstrative evidence which may be misleading and confusing to the jury or prejudicial to a party constitutes an abuse of discretion by the trial court. As further indicated in *Lorenz*, it is proper to exclude experiments designed to address the “visibility” portion of an accident if the conditions are not substantially similar. An opposing party can be substantially prejudiced by improperly admitted motion picture type evidence, which does not accurately portray the conditions at the time of the accident, because such visualizations precondition the minds of the jurors to accept the parties’ theory of the case. *French v. City of Springfield*, 357 N.E.2d 438 (Ill. 1976).

Such propositions are equally true in this case with respect to the testimony of Mr. Neale and Mr. Rose. Their testimony, along with the animations created by them, were and are inherently unreliable because of the multitude of random variables that would have come into play with respect to three vehicles independently operating in a short space of time. The potential random variability of speed of the three cars alone, would make a truthful and accurate animation impossible to manufacture. See, *Solis v. Southern California Rapid Transit District*, 105 Cal. App. 3d 382

(1980). (Holding the trial court erred in allowing accident reconstruction testimony because it relied on too many assumptions, and where under the circumstances of the case, too many variables were involved so as to make the opinion based primarily on conjecture and speculation). Thus, it is respectfully suggested that the animations presented to the jury, as well as the speculative testimony supporting them, was improperly admitted, and such erroneous admission of such expert-related evidence warrants the grant of a new trial.

J. The False And Misleading Testimony Perpetrated By Defense Expert Partin Warrants Reversal.

In many respects, this case is on point with the case of *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265 (1984). The *Barth* case was a wrongful death medical malpractice case. In *Barth*, a defense medical expert testified regarding the contents of a textbook in a manner which turned out to be absolutely false. Based on the false testimony, which was not discovered until after a jury entered a verdict in favor of the defendant, the Trial Court granted a new trial based on CR 59(a)(9), including that “substantial justice” had not been done. In *Barth*, at 403, the Court rejected the notion that such erroneous testimony by a critical expert involved matters of credibility, which was ultimately for the jury to decide. Under such circumstances where the testimony has misled the

jury, the Trial Court has the discretion of ordering a new trial to ensure that there is not a failure of substantial justice. *Id.* Here, Mr. Partin testified about a discount rate in a manner inconsistent with the recognized standards within his profession. (CP 2984-3045)

Additionally, Mr. Partin should never have been allowed to provide an opinion regarding Plaintiff's future medical care needs. (RP Vol. 45, p. 49-58) He is admittedly not a physician, and experts are not permitted to render medical opinions which are outside of their area of expertise. (RPV at 45, p.11, 19, and 22). See, *Barie v. Intalco Aluminum Corp. I*, 11 Wn.App 342, 522 P2d 1159 (1974); *Hiener v. Bridgestone/Firestone, Inc.*, 91 Wn.App 72, 959 P2d 8 reviewed in part, 138 Wn.2d 248, 978 P.2d 505 (1999)

Also, Mr. Partin should not have been permitted to testify on such issues because he reviewed reports from other experts and there is no showing that a person within Mr. Partin's field regularly relies on such information outside of the legal forensic context. See, *State v. Nation*, 110 Wn.App 651, 663, 41 P.3d 1004 (2002).

In this case, Mr. Partin's testimony was false and misleading because it was contrary to the norms and standards of his profession. Plaintiff's motion to limit Mr. Partin's testimony should have been

granted. Not only should a new trial address liability issues, but it should also include damages given this tainted damage-related testimony.

K. Misconduct of Counsel for the City of Seattle Was Highly Prejudicial and Incurable, Thus Warranting the Grant of a New Trial.

A critical focus of the Plaintiff's Motions in Limine was to try to keep information from the jury with respect to "joint and several liability," or information which would in any way suggest that as a result of allocating any percentage of fault to the City of Seattle, that the City of Seattle would be responsible for paying 100 percent of the damages.

In that regard, Plaintiff filed Motion in Limine 5.10 to preclude any evidence regarding insurance and/or arguments relating to the fact that the defendant City of Seattle has a "deep pocket." That Motion in Limine was agreed to and thus was granted. Additionally, Plaintiff filed Motion in Limine 5.29, which was specifically designed to exclude any reference to the City of Seattle's "insurance 'deep pockets'/joint and several liability." That motion was granted as to all parties. (See, Combined Order on Motions in Limine). Nevertheless, as noted above, during the course of his opening statement, defense Counsel Christie stated as follows:

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.

Such statement by Mr. Christie was violative of the Court's Motions in Limine regarding "joint and several liability," and Defendant City of Seattle as a "deep pocket" defendant. Such statement was obviously made with the intent to communicate to the jury that even as little as a 1 percent finding of responsibility on the part of the City of Seattle would equate to the City of Seattle paying 100 percent of the damages.

Given that the core issue in this case was the allocation of responsibility between the City of Seattle and Co-Defendant Tammam, such efforts to put such information in front of the jury, particularly as early as opening statement, should be viewed as egregious and a flagrant act of misconduct.²¹ Although such a comment appears to have been cleverly crafted in an attempt to circumvent the Orders in Limine, (by speaking in terms of "negligence" as opposed to "damages"), it is respectfully suggested that the intent of such statement to convey a contrary message is self-evident.

The standards of applicable misconduct occurring during the opening statement are identical to the standards applicable to closing arguments. See, *Nelson v. Martinson*, 52 Wn. 2d 684, 328 P.2d 703

²¹ Given the outcome of the case, it reasonably can be said that such efforts on the part of Mr. Christie hit the intended target.

(1958); *Jones v. Hogan*, 56 Wn. 2d 23, 351 P.2d 153 (1960). In assessing whether or not "misconduct" is so flagrant, ill-intentioned and prejudicial to obviate the need for a contemporaneous objection and request for a curative instruction, is something that must be examined on a case-by-case basis, and in the context of the potential prejudicial impact of the statement within the context of the case. See, *Riley v. Department of Labor and Industries*, 51 Wn.2d 438, 443-44 39 P.2d 549 (1957). When an argument is ingenious and has an insidious effect on the jury, it has been recognized that to make an objection and request a curative instruction would only call attention to the inappropriate argument. *Id.*

This is particularly true when a party has sought and revised an order in limine specifically designed to preclude the information and to ameliorate the need to object in front of the jury, drawing emphasis to prejudicial information. See, *Osborn v. Lake Washington Sd. Rest.*, 1 Wn.App 534, 539, 462, P.2d 966 (1969); *State v. Latham*, 30 Wn.App 766, 780, 638 P.2d 592 (1981) (once a motion in limine has been granted, no objection is necessary to preserve error should such evidence be admitted).

Given the fact that the above issue had been repeatedly ruled upon in Motions in Limine, one can only conclude that such actions on the part of defense counsel were purposeful, and that said actions constituted "such

flagrant misconduct that no instruction would have cured the prejudicial impact derived therefrom.” See, *McUne v. Fuqua*, 42 Wn. 2d 65, 253 P.2d 632 (1953).

Such reference to joint and several liability by defense counsel served only to mislead and confuse the jury, and interjected a collateral matter outside of the Court's instructions. *Id.* See, *State v. Pierce*, 169 Wn.App 533, 553, 280 P.3d 1158 (2012) (Reversible error based on attorney misconduct for an attorney to urge the jury to decide the case based on matters outside of the record and instructions of the court). Such statement also invited "jury nullification," i.e., suggesting to the jury that it should intentionally disregard the Court's instruction and reach what the jury viewed as a proper outcome. See, Tegland, 14A WAPRAC, § 32:29(2d Ed 2012); *State v. Elmore*, 155 Wn. 2d 758, 123 P.3d 72 (2005). Judge Middaugh's Orders in Limine, at Section 5.26, specifically prohibited such efforts at jury nullification. (CP 1956).

Such comment also "put into play" the relative wealth of the parties, which also is entirely inappropriate. See, *Cramer v. Van Parys*, 7 Wn.App. 584, 593-94, 500 P.2d 1255 (1972); *Lockwood v. AC and S, Inc.* 44 Wn.App. 330, 359n24, 722 P.2d 826 (1986) (cases which have found the injection of information about defendants ability to pay damages or

insurance companies to be irrelevant and so prejudicial as to require a new trial).

The above-referenced ingenious and insidious comment by Mr. Christie, during opening statement, standing alone, warrants the grant of a new trial. Given the outcome of the case, one cannot presume that such comment by Mr. Christie was "harmless."

As discussed above, Mr. Christie erroneously stated police officers could violate the rules of the road with impunity, without complying with the emergency vehicle statute. Such erroneous statements were repeated by defense witnesses, particularly Mr. Kimerer. Such statements, as shown by WPI 71.06, were wrong.

The prejudicial impact of such false information should be self-evident, particularly where Defendant Thorp admitted to defense accident reconstructionist Rose that he could have been operating his motor vehicle on a residential street at speeds in excess of 60 miles per hour, "perhaps maybe more," allegedly without his lights and sirens on. Such inaccurate information could only mislead and confuse the jury, particularly when the core question was whether or not the officers were in a "pursuit," thus triggering application of SPDs internal pursuit policy. *Kuhn V. Schnell*, 155 Wn.App 560, 577, 228 P.3d 828 (2010).

Defense counsel's statements during opening statement were obviously calculated to convey information otherwise barred by the trial court's well-crafted, and near exhaustive, orders on Plaintiff's motion in limine. Such misconduct should not be rewarded, and forms an independent basis from which to order a new trial.

V. CONCLUSION

The events which resulted in the catastrophic injury to Ms. Hor occurred fairly rapidly, but have resulted in a litigation of enormous complexity. This is a case where the facts were substantially disputed, and it was critical that the jury be properly instructed on the law and not unduly tainted by improper argument, and speculative and misleading expert testimony. This case, unfortunately, was plagued with substantial error, which served to deny Ms. Hor a fair and full opportunity for her case to be resolved upon its merits.

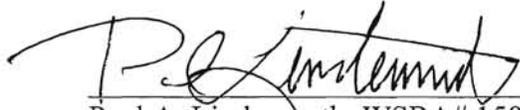
There are multiple grounds which, standing alone, warrant reversal of the judgment in this case, and remand for a new trial. Cumulatively, such errors overwhelmingly establish the need for relief and an order remanding this case back for a full new trial.

///

///

It is respectfully prayed that the judgment in this matter be reversed, and this matter be remanded for a plenary new trial.

DATED 12th day of August, 2014.

A handwritten signature in black ink, appearing to read "P. A. Lindenmuth". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Paul A. Lindenmuth, WSBA# 15817
Attorney for Plaintiff/Appellant

DECLARATION OF SERVICE

I, MARILYN DELUCIA, hereby declares under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.
2. I am a paralegal working for the The Law Offices of Ben F. Barcus & Associates, PLLC.
3. On the 12th day of August, 2014, a true and correct copy of the APPELLANT'S OPENING BRIEF was sent for delivery as indicated to the following:

Original filed via legal messenger to:

Court of Appeals, Division I
Clerk's Office
600 University St.
Seattle, WA 98101

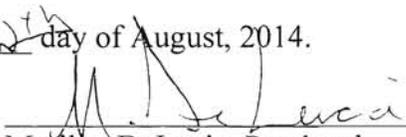
Via email and legal messenger to:

Rebecca Boatright, Esq.
Seattle City Attorney's Office
600 4th Avenue, 4th floor
Seattle, WA 98124-4769
Rebecca.boatright@seattle.gov

Via email and legal messenger to:

Robert Christie, Esq.
Christie Law Group, PLLC
2100 Westlake Ave. N., Ste. 206
Seattle, WA 98109
bob@christielawgroup.com

DATED this 12th day of August, 2014.



Marilyn DeLucia, Paralegal

APPENDIX I

FILED
KING COUNTY, WASHINGTON

JUN 27 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

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

Jeffrey M. Ramsdell
JUDGE JEFFREY M. RAMSDELL

ORIGINAL

1(A)

5

Instruction No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to

1 (B)

observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so.

1(c)

These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

1 (D)

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.

1 (E)

2909

Instruction No. 3

The defendant, City of Seattle, is a municipal corporation. 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.

1 (F)

Instruction No. 4

The 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.

1 (a)

1136

Instruction No. 5

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

1(H)

29/2

Instruction No. 6

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

1(I)

29/3

Instruction No. 7

The plaintiff has the burden of proving each of the following propositions:

First, that the co-defendant City of Seattle, through its employees, acted, or failed to act, in one of the ways claimed by plaintiff and that in so acting or failing to act, the City of Seattle was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the City of Seattle was a proximate cause of the injury to the plaintiff.

1(J)

2914

Instruction No. 8

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

1(K)

99/5

Instruction No. 9

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

1(L)

2916

Instruction No. 10

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of a third person.

1 (M)

7/9/7

Instruction No. 11

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect the conduct of a third person, in such a manner as to create an unreasonable risk of harm to another.

1(N)

29/10

Instruction No. 12

It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing himself or herself or others in danger and to exercise ordinary care to avoid a collision.

1(0)

9/19

Instruction No. 13

In considering whether police officers exercised ordinary care, the reasonableness of the officer's actions must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

1(P)

2920

Instruction No. 14

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

The experts may have testified with regard to statements of others that the experts have considered in formulating their opinions. Those statements are not being offered by the experts for the truth of the matters asserted in those statements. Rather, they are being offered solely to explain the basis for the experts' opinions.

1(a)

2921

Instruction No. 15

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

1(R)

2922

Instruction No. 16

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing.

The statute provides that a driver shall drive at an appropriate reduced speed when approaching and crossing an intersection, when approaching and going around a curve, and when approaching a hill crest.

1(S)

2923

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.

(T)

8924

Instruction No. 18

The violation, if any, of a ^{Policy} ~~statute~~ ^{rule} is not necessarily negligence, but may be considered by you as evidence in determining negligence.

1 (4)

2925

Instruction No. 19

Plaintiff's claim of negligence cannot be based solely on the decision by the officers to initiate a vehicle stop. It is for you to decide if and/or when a stop was initiated and whether or not there was a "pursuit."

1(V)

2926

Instruction No. 20

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

1 (w)

0927

Instruction No. 21

A statute provides under the title "Attempting to Elude Police Vehicle":

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with emergency lights and sirens.

1(X)

9928

Instruction No. 22

An Ordinance provides:

General park operating hours shall be between four (4:00) a.m. and eleven-thirty (11:30) p.m. Individual parks shall not be open to the public between eleven-thirty (11:30) and four (4:00) a.m.

Any person who knowingly enters, remains in, or is otherwise present within the premises of a park during hours which the park is not open to the public shall be guilty of a trespass in parks, a gross misdemeanor.

(11)

2929

Instruction No. 23

You are instructed that Omar Tammam was guilty of vehicular assault for the manner in which he drove on May 18, 2006.

1(2)

2930

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.

1 (AA)

2931

Instruction No. 25

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

1(BB)

2932

Instruction No. 26

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

1 (CC)

2933

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.

1 (DD)

2934

Instruction No. 28

There may be more than one proximate cause of the same injury. If you find that Defendant City of Seattle was negligent and that such negligence was a proximate cause of injury to the Plaintiff, it is not a defense that the act of Omar Tammam was also a proximate cause.

However, if you find that the sole proximate cause of injury to the Plaintiff was the act of Omar Tammam, then your verdict should be for the City.

1 (EE)

0935

Instruction No. 29

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that the Defendant City of Seattle was negligent but that the sole proximate cause of the event was a later independent intervening act of Mr. Tammarn that the City, in the exercise of ordinary care, could not reasonably have anticipated, then the City's original negligence is superseded by the intervening act and is not a proximate cause of the event.

If, however, in the exercise of ordinary care, the City should reasonably have anticipated the intervening act, then the intervening act does not supersede City's original negligence and City's negligence is a proximate cause.

It is not necessary that the sequence of events or the particular resultant event be foreseeable. It is only necessary that the resultant event fall within the general field of danger which the City should reasonably have anticipated.

^ (FF)

2936

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.

1 (GG)

Instruction No. 31

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by the negligence of the defendants.

If you find for the Plaintiff your verdict must include the following reasonable value of necessary medical care, treatment and services receive to the present time.

1. Undisputed reasonable value of necessary medical care, treatment, and services received to the present time: **\$674,052.26**
2. The reasonable value of any other medical care, treatment and services to the present time.

In addition, you should consider the following past economic damages elements:

1. The reasonable value of necessary substitute domestic services, including the reasonable value of services gratuitously rendered by members of plaintiff's family, and nonmedical expenses that have been required to the present time.
2. The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

In addition you should consider the following future economic damages elements:

1. The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future.

1 (A H)

1930

2. The reasonable value of earnings, earning capacity, employment, employment opportunities with reasonable probability to be lost in the future.
3. The reasonable value of necessary substitute domestic services, including the reasonable value of services gratuitously rendered by members of plaintiff's family, and non-medical expenses that will be required with reasonable probability in the future.

In addition, you should consider the following non-economic damages elements:

1. The nature and extent of the injuries.
2. The disability, disfigurement, loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.
3. The pain and suffering, both mental and physical experienced and with reasonable probability to be experienced in the future.
4. The emotional harm to the plaintiff caused by the defendants' negligence, including emotional distress, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

1 (II)

Instruction No. 32

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

1 (JJ)

Instruction No. 33

According to the mortality tables, the average expectancy of life of Channary Hor, a female aged 23 years, is 58.29 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

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0941

Instruction No. 34

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the balliff. The court will confer with counsel to determine what answer, if any, can be

1 (LL)

Q942

given.

In your question, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, nor in any other way express your opinions about the case.

In order to answer any question, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the verdict forms, the presiding juror must sign the forms, whether or not the presiding juror agrees with the verdicts. The presiding juror will then tell the bailiff that the jury has reached the verdicts, and the bailiff will bring you back into court where your verdicts will be announced.

1 (MM)

P943

FILED
KING COUNTY, WASHINGTON

JUN 28 2013

SUPERIOR COURT CLERK
KRISTIN 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, 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.

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ORIGINAL

1(NN)

Special Verdict Form / Page 1 of 3

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: \$ \$13,100,000
- 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 %

100

2943

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

DATE: 6/28/2013

SIGNED: 
Presiding Juror

1(CPP)

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APPENDIX II

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The Honorable Jeffrey M. Ramedell
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,

NO. 10-2-34483-9 SEA

v.

**THE CITY OF SEATTLE, a Washington
Municipal Corporation; ADAM THORP;
ARRON GRANT; and OMAR
TAMMAM,**

**PLAINTIFF'S THIRD
SUPPLEMENTAL PROPOSED
JURY INSTRUCTIONS**

Defendants.

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

PLAINTIFF'S THIRD SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS-1	The Law Offices of Ben F. Barcus & Associates, PLLC 4303 Ruston Way Tacoma, WA 98402 (253) 752-4444 • FAX (253) 752-1035
--	--

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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**

2901

INSTRUCTION NO. 28

The Plaintiff claims that Officers Grant and Thorp pursued Omar Tammam in violation of Seattle Police Department policy, were negligent in doing so, and that such negligence was a proximate cause of Plaintiff's injuries. The City denies these claims.

The City denies the nature and extent of Plaintiff's claimed damages.

WPI 20.01

2010

INSTRUCTION NO. 29

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 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 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.

29 (3)

INSTRUCTION NO. 30

The City of Seattle Police Department has a duty to exercise reasonable care in initiating a police pursuit and, once commenced, whether to terminate a police pursuit. The City's police officer's failure to exercise such reasonable care in connection with a police pursuit constitutes negligence for which the City of Seattle is liable.

WPI 70.01

Mason v. Bitton, 85 Wn.2d 321, 534 P.2d 1360 (1975)

Brown v. Spokane Fire Dist., 100 Wn.2d 188, 668 P.2d 571 (1983)

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

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

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;

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- 1 6. Plaintiff's Motion in Limine to Exclude Evidence of Omar Tamman's Drug Use
2 and to Give the Jury an Adverse Inference Instruction Due to Spoliation of
3 Evidence;
- 4 7. Declaration of Ben Barcus in Support of Plaintiff's Motion in Limine to Exclude
5 Evidence of Omar Tamman's Drug Use and to Give the Jury an Adverse
6 Inference Instruction Due to Spoliation of Evidence;
- 7 8. Plaintiff's Motion in Limine Re: Golden Rule; Jury Nullification; Personal
8 Opinion;
- 9 9. Plaintiff's Memorandum and Points of Authority in Support of Motion in Limine
10 Re: Exclusion of Pre-Collision and Post-Collision Unrelated Medical Treatment
11 or Conditions [Harris Motion];
- 12 10. Plaintiff's Motion in Limine and Supporting Memorandum to Exclude
13 Hypothetical/Speculative Questions or Witnesses and Testimony;
- 14 11. Plaintiff's Motion in Limine Re: Statement of Damages;
- 15 12. City's Consolidated Response to Plaintiff's Motions in Limine;
- 16 13. Plaintiff's Reply to City's Response to Plaintiff's Motions in Limine was not
17 considered by the Court since it was not received by the Court in time to be
18 considered. ;
- 19 14. Declaration of Colleen Durkin and attachments thereto (not considered. See
20 above); and,
- 21 15. City's Reply to Plaintiff's Response to City's Motions in Limine.

22 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows
23 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 Tamman;

 x Granted as follows:

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

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

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

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

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

14 X Granted as follows:

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

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

22 X Granted as follows:
23

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

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

9 Granted

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

16 5. Speculation and conjecture, either as to what did happen or as to what would have
17 happened but for events that did not, in fact, transpire;

18 Granted and Denied as follows:

19
20 The Court has allowed the statements of Defendant Tamman that the plaintiff said he
21 made (that he would stop if they would stop chasing him) and the Court has also allowed
22 in the drug use of the defendant Tamman and the relationship between the defendant
23 Tamman and the Plaintiff. It will be up to the jury to decide based on all the evidence

1 before it whether the defendant Tamman would have stopped driving fast and if so
2 when. However, no expert or lay person may opine as to what defendant Tamman
3 would have done.

4 6. Testimony from fact witnesses that is outside the scope of the witness's personal
5 knowledge (ER 602);

6 Granted as follows:

7 While only Officer Grant and Thorp can testify as to what they did and what they
8 intended, the persons designated under 30(b)(6) as well as the persons from the Police
9 department in charge of determining whether a pursuit occurred may testify as to their
10 opinions. Defense has no objection to the testimony of Chief Kerlikowske.

11 7. Plaintiff's liability experts Wuorenma and Van Blaricom;

12 Granted Denied Reserved

13 a. Exclude Expert Van Blaricom from Plaintiff's case in chief because he was
14 disclosed as a rebuttal expert until recently: Denied

15 b. Limit Van Blaricom testimony to non-cumulative, non-duplicative testimony:

16 Reserved to trial judge

17 c. Exclude expert testimony as to whether the officers violated the City policy
18 because it is not helpful to the jury:

19 X denied . violation of internal policies regarding pursuit can be evidence
20 of negligence

21 d. Exclude expert testimony of Van Blaricom and Wuorenma because it is not
22 helpful to the jury and there is no proper foundation
23

1 X reserved to trial Court. This court was not provided with a copy of the
2 latest reports of these experts. They should be evaluated in light of all the other pre-trial
3 rulings.

4 8. Exclude Evidence regarding "probable cause" certifications;

5 X Granted

6
7 9. Exclude testimony of Annelie Harvey;

8 X Denied

9
10 10. Evidence, argument, or testimony regarding the training of the officers, the
11 supervision of the officers, or the training of the officers' supervisors;

12 X Granted as to negligent training since that claim has been
13 dismissed. X Denied as to the training Officers Grant and Thorp received.

14
15 11. Exclude Tammam's hearsay statements;

16 X Denied See below

17
18 12. Limit Number of friends and family who may be called;

19 Reserved to trial court

20
21 13. References to insurance, ability to pay, or lack thereof;

22 See below

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14. Requests by counsel to ask the jurors to place themselves in plaintiff's shoes;

Granted

15. Exclude Witnesses offered in "rebuttal" whose opinions are already available on matters relating to plaintiff's burden of proof;

Granted though whether any particular witness should be allowed is reserved to the trial judge.

16. Exclude Non-party witnesses in the courtroom;

Granted except that the Plaintiff's sister is her caregiver and may remain in the courtroom with her even before her testimony, and the City may have a non-testifying representative.

17. Prohibit the Plaintiff from arguing or implying that the jury should "send a message."

Granted

18. Argumentative, irrelevant questions intended to inflame the jury.

Denied without prejudice, except as otherwise specifically stated herein. The trial court will have to make decisions as the situation arises and objections are made.

Plaintiff 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.

Plaintiff'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

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1 matters. Non-compliance with this order may result in the imposition of terms and sanctions, the
2 type and amount to be determined at the time according to the circumstances.

3 NOW, THEREFORE, it is hereby ORDERED, ADJUDG ED and DECREED as follows
4 regarding Plaintiff's Motions in Limine:

5 5.1: Exclude evidence of Prior and/or Subsequent Unrelated Injuries :

6 Granted and Denied as follows:

7 Plaintiff has argued that Plaintiff's prior and current medical history, sexual activity,
8 substance use, and mental health history are not relevant, and that she did not suffer from
9 any psychological problems at the time she was injured. Defendants argue that these
10 things may be relevant and were considered by their expert in computing future economic
11 damages. Plaintiff argued that there is no scientific basis to consider such information.
12 Neither side provided copies of expert reports concerning future damages or statements
13 from experts as to whether or not such things were or should be considered. To the extent
14 that such information was relied upon by the defense expert, it is admissible. This is
15 without prejudice to the trial judge if he determines that it is appropriate to exclude such
16 evidence after receiving the expert reports. Evidence of current sexual activity may be
17 relevant if it impacts loss of enjoyment of life, even though the plaintiff is not asking for
18 costs associated with such treatment. The trial judge may have to rule on this after
19 evidence has been presented. Evidence of sexually transmitted diseases is excluded.

20
21 5.2: Exclude "Irrelevant" Information Set Forth Within Plaintiff's Medial Records and
22 Other Records (specifically references in school/medical records or social media content to previous
23 drug or alcohol use, sexual history, domestic violent in plaintiff's home, conflicts at school or home,
referral for a medical evaluation due to suicidal concerns):

Granted and Denied same as 5.1 above.

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1 Plaintiff shall provide defendants with a redacted and an unredacted copy of any medical,
2 school or social media records they are offering, if plaintiff wishes a redaction of any of
3 the records.

4 5.3: Exclude evidence of Prior Juvenile Offenses

5 Granted: Agreed

6 5.4: Exclude hypothetical Medical Conditions

7 Granted

8
9 However, this does not preclude defense expert from testifying regarding elements
10 considered in determining future economic damages.

11 5.5: Exclude evidence of Plaintiff's Financial Circumstances

12 Granted Agreed

13 5.6: Exclude "Irrelevant" Medical Conditions of Family Members

14 Granted as follows

15 Plaintiff sought to exclude evidence relating to Plaintiff's mother's mental health or
16 substance abuse issues. This motion is granted subject to further review by the trial court
17 if the defense expert offers that the information is relevant to evaluating the plaintiff's
18 future economic damages.

19 5.7: Exclude evidence of General Criminal Activity in Seward Park and Alleged Rapes or
20 Other Violent Crimes

21 Denied

22
23 But Plaintiff's may cross examine as to what the officers knew about the actual statistics of
criminal activity in the area, assuming these statistics are admissible.

195-2

1 5.8: Exclude evidence of Collateral Sources

2 Granted as to all parties: Agreed

3
4
5 5.9: Exclude References as to How Plaintiff Might Use the Proceeds of Any Judgment

6 Granted: agreed

7 5.10: Exclude evidence about Lack of Insurance; Defendant's Pocket

8 Granted as to all parties: Agreed

9 5.11: Exclude Circumstances of Hiring Counsel

10 Granted as to all parties: Agreed

11 5.12: Exclude Undisclosed Witnesses, Exhibits, Evidence/Opinions

12
13 Granted as to all parties.

14 But Defendants may present scenarios by their experts that have been produced to
15 Plaintiff before 5/17/13 and parties are not precluded from presenting any evidence that is
16 in actual rebuttal.

17 5.13: Allow Use of Demonstrative Evidence/Exhibits

18 Granted as to all parties: Agreed.

19 5.14: Plaintiff's Comparative and/or Contributory Fault

20 Granted

21 But this does not preclude the defendants from introducing evidence of the length and
22 other details about the plaintiff's relationship with the driver as this goes to the
23 description and evaluation of his reactions. Defendants may not introduce evidence that

1 the Plaintiff violated her curfew or was otherwise in violation of any rules of her home by
2 being with defendant Tammam

3 5.15: Exclude evidence or argument about a parties Failure to Call Witness

4 Granted as to all parties: Agreed

5 5.16: Exclude evidence or argument that Plaintiff filed to mitigate her damages?

6 Granted: Agreed

7 5.17: Exclude Effect of Taxation

8 Granted: Agreed

9 5.18: Exclude argument or evidence that this was an Unavoidable Collision

10 Granted

11 But see 5.19 below

12 5.19: Exclude Statements of Tammam's Drug Use

13 Denied

14 Defendant's drug use is not relevant to the actions of the officers. However, it is relevant
15 to evaluate the credibility of the statements defendant Tammam made about stopping.
16 The defendant's expert may testify about effects of the drugs in his system and when they
17 were probably ingested based on the evidence and science.
18

19 5.20: Exclude evidence of Settlement/Negotiation Discussions

20 Granted: Agreed

21 5.21: Exclude Statements Concerning "Ted Bundy" or other high profile events as
22 examples
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Granted

But this does not preclude the officers from testifying in general terms about the reasons for concern with the actions and occurrences at the park that night. No specific examples of other incidents are to be offered.

5.22: Exclude Evidence of Omar Tammam's Criminal History

Denied but limited as follows:

Since defendant Tammam gave as his reason for running that he had outstanding warrants, evidence may be admitted that he had outstanding warrants for reckless driving and assault 4 at the time of the incident.

5.23: Exclude Family and School History of Plaintiff

Denied

But limited to that information relevant to opinions by experts relating to plaintiff's future economic expectations.

5.24: Sexual History

Denied but limited as follows:

Evidence about sexually transmitted diseases is excluded. If defendant's expert has a valid basis that consideration of plaintiff's sexual history affects the evaluation of her future economic circumstances it may be considered. Sexual history since the accident may be considered only in so far as it is relevant to damage requests. Since no reports were provided to this Judge, this matter must be addressed by the trial judge.

5.25: Do not allow argument of the "Golden Rule"

Granted as to all parties: Agreed

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5.26: Prohibit any attempt at Jury Nullification

Granted as to all parties: Agreed

5.27: Prohibit counsel from offering his or her Personal Opinion

Granted as to all parties: agreed

5.28: Exclude evidence or argument about the Timing or Hiring of Plaintiff's Counsel and Expert Witnesses

Granted

But this does not preclude the defendant from providing evidence as to what the defense costs have been and to explain why they are so high if the plaintiff inquires about costs or payments to defense experts.

5.29: Exclude evidence or argument about City's Insurance/"Deep Pockets"/Joint and Several Liability

Granted as to all parties

5.30: Exclude evidence or argument as to Increase in Insurance Rates/Impact on taxes or Other Inflammatory Arguments/Suggestions

Granted as to all parties: Agreed.

5.31: Exclude Evidence of Witnesses Personal Background Designed to Evoke Sympathy from the Jury

Granted as to all parties: agreed

5.32: Exclude evidence or References to Experts not Interviewing Plaintiff

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 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

1957

1 5.38: Seatbelt Use

2 Granted as to Plaintiff

3 Denied as to defendant Tammam

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6 5.39: Exclude Rose/Neale Accident Reconstruction Simulations/Animations

7 Denied

8 Parties have agreed that all simulations by experts will be illustrative only.

9 5.40: Allow Plaintiff's Ability to Call Defense Witnesses Adversely in Plaintiff's Case-in-Chief

10 Granted

11 However, plaintiff shall not ask questions to illicit opinions from patrol officers, other
12 than Grant and Thorp, as to what they would have done or their opinion as to whether
13 and/or when there was a pursuit unless the officer is an authorized speaking agent or had
14 the duty to make the determination as to whether the action was a "pursuit."

15 5.41: ER 904

16 Reserved to trial Judge

17 5.42: Exclude reference to Filing of Motions in Limine

18 Granted as to all parties: Agreed

19 Other Plaintiff Motions in Limine:

20 a. Exclude evidence of Defendant Tammam's Drug Use: Denied. See above

21 b. Give "spoliation of evidence" instruct because the City cannot produce the video
22 taken of Ms. Tammam after he was arrested:

23 Denied

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

3 c. Exclude Hypothetical/Speculative Questioning of Witnesses and Testimony

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

6 d. Exclude evidence or argument about Statement of Damages

7 Granted as to all parties: Agreed

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

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

15 DONE this 25th day of MAY, 2013.

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18 HONORABLE LAURA GENE MIDDAGH
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