

79971-7

NO. 246370

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MELANIE MORIN,

Plaintiff-Appellant,

v.

CLARENCE HARRELL & HAZEL HARRELL Et Ux. ,

Defendant-Respondent

APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT MELANIE MORIN

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Reply to the Constitutionality of I-518.

A very recent Supreme Court case, cited above, held that if the original title of an act passes constitutional muster under the jurisprudence of Const. art. II, § 19, the title of an amendatory act is sufficient if it explicitly identifies what sections of the original act is amended and the proposed amendments could have been included in the original act. *Jensen* Page 4 of the attached copy of the case). *Jensen* discusses prior cases where some required the amendment title to pass the full constitutional test: the single-subject rule and the subject-in-title rule. The parties agree the Initiative 518 amended the Washington wage and hours

laws and there is no inference in this case the original title of Chap. 49.46 RCW violated article two section 19. The Ballot Title for Initiative 518 was “Shall the state minimum wage increase from \$2.30 to \$3.85 (January 1, 1980) and then to \$4.25 (January 1, 1990) and include agricultural workers?”

The changes in the wage laws proposed in I-518 could have been included in the original act and the ballot title clearly indicates the Initiative proposes to change the wage and hour laws. An agricultural worker is a simple classification, as is a domestic worker or caregiver. Therefore, under the rule reaffirmed in *Jensen*, I-518 is constitutional.

Reply to Laches.

Laches is by far the most compelling reason to reverse the trial court. Laches is common law applicable when no statute of limitations applies to a set of facts. Most states find ten years sufficient for land title disputes such as adverse possession but now we have eighteen years for a single farmer to invalidate settle law affecting many thousands of workers retroactively. It is not only unfair to the affected workers, but it is very burdensome and will unleash a storm of claims and litigation if Respondent ultimately prevails. The reason there is no case law on this may well be because it has never happened before. It's never happened before because it shouldn't.

Reply to FLSA Claim

If Washington courts will not hear a claim under a federal law that is congruent with a parallel state law, then the claim will have to be brought in federal court by default. This court should not forget the temporal issues involved. When the complaint was filed, I-518

was not yet unconstitutional, and the same claim for overtime wages for a caregiver could be brought under both Washington and federal law. Then, the state law was more favorable due to the existence of exemplary damages. The trial court would not have made two awards of damages, one under federal law and one under state law for the same violations of the same provisions. The FLSA claim was, at worst, subsumed within the state law claim but it is going too far to say it was not even pleaded under elementary rules of notice pleading.

December 7, 2006

4/2/07

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William G. Simmons", written over a horizontal line.

William G. Simmons, WSBA 19071
Attorney for Appellant

767386MAJ

Supreme Court of the State of Washington

Opinion Information Sheet

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File Date: 10/05/2006
Oral Argument Date: 10/27/2005

SOURCE OF APPEAL

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JUSTICES

See the end of the opinion for the names of the signing Justices.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF FIRCREST,)	No. 76738-6
)	
Respondent,)	
)	
v.)	En Banc
)	
THEO JENSEN,)	
)	
Appellant.)	Filed October 5, 2006

C. JOHNSON, J. This case involves a challenge to Substitute House Bill 30551 (SHB 3055), AN ACT Relating to admissibility of DUI (driving under the influence of an intoxicant) tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section. Substitute H.B. 3055, 58th Leg., Reg. Sess. (Wash. 2004). The appellant argues the act violates either the United States Constitution or the Washington Constitution by (1) including more than one subject in its title (2) not including the subject of the bill in its title (3) violating the doctrine of separation of powers and/or (4) violating due process by creating a mandatory rebuttable presumption. SHB 3055 took effect on June 10, 2004, and has been challenged in various municipal and district courts on similar grounds with varying results. In this case, the municipal court judge rejected all challenges to the act. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 22, 2004, the legislature enacted SHB 3055. In the bill's first section, the legislature conveys its frustration with the inadequacy of previous attempts to curtail the incidence of DUI and sets a goal of ensuring swift and certain consequences for those who drink and drive. In section 2, the bill amends RCW 46.20.308, the implied consent statute, to allow police officers to obtain search warrants for a person's blood or breath, even if that person consents to the search. The bill also revises the warnings a police officer must give to a driver before conducting a breath or blood alcohol concentration test (BAC). These revisions were intended to reflect the then-current state of the law. Section 4 amends RCW 46.61.506 by codifying the foundational requirements for the admissibility of BAC test results and expands the list of people qualified to administer a blood test under RCW 46.20.308.

The facts giving rise to this claim are undisputed. During the early morning

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hours of October 23, 2004, appellant Theo Jensen was pulled over for speeding by a

city of Fircrest police officer. The officer noticed the smell of alcohol on Jensen's breath and proceeded to conduct field sobriety tests. Based on the results of the tests, the smell of alcohol on Jensen's breath, and the fact that Jensen had been speeding, the officer arrested Jensen and took him to the police station to conduct a BAC test. The BAC test results were 0.043 and 0.042, above the 0.02 legal limit for persons under the age of 21.

Jensen moved to suppress the test results on the grounds that SHB 3055 is unconstitutional. The municipal court heard arguments and ultimately denied the motion. Jensen was convicted of driver under 21 consuming alcohol, RCW 46.61.503. Jensen petitioned for direct review of his case under RAP 4.3.

ANALYSIS

We review challenges to the constitutionality of legislation de novo. The party challenging the legislation bears the burden of showing the legislation is unconstitutional. The appellant challenges SHB 3055 on three grounds. First, he argues the bill violates article II, section 19 of the Washington Constitution by either containing more than one subject in the title or not reflecting the subject of the bill in

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the title. Next, he argues the act violates the doctrine of separation of powers by allowing the legislature to usurp the power of the judiciary to determine the admissibility of evidence. Finally, he argues the substance of the act violates a defendant's due process rights to a fair trial.

I. ARTICLE II, SECTION 19

Article II, section 19 of the Washington Constitution reads, "No bill shall embrace more than one subject, and that shall be expressed in the title." This has been interpreted as creating two distinct prohibitions: first, no bill shall embrace more than one subject (the single-subject rule); and second, no bill shall have a subject not expressed in the title (the subject-in-title rule). *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 249, 88 P.3d 375 (2004). This constitutional mandate serves three distinct purposes:

(1) to protect and enlighten the members of the legislature against provisions in bills of which the titles give no intimation; (2) to apprise the people, through such publication of legislative proceedings as is usually made, concerning the subjects of legislation that are being considered; and (3) to prevent hodge-podge or log-rolling legislation. We have declared that when laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void. *Patrice v. Murphy*, 136 Wn.2d 845, 851-52, 966 P.2d 1271 (1998) (quoting *State*

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ex rel. Wash. Toll Bridge Auth. v. Yelle, 32 Wn.2d 13, 24, 200 P.2d 467 (1948)). Violation of either the single-subject rule or the subject-in-title rule is sufficient to declare the relevant provisions of the bill unconstitutional. *Patrice*, 136 Wn.2d at 852. Article II, section 19 is liberally construed in favor of upholding the challenged legislation. The burden is on the challenger to establish the bill's unconstitutionality

beyond a reasonable doubt.

As a threshold matter, this court must first decide the relevant title of the act. As both parties note, there exists a line of cases establishing that when an act purports to amend a prior act, the relevant title to be examined under article II, section 19 is the title of the original act. *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 355, 243 P.2d 474 (1952).² Although this rule has never been expressly overruled, it has been called into question by its absence from more recent article II, section 19 challenges involving amendatory acts. See, e.g., *Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998) (in article II, section 19 challenge, only the title of the amendatory act was considered). Of the seven lower

² This rule was affirmed in the following cases: *Keeting v. Pub. Util. Dist. No. 1*, 49 Wn.2d 761, 306 P.2d 762 (1957); *Goodnoe Hills Sch. Dist. No. 24 v. Forry*, 52 Wn.2d 868, 329 P.2d 1083 (1958); *Water Dist. No. 5 v. State*, 79 Wn.2d 337, 485 P.2d 66 (1971); & *Belansik v. Overlake Mem'l Hosp.*, 80 Wn.2d 111, 492 P.2d 219 (1971).

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court rulings submitted by the appellant, four declined to follow *St. Paul* and analyzed the amendatory title of the act. The remaining three followed *St. Paul* and analyzed the title of the original act.

The appellant argues that *St. Paul* and its progeny are an anomaly and should be overruled here. They cite the language of article II, section 19 to assert that the words "[n]o bill" expresses the framers' intention that the mandate apply equally to both original and amendatory acts. The respondent argues only that the appellant has failed to meet its burden to overturn the *St. Paul* line of cases.

We agree with the respondent that the appellant has failed to show the *St. Paul* rule, requiring examination of the original title, is harmful and incorrect. Any original act passed by the legislature is subject to traditional article II, section 19 challenges, ensuring compliance with our constitution and adherence to the goals stated above. When amending an original act, it is unnecessary to examine the amendatory title for strict compliance with article II, section 19 because the underlying act has already passed such scrutiny. In these cases, we need only inquire if the amendatory act explicitly identifies what sections of the original act it is purporting to amend and that the amendments proposed could have been included

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in the original act. If the answer to both questions is yes, the amendatory title passes constitutional scrutiny. We take this opportunity to explicitly reaffirm the *St. Paul* cases and hold that, for the purposes of article II, section 19 challenges, the title of an amendatory act is sufficient if the title identifies and purports to amend the original act and the subject matter of the amendatory act is within the purview of the title of the original act.

The dissent agrees with the appellant and would likewise overrule *St. Paul*. The dissent similarly fails to show how the *St. Paul* rule is incorrect or harmful and

provides little reasoning to support its conclusion that the rule undercuts the constitutional provision at issue. In fact, St. Paul does not undercut our constitution, but rather reflects the general understanding of article II, section 19 at the time it was adopted. St. Paul relied primarily on a treatise which explained:

?If the title identifies and purports to amend a prior act, any matter properly connected with, or germane to, the subject expressed in the title of that act may be included in the body of the amendatory act. Any matter that could validly have been enacted as part of the original act under its title is considered germane. If the title of the original act is sufficient to embrace the matter contained in the amendatory act, the sufficiency of the title of the latter will not be inquired into.?

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St. Paul, 40 Wn.2d at 355 (quoting 1 J.G. Sutherland, Statutes and Statutory Construction § 1908 (Frank E. Horack, Jr., ed., 3d ed. 1943)). The treatise, in turn, reflected the common understanding of how to interpret similar state constitutional provisions. See, e.g., Morford v. Unger, 8 Iowa 82 (1859) (interpreting article III, section 26 of the Iowa Constitution reading, "[e]very law shall embrace but one object which shall be expressed in its title?"); In re Miller, 29 Ariz. 582, 244 P. 376, 379 (1926) (interpreting article IV, section 13 of the Arizona Constitution reading, "[e]very act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title?"). Thus, St. Paul and its progeny reflect the common understanding of article II, section 19 at the time it was adopted. This rule is well established. Because the appellant and the dissent cannot show how this rule is incorrect or harmful, we will not overrule it.³

The title of SHB 3055 reads, "AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and

3 Further, as the dissent recognizes, the rule applied in St. Paul has been applied in subsequent cases. What the dissent fails to acknowledge is that the St. Paul analysis in turn cited to a 1908 treatise for support and was not a new or novel approach. St. Paul and other cases are entirely consistent with the general understanding of how article II, section 19 would operate when it was adopted.

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46.20.3101; and creating a new section.? Here, the title of SHB 3055 states explicitly that it is amending RCW 46.61.506 and reenacting and amending RCW 46.20.308 and 46.20.3101. The act meets the first prong of the above test by explicitly identifying and announcing its amendment of the original act.

Next, we must determine if the subject matter of SHB 3055 falls within the scope of the original act. The title of the original act reads, "AN ACT Relating to vehicles; providing for the regulation and licensing thereof and of persons in relation thereto; providing for the collection and disposition of moneys; enacting a vehicle code to be known as Title 46 of the Revised Code of Washington??Motor Vehicles?; providing penalties; repealing certain acts and parts of acts; and declaring an emergency.? Laws of 1961, ch. 12. The scope of the original act includes the creation of Title 46 of the Revised Code of Washington and deals

specifically with motor vehicles, the regulation and licensing of vehicles and persons, and provides penalties for violations of the act. The subject matter of SHB 3055, which concerns preliminary procedures of BAC tests, including search warrants and required warnings along with the admissibility of BAC tests in court, logically fits within the ambit of the regulation of vehicles and penalties for

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violations of those regulations. We conclude that the title of SHB 3055 adequately announces it is amending the Motor Vehicle Act, and the subject matter of SHB 3055 is within the purview of the Motor Vehicle Act. SHB 3055 does not offend article II, section 19 of our constitution.

II. SEPARATION OF POWERS

The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government. Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist. ??The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.?? State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The issue here is whether the legislature is threatening the independence or integrity or invading the prerogative of the judiciary by passing SHB 3055.

This court is vested with judicial power from article IV of our state

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constitution and from the legislature under RCW 2.04.190.4 The inherent power of article IV includes the power to govern court procedures. The delegated power of RCW 2.04.190 includes the power to adopt rules of procedure. State v. Fields, 85 Wn.2d 126, 128-29, 530 P.2d 284 (1975). In general, the judiciary's province is procedural and the legislature's is substantive. ?Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.? State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). The adoption of the rules of evidence is a legislatively delegated power of the judiciary. RCW 2.04.190. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter

4 RCW 2.04.190 reads in part, ?[t]he supreme court shall have the power to prescribe . . . the forms of writs and all other process, . . . of taking and obtaining evidence; . . . and generally to

regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature ?

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related to the court's inherent power, the court rule will prevail. Wash. State Council of County & City Employees v. Hahn, 151 Wn.2d 163, 168-69, 86 P.3d 774 (2004).

The appellant argues that SHB 3055 is not a substantive bill but instead is an attempt to regulate court procedure by mandating the admission of BAC test results.

The appellant relies on the language of section 4 (4) (c), which reads:

Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

SHB 3055, § 4 (4) (c) (emphasis added). Thus, according to the appellant, once the State has met its prima facie burden under section 4 (4) (a), the results of the BAC test must be admitted. The appellant argues that under this interpretation, the act conflicts directly with the court's authority to exclude evidence based on relevancy or prejudice under ER 401, 402, 403, and 404(b).

The respondent argues that SHB 3055 is merely a codification of admissibility rules for BAC tests as they have developed from our case law. This

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court first outlined the prima facie requirements for the admission of Breathalyzer test results in State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960). The prima facie requirements under Baker are that (1) the machine was properly checked and in proper working order at the time of conducting the test (2) the chemicals employed were of the correct kind and compounded in the proper proportions (3) the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within 15 minutes prior to taking the test and (4) the test be given by a qualified operator and in the proper manner. All remaining challenges went to the weight of the test results, not its admissibility. Baker, 56 Wn.2d at 852-55. In 1969, by initiative, the role of approving testing instruments, establishing procedures for conducting tests, and licensing individuals to conduct the test was delegated to a state toxicologist. The toxicologist eventually recommended that the machine be switched from the Breathalyzer to the BAC Verifier DataMaster machine and adopted appropriate regulations, including a modified version of the four Baker requirements. The respondent argues that this court continued to look only to the modified Baker requirements codified in the Washington Administrative Code by the toxicologist and regarded all other challenges as going to weight and not

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admissibility.

However, in 2004, this court deviated from precedent and suppressed numerous BAC tests based on a failure to comply with a WAC that did not concern one of the four Baker requirements. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004) (holding that the State failed to comply with former WAC 448-13-035 (2001) by using thermometers not traceable to standards maintained by the National Institute of Standards and Testing). The respondent maintains that in response to *Clark-Munoz*, the legislature restored its authority to prescribe admissibility requirements, which had previously been delegated to the state toxicologist, by enacting SHB 3055. The legislature is now reaffirming the modified Baker requirements and expanding them to include three additional requirements, as prima facie evidence of admissibility and requiring all other challenges to the reliability or accuracy of the tests to go to the weight of the evidence.⁵ Essentially,

⁵ SHB 3055, section 4 (4).(a) reads:

A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

- (i) The person who performed the test was authorized to perform such test by the state toxicologist;
- (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
- (iii) The person being tested did not have any foreign substances, not to include dental work,

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the legislature is attempting to return the requirements of BAC test admissibility to the way it was before our holding in *Clark-Munoz*.

The respondent further argues that the standard adopted in SHB 3055 is the legislature's attempt to put BAC test results on the same level as other scientific tests, such as DNA (deoxyribonucleic acid) test results. That is, the legislature is essentially adopting the *Frye*⁶ rule for BAC test admissibility. Under the *Frye* standard, scientific evidence is admissible when it is generally accepted as reliable within the relevant scientific community. The courts need not assess the reliability of the scientific evidence, they should defer to the judgment of scientists. *State v. Copeland*, 130 Wn.2d 244, 254, 922 P.2d 1304 (1996). Once the *Frye* standard is satisfied, however, the trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence.

fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). This standard was adopted implicitly in Washington in *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974), and explicitly in *State v. Canaday*, 90 Wn.2d 808, 585 P.2d 1185 (1978).

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In the DNA analogy, DNA admissibility has been accepted under Frye; however, challenges to the weight of the DNA evidence, including laboratory error, the size, quality, and randomness of Federal Bureau of Investigation (FBI) databases, and the methodology and practices of the FBI in declaring a DNA match, are subject to ER 702 admissibility as determined by the trial court. *State v. Cannon*, 130 Wn.2d 313, 325, 922 P.2d 1293 (1996). Similarly, the respondent argues, SHB 3055 sets forth the standards for reliability; once reliability of the test is established by a prima facie showing from the State, all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.

The twin cases of *State v. Zwicker*, 105 Wn.2d 228, 713 P.2d 1101 (1986), and *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1987), are helpful to our analysis. Both cases involve the implied consent statute, RCW 46.20.308, and its evidentiary counterpart, RCW 46.61.517. The implied consent statute, passed in 1969, states that any person who operates a motor vehicle within the state has

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consented to have his or her blood or breath tested for purposes of detecting the presence of alcohol or other drugs. Consent can be revoked by refusal to submit to the tests. In the first version of RCW 46.61.517, refusal to submit to a test was admissible without comment and required a jury instruction that no inference could be drawn from the defendant's refusal. In *Zwicker*, this court held that because no inference could be drawn from the refusal, the evidence was not part of the State's case in chief and therefore could be admitted only if the defendant first opened the matter by arguing lack of credibility or competence on the part of the police. In 1985 and 1986, the legislature amended the statute to read only that refusal to submit to a BAC test was admissible and deleted the language concerning the jury instruction or the requirement that the evidence be admitted without comment. In *Long*, this court interpreted these amendments as a legislative determination that refusal evidence is admissible to infer guilt or innocence, commenting "[w]e see no satisfactory reason not to follow the Legislature's now clear intent of rendering refusal evidence fully admissible in a criminal trial for driving while under the influence of intoxicants." *Long*, 113 Wn.2d at 272-73. In recognizing this legislative rule of evidence, this court made clear that depending on the facts of a

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particular case, a trial court could still exclude such evidence if its probative value were substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury under ER 403.

The same analysis applies here. The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are admissible. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening judicial independence. SHB 3055 does not violate the separation of powers doctrine.

III. DUE PROCESS

The appellant argues that under the federal and state constitutions, he is entitled to a fair trial, including a right to be convicted by reliable evidence. He argues that SHB 3055 violates his rights because it admits unreliable evidence and

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inappropriately places the burden of proof of the reliability of the evidence on the defendant. The appellant's argument is without merit.

The foundational requirements to establish the admissibility of breath tests were first established in Baker. Since Baker, the State has always had the initial burden to satisfy the foundational requirements. Once the results are admitted, the defendant may introduce evidence attacking their accuracy or reliability. City of Seattle v. Allison, 148 Wn.2d 75, 79-80, 59 P.3d 85 (2002). Similarly, SHB 3055 sets forth the requirements the State must establish, including the four modified Baker requirements, before the BAC test results may be admitted. Once the State makes a prima facie showing of admissibility and the court admits the evidence, the defendant may introduce evidence attacking the reliability or accuracy of the test. SHB 3055 does not alter the burden of the State in DUI cases, it is merely codifying it. The appellant has not shown an impermissible or unconstitutional shifting of the evidentiary burden.

CONCLUSION

The Motor Vehicle Act does not violate article II, section 19, the separation of powers doctrine, nor does it offend due process as embodied in both the state and

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federal constitutions. The trial court is affirmed.

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AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Barbara A. Madsen

Justice Bobbe J. Bridge