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Nos. 51791-1-I, 55065-9-I.  
COURT OF APPEALS, DIVISION I,  
STATE OF WASHINGTON

(King County Superior Court Cause Nos. 03-2-00810-9 KNT, 03-1-04645-7 SEA)

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CITY OF AUBURN

Petitioner,

v.

TERESA A. HEDLUND,

Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 APR 11 PM 4:25

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PETITION FOR REVIEW

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\* Appendix D located  
in pouch. (videotape)  
*a*

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Court of Appeals decision in *City of Auburn v. Teresa A. Hedlund*, Cause Numbers 51791-1-I and 55065-9-I, decided March 12, 2007.

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Order on Writ of Review, King County Superior Court Cause Number 03-2-00810-9 KNT, issued by the Honorable James D. Cayce, dated February 5, 2003.

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Appendix E

Plaintiff's Application for the Writ of Review, filed in King County Superior Court Cause Number 03-2-00810-9 KNT, dated January 31, 2003.

Appendix F

Affidavit of Daniel B. Heid in Support of Plaintiff's Application for Writ of Review, filed in King County Superior Court Cause Number 03-2-00810-9 KNT, dated January 31, 2003.

Appendix G

Affidavit of Kelly M. Montgomery in Support of Plaintiff's Application for Writ of Review, filed in King County Superior Court Cause Number 03-2-00810-9 KNT, dated January 31, 2003.

Appendix H

Plaintiff's Memorandum of Points and Authorities for Writ of Review, filed in King County Superior Court Cause Number 03-2-00810-9 KNT, dated January 31, 2003.

Appendix I

Plaintiff's Supplemental Submittal and Memorandum of Authorities Regarding Jurisdiction for Writ of Review and Stay, filed in King County Superior Court Cause Number 03-2-00810-9 KNT, dated February 3, 2003.

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I. IDENTITY OF PETITIONER

Comes now the Petitioner, City of Auburn, by and through its attorney, Daniel B. Heid, and pursuant to Rule 13.4 of the Rules of Appellate procedure (RAP), respectfully petitions the Supreme Court for review of the decision designated in part II of this petition.

II. DECISION

The decision for which review is sought is the decision of the Court of Appeals entitled City of Auburn v. Teresa A. Hedlund, Court of Appeals Cause Numbers 51791-1-I and 55065-9-I, decided March 12, 2007, a copy of which is appended hereto, marked as appendix A.

The above decision is the result of the appeals, cross-appeals and motions for discretionary review of the decisions of the King County Superior Court, to wit: the Order on Writ of Review, King County Cause Number 03-2-00810-9 KNT, issued by the Honorable James D. Cayce, dated February 5, 2003, a copy of which is appended hereto, marked as Appendix B; and the opinion and order on RALJ appeal under King County Cause Number 03-1-046475-7 SEA, issued by the Honorable Mary E. Roberts, dated September 3, 2004, a copy of which is appended hereto, marked as Appendix C.

Pivotal to the case involving the above-referenced decision of the Court of Appeals and the underlying decisions of the King County Superior

Court is a video tape which was entered into evidence in the trial court, the Auburn Municipal Court under cause numbers 1C7374 and C78961, a copy of which video tape is appended hereto, marked as Appendix D.

### III. ISSUE PRESENTED FOR REVIEW

#### A. Accomplice Liability

The Court of Appeals erred in ruling that Section 9A.08.020(5)(a) of the Revised Code of Washington (RCW) precludes the Respondent, Teresa A. Hedlund, from being an accomplice “because” she was a victim. This ruling was in error because everything the Respondent did that solicited, encouraged, aided and promoted criminal activity by others occurred well in advance of the point in time when she (later) became hurt, and could be described as a victim. Admittedly, the Respondent was hurt in a single-car accident that killed the other six young people who were in that car.

However, what the Respondent did – not only at the alcohol party she hosted in her apartment, but also what she did in the car prior to the accident – contributed to the illegal driving of driver, Tom Stewart. These things occurred well in advance of the car’s collision with a concrete pillar. There is no basis in the law, and it would be an unwise move for the courts, to exonerate a person from criminal responsibilities for something that occurred after the crime was committed. That is what the Court of Appeals decision does.

B. Double Jeopardy.

The Court of Appeals erred in holding that the Municipal Court's mid-trial, oral accomplice/victim ruling imposed a double jeopardy bar from the Petitioner proceeding with prosecution for the accomplice charges.

1. Oral Decision. Contrary to the Court's holding in *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989), the Court of Appeals ruled that at the time the Municipal Court rendered its oral decision, that triggered double jeopardy. In fact, at the time that he ruled, the Municipal Court judge questioned the prudence of a statute that would exonerate an accomplice for subsequent actions. His comments included the statement that the "Washington state legislature, in its infinite wisdom, or some would say lack thereof, has a statute that - I'm not quite sure what they were thinking when they drafted this statute." (CP 597 SEA.) Nevertheless, the judge orally ruled in the Respondent's favor, but did so very tentatively. Immediately after the judge ruled, the prosecutor asked for leave to seek review of that decision. "Would the Court grant us leave to file an immediate writ? Your Honor, there is nothing under the statute - this is - this is a - basically, a case of first impression of this type. I think that this needs to be reviewed immediately." (CP 598 SEA.) Not only did the judge agree, Respondent's counsel agreed. (600 SEA) Accordingly, even though *Collins* says that for double jeopardy, a ruling is final only after it is signed by the trial judge in the

journal entry or is issued in formal court orders. *Collins*, 112 Wn.2d at 308, not done in this case, the Court of Appeals applied a *new rule* that the order is final if the reversal is by a reviewing judge. See page 5 Appendix A. But that ignored the tentative nature of the trial judge's decision (still only oral) as well as the agreed permission to seek immediate review. The Supreme Court needs to weigh-in on this.

2. Petitioner's Position on *Finality*. The Court of Appeals also ruled incorrectly, in support of its double jeopardy holding, that the Petitioner concluded that the trial court's oral decision was final.<sup>1</sup> This characterization is bewildering to the Petitioner in that nowhere did the Petitioner use language identifying the ruling as final. In support of that assertion, the Petitioner is appending hereto, copies of the Petitioner's Application for the Writ of Review, as Appendix E; Affidavit of Daniel B. Heid in Support of Plaintiff's Application for Writ of Review, as Appendix F; Affidavit of Kelly M. Montgomery in Support of Plaintiff's Application for Writ of Review, Appendix G; Plaintiff's Memorandum of Points and Authorities for Writ of Review, Appendix H; and Plaintiff's Supplemental Submittal and

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<sup>1</sup> According to the Court of Appeals, "[t]he application for writ of review the City presented to the superior court sought review of the trial court's decision to grant Hedlund's motion to dismiss. It presented the trial court's ruling as *final*. The superior court ruled as if the trial court ruling were *final*: In its order on writ of review, the superior court ordered the ruling reversed, and the charges reinstated. The City returned to trial and prevailed on the basis of that ruling. Having presented the ruling as *final* in its application for writ of review, the City cannot now claim that the ruling was not *final*." Appendix A, page 5. (Emphasis added.)

Memorandum of Authorities Regarding Jurisdiction for Writ of Review and Stay, Appendix I. In addition to these documents, Judge Cayce's Order on Writ of Review, Appendix B, does not contain a description of the Municipal Court's oral ruling as *final*. Moreover, the Petitioner's pleadings actually take the opposite tack. Citing *Smalis v. Pennsylvania*, 476 U.S. 140, 144-45, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986), the Petitioner argued that:

The significance of Double Jeopardy is that it precludes post acquittal prosecution appeals (or prosecution appeals of dismissal after any evidence has been presented to the trier of fact) – no matter how erroneous the basis may have been for the ruling that resulted in the dismissal or acquittal. But *that same preclusion legitimizes a right by the prosecution to seek a writ of review of preliminary rulings*. If review is not available at this juncture, no review could be had (post trial). Thus, the prosecution would (otherwise) have no adequate remedy at law.

Plaintiff's Memorandum, Appendix H, page 8 (emphasis added.)

Additionally, the Court of Appeals' decision ignored the spontaneous action of the trial court prompting Petitioner's application for a Writ of Review. It is not fair to miss-characterize the Petitioner's position (regarding the finality of the trial court's oral ruling), and use that as the basis for its ruling on double jeopardy. However, more than that, while the Court of Appeals ruled that the constitutional claim of double jeopardy may be raised at any time, that overlooks the fact that the Respondent not only failed to object on the basis of double jeopardy when the Petitioner requested

permission to seek a writ of review, the defense agreed to it. The rules should not be changed after the game has been played. Additionally, double jeopardy is a personal right which if not affirmatively plead at the time of trial will be regarded as waived. *U.S. v. Parker*, 368 F.3d 963 (7th Cir 2004), citing *United States v. Buonomo*, 441 F.2d 922, 924 (7th Cir.1971).

The Court of Appeals' curious determination of the Petitioner's position regarding the finality of the municipal court's oral ruling and double jeopardy begs for review by the Supreme Court.

#### C. Evidentiary Rulings

The Court of Appeals erred in completely ignoring and disregarding the evidentiary rulings stating, instead, that its ruling on the accomplice liability rendered the [evidentiary] issues addressed in the City's cross-petition moot.<sup>2</sup> That ruling creates a paradox that warrants review.

If the ruling on accomplice liability and double jeopardy were favorable to the Petitioner, that would still leave a need for the Petitioner's cross-appeal issues to be addressed. But even in, for the sake of argument, it were deemed that the accomplice liability/double jeopardy issues were concluded favorably to the Respondent, the non-accomplice liability/double

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<sup>2</sup> The Court of Appeals said, "[w]e granted review, and reverse Hedlund's conviction of DUI as an accomplice. Our ruling renders the issues addressed in the City's cross-petition moot." Appendix A, page 2.

jeopardy charges – furnishing liquor to a minor and furnishing tobacco to a minor – would still need to be resolved. They would not be rendered moot just because of the accomplice liability/double jeopardy issues were decided – regardless of which way they went. The Petitioner’s cross-appeal involved three of the Respondent’s original eleven assignments of error, all of which were part of the King County Superior Court decision in Cause Number 03-1-04645-7 SEA, Appendix C hereto. Of the eleven assignments of error identified by the Respondent (Appellant in the RALJ Appeal), the Superior Court ruled in favor of the City of Auburn on eight of those assignments, but ruled against the City on three – all evidentiary/discretionary issues; (1) the 911 tape, (2) the videotape and (3) joinder/severance. By the Court of Appeals concluding that its accomplice liability/double jeopardy ruling rendered these other matters moot, that not only ignores the need to address those evidentiary/discretionary rulings but creates confusion and uncertainty about its decision. Again, regardless of which way the accomplice liability/double jeopardy ruling went, the 911 tape, the videotape and the joinder/severance items (Petitioner’s cross-appeal) still need to be addressed.

This, too, warrants review by the Supreme Court.

#### IV. STATEMENT OF THE CASE

On July 16, 2001, a vehicle driven by Tom Stewart (Tom), crashed into a cement pillar at 15th Street SW, in Auburn, Washington, killing the

driver and his passengers, Timothy Stewart (Tom's twin brother), Jayme Vomenici, Marcus Cooper, Brandon Dupea and April Byrd. April was 17 years of age. (CP 772-776, 1118 [King County Superior Court Cause No. 03-1-04645-7 SEA].)<sup>3</sup> The Respondent, Teresa Hedlund, was the only survivor. (CP 792 SEA.) The Auburn Police Department investigated the accident and concluded that the accident was caused by excessive speed and alcohol, not mechanical difficulties. (CP 775, 793-94, 871, 969-1000 SEA.)

A camcorder was found in the accident vehicle. (CP 893 SEA.) The videotape from that camcorder consisted of four (4) parts, the last two of which were admitted into evidence by the trial court. A transcript of that videotape is part of the record hereto (CP 9-15 KNT, CP 1187-92 SEA), a copy of which (CP 1187-92 SEA, CP 9-15 KNT) is appended hereto, as Appendix "D."<sup>4</sup>

Part three of the tape showed a party at the Respondent's apartment occurring just prior to the fatal car trip, and the fourth part showed the activity in the vehicle prior to the crash. (CP 1260-62 SEA [the videotape].) Part three of the videotape showed that the Respondent furnished liquor to the party-goers and provided tobacco to a minor. (CP 1260-62, 852, 855, 874-

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3 Transcript referenced are to the documents per the designated clerks papers in the Court of Appeals.

4 It would be important for this Court to review the actual videotape (CP 1260 SEA, CP 9-15 KNT), in addition to a review of the transcript, to fully appreciate the issues before this Court and those that were before the trial court.

75 SEA.) The party-goers acted out and showed off for the camera, encouraged by the Respondent. Part three of the tape showed that the Respondent went so far as to call for the camera to record her four-year-old daughter's smoking and dancing (Kennedy, go grab my cigarettes off of the fireplace ... Look at what my daughter's doing .... Shake your moneymaker for the camera. CP 1188-89 SEA).

The party-goers were asked to leave by the Respondent's mother [with whom the Respondent resides] when she returned home from work. (CP 516-18 SEA.) There was an argument about who would drive. (CP 542 SEA.) Jayme Vomenici (Jayme) was the only person who hadn't been drinking (CP 543-44, 553, 1182, 1260-62 SEA), but she was not allowed to drive her own vehicle. (CP 1260-62 SEA.). Tom Stewart was heard to say that he was most sober out of them all, which was not the case.

Part four of the videotape showed the events in the vehicle during the last few minutes of six young peoples' lives. (CP 1260-62 SEA.) Seven people were crammed into the two-door, four-passenger vehicle. This required the two smallest people in the vehicle, Jayme and April, to sit on the laps of the bigger people, forcing Jayme, the sober owner of the vehicle, into the back seat. (CP 1117-19 SEA.)

The Respondent was in the front passenger seat, facing backwards, operating the videotape recorder, recording the actions, statements and

responses of herself, the driver and other passengers in the vehicle. (CP 1260-62, 1187-92 SEA.) The videotape also showed that the party-goers' competition to show off for the camera and to act out continued in the car. (CP 1260-62, 1187-92 SEA.)

As Tom Stewart drove, the Respondent filmed him leaning into the camera saying, "It's me driving - Record this shit nigga." (CP 13 KNT, CP 1190, 1260-62 SEA.) The Respondent knew that Tom had been drinking. She was present in the parking lot when he said he was "f---ed up" (CP 552 SEA), and at the party when he said he was "liquored up." (CP 12 KNT, CP 1189, 1260-62 SEA.) Tom continually acted out and show-boated for the camera during the party, yet the Respondent continued to encourage his behavior in the car, while he was driving. Later, almost immediately before the collision, Tom said toward the camera "I'm going to kill all of us right now." (CP 15 KNT, CP 1191, 1260-62 SEA.) And although Jayme and others were fearful, the Respondent merely said that Tom was being "funny." (CP 14 KNT, CP 1191, 1260-62 SEA.) Seconds later, six of the seven people in the car were dead.

The Respondent was charged in the Auburn Municipal Court with Driving Under the Influence of Intoxicants (DUI) by Accomplice Liability, per RCW 46.61.502 and RCW 9A.08.020, Reckless Driving by Accomplice Liability, per RCW 46.61.500 and RCW 9A.08.020 (Cause No. C78961); and

with Furnishing Liquor to a Minor, per Section 9.01.420 of the Auburn City Code (ACC) and Furnishing Tobacco to a Minor, per RCW 26.28.080, and RCW 39.34.180 (Cause No. 1C7374).

At a jury trial in the Auburn Municipal Court, in late January and early February, 2003, the Respondent was found guilty of the offenses of DUI as an Accomplice, Furnishing Liquor to a Minor and Furnishing Tobacco to a Minor, and found not guilty of Reckless Driving. (CP 162 SEA.) However, prior to those verdicts, after the close of the Plaintiff's case in the jury trial, the Respondent brought a Motion to Dismiss the charges of DUI by Accomplice and Reckless Driving by Accomplice. (CP 35-38 KNT.) *See also* (CP 574-98 SEA.) The Respondent argued that she was a victim of Tom's driving and therefore, pursuant to RCW 9A.08.020(5)(a), she could not be an accomplice. The trial court seemingly reluctantly agreed, ruling that the:

Washington state legislature, in its infinite wisdom, or some would say lack thereof, has a statute that - I'm not quite sure what they were thinking when they drafted this statute ... [that] says if [people] are a victim of that crime, they are not an accomplice to the crime committed by the other person.

(CP 597 SEA).

Thereafter, the Plaintiff immediately requested, and was granted, a recess to seek a writ of review from the King County Superior Court. (CP 598, 602 SEA.) The Respondent's attorney did not object to the request. (CP

600 SEA), and the trial court recessing to the next week. (CP 602 SEA.) The Plaintiff's application for a Writ of Review was filed that next morning. After several hearings and arguments, the King County Superior Court reversed the trial court's ruling on the accomplice - victim statute, and reinstated the DUI and Reckless Driving charges. (CP 71-73 KNT.)

## V. ARGUMENT.

Each of the considerations of Rule 13.4(b) of the Rules of Appellate Procedure (RAP) applies to this case, warranting review.

### 1. Conflict with Supreme Court and appellate court decisions

The decision of the Court of Appeals is in conflict with decisions of the Supreme Court and the Courts of Appeals, among them most notably, *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989). That case held that oral rulings do not implicate double jeopardy. Here, without the benefit of any case law (and with a miss-construed factual construction – the Petitioner's position on the finality of the trial court's oral ruling), the Court of Appeals decided that an oral ruling does trigger double jeopardy.

According to *State v. Collins*, a ruling is final only after it is *signed by the trial judge in the journal entry or issued in formal court orders*. *Collins*, 112 Wn.2d at 308 (emphasis added), *citing State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977); *State v. Mallory*, 69 Wn.2d 532, 419 P.2d 324 (1966); *Chandler v. Doran Co.*, 44 Wn.2d 396, 267 P.2d 907 (1954); and *State v.*

*McClelland*, 24 Wn. App. 689, 604 P.2d 969 (1979), *review denied*, 93 Wn.2d 1019 (1980). For perspective, *State v. Collins* overruled the prior standard for determining the finality of rulings under *State v. Dowling*, 98 Wn.2d 542, 656 P.2d 497 (1983), where a trial court's ruling was viewed as final when "read conclusively into the record" without qualification. *Collins*, 112 Wn.2d at 305. The Court of Appeals reversed the directions of these courts.

## 2. Constitutional Questions

The Court of Appeals decision also involves significant questions of law under the Constitution of the State of Washington and of the United States. Obviously, double jeopardy is pivotal to the Court of Appeals' decision. However, the Court's handling of this issue departs from previous authorities and case law. The Court of Appeals applied a *new* standard as to when double jeopardy would apply, to wit: if the "oral" trial court ruling is reviewed by another judge mid-trial, the Court of Appeals holds that double jeopardy would apply. This holding was notwithstanding the fact that the trial court's decision was couched in terms of a question as to the prudence of the accomplice/victim law (as the Court of Appeals construed it), and notwithstanding the fact that the trial court gave *permission* for the Petitioner to seek a writ of review to the Superior Court, and notwithstanding the fact that the defendant's (Respondent's) agree to that process.

Ironically, while the Court of Appeals notes that constitutional claims, including double jeopardy, may be raised at any time. Yet, other courts have held that double jeopardy is a personal right which if not affirmatively plead at the time of trial will be regarded as waived. *U.S. v. Parker*, 368 F.3d 963 (7th Cir 2004), *citing United States v. Buonomo*, 441 F.2d 922, 924 (7th Cir.1971). Here, we are not even just talking about silence, we are talking about an affirmative agreement to the requested permission to seek a Writ of Review.

And again, the Court of Appeals premised its double jeopardy decision on a purported position of the Petitioner regarding the *finality* of the trial court's oral ruling. Such a position is not consistent with the Petitioner's pleadings and argument, and insofar as the Petitioner clearly recognized the Writ as seeking clarification of a *preliminary* ruling, again, with the trial court's permission, and agreement of defense counsel, it not only inconsistent with the above cited authorities, it is unfair to the Petitioner to have double jeopardy imposed in this way. That unfairness interferes with the due process rights of the Petitioner. Even prosecutors are entitled to a fair setting for their trials.

### 3. Issues of Substantial Public Interest

This case involves a substantial public interest that warrants review by the Supreme Court. This case and its criminal charges stemmed from a six-

person fatality accident that several news sources reported as the “worst single car accident” in Washington state history.<sup>5</sup> Additionally, this case throughout its trial, has received significant news media coverage. All of the major television stations in the state, as well as major national news services, were in attendance throughout the trial, and its participants were featured in nationally syndicated news programs. This case is of public interest. More than just that, however, this case involves some significant legal issues and the application of laws to the tragic facts of the case. Specifically, again, the defendant, the sole survivor of a six person fatality accident, was engaged in conduct which the prosecution felt encouraged, solicited, aided and promoted illegal conduct by others, including the driving that ultimately resulted in the accident. Since the Court of Appeals’ decision, the matter has continued to garner news media attention, and the predominant question surfacing, from the Petitioner’s perspective, is (paraphrased), how could a person be exonerated from criminal responsibility by something that happens after the fact?

This case, and the Court of Appeals’ decision, poses the potential for significant changes to Washington law, not only in terms of double jeopardy, but also in terms of accomplice liability. RCW 9A.08.020, the accomplice

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<sup>5</sup> See, for instance, *The Seattle Times*, Local News, Wednesday, July 18, 2001, Accident Fueled by Alcohol Ends Lives of Six Young People “. . . the worst single-car accident in state history.”

liability statute, describes how and when a person is criminally liable for the conduct of another, That statute states, in pertinent part, as it applies to the Petitioner's theory of the case, as follows:

9A.08.020. Liability for conduct of another--Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

...

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

....

(Emphasis added.)

The facts of this case include a number of ways that the Respondent would have been an accomplice, including her hosting a party, furnishing alcohol to youth, not all of whom were over twenty-one years of age, getting into the four-seat Ford Escort While it was parked at her own apartment – so that the other occupants had to shift people around (which because of the size constraints, put Tom Stewart in the driver's seat, and prevented Jayme

Vomenici (Jayme), the owner of the vehicle and the only person who hadn't been drinking (CP 543-44, 553, 1182, 1260-62 SEA), from driving. Moreover, the Respondent knew from the video-camera and statements Tom made on camera that he was under the influence of what he had to drink.

The Respondent argued and the Court of Appeals agreed that per RCW 9A.08.020(5)(a) the Respondent could not be an accomplice because she was a victim. RCW 9A.08.020(5)(a) states as follows:

9A.08.020 Liability for conduct of another--Complicity

...

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He *is* a victim of that crime ....(Emphasis added.)

With all due respect to the Court of Appeals, the statute could not reasonably been intended to *excuse* a person who is later found to suffer a consequence - after he or she did all that was required of him or her to commit a crime as an accomplice. That makes no sense.

The above statutory language does provide that a person cannot be an accomplice if that person is a victim of the crime. However, in addition to the fact that a person who already committed the crime *was not a victim when* the crime was committed, albeit by accomplice participation, the question of whether the law should be or was ever intended to be applied so as to allow a person to escape responsibility after the person took whatever

actions constituted criminal activity because of something that occurred subsequently. As an illustration of this point, for instance, based upon the Court of Appeals' decision, Petitioner submits the following:

If a terrorist wished to blow up an embassy building, but needed access to the building to make sure that the explosives were properly planted, recruiting a disenchanted employee of the embassy who would give the terrorist a key would typically implicate the employee as an accomplice – accessory-before-the-fact. Based upon the Court of Appeals' decision, if that employee were hurt in the explosion because he did not leave soon enough or didn't go far enough, that person would be excused from any culpability for that terrorist act. That makes no sense, but that is how the law would be construed unless reviewed by the Supreme Court. This is a significant issue of public interest.

Also of significant public interest is the Court of Appeals' ruling regarding double jeopardy. If a review by another judge (as opposed to the trial court judge reversing his own ruling) triggers the double jeopardy bar, that, in and of itself, precludes prosecutors from being able to seek interlocutory reviews of preliminary decisions. Again, in this case, that review was done with the trial court's permission. Additionally again, the Court of Appeals made some conclusions about the Petitioner's position regarding the *finality* of the oral ruling that are not consistent at all with the

pleadings and are not consistent with the position taken by the Petitioner. Those things only add further to the deserving public interest and the need for clarification of the new rules of law that the Court of Appeals would impose.

Only adding further to the appropriateness of review by the Supreme Court is the fact that the Court of Appeals, in its decision in this case, concluded that the evidentiary issues that were pending in connection with the Petitioner's cross-appeal are moot. As was mentioned herein and above, that mootness does not make sense and leaves the evidentiary/discretionary rulings of the Petitioner's cross-appeal completely uncertain as to their status.

## VI CONCLUSION

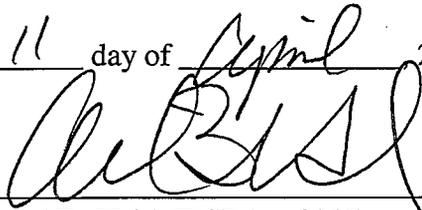
Based upon all of these reasons, the conflict with appellate court cases, the impacts and implications for constitutional issues including double jeopardy, and the significant issues of public interest (not just the accident but the legal issues as well and their implications for other cases) this case is deserving of review by the Supreme Court. If the law is to be changed in all of the many ways that the Court of Appeals decision would change it, that is something that should be given review and countenance by the Supreme Court.

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Respectfully submitted this 11 day of April 2007.

A handwritten signature in black ink, appearing to read 'Daniel B. Heid', written over a horizontal line.

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

CITY OF AUBURN, )  
 )  
 ) Petitioner, )  
 )  
 vs )  
 )  
 ) TERESA A. HEDLUND, )  
 )  
 ) Respondent. )  
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Case Nos. Nos. 51791-1-I,  
55065-9-I

CERTIFICATE OF SERVICE OF  
PETITION FOR REVIEW

I, Daniel B. Heid, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Petitioner's Petition for Discretionary Review, with attachments [except for the videotape Appendix D – already provided to counsel for the Respondent], concerning the above entitled matter to:

Matthew V. Honeywell, WSBA # 28876  
Attorney for Respondent  
323 First Avenue West  
Seattle, Washington 98119

by:  personally serving the same on \_\_\_\_\_  
 depositing the same in the U.S. Mail, postage prepaid, to the above address.  
 delivering the same to ABC Legal Messenger Service for delivery to the above address.

SIGNED at Auburn, Washington, this 11 day of April,  
2007.

  
Signature

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 APR 11 PM 4:25

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

CITY OF AUBURN, a municipal corporation of the State of Washington,	)	DIVISION ONE
	)	
Respondent,	)	No. 51791-1-I
	)	(Consolidated with
vs.	)	No. 55065-9-I)
	)	
TERESA A. HEDLUND,	)	<b>PUBLISHED OPINION</b>
	)	
Petitioner.	)	FILED: March 12, 2007
_____	)	

**BAKER, J.** — Teresa Hedlund was charged as an accomplice to reckless driving and DUI, furnishing alcohol to a minor, and furnishing tobacco to a minor. At the close of the City's evidence, Hedlund moved to have the reckless driving and DUI charges dismissed, arguing that under RCW 9A.08.020(5) she was a victim, and thus could not be an accomplice. The court dismissed. The City sought a continuance and immediate writ of review of the dismissal by the superior court. The superior court reversed and trial continued.

Hedlund was acquitted of reckless driving as an accomplice, and convicted of the remaining charges. Hedlund appealed to the superior court. The superior court rejected most of Hedlund's challenges, but ruled the trial court abused its discretion in several of its evidentiary rulings, and in declining to sever the furnishing tobacco to a

9A.08.020(5), she was a victim of the crimes charged and thus could not be an accomplice. The court agreed, and orally dismissed the DUI and reckless driving charges.

The City immediately sought and was granted a continuance of the trial to allow it to seek a writ of review in the superior court. The superior court ruled that the writ was not barred by double jeopardy. It concluded that Hedlund was a victim of vehicular assault, but not DUI or reckless driving, and that prosecution was thus not barred under RCW 9A.08.020(5).

Trial resumed, and Hedlund was convicted of DUI as an accomplice, furnishing alcohol to a minor, and furnishing tobacco to a minor. She was acquitted of reckless driving as an accomplice.

Hedlund appealed to the superior court. The superior court rejected most of Hedlund's challenges, but ruled the trial court had abused its discretion in declining to sever the charge of furnishing tobacco to a minor, allowing the jury to hear a tape of a witness's 911 call, and admitting a portion of the video tape showing Hedlund's five-year-old daughter smoking. Concluding that the cumulative effect of the errors called for a new trial, the superior court remanded. Both parties sought discretionary review, which we granted.

## II.

Statutory interpretation is a matter of law and is reviewed de novo.<sup>1</sup>

Hedlund was charged as an accomplice under RCW 9A.08.020. The statute provides, in relevant part that:

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<sup>1</sup> Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004).

face, the court must give effect to that plain meaning as an expression of legislative intent.<sup>5</sup>

The City also maintains that the statute is facially clear, and cites the holding in Department of Ecology v. Campbell & Gwinn, L.L.C<sup>6</sup> that statutes are interpreted according to the plain and ordinary meaning of the language used.<sup>7</sup> The City asserts, in essence, that Hedlund is not a victim because her injuries were sustained after the acts which constituted her criminal complicity were committed. It draws a temporal distinction between the injury-causing accident and Hedlund's purported criminal acts. The City argues that RCW 9A.08.020(5) does not absolve a "victim-after-the-fact" from being an accomplice to an already committed crime, and that any actions by Hedlund that aided or promoted Stewart's illegal driving occurred before she became a victim.

Under the City's interpretation, the word "is" in the statutory phrase "is a victim" implies a present state distinguishable from past criminal activity. The City is understandably concerned that a strict reading of section 5 of RCW 9A.08.020 would shield injured accomplices from the reach of the law. But the City's argument is strained. As our Supreme Court noted in State v. Fjermestad,<sup>8</sup> a case cited by the City itself, strained and unrealistic interpretive consequences are to be avoided.<sup>9</sup> There is nothing in the statute to support the notion that the word "is" delineates the time when a victim might sustain her injuries.

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<sup>5</sup> Jacobs, 154 Wn.2d at 600.

<sup>6</sup> 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

<sup>7</sup> Ecology, 146 Wn.2d at 9-10.

<sup>8</sup> 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

<sup>9</sup> Fjermestad, 114 Wn.2d at 835.

The superior court apparently grappled with this distinction when it ruled that Hedlund was a victim, not of DUI or reckless driving, but of vehicular assault. The court observed that the King County Prosecutor's Office had declined to bring vehicular manslaughter charges against Hedlund, noting that RCW 9A.08.020 would clearly have barred prosecuting her on that charge. The court then declared that because there is no victim in the statutory definition of DUI or reckless driving, Hedlund could not be a victim as described in RCW 9A.08.020.

Miss Hedlund is a victim of vehicular assault. DUI and reckless driving aren't crimes against persons, nor are they crimes against property. There's no statutory victim for those crimes other than the State of Washington, basically. The Legislature and all of us recognize that the natural, foreseeable, probable consequences of many of those cases are accidents, injuries, and deaths, but the statutory crime itself does not contain a victim.<sup>[12]</sup>

The court was correct that accidents, injuries, and deaths are foreseeable consequences of DUI and reckless driving. But it was mistaken in finding that those are victimless crimes.

RCW 46.61.5055 lays out the penalty schedule for alcohol violators. It states that in exercising its discretion in setting penalties for those convicted of DUI or reckless driving, a court shall particularly consider whether the person's driving at the time of the offense was responsible for injury or damage to another or another's property.<sup>13</sup>

The statute plainly recognizes that DUI and reckless driving may potentially involve flesh and blood victims beyond the State in the abstract and the public at large. Section 5 draws no distinction between victims of DUI, reckless driving, and vehicular assault. Indeed, by requiring the court to consider whether the accused's driving

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<sup>12</sup> Report of Proceedings (RP) (Feb. 5, 2003) at 31.

<sup>13</sup> RCW 46.61.5055(5)(a).

well as against a subsequent prosecution for the same offense after acquittal or conviction.<sup>18</sup>

The City argues that, since Hedlund did not object on the basis of double jeopardy at trial, she is barred from asserting it on appeal. The City cites United States v. Parker<sup>19</sup> for the proposition that double jeopardy is a personal right which if not affirmatively pled at the time of trial will be regarded as waived.<sup>20</sup> However, our Supreme Court has ruled that a defendant may raise for the first time on appeal a claim that his or her double jeopardy rights were violated.<sup>21</sup>

The City also argues that Hedlund was not subject to double jeopardy because, under the standard set forth in State v. Collins,<sup>22</sup> the trial court's oral dismissal was not final.

In Collins, the court addressed the issue of oral dismissal and concluded that a ruling is final only after it is signed by the judge in the journal entry or is issued in formal court papers.<sup>23</sup> During Collins's trial, the court reversed its own oral dismissal of the charged crime for lack of evidence. The Supreme Court held that the reversal did not constitute double jeopardy because the earlier dismissal was oral, and not memorialized in a signed ruling or journal entry. The Collins court observed that individual judge's style of ruling vary: "Many judges will think out loud along the way to reaching the final

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<sup>18</sup> State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

<sup>19</sup> 368 F.3d 963 (7th Cir. 2004).

<sup>20</sup> Parker, 368 F.3d at 969. Parker explicitly disclaimed a double jeopardy argument, thus depriving the trial court the opportunity to address the issue. The reviewing court concluded the argument was waived and thus not reviewable on appeal. No such explicit waiver is at issue in the present case.

<sup>21</sup> State v. Tvedt, 153 Wn.2d 705, 709 n.1, 107 P.3d 728 (2005).

<sup>22</sup> 112 Wn.2d 303, 771 P.2d 350 (1989).

<sup>23</sup> Collins, 112 Wn.2d at 308.

superior court, which adopted the City's depiction of the trial court's action as a dismissal. The application for writ of review the City presented to the superior court sought review of the trial court's decision to grant Hedland's motion to dismiss. It presented the trial court's ruling as final. The superior court ruled as if the trial court ruling were final: In its order on writ of review, the superior court ordered the ruling reversed, and the charges reinstated. The City returned to trial and prevailed on the basis of that ruling. Having presented the ruling as final in its application for writ of review, the City cannot now claim that the ruling was not final.

The trial court ruling depicted in the City's application for writ of review and the superior court's subsequent order does not evince the ambiguity the Collins holding was meant to alleviate. We hold that reinstating the charges against Hedlund placed her in double jeopardy. On this additional basis, we reverse her conviction for DUI as an accomplice.

REVERSED.

Baker, J.

WE CONCUR:

Appelwick, C.J.

Cox, J.

--- P.3d ---

--- P.3d ---, 2007 WL 730793 (Wash.App. Div. 1)

(Cite as: --- P.3d ---)

City of Auburn v. Hedlund

Wash.App. Div. 1, 2007.

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.

CITY OF AUBURN, a municipal corporation of the  
State of Washington, Respondent,

v.

Teresa A. HEDLUND, Petitioner.

Nos. 51791-1-I, 55065-9-I.

March 12, 2007.

**Background:** Defendant, the sole surviving passenger of single-car accident, was charged as accomplice to reckless driving and driving under influence (DUI) and other crimes, and the trial court dismissed accomplice charges. City sought review, and superior court reversed. At trial, defendant was acquitted of reckless driving, but convicted of DUI as accomplice and other offenses. Defendant appealed. The Superior Court, King County, James D. Cayce, J., rejected most of defendant's challenges, but ruled trial court abused its discretion in declining to sever one charge and remanded. Defendant appealed, and city cross-appealed.

**Holdings:** The Court of Appeals, Baker, J., held that:

(1) defendant was "victim" of driver driving recklessly and DUI and thus could not be accomplice, and

(2) Superior Court's reinstating dismissed charges violated double jeopardy.

Reversed.

[1] Automobiles 48A ↪ 330

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak330 k. Reckless Operation. Most CitedCases

Automobiles 48A ↪ 332

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak332 k. Driving While Intoxicated.

Most Cited Cases

Passenger injured in single-car accident involving driver driving recklessly and under the influence (DUI) was "victim" of crimes of reckless driving and DUI, and thus could not be accomplice to those offenses. West's RCWA 9A.08.020(5), 46.61.5055.

[2] Double Jeopardy 135H ↪ 88.1

135H Double Jeopardy

135HIV Effect of Proceedings After Attachment of Jeopardy

135Hk88 Dismissal or Discharge in General

135Hk88.1 k. In General. Most Cited Cases

Trial court's oral dismissal of defendant's charges of reckless driving and driving under influence (DUI) as an accomplice was final, and thus Superior Court's reinstatement of those charges on review violated double jeopardy. U.S.C.A. Const. Amend. 5; West's RCWA Const. Art. 1, § 9.

[3] Double Jeopardy 135H ↪ 1

135H Double Jeopardy

135HI In General

135Hk1 k. In General. Most Cited Cases

The prohibition against double jeopardy protects against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction. U.S.C.A. Const. Amend. 5; West's RCWA Const. Art. 1, § 9.

[4] Criminal Law 110 ↪ 1030(2)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in General

110k1030(2) k. Constitutional Questions. Most Cited Cases

A defendant may raise for the first time on appeal a claim that his or her double jeopardy rights were violated. U.S.C.A. Const. Amend. 5; West's RCWA Const. Art. 1, § 9.

Appeal from King County Superior Court, Honorable James D. Cayce, J.

Daniel Brian Heid, Auburn, WA, for Petitioner.

Matthew Valen Honeywell, Attorney at Law, Seattle, WA, for Respondent.

BAKER, J.

\*1 ¶ 1 Teresa Hedlund was charged as an accomplice to reckless driving and DUI, furnishing alcohol to a minor, and furnishing tobacco to a minor. At the close of the City's evidence, Hedlund moved to have the reckless driving and DUI charges dismissed, arguing that under RCW 9A.08.020(5) she was a victim, and thus could not be an accomplice. The court dismissed. The City sought a continuance and immediate writ of review of the dismissal by the superior court. The superior court reversed and trial continued.

¶ 2 Hedlund was acquitted of reckless driving as an accomplice, and convicted of the remaining charges. Hedlund appealed to the superior court. The superior court rejected most of Hedlund's challenges, but ruled the trial court abused its discretion in several of its evidentiary rulings, and in declining to sever the furnishing tobacco to a minor charge, and remanded for a new trial. She then sought review of the superior court's reversal of the municipal court's original dismissal of the DUI and reckless driving charges. The City also sought review of the superior court's holdings on severance of charges and certain evidentiary rulings. We granted review, and reverse Hedlund's conviction of DUI as an accomplice. Our ruling renders the issues addressed in the City's cross-petition moot.

### I.

¶ 3 Teresa Hedlund was the sole survivor of a horrific one-car automobile accident which took the lives of six young people. The driver, Tom Stewart, was among those killed. Hedlund suffered severe injuries and spent months in treatment.

¶ 4 All but one of the passengers had consumed alcohol, and Stewart was speeding and driving erratically. Investigators found a video camera in the car. The video tape contained footage of the occupants of the car taken just moments before the accident. It also contained footage of a party at Hedlund's residence attended by the same people earlier that day.

¶ 5 The City charged Hedlund under RCW 9A.08.020 as an accomplice to DUI and reckless driving, and with furnishing alcohol to a minor. It later added the charge of furnishing tobacco to a minor. The City based its theory of accomplice liability in large part on Hedlund's use of the video camera, asserting that her act of video taping the occupants of the car caused Stewart to "showboat" and encouraged his reckless driving.

¶ 6 At the close of the City's evidence, Hedlund moved to dismiss the DUI and reckless driving accomplice liability charges, arguing that under the terms of RCW 9A.08.020(5), she was a victim of the crimes charged and thus could not be an accomplice. The court agreed, and orally dismissed the DUI and reckless driving charges.

¶ 7 The City immediately sought and was granted a continuance of the trial to allow it to seek a writ of review in the superior court. The superior court ruled that the writ was not barred by double jeopardy. It concluded that Hedlund was a victim of vehicular assault, but not DUI or reckless driving, and that prosecution was thus not barred under RCW 9A.08.020(5).

\*2 ¶ 8 Trial resumed, and Hedlund was convicted of DUI as an accomplice, furnishing alcohol to a minor, and furnishing tobacco to a minor. She was acquitted of reckless driving as an accomplice.

¶ 9 Hedlund appealed to the superior court. The superior court rejected most of Hedlund's challenges, but ruled the trial court had abused its discretion in declining to sever the charge of furnishing tobacco to a minor, allowing the jury to hear a tape of a witness's 911 call, and admitting a portion of the video tape showing Hedlund's five-year-old daughter smoking. Concluding that the cumulative effect of the errors called for a new trial, the superior court remanded. Both parties sought discretionary review, which we granted.

### II.

¶ 10 Statutory interpretation is a matter of law and is reviewed de novo. <sup>FNI</sup>

[1] ¶ 11 Hedlund was charged as an accomplice under RCW 9A.08.020. The statute provides, in relevant part that:

A person is an accomplice of another person in the

commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it. <sup>[FN2]</sup>

¶ 12 The City argues that, in addition to furnishing alcohol to the party-goers, Hedlund aided, promoted, and encouraged Stewart's reckless and intoxicated driving by video taping the activities at the party and in the car, and was thus complicit in Stewart's criminal acts.

¶ 13 Hedlund, in turn, points to section 5 of the statute which states that a person is not an accomplice in a crime committed by another person if he or she is a victim of that crime. <sup>FN3</sup>

¶ 14 The trial court held that, given Hedlund's extensive injuries, no jury would fail to find that she was a victim, and therefore she was not an accomplice under RCW 9A.08.020(5).

¶ 15 Hedlund argues on review that, as a victim of Tom Stewart's drunk and reckless driving, she cannot be an accomplice to his criminal acts. In support of her argument she cites to State v. Jacobs <sup>FN4</sup> for the proposition that if a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. <sup>FN5</sup>

¶ 16 The City also maintains that the statute is facially clear, and cites the holding in Department of Ecology v. Campbell & Gwinn, L.L.C. <sup>FN6</sup> that statutes are interpreted according to the plain and ordinary meaning of the language used. <sup>FN7</sup> The City asserts, in essence, that Hedlund is not a victim because her injuries were sustained after the acts which constituted her criminal complicity were committed. It draws a temporal distinction between the injury-causing accident and Hedlund's purported criminal acts. The City argues that RCW 9A.08.020(5) does not absolve a "victim-after-the-fact" from being an accomplice to an already committed crime, and that any actions by Hedlund that aided or promoted Stewart's illegal driving occurred before she became a victim.

\*3 ¶ 17 Under the City's interpretation, the word "is" in the statutory phrase "is a victim" implies a present state distinguishable from past criminal activity. The City is understandably concerned that a strict reading

of section 5 of RCW 9A.08.020 would shield injured accomplices from the reach of the law. But the City's argument is strained. As our Supreme Court noted in State v. Fjermestad, <sup>FN8</sup> a case cited by the City itself, strained and unrealistic interpretive consequences are to be avoided. <sup>FN9</sup> There is nothing in the statute to support the notion that the word "is" delineates the time when a victim might sustain her injuries.

¶ 18 Moreover, the City's argument misreads that statute. The crime referred to is the crime committed by the principal, not the aiding or abetting committed by the alleged accomplice. The acts of complicity may have concluded, but the crimes of DUI and reckless driving continued without any apparent interruption.

¶ 19 To support its contention that Hedlund was not a victim, the City cites Hansen v. Department of Labor and Industries. <sup>FN10</sup> In Hansen, the appellant challenged a determination by the Board of Industrial Insurance Appeals that she was not an innocent victim of assault, and was therefore ineligible for benefits under the crime victims compensation act. The City argues that Hansen stands for the proposition that a person is not a victim of a crime if he or she caused or contributed to his or her injuries. The Hansen ruling, however, was much narrower. It addressed the availability of benefits to one who provoked or incited a criminal act which resulted in her injuries. The court found that Hansen was not an "innocent" victim; it did not strip Hansen of her victim status entirely. In fact the court noted, "Without question Hansen was the victim of a criminal assault." <sup>FN11</sup>

¶ 20 Neither is RCW 9A.08.020(5) the get-out-of-jail-free card the City fears it to be. An accomplice is not necessarily absolved of all liability for his crimes by dint of injuries sustained in the course of committing those crimes.

¶ 21 The City likens Hedlund's argument to a get-away driver in a bank robbery who is accidentally shot by the bank robber, then claiming to be a victim and thus not an accomplice. But the driver would be a victim of assault, not a victim of robbery.

¶ 22 The superior court apparently grappled with this distinction when it ruled that Hedlund was a victim, not of DUI or reckless driving, but of vehicular assault. The court observed that the King County Prosecutor's Office had declined to bring vehicular manslaughter charges against Hedlund, noting that RCW 9A.08.020 would clearly have barred

prosecuting her on that charge. The court then declared that because there is no victim in the statutory definition of DUI or reckless driving, Hedlund could not be a victim as described in RCW 9A.08.020.

Miss Hedlund is a victim of vehicular assault. DUI and reckless driving aren't crimes against persons, nor are they crimes against property. There's no statutory victim for those crimes other than the State of Washington, basically. The Legislature and all of us recognize that the natural, foreseeable, probable consequences of many of those cases are accidents, injuries, and deaths, but the statutory crime itself does not contain a victim.<sup>[FN12]</sup>

\*4 ¶ 23 The court was correct that accidents, injuries, and deaths are foreseeable consequences of DUI and reckless driving. But it was mistaken in finding that those are victimless crimes.

¶ 24 RCW 46.61.5055 lays out the penalty schedule for alcohol violators. It states that in exercising its discretion in setting penalties for those convicted of DUI or reckless driving, a court shall particularly consider whether the person's driving at the time of the offense was responsible for injury or damage to another or another's property.<sup>FN13</sup>

¶ 25 The statute plainly recognizes that DUI and reckless driving may potentially involve flesh and blood victims beyond the State in the abstract and the public at large. Section 5 draws no distinction between victims of DUI, reckless driving, and vehicular assault. Indeed, by requiring the court to consider whether the accused's driving caused injury to another, the statute makes it plain that vehicular assault and vehicular homicide are not the only crimes which could give rise to injuries under the statute.

¶ 26 Hedlund's injuries were the direct result of Stewart's reckless and intoxicated driving. Under RCW 46.61.5055, the sentencing court would have been required to consider Hedlund's injuries in imposing sentence on Stewart had he lived and charges been brought against him. Having sustained serious injuries as a result of Stewart's criminal acts, Hedlund is Stewart's victim. RCW 9A.08.020(5) thus bars her prosecution as an accomplice.

### III.

[2] ¶ 27 Hedlund also argues that the trial court's

grant of her motion to dismiss the DUI and reckless driving charges precluded further proceedings on those charges because of the constitutional prohibition on double jeopardy.

¶ 28 We review the issue of double jeopardy de novo.<sup>FN14</sup>

[3] ¶ 29 The United States Constitution states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.<sup>FN15</sup> The Washington State Constitution provides that no person shall be twice put in jeopardy for the same offense.<sup>FN16</sup> Article I, section 9 of the Washington Constitution is given the same interpretation the Supreme Court gives to the Fifth Amendment.<sup>FN17</sup> The prohibition against double jeopardy protects against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction.<sup>FN18</sup>

[4] ¶ 30 The City argues that, since Hedlund did not object on the basis of double jeopardy at trial, she is barred from asserting it on appeal. The City cites United States v. Parker<sup>FN19</sup> for the proposition that double jeopardy is a personal right which if not affirmatively pled at the time of trial will be regarded as waived.<sup>FN20</sup> However, our Supreme Court has ruled that a defendant may raise for the first time on appeal a claim that his or her double jeopardy rights were violated.<sup>FN21</sup>

¶ 31 The City also argues that Hedlund was not subject to double jeopardy because, under the standard set forth in State v. Collins,<sup>FN22</sup> the trial court's oral dismissal was not final.

\*5 ¶ 32 In Collins, the court addressed the issue of oral dismissal and concluded that a ruling is final only after it is signed by the judge in the journal entry or is issued in formal court papers.<sup>FN23</sup> During Collins's trial, the court reversed its own oral dismissal of the charged crime for lack of evidence. The Supreme Court held that the reversal did not constitute double jeopardy because the earlier dismissal was oral, and not memorialized in a signed ruling or journal entry. The Collins court observed that individual judge's style of ruling vary: "Many judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated into the findings, conclusions, and judgment."<sup>FN24</sup> The Collins court ruled that, to serve the interests of certainty, the better rule is to rely on the final written court order or written journal entry

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(Cite as: --- P.3d ----)

to determine the finality of a ruling.<sup>FN25</sup>

¶ 33 In both *Collins*, and *State v. Dowling*<sup>FN26</sup> which *Collins* overruled, the trial court reversed its own prior oral dismissals. Similarly, the unpublished Washington cases citing *Collins* which we have reviewed also involve cases where the trial court revised or reconsidered its own prior ruling. The United States Supreme Court cited *Collins* in *Smith v. Massachusetts*.<sup>FN27</sup> In *Smith*, the trial court reversed its earlier dismissal of one of the charges against the defendant. The Supreme Court held that the reversal constituted double jeopardy. However, in doing so, it noted that Massachusetts had not adopted any rule regarding the finality of mid-trial oral rulings.<sup>FN28</sup> The court acknowledged that, as a general matter, state law may prescribe that a judge's mid-trial rulings can be reconsidered.<sup>FN29</sup> While it could find no instance in which a state had done so by statute or rule, it pointed out that case law in some states, including Washington, defines the limitations of oral dismissal or acquittal.<sup>FN30</sup>

¶ 34 The present case is distinguishable from *Smith*, *Collins*, and the unpublished cases citing *Collins*. Here, the trial court did not reverse its own dismissal of Hedlund's DUI and reckless driving charges. The dismissal was reversed on review by the superior court, which adopted the City's depiction of the trial court's action as a dismissal. The application for writ of review the City presented to the superior court sought review of the trial court's decision to grant Hedlund's motion to dismiss. It presented the trial court's ruling as final. The superior court ruled as if the trial court ruling were final: In its order on writ of review, the superior court ordered the ruling reversed, and the charges reinstated. The City returned to trial and prevailed on the basis of that ruling. Having presented the ruling as final in its application for writ of review, the City cannot now claim that the ruling was not final.

\*6 ¶ 35 The trial court ruling depicted in the City's application for writ of review and the superior court's subsequent order does not evince the ambiguity the *Collins* holding was meant to alleviate. We hold that reinstating the charges against Hedlund placed her in double jeopardy. On this additional basis, we reverse her conviction for DUI as an accomplice.

¶ 36 REVERSED.

WE CONCUR: MARLIN APPELWICK, C.J., and RONALD COX, J.

FN1. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004).

FN2. RCW 9A.08.020(3).

FN3. RCW 9A.08.020(5). The section reads in full: "Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime; or (b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime."

FN4. 154 Wash.2d 596, 115 P.3d 281 (2005).

FN5. *Jacobs*, 154 Wash.2d at 600, 115 P.3d 281.

FN6. 146 Wash.2d 1, 9, 43 P.3d 4 (2002).

FN7. *Ecology*, 146 Wash.2d at 9-10, 43 P.3d 4.

FN8. 114 Wash.2d 828, 835, 791 P.2d 897 (1990).

FN9. *Fjermestad*, 114 Wash.2d at 835, 791 P.2d 897.

FN10. 27 Wash.App. 223, 615 P.2d 1302 (1980).

FN11. *Hansen*, 27 Wash.App. at 226, 615 P.2d 1302.

FN12. Report of Proceedings (RP) (Feb. 5, 2003) at 31.

FN13. RCW 46.61.5055(5)(a).

FN14. *State v. Leming*, 133 Wash.App. 875, 881, 138 P.3d 1095 (2006).

FN15. U.S. Const. amend. V.

FN16. Wash. Const. art. I, § 9.

FN17. *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267 (1995).

FN18. State v. Graham, 153 Wash.2d 400, 404, 103 P.3d 1238 (2005).

FN19. 368 F.3d 963 (7th Cir.2004).

FN20. Parker, 368 F.3d at 969. Parker explicitly disclaimed a double jeopardy argument, thus depriving the trial court the opportunity to address the issue. The reviewing court concluded the argument was waived and thus not reviewable on appeal. No such explicit waiver is at issue in the present case.

FN21. State v. Tvedt, 153 Wash.2d 705, 709 n. 1, 107 P.3d 728 (2005).

FN22. 112 Wash.2d 303, 771 P.2d 350 (1989).

FN23. Collins, 112 Wash.2d at 308, 771 P.2d 350.

FN24. Collins, 112 Wash.2d at 308, 771 P.2d 350.

FN25. Collins, 112 Wash.2d at 308, 771 P.2d 350.

FN26. 98 Wash.2d 542, 656 P.2d 497 (1983).

FN27. 543 U.S. 462, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005).

FN28. Smith, 543 U.S. at 471.

FN29. Smith, 543 U.S. at 470.

FN30. Smith, 543 U.S. at 470-71.

Wash.App. Div. 1,2007.

City of Auburn v. Hedlund

--- P.3d ----, 2007 WL 730793 (Wash.App. Div. 1)

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APPENDIX "B"

FILED  
KING COUNTY WASHINGTON

FEB - 5 2003

SUPERIOR COURT CLERK  
BY: *BRENDA* DEPUTY  
*BELEHR*

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

CITY OF AUBURN,

Plaintiff

v.

TERESA HEDLUND,

Defendant.

NO. 03-2-00810-9 KNT

ORDER ON WRIT OF REVIEW

Clerk's Action Required

THIS MATTER having come on before the above-entitled Court this 5<sup>th</sup> day of February, 2003, on the Writ of Review issues by the Court pursuant to the application of the Plaintiff, City of Auburn, requesting that this Court review the matter in the Auburn Municipal Court, entitled City of Auburn, Plaintiff, v. Teresa Hedlund, Defendant, under Cause Numbers 1C7374 and C78961, specifically including review of the decision of the Auburn Municipal Court on January 30, 2003, granting the Defendant's Motion to dismiss the charges of Driving Under the Influence of Intoxicants by Accomplice Liability, and Reckless Driving by Accomplice Liability under the theory that, pursuant to RCW 9A.08.020, the Defendant cannot be an accomplice for these charges because she was a victim, and this Court having reviewed and considered the arguments and authorities presented by the parties, and being fully advised, Now, Therefore,

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

2 The Court hereby finds and concludes as follows:

3 1. On January 30, 2003, the Auburn Municipal Court ruled on a Defense Motion at  
4 the close of the Prosecution's case in the jury trial on the above referenced Municipal Court  
5 matters, dismissing the charge of Driving Under the Influence (DUI) as an accomplice and the  
6 charge of Reckless Driving as an accomplice, leaving still pending the charges of Furnishing  
7 Liquor to a Minor and Furnishing Tobacco to a Minor.

8 2. The Defendant argued and the Municipal Court agreed that the Defendant could  
9 not be an accomplice in the DUI and Reckless Driving crimes because she was a victim, citing  
10 RCW 9A.08.020(5)(a). *and produced at trial*

11 3. The facts asserted in the Defendant's Motion before the Auburn Municipal *TC*  
12 Court indicate that the Defendant was a victim of the Driving Under the Influence (DUI) as an *JAC*  
13 accomplice and the charge of Reckless Driving crimes because she was seriously injured in  
14 the accident occurring on July 16, 2001, when the vehicle in which she was an occupant  
15 collided with a concrete road support. *2DC*

16 *4. The Defendant is a victim of Vehicular Assault,*  
17 ~~The Court finds as a matter of law that the construction and interpretation of  
18 RCW 9A.08.020(5)(a) is a strained and unreasonable interpretation, and it does not create an  
19 ambiguity that warrants application of the Rule of Lenity.~~ *TC*

20 *5. The provisions of RCW 9A.08.020(5)(c)  
21 would only apply to Vehicular Assault.*  
22 ~~The Court further finds as a matter of law that a person's criminal conduct is  
23 measured as of the time that the criminal conduct occurs.~~ *JAC*

24 ~~6. The Court further finds as a matter of law that as to the language of RCW  
25 9A.08.020(5)(a) that states a person is not an accomplice in a crime committed by another  
26 person if he or she is a victim of that crime, in order for a person to qualify for this  
27 accomplice-victim defense, the person would have had to be a victim when committing the  
28 accomplice crime. If a person did not become a victim until after the person took some action~~

1 ~~to commit the accomplice crime, the person would not be immune from prosecution as an~~  
2 accomplice.

3 7. The Court further finds that the Municipal Court's oral ruling dismissing the two  
4 accomplice charges was made outside of the presence of the jury, and that the Plaintiff  
5 immediately sought review of that oral ruling.

6 8. The Court further finds as a matter of law that a continuation of the jury trial in  
7 the Auburn Municipal Court would not be barred by Double Jeopardy protections.

8 9. The ruling of the Auburn Municipal Court dismissing the DUI and Reckless  
9 Driving crimes should be reversed and said charges should be reinstated among the charges to  
10 be considered by the jury in the trial before the Auburn Municipal Court. Now Therefore,

11 IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

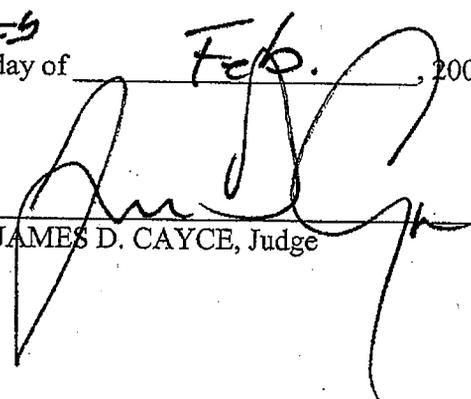
12 1. That the ruling of the Auburn Municipal Court dated January 30, 2003,  
13 dismissing the DUI and Reckless Driving accomplice charges under the above referenced  
14 cause numbers is hereby reversed;

15 2. That the DUI and Reckless Driving accomplice charges are hereby reinstated  
16 among the charges to be considered by the jury in the trial before the Auburn Municipal  
17 Court; and

18 3. That the matter is hereby remanded back to the Auburn Municipal Court for  
19 continuation of the jury trial.

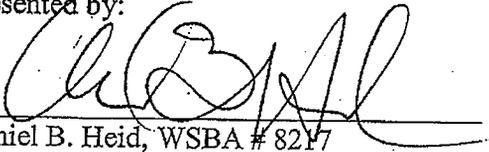
20 DONE IN OPEN COURT this 5<sup>th</sup> day of Feb., 2003.

21  
22  
23 Approved as to form:

  
\_\_\_\_\_  
JAMES D. CAYCE, Judge

24  
25 \_\_\_\_\_  
Thomas A Campbell, WSBA # 14289  
Attorney for Defendant, Teresa Hedlund

1 Presented by:

2 

3  
4 Daniel B. Heid, WSBA # 8217  
Attorney for Plaintiff, City of Auburn

APPENDIX "C"

THE HON. MARY E. ROBERTS

**FILED**

KING COUNTY WASHINGTON

SEP 03 2004

SUPERIOR COURT CLERK  
BY LAMEANA M. BRIDGES  
DEPUTY

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

CITY OF AUBURN

Plaintiff/Respondent,

v.

TERESA A. HEDLUND,

Defendant/Appellant.

NO. 03-1-04645-7 SEA

OPINION AND ORDER  
ON RALJ APPEAL

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This matter came before the court for hearing on July 30, 2004, upon a RALJ appeal. The court reviewed the record below, including the pleadings, the full trial transcript, and the video tape of a party and events leading up to the automobile collision that led to the filing of charges at issue in this case. The court also considered the briefs of the parties and the oral argument of counsel. Based on this, the court finds and orders as follows.

This case involves a tragic automobile accident in which 6 young people were killed. Just prior to the collision that took these lives, the defendant (and sole survivor of the accident) operated a video camera in the car from her place in the front passenger seat. Following the accident, the video camera was found in the car. The tape in the camera contained footage in

OPINION AND ORDER  
ON RALJ APPEAL - 1

**ORIGINAL**

JUDGE MARY E. ROBERTS  
KING COUNTY SUPERIOR COURT  
516 THIRD AVENUE  
SEATTLE, WA 98104  
(206) 296-9240

1 the car just prior to the accident, as well as footage from a party at the defendant's apartment  
2 earlier that same day. The footage from the party shows many of those who were later in the  
3 car.

4  
5 The court affirms the trial court rulings related to the following issues raised by the  
6 defendant on appeal: (1) delay in filing charges; (2) alleged discovery violations; (3) the  
7 request to sever trial of the charge of furnishing alcohol to a minor; (4) whether the accomplice  
8 liability theory implicated a first amendment right; (5) admission of photographs of the  
9 accident scene; (6) admission of evidence related to the Total Station Map; (6) motion to  
10 dismiss for insufficiency of the evidence; (7) alleged prosecutorial misconduct during closing  
11 argument relating to alleged sexual misconduct by the defendant; and (8) alleged prosecutorial  
12 misconduct during closing related to a "new" theory of accomplice liability tied to seating  
13 arrangements in the car.  
14

15 The court finds that the trial court abused its discretion with regard to the following  
16 rulings:

17 **TRIAL OF CHARGE OF PROVIDING TOBACCO TO A MINOR**

18 The City joined with other charges in this case a charge of furnishing tobacco to a  
19 minor. This charge was based on a depiction on the video tape found in the car. The video  
20 shows a party earlier on the day of the accident, at the apartment where the defendant lived.  
21 The video shows a lit cigarette in the mouth of the defendant's four-year-old daughter.  
22 Defendant moved the trial court to sever the trial of the charge of providing tobacco to a minor.  
23

24 CrRLJ 4.3(a) permits two or more offenses to be joined in one trial when the offenses  
25 are similar, or when the offenses are based on the same conduct or part of a single scheme or

1 plan. But even if properly joined, the charge may be severed if "the court determines that  
2 severance will promote a fair determination of the defendant's guilt or innocence of each  
3 offense." CrRLJ 4.4(b). A defendant seeking severance has the burden of demonstrating that a  
4 trial of both counts would be so manifestly prejudicial as to outweigh the concern for judicial  
5 economy. *St. v. Bythrow*, 114 Wn.2d 713 (1990). Here, there is no doubt that the portrayal of  
6 the defendant's four-year-old child smoking a cigarette in the presence of her mother is  
7 extremely prejudicial to the defendant. The City's attorney recognized this fact by focusing on  
8 the incident in closing argument. He referred to the defendant as having "exploited" and  
9 "sacrificed" her daughter in order to show off for her friends. Given the simplicity of a trial of  
10 a charge of furnishing tobacco to a minor, especially where the alleged offense was caught on  
11 video tape, the judicial economy to be achieved by refusing severance is minimal. The  
12 prejudice to the defendant far outweighed such concern. The failure of the trial court to sever  
13 counts is reversible only upon a showing that the court's decision was a manifest abuse of  
14 discretion. Here, the trial court abused its discretion by allowing the charge of furnishing  
15 tobacco to a minor to go forward in the same trial as the other charges.

#### 18 ADMISION OF 911 TAPES

19 Over defendant's objection, the trial court allowed the jury to hear the tape recording of  
20 a 911 call from a witness who came upon the scene of the accident. The witness described the  
21 scene, including her erroneous statements that at least one of the victims was decapitated. The  
22 only purpose for this evidence was to arouse a sense of horror in the jury. The incorrect,  
23 graphic, and emotional description of the scene of the accident was not relevant to the issues in  
24 the case. To the extent that this description could be considered minimally relevant, the  
25

1 prejudice to the defendant of having the jury hear that the accident victims had been  
2 decapitated far outweighs any minimal probative value to the evidence. This would be the case  
3 even if a victim had been decapitated. Given that no victim was in fact decapitated, the  
4 prejudice is particularly unfair and severe. The trial court abused its discretion in admitting the  
5 911 tape.  
6

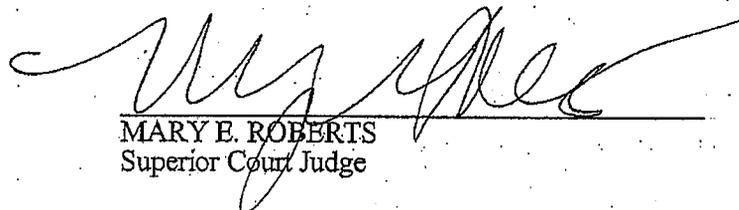
#### 7 ADMISION OF VIDEO TAPE

8 The trial court admitted portions of the video tape of partying earlier on the day of the  
9 accident. The video tape was used in part to support the City's claim that the Defendant had  
10 furnished alcohol to a minor, and to the driver of the vehicle. Most of the video tape that was  
11 admitted was clearly relevant to the City's charges and was appropriately admitted. However,  
12 the portions of the video tape that show the defendant's four-year-old daughter with a lit  
13 cigarette in her mouth were not relevant to any charge other than furnishing tobacco to a  
14 minor. Nor were the portions of the video tape relevant that showed the child dancing  
15 provocatively while the defendant said "[s]hake your moneymaker for the camera." At one  
16 point in the video, the child exposed her bare buttocks while dancing. The City argues that  
17 these portions of the video tape are relevant to their theory that the defendant used the camera  
18 to encourage reckless driving in the car. But the defendant urging her daughter to act out for a  
19 camera that the defendant was not holding is only minimally relevant to the City's theory,  
20 especially given that there is scant evidence that the defendant used the camera to encourage  
21 the driver to act out just before the accident; in stead, she focused on the other passengers in  
22 the car. The prejudice to the defendant is extreme, far outweighing any probative value to the  
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1 evidence. The trial court abused its discretion in admitting the portions of the video tape that  
2 portrayed the defendant's daughter dancing and smoking.

3 The cumulative effect of the above errors compels a new trial. Therefore, the court  
4 ORDERS that this matter be remanded to the trial court for a new trial consistent with this  
5 decision.

6 DATED this 3rd day of September, 2004.

7  
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10 MARY E. ROBERTS  
11 Superior Court Judge

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APPENDIX "E"

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

CITY OF AUBURN,

Plaintiff

v.

TERESA HEDLUND,

Defendant.

**03-2-00810-9KNT**  
NO.

APPLICATION FOR  
WRIT OF REVIEW

COMES NOW the Plaintiff, City of Auburn, by and through its attorney, Daniel B. Heid, and respectfully applies to the above-entitled Court, for the issuance of a Writ of Review pursuant to RCW 7.16.030 et seq., directed to the Auburn Municipal Court, located at 3 - 1<sup>st</sup> Street N.W., Suite A, Auburn, Washington 98001-8500. In connection with the matter entitled City of Auburn, Plaintiff, v. Teresa Hedlund, Defendant, under Auburn Municipal Court Cause Numbers 1C73754 and C78961, the Plaintiff seeks review of the decision of the Auburn Municipal Court on January 30, 2003, granting the Defendant's Motion to dismiss the charges of Driving Under the Influence of Intoxicants by Accomplice Liability, and Reckless Driving by Accomplice Liability.

The Municipal Court ruled that, pursuant to RCW 9A.08.020, the Defendant cannot be

APPLICATION FOR  
WRIT OF REVIEW

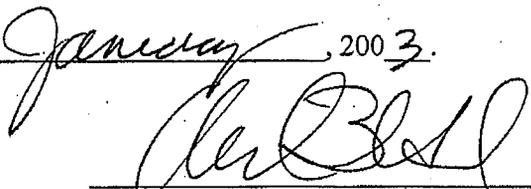
**CITY OF AUBURN**  
Legal Department  
25 West Main Street  
Auburn, WA 98001-4998  
(253) 931-3054 FAX (253) 931-4007

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an accomplice for these charges because she was a victim.

This is a proper case for the issuance of a Writ of Review, as the Plaintiff has no plain, speedy or adequate remedy at law. This Application is based upon the Affidavits of Daniel B. Heid and Kelly M. Montgomery, attached hereto and incorporated herein by this reference, and the Memorandum of Points and Authorities submitted in support hereof.

DATED this 31 day of January, 2003.



\_\_\_\_\_  
Daniel B. Heid, WSBA # 8217  
Attorney for Plaintiff, City of Auburn

APPLICATION FOR  
WRIT OF REVIEW

**CITY OF AUBURN**  
Legal Department  
25 West Main Street  
Auburn, WA 98001-4998  
(253) 931-3054 FAX (253) 931-4007



1 Tom Stewart, 22 years of age, crashed against a cement pillar at 15th Street SW, in Auburn,  
2 Washington, killing the driver, Tom Stewart, his twin brother, Timothy Stewart, 22 years of  
3 age, Jayme Vomenici, 18 years of age, Marcus Cooper, 21 years of age, Brandon Dupea, 21  
4 years of age, and April Byrd, 17 years of age. The Defendant, Teresa Hedlund, approximately  
5 30 years of age, was the only occupant of the vehicle who survived what has been described  
6 as the worst single vehicle accident in the history of the State of Washington. The Auburn  
7 Police Department investigated the accident and concluded that the accident was caused by  
8 excessive speed and alcohol.  
9

10 Those conclusions were validated and reaffirmed by a videotape found in a camcorder  
11 located in the accident vehicle.

12 Ultimately, the City of Auburn, as Plaintiff, charged the Defendant in the Auburn  
13 Municipal Court with the offenses of Driving Under the Influence of Intoxicants by  
14 Accomplice Liability, RCW 46.61.502 and RCW 9A.08.020; Reckless Driving by  
15 Accomplice Liability, RCW 46.61.500 and 9A.08.020; Furnishing Liquor to a Minor, ACC  
16 9.01.420; and Furnishing Tobacco to a Minor, RCW 26.28.080, and RCW 39-34.180, under  
17 Cause Numbers 1C73754 and C78961.

18 The trial on the above referenced matter commenced in the Auburn municipal Court on  
19 January 27, 2003. At the close of the prosecution case, on January 30, 2003, the Defendant  
20 brought a motion to dismiss the charges of Driving Under the Influence of Intoxicants by  
21 Accomplice liability and Reckless Driving by Accomplice Liability, arguing that the  
22 Defendant cannot be an accomplice because she was a victim of the accomplice crimes with  
23 which she was charged. The Municipal Court decided in favor of the Defendant, but agreed  
24  
25

1 allow the Plaintiff a brief continuance of the jury trial that is underway, to seek a writ of  
2 review regarding the issues of the Defendant's Motion, something with which the Defendant's  
3 attorney has also agreed to coordinate and cooperate regarding any hearings on the requested  
4 writ.

5 Facts and testimony presented at the trial, and inferences there from includes the  
6 following:

7 As the attendees at the alcohol party were getting ready to leave the defendant's  
8 apartment (the site of the party – they were asked to leave by the Defendant's mother [with  
9 whom the Defendant resides] when she returned home and told the party-goers to leave), there  
10 was an argument about who would drive. Jayme Voimenici (Jayme), the only person who  
11 hadn't been drinking, was not allowed to drive her own vehicle – the vehicle belonged to  
12 Jayme. Tom Stewart (Tom) was heard to say that he was most sober out of them all, which  
13 was not the case. In fact, the evidence showed that Jayme was sober, since she had not been  
14 drinking. The evidence also shows that the vehicle was meant for four passengers, as it was a  
15 two door and very small. The smallest two people in stature were Jayme and April Byrd  
16 (April). It would be physically impossible for any other person to sit "on the laps" of the  
17 bigger people. This forced Jayme into the back seat, as she was the smallest person in the  
18 vehicle. These facts may have given some context to Tom's statement about being the most  
19 sober person. He may have been the most sober person of the group, once Jayme and April  
20 were eliminated from the group. April could not drive as she had passed out and was  
21 completely unresponsive during the entire car ride. She had to have been carried to and lifted  
22 into the vehicle, where she was laid out across the laps of people in the back seat, next to  
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1 Jayme, who was sitting on the lap of Marcus Cooper. The Defendant was noticeably larger  
2 than Jayme. Therefore, Jaime could not drive if the Defendant was in the vehicle. The  
3 Defendant did not need to go for the drive as she lived at the apartment where the party was  
4 located and from which the party-goers were leaving. Furthermore, her small child was at the  
5 apartment and she did not own the car in which the group was leaving. Additionally, The  
6 Defendant's mother, Karen Bice, was outside on the deck when she ordered the party-goers to  
7 leave. Teresa was inside the apartment at that time. The evidence shows that she was not  
8 asked to leave.  
9

10 Also, the Defendant knew that Tom had been drinking. She was in the parking lot when  
11 he said he was "fucked up." Therefore, she knew she was letting a drunk person get behind  
12 the wheel of the car, and preventing Jayme from driving (her own vehicle).

13 In side the car, the Defendant filmed the Tom as he said, "It's me driving - Record this  
14 shit nigga." He made an effort to lean into the camera to make sure that this was on film.  
15 This is consistent with his behavior at the Defendant's apartment, where Tom continually  
16 acted out and show-boated for the camera.

17 When Tom started the doomed drive, he told the Defendant; "Get me on camera - I'm  
18 driving." That was said for a reason and it was told to the Defendant for a reason. He wanted  
19 to show off for the camera. That is consistent with Tom's later statement; "I'm going to kill  
20 all of us." That statement, in turn, is consistent with Sgt. Lowery's testimony - when  
21 describing how the yaw marks commenced, with no weather, roadway or other apparent  
22 reason for the yaw. Sgt. Lowery said that he thought that the driver was trying to scare the  
23 occupants of the vehicle.  
24  
25

1 The bottles of Captain Morgan's and Brandy (identified by the relative who cleaned up  
2 the party apartment) were found in the trash bin near the apartment. Again, the Defendant  
3 knew that Tom had been drinking, and that he was telling people that he was "liquored up"  
4 and "f\*\*\*ed up."

5 The testimony also showed that the Defendant went to the liquor store for the party.

6 There was nothing to indicate that there were any problems with the blood/alcohol tests.  
7 they showed that Jayme had negative results for alcohol, that April had results of 0.13 g/ml,  
8 and Tom (the driver) has results of 0.15 g/ml.

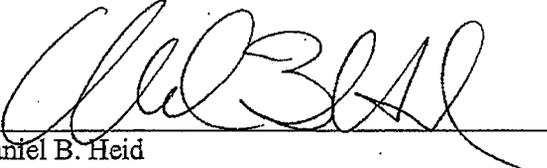
9 The Defendant knew the driving was reckless. She was in the vehicle. She was  
10 videotaping the driving, she heard the desperate statements and pleas by Jayme to stop, slow  
11 down, and she videotaped those statements as well. The Defendant's response? "He's being  
12 funny." Added to that, she videotaped the driver (Tom) saying "Get me on camera, I'm  
13 driving" and later "Now I'm going to kill all of us."

14 The Defendant responded to Jayme's pleas for the driver to stop, slow down and stay in  
15 the right lane of travel, by sayng/asking: "Jayme, do you want me to drive?" Jayme said no,  
16 she wanted the driver to stop! The Defendant did not tell the driver to drive more carefully  
17 even though there was no doubt that Jayme was scared - that was obvious in the videotape that  
18 she was recording and that she was seeing through the video camera.

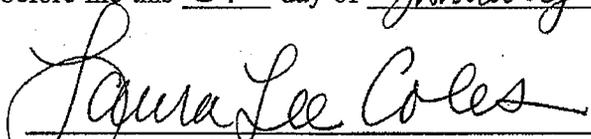
19 By the Defendant asking Jayme if she wanted her (the Defendant) to drive - that  
20 indicates that the Defendant had the authority, power or control to drive if she (the Defendant)  
21 deemed that appropriate. If that were the case, she could have stepped in and done something  
22 to control Tom's driving, but she did not. She thought he was being funny. In spite of her  
23 question to Jayme, the Defendant did not tell Tom to drive more slowly or more carefully. If  
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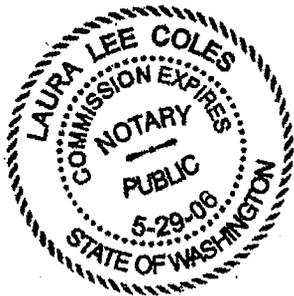
1 she had control to determine who should/could drive - she was then responsible for letting  
2 Tom drive and allowing him to continue driving.

3 Ironically, the Defendant did not even tell Tom to drive more carefully even after the  
4 driving caused Tim Stewart (the Defendant's fiancé) to hit his head twice on the rear window  
5 frame, something she captured on the video camera. Also, because of the movement of the  
6 video camera within the vehicle (panning back and forth and from the front, to the right  
7 [passenger window] and continuing to the back, etc.), and the close (blurred) camera vision of  
8 the driver, it is obvious that the Defendant (who held the video camera during the entire time  
9 it was being used in the car ride) was not only not wearing a seat belt. None of the occupants  
10 were wearing seat belts, but the Defendant was actually facing backwards on her knees, and  
11 especially in light of the driving problems, that was very unsafe, contributing, by her own  
12 actions to her risk of danger. She therefore created the danger (to herself) that justified  
13 reckless driving.  
14

15   
16 Daniel B. Heid

17 SUBSCRIBED AND SWORN to before me this 31 day of January,  
18 2003.

19   
20 NOTARY PUBLIC in and for the State of  
Washington, residing at Bellevue  
21 My Commission Expires: 5-29-06



AFFIDAVIT OF DANIEL B. HEID  
IN SUPPORT OF APPLICATION FOR  
WRIT OF REVIEW

Page - 6

**CITY OF AUBURN**  
Legal Department  
25 West Main Street  
Auburn, WA 98001-4998  
(253) 931-3054 FAX (253) 931-4007



1 and excessive speed contributed to the accident. The accident followed an alcohol party at the  
2 apartment of the above named Defendant. Although she was not the driver, the Defendant  
3 was charged in the Auburn Municipal Court with Driving while Under the Influence (DUI), as  
4 an Accomplice, Reckless Driving as an Accomplice, Furnishing Liquor to a Minor and  
5 Furnishing Tobacco to a Minor, under Cause Numbers 1C73754 and C78961.

6 At the close of the Plaintiff's case, the Defendant moved for dismissal, alleging that the  
7 Defendant could not be an accomplice because she was a "victim."

8 A videotape was taken by the attendees at the alcohol party, and by the Defendant  
9 during the fateful car ride which ended in the fatality accident. The videotape does not  
10 include the accident, but appears to include activity within the vehicle, stopping shortly before  
11 the vehicle's collision with a concrete pillar. I have reviewed the videotape of the alcohol  
12 party and the car ride, and have transcribed the audio portion as follows:

14 TRANSCRIPT OF VIDEO

15 Alcohol Party

16	08:22:30p	Unknown	You're on candid camera homey
17		Unknown	Work it
18	09:26:55p	Unknown	Hey
19		April	We got booze on
19		Brandon	What up?
20	09:27:00p	April	Capt'n Morgan's and ah...MGD
20		Brandon	Hey - give me a kiss
21	09:28:56p	Tom	There's my nigga' ... slim shady
22			April's in the bathroom homey
22			This is my beer right here....right here
23		April (in background)	"I'm not turning to the f***in' videotape-
24			You're my f***in' brother
24		Brandon (in background)	No I'm not

1	Tom	There, here's Tim's girl
2	Marcus	There she is
3	Tom	Pee on....pee on
4	Marcus	Ah - there's my nigga' Marcus
5	Tom	There goes my nigga'
6		Dude
7		There goes my nigga'
8		(background noise)
9	09:29:26p Tom	Hey, here we go right here
10		Hey Slim, break it off to her cous'...ay
11	Teresa (in background)	cous'...hey cous'
12	Kennedy (in background)	Kennedy, go grab my cigarettes off of
13	Tom	the fireplace
14	Tom	Ok
15	April (in background)	Look at that action homey...look at that
16	Teresa (in background)	action. Look at that
17		<unintelligible> now get outta' here
18		Kennedy, Kennedy, Kennedy, Kennedy,
19		Kennedy
20	Tom	On the fireplace, right up here honey
21	Jayne	Jayne, Jayme come here girl
22	Tom	What
23	Jayne	Look at that, uhhh
24	April (in background)	Put that camera away
25		I can't stand being here - I just wanna
		get drunk real fast
	Unknown	<unintelligible>
	Brandon (in background)	Did you get that on tape
	Teresa	<unintelligible>
		You want to try some
	Brandon	<unintelligible>...the camera
	Tom	alright, you record
	Tim	Noodles
	Tom	record the homeys
		It's already on record
		Hey -
		Record me
	Teresa	Noodles.....Noodles
	Brandon	huh?
	April (in background)	You are trippin'
	Teresa	Look what my daughter's doing
	Tom	Hey Kennedy...dance

1		Tom	Hey girl...Kennedy
2		Teresa	No, no wait hon - give me your cigarette
3	09:30:30p	Tom	Do your thing Kennedy
4	09:31:31p	Teresa	Shake your moneymaker for the camera
5		Brandon	Ooh girl
6		Teresa	Shake your money maker for the camera
7		Brandon	Work it girl
8			Work it
9		Tom	Work it
10		April	Hey Slim...Slim
11			I seen her doing that shit...I was like
12			"Get down girl" Yeah...guys'll love
13			that shit...Wahoo
14		Teresa (in background)	Look again
15		Brandon	Who - Jayme's tits look good in this
16	09:49:47p	Jayme	What
17	09:49:58p	Unknown	<unintelligible>
18		Tom	record it Noodles
19		Brandon	are you peein?
20		Tom	I'm f***ed up
21		April	(laughing)...yeah...go girl
22		Tom	hah - that's <unintelligible> cous'
23		April	Go girl
24		Tom	C'mon girl let's...alright...dance to this
25			Ah girl
26		April	Hey...I'm f***ed up boy
27		Tom	We're f***in' liquored up cous'
28		April	Waoooo
29		Tom	But we're f***in' gonna do this
30		April	Yeahhhhh
31		Tom	But my nigga' Noodles - my nigga' slim
32			shady - gonna get that shit started on
33			that big camera...nigga' - we gonna get
34			his big ole' horse dick up in this
35		April	Yeah...<unintelligible>
36		Tom	Uh ... She said yeah too...she knows
37			nigga' - she knows-she knows. We're
38			gonna get my nigga' slim's horse dick up
39			in this-
40		April	No - 'aint getting shit in it man - F***
41			that shit
42			F*** you

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F\*\*\* you  
Tom Ah - my nigga' slim shad...  
Tom Ah  
Tom Ah  
Brandon Yeah I am  
Tom My nigga' slim's - he gonna get it  
April Lick 'em  
Tim <unintelligible> bro'  
Brandon What up  
Brandon What up  
Unknown <unintelligible>

Car Ride

10:25:06p Brandon bumh, bumh, bumh, bumh  
Unknown <unintelligible>  
Tim Wahoo  
Brandon: <unintelligible> (singing)  
Teresa: You gonna get a piece of ass off of April

10:25:29p Tom Record me drivin'  
What's up cous' -  
It's me driving  
Gotta record this shit...nigga'  
What's up cous'...nigga'

10:26:02p Jayme Tom...  
Brandon Slow down nigger  
Jayme Slow the f\*\*\* down  
Hey  
Tom (in background) Hey - don't worry about me drivin'  
Brandon Want me to put it on night vison  
Teresa Yeah

10:26:31p Teresa How much you love me?  
Tim This much  
Teresa Hey girls -  
Brandon (in background) Wahhhh  
Teresa Are you getting a piece of ass tonight  
off of April

Brandon Uh huh

10:26:49p Jayme Tom - slow your f\*\*\*in' ass down  
or stop the f\*\*\*in' car

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10:26:59p Teresa Jayme - you want me to drive  
Jayme No - stop the f\*\*\*in' car

10:27:04p (Tim hits head on roof)

Brandon (singing)  
Tim/Brandon (talking)(laughing)  
Brandon Tom - what happened

10:27:43p Tim I gotta pee so bad...  
I gotta pee

10:27:58p Brandon Here come the other train tracks

(Teresa turns around in car seat and turns back)  
(Tim hits head on roof)

Brandon (singing)

Brandon Hey, Tom - put another CD in  
Teresa You're being funny Tom  
Jayme Tom...slow down  
Teresa I love you  
Jayme <unintelligible>... Tom,  
Tom Shut the f\*\*\* up...god damn it  
Brandon Yeah - shut up  
Tom Don't try to f\*\*\*in' yell when I'm  
f\*\*\*in' drivin'... shit...

Brandon (in background) Just play good music  
Teresa (in background) Cuz your drivin...<unintelligible>  
asshole

Jayme You're going to drive in the f\*\*\*in'  
right lane

Brandon (in background) Just play good music DJ  
Tom Does it look like I'm driving in the  
right lane

Brandon (in background) Two...two  
Jayme Yeah, now it does  
Tom Alright - well f\*\*\* ya all - I'm  
gonna drive like I want to

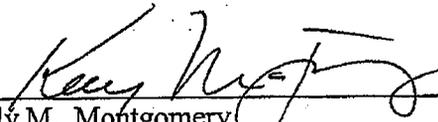
Brandon Hey Tom  
Jayme Tom, you're gong to f\*\*\*in' drive  
the speed limit or you're gonna  
f\*\*\*in' stop the f\*\*\*in' car

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Tom (in background)      Alright--...I'm going to kill us all  
right now  
Brandon                      Hey Tom...hey Tom look at this  
Jayme                        Tom, will you f\*\*\*in' stop  
Unknown                     Tom.

End of Videotape

I hereby certify that the foregoing Transcript was prepared by me, to the best of my ability, from the videotape recording of activities leading up to the accident occurring on July 16, 2001, in Auburn, Washington.

  
\_\_\_\_\_  
Kelly M. Montgomery

SUBSCRIBED AND SWORN to before me this 31 day of JANUARY, 2003.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at Lincoln County  
My Commission Expires: 6-29-06

**APPENDIX "H"**

**FILED**  
03 JAN 31 AM 9:54  
KING COUNTY  
SUPERIOR COURT CLERK  
KENT, WA

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

CITY OF AUBURN,

Plaintiff

v.

TERESA HEDLUND,

Defendant.

**08-2-00810-9KNT**  
NO.

PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES FOR  
WRIT OF REVIEW

COMES NOW the Plaintiff by and through its attorneys and as its Memorandum of Points and Authorities in support of its Application for a Writ of Review, respectfully submits the following:

STATEMENT OF FACTS

These records and files include the police investigative reports of their accident investigation of the multiple-fatality, single-car accident occurring within the City of Auburn on July 16, 2001. According to those police reports, on July 16, 2001, a vehicle driven by Tom Stewart, 22 years of age, crashed against a cement pillar at 15th Street SW, in Auburn, Washington, killing the driver, Tom Stewart, his twin brother, Timothy Stewart, 22 years of

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1 age, Jayme Vomenici, 18 years of age, Marcus Cooper, 21 years of age, Brandon Dupea, 21  
2 years of age, and April Byrd, 17 years of age. The Defendant, Teresa Hedlund, approximately  
3 30 years of age, was the only occupant of the vehicle who survived what has been described  
4 as the worst single vehicle accident in the history of the State of Washington. The Auburn  
5 Police Department investigated the accident and concluded that the accident was caused by  
6 excessive speed and alcohol.

7  
8 Those conclusions were validated and reaffirmed by a videotape found in a camcorder  
9 located in the accident vehicle.

10 Ultimately, the City of Auburn, as Plaintiff, charged the Defendant in the Auburn  
11 Municipal Court with the offenses of Driving Under the Influence of Intoxicants by  
12 Accomplice Liability, RCW 46.61.502 and RCW 9A.08.020; Reckless Driving by  
13 Accomplice Liability, RCW 46.61.500 and 9A.08.020; Furnishing Liquor to a Minor, ACC  
14 9.01.420; and Furnishing Tobacco to a Minor, RCW 26.28.080, and RCW 39-34.180, under  
15 Cause Numbers 1C73754 and C78961.

16 The trial on the above referenced matter commenced in the Auburn municipal Court on  
17 January 27, 2003. At the close of the prosecution case, on January 30, 2003, the Defendant  
18 brought a motion to dismiss the charges of Driving Under the Influence of Intoxicants by  
19 Accomplice liability and Reckless Driving by Accomplice Liability, arguing that the  
20 Defendant cannot be an accomplice because she was a victim of the accomplice crimes with  
21 which she was charged. The Municipal Court decided in favor of the Defendant, but agreed  
22 allow the Plaintiff a brief continuance of the jury trial that is underway, to seek a writ of  
23 review regarding the issues of the Defendant's Motion, something with which the Defendant's  
24

25  
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1 attorney has also agreed to coordinate and cooperate regarding any hearings on the requested  
2 writ.

3 Facts and testimony presented at the trial, and inferences there from includes the  
4 following:

5 As the attendees at the alcohol party were getting ready to leave the defendant's  
6 apartment (the site of the party – they were asked to leave by the Defendant's mother [with  
7 whom the Defendant resides] when she returned home and told the party-goers to leave), there  
8 was an argument about who would drive. Jayme Vomenici (Jayme), the only person who  
9 hadn't been drinking, was not allowed to drive her own vehicle – the vehicle belonged to  
10 Jayme. Tom Stewart (Tom) was heard to say that he was most sober out of them all, which  
11 was not the case. In fact, the evidence showed that Jayme was sober, since she had not been  
12 drinking. The evidence also shows that the vehicle was meant for four passengers, as it was a  
13 two door and very small. The smallest two people in stature were Jayme and April Byrd  
14 (April). It would be physically impossible for any other person to sit "on the laps" of the  
15 bigger people. This forced Jayme into the back seat, as she was the smallest person in the  
16 vehicle. These facts may have given some context to Tom's statement about being the most  
17 sober person. He may have been the most sober person of the group, once Jayme and April  
18 were eliminated from the group. April could not drive as she had passed out and was  
19 completely unresponsive during the entire car ride. She had to have been carried to and lifted  
20 into the vehicle, where she was laid out across the laps of people in the back seat, next to  
21 Jayme, who was sitting on the lap of Marcus Cooper. The Defendant was noticeably larger  
22 than Jayme. Therefore, Jaime could not drive if the Defendant was in the vehicle. The  
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1 Defendant did not need to go for the drive as she lived at the apartment where the party was  
2 located and from which the party-goers were leaving. Furthermore, her small child was at the  
3 apartment and she did not own the car in which the group was leaving. Additionally, The  
4 Defendant's mother, Karen Bice, was outside on the deck when she ordered the party-goers to  
5 leave. Teresa was inside the apartment at that time. The evidence shows that she was not  
6 asked to leave.

7  
8 Also, the Defendant knew that Tom had been drinking. She was in the parking lot when  
9 he said he was "fucked up." Therefore, she knew she was letting a drunken person get behind  
10 the wheel of the car, and preventing Jayme from driving (her own vehicle).

11 In side the car, the Defendant filmed the Tom as he said, "It's me driving - Record this  
12 shit nigga." He made an effort to lean into the camera to make sure that this was on film.  
13 This is consistent with his behavior at the Defendant's apartment, where Tom continually  
14 acted out and show-boated for the camera.

15 When Tom started the doomed drive, he told the Defendant; "Get me on camera - I'm  
16 driving." That was said for a reason and it was told to the Defendant for a reason. He wanted  
17 to show off for the camera. That is consistent with Tom's later statement; "I'm going to kill  
18 all of us." That statement, in turn, is consistent with Sgt. Lowery's testimony - when  
19 describing how the yaw marks commenced, with no weather, roadway or other apparent  
20 reason for the yaw. Sgt. Lowery said that he thought that the driver was trying to scare the  
21 occupants of the vehicle.

22 The bottles of Captain Morgan's and Brandy (identified by the relative who cleaned up  
23 the party apartment) were found in the trash bin near the apartment. Again, the Defendant  
24 knew that Tom had been drinking, and that he was telling people that he was "liquored up"

1 and "f\*\*\*ed up."

2 The testimony also showed that the Defendant went to the liquor store for the party.

3 There was nothing to indicate that there were any problems with the blood/alcohol tests.  
4 They showed that Jayme had negative results for alcohol, that April had results of 0.13 g/ml,  
5 and Tom (the driver) has results of 0.15 g/ml.

6 The Defendant knew the driving was reckless. She was in the vehicle. She was  
7 videotaping the driving, she heard the desperate statements and pleas by Jayme to stop, slow  
8 down, and she videotaped those statements as well. The Defendant's response? "He's being  
9 funny." Added to that, she videotaped the driver (Tom) saying "Get me on camera, I'm  
10 driving" and later "Now I'm going to kill all of us."

11 The Defendant responded to Jayme's pleas for the driver to stop, slow down and stay in  
12 the right lane of travel, by sayng/asking: "Jayme, do you want me to drive?" Jayme said no,  
13 she wanted the driver to stop! The Defendant did not tell the driver to drive more carefully  
14 even though there was no doubt that Jayme was scared - that was obvious in the videotape that  
15 she was recording and that she was seeing through the video camera.

16 By the Defendant asking Jayme if she wanted her (the Defendant) to drive - that  
17 indicates that the Defendant had the authority, power or control to drive if she (the Defendant)  
18 deemed that appropriate. If that were the case, she could have stepped in and done something  
19 to control Tom's driving, but she did not. She thought he was being funny. In spite of her  
20 question to Jayme, the Defendant did not tell Tom to drive more slowly or more carefully. If  
21 she had control to determine who should/could drive - she was then responsible for letting  
22 Tom drive and allowing him to continue driving.

23 Ironically, the Defendant did not even tell Tom to drive more carefully even after the driving  
24

1 caused Tim Stewart (the Defendant's fiancé) to hit his head twice on the rear window frame,  
2 something she captured on the video camera. Also, because of the movement of the video  
3 camera within the vehicle (panning back and forth and from the front, to the right [passenger  
4 window] and continuing to the back, etc.), and the close (blurred) camera vision of the driver,  
5 it is obvious that the Defendant (who held the video camera during the entire time it was being  
6 used in the car ride) was not only not wearing a seat belt. None of the occupants were  
7 wearing seat belts, but the Defendant was actually facing backwards on her knees, and  
8 especially in light of the driving problems, that was very unsafe, contributing, by her own  
9 actions to her risk of danger. She therefore created the danger (to herself) that justified  
10 reckless driving.  
11

#### 12 DEFENDANT'S MOTION

13 A Copy of the Defendant's Motion is attached hereto, marked as Exhibit "A" and  
14 incorporated herein by this reference.

#### 15 ISSUE BEFORE THE COURT

16 At the close of the Plaintiff's case in the jury trial in the Auburn Municipal Court, the  
17 Defendant brought a motion to dismiss the charges of the offenses of Driving Under the  
18 Influence of Intoxicants (DUI) by Accomplice Liability, RCW 46.61.502 and RCW  
19 9A.08.020; Reckless Driving by Accomplice Liability, RCW 46.61.500 and 9A.08.020. The  
20 Defendant's motion was based on the argument that the Defendant, who was ultimately  
21 injured by the errant driving of Tom Stewart (Reckless Driving and DUI), was a victim, and  
22 therefore cannot be an accomplice, pursuant to RCW 9A.08.020.

23 The Municipal Court agreed, but allowed the Plaintiff to seek a writ of review,  
24 continuing the jury trial for the brief time it would take to pursue a writ of review. Similarly,  
25

PLAINTIFF'S MEMORANDUM OF  
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1 the attorney for the Defendant has coordinated his calendar for available for a prompt review.

2 The issue herein is as follows:

3 IS A PERSON WHO HAS PREVIOUSLY ACTED AS AN ACCOMPLICE IN  
4 A CRIMINAL OFFENSE EXONERATED BECAUSE THE PERSON LATER  
5 BECOMES A VICTIM OF THAT CRIME?

6 ARGUMENT

7 OFFENSES INVOLVED

8 The Plaintiff charged the Defendant in the Auburn Municipal Court with the offenses of  
9 Driving Under the Influence of Intoxicants by Accomplice Liability, RCW 46.61.502 and  
10 RCW 9A.08.020; Reckless Driving by Accomplice Liability, RCW 46.61.500 and 9A.08.020.  
11 The Defendant was also charged with Furnishing Liquor to a Minor and Furnishing Tobacco  
12 to a Minor, but these charges are not involved in the matter before this court.

13 WRIT OF REVIEW

14 The double jeopardy clauses of the Fifth Amendment<sup>1</sup> to the United States Constitution  
15 and Art. 1, § 9<sup>2</sup> of the Washington State Constitution precludes retrial after acquittal. Burks v.  
16 United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); State v. Crediford, 130  
17 Wn.2d 747, 760-61, 927 P.2d 1129 (1996); State v. Corrado, 81 Wn. App. 640, 647, 915 P.2d

18  
19 <sup>1</sup> United States Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double  
20 Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

21 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or  
22 indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual  
23 service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in  
24 jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be  
25 deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public  
use, without just compensation.

<sup>2</sup> Washington State Constitution, Article 1, § 9. Rights of Accused Persons.

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in  
jeopardy for the same offense.

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1 1121 (1996). In Burks, the court held that the double jeopardy clause also bars a second trial  
2 even where the evidence, including any erroneously admitted evidence, has been deemed  
3 legally insufficient. Burks v. United States, 437 U.S. at 11; State v. Stanton, 68 Wn. App. 855,  
4 867, 845 P.2d 1365 (1993). Also, in Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745,  
5 1748-1749, 90 L.Ed.2d 116 (1986), the court ruled that granting a demurrer at the end of  
6 state's case constituted acquittal even if based on erroneous legal rulings. Smalis v.  
7 Pennsylvania, 476 U.S. at 144-145. The significance of Double Jeopardy is that it precludes  
8 post acquittal prosecution appeals (or prosecution appeals of dismissal after any evidence has  
9 been presented to the trier of fact) – no matter how erroneous the basis may have been for the  
10 ruling that resulted in the dismissal or acquittal. But that same preclusion legitimizes a right  
11 by the prosecution to seek a writ of review of preliminary rulings. If review is not available at  
12 this juncture, no review could be had (post trial). Thus, the prosecution would (otherwise)  
13 have no adequate remedy at law.

14  
15 Essentially, in this case, the Plaintiff must now seek, during the pendency of the  
16 Municipal Court trial, review of this matter. Otherwise, it is forever barred from doing so.

17 EXTRAORDINARY WRITS

18 RCW 7.16 includes three statutory writs; writ of certiorari (also writs of review), RCW  
19 7.16.030; writs of mandamus (also writs of mandate) RCW 7.16.150; and writs of prohibition,  
20 RCW 7.16.290. Writs of certiorari/review are appeal processes in which the superior court  
21 may act in an appellate capacity. G 3 Properties, Inc. v. Board of County Com'rs of Yakima  
22 County, 27 Wn. App. 625, 620 P.2d 108, review granted, reversed on other grounds 96 Wn.2d  
23 359, 635 P.2d 721 (1980).

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1 REVIEW BY WRIT

2 The grounds for granting a writ of review are set forth in RCW 7.16.040, as follows:

3 7.16.040 Grounds for granting writ.

4 A writ of review shall be granted by any court, except a municipal or district  
5 court, when an inferior tribunal, board or officer, exercising judicial functions,  
6 has exceeded the jurisdiction of such tribunal, board or officer, or one acting  
7 illegally, or to correct any erroneous or void proceeding, or a proceeding not  
8 according to the course of the common law, and there is no appeal, nor in the  
9 judgment of the court, any plain, speedy and adequate remedy at law.

7 (Emphasis added.)

8 ADEQUACY OF REMEDY AT LAW

9 The adequacy of remedy by appeal or in ordinary course of law is a test to be applied by  
10 the court in all applications for extraordinary writs, and not mere question of jurisdiction or  
11 lack of jurisdiction. Mattson v. Kline, 47 Wn.2d 538, 288 P.2d 483 (1955). When there is an  
12 adequate remedy by appeal, certiorari (review) does not lie. State ex rel. Northern Pac. R. Co.  
13 v. Superior Court, 80 Wash. 190, 141 Pac. 365 (1914); State ex rel. Horne v. McDonald, 32  
14 Wn.2d 272, 201 P.2d 723 (1949); State ex rel. Heney v. Superior Court, 27 Wn.2d 608, 179  
15 P.2d 323 (1947); Sutter v. Sutter, 51 Wn.2d 354, 318 P.2d 324 (1957); and State ex rel.  
16 Simeon v. Superior Court for King County, 20 Wn.2d 88, 145 P.2d 1017 (1944).

17 JURISDICTION OF MUNICIPAL COURT

18 As noted above, among the grounds for the issuance of a Writ of Review, pursuant to  
19 RCW 7.16.040, is the ground that the tribunal has exceeded its jurisdiction, or has proceeded  
20 with a case erroneously, invalidly or not according to the course of the common law. The writ  
21 of review is the only opportunity the prosecution has to address erroneous rulings. In this  
22 regard it is appropriate for the Superior Court to measure the Municipal Courts decision in  
23 terms of its validity, propriety and consistency with accepted case law. This is necessary in  
24

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1 order to assure that the public's right to have laws enforced by the prosecuting authority with  
2 jurisdiction over the violations is afforded fair treatment under the law and the opportunity to  
3 utilize the legal tools available.

4 Per RCW 7.16.040, the Superior Court may grant a writ of review if (1) the municipal  
5 or district court exceeded its jurisdiction or acted illegally; and (2) there is no appeal or  
6 adequate remedy at law. Both elements are necessary to be present in order for the superior  
7 court to have jurisdiction for review. City of Seattle v. Williams, 101 Wn.2d 445, 454, 680  
8 P.2d 1051 (1984).

9 Again, in the case before this Court, Double Jeopardy prevents the Plaintiff from having  
10 an adequate remedy at law, and therefore, the only other element the Plaintiff need show is  
11 that the Municipal Court, an inferior tribunal, has exceeded its jurisdiction to act, or has acted  
12 illegally or erroneously, or not according to the law. RCW 7.16.040.

#### 13 STANDARD TO BE APPLIED

14 State v. Robinson, 35 Wn. App. 898, 671 P.2d 256 (1983), addressed the standard  
15 applicable to motions to dismiss at the close of the prosecution's case. Robinson cited State v.  
16 Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), quoting Jackson v. Virginia, 443 U.S.  
17 307, 318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 25  
18 L.Ed.2d 368, 90 S.Ct 1068 (1970), for the proposition that the proper standard for a motion to  
19 dismiss at the close of the prosecution's case is whether the record evidence could reasonably  
20 support a finding of guilt beyond a reasonable doubt. Robinson, 35 Wn. App at 900.

#### 21 ACCOMPLICE LIABILITY

22 Accomplice liability in our state is premised on the idea that a defendant need not  
23 participate in each element of the crime, nor must he share the same mental state required of  
24

25  
PLAINTIFF'S MEMORANDUM OF  
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1 the principal actor in the crime. State v. Galisia, 63 Wn. App. 833 840, 822 P.2d 303 (1992).  
2 The law governing accomplice liability seeks to punish the actions of a person intending to  
3 facilitate the commission of a crime by providing assistance to another through his presence or  
4 his actions. Id.

5 The Defendant cites RCW 9A.08.020 for the proposition that the accomplice statute  
6 excludes the Defendant from accomplice liability because she is a victim. That statute states  
7 in full as follows:

8 9A.08.020 Liability for conduct of another--Complicity

9 (1) A person is guilty of a crime if it is committed by the conduct of  
10 another person for which he is legally accountable.

11 (2) A person is legally accountable for the conduct of another person  
when:

12 (a) Acting with the kind of culpability that is sufficient for the commission  
of the crime, he causes an innocent or irresponsible person to engage in such  
conduct; or

13 (b) He is made accountable for the conduct of such other person by this  
title or by the law defining the crime; or

14 (c) He is an accomplice of such other person in the commission of the  
crime.

15 (3) A person is an accomplice of another person in the commission of a  
crime if:

16 (a) With knowledge that it will promote or facilitate the commission of the  
crime, he

17 (i) solicits, commands, encourages, or requests such other person to  
commit it; or

18 (ii) aids or agrees to aid such other person in planning or committing it; or

19 (b) His conduct is expressly declared by law to establish his complicity.

20 (4) A person who is legally incapable of committing a particular crime  
himself may be guilty thereof if it is committed by the conduct of another person  
for which he is legally accountable, unless such liability is inconsistent with the  
purpose of the provision establishing his incapacity.

21 (5) Unless otherwise provided by this title or by the law defining the  
crime, a person is not an accomplice in a crime committed by another person if:

22 (a) He is a victim of that crime; or

23 (b) He terminates his complicity prior to the commission of the crime, and  
24 either gives timely warning to the law enforcement authorities or otherwise makes  
a good faith effort to prevent the commission of the crime.

1 (6) A person legally accountable for the conduct of another person may be  
2 convicted on proof of the commission of the crime and of his complicity therein,  
3 though the person claimed to have committed the crime has not been prosecuted  
4 or convicted or has been convicted of a different crime or degree of crime or has  
5 an immunity to prosecution or conviction or has been acquitted.

6 However, regardless of the level of participation or the acts a participant actually  
7 performed, his culpability is the same. State v. McDonald, 138 Wn.2d 680, 688, 981 P.2d 443  
8 (1999). The prosecution does not have to charge a participant as an accomplice. State v.  
9 Rodriguez, 769,773-74, 898 P.2d 871 (1995) (an information that charges an accused as a  
10 principal adequately apprises him or her of potential accomplice liability). Nor does the fact-  
11 finder have to determine whether the culpability of participants in a criminal enterprise is that  
12 of a principal or an accomplice. State v. McDonald, 138 Wn.2d 688.

13 Nevertheless, the Defendant focuses on RCW Subsection 9A.08.020(5)(a), which reads  
14 as follows:

- 15 (5) Unless otherwise provided by this title or by the law defining the  
16 crime, a person is not an accomplice in a crime committed by another person if:  
17 (a) He is a victim of that crime;

18 However, the construction suggested by Defendant does not make sense. According to  
19 the Defendant's argument, even though everything (anything) that the Defendant did – could  
20 have done – to aid or abet Tom Stewart to drive recklessly or drive under the influence of  
21 intoxicants had to have occurred prior, to the collision in which she was injured, so that any  
22 accomplice liability she would have had would have been BEFORE SHE WAS A VICTIM.  
23 Nevertheless, the Defendant argues that because the Defendant (eventually – after the fact)  
24 became a victim, her (prior) accomplice liability would disappear.

25 The Defendant also cites RCW 7.68.020(3) and RCW 7.69.020(3) for the definition of

1 "victim." They say as follows:

2 7.68.020. Definitions

3 ...  
4 (3) "Victim" means a person who suffers bodily injury or death as a  
5 proximate result of a criminal act of another person, the victim's own good faith  
6 and reasonable effort to prevent a criminal act, or his or her good faith effort to  
7 apprehend a person reasonably suspected of engaging in a criminal act. ...

6 7.69.020. Definitions

7 ...  
8 (3) "Victim" means a person against whom a crime has been committed  
9 or the representative of a person against whom a crime has been committed.

9 These statutes define a victim in terms of a person who suffered injury or against whom  
10 a crime has been committed. If a person already committed a crime – as an accomplice – even  
11 if the person later becomes a victim, that does not undo what has already happened. The only  
12 thing it could do is prevents the person from THEREAFTER being an accomplice. RCW  
13 9A.08.020(5)(a) DOES NOT SAY that ...

14 Unless otherwise provided by this title or by the law defining the crime, a  
15 person is not an accomplice in a crime committed by another person if:

16 He LATER BECOMES a victim of that crime.  
17 Rather, the statute says, a person IS NOT an accomplice if the person IS a victim.  
18 Additionally, it would be inconsistent with the concepts of accomplice liability being  
19 measured as of the time of commission as illustrated by Subsection (5)(b).

20 Subsection RCW 9A.08.020(5)(b) states as follows:

21 (5) Unless otherwise provided by this title or by the law defining the  
22 crime, a person is not an accomplice in a crime committed by another person if:

23 (b) He terminates his complicity prior to the commission of the crime, and  
24 either gives timely warning to the law enforcement authorities or otherwise  
25 makes a good faith effort to prevent the commission of the crime. (Emphasis  
added.)

1 It only makes sense that a person's ability to avoid accomplice liability would be if that  
2 person was a victim AT THE TIME that the person would commit the crime (as an  
3 accomplice), not after the fact - AND NOT SO AS TO ABSOLVE a person who has already  
4 committed a crime. All criminal law pins criminal liability based on the point of time a  
5 criminal act is done. No where is there any concept that exonerated a person who has already  
6 completed (committed) a crime because of something that occurs after the fact (with the  
7 possible only exception being the grant of a gubernatorial or presidential pardon.) Once more,  
8 other than these pardons, the law does not provide for the undoing of already completed  
9 crimes.  
10

11 Here, again, the criminal conduct in which the Defendant is alleged to have been  
12 engaged stopped BEFORE she was injured - before she was a victim.

13 The accomplice limitation statute, something that has been around since English  
14 common law was not intended, nor has it ever been interpreted, to release from culpability  
15 criminal participants who may suffer some injury from the criminal enterprise in which the  
16 ALREADY participated. Were that the case, the bank robbery get-away driver or the look-out  
17 person who is injured when bullets fly could claim that same insulation from criminal  
18 consequences. That doesn't make any sense.

19 The folly of Defendant's argument can also be illustrated by the following hypothetical:

20  
21 A person wishes to kill his wife. He visits a friend to secure an illegal poison. The  
22 friend is aware of the purpose of the poison, so that he would be an  
23 accomplice/accessory before the fact. The person intends to introduce the poison to his  
24 wife, but only after he has developed a tolerance to the poison (to deflect suspicion).  
25 When he finally introduces the poison to his wife, months later, the wife dies but the  
26 next day, the friend happens to visit and unwittingly partakes of the same poison.  
27 Though not killed, he is injured - hospitalized.

1 According to the Defendant's argument, even though the friend had already committed  
2 his crime (in fact his criminal actions occurred months earlier) he is released from any  
accomplice liability.

3 Such a result does not make any sense. Added to the lack of sense is the fact that the  
4 time of an accomplice crime could hypothetically stretch out much longer than just a few  
5 months. Some crime can occur over a very long time. However, the length is not the pivotal  
6 issue. Again, the issue is whether at the time that the person is committing the crime (doing  
7 whatever action involves criminal liability – even accomplice liability) was the person at that  
8 time a victim?

9 Again, not only does the Defendant's argument make no sense, it goes counter to the  
10 entire historical system of criminal responsibility.

#### 11 STATUTORY CONSTRUCTION

12 In construing statutes, the court is to carry out the Legislature's intent, as determined  
13 primarily from the statutory language. State v. Wilbur, 110 Wn.2d 16, 18, 749 P.2d 1295  
14 (1988). Statutes are interpreted according to the plain and ordinary meaning of the language  
15 used. State v. Bright, 77 Wn. App. 304, 310, 890 P.2d 487 (1995).

16 In State v. Smith, 80 Wn. App. 535, 910 P.2d 508 (1996), the court held that the  
17 primary objective of statutory construction is to carry out the intent of the legislative body by  
18 examining the language of the legislative enactment. Stone v. Chelan County Sheriff's Dept.,  
19 110 Wn.2d 806, 809, 756 P.2d 736 (1988). Words are to be given their plain meaning unless  
20 a contrary intent appears. In Re Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986).  
21 All provisions of an act must be considered in their relation to each other, and if possible,  
22 harmonized to insure proper construction for each provision. Tommy P. v. Board of County  
23  
24  
25

PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES FOR  
WRIT OF REVIEW

1 Commissioners, 97 Wn.2d 385, 645 P.2d 697 (1982).

2 Strained, unlikely, unrealistic or absurd consequences are to be avoided. State v.  
3 Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990); State v. Neher, 112 Wn.2d 347, 351,  
4 771 P.2d 330 (1989); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1977); State v.  
5 Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983) and State v. Hughes, 80 Wn. App. 196, 199,  
6 907 P.2d 336 (1995). See also City of Seattle v. Wandler, 60 Wn. App. 309, 314, 803 P.2d  
7 833 (1991). Likewise, Appellate Courts should not construe statutes "so as to render any  
8 provision meaningless or superfluous." Stone v. Chelan, (supra) 110 Wn.2d at 810. If a  
9 statute is ambiguous, the court must construe the statute so as to effectuate the legislative  
10 intent. In doing so, the court shall avoid a literal reading if it would result in unlikely, absurd  
11 or stained consequences. State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992); and  
12 Thatcher v. Dept. of Social and Health Services, 80 Wn. App. 319, 908 P.2d 920 (1996).  
13 Also, the purposes of an enactment should prevail over but inept wording. State ex rel. Royal  
14 v. Board of Yakima County Commissioners, 123 Wn.2d 451, 462, 869 P.2d 56 (1994).

15  
16 Bluntly, the only construction of RCW 9A.08.020(5)(a) that would make sense is that a  
17 person cannot be criminally liable as an accomplice if at the time that the person does  
18 whatever acts would otherwise involve criminal liability he or she is a victim. These things  
19 must match in time. Again, no where in the law – other than pardons - is there an after the  
20 fact exoneration. Thus, this Court must recognize that the argument made by the Defendant is  
21 absurd, and strained.

22  
23 The Municipal Court's ruling also poses problems since it seemed hinged upon a status  
24 of victim – regardless of timing of being a victim (and without regard to the timing of criminal  
25

PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES FOR  
WRIT OF REVIEW

Page - 16

CITY OF AUBURN

Legal Department  
25 West Main Street  
Auburn, WA 98001-4998  
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1 conduct) and regardless of level of injury – apparently any injury - no matter how slight will  
2 trigger the status. If that were the law, it would open the potential for contrived and  
3 manipulated victim statuses. If one suffers some minor injury that that the person could tie to  
4 the criminal partner, that is a get out of jail free card. That too shows the absurdity of the  
5 Defendant's argument.

6 Statutory construction dictates that this interpretation be scuttled.

7 PURPOSE OF RCW 9A.08.020(5)(a)

8 The rationale for RCW 9A.08.020(5)(a) is that a person who is A VICTIM OF THE  
9 CRIME AT THE TIME OF THE COIMMISSION OF THE CRIME ought not to have to  
10 defend himself or herself from prosecution. But the only application of that principle is to  
11 protect a victim who's protection was contemplated in the law. For instance, a "victim" in a  
12 statutory rape case could not, under RCW 9A.08.020(5)(a) be prosecutable as an accomplice.  
13 That is what was intended. Furthermore, the statutory rape victim was a victim at the time  
14 that any action was taken for which that victim could (but for this law) be criminally charged.

15 The Defendant was NOT A VICTIM OF ANY THING (she hadn't suffered anything)  
16 UNTIL AFTER SHE WAS DONE COMMITTING THE CRIMES (after she concluded the  
17 things that aided, encouraged the drunk driving and reckless driving).

18 DEFENDANT'S STATUS AS VICTIM

19 In this case, the Defendant was an accomplice before any injuries were received by  
20 anybody. She was an accomplice long before any one was a victim - unless the Defendant  
21 suggests that she became a victim merely by getting in the car. That ignores the fact that the  
22 car could have been driven practically forever without colliding into the concrete pillar.  
23  
24  
25

1 Also, the Defendant cannot put herself in the position of being a victim, and then escape  
2 responsibility for what she has done because the danger she compounded in fact occurred.

3 In State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991), the court stated, "We  
4 will not give the [restitution] statutes (those relied upon by the Defendant) an overly technical  
5 construction which would permit the defendant to escape from just punishment."

6 However, more than that, Hansen v. Department of Labor and Industries, 27  
7 Wn.App.223, 615 P.2d 1302 (1980), holds that one is not a victim of a crime if he or she  
8 caused or contributed to his or her injuries. The evidence here shows unseatbelted and that  
9 she was kneeling in the front passenger seat, facing the back seat passengers. Additionally, she  
10 knew that Jamie had not been drinking and that Tom had. That, in and of itself, takes her out  
11 of victim status.

12 The statute does not define the words "innocent," "provoked," or "incited." Webster's  
13 Third New International Dictionary (1969), in part, defines "provoke" as "to call forth (an  
14 emotion, action, activity) . . ." The same dictionary explains that provoke "may center  
15 attention on the fact of rousing to action or calling forth a response" and "is often used in  
16 connection with angry or vexed reactions . . ." "Incite" is defined as "to move to a course of  
17 action: stir up: spur on: urge on" and "to bring into being: induce to exist or occur."  
18 "Innocent" is defined as "free from guilt or sin" and "blameless." Hansen, at 226.

19 In that case, the court noted that Hansen could have ignored the derogatory remarks.  
20 Instead, she crossed the street to confront Adele (Hansen's adversary). At this point Adele  
21 threatened to use a knife and began fumbling in her purse. Hansen continued to confront her,  
22 literally backed her against a wall and reached out to touch her face. It is not surprising that  
23  
24  
25

PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES FOR  
WRIT OF REVIEW

1 these actions "provoked or incited" a violent response from Adele. Without question Hansen  
2 was the victim of a criminal assault. She was not, however, blameless. The board correctly  
3 concluded that she was not an innocent victim because Hansen provoked or incited the  
4 criminal act which caused her injuries.

5  
6 **CONCLUSION**

7 For all of the reasons set forth above, the Court must reverse the Municipal Court's  
8 ruling and remand the matter back to the Auburn Municipal Court for continuation of the trial  
9 on all four counts, resurrecting the accomplice charges of Reckless Driving and DUI.

10 DATED this 31 day of January, 2003.

11  
12 

13 Daniel B. Heid, WSBA # 8217  
14 Attorney for Plaintiff, City of Auburn

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IN THE AUBURN MUNICIPAL COURT  
COUNTY OF KING, STATE OF WASHINGTON

CITY OF AUBURN,	)	NO: C78961 AUP
	)	& IC7374 AUP
Plaintiff,	)	
	)	
vs.	)	MOTION TO DISMISS:
	)	DEFENDANT AS
TERESA A. HEDLUND	)	VICTIM
	)	
Defendant.	)	

COMES NOW the defendant, Teresa Hedlund, by and through her attorney of record, Thomas A. Campbell, and moves the court to dismiss the charges against the defendant that allege accomplice liability.

**FACTS**

The defendant has been charged as an accomplice to the driver of a car that was involved in an accident on July 16, 2001. The driver, Tom Stewart, it is alleged, drove the car in a reckless manner and while he was under the influence of alcohol. The accusations charge the defendant with violations of RCW 46.61.500 and 46.61.502 in conjunction with RCW 9A.080.020, the accomplice liability statute.

**EXHIBIT "A"**

**COPY**

1 The evidence has established that the accident occurred on 15<sup>th</sup> St. SW in  
2 Auburn when the car was heading westbound with seven occupants. The car left  
3 the roadway and collided with the cement support for the "flyover" that permits  
4 entry to the Auburn Supermall. The impact of the collision caused five of the  
5 occupants to be ejected from the vehicle. They died on impact. The driver was  
6 also mortally injured in the accident. The defendant, Teresa Hedlund, was  
7 seriously injured.

8 Responding police officers found Ms. Hedlund, the sole survivor, and  
9 summoned assistance. She was airlifted from the scene to Harborview Hospital in  
10 Seattle. She remained there for weeks. Following her stay at Harborview, Ms.  
11 Hedlund was released to nursing home care. Ms. Hedlund remained there for  
12 months before her return home. Ms. Hedlund continues to receive treatment for  
13 her injuries.  
14

### 15 ARGUMENT

16 Ms. Hedlund is not an accomplice because she is a victim of any crime  
17 committed by Tom Stewart.

18 RCW 9A.08.020 defines circumstances in which a person can be held  
19 criminally liable for the conduct of another. Additionally, however, RCW  
20 9A.08.020(5) provides in pertinent part,  
21

22 (5) Unless otherwise provided by this title or by the law defining the crime,  
23 a person is not an accomplice in a crime committed by another person  
24 if:

1 (a) He is a victim of that crime

2 Teresa Hedlund is a victim of the accident. RCW 7.68.020 defines a victim  
3 for the purposes of determining persons entitled to compensation under the Crime  
4 Victims Compensation Act.  
5

6 (3) "Victim" means a person who suffers bodily injury or death as a  
7 proximate result of another person, the victim's own good faith and  
8 reasonable effort to prevent a criminal act, or his or her good faith  
9 effort apprehend a person reasonably suspected of engaging in a  
10 criminal act.  
11 RCW 7.68.020(3)

12 RCW 7.69.020 defines a victim for the purposes of determining when a  
13 person is entitled to protection and the services of a victim's advocate.  
14

15 (3) "Victim" means a person against whom a crime has been committed or  
16 the representative of a person against whom a crime has been  
17 committed.  
18 RCW 7.69.020(3)

19 RCW 9.94A.030(44) defines a victim as "any person who has sustained  
20 emotional, psychological, physical or financial injury to person or property as a  
21 direct result of the crime charged.  
22

23 In State v. Davis, 53 Wn.App. 306, 766 P.2d 1120 (1989), the defendant  
24 challenged the court's determination to impose an exceptional sentence based on  
the existence of multiple victims. The defendant argued that, because he was  
convicted of vehicular homicide, the multiple injured parties were not "victims"  
because they had not died. The court rejected the defendant's argument and

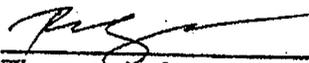
1 found that, under RCW 9.94A.030, a "victim" is one whose injuries are proximately  
2 caused by conduct forming the basis of the crime charged.

3 Teresa Hedlund's injuries were caused as a direct and proximate result of  
4 the actions of Tom Stewart. The injuries were substantial and qualify Ms. Hedlund  
5 as a victim under any applicable statute.

6 **CONCLUSION**

7 The injuries sustained by Ms. Hedlund clearly are the type of injuries  
8 described in the multitude of statutes that define a victim status. Her injuries were  
9 significant and disabling. Accordingly, Ms. Hedlund can not be found to be an  
10 accomplice pursuant to RCW 9A.08.020(5)(a) and defense requests that the court  
11 dismiss charges applying an accomplice liability standard.  
12

13 DATED this 29 day of January, 2003.

14  
15  
16  
17   
18 Thomas A. Campbell  
19 WSBA #14289  
20 Attorney for Defendant  
21  
22  
23  
24

**APPENDIX "I"**

**FILED**  
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The Honorable James D. Cayce, Judge  
Hearing: February 3, 2003, 9:00 a.m.

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

CITY OF AUBURN,

Plaintiff

v.

TERESA HEDLUND,

Defendant.

NO. 03-2-00810-9 KNT

PLAINTIFF'S SUPPLEMENTAL  
SUBMITTAL AND MEMORANDUM  
OF AUTHORITIES REGARDING  
JURISDICTION FOR WRIT OF  
REVIEW AND STAY

COMES NOW the Plaintiff by and through its attorneys and in response to issues raised at the January 31, 2003, hearing before the Court relative to Jurisdiction, and in supplementation of its Memorandum for a Writ of Review, respectfully submits the following:

**JURISDICTIONAL ISSUES**

**DOUBLE JEOPARDY**

The Defendant raised the argument at the hearing that any continuation of the trial in the Auburn Municipal Court on the accomplice charges (DUI and Reckless Driving) against the Defendant would violate Double Jeopardy as a post-acquittal prosecution.

PLAINTIFF'S SUPPLEMENTAL SUBMITTAL AND  
MEMORANDUM OF AUTHORITIES REGARDING  
JURISDICTION FOR WRIT OF REVIEW AND STAY

**CITY OF AUBURN**  
Legal Department  
25 West Main Street  
Auburn, WA 98001-4998  
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1 The double jeopardy clauses of the Fifth Amendment<sup>1</sup> to the United States Constitution  
2 and Art. 1, § 9<sup>2</sup> of the Washington State Constitution preclude retrial of a defendant for a  
3 crime after acquittal. Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1  
4 (1978); State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996); State v. Corrado,  
5 81 Wn. App. 640, 647, 915 P.2d 1121 (1996). The state constitutional rule against double  
6 jeopardy, Const. Art. I, § 9, offers the same scope of protection as its federal counterpart. State  
7 v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

8 As noted in State v. Crediford, Double Jeopardy “forbids a second trial for the purpose  
9 of affording the prosecution another opportunity to supply evidence which it failed to muster  
10 in the first proceeding.” Crediford, 130 Wn.2d at 760, citing State v. Hennings, 100 Wn.2d  
11 379, 383, 670 P.2d 256 (1983) (quoting Burks v. United States, 437 U.S. at 9). Similarly, in  
12 State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996), the court said that “[t]he constitutional  
13 guaranty against double jeopardy protects a defendant from a second trial for the same offense  
14 and against multiple punishments for the same offense.” State v. Hayes, 81 Wn. App. at 439,  
15 citing State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308 (1992). The same language  
16 (including the reference to a “second” trial) was made in State v. Noltie, 116 Wn.2d 831, 848,  
17

18  
19 <sup>1</sup> United States Constitution, Amendment V (Grand Jury Indictment for Capital Crimes;  
20 Double Jeopardy;

21 Self-Incrimination; Due Process of Law; Just Compensation for Property).

22 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a  
23 presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the  
24 Militia, when in actual service in time of War or public danger; nor shall any person be subject for the  
25 same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to  
be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;  
nor shall private property be taken for public use, without just compensation.

<sup>2</sup> Washington State Const., Article 1, § 9 (Rights of Accused Persons).

No person shall be compelled in any criminal case to give evidence against himself, or be twice  
put in jeopardy for the same offense.

1 809 P.2d 190 (1991), citing State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). See  
2 also Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). (The  
3 Fifth Amendment guarantee against double jeopardy protects against a second trial for the  
4 same offense. Whalen, 445 U.S. at 687.)

5 Clearly what is involved here would not be a second trial, nor would it be a new  
6 presentation of the evidence. Double jeopardy, however, illustrates the time sensitivity of the  
7 matter before this Court, and the propriety of a stay of proceedings in the Municipal Court,  
8 without which the jury trial would soon conclude and any further prosecution of the  
9 accomplice charges would be precluded as a retrial after acquittal. This is also significant in  
10 that it legitimizes the Plaintiff's right to a writ, as there are no other adequate remedies at law.

#### 11 WRIT AUTHORITY

12  
13 The Defendant also argued that the Plaintiff does not have authority to apply for a writ  
14 unless the Municipal Court has "acted illegally." The Defendant advised that an unrelated  
15 issue (a discovery issue – Public Disclosure Law versus CrRLJ 4.7) had already been up to the  
16 Court of Appeals in this case. The Court of Appeals ruled that despite the legal dispute,  
17 Review via Writ is discretionary, and stated that the Plaintiff did not sufficiently show that the  
18 Municipal Court made an error of law.<sup>3</sup> To aid this Court, a copy of the Court of Appeals  
19 Commissioner's Ruling is attached, marked as Exhibit "A" and incorporated herein by this  
20

21  
22 <sup>3</sup> The Plaintiff thought it did sufficiently show the error of law, ignoring Limstrom v. Ladenburg, 110  
23 Wn. App. 133, 39 P.3d 351 (2002), CR 26(b)(4), and cases cited therein. The Auburn Municipal Court  
24 ordered correspondence and communications to the Plaintiff from the King County Prosecutor's Office  
25 and from its private out-side civil legal counsel be disclosed to the Municipal Court for in-camera  
review, even though no showing of plausible materiality of the requested correspondence and  
communications. (MUNICIPAL COURT: "The Defense has not made a showing that there is  
information that the City has that it claims is privileged that is material to the Defense. The problem is  
the Defense can't make that showing without knowing what's there." [VRP 52.]

1 reference. Aside from the arguments involved in the earlier matter, the Plaintiff respectfully  
2 submits that this Court DOES have authority to issue a writ. The Defendant argued that per  
3 State v. Epler, 93 Wn. App. 520, 969 P.2d 498 (1999), a writ is only available if it can be  
4 shown that the lower court exceeded its jurisdiction or acted illegally. (Note: the Court of  
5 Appeals looked for sufficient showing of an "error of law," not just a showing that the court  
6 exceeded its jurisdiction or acted illegally.)

7  
8 The grounds for granting a writ of review are set forth in RCW 7.16.040, as follows:

9 7.16.040 Grounds for granting writ.

10 A writ of review shall be granted by any court, except a municipal or  
11 district court, when an inferior tribunal, board or officer, exercising judicial  
12 functions, has exceeded the jurisdiction of such tribunal, board or officer, or one  
13 acting illegally, or to correct any erroneous or void proceeding, or a proceeding  
14 not according to the course of the common law, and there is no appeal, nor in the  
15 judgment of the court, any plain, speedy and adequate remedy at law. (Emphasis  
16 added.)

17 The matter before this Court is not a discretionary factual decision. It is a ruling as a  
18 matter of law, as evidenced by the fact that the ruling is one unrelated to the facts of the case -  
19 any (subsequent) victim would be invulnerable to prosecution as an accomplice. As noted  
20 below, the Municipal Court's ruling is error (erroneous), and insofar as a legal error is an  
21 excess of jurisdiction and/or illegal, a writ is likewise indicated.

22 Unquestionably, there is no plain, speedy and adequate remedy at law, as if this relief is  
23 not granted, per Double Jeopardy, the cases (accomplice DUI and Reckless Driving) will be  
24 lost forever. In light of the dismissal of the charges, they are not even something the Plaintiff  
25 would be able to raise on appeal if the Defendant were to be convicted of the other charges  
and SHE appeals.

As to the specific concerns the Defendant argued regarding State v. Epler, and the issue  
of whether a writ of review is "a matter of jurisdiction" [whether the court exceeded its

1 jurisdiction] and that [per Defendant's argument] even "a clear error at law . . . is not enough,"  
2 in City of Seattle v. Keene, 108 Wn. App. 630, 31 P.3d 1234, amended on denial of  
3 reconsideration (2001), that issue was addressed. City of Seattle v. Keene, said that this  
4 discussion in Epler "is dicta." Keene, 108 Wn. App. at 635. The court then distinguished the  
5 holding of Epler from that of City of Mount Vernon v. Mount Vernon Mun. Court, 93 Wn.  
6 App. 501, 973 P.2d 3 (1998). Keene, 108 Wn. App. at 635.

7 Seattle v. Keene noted that Mount Vernon was decided a few days before Epler, but was  
8 not ordered published until later, and neither case discussed the other. Id. at 635. Keene,  
9 wherein the court found in favor of the writ, pointed out that Mount Vernon essentially held  
10 for a proposition opposite that of the Epler scenario. Keene, 108 Wn. App. at 635, citing  
11 Mount Vernon, 93 Wn. App. at 509. Per Keene, writs of review are for the purpose of  
12 correcting errors of law.

13 The Defendant also argued a more restrictive reading of Commanda v. Cary, 143 Wn.2d  
14 651, 23 P.3d 1086 (2001), than given by Keene. Keene recited the language in Commanda  
15 that said a superior court may grant a writ of review only if the lower tribunal exceeded its  
16 jurisdiction or acted illegally, and there is no appeal or adequate remedy at law. Keene, 108  
17 Wn. App. at 634, citing Commanda v. Cary, 143 Wn.2d at 655. Obviously, based on the  
18 below discussion, Keene interprets exceeding jurisdiction and acting illegally to include  
19 correcting an error of law. That too seems consistent with the attached the Court of Appeals  
20 Commissioner's Ruling, evaluating whether there was sufficient showing of an error of law.  
21 City of Seattle v. Keene discussed in some length the distinction between writs of review and  
22 writs of mandamus and prohibition, as follows:

23 As the New York Casualty [State ex rel. New York Cas. Co. v Superior Court, 31  
24 Wn.2d 834, 837-38, 199 P.2d 581 (1948)] court recognized, the writ of  
25 prohibition has a purpose entirely different from that of a writ of review. The writ  
of prohibition is "the counterpart of the writ of mandate. It arrests the proceedings

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1 of any tribunal ... when such proceedings are without or in excess of the  
2 jurisdiction of such tribunal ....” RCW 7.16.290 and may be issued “where there  
3 is not a plain, speedy and adequate remedy in the ordinary course of law.” RCW  
4 7.16.300 The writ of mandamus issues to compel the performance of an act  
5 “which the law especially enjoins as a duty.” RCW 7.16.160. Neither a writ of  
6 mandate nor a writ of prohibition is authorized to correct errors of law. The writ  
7 of review, on the other hand, is for just that purpose. While the writs are similar,  
8 the statutes differentiate the grounds upon which the various writs are authorized;  
9 only the writ of review statute includes the ground “acting illegally,” and only the  
10 writ of review statute sets forth the questions to be determined in deciding the  
11 merits (including “[w]hether ... any rule of law ... has been violated” RCW  
12 7.16.120(3)).

13 Keene, 108 Wn. App. at 639-40. (Emphasis added.)

14 Ultimately, the Keene court noted that before adoption of the Rules for Appeal of  
15 Decisions of Courts of Limited Jurisdiction (RALJ), appeals from lower courts were  
16 conducted de novo in superior court, and interlocutory rulings were therefore never  
17 reviewable on appeal and could be reviewed only by interlocutory writ. The RALJ create a  
18 right of appeal on the record, but the rules specifically retain statutory writs. See RALJ 1.1(b).  
19 The court held “the only method of review of interlocutory decisions in courts of limited  
20 jurisdiction is still the statutory writ.” City of Seattle v. Keene, 108 Wn. App. at 642, citing  
21 City of Seattle v. Williams, 101 Wn.2d 445, 455, 680 P.2d 1051 (1984).

22 The essence of City of Seattle v. Keene, with its endorsement of City of Mount Vernon  
23 v. Mount Vernon Mun. Court, is that WRITS OF REVIEW ARE APPROPRIATE TO  
24 CORRECT ERRORS OF LAW, different than the dicta of Epler.  
25 AUTHORITY TO CHARGE AS ACCOMPLICE

Another issue raised at the January 31, 2003, hearing was whether the traffic  
accomplice charges (DUI and Reckless Driving) with which the Plaintiff charged the  
Defendant should have been charged under RCW 46.64.048 rather than in accordance with  
RCW 9A.08.020. RCW 46.64.048 reads as follows:

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1 46.64.048 Attempting, aiding, abetting, coercing, committing violations,  
2 punishable.

3 Every person who commits, attempts to commit, conspires to commit, or  
4 aids or abets in the commission of any act declared by this title to be a traffic  
5 infraction or a crime, whether individually or in connection with one or more  
6 other persons or as principal, agent, or accessory, shall be guilty of such offense,  
7 and every person who falsely, fraudulently, forcefully, or willfully induces,  
8 causes, coerces, requires, permits or directs others to violate any provisions of  
9 this title is likewise guilty of such offense.

10 By comparison, RCW 9A.08.020 reads in pertinent part, as follows:

11 9A.08.020 Liability for conduct of another—Complicity.

12 (1) A person is guilty of a crime if it is committed by the conduct of  
13 another person for which he is legally accountable.

14 (2) A person is legally accountable for the conduct of another person  
15 when:

16 ...  
17 (c) He is an accomplice of such other person in the commission of the  
18 crime.

19 (3) A person is an accomplice of another person in the commission of a  
20 crime if:

21 (a) With knowledge that it will promote or facilitate the commission of  
22 the crime, he

23 (i) solicits, commands, encourages, or requests such other person to  
24 commit it; or

25 (ii) aids or agrees to aid such other person in planning or committing it ...

Under each of the two accomplice approaches, penalties would be the same. There is no separate penalty provision, and the penalty for the underlying offense controls. Though the two approaches are similar, they do have different elements. For instance, RCW 46.64.048 includes the elements of falsely, fraudulently, forcefully, or willfully inducing, causing, coercing, requiring, permitting and directing another to violate the law, while RCW 9A.08.020 includes the elements of soliciting, commanding, encouraging, requesting and aiding another directing another to violate the law. RCW 9A.08.020 also has the important element of "with knowledge that it will promote or facilitate the commission of the crime." Certainly the elements are different.

1 Neither RCW 46.64.048 nor 9A.08.020 preempts the other. For example, RCW  
2 69.50.608 of the Uniform Controlled Substances Act, fully preempts illegal drugs ("The state  
3 of Washington fully occupies and preempts the entire field of setting penalties for violations  
4 of the controlled substances act."), no such preemption exists for RCW 46.64.048. Preemption  
5 occurs when the Legislature states its intention either expressly or by necessary implication to  
6 preempt the field. Kennedy v. Seattle, 94 Wn.2d 376, 383-84, 617 P.2d 713 (1980).  
7

8 Rather than preempting any charging action, RCW 46.64.048 states, in non-exclusive  
9 language, that a person who does certain things . . . willfully induces, causes, coerces, requires,  
10 permits or directs others to violate any offense under Title 46 . . . shall be guilty of such  
11 offense. That is the same approach taken by RCW 9A.08.020, a person who does certain  
12 things . . . with knowledge that it will promote or facilitate the commission of a crime, solicits,  
13 commands, encourages, requests or aids another person to commit it . . . is guilty of the  
14 offense. Whichever best fits a particular fact situation can be used by a prosecutor in his/her  
15 discretion.

16 With accomplice liability not being preempted, Plaintiff is entitled to determine how best  
17 to prosecute those violations within its jurisdiction. The discretion vested in the prosecutor to  
18 selectively enforce criminal statutes is not unconstitutional if not based on unjustifiable  
19 standards. State v. Wanrow, 91 Wn.2d 301, 312, 588 P.2d 1320 (1978). Additionally, in light  
20 of the decision in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), scrutiny of the  
21 elements of and instructions for accomplice liability warranted caution that seemed better  
22 addressed by charging of RCW 9A.08.020.  
23  
24  
25

1 Also, while two statutes that declare the same acts to be crimes, but penalize one more  
2 severely than the other (not involved here) may violate the right to equal protection, State v.  
3 Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990), no equal protection violation occurs when  
4 the crimes require proof of different elements. Id.; In re Personal Restraint of Taylor, 105  
5 Wn.2d 67, 68, 711 P.2d 345 (1985). See also City of Kennewick v. Fountain, 116 Wn.2d 189,  
6 193, 802 P.2d 1371 (1991). Where there are differing elements between offenses, the  
7 prosecutor's discretion is limited by consideration of which elements under the respective  
8 statutes can be proved. Fountain, 116 Wn.2d at 193.

9  
10 The "knowingly encouraging" conduct, per RCW 9A.08.020, is pivotal to the Plaintiff's  
11 case, and even though that statute includes the (additional) element of "knowingly," the facts  
12 of the Plaintiff's case necessitates the element of "encouraging," rather than "inducing" or  
13 "coercing," per RCW 46.64.048. In fact, in State v. Parker, 60 Wn. App. 719, 806 P.2d 1241  
14 (1991), the court concluded that the actions of a person who allegedly "knowingly encouraged  
15 reckless driving by another driver," could constitute accomplice liability (under RCW  
16 9A.08.020) for offenses contained in Title 46 RCW (in that case, vehicular assault [RCW  
17 46.61.522] and vehicular homicide [RCW 46.61.520]).

#### 18 INTERPRETATION OF STATUTE - RULE OF LENITY

19 The court's goal in statutory interpretation is to identify and give effect to the  
20 Legislature's intent. State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v.  
21 Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001).  
22 When the language of a statute is clear and unambiguous, its meaning is to be derived from  
23 the language of the statute alone and it is not subject to judicial construction. State v. Keller,  
24 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

1 If the statute is ambiguous, per the Rule of Lenity, any ambiguity is interpreted to favor  
2 a criminal defendant. State v. Hepton, 113 Wn. App. 673, 689, 54 P.3d 233 (2002), citing  
3 State v. Spandel, *supra*, and State v. Bright, *supra*. See also In re Post Sentencing Review of  
4 Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998).

5 However, a statute is not ambiguous merely because different interpretations are  
6 conceivable. State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996) (citing State v.  
7 Sunich, 76 Wn. App. 202, 206, 884 P.2d 1 (1994)). A statute is ambiguous if it can  
8 REASONABLY be interpreted in two or more ways. In re King, 146 Wn.2d 658, 665, 49 P.3d  
9 854 (2002), citing Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Also, an  
10 ambiguity exists if the statute is susceptible to more than one REASONABLE interpretation.  
11 State v. Thorne, 129 Wn.2d 736, 763 n. 6, 921 P.2d 514 (1996).

12 More importantly, a statute is not ambiguous when an alternative reading of it is  
13 strained. State v. C.G., 114 Wn. App. 101, 107, 55 P.3d 1204 (2002). See also State v. Keller,  
14 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); State v. Tili, 139 Wn.2d 107, 115, 985 P.2d  
15 365 (1999), review granted, 145 Wn.2d 1026 (2002). The court must avoid constructions  
16 "that yield unlikely, strange or absurd consequences." State v. Keller, 143 Wn.2d at 277,  
17 citing State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994), and Upjohn v. Russell,  
18 33 Wn. App. 777, 780, 658 P.2d 27 (1983). That mandates the review of an interpretation of a  
19 statute to determine if the interpretation is reasonable.

20 In addition to the authorities and argument set forth in the Plaintiff's Memorandum of  
21 Points and Authorities for Writ of Review, the unreasonability of the strained and absurd  
22 interpretation sought by the Defendant is shown simply as follows: It is unreasonable to  
23 propose that something that happens after the fact reverses the criminality of something that  
24 already occurred. If the Defendant in this case committed the crime of DUI or Reckless  
25 Driving as an accomplice, as argued by the Plaintiff, it would have been committed (already

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1 committed) BEFORE she could be described as a victim – before the collision. Nowhere in  
2 RCW 9.A.08.020, or any other statute, is such a concept provided.

3 A defendant's mental state is measured AS OF THE TIME OF THE CRIME. State v.  
4 Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). The assessment of whether a defendant  
5 had the ability to appreciate nature of his or her actions or to form the required specific intent  
6 to commit charged crime is MADE AS OF THE TIME OF THE CRIME. State v. Greene, 139  
7 Wn.2d 64, 65, 984 P.2d 1024 (1999). Furthermore, an ex post facto law is one that (1)  
8 deprives the defendant of a defense that was available AT THE TIME THE CRIME WAS  
9 COMMITTED; (2) makes more burdensome the punishment for a crime, AFTER ITS  
10 COMMISSION, or (3) punishes past conduct that was INNOCENT WHEN DONE. State v.  
11 Stewart, 72 Wn. App. 885, 894, 866 P.2d 677 (1994), aff'd, 125 Wn.2d 893 (1995).

12 When a person commits a crime, its criminality is determined at the time it is  
13 committed, not after the fact, and it would not change because of things that happen later. If a  
14 person is invulnerable from prosecution as an accomplice because he or she is a victim, that  
15 victim status must exist at the time of the commission of the crime. With that, also illustrative  
16 of the absurdity of the Defendant's argument is that it would mean that the look-out or get-  
17 away driver in a failed bank robbery would be immune from prosecution if injured in any way  
18 when attempting to flee.

19 As an aside, in addition to the question of when the Defendant would have been a  
20 victim - contrasted with when she would have committed the accomplice crimes, the question  
21 also ought to be answered as to whether a person is a "victim" of Reckless Driving. For  
22 instance, the purpose of the compromise of misdemeanor statute (RCW 10.22.020) is to  
23 provide "restitution to crime victims and avoidance of prosecution for minor offenders." State  
24 v. Ford, 99 Wn. App. 682, 686, 995 P.2d 93 (2000), citing State v. Norton, 25 Wn. App. 377,  
25 380, 606 P.2d 714 (1980). The compromise of misdemeanor statute was not appropriate for

1 Reckless Driving. City of Seattle v. Stokes, 42 Wn. App. 498, 712 P.2d 853 (1986). "Because  
2 injury is not a necessary element of Reckless Driving, a compromise will inequitably be  
3 available only when an accident occurs. We hold that the compromise of misdemeanor should  
4 be permitted only for traffic offenses whose elements include injury to persons or property."  
5 Id. at 502.

6 However, again, even if the Court concludes that the Defendant "could" be a victim of  
7 Reckless Driving, that would not change the fact that if she committed the accomplice  
8 offenses, she committed them BEFORE she could have been a victim. In that regard, if there  
9 never had been an accident, the offenses would have been committed just the same. That  
10 further illustrates the fact that subsequently acquired "victim status" would not change the  
11 commission of such prior offenses.

#### 12 NEED FOR STAY OF PROCEEDINGS

13 RCW 7.16.080 authorizes the court to order a stay of proceedings in connection with a  
14 writ, as follows:

##### 15 7.16.080. Stay of proceedings

16 If a stay of proceedings be not intended, the words requiring the stay must  
17 be omitted from the writ. These words may be inserted or omitted, in the sound  
18 discretion of the court, but if omitted the power of the inferior court or office is  
19 not suspended or the proceedings stayed.

20 As indicated by the Double Jeopardy discussion above, a stay of proceedings, to  
21 temporarily suspend the jury trial currently underway in the Auburn Municipal Court, is  
22 necessary in order to preserve the status quo. That would allow the matter to be reviewed  
23 before the jury trial is concluded, without which the Plaintiff's ability to prosecute or appeal  
24 the accomplice offenses will be lost forever. It would be preferable for the review to be made  
25 and the decision rendered immediately, but if that is not possible, a stay is authorized and  
appropriate, and the Plaintiff respectfully requests the same.

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CONCLUSION

This is a case deserving of a writ of review. Writs of review are appropriate tools to correct errors of law. The accomplice charges (under RCW 9A.08.020) are proper. The Court has jurisdiction to issue the writ and grant the relief requested by the Plaintiff.

DATED this 3 day of February, 2003.

  
Daniel B. Heid, WSBA # 8217  
Attorney for Plaintiff, City of Auburn

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CITY OF AUBURN  
LEGAL DEPARTMENT

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

CITY OF AUBURN,

Appellant,

v.

TERESA HEDLUND,

Respondent.

No. 51388-5-1

COMMISSIONER'S RULING DENYING  
DISCRETIONARY REVIEW AND  
LIFTING STAY

The City of Auburn appeals from a denial of a writ of review of a municipal court order requiring the prosecutor to produce documents for in camera review. When the municipal court scheduled a show cause hearing at which the prosecutor could have been held in contempt for refusing to turn over files, the City moved for a stay of the hearing and to accelerate review. I stayed the contempt hearing pending a ruling on whether the denial of the writ of review is appealable and, if not, whether discretionary review pursuant to RAP 2.3(d) is appropriate. As the order below is not appealable under RAP 2.2(a) and the discretionary review is not warranted, discretionary review is denied and the stay is lifted.

This case involves a municipal court order requiring the City prosecutor to produce for in camera review documents it exchanged with the King County Prosecutor's Office and the City's outside counsel. In camera review has not yet taken

**EXHIBIT "A"**

place, so no documents have been disclosed to the defense. The City argues that the defense has not established that the documents are material, and thus the court lacks discretion to order their discovery pursuant to CrRLJ 4.7(e)(1). Respondent argues that the City appears to be withholding information that must be disclosed pursuant to CrRLJ 4.7(a)(1) and that in camera review of these documents is the only way, in the unique circumstances of this case, to ensure that what must be disclosed has been disclosed. The superior court denied the writ of review because the municipal court did not exceed its jurisdiction or act illegally, as required by RCW 7.16.040.

### **FACTS**

In July, 2001, six young people were killed when their car crashed into a cement pillar on an Auburn street. Respondent Teresa Hedlund, a passenger in the car, was the only survivor of what has been described as the worst single vehicle accident in this state's history. After investigation, the police concluded that the deceased driver was intoxicated and was driving too fast. Among other things, the police apparently found a videotape in the wreckage of what had transpired in the car prior to the accident.

The accident investigation was conducted by the Auburn and Kent police and completed in November, 2001. It was referred to the King County Prosecutor's Office for consideration of filing felony charges against Respondent. King County declined to file charges and returned the matter to the City of Auburn for consideration of filing misdemeanor charges against Respondent. In July, 2002, the City prosecutor charged Respondent in Auburn Municipal Court with the offenses of driving under the influence of intoxicants by accomplice liability, reckless driving by accomplice liability, and furnishing liquor to a minor.

Meanwhile, public disclosure requests for information concerning the accident were filed by news media and some of the victims' families. To deal with these requests, the City sought advice from its outside legal counsel, Keating, Bucklin & McCormack. Police reports were shared with the firm and correspondence received from the firm. Eventually, the City addressed the public disclosure requests by filing a declaratory judgment action in King County Superior Court to enjoin release of documents and the videotape. A temporary protective order was issued pending resolution of Respondent's criminal matter.

In Auburn Municipal Court, Respondent was arraigned August 1, 2002 and a pretrial conference was scheduled for August 20, 2002.<sup>1</sup> Speedy trial would expire October 28, 2002. Discovery materials were not provided to defense counsel until August 19, 2002. The pretrial conference was postponed one week and additional materials were made available to the defense August 22, 2002. At the August 27, 2002 pretrial conference, the parties outlined the materials that had been provided to the defense; defense counsel sought the court's assistance in obtaining additional documents, and asked the City to identify its expert witnesses and summaries of their testimony. The City responded that it had not decided which, if any, expert witnesses it would call. At the request of Respondent, the City was ordered to file a bill of particulars by September 4 and another pretrial conference was scheduled for September 10. The bill of particulars was provided September 10; on that date, the City still was unable to provide information concerning its expert witnesses. It had not yet provided records

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<sup>1</sup> This account of the facts is gleaned primarily from Respondent's Response to Application for Writ of Review filed in the Superior Court. The City has not provided an alternative account.

from the Medical Examiner's Office regarding the decedents. Neither had records from the State Toxicologist been provided. At this stage, the defense asked that the City be ordered to disclose its files and communications with the King County Prosecutor and outside counsel concerning the facts of the accident. The City objected. The court ordered briefing and scheduled another pretrial conference for September 24, 2002.

At the September 24 hearing, the City provided the Medical Examiner's records, but still failed to identify its expert witnesses or indicate what, if any, accident reconstruction evidence it intended to use at trial. Over the City's objection, the court ordered the prosecutor to provide defense counsel with a copy of the videotape made shortly before the accident, subject to a protective order prohibiting secondary dissemination. The court also heard argument on the defense motion to turn over the documents exchanged between the City and the King County Prosecutor and the City's outside counsel. The City objected on grounds that this material was privileged, either as attorney-client communications or work product. The defense indicated that it was not seeking privileged materials, but rather suspected that discoverable information was not being provided.

The municipal court proposed that the documents be provided to it for in camera review to determine whether they contained any material, discoverable information, and to identify privileged information that would not be subject to disclosure. The City objected on the grounds that the defense had not established the materiality of the information it believed would be in the records it sought. The defense acknowledged it could not do so, but pointed out that it still had not even been told what expert witnesses would be called and it still lacked key accident reconstruction information. Given the

state of the discovery process to date, the court found that the defense could not be expected to know what material information was being withheld, if any, and that in camera review was the only way to sort the situation out in time for an October 28, 2002 trial date.

The municipal court explained its decision as follows:

The real question is, is there in the information that hasn't been provided anything that wouldn't really fit into the requirements of privilege as well as the requirements of those matters that wouldn't necessarily be disclosed under 4.7(f)? And then the question arises, well, who makes that decision, whether or not it's excludable. . . .

[S]omebody should look at it. And I think it would behoove me not only under the Court Rules, but under the case law that I read, to be the person to take a look at that. So, what I'm going to do is direct that the information that the City contends is privileged either under the Court Rule or attorney/client privilege that hasn't been disclosed be provided to the Court for an in camera review, and I'll review it and see if there is any information in there that arguably is material. If I do see anything, then I think we have another hearing.

Exhibit B, Transcript from September 24, 2002 hearing, pages 49-52. The court went on to emphasize the unusual nature of this case, Respondent's entitlement to all material discoverable information, and the need to have a clear and complete record for appellate review.

The City applied for a writ of review in King County Superior Court. Both sides extensively briefed the issue. The superior court denied the application for a writ because at worst, the municipal court's decision amounted to an error of law. The superior court concluded that despite conflicting case law on the subject, neither RCW 7.16.040 nor Commanda v. Cary, 143 Wn. 2d 651, 23 P. 3d 1086 (2001) permitted a writ to issue where a court of limited jurisdiction was acting within its jurisdiction to exercise its discretion.

The City filed a notice of appeal to this Court. The possibility that the denial of the writ of review was not appealable was not raised until after the City moved for emergency relief in December, 2002; despite the pendency of a notice of appeal, events continued to proceed in the municipal court and trial is now scheduled for January 27, 2003.

### DECISION

Appealability. The City argues that the denial of the writ must be appealable because otherwise it can have no effective review of what it believes to be an erroneous order by the municipal court. The City appears to conceive of the superior court's order as refusing to consider whether the order for in camera review was erroneous, and thus not truly appellate review. The City misunderstands the process for interlocutory review of a decision of court of limited jurisdiction.

Under RCW 7.16.040, a "superior court can grant a writ of review only if (1) the [court of limited jurisdiction] exceeded its jurisdiction or acted illegally, and (2) there is no appeal or adequate remedy at law." State v. Epler, 93 Wn. App. 520, 523-24, 969 P.2d 498 (1999). In most cases when defendants seek a writ of review, they have a right to RALJ appeal if they are convicted. Prosecutors, however, are rarely able to seek appellate review without placing defendants in double jeopardy. RAP 2.2(b). The City argues persuasively that only interlocutory review could prevent it from being forced to disclose material it believes to be privileged to the municipal court.

However, the application for a writ of review in the superior court is the interlocutory review process available to the City. The City's quarrel is really with the strict standard of review applied by the superior court in this case. However, review of a

grant or denial of a writ of review "is subject to further review by the Court of Appeals or [the Supreme Court] solely as a matter of discretion and not as a matter of right. . . . [R]eview is a matter of discretion subject to the considerations found in RAP 2.3(d)." City of Seattle v. Williams, 101 Wn.2d 445, 456, 680 P.2d 1051 (1984). To allow appeals as of right from denials of writs of review would perversely allow greater appellate review of interlocutory decisions of district and municipal courts than of superior courts, to which the stringent criteria of RAP 2.3(b) are applied. Thus, to the extent that the City believes the superior court applied the wrong standard of review to the municipal court's decision, its argument must be addressed to RAP 2.3(d)(1).

Discretionary Review. Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction (RALJ) will be accepted only:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitutions of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

The City contends review is appropriate under RAP 2.3(d)(1) and (3) because the superior court's decision conflicts with City of Seattle v. Keene, 108 Wn. App. 630, 31 P.3d 1234 (2001) and because the case involves an important question of public interest.

Conflict with Appellate Decisions. The superior court relied in its denial of the writ of review on a paragraph in Commanda, 143 Wn.2d at 655-56, that was subsequently parsed by this Division in Keene, 108 Wn. App. at 643. Commanda's critical paragraph discusses State v. Epler, 93 Wn. App. 520, 969 P.2d 498 (1999), a Division III case which limited issuance of writs of review to acts of a court of limited jurisdiction that exceed its jurisdiction or are illegal, and where there is no appeal or adequate remedy at law.

This Division concluded in Keene that Commanda did not address the question of reviewability of errors of law through writs of review, but merely recapitulated Epler's holding to explain the parties' arguments without endorsing it. Keene, 108 Wn. App. at 643. Keene held that a writ of review does lie to correct errors of law. Keene, 108 Wn. App. at 644. The superior court reads Commanda to adopt Epler's prohibition against issuing writs of review to correct errors of law. Thus, the City argues, the superior court's conclusion that issuance of a writ of review requires more than an error of law conflicts with Keene.

There is no question that the state of the law regarding the circumstances under which a writ of review may lie is confusing. However, in this case, there is no need to determine whether the superior court misread Commanda because even if the superior court should have analyzed whether the municipal court erred when it ordered the in camera review, the City has not shown that the municipal court did err.

The City argues that before disclosure of privileged materials may be ordered, the defense must demonstrate their "plausible materiality." For this premise, the City relies primarily on Limstrom v. Ladenburg, 110 Wn. App. 133, 39 P.3d 351 (2002),

which analyzed a Public Disclosure Act request for attorney work product material. The Public Disclosure Act is really beside the point here, however, as this dispute arises under CrRLJ 4.7. Nonetheless, CrRLJ 4.7(e)(1) requires that a court may, in its discretion and "[u]pon a showing of materiality and if the request is reasonable," order disclosure of "relevant material and information" that the prosecutor is not obligated to disclose under CrRLJ 4.7(a) and (d). The body of case law interpreting this rule supports the City's argument that a showing of materiality must be made before the prosecution is required to disclose information it is not obligated to disclose. See, e.g., State v. Norby, 122 Wn.2d 258, 266, 858 P.2d 210 (1993); State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993); State v. Terrovonia, 64 Wn. App. 417, 423, 824 P.2d 537 (1992).

However, the City's argument rests on the premise that the municipal court ordered disclosure of material the City was not obligated to release.<sup>2</sup> The record does not support this premise. First, the municipal court has ordered in camera review, not automatic disclosure to the defense. In camera review is a method of regulating discovery explicitly provided for by CrRLJ 4.7(g)(6) and required by case law when privilege is asserted. State v. Garcia, 45 Wn. App. 132, 139, 724 P.2d 912 (1986). Second, from the municipal court's ruling, it is plain the court is attempting to ensure that the defense is provided with information to which it is entitled under CrRLJ 4.7(a), and does not intend to order privileged information to be disclosed to the defense. The municipal court specifically said that it would hold another hearing if it believed material needed to be disclosed. The court's ruling capped a series of pretrial conferences at

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<sup>2</sup> The City does not actually cite CrRLJ 4.7(e) in its brief.

which the provision of discovery and identity of possible prosecution experts was litigated. More than a year had passed since the accident. The ruling came less than five weeks before speedy trial was scheduled to expire, and well after the 21 days allowed for production of discovery under CrRLJ 4.7(a)(2). The plodding pace of the discovery process in this case would appear unnecessary since it should have amounted to a simple matter of photocopying all, or nearly all, of the information previously provided to the King County Prosecutor for consideration of felony charges. The municipal court appears on this record to have reasonably exercised its discretion to regulate the discovery process when it decided to review in camera information exchanged with the prosecutor and the City's outside counsel. Thus, regardless of the standard of review applied by the superior court to the City's application for a writ of review, the City's failure to show that the municipal court erred suggests that a writ would not lie even if the superior court had applied Keene rather than Commanda.

The City argues that the trial judge should not be privy to its correspondence with the King County Prosecutor or its outside counsel. Judges are expected to be able to separate admissible from inadmissible information in rendering decisions on a regular basis, even in deciding between guilt and innocence. The City could propose that a judge pro tempore or a special master be appointed to review the documents if it is truly concerned that simply seeing the correspondence will bias the trial judge. The court rules clearly anticipate that from time to time a trial judge will be required to review discovery issues in camera.

In view of the alleged error at the municipal court level asserted by the City, discretionary review of the superior court's denial of the writ of review is not warranted since the City has failed to show that the municipal court committed an error of law.

Public Interest. The City argues there is a strong public interest in an appellate decision concerning disclosure of communications between the county prosecutor and the municipal prosecutor on the subject of declined felony charges. If the municipal court were ordering such disclosure, there would indeed be strong public interest in appellate review. The municipal court's oral ruling makes very clear its respect for the confidentiality of those communications, as well as its reticence to engage in in camera review in most cases. This is a unique case, and the issues presented do not appear likely to recur. If, after in camera review, the municipal court orders disclosure of material the City believes is privileged, it can request a stay to allow appellate review. At that point, it is possible that an issue of public interest will be presented. At this stage, discretionary review is not warranted.

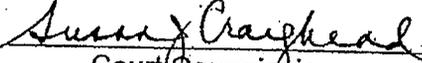
Now, therefore, it is hereby

ORDERED that the notice of appeal will be treated as a notice of motion for discretionary review; it is further

ORDERED that discretionary review is denied; it is further

ORDERED that the stay previously imposed is lifted.

Done this 27<sup>th</sup> day of December, 2002.

  
Court Commissioner