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SUPREME COURT OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Petitioner,

v.

STATE OF WASHINGTON and WASHINGTON STATE PATROL,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS
STATE OF WASHINGTON

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I. INTRODUCTION

On the night of August 22, 2009, while heavily intoxicated, Ms. Peralta walked into the middle of a pitch-black street in front of a car she assumed her brother was driving. Unfortunately, she had stepped in front of a Washington State Patrol cruiser driven by Trooper Ryan Tanner (Trooper Tanner), who was unable to avoid hitting her. Tests indicated she had a 0.167 serum blood alcohol level.

After she sued the Washington State Patrol (WSP), WSP asserted the intoxication defense provided by RCW 5.40.060(1). In response to Request for Admission No. 2 (CP at 72), Ms. Peralta admitted, without any qualification, that she was under the influence of intoxicating liquor at the time of the collision. Her admission was given in response to a request for admission that was specifically directed to WSP's intoxication defense. Shortly before trial, Ms. Peralta argued that she had not admitted to being "under the influence" within the meaning of the intoxication defense statute. The trial judge correctly ruled that her admission had "conclusively established" the first element of the intoxication defense under RCW 5.40.060. Per Ms. Peralta's request, this ruling was incorporated into Jury Instruction No. 20.

Despite the fact that Civil Rule (CR) 36 specifically vests the trial judge with the authority and discretion to determine the final disposition of requests at a pre-trial conference, the Court of Appeals erroneously

applied a de novo standard of review and reversed the trial judge's decision. The Court held that Ms. Peralta's admission that she was under the influence of intoxicating liquor was not an admission that her intoxication had influenced her pursuant to the first element of RCW 5.40.060(1)'s intoxication defense.

Under CR 36, Ms. Peralta had a good faith obligation to qualify her answer at the time it was given. This obligation exists to prevent an answering party from going back later and qualifying an admission to negate its operative legal effect. Otherwise, CR 36 admissions are useless because they don't conclusively establish anything. The good faith qualification requirement discourages gamesmanship. It prevents litigants from giving an unqualified admission to a matter that is an element of statutory liability or defense, but then to belatedly qualifying their admission in a manner that renders the admission meaningless. The decision of the Court of Appeals should be reversed.

II. STATEMENT OF THE CASE

A. Statement of Facts

On Saturday, August 22, 2009, Ms. Peralta met up with friends at the Tip Top Tavern in downtown Vancouver for drinks. In addition to beer at the tavern, she also had two small bottles of vodka. RP at 936-37, 1335-36. As the evening progressed, Ms. Peralta was invited to a party in the Hazel Dell area of Vancouver by her best friend, Christina Price.

RP at 815. Ms. Peralta knew she had consumed alcohol and intended to drink more, so she asked her friend to give her a ride to the party, RP at 1343. At the party, Ms. Peralta consumed more beer and an unknown quantity of vodka.¹ After getting into an argument, Ms. Peralta abruptly left and began aimlessly walking around Hazel Dell, an area with which she was unfamiliar.²

Lost and disoriented, Ms. Peralta called her brother, Jorge Peralta, to come pick her up. RP at 862-63. She initially gave him the wrong directions, directing him to Andresen and 74th. RP at 863. Her brother soon realized that Andresen and 74th didn't intersect. RP at 865. Ms. Peralta then redirected him to Andersen Street, several miles away. RP at 865-66, 1427.

Jorge went to Andersen Street, but did not see his sister. He called her again on her cell phone. She told him she was walking "down the hill now." RP at 871. He responded that he was driving down the hill and directed his sister to remain on the phone. RP at 873. Ms. Peralta told him she could see the headlights on his car. RP at 873. Jorge responded that he still did not see her and asked her to walk into the street. RP at 874. Dressed in brown boots, blue jeans and a black sweater, Ms. Peralta

¹ Testimony from the State's expert toxicologist, Dr. Tac Lam, established that the number of alcoholic beverages Ms. Peralta consumed on the night of the accident was consistent with her blood alcohol concentration of 0.13 to 0.16. RP at 1270.

² Significantly, four days after her accident, Deputy Taylor interviewed Ms. Peralta at the hospital. Ms. Peralta told Clark County Sheriff's Deputy Taylor that, even if she had a car, she knew she was too intoxicated to drive by the time she left the party, a fact her blood test subsequently confirmed. RP at 816, 1145, 1347.

walked into the middle of the street in front of the car travelling down the hill. Still on the telephone, Jorge told his sister that he still could not see her. She replied that she was right in front of him and that she saw the headlights of Jorge's car and the two cars behind him. RP at 875. Jorge responded that there were no cars behind him. He then heard Ms. Peralta scream and the cell phone connection ended. RP at 876.

Unfortunately, Ms. Peralta was not on Andersen Street where her brother was looking for her; she had turned and was walking down NW 78th. RP at 872-73. There were no street lights or other illumination on the NW 78th Street hill. It was pitch black on the night of the accident. RP at 237, 295, 1417-19. Ms. Peralta had not walked in front of her brother's car, but instead had stepped directly in front of a WSP vehicle driven by Trooper Tanner. Trooper Tanner did not have enough time to avoid striking Ms. Peralta. RP at 1089-90.

Trooper Tanner stopped his vehicle and immediately called for medical assistance. RP at 1102, 1106. He activated the emergency lights on his patrol car. As he bent down over Ms. Peralta, he smelled a strong odor of alcohol. RP at 1113, 1185. While looking for Ms. Peralta driver's license, he found a small, partially-consumed bottle of vodka in her purse. The Clark County Sheriff's Department arrived just minutes after Trooper Tanner's aid call and assumed responsibility for investigating the accident. RP at 1114-15.

Ms. Peralta was taken to Southwest Medical Center where a blood test established Ms. Peralta had a 0.167 serum blood alcohol level. This blood test was later admitted at trial. CP at 15-19, 385; RP at 1073, 1140-41, 1144, 1238-39. Dr. Lam, WSP's toxicologist, informed the jury of the mathematical formula for converting the serum alcohol level to blood alcohol concentration (BAC) and opined that Ms. Peralta's BAC fell between the range of a 0.13 to 0.16. RP at 1234, 1242. This was "about 1½ to 2 times the legal limit" of 0.08. RP at 1234.

B. Procedural History

Ms. Peralta filed this lawsuit in December 2010. CP at 1. In its answer, the WSP asserted the intoxication defense provided by RCW 5.40.060 as an affirmative defense. CP at 8. WSP then propounded discovery to Ms. Peralta directed to the intoxication defense. CP at 71-77.

On June 30, 2011, in response to Request for Admission No. 2, Ms. Peralta admitted she was "under the influence of intoxicating liquor" at the time of the collision. CP at 72, 77. This is the exact language of the first element of the alcohol defense statute. RCW 5.40.060(1) states:

**Defense to personal injury or wrongful death action—
Intoxicating liquor or any drug.**

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was **under the influence of intoxicating liquor** or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The

standard for determining whether a person was **under the influence of intoxicating liquor** or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was **under the influence of intoxicating liquor** or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs. [Emphasis added.]³

Ms. Peralta's admission was unqualified and without objection. Her admission of "being under the influence" avoided potential responsibility under CR 37(c) for paying WSP's expert witness expenses and reasonable attorney's fees for establishing the first element of the intoxication defense. However, shortly before trial, Ms. Peralta sought to limit the legal impact of her admission, contending that she had not admitted that she was legally intoxicated as defined by RCW 5.40.060(1) and RCW 46.61.502. When the trial judge inquired whether Ms. Peralta's counsel wanted to object to the admission, they responded that "We admitted it. We are not trying to withdraw it or amend it." RP at 24, 25, 79.

WSP argued that her unequivocal admission that she was "under the influence of intoxicating liquor" conclusively established that Ms. Peralta was intoxicated as defined under the intoxication defense statute. Considering the language of the request and the context in which it was made, the trial court stated that:

THE COURT: -- we've got request for admissions propounded by highly trained counsel, responded to by highly trained counsel and intoxication was pleaded as an affirmative defense. And so the

³ RCW 5.40.060 is attached as Appendix A.

question for the court -- I believe that she ought to be bound by her admission that she's under the influence, but it's up to the jury to determine to what extent that was a --

MR. PUZ: Proximate cause.

THE COURT: -- default, yeah. Whether it was proximate cause of the injuries, number one, and also was it at least -- was it over 50 percent --

RP at 77.

At trial, the jury was instructed on the three elements of the intoxication defense per Ms. Peralta's request. CP at 363. Defendants planned to offer Ms. Peralta's response to Request for Admission No. 2 as an exhibit at trial. But pursuant to the request of Ms. Peralta's counsel, the trial court instead put the admission in Jury Instruction No. 20. RP at 1679-89. The instruction left issues of proximate cause and apportionment of fault for the jury to decide. CP at 363. Jury Instruction No. 20 states:

To establish the defense that the plaintiff was under the influence, the defendant has the burden of proving each of the following propositions: First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. *Plaintiff admits this element.* Second, that this condition was a proximate cause of the injury; and: Third, that the person injured was more than fifty percent at fault. If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

CP at 363. The italicized portion is the only part that differs from Ms. Peralta's proposed Jury Instruction No. 16. *See* CP at 328.

The jury found that the fact Ms. Peralta was under the influence of alcohol was a proximate cause of her injury and that she was more than

50 percent at fault, CP at 388. In accordance with RCW 5.40.060, the trial court entered judgment in favor of the WSP. CP at 496-97. The plaintiff filed a timely appeal.

The Court of Appeals reversed and remanded this matter for a new trial. *Peralta v. State*, 191 Wn. App. 931, 366 P.3d 45 (2015). It concluded that “State Patrol’s request for admission was much broader than the language of RCW 5.40.060(1)” and “merely asked whether Peralta was under the influence of intoxicating liquors at the time of the collision.” *Peralta*, 191 Wn. App. at 941-48. But WSP’s admission “did not define ‘under the influence’ as that phrase is used in RCW 5.40.060 and RCW 46.61.502.” *Id.* The instruction was deemed error and not harmless “because Peralta did not have the opportunity to present evidence rebutting the court’s instruction to the jury that she was under the influence.” *Peralta*, 191 Wn. App. at 948-49.

Thus, the Court of Appeals accepted Ms. Peralta’s argument that although she admitted she was under the influence of alcohol at the time of the collision, the admission was insufficient to meet the element of the intoxication defense, requiring that alcohol influenced her behavior.⁴ *Id.*

⁴ For purposes of this appeal, the standard for determining whether a person was under the influence of alcohol for purposes of RCW 5.40.060 is set forth in the Court’s Jury Instruction No. 21 (CP at 364), and Ms. Peralta’s proposed Jury Instruction No. 13. CP at 325. “A person is under the influence of alcohol if, as a result of using alcohol, the person’s ability to act as a reasonably, careful person under the same or similar circumstances is lessened any appreciable degree.” CP at 364. WPI 16.04.

Both Ms. Peralta and WSP petitioned this Court for review on the Court of Appeals decision. Ms. Peralta's petition was denied, and WSP's was granted. *Peralta v. State*, 191 Wn. App. 931, 366 P.3d 45 (2015), *review granted in part, denied in part*, 185 Wn.2d 1027 (2016).

III. STATEMENT OF THE ISSUES

1. Where Ms. Peralta did not qualify, amend or withdraw her CR 36 admission that she was under the influence of intoxicating liquor at the time of her accident, did the trial court abuse its discretion in determining that Ms. Peralta's admission conclusively established the first element of RCW 5.40.060(1)—“that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury . . .”?

2. Should the Court of Appeals order for new trial be reversed and the judgment for the WSP reinstated where the Court of Appeals opinion includes advisory rulings regarding excluded evidence that was cumulative and therefore not prejudicial?⁵

IV. ARGUMENT

A. Overview of Civil Rule 36

The purpose of CR 36 is not focused on discovering evidence. Instead, the quintessential function of requests for admission is to allow the narrowing of matters that are in dispute, thereby limiting discovery and simplifying the presentation of the case at trial. *Brust v. Newton*, 70 Wn. App. 286, 295, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d

⁵ This second issue need only be reached if Ms. Peralta raises this argument about the Court of Appeals' advisory rulings, and if the Court finds that her argument is not waived. *See pp. 18-19, infra.*

1010, 869 P.2d 1085 (1994) (the purpose of CR 36 is to eliminate from the controversy matters that will *not* be disputed at trial).⁶

Under CR 36, a party may serve a written request for the admission of the truth of matters that relate to statements or opinions of fact or the application of law to fact. The matter is deemed admitted unless within 30 days after service, the party responding to the request serves a written answer or objection. When good faith requires, a party shall qualify an answer, specifying so much of it as true and qualify or deny the remainder. A denial of a request for admission may subject responding party to an award of expenses for failure to admit under C R 37(c). Any matter admitted is conclusively established.⁷ *See generally* CR 36 (Appendix B attached).

B. The Trial Court Properly Concluded Ms. Peralta's Unqualified Admission That She Was Under the Influence of Intoxicating Liquor as Conclusively Establishing the First Element of the Intoxication Defense in RCW 5.40.060(1)

Ms. Peralta admitted, without any qualification, that she was "under the influence of intoxicating liquor" at the time of her injury. She then sought to deny that she had admitted that she was under the influence

⁶ As noted in *Xcel Energy, Inc. v. United States*, 237 F.R.D. 416, 421 (D. Minn. 2006) "The Advisory Committee Notes to CR 36 state '[r]ule 36 serves two vital purposes, both of which are designed to reduce trial time,' " as " '[a]dmissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.' "

⁷ Similarly, the Washington Pattern Instructions (WPI) treats plaintiff's admission as proven fact which the jury must accept as true, *See* WPI 6.10.02 ("The [plaintiff] has admitted that certain facts are true. You must accept as true the following facts: [admitted fact]").

of intoxicating liquor for purposes of the definition set forth in RCW 5.40.060(1), the intoxication defense. The trial court was well within its discretion in rejecting this argument. As the trial judge noted, Request for Admission No. 2 had been propounded by WSP to Ms. Peralta in the context of its assertion of the intoxication defense set out in RCW 5.40.060(1) that specifically defines under the influence, by reference to RCW 46.61.502. RP at 77. The definition of “under the influence of alcohol” stated in the statutes is contained in Jury Instruction No. 21 (CP at 364) plaintiff’s proposed Jury Instruction No. 13. CP at 325.

If the trial judge determines that an answer to a request for admission does not comply with the requirements of CR 36, the court is authorized to rule in a pre-trial conference that the matter is admitted. CR 36(a). If Ms. Peralta wanted to only admit that she was generally under the influence of intoxicating liquor, but to deny that it had to any appreciable degree lessened her ability to act as a reasonable person, then CR 36(a) required her in good faith to qualify her answer to say so, to “specify so much of it as is true and qualify or deny the remainder.”⁸

⁸ The requirement for qualified or partial responses, like the requirement that a denial meet the substance of the request for admission, are strictly construed and rigidly enforced. See *United States v. Jefferson Trust & Savings Bank*, 31 F.R.D. 137 (S.D. Ill. 1962); *Qualified or Partial Denials*, 23 Am. Jur. 2d *Depositions and Discovery*, § 95 (2016); see generally *Hill v. Lockwood Greater Corp.*, 153 F. Supp. 276, 279 (D. Neb. 1957). (To the extent a request for admission is not supported by the facts, the requests should be met with denial, either in whole or in part, or with a qualified admission, to achieve a result that serves the causes of certainty, simplicity and economy in the administration of justice.)

In essence, Ms. Peralta seeks to avoid the application of CR 36 and CR 37(c). If she is allowed to unqualifiedly and generally admit that she was under the influence of intoxicating liquor, but not have that admission “conclusively establish” the first element of the intoxication defense under RCW 5.40.060(1), then she will claim she is not liable for imposition of expert witness expenses and reasonable attorney’s fees under CR 37(c). But at the same time, she claims she has admitted something legally meaningless. Her attempt to have it both ways is contrary to the law. Under CR 36, an unqualified admission conclusively establishes the matter admitted and constitutes a judicial admission. CR 36(a). A judicial admission deliberately drafted by counsel for the express purpose of limiting and defining facts in issue is traditionally regarded as conclusive, and an admission under CR 36 falls into this category. 8 B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* 742-43 § 2264 (3d ed. 2010).

Her argument is also contrary to the trial court’s evaluation of the admission in the context of this case. RP at 77. Given Ms. Peralta’s unqualified admission that she was under the influence of intoxicating liquor conclusively, the trial court did not abuse its discretion, or commit legal error, by ruling that this admission established the first element of the intoxication defense under RCW 5.40.060(1). He appropriately

included that decision, per plaintiff's request, into Jury Instruction No. 20. CP at 363.

The Court of Appeals erred in analyzing the trial court's decision under a de novo standard of review, instead of the proper abuse of discretion standard of review. *See Santos v. Dean*, 96 Wn. App. 849, 860, 982 P.2d 632 (1999) (abuse of discretion standard governs review of trial court rulings on requests for admission and such standard cannot be so narrow as to limit "a trial court's discretion to confront the infinite fact situations presented during the discovery process and design appropriate remedies"). *See also Kappelman v. Lutz*, 167 Wn.2d 1 217 P.3d 286 (2009) (a trial court's decision to give a jury instruction is reviewed for abuse of discretion if based upon a matter of fact).

The Court of Appeals also erred by overlooking how Admission No. 2 was sent to Ms. Peralta in the context of WSP's assertion of an alcohol defense under RCW 5.40.060(1). Rather than focus on the actual record before the trial court, it turned to hypothetical issues. It noted that the phrase "under the influence" was susceptible to interpretations other than the RCW 46.61.502 standard that RCW 5.40.060 specifically incorporates. This was an unsound reason for concluding that it was unclear which meaning of the phrase "under the influence" Ms. Peralta had admitted. The Court of Appeals should have assumed that, in the absence of qualification, Ms. Peralta's admission incorporated all

meanings of “under the influence” and easily addressed the meaning of the statutory defense.⁹

To justify its application of de novo review, the Court of Appeals inaccurately characterized the trial judge’s ruling on Ms. Peralta’s admission as a matter of “statutory interpretation.” *Peralta*, 191 Wn. App. at 945, 947. But, the appropriate analysis was under CR 36 in determining whether the trial judge abused his discretion in deciding that Ms. Peralta’s unqualified admission that “she was under the influence of intoxicating liquor” conclusively established that she “was under the influence of intoxicating liquor . . . at the time of the occurrence causing the injury.” *Santos*, 96 Wn. App. at 860.

Similarly, the Court of Appeals ruling misinterpreted and misapplied CR 36. It allowed Ms. Peralta to qualify her admission long after discovery had ended, shortly before trial. If Ms. Peralta wanted to admit she was under the influence of intoxicating liquor, but not under the influence of intoxicating liquor for the purposes of RCW 5.40.060, CR 36(a) required her “to specify so much of [the matter] as is true and qualify or deny the remainder.” Ms. Peralta made no such qualification. Given that fact, the trial court correctly applied CR 36(a) and properly

⁹ In *State v. Hurd*, 5 Wn.2d 308, 315-16, 105 P.2d 59 (1940), this Court analyzed the statute criminalizing driving while under the influence of intoxicating liquor, and held that the phrases “under the influence of” and “affected by,” as employed in the statute had the same significance, import and breadth of meaning. Accordingly, a stipulation to one of the phrases would be the equivalent of a stipulation to the other.

exercised its discretion in deciding that she had admitted the first element of the intoxication defense under RCW 5.40.060.

This Court should hold that the trial court did not err by rejecting Ms. Peralta's last minute attempt to avoid her admission, and did not abuse its discretion by giving Jury Instruction No. 20 reflecting that admission. CP at 363.

C. Civil Rule 36 Should Be Applied in a Manner That Effectuates Its Purposes, to Simplify Discovery and Trial by Elimination of Matters That Can Be Admitted

The decision of the Court of Appeals seriously undermines the operative effectiveness and utility of CR 36 by allowing Ms. Peralta to unqualifiedly admit, and conclusively establish that she was "under the influence of intoxicating liquor" at the time of the collision, but then, over two years later, after discovery had ended, come back and qualify her admission in a manner that rendered it legally useless. This Court should discourage such outcomes to prevent future litigants from impeaching their own responses to a request for admission to gain an unfair advantage at trial by suddenly avoiding what was unqualifiedly admitted and reasonably relied upon by the opposing party as having been "conclusively established." RP at 1736.

Unless parties in litigation can depend on an admission's binding effect, they cannot safely avoid the expense of preparing to prove the very matters on which they have secured the admission. This defeats the

purpose of the rule. For example, if a defendant admits that the person causing an injury was acting in the course and scope of employment as their agent, that party cannot come back later and argue that they had not admitted that element for purposes of vicarious liability under the doctrine of *respondeat superior*. The purpose of CR 36 is to avoid such backtracking and potentially sand-bagging tactics. See CR 36(b) (“Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”); see also RP at 79 (Ms. Peralta disclaiming any intent to withdraw admission).¹⁰

Moreover, existing case law establishes that answers to requests for admission should not be based on “hair splitting” distinctions. See *Farmers Ins. Group v. Johnson*, 43 Wn. App. 39, 46, 715 P.2d 144 (1986) (trial judge justified in rejecting argument that synonymous terms should be given different meanings in interpreting answers to requests for admissions); *Flanders v. Claydon*, 115 F.R.D. 70, 72 (D. Ma. 1987) (a reviewing court should not permit a responding party to undermine the efficiency of CR 36 admissions by creating disingenuous, hair splitting distinctions whose unarticulated goal is unfairly to burden the opposing party); *McSparran v. Hanigan*, 225 F. Supp. 628, 636-37 (Pa. E.D. 1963), *judgment aff’d*, 356 F.2d 983 (3d Cir. 1966) (“Requests for admission of

¹⁰ “Conclusively establish means that the admission cannot be contradicted or rebutted at trial, and the fact finder must accept the admission as accurate and proven.” 3 Karl B. Tegland, *Washington Practice: Rules of Practice CR 36* (7th ed. 2003).

relevant facts under CR 36 would be even less useful than interrogatories to parties under CR 33 if they were not conclusively binding on the party making the admission.”).

The trial judge noted that it would be unfair and prejudicial to allow Ms. Peralta to alter her unequivocal admission near the beginning of trial, (RP at 24-25, 79) after WSP had reasonably relied upon her answer as conclusively establishing the first element of the intoxication defense. RCW 5.40.060(1).

In short, by construing Ms. Peralta’s unequivocal and unqualified admission that she was “under the influence of intoxicating liquor” as if it were ambiguous, rather than conclusively established, the Court of Appeals violated the directives of CR 36, undermining its operative effectiveness and purpose. For these additional reasons, the decision of the Court of Appeals should be reversed.

D. If Jury Instruction No. 20 Was Error, It Was Harmless Error

Lastly, even if any error existed in the trial court’s ruling that Request for Admission No. 2 established that Ms. Peralta was under the influence of intoxicating liquor for purposes of the intoxication defense, such error was harmless. First, the jury independently determined that the fact that she was under the influence of intoxicating liquor was a proximate cause of her injury. CP at 388. The jury could not have reached that conclusion without finding that her use of alcohol had, to some

appreciable degree, influenced the actions that led to her injury. See Jury Instruction No. 21, defining “under the influence.” CP at 364.

In addition, in finding prejudice from Jury Instruction No. 20 (CP at 363), the Court of Appeals relied on the fact that Ms. Peralta did not have an opportunity to present evidence rebutting the admission, and that the trial court had not allowed her to present such “evidence” through witness, Christina Price, that she did not see Ms. Peralta consume alcohol and that Ms. Peralta did not seem drunk. *Peralta*, 199 Wn. App. at 948-49. In fact, Christina Price did testify at trial (RP at 803-20), and she was specifically allowed to testify that Ms. Peralta did not seem drunk when she was picked up from the Tip Top Tavern and did not seem inebriated that night. RP at 809. Accordingly, Jury Instruction No. 20, if error, was harmless. *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996) (trial court error on jury instructions is not ground for reversal unless it is prejudicial; error is “prejudicial” if it effects the outcome of trial).

E. The Advisory Rulings on Evidentiary Issues by the Court of Appeals Have Been Abandoned by Ms. Peralta and, Even if Not Abandoned, Do Not Constitute a Basis for Reversal

The Court of Appeals also criticized several of the trial court’s evidentiary rulings, anticipating the remand based upon Jury Instruction No. 20. *Peralta*, 191 Wn. App. at 951-52. But it did not hold that those evidentiary rulings were prejudicial or base its reversal on those rulings.

As a threshold matter, these rulings cannot be a basis for affirmance. Ms. Peralta failed to raise them in her petition as an alternative basis for reversal of the trial court's judgment in favor of the State. *See Calhoun v. State*, 146 Wn. App. 877, 193 P.3d 188 (2008) (a court will not review alternative grounds for challenging a judgment when not addressed in the party's brief); *Jackson v. Quality Loan Svcs. Corp.*, 186 Wn. App. 838, 347 P.3d 487 (2015) (an appellate court will not consider a claim of error that a party fails to support the legal argument in an opening brief—such claims are waived).

In the event Ms. Peralta attempts to rely on any of the evidentiary rulings discussed in the Court of Appeal's opinion as a basis for reversal in her supplemental brief, and the Court finds that they are not abandoned, the analysis must next proceed to the question of whether the exclusion of evidence was prejudicial. *See Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).¹¹ The non-prejudicial nature of these evidentiary rulings is set forth in the Brief of Respondent at 41-45.

V. CONCLUSION

The first element of the intoxication defense under RCW 5.40.060(1) is whether the person was "under the influence of intoxicating liquor at the time of the injury." Ms. Peralta admitted, without

¹¹ See also Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principle Process*, 31 Gonzaga Law Review 27 at 319 (1995-96) (citing cases and noting Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative).

any qualification, this specific fact. Her admission was given in response to a request for admission that was specifically directed to WSP's intoxication defense. The trial judge correctly ruled that her admission had "conclusively established" the first element of the intoxication defense under RCW 5.40.060(1).

Applying the wrong standard of review, the Court of Appeals erroneously held that the trial judge's ruling was in error because the term "under the influence" is susceptible to different interpretations and WSP's request for admission "had not been couched in relation to the proper standard." This analysis ignores the good faith requirement of CR 36 that the responding party must qualify their answer to a request for admission. In the absence of such a qualification, CR 36 authorized the trial judge to order that her admission incorporated all interpretations of "under the influence," or at a minimum the interpretation given to that term under RCW 5.40 .060(1).

The Court of Appeals interpretation and application of CR 36 undermines its purpose and operative legal effect, encouraging a game of "gotcha" based on disingenuous, *post hoc* hair splitting. This Court should reverse the decision of the Court of Appeals and encourage the courts below to implement CR 36 to achieve its real purpose of eliminating from controversy matters that should not be disputed at trial.

RESPECTFULLY SUBMITTED this 1st day of August, 2016.

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DECLARATION OF SERVICE

I declare on the undersigned date the preceding document was filed with the Supreme Court of the State of Washington as a PDF e-mail attachment at the following e-mail address: (Supreme@courts.wa.gov).

I further declare that a copy of the preceding document was served on counsel for Petitioner by e-mail as a PDF attachment to the following:

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DATED this 1st day of August, 2016, at Tumwater, WA.

/s/ Lisa M. Savoia
Lisa M. Savoia, Legal Asst.

APPENDIX A

RCW 5.40.060

Defense to personal injury or wrongful death action—Intoxicating liquor or any drug.

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death. [1994 c 275 § 30; 1987 c 212 § 1001; 1986 c 305 § 902.]

NOTES:

Retroactive application—1994 c 275 § 30: "Section 30 of this act is remedial in nature and shall apply retroactively." [1994 c 275 § 31.]

Short title—Effective date—1994 c 275: See notes following RCW 46.04.015.

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

APPENDIX B

CR 36
REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests for admission shall not be combined in the same document with any other form of discovery.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 40 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that the answering party has made reasonable inquiry and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial or a central fact in dispute may not, on that ground alone, object to the request; a party may, subject to the provisions of rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining an action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

[Originally effective July 1, 1967; amended effective July 1, 1972; September 1, 1985; September 1, 1989; April 28, 2015.]

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Good afternoon,

I am providing with this email the Supplemental Brief of Respondents State of Washington.

Thank you.

Lisa Savoia, Legal Asst.

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