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No. 93076-7

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

DILLON SMELSER and DERRICK SMELSER,

Appellants,

v.

JEANNE PAUL and RONALD SMELSER,

Respondents.

APPELLANTS REPLY BRIEF

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ORIGINAL

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I. REPLY ARGUMENT

A. <u>The Court's Instruction No. 10 Relating to "Unavoidable Accident" was Factually Unsupported, Prejudicial and the Giving of it was not a Harmless Error.</u>

Our Supreme Court provided the following, long ago, in the case of *LaMoreaux v. Fosket,* 45 Wn. 2d 249, 255-56, 273 P.2d 795 (1954);

> The driver of an automobile is bound to exercise ordinary, reasonable, or due care towards a child in the operation of his car, taking into consideration the age, maturity, intelligence of such child. "Ordinary care" means that degree of care which a man of ordinary prudence would exercise under the particular circumstances. He is not an insurer against injuries to children from the operation of the car. Each case must be governed by its own peculiar facts. The test in each case is did the defendant, realizing the proclivities of children, and in particular, the age, maturity, and intelligence of the child involved, act in a reasonably prudent manner under the circumstances? The generally accepted rule is: **"If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car, negligence cannot be predicated on the mere fact that he started his machine, injuring the child** (emphasis added) (citations omitted).

The undisputed facts, as presented below, establish that Ms. Paul knew that two toddler children were in the area prior to entering her automobile and placing it into motion. While the defense below, and on appeal, desperately would like this to be a "darting child" case, in order to

support such theory, the defense seeks to obfuscate Ms. Paul's obvious lack of attention toward children she knew were in the area, with speculative innuendo predicated on the fact that she had seen Derrick, (who she ran over, and who was 2 ½ years old at the time), and Dillon, (who was 5 years old), earlier in her visit playing in a field adjacent to the driveway where the accident occurred. According to the defense theory, since Ms. Paul had earlier seen the children playing out in the field, they were somehow mysteriously transported into the path of her vehicle, which admittedly was "jacked up" in a manner which obstructed her view of what was directly in front of her. (See Respondent's Brief, hereafter RB, Page 4).

In order to try to mend the speculative gap that otherwise exists within the defense theory, Ms. Paul has pointed to inadmissible, (as discussed below), hearsay within Derrick's medical records which is not only internally contradictory, but also inconsistent with the defense theory of the case. If Derrick was "playing on the front bumper" of Ms. Paul's vehicle that suggests that he had been there a sufficient period of time to afford Ms. Paul the opportunity to see what there was to be seen. Ms. Paul ignores the fact that even if we credit her testimony, that she had earlier seen the children playing in a field adjacent to the driveway, there was nothing between that wide-open field and where her vehicle was parked

which would have in any way obstructed her view of the children and their subsequent movements.[1]

This total lack of evidence that Derrick engaged in some kind of unanticipated darting prior to the accident, separates this from the cases the defense relies upon for their proposition that it was entitled to a "unavoidable" accident instruction. In *Larson v. Puyallup School District,* 7 Wn. App. 736, 502 P.2d 1258 (1972) three eye witnesses testified that immediately prior to the accident the injured child ran out between two parked vehicles and directly into the path of a school bus. As soon as the bus driver observed the child's approach, she applied her brakes and swerved the bus into a ditch in order to try to avoid the accident. In *Carraway v. Johnson,* 63 Wn. 2d 212, 386 P.2d 420 (1963), the giving of an unavoidable accident instruction was affirmed, but in that case the eye witness testimony established that the 12-year-old child who was struck by the defendant's truck was hiding behind a telephone pole and darted into the street; see also, *Rettig v. Coca-Cola Bottling Co.,* 22 Wn. 2d 572, 156

[1] Again it is emphasized that Ms. Paul at time of trial admitted that once she returned to her vehicle she began backing the vehicle and placed it in gear moving forward and began moving forward prior to turning her head in the forward direction which would have enabled her to see Derrick who was directly in front of her vehicle. (See Appellant's Opening Brief, hereafter AB, Pages 34-42, and the trial testimony quoted therein). Ms. Paul at trial candidly admitted that her theory of liability was based upon "guess, speculation, and conjecture". (AB Page 40).

P.2d 914 (1945) (child darted out in front of a bus and was struck by a truck traveling the same direction in the inside lane).

Unlike those cases, here it cannot be disputed that Ms. Paul, given her awareness of the presence of the children and a poor forward sightline from the driver's seat of her Bronco, should have reasonably anticipated that the children would move from their prior location, and reasonable care required here to maintain a modicum of vigilance. The bottom line is as that the undisputed evidence presented at the time of trial established that Ms. Paul failed to see what clearly should have been there to be seen. The undisputed evidence establish that the accident was more likely a byproduct of "negligence rather than happenstance" and was something which reasonably could have been avoided in the exercise of "prudence, foresight, and caution" thus warranting refusal to give an unavoidable accident instruction. See *Zook v. Baier,* 9 Wn. App. 708, 514 P.2d 923 (1973), citing to, *Jackson v. Seattle,* 15 Wn. 2d 505, 513, 131 P.2d 172 (1942).

In *Carraway, supra,* "unavoidable accident" instructions are characterized as being "dubious". *Id.* at 63 Wn. 2d at 615. As the comments to WPI 12.03 suggests such instructions are disfavored because they are potentially confusingly prejudicial. Such instructions "may be

refused as injecting confusion rather than enlightenment." *Zook*, 9 Wn. App at 715.

An instruction must be supported by evidence and not mere speculation. *Hoffman v. Damach*, 1 Wn. App 833, 645 P.2d 203 (1970). An instruction is presumed to be prejudicial if it in any way relates to the elements of a party's claim(s), when it is given on behalf of a party whom the verdict favored. See *Mackay v. Acorn Custom Cabinetry,* 127 Wn. 2d 302, 311, 898 P.2d 284 (1995). Such prejudice is presumed and is grounds for reversal, unless it is to affirmatively establish that the error was harmless. *Id.*

In this case, while Derrick was able to acquire a verdict in his favor, it is undisputed that Dillon did not. (See AB Appendix No. 4)[2] In this matter the "unavoidable accident" instruction, Court's Instruction No. 10, included both Dillon and Derrick within its coverage. A reasonable juror reading Instruction No. 10 would assume that the first paragraph, which instructs that children under the age of 6 are incapable of contributory negligence", and which specifically names both Dillon and

[2] As reflected by the record Dillon, who observed his brother being run over by Ms. Paul's Bronco, brought a claim for bystander negligent infliction of emotional distress. See *Gain v. Carroll Mill Co., Inc.*, 114 Wn. 2d 254, 787 P.2d 553 (1990); *Hegel v. McMahon,* 136 Wn. 2d 112, 960 P.2d 424 (1998). The jury was instructed on this claim by way of Court's Instruction No. 17 which is set forth in Appendix No. 1 to this Reply Brief.

Derrick, also defines the scope of the coverage in the second paragraph relating to "unavoidable accident".

Thus, this inherently confusing type of instruction was rendered even more confusing by the fact that it applied to both children's claims. Armed with such an instruction a reasonable juror could very well have concluded that although the direct accident involving Ms. Paul and Derrick was clearly avoidable, it was only happenstance that Dillon observed the accident and was injured thereby, in a manner Ms. Paul could not have reasonably anticipated or prevented. The "dubious" and dangerous nature of such instructions is that it permits the juror to deny a claim simply because "stuff happens".

Given that Dillon received an adverse result, and the instruction clearly favored the defense, it should be presumed prejudicial and the error in giving such an instruction should not be viewed as being harmless.

B. <u>The Trial Court Erred in Failing to Direct a Verdict of Liability in the Plaintiffs' Favor.</u>

For the same reasons discussed with respect to Court's Instruction No. 10, it was also error for the trial court not to a direct a verdict of liability in Plaintiffs' favor. The defense theory of the case rested solely on a foundation of conjecture and speculation. It was, and continues to be internally contradictory, and should not have been deemed sufficient to

overcome Plaintiffs' motion for a judgment of the matter of law on the issue of liability, particularly given that the undisputed facts serve to establish Ms. Paul's negligence. This is a case where the issue of Ms. Paul's negligence should have been decided as a matter of law.

C. The Trial Court Erred in Admitting Unsubstantiated, Unattributed Hearsay Contained within Derrick's Medical Records, Which Did Not Meet the Standards of ER 803(a)(4).

As Division One's recent opinion in *Clark County v. McManus*, 2015 WL 3609385 (6/8/15) indicates, simply because a statement involves a party's medical condition does not make it automatically admissible under the terms of ER 803(a)(4). Further, **even if** a hearsay exception is superficially applicable, such hearsay may nevertheless be excluded if it does not contain "particularized guarantees of trustworthiness." *Warner v. Regent Assisted Living*, 132 Wn. App., 126, 136, 130 P.3d 865 (2006).

On the face of the statements set forth within the emergency room record, Exhibit 119, it is clear that nobody who was in attendance at the emergency room claimed they actually saw the accident "the accident was really not witnessed by anyone". (Exhibit 119 – AB Appendix No. 2). Thus, at best, the statement ".... usually healthy child who was playing on the front bumper of a raised 4x4 truck which was driven by his father's girlfriend," constitutes rank speculation from an unknown source. It cannot be presumed that that is something that Ronald Smelser, Derrick's

father, actually said because it is just as likely an interpretation by medical personnel of facts garbled by the stress of the situation. Under such circumstances, it is hard to imagine that such statements can be presumed trustworthy.

The general rule in interpreting ER 803 (a)(4) is that statements that attribute fault are not relevant to diagnosis or treatment thus not admissible. *State v. Moses,* 129 Wn. App. 718, 728-29, 119 P.3d 906 (2005). In order for such statements to be admissible the declarant's motive must be consistent with receiving treatment and the medical provider must actually rely on the information for diagnosis and treatment. *Id.* citing to *State v. Lopez,* 95 Wn. App. 842, 849, 980 P.2d 224 (1999); see also *Young v. Liddigton,* 50 Wn.2d 78, 309 P.2d 761 (1957) (reaching a similar conclusion when addressing the business records exceptions codified at RCW 5.45.020).

Using the analysis set forth in Respondent's Brief Page 37, clearly the information alleging Derrick was "playing on the bumper" would be inadmissible attribution of fault information, while the facts relating to the mechanics of the accident would not. The alleged "playing on the bumper" relates to why the accident happened and not what happened in the accident causing injury. Thus, while the "playing on the bumper" part of the record should have been found inadmissible as indirectly "attributing

fault", the physical facts of the accident would not be, because naturally the doctor would want to know that Derrick was hit by a motor vehicle but did not actually get crushed under its wheels. Also, the fact that the accident occurred on a gravel roadway certainly would be significant to Derrick's scalp laceration, and the need for cleaning debris from the wound.

Dr. Hood, the doctor who wrote the emergency room note, (Exhibit 119), testified at time of trial. At trial she indicated that what was important to her, in her role as an emergency medicine physician, is the mechanism of the injury. (RP 950).[3] Dr. Hood could not remember the source of the information within her note, but indicated that it could have come from whoever was with the patient, **or "by looking at the demographic data on the front sheet."** (Id. 952). Dr. Hood repeatedly reiterated that when creating an emergency room note, she is attempting to gather necessary information regarding "general mechanism of injury" and is no way trying to determine "exactly how the injury occurred". (Id. 989-90).

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[3] It is interesting to note that Dr. Hood also suggested in her testimony that one of her goals when addressing a child injury is a determination of whether or not the injury should be reported and investigated by someone. Physicians, such as Dr. Hood, are mandatory reporters under our anti-child abuse laws. See RCW 26.44.030; *Beggs v. State,* 171 Wn.2d 69, 247 P.3d 421 (2011). Thus, while gathering information regarding "attribution of fault" and/or causation may be pertinent to this statutory obligation, that does not automatically transform the gathering of such information into something which is necessary for "diagnosis and treatment".

Similarly, with respect to plastic surgeon, Thomas G. Griffith, M.D. the likely source of the information within Dr. Griffith's records, (Exhibit 124A), would have been information from the emergency room. (RP 1097). Dr. Griffith had no idea where he got any information regarding Derrick's actions immediately prior to being run down by Ms. Paul's Bronco. (RP 1113). Dr. Griffith candidly acknowledged that information coming out of emergency rooms are at best "roughly accurate" and often people tend to "fill in the blanks". (RP 173-74). Thus from neither of these doctors was there any indication that they actually relied on the "playing on the bumper" comment when providing medical care. What was significant to them was the actual mechanism of the injury and not what somebody may or may not have been doing immediately prior to the injury producing event.

The inadmissible nature of such information cannot be "saved" by the alleged subsequent statement made by Dillon, regarding Derrick "skiing" on the front bumper. This alleged ambiguous and nonsensical comment from a 5 or 6 year old does not bolster the inadmissible information contained within Derrick's medical records. Dillon's statement is not the same as those contained within the medical records and is a strain to assert that such statements constitutes an "admission of a party opponent" under ER 801(e)(2). With respect to the hospital record

information we simply do not know who made any such statements which, at best, may be a paraphrase of information from a variety of unknown sources. Further, the "skiing" comment made by Dillon when he was approximately 6 years old is far too ambiguous to constitute any kind of a "admission". Even if, for the sake discussion, we assume that Dillon made such a comment, such a comment is equally consistent with Derrick, as he's being struck by Ms. Paul's Bronco, grabbing ahold of the bumper and being dragged along with it a short distance before losing his grip and tumbling under the vehicle. Or perhaps it is nothing more than a by-product of the fanciful imagination of a 6 year old.

D. <u>Absent Willful or Wanton Misconduct a Parent Has No Duty to be Non-Negligent in the Supervision of Their Children.</u>

It appears the Respondent either grossly misperceived or is grossly mischaracterizing the plaintiffs' position with respect to "parental immunity". Plaintiffs' position is rooted in the notion there must be "fault" within the meaning of RCW 4.22.015, before one can even address the question of whether or not an individual and/or entity can be subject to allocation under the terms of RCW 4.22.070. Fault is defined in RCW 4.22.015 in the following terms:

> 'Fault' includes acts or omissions including use of a product **that are any measured negligent or reckless towards the person or property of the actor or others,** or that subject a person to strict

> liability or liability of a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid injury or to mitigate damages. Legal requirements of causal relation apply both to fault as a basis for liability and to contributory fault ... (emphasis added).

In the context of this case, in ordered for Ron Smelser to be an individual towards whom "fault" can be allocated, under the terms of RCW 4.22.070, it first must be established that he was "in any measure negligent".[4]

In order for an individual or entity to be "negligent" it must be established that they breached a duty of care owed to the alleged victim, and that such a breach was a proximate cause of the injury and/or damages. See *Nivens v. 7-Eleven Hoagy's Corner,* 133 Wn.2d 192, 198, 943 P.2d 286 (1997). Whether an actual duty was owed to a plaintiff is a threshold determination and a question of law. See *Munich v. Skagit Emergency Commc'n Cent.,* 175 Wn.2d 871, 877, 288 P.3d 328 (2012). Sometimes the issue of whether or not a duty exists, is tied to the concept of "legal causation", which typically involves a judicial determination as to whether or not a duty should be imposed based on "mixed consideration

[4] Respondent concedes that Mr. Smelser did not engage in "wanton or willful misconduct in the supervision" of his children on the day of the accident. (RB, Page 15). There has been no contention here, or below, that Ronald Smelser's actions reached the level of "reckless", nor any issues regarding breach of warranty, assumption of risk or mitigation.

of logic, commonsense, justice, policy, and precedent." See *Tyner v. State,* 141 Wn.2d 68, 82, 1 P.3d 1148 (2000).[5]

Here, Mr. Smelser cannot be subject to a fault allocation because there is lack of an actionable parental duty to supervise. *Zellmer v. Zellmer,* 164 Wn.2d 147, 157, 188 P.3d 497 (2008). As the Supreme Court itself observed at Page 155 of *Zellmer* "this court has consistently held that the parent is not liable for ordinary negligence in the requirements of parental responsibilities". Thus, despite the use of the term "immunity" in its' title, "parental immunity" is nothing more than a recognition that a parent who is negligent in the supervision of their children has breached no actionable duty. As a result, a parent cannot be found negligent, or "at fault" within the meaning of RCW 4.22.015.

As recognized in *Zellmer*, in well-seasoned precedent the Supreme Court has already made the determination, based on policy and/or legal causation grounds, that parents cannot be held accountable in tort for simple negligence in the fulfillment of their parental responsibilities.

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[5] The defendants in their analysis *sub silentio* skip the first element of negligence i.e. the existence of a duty, but instead simply assume that "fault" can be established if there is "cause in fact". In other words, the defense appears to be arguing that if there is a "but for" cause of injury, irrespective of the existence of a duty, fault can be allocated. That is inconsistent with the language of RCW 4.22.015 which requires that there be some modicum of negligence on the part of the individual or entity towards whom fault is attempted to be allocated.

The case of *Price v. Kitsap Transit,* 125 Wn.2d 456, 886 P.2d 556 (1994), which the defense is attempting to misapply, holds no different, and clearly at Page 461 looks at the definition set forth within RCW 4.22.015 in analyzing whether or not a child could be allocated fault under RCW 4.22.070. The appropriate definition of "fault" is set forth within RCW 4.22.015 and **not as the defense suggests, "every entity which causes the claimant damages."** (RB, Page 16). That could potentially create "liability in the air" with fault being allocated to those who committed no actionable wrong. Such a construction would defy commonsense, be absurd, violate public policy, is unsupportable by statutory language and prior precedent.

As RCW 4.22 et. seq. is in derogation of prior common law relating to joint several liability principles, it must be strictly construed. See *Kottler v. State,* 136 Wn.2d 437, 442-43, 963 P.2d 834 (1998); *McNeal v. Allen,* 95 Wn.2d 265, 269, 621 P.2d 285 (1980) (statutes in derogation of common law must be strictly construed, and no intent to change the law will be found unless it appears with clarity). It also must be presumed that the legislature knew the existing state of case law prior to the adoption of legislation. *Price v. Kitsap Transit*, 125 Wn.2d at 463.

Thus, in this case, it has to be presumed by the Court the legislature was well aware of "parental immunity" prior to the 1986

passage of RCW 4.22.015 and RCW 4.22.070. If the legislature intended to alter the Supreme Court's prior precedent which held a parent breaches no actionable duty in tort by failing to supervise children, it clearly should have stated so in the language of statute. It cannot be presumed the legislature intended to overrule Supreme Court precedent, and to make such a sweeping change in the law simply because it used the inherently ambiguous and elastic term "immunity" in the statute. RCW 4.22.070.

Further, had the legislature intended to alter the principle that the negligence of a parent cannot be imputed to a child "no matter how derelict a parent may have been in supervising the activities and safety of the child" it would have clearly stated so. See *Carraway v. Johnson,* 63 Wn.2d at 215, citing to, *Adamson v. Traylor,* 61 Wn.2d 332, 373 P.2d 961 (1962).

In sum, the Supreme Court has already determined that a parent cannot be found negligent for inadequate supervision of children. Such public policy based consideration precludes an allocation of responsibility to a parent under RCW 4.22.020 because they have done nothing that falls within the definition of "fault" set forth within RCW 4.22.015. See generally *Christensen v. Royal School District,* 156 Wn.2d 612, 66, 124 P.3d 283 (2005) (On public policy grounds refused to permit the

imposition of comparative fault onto a child victim of sexual abuse for RCW 4.22.005 purposes).

E. Assuming that Fault Can Be Allocated, the Trial Court Erred in Failing to Find that Ron Smelser and Ms. Paul were "Jointly and Severely" Liable, And By Refusing to Enter a Judgment Against Mr. Smelser.

Ms. Paul in her Answer to Plaintiffs' Complaint specifically alleged as an affirmative defense "RCW 4.22" and named Ron Smelser as a potentially responsible individual. (CP 6-9). Disagreeing with the defense position in August of 2012, plaintiffs moved for partial summary judgment on, *inter alia*, the viability of a "empty chair" defense under RCW 4.22.070. (CP 23-49). As pretrial motion practice developed, not only did the Trial Court deny plaintiffs' motion for partial summary judgment on the "empty chair" defense, but also indicated that in the Trial Courts' view, Ron Smelser could be entitled to "parental immunity", but nevertheless could be allocated fault by the jury. (CP 246-248; 289-290).

Confronted with such pretrial rulings plaintiffs filed a Motion to Amend the Complaint in order to add Ron Smelser as a party (CP 293-302). The motion was granted. (CP 337-338). (CP 329-332).

Within the amended complaint, and consistent with Plaintiffs' position below, and herein, it is specifically alleged that Paragraph 2.5;

> Defendant Ronald Smelser is the father of the plaintiff. He's being sued because he was identified

> by the Defendant Paul as an entity at fault for Plaintiffs' injuries and in order to preserve joint and several liability. It was further alleged that the 'defendants had a duty to exercise ordinary care and that the defendants' breach of various duties was a sole, direct and proximate cause of the incident, Plaintiffs' damages and Plaintiffs' severe injuries. The complaint also has specific prayer for damages directed towards **the defendants**.

As opposed to answering plaintiffs amended complaint, or moving for dismissal pursuant to CR 12(b)(6) for failure to state a claim, or seeking to make more definite and certain, pursuant CR 12(e), Mr. Smelser did nothing. He did not answer, and was subject to an order of default.

Further, on examination of the amended complaint, it is quite clear that plaintiff did make a claim against Mr. Smelser, albeit with an explanation, that was more than adequate for notice pleading purposes. See CR 8. Under CR 8 "notice of pleading" standards, all that is necessary to file a lawsuit is "a short and plain statement of the claim, and a demand for relief". See *Putnam v. Wenatchee Valley Medical Center, P.S.* 166 Wn.2d 974, 216 P.3d 374 (2009).

Given such standards, and the procedural posture of the case, plaintiffs' counsel did everything possible to maintain a legally and factually consistent position in this lawsuit, while at the same time not prejudicing the Plaintiffs' ability to acquire a judgment that would be joint

and severable under the terms of RCW 4.22.070. Plaintiffs' counsel is unaware of any requirement that simply because a defendant raises an "empty chair" defense, the plaintiff has the Hobson's choice to either abandon their legal position that there is no other party at fault, risking the breaking of "joint and several liability", or adding the identified alleged wrongdoer to the lawsuit.

To the extent that the court instructed the jury that it was Ms. Paul's burden of proof to establish that Mr. Smelser was negligent, does not change the fact that plaintiffs in their complaint brought an actionable claim against Mr. Smelser, upon which he defaulted. Once the jury allocated fault to Mr. Smelser, a judgment should have been entered against him. (CP 1686-1688).

It was defendant who urged that the matter should be treated as an affirmative defense and she should not be provided any benefit by what otherwise would be her invited error. See *In re Personal Restraint of Tortorelli,* 149 Wn.2d 82, 94, 66 P.3d 606 (2003) (the invited error doctrine prohibits a party from setting up an error in the trial court and then complaining about it on appeal). Under the terms of CR 8(c) "fault of a non-party" is an affirmative defense. Under the terms of CR 12(i) an "empty chair" defense is also labeled as an "affirmative defense". There is no rule or case law which suggests that once a plaintiff adds a party to

trump an "empty chair" a defense, that its status of an "affirmative defense" ceases. Should the Court be inclined to adopt such a previously unprecedented position, it should be afforded prospective application only. Plaintiffs' position was supported by the language of the Court Rules and it would be inequitable to require plaintiffs to have previously predicted a substantial change or clarification of the law. See, *McDivitt v. Harborview Medical Center,* 179 Wn.2d 59, 76, 316 P 3d 469 (2013).

The bottom line is that the jury entered a verdict against Mr. Smelser finding that he was negligent and there was no legal basis for the trial court not to enter a judgment against him "jointly and severally" with Ms. Paul. This is particularly so given the fact, (as discussed in Appellant's Opening Brief), Mr. Smelser, by failing to answer and defend in this matter waived any claim on his part to "parental immunity". He was on the verdict form. Damages were awarded and he was allocated fault. Even assuming the trial court erroneously placed the burden of proof on Mr. Smelser's liability onto the defense, such an error was harmless. See *Hoskins v. Reich,* 142 Wn.App. 557, 174 P.3d 1250 (2008) (Harmless error occurs when it cannot be clearly established that the error had an effect on the outcome).

Further, the defense obviously benefited from the trial courts' actions because fault was allocated to Mr. Smelser. Had the burden been

on plaintiffs, it would be hard to imagine that the jury would have allocated 50% fault to Ron Smelser, because all plaintiffs' counsel would have to do to either extinguish or lessen the allocation, would be to concede in closing that the plaintiffs had not met their burden of proof.

The case of *Mailloux v. State Farm,* 76 Wn. App. 507, 513, 877 P.2d 449 (1985) provides the defense no help. The *Mailloux* case simply stands for the proposition that in order to preserve joint and several liability, once an empty chair defense has been raised, a plaintiff is obligated to add the alleged wrongdoing party to the lawsuit in order to preserve any potential joint and several liability. See also *Anderson v. City of Seattle,* 143 Wn.2d 847, 873 P.2d 489 (1994) (plaintiff allowed bankrupt, at fault party to be dismissed from lawsuit and did not have a judgment entered against the bankrupt).

Here, Mr. Smelser was a named party in the lawsuit and was on the verdict form. Plaintiffs should have been provided the benefit of the verdict and judgment should have been entered "jointly and severally" against him, and Ms. Paul. The trial court's efforts to separate the verdict between Ms. Paul and Mr. Smelser was erroneous and requires immediate reversal and removal, with direction to correct such error.

F. <u>The Ms. Paul Lacks Standing to Raise Mr. Smelser's "Parental Immunity" Defense.</u>

Contrary to the defendants' assertion, the Appellate Court should view comments to Restatement (Second) of Torts § 395G, which addresses "parental immunity", as being highly persuasive authority. As indicated in this comment, "parental immunity", is highly personal to the parent and does not serve to protect third parties "otherwise liable in tort to the child." (See AB Page 27-29 in the cases cited there). There are certainly no cases to the contrary in Washington and such a position is clearly consistent with Washington jurisprudence regarding "standing" which precludes a party from asserting the rights of another even when doing so when otherwise afforded litigation advantage. See, *Cassell v. Portelance, M.D.* 172 Wn. App. 156, 294 P.2d 1 (2012).

The case of *Humes v. Fritz Companies, Inc.,* 125 Wn. App. 477, 105 P.3d 1000 (2005) is not on point. In *Humes* the trial court addressed tribal sovereign immunity which is a true immunity from suit, unlike "parental immunity", which is nothing more than the recognitions of an absence of duty. Further in *Humes* the tribe was never named as a party to the lawsuit, and unlike Mr. Smelser had not waived its immunity, which is something it certainly could have done. See *Foxworthy v. Puyallup Tribe,* 141 Wn. App. 221,169 P.3d 53 (2007) (Indian tribes have sovereign

immunity but such immunity can be subject to waiver or by tribal waiver or congressional abrogation).

Tribal immunity is different because it operates to insulate from tort liability all tribal entities, while on the other hand, "parental immunity", as discussed above, is highly personal to the parent.

In any event once Mr. Smelser became a party it is respectfully suggested that it simply was not Defendant Paul's prerogative to impose or assert parental immunity on his or its own behalf.

G. <u>Defendants' Issues</u>

While plaintiff does not quarrel with the notion that pursuant to RAP 2.4 the appellate court is authorized, despite the absence of a cross appeal, to review those acts in the proceedings below, which if repeated on remand would constitute error prejudicial to the respondent. That being said, it respectfully suggested that the Court should not consider the defendants issues, given the absence of any meaningful analysis and citation to appropriate authority. Generally appellate courts do not consider issues unsupported by reasoned argument or authority. See *State v. Selander,* 65 Wn. App. 134, 827 P.2d 1090 (1992); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 828 P.2d 549 (1992). Here, the defendant's bald citation to a few evidentiary rules should be viewed as insufficient argument to warrant consideration.

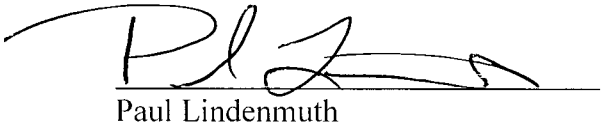
A trial court's evidentiary rulings are reviewed under a "abuse of discussion" standard, and can be highly particularized depending on the context of any particular case. See *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 232 P.3d 591 (2010). As *Minehart* suggests, because of the fluid nature of trials, appellate courts should not prejudge evidentiary issues before a trial has occurred. In the retrial, which must occur in this case, Ms. Paul's alcohol use may become admissible for a variety of reasons, including challenges to her credibility or ability to recall temporally distant events.

The appellate court should decline to prejudge evidentiary rulings that have yet to occur.

II. CONCLUSION

For the reasons stated in Appellants' Opening Brief, and herein, the decisions of the Trial Court should be reversed and this case remanded for a full new trial.

Submitted this 22nd day of June, 2015.



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BY
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CERTIFICATE OF FILING & SERVICE

I, Sheri McKechnie, hereby declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

On the 22nd day of June, 2015, a true and correct copy of the ***Appellant's Reply Brief re: Respondent's Motion*** was hand delivered and filed with the Court of Appeals, Division II:

Court of Appeals, Division II
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In addition, a true and correct copy was hand delivered to:

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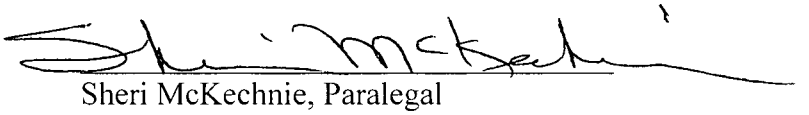
DATED at Tacoma, Washington this 22nd day of June, 2015.



Sheri McKechnie, Paralegal

APPENDIX NO. 1

11-2-14979-5 42846459 CTINJY 07-02-14

The Honorable Katherine M. Stolz
Trial Date: June 2, 2014

FILED
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IN OPEN COURT
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Pierce County Clerk
By _____
DEPUTY

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

DILLON SMELSER, individually, and DERRICK SMELSER, individually, Plaintiffs, vs. JEANNE PAUL ~~and "JOHN DOE" PAUL~~, individually ~~and the marital community comprised thereof~~, and RONALD SMELSER, Individually, Defendants.	NO. 11-2-14979-5 COURT'S INSTRUCTIONS TO THE JURY

DATED this 25th day of June, 2014.

Katherine M. Stolz, Judge
Department 2

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INSTRUCTION NO. 17

Plaintiff Dillon Smelser claims that he suffered severe emotional distress as a result of witnessing the injury to Derrick Smelser. To establish this claim, plaintiff has the burden of proving each of the following :

(1) That the negligence of one or more of the defendants proximately caused injury to Derrick Smelser;

(2) That Dillon Smelser was present at the scene of the injury or arrived shortly after it occurred and witnessed Derrick Smelser's pain and suffering;

(3) That Dillon Smelser suffered severe emotional distress proximately caused by witnessing Derrick Smelser in that circumstance.

To constitute "severe emotional distress" under this claim, plaintiff's emotional response must be reasonable under the circumstances and corroborated by objective symptomology. "Objective symptomology" means that the response must be susceptible of expert diagnosis and proved through expert evidence as to both the severity of the distress and its causal link to plaintiff's observations at the scene. Symptoms such as nightmares, sleep disorders, intrusive memories, fear and anger may be sufficient, but must constitute a diagnosable emotional disorder.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff Dillon Smelser on this claim against the responsible defendant or defendants. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the defendants on this claim.