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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 46509-4-II

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

DILLON SMELSER, individually AND DERRICK SMELSER, individually

Appellants

vs.

JEANNE PAUL, individually

Respondent

and

RONALD SMELSER, individually

Defendant

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED FOR REVIEW

Respondent contends that the issues presented for review in this appeal are more appropriately expressed as follows:

1. Did the trial court err in its legal ruling that Dillon and Derrick's father, Ronald Smelser, was an "entity" to whom fault could be apportioned under RCW 4.22.070(1), despite his parental immunity from suit by his children, based on defendant Jeanne Paul's defensive allegation that he had been negligent in supervising his children as they played outdoors and that such negligence was a proximate cause of the accident which injured Derrick, and in submitting the issue to the jury for decision?

2. Based on the verdict of the jury that Jeanne Paul and Ronald Smelser were each negligent and a proximate cause of injury to Derrick and were each 50% at fault, did the trial court err in entering Judgment against only Jeanne Paul for her 50% proportionate share of the damages awarded to Derrick where plaintiffs elected, when the case was submitted to the jury, to make no claim against Ronald Smelser and consistently argued that he was not negligent?

3. Did the trial court err in refusing to direct a verdict of negligence against defendant Jeanne Paul, when her testimony and that of Ronald Smelser was that Derrick was not visible in the driveway at any time prior to

the accident, in contrast to Dillon's version of the accident relied on by plaintiffs, and was any such error harmless, in light of the fact that the jury ultimately found Jeanne Paul to have been negligent?

4. Did the trial court err in giving Court's Instruction No. 10, which included instruction on "unavoidable accident" involving a young child incapable of contributory negligence, where there was evidence that the adult driver may have been free from fault based on the unexpected actions of the child, and was any such error harmless, in light of the fact that the jury ultimately found Jeanne Paul to have been negligent?

5. Did the trial court err in admitting Exhibit 119, the record of Derrick's post-accident treatment at the Mary Bridge emergency room, which contained as part of the medical history a description of how the accident occurred which corroborated defendant's contention that Jeanne Paul was not negligent because Derrick was physically in a position where she could not see him in the exercise of ordinary care, and was any such error harmless, in light of the fact that the jury ultimately found Jeanne Paul to have been negligent?

II. COUNTERSTATMENT OF THE CASE

A. Facts of the Accident

This case arises out of an automobile/ pedestrian collision which

occurred on April 16, 1998, where a vehicle driven by respondent Jeanne Paul struck and injured Derrick Smelser, who was then two and one-half years old, in the driveway of his father's house. Dillon Smelser, then five years old, witnessed the accident. Also present on the scene was the boys' father, Ronald Smelser.

At trial, the two adults and then five year old Dillon had very different recollections of the accident. As recounted in Appellants' Brief, Dillon testified that he and Derrick were playing on the field behind the house when Jeanne Paul arrived for a visit with their father. (RP 1305-1306). He said that she drove in and turned around to park facing outward toward the street (RP 1335), and went onto the house for a lengthy period of time. (RP 1308) Derrick then moved to the middle of the driveway to play in the mud "for the rest of the day," while Dillon stayed in the field. (RP 1307-1308) He testified that when Jeanne Paul came out to get in her truck to leave, Derrick was standing in the middle of the driveway in front of the truck far down toward the street. (RP 1308, 1335.) He said she drove forward at a high rate of speed and just ran over Derrick as he, Dillon, ran toward the accident scene screaming. (RP 1335, 1309, 1368-1369, 1370-1371).

On the other hand, Jeanne Paul and Ronald Smelser testified that she pulled in the driveway and parked facing inward. (RP754, 299) She visited

with Ronald for about five or ten minutes outside beside the house where he was working on a car. (RP 330, 757-758) Both agree that at all times during Paul's visit both of the boys were out in the field. (RP 333, 631, 760-761) When she went to leave, Ronald walked her to her vehicle. (RP 582) Both were clear that at that time, Derrick was not in the driveway, and in fact, they saw both boys still in the field just before Jeanne Paul got into her truck. (RP 330-331, 333, 633, 672, 681,760-761) At that time, Ronald turned to go back toward the house, and testified that he did not see the accident itself. (RP 304-305)

Jeanne Paul checked her mirrors before backing up, then backed slowly a few truck lengths before attempting to make a "J" turn to go forward out the driveway. (RP 587, 595, 759,772) As she started forward, Derrick was not in the driveway in her line of sight to the front, and Ronald also did not see him. (RP 588, 778) Her old Ford Bronco had a large hood, so she was not able to see something as small as a two and a half year old child if it were immediately in front of the truck. (RP 775) She began to drive forward and immediately felt/ heard a "thunk" and stopped, thinking she had hit the boys' dog. (RP 673, 779) Derrick was under the truck, approximately half way from front to back. (RP 305, 766) He was apparently dragged somewhat, but not run over by the wheels. (RP 590)

Derrick suffered a large, bleeding laceration on his forehead. (RP 592) Ronald Smelser took both boys with him in his car and drove to Mary Bridge Hospital, approximately 40 minutes away. (RP 599) Jeanne Paul did not accompany them. (RP 639) At the hospital emergency room, the contemporaneous record shows that a brief history was taken:

> "Derrick is a 3 year old male who was brought in by his father with possible head injury and scalp laceration. He is a usually healthy child who was playing on the front bumper of a raised 4x4 which was being driven by his father's girlfriend. She did not know he was there and accelerated forward. He let go, actually tumbled under the truck a couple times, not getting injured by the wheels. When he came out from under the truck after having landed on the gravel road, his father noticed a large scalp laceration and rushed him in the car to the emergency department. The father states he has been normal on the way here, although he seems to be falling asleep. The accident was not really witnessed by anyone. The only injuries seem to be to the upper body and head. The patient is moving all of his extremities. The patient last ate at 11:30."
> (Ex. 119, page 1)

The hospital records indicate that two year, eight month old Derrick was non-verbal at the emergency room, except when one of the doctors asked him to speak briefly to assess for hoarseness. (RP 997, 1117) By the time this litigation commenced in 2011, the only available speakers, father Ronald Smelser and son Dillon, deny having given this or any other version of events and background at the hospital. (RP 311-313, 1315) The emergency room physician, Dr. Margaret Hood, testified at trial. She had no independent

recollection of the source, but denied having fabricated the information in her treatment note. (RP 955) Jeanne Paul testified that a few months after the accident, the only time that Dillon talked to her about the accident, he told her, consistently with the ER note, that Derrick had been "skiing" on the front of her truck. (RP 770, 777-778)

B. Procedural History

This case was filed in 2011 seeking damages for Derrick for his physical injuries incurred in the 1998 accident, primarily relating to residual scarring on his forehead. Dillon also sought damages on a negligent infliction of emotional distress "bystander" claim based on his having witnessed his brother's injury. Initially, Jeanne Paul was the only named defendant. (CP 1-5).

In her Answer, Paul pleaded the affirmative defense that the accident was caused by the negligence of a non-party to whom fault should be allocated, and pursuant to CR 12(i) named Ronald Smelser as the allegedly responsible entity. (CP 8) Following the depositions of the parties and Ronald Smelser, plaintiffs filed a Motion for Partial Summary Judgment seeking rulings (1) that the boys could not be found contributorily negligent because of their young age at the time of the accident, (2) that Jeanne Paul was negligent as a matter of law, and (3) that no fault could be allocated to Ronald

Smelser due to his "parental immunity." (CP 23-49) Jeanne Paul responded by admitting that the boys were fault-free, but contending that there were numerous issues of fact as to her negligence and that fault could be allocated to Ronald due to the express terms of RCW 4.22.070(1) requiring allocation to "immune" entities, except those immune under the Industrial Insurance Act. (CP 127-139).

The Court entered the Order quoted at length at pages 8-9 of Appellants' Brief (CP 246-248), holding that the boys could not be charged with contributory fault, and that there were issues of fact as to Jeanne Paul's and Ronald Smelser's negligence. The court further ruled that Ronald was entitled to assert parental immunity from suit by his sons, but that he was a potential non-party at fault to whom a percentage of fault could be allocated by the trier of fact, and that any such percentage could be deducted from the verdict. The court denied plaintiffs' Motion for Reconsideration, which made further argument on the parental immunity issue. (CP 251-265, 289-290)

In response to these rulings, plaintiffs amended their Complaint to add Ronald Smelser as a named defendant. (CP 329-332) In the Amended Complaint, however, plaintiffs did not plead a cause of action against Ronald. They alleged that Jeanne Paul owed and breached a duty of care and was the "sole proximate cause" of the accident. As to Ronald, they only stated that he

was being sued because Paul had identified him as an entity at fault "and in order to preserve joint and several liability." CP 331)

In her Answer to the Amended Complaint, Jeanne Paul continued to allege that Ronald Smelser was at fault in the accident based on negligent supervision of his sons and that his proportionate share of fault should be determined at trial. She further pleaded that Ronald was immune from liability to his sons, the plaintiffs, and that no judgment could be taken against him, so that her liability, if any, would be several only. (CP 358-359)

Ronald Smelser was served with the Amended Complaint but did not appear or answer, and an Order of Default was entered against him. (CP 364-365) No default judgment was sought, and the matter proceeded to trial on June 2, 2014. (RP 1) Ronald Smelser appeared and testified at trial. In so doing, he neither expressly waived nor asserted his parental immunity. (RP 287-333, 540-649) The parties agree that there was no evidence at trial that Ronald Smelser's conduct regarding the accident was "willful or wanton," so as to abrogate his immunity. (RP 1622, 1625, 1630)

At the conclusion of the evidence, plaintiffs made a Motion for Judgment as a Matter of Law, directed in part to the potential liability and allocation of fault to Ronald Smelser. (CP 1498-1509). Among other contentions, plaintiffs argued that Ronald had waived his parental immunity

by failing to plead it as an affirmative defense to the Amended Complaint and allowing a default to be taken, and that Jeanne Paul could not take advantage of that immunity to prevent entry of a judgment against him while having the jury allocate fault to him.(CP 1506-1508). However, when final jury instructions were being proposed, plaintiffs specifically elected on the record to not make a negligence claim against their father. (RP 1596, 1600-1602)

The case was therefore submitted to the jury under the Court's Instruction No. 12, that only Jeanne Paul was alleging Ronald Smelser's negligence, and that it was an affirmative defense on which she had the burden of proof. (CP 1632-1633) The jury was also given Instruction No. 15, identifying Jeanne Paul and Ronald Smelser as the entities to whom fault could be allocated, together with a corresponding Special Verdict Form. (CP 1636, 1644-1646) The jury returned a verdict finding both Jeanne Paul and Ronald Smelser negligent and allocating fault 50% to each. The jury found that this negligence was a proximate cause of Derrick's injury and awarded him damages totaling $30,225.40. The jury found that the negligence was not a proximate cause of the claimed "bystander" injury to Dillon. (CP1644-1646)

Judgement was entered on the jury verdict against only Jeanne Paul for her proportionate 50% share of Derrick's damages. (CP 1686-1688) This

timely appeal followed, (CP1679-1684)

III. SUMMARY OF ARGUMENT

Parents are immune from suit by their children for injuries resulting from the parent's negligent supervision of the child. Only if the parent's actions in failing to protect the child by adequate supervision were "willful and wanton" is this immunity from suit abrogated. Parental immunity is no different from any other immunity. It reflects a policy decision by the courts that the actor is not to be held legally accountable for his otherwise actionable negligence, and it can be waived.

Under the 1986 Tort Reform Act, fault is to be allocated to all "entities" that proximately caused an injury. Entities whose fault is to be determined specifically include "entities immune from liability to the claimant," whether parties to the suit or non-parties. By amendment in 1991, the definition of entities was altered to exclude only entities immune under the Industrial Insurance Act.

Tort Reform made a significant change to the common law by providing that a defendant's liability for his share of causative fault is several only, except in limited instances, including when the plaintiff is fault-free, such as in the case of very young children. Then, the defendants against whom judgment is entered are jointly and severally liable, but for only the

sum of their proportionate shares of the plaintiff's total damages. The shares of any other at-fault entities, such as immune or released entities, are not recoverable by the fault-free plaintiff.

Fault of another entity is an affirmative defense to be pleaded by a defendant, and if the other entity is not being sued by plaintiff, the pleading defendant has the burden of proving such fault. The jury is required by the statute to allocate fault to all entities against whom fault has been proved by any party, and the total fault shall equal 100%.

Jeanne Paul alleged that Ronald Smelser was at fault in the accident, both initially when he was not a party to the suit and again after he was added as a named defendant by the Amended Complaint. Although the Amended Complaint did not allege that Ronald was negligent, Jeanne Paul additionally pleaded in her Answer that he was immune from suit for negligence and that therefore judgment could not be taken against him.

At the close of the case at trial, although plaintiffs argued that Ronald Smelser had waived his parental immunity by defaulting on the Amended Complaint, they nonetheless elected to not seek a judgment against him for his negligence. On that basis, when the jury allocated 50% fault to him based on Jeanne Paul's proving her affirmative defense, the court properly entered judgment only against Paul for her 50% proportionate share.

The liability of an adult driver who collides with fault-free young child is based on negligence, not strict liability. The duties of ordinary care owed are based on what the driver sees or reasonably should have seen of the child in proximity to the vehicle. There was substantial evidence at trial that Derrick was in position immediately before the accident where he could not be seen and where he was not expected to be, and therefore the issue of Jeanne Paul's negligence was a question for the jury. However, even if it was error to grant plaintiffs' motion for a directed verdict on her negligence, such error was harmless, because the jury in fact found Paul to be negligent.

It was likewise not error for the court to instruct as it did on "unavoidable accident" in relation to the actions of a young child. Since Derrick could not be found to be negligent due to his age and there was evidence to support a finding that Jeanne Paul was not negligent because of Derrick's unexpected conduct, defendant was entitled to an instruction on her theory of the case that the accident was unavoidable as to her. Even, if the instruction was erroneous, such error was also rendered harmless by the jury's finding that Jeanne Paul was negligent.

The emergency room record containing the description of the accident that Derrick was playing on the bumper of Jeanne Paul's truck was admissible based on the hearsay exception for statements made for purposes

of medical diagnosis and treatment, and as non-hearsay statements of a party opponent. Since it is clear that two and a half year old Derrick was not the speaker, the cases calling for extra scrutiny for medical statements by a young child are not applicable. Because this evidence related strictly to the issue of Jeanne Paul's negligence, any error in its admission was harmless based on the jury's finding that she was negligent.

IV. ARGUMENT

A. The Court Correctly Ruled That Ronald Smelser's Fault Was Required to be Submitted to the Jury Pursuant to RCW 4.22.070(1) Despite his Parental Immunity from Suit by His Children

On partial Summary Judgment and in denying plaintiffs' Motion for Reconsideration, the Judge then assigned to the case determined that Ronald Smelser was an entity capable of fault to whom fault could be apportioned under RCW 4.22.070(1) at the behest of defendant Jeanne Paul, despite the fact that he was entitled to parental immunity from suit by his children. (CP 246-248, 289-290). This issue was revisited on numerous occasions before the Judge who presided over the trial, including pre-trial Motions in Limine (RP 50-66), rehash of motions during trial, (RP 928-932), Motion for Judgment at the close of the evidence (RP 1618-1630, 1633-1636) and settling of jury instructions. (RP 1653-1661).

While the trial Judge certainly expressed her intent to follow the prior

Judge's rulings, it was clear that she fully understood the legal issues, knew that she was not bound by prior rulings, but intended to adopt them as her own because she believed them to be correct. (See above portions of transcript.) She did not fail or refuse to exercise her judicial functions and discretion. Her rulings on this matter thus must be reviewed on the merits, and affirmed as correct.

In Zellmer v. Zellmer, 164 Wn.2d 147, 155, 188 P.2d 497 (2008), the Washington Supreme Court examined and reaffirmed the common law rule that parents are not subject to suit by their children for injuries caused by the parent's ordinary negligence in exercising his parental responsibility to supervise his child. The Court expressed this doctrine as a "limited form of parental immunity," justified by important public policy interests to prevent judicial second-guessing of parental discretion, and analogized it to the rule of discretionary governmental immunity. Id. at 159-160. The Zellmer court concluded:

> "We adhere to the parental immunity doctrine as it relates to claims of negligent parental supervision. We reaffirm the holding in Jenkins v. Snohomish County PUD, 105 Wn.2d 99, 713 P.2d 79 (1986)] that parents are immune from suit for negligent parental supervision, but not for willful or wanton misconduct in supervising a child." Id. at 161

The parties here agree that Ronald Smelser did not engage in willful or wanton misconduct in his supervision of Derrick and Dillon on the day of the accident. He therefore fell within the rule of Zellmer that he was immune from suit by his sons for his ordinary negligence. The issue in contention here is whether he can be allocated a percentage of fault in this suit by his sons against Jeanne Paul.

As plaintiffs acknowledge (Appellants' Brief, page 20), RCW 4.22.070(1) provides that "immune" entities are to be allocated fault in a tort case. This section, which is the cornerstone of the 1986 Tort Reform statute, provides in pertinent part as follows:

> "(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant...defendants, third-party defendants, entities released by the claimant and entities with any other individual defense against the claimant, *and entities immune from liability to the claimant,* but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant...in the amount that represents that party's proportionate share of the claimant's total damages..."
> RCW 4.22.070(1) [emphasis added]

Plaintiffs attempt to take this case outside the express provisions of the statute by arguing that "parental immunity" is unlike any other of the various "immunities" recognized by Washington law, and is not within the intent of the Legislature to include all at-fault entities in the allocation process. This argument is not well taken. Parents are no different from other immune "entities" identified in RCW 4.22.070(1) as part of the Tort Reform-required 100% fault calculation.

The court in Price v. Kitsap Transit, 125 Wn.2d 456, 886 P.2d 556 (1994) analyzed the Legislature's intent in requiring allocation of fault to "every entity which caused the claimant's damages." The court concluded that an "entity," as that term is used in RCW 4.22.070(1), is every "juridical being capable of fault," and excludes only a party/ thing "incapable of fault as a matter of law," such as animals, inanimate objects, forces of nature and, as decided in Price, very young children. Id. at 461. These non- "entities" share the characteristic of not having the capacity to comprehend a duty to conform to a standard of care. Id. at 462

In response to Kitsap Transit's argument that the four-year old child in question was an "immune entity" to whom fault could and should be allocated under the statute, the Price court explained the difference between "incapacity" (very young child) and "immunity." It held that immune entities

are "juridical beings capable of fault, but excused for policy reasons from incurring liability," while "infants escape liability not because of immunity, but because they lack the mental capacity to commit a tort." Id. at 463

Based on this reasoning, a parent whose negligent supervision causes injury to his child is an "entity immune from liability to the claimant" to whom fault must be allocated under RCW 4.22.070(1). The parent's freedom from suit by his child is not because he is incapable of conforming his conduct to a standard of care, but because he is excused from the consequences of his lack of care based on public policy concerns.

In this sense, it is true that the doctrine of parental immunity means that a parent has no actionable duty to not be negligent in supervising his child. Here, of course, Jeanne Paul is not attempting to sue and recover from Ronald Smelser in tort for his actions, but is simply invoking the statutory scheme for allocation of fault, which is designed to protect partially at-fault defendants from shouldering the share of other "at fault" but released or immune entities, or entities with individual defenses.

This construction of the statute as including parents within the ambit of immune entities is buttressed by the Legislature's amendment of RCW 4.22.070(1) in 1991 to expressly exclude from the definition of "immunity" employers and fellow servants who are immune from liability under the Title

51 Industrial Insurance scheme. If the Legislature believed that compensating children for injuries caused by their negligent but immune parents, by taking parental fault out of the allocation calculation, was more important than the general Tort Reform principle of proportional, several-only liability, it could have enacted a similar express exception for parents. It has not done so, and the statute must be applied here as written.

Plaintiffs' arguments (Appellants' Brief, pages 23-24) that it is necessary to exclude immune parents from fault allocation to "harmonize" section .070 with the "prior common law" is specious, since the statute simply cannot be read consistently with prior law-- it is a radical change, fully intended by the Legislature as such. See: Washburn v. Beatt Equipment, 120 Wn.2d 246, 294, 840 P.2d 860 (1992), where the court explained the full extent of the changes the Legislature intended to and did inflict on the prior concepts of "pure" joint several liability, replacing it with fault apportionment and several-only liability, or a severely modified form of joint and several liability to fault-free plaintiffs.

The common law concept that the negligence of a parent cannot be "imputed" to a child may or may not have survived Tort Reform. See: Comment to WPI 11.04, which states this "rule" and questions its continued viability. However, RCW 4.22.020 (first enacted in 1973) which plaintiffs

ask the court to "harmonize" with section .070(1) by reading parental immunity out of the allocation statute, does not by its terms apply to a case like this one, involving injury to the child allegedly caused by the negligent parent. Section .020 merely bars imputation of the fault of a spouse to the plaintiff in an action brought by a spouse or minor child for injury to the at-fault spouse/ parent, such as a loss of consortium claim. See eg: Christie v. Maxwell, 40 Wn.App.40, 696 P.2d 1256 (1985).

B. Allocation of Fault to Ronald Smelser Is Appropriate and Required Despite His "Default" to the Amended Complaint

Fault of another entity is an affirmative defense which must be raised by the party seeking to take advantage of it. See: Civil Rules 8(c), 12(i). The plaintiff has the burden of proving fault against any party from whom he seeks recovery. Mailloux v. State Farm, 76 Wn.App. 507, 513, 887 P.2d 449 (1995) Otherwise, the defendant alleging that fault should be allocated to a non-party for the purpose of reducing her allocable share of the total fault has that burden. Id. at 511-512. Under RCW 4.22.070 the jury is required to allocated fault to all entities against fault has been proven by any party, and the total fault must equal 100%.

Contrary to plaintiffs' argument, this case does not present any issues of "standing." Here, at a time when Ronald Smelser was not a named party,

Jeanne Paul properly identified him and pleaded his allocable fault as an affirmative defense. (CP 8) In response, plaintiffs raised his parental immunity in support of their argument that he could not be allocated fault. While, as discussed above, that argument is not legally supportable, plaintiffs' raising of it was perfectly appropriate since it was a matter which arguably benefitted their case.

Plaintiffs cite no support for the bald assertion that immunity is a peculiarly "personal" defense that must be raised by the immune entity. (Brief, pages 24-25). In fact, because immune entities are generally known to be such and are not generally inclined to waive their immunity, they are often, if not usually, not named as parties. Therefore, they do not raise their own immunity; the named defendants who want to take advantage of section .070's allocation scheme do so by pleading "non-party at fault." See eg: Humes v. Fritz Companies, 125 Wn.App 477, 105 P.3d 1000 (2005) where the work-site owner Tulalip Indian Tribe was not a defendant, but the defendant construction contractor pleaded fault allocation and raised tribal immunity avoid joint and several liability.

In this case, when plaintiffs amended their Complaint to add Ronald Smelser as a named defendant, but did not plead a negligence claim against him, (CP 329-332) Jeanne Paul reasserted her defense that fault should be

allocated, and affirmatively pleaded that no judgment could be taken against him based on his parental immunity. (CP 358-359). She was not pleading his immunity "for him," but for herself under Washington's Tort Reform Act, just as the defendant did in Humes.[1]

Since parental immunity has the same operative effect for fault-allocation purposes as any other immunity, Jeanne Paul agrees with plaintiffs that it can be waived. (The court recognized but did not discuss the fact of waiver by a negligent mother in Romero v. West Valley School District, 123 Wn.App. 385, 98 P.3d 96 (2004).) Here, Ronald Smelser did not respond to the Amended Complaint which named him as a defendant but did not plead a cause of action against him, and an Order of Default was entered. (CP 364-365) However, no Default Judgment was taken against him, nor could it have been, based on CR 54(c), which states the obvious rule, required by due process, that "A judgement by default shall not be different in kind from or exceed in amount that that prayed for in the demand for judgment…" One can only speculate as to actual motives, but Ronald Smelser may well have

1 Because the required allocation of fault to immune entities is a matter of Washington statutory law, the out-of–state cases and Restatement comment relied upon by plaintiffs are completely inapplicable. (Appellants' Brief, pages 27-28) Furthermore, the Restatement provision quoted refers to cases where a defendant is jointly liable for the tort of the immune parent, such a employee/ employer *respondeat superior* and "acting in concert" liability. This alone distinguishes this supposed "rule" from a case involving the concurrent negligence of a parent and another tortfeasor.

consciously defaulted precisely because the Amended Complaint made no claim against him.

As discussed below, the question of whether a parent's, such as Ronald Smelser's, failure to file an Answer and raise his parental immunity as an affirmative defense resulted in a "waiver" which would have allowed his sons to take a negligence judgment against him at trial will have to await another day, because of the way this case was tried. However, his default did not affect the proper submission of the issue of his negligence to the jury based on Jeanne Paul's proof of her affirmative defense of his negligence, for purposes of having his percentage of fault for the accident apportioned separately from hers.

C. Judgment Was Properly Entered Only Against Jeanne Paul for Her Proportionate Share of Fault As Found by the Jury

Ronald Smelser appeared and testified at trial, and neither expressly waived nor expressly asserted his parental immunity, nor did either party ask him about the subject. (RP 287-333, 540-649) At the conclusion of the evidence, plaintiff's argued that Ronald had waived his parental immunity by failing to plead it as an affirmative defense to the Amended Complaint, in the context of asserting that his default prevented Jeanne Paul from allocating fault to him. (CP 1506-1508, RP 1620, 1624, 1629-1630) However, when it

came time to frame the jury instructions on the parties' claims and parties' burdens of proof, plaintiffs expressly elected to continue to not make a claim against Ronald Smelser.

Jeanne Paul submitted alternative proposed instructions based on whether or not plaintiffs were making a negligence claim against their father based on his supposed waiver of parental immunity. (Proposed Instructions No. 6 and 23 on burden of proof: CP 1811, 1472 and Proposed Instructions No. 33 and 34 on parties' claims: CP 1594, 1495) Paul's counsel explained to the court that it was unclear from plaintiffs' arguments and instruction submissions whether a claim was being made against Ronald Smelser. (CP 1460, RP 1596) Plaintiffs' counsel responded that Ronald was not negligent, and that plaintiffs were not contending that he was. (RP 1598, 1600-1602) The full colloquy on this matter is reproduced as Appendix A hereto.

The Court elected not to give a "parties' claims" Instruction (RP 1671-1672), but gave defendant's proposed No. 6 on the parties' burdens of proof as Court's Instruction No. 12, attached hereto as Appendix B, instructing that Jeanne Paul alleged that Ronald Smelser was negligent and assigning to her the burden of proof. (CP 1632-1633, RP 1642) Plaintiffs excepted to Court's Instruction No. 12 solely on the basis that it allowed Jeanne Paul to allege and prove negligence against Ronald Smelser, not

because it did not address their own claim against him. (RP 1653) In accordance with the burden of proof Instruction, in closing argument to the jury, plaintiffs argued repeatedly that Ronald Smelser was not negligent and that Jeanne Paul was 100% at fault. (CP 1616-1617, RP 1725, 1800-1801, 1814)

The jury returned its verdict by answering the questions on the Special Verdict Form, finding both Jeanne Paul and Ronald Smelser negligent, assigning 50% fault to each, and awarding Derrick total damages of $30,225.40. (CP 1644-1646) Judgment was entered only against Jeanne Paul for her half of Derrick's damages. (CP 1686-1688)

The Judgment was correct in accordance with the way the case was tried, and submitted to and decided by the jury. Even if the trial court were to find that Ronald Smelser had waived his parental immunity to allow his sons to recover against him for mere negligence, no Judgment could properly be entered against him. This case presents the same scenario as Mailloux v. State Farm, 76 Wn.App. 507, 511-512, 887 P.2d 449 (1995), which explained the operation of RCW 4.22.070 in this context:

> "Under that statute, any party to a proceeding can assert that another person is at fault. Only the plaintiff, however, can assert that another person is liable to the plaintiff.
> . . .
> If the plaintiff proves fault that is the proximate cause of

plaintiff's damages, the person at fault is also liable to the plaintiff, and judgment is entered as set forth in the statute. If a party other than the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff—the plaintiff has made no claim against him or her—but his or her fault nevertheless operates to reduce the 'proportionate share' of damages from those against whom the plaintiff has claimed." [emphasis added, internal citations omitted]

Under the current Tort Reform statute, "joint and several" liability in favor of fault-free plaintiffs, such as extremely young children, can only exist if there are two or more "defendants against whom judgment is entered." RCW 4.22.070(1)(b). "A person is not liable to the plaintiff at all, much less jointly and severally," if he not been named as a potentially liable party by the plaintiff, who then must prove fault. Mailloux at 513. Since plaintiffs made no claim against Ronald Smelser, they could not take a Judgment against him based on Paul's allegation and proof of his fault. Therefore, there can be no "joint and several" liability, and Paul was only subject to Judgment for her 50% "proportionate share" of Derrick's damages as found by the jury.

D. If There Was Error in the Way Ronald Smelser's Fault Was Handled, the Remedy on Appeal is to Amend the Judgment to Assign His 50% of Derrick's Damages to Jeanne Paul

Appellants have not stated in their Brief what relief they believe they are entitled to for the alleged error regarding Ronald Smelser's parental immunity and allocation of fault to him. While, of course, Jeanne Paul does

not believe that the trial court's rulings on these matters were erroneous in any respect, if this Court finds error, the only appropriate remedy is to direct that the Judgment be amended to assign Ronald Smelser's one-half of Derrick's damages to Jeanne Paul. No new trial on either liability or damages is warranted.

No error in the immunity and fault allocation issues could have had any possible effect on the jury's determination of the amount of Derrick's total recoverable damages or its decision that Jeanne Paul's (and Ronald Smelser's) negligence was not a proximate cause of injury or damage to Dillon. In particular, the jury was instructed on the elements which Dillon needed to prove to recover on his "bystander" emotional distress claim, and no error has been assigned to this Instruction. (CP 1639) In finding no proximate cause, the jury obviously simply found that Dillon had failed to prove this claim. This had nothing to do with the fact that the jury was asked to assess whether his father was negligent along with Jeanne Paul.

E. The Issue of Jeanne Paul's Negligence Was Properly Submitted to the Jury, and Any Error in Failing to Direct a Verdict Was Harmless Because the Jury Found Her to Be Negligent

As set forth at pages 3-6 above, both Jeanne Paul and Ronald Smelser testified at trial that Derrick was not in a place where he could reasonably have been seen or where Paul had reason to expect him to be as she drove her

vehicle forward and collided with the child. This was supported by the medical history appearing in the Mary Bridge ER record and Jeanne Paul's testimony of what Dillon told her shortly after the accident about Derrick's "skiing" actions in front of the truck.

The jury was properly instructed as to the duty of care owed by a driver to a child pedestrian. (CP 1631) The driver is not negligent simply because she collided with the child. The duty to avoid the collision arises when the driver sees or in the exercise of ordinary care should have seen the child in proximity to the vehicle. Larson v. Puyallup School District, 7 Wn.App. 736, 741, 502 P.2d 1258 (1972); LaMoreaux v. Fosket, 45 Wn.2d 249, 255-256, 273 P.2d 795 (1954) If the driver has no reason to anticipate that the child is near the vehicle, she is not required to take extraordinary measures such as looking under the car, and is not negligent simply because she started the vehicle and struck the child. LaMoreaux, supra at 259-260.

Here, in addition to the evidence that after the last time Jeanne Paul and Ronald Smelser saw both boys in the field behind the house immediately before Paul got in her truck to leave, Derrick somehow got himself positioned directly in front of the large hood where he could not be seen from the driver's seat, there was also testimony that neither boy was in the habit of greeting or saying goodbye to Jeanne Paul or coming around her vehicle.

(RP754, 759, 761) She thus had no reason to anticipate that Derrick would come in from the field and closely approach her truck just as she started to leave.

Plaintiffs were certainly entitled to argue to the jury, based on Dillon's rather incredible testimony, that Derrick was standing in plain view in the middle of the driveway in front of Jeanne Paul's truck and that she was negligent in failing to see him and "running him down." They could and did also argue that her "admission" that she was factually "responsible" for the accident because she was driving the vehicle was an acknowledgment that she was at fault. They are not, however, entitled to ask the court to ignore her and Ronald Smelser's testimony that Derrick was not "there to be seen" and that Derrick's actions in placing himself in harm's way were unexpected and unpredictable. Ronald Smelser himself testified that did not believe that Jeanne Paul was at fault in the accident. (RP 551)

Plaintiff correctly acknowledge that a motion for judgement as a matter of law admits the truth of the opponent's evidence and all reasonable inferences therefrom, quoting from Goodman v. Goodman, 128 Wn.2d 366, 907 P.2d 290 (1995). That should be the end of the inquiry on this argument, since Jeanne Paul's evidence that she had exercised reasonable care was more than sufficient to take that issue to the jury.

Even if the trial court erred in not directing a verdict on Jeanne Paul's negligence, any such error was clearly harmless, since the jury evaluated the conflicting evidence and found that she was negligent and a proximate cause of the injury to Derrick. As the court succinctly ruled in Saleemi v. Doctor's Associates, Inc., 176 Wn.2d 368, 380, 292 P.3d 108 (2013):

> "[E]rror without prejudice is not ground for reversal...
> Error will not be considered prejudicial unless it affects
> or presumptively affects the outcome of the trial."
> [internal citations omitted]

F. Instruction No. 10, Which Included Instruction on "Unavoidable Accident," Was Properly Given

Court's Instruction No. 10 instructed the jury, in the terms of WPI 11.03, that children under the age of six are incapable of contributory negligence, and that there was no such issue as to Dillon or Derrick. The remainder of the instruction was based on the holding of Larson v. Puyallup School District, supra, that an accident could be solely caused by the spontaneous, unpredictable behavior of the child victim so as to render the accident unavoidable as to the defendant:

> "Even though the child's age prevents application of the
> contributory negligence doctrine, it does not follow that
> negligence and proximate cause have been established
> against either defendant. As stated above, the jury could
> reasonably have ascertained that because of the child's
> own actions, the accident was unavoidable as to the
> defendants."

Id. at 743

It is true that the Supreme Court Committee on Jury Instructions recommends in the Comment to WPI 12.03 that ordinarily no instruction on "unavoidable accident" should be given. However, a party is entitled to an instruction if it is supported by substantial evidence and is necessary for the party to argue her theory of the case. Farm Crop Energy v. Old National Bank, 109 Wn.2d 923, 750 P.2d 231 (1988). Here, Jeanne Paul needed this instruction to counter the danger that the jury would improperly assume that because Derrick could not be "negligent" in the accident, he could not be the cause in fact of the accident, and to argue her theory of the case that because of his actions, she could not reasonably have avoided the collision.

The case law approving the giving of an instruction on unavoidable accident or similar instruction supports the giving of Instruction No. 10 here. Cooper v. Pay-n-Save Drugs, 59 Wn.2d 829, 371 P.2d 43 (1962) catalogs many of the cases to that date regarding giving and refusing such an instruction. Cooper held that "It is proper to give the instruction if there is affirmative evidence that an unavoidable accident occurred." Id. at 835. The more recent case of Zook v. Baer, 9 Wn.App. 708, 715, 514 P.2d 923 (1973) likewise held that "When the evidence would support a jury finding that there was no negligence on the part of either party, the instruction may properly be

given."

The cases considering unavoidable accident make it clear that the evidence required to support the instruction is not evidence which compels such a conclusion, but only that the evidence supports a finding that the accident occurred without negligence on the part of the participants. See: Zook, supra.

In fact, many of the cases where the instruction was approved have involved young children who are incapable of contributory negligence, and whose unpredictable conduct may have caused the accident without negligence by the adult driver. See: Rettig v. Coca-Cola Bottling, 22 Wn.2d 572, 582, 156 P.2d 914 (1945), a four-year old child "dart out" case: the jury "could conclude" that the driver and parent exercised reasonable care, while the child could not legally be negligent when he stepped out from behind a bus in front of the driver. "In view of this situation, it was proper to instruct the jury on the subject of unavoidable accident."

Carraway v. Johnson, 63 Wn.2d 212, 386 P.2d 420 (1963) involved a two and a half year old child, where it was disputed whether the child had been in the street for a sufficient time for the driver to see him or ran into the street so quickly he could not have been seen in time. Under such circumstances, giving an unavoidable accident instruction is within the sound

discretion of the court:

> "Our examination of the record leads us to conclude that there was evidence showing or justifying an inference that this accident occurred without having been proximately caused by negligence of the defendant [driver.] Where an accident seems to have been proximately caused by the acts of a child too young to be tagged with contributory negligence, the accident may be considered to have been 'unavoidable' for purposes of giving the otherwise dubious unavoidable- accident instruction."
> Id. at 215, citing to Rettig, supra

See also: Orme v. Watkins, 44 Wn.2d 325, 330, 267 P.2d 681 (1954), where the young child, incapable of negligence, suddenly entered the intersection and the evidence conflicted as to whether the driver had a green or red light. The court approved a fact-based instruction similar to "unavoidable accident," which allowed the defendant to argue her theory that the accident was unavoidable because of the child's unpredictable action.

The present case is precisely the kind of situation where the trial court had discretion to give an instruction which includes a discussion of "unavoidable accident." There is no requirement, as suggested by plaintiffs (Brief, page 45), that the evidence show that the accident was caused by something other than the actions of the human participants, eg: an "Act of God." See: Brewer v. Berner, 15 Wn.2d 644, 648, 131 P.2d 940 (1942), identified by Cooper, supra as containing "the best statement of the rule," that

unavoidable accident "means an accident that could not have been prevented by the exercise of due care on the part of the human actors involved."

Where the child participant is incapable of negligence (has no duty to exercise care), that half of the evaluation is satisfied, leaving only the requirement for evidence to support a conclusion that the adult involved exercised all the care required of her under the circumstances. This is precisely how Instruction No. 10 is worded. Since the evidence at trial allowed the jury to find that Derrick unexpectedly put himself in a position so close to the front of Jeanne Paul's truck that she could not see him as she went to drive forward, and ordinary care does not require a driver to get out and look under and around the vehicle for children she has no reason expect to be there, the jury could have concluded that the accident was "unavoidable." The trial court did not abuse its discretion in giving Instruction No.10.

However, just as with the previously discussed issue on failure to direct a verdict on negligence, the jury did in fact find Jeanne Paul to have been negligent. Therefore, they clearly did not draw the conclusion permitted but not required by Instruction No. 10, that the accident was unavoidable, so any error in giving that Instruction was harmless. "An erroneous jury instruction is harmless if it is 'not prejudicial to the substantial rights of a the

part[ies] and in no way affected the final outcome of the case." Blaney v. Internat'l Assoc. of Machinists, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). No prejudice is presumed, or demonstrable, where the party against whom the erroneous instruction was given ultimately prevailed on the issue. Id.

Appellants argue that Dillon did not prevail at trial, since he was awarded no damages on his "bystander" emotional distress claim, and therefore prejudice should be presumed. However, Instruction No. 10 could have had no conceivable effect on that result. The Instruction did not in any way refer to damages in general, or emotional distress damages in particular, being unavoidable. It clearly addresses the avoidability of the accident involving the young child actor (Derrick) and the adult driver.

Furthermore, the "bystander" claim Instruction No. 17 (CP 1639) and jury's answers to the Special Verdict Form (CP 1644-1646) make it clear that there was no confusion as to "unavoidable" emotional distress. Instruction No. 17 required Dillon to prove (1) that the negligence of one or more of the defendants proximately caused injury to Derrick; (the jury answered "yes"), (2) that Dillon was present and witnessed Derrick's pain and suffering (undisputed) and (3) that Dillon suffered "severe emotional distress" as defined in the Instruction, and instructed that if any of these propositions had not been proved, "your verdict should be for the defendants

on this claim." The jury is presumed to have followed the court's instructions. Singh v. Edwards Lifesciences, 151 WnApp. 137, 210 P.3d 337 (2009) Therefore, the jury obviously found that the last element had not been proved, because it answered "no" to Question 2 as to whether defendants' negligence proximately caused "injury or damage" to Dillon, not that Dillon had proved his case but suffered damages that were "unavoidable." Dillon can demonstrate no prejudice from the giving of Instruction No. 10

G. The Mary Bridge Emergency Room Record Was Properly Admitted

The Emergency Services note from Mary Bridge Children's Hospital regarding Derrick's treatment on the evening of the accident was admitted at trial over plaintiffs' objection as Exhibit 119. The Note was dictated by the attending physician, Dr. Margaret Hood, who testified at trial and authenticated the record.

Dr. Hood testified that it is important to find out what happened in an accident and get the mechanism of the injury. (RP 948-950) She of course had not independent recollection of the 16 year-old incident, but knows that she had to have talked to the father to get the background information such as the child's age and health. (RP 951-952) The injuries she examined were consistent with the report of the accident, and Dr. Hood was definite that she did not make up the account and would not have recorded anything that she

did not feel was accurate. (RP 954-955)

Dr. Thomas Griffith, the on-call plastic surgeon who attended to Derrick's scalp laceration, and whose contemporaneous note (Ex. 124A) contains the same history of the accident, also testified at trial. He likewise testified that the information as to how the accident occurred was important to his treatment of the patient, and that for a child, he would talk to the parent, if available, which Ronald Smelser was. (RP 1096-1098) He only spoke to young Derrick to assess his physical state, and would have counselled the father about the surgical procedure and to get his consent. (RP 1117, 1141). While he has no independent recollection of how he received the information, he testified that he did not make it up out of thin air. (RP 1175-1177)

The first paragraph of the Dr. Hood's note contains the history of Derrick's injury at issue. While plaintiffs argue repeatedly that the report is "unattributed" and "we have no way of knowing who the speaker was," it is crystal clear that the information came from Ronald Smelser. The note records that Derrick was "brought in by his father," several of the statements are in fact attributed to the father, and all contain information that would naturally have come from Ronald Smelser, since there was no one else present with knowledge of such matters as Derrick's age, normal health

status and when he last ate. The fact that every single statement in the history is not prefaced by "the father states" does not affect the conclusion that the information came from Ronald.

These statements are clearly admissible under ER 803(a)(4) for "*Statements for Purposes of Medical Diagnosis or Treatment.*" This hearsay exception covers such statements, including those relating to "the inception or general character of the cause or external source [of the injury] insofar as reasonably pertinent to diagnosis or treatment." 5C Washington Practice, Evidence, sec. 803.23 notes that "neutral statements of causation," such as "I was hit by a car," are normally admissible, while "statements attributing fault," such as "...a car driven by [defendant] ... that ran a red light" may not.

The Court confirmed this commentary in State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003):

> "Because ER 803(a)(4) pertains to statements 'reasonably pertinent to diagnosis or treatment,' it allows statements regarding causation of injury, but generally not statements attributing fault...For example, the statement 'the victim said she was hit on the legs with a bat' would be admissible, but 'the victim said her husband hit her in the face' would not be admissible."
> Id. at 496 [Internal citations omitted]

The challenged statements in the Mary Bridge record are not fault attribution, but described the mechanism and causation of the injury: being on

or near the raised bumper of a 4 x 4, letting go, tumbling on a gravel road, not getting injured by the wheels. They were clearly made in the course of seeking treatment for Derrick. As noted above, both doctors testified that this is just the sort of accident history that they need and deem important in assessing the injury, and that the description coincided with the injuries they saw.

Plaintiffs' argument that the record required special scrutiny as to its reliability because the declarant was a young child is not well taken. It is obvious that Derrick did not give the information in Emergency Room note. Not only is this not the sort of information such a young child would relate, but the doctors were specific that Derrick did not speak during the course of the hospital visit except when Dr. Griffith checked him for hoarseness. Furthermore, the information about the accident is "corroborated," both by Jeanne Paul's eyewitness testimony that Derrick, who obviously was in front of the truck as it started forward, was not in her view from the driver's seat, indicating that he was too close to be seen, and Dillon's account to her later that summer about Derrick "skiing" on the bumper. The trial court was well within its discretion in admitting this medical record under the "diagnosis and treatment" hearsay exception.

The statements are also admissible as a non-hearsay "*Admission of a*

Party Opponent," under ER 801(d)(2). A party admission need not be "against interest" at the time it was made, but must merely be a statement by a party which is in some way inconsistent with the party's position in the lawsuit. 5B Washington Practice, Evidence, sec. 801.35. Here, both Ronald and Dillon Smelser currently tell a different version of the accident and their recollections, so the record qualifies as an "admission."

To the extent that the information imbedded in statements is unattributed, it had to have come from Ronald and/or Dillon Smelser, because Jeanne Paul did go to the hospital, Dillon was non- verbal, and the medical personnel at the Hospital have denied that they simply made it up. The description of the truck and driver certainly came from Ronald Smelser, since they are "adult" in nature. The description of the accident may well have originated with Dillon. Whether the description was made directly by him to the doctors or relayed through his father, Dillon was in position to and consistently claims to have seen the accident, and he made the same statement directly to Jeanne Paul within a short time after the accident. (RP 770, 777-778) It is also possible that Ronald Smelser witnessed some portion of the accident and recounted it at the hospital while his memory was fresh. He claimed no such memory at trial, but he also denied having told anyone anything at the hospital, which is obviously not correct.

Dillon, of course, is a party himself, so his statements are unequivocally "party admissions." If it was Ronald Smelser who relayed Dillon's statements to the medial personnel, Mr. Smelser as a parent was clearly a "speaking agent" for his son under these circumstances. "A statement by a person authorized by the party to make a statement concerning the subject" is that party's admission pursuant to the express terms of ER 801(d)(2)(iii). Furthermore, Ron Smelser is himself a party defendant, and his own statements can be used against him and, if the account was Dillon's, he clearly "manifested [his] adoption or belief in [the] truth" of it under ER 801(d)(2)(ii) by repeating it to the medical personnel.

For the reasons discussed above, there was no abuse of discretion in admitting the Mary Bridge emergency room record. Neither Evidence Rule at issue requires the trial court to determine that the out of court statements in such a record are "true." They are admitted for the purpose of proving the truth of the matter set forth, and like other admissible evidence, they are subject to explanation and argument as to their accuracy and weight.

However, even if the admission was erroneous, plaintiffs cannot demonstrate that any such error was prejudicial. As with erroneous instructions, "error [in the admission of evidence] without prejudice is not grounds for reversal...Error will not be considered prejudicial unless it

affects, or presumptively affects, the outcome of the trial." Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) [internal citations omitted].

This evidence related strictly to the issue of liability, which the jury resolved in favor of the plaintiffs by finding Jeanne Paul negligent. The jury certainly did not give the record the prejudicial effect which plaintiffs so vehemently argue. Whether or not the jury concluded that Derrick had been playing on the front bumper of the truck, they did not use that information to absolve Jeanne Paul of fault. Any error in the admission of the hospital record was clearly harmless.

V. ERROR NOT TO BE REPEATED IF THE CASE IS RE-TRIED

Pursuant to RAP 2.4(a), this Court should rule that the trial court's admission of evidence of Jeanne Paul's drinking not connected with the accident was erroneous and prejudicial and should not be allowed at any retrial of this matter.

As argued above, Jeanne Paul does not believe that a new trial on any issue is appropriate in this case because of the complete lack of error prejudicial to the plaintiffs. However, the trial court committed one significant evidentiary error which was presumptively prejudicial to Jeanne Paul. Despite the fact that there was no credible evidence that Paul had been drinking before the accident, let alone was intoxicated or impaired in any

way, the trial court allowed extensive examination of Jeanne Paul and Ronald Smelser about the fact that Paul was a habitual heavy drinker in the time around the accident, excluding only evidence of two DUI arrests after the accident. (RP 130-145)

This evidence became a major part of the theme of plaintiffs' case. See: RP 296-298, 300-301, 303, 321, 322-323, 325-32, 575-577610, 612625, 642-643 from the testimony of Ronald Smelser, where plaintiff inquired repeatedly about Jeanne Paul's general drinking habits, and defense counsel was required to revisit the area to attempt to defuse the prejudice. In all this testimony, Ronald was lead to say on one occasion that Jeanne Paul had had anything to drink before the accident, but then consistently recanted this.

In her examination at trial Jeanne Paul was asked extensively about her drinking habits, while she was forced to repeatedly deny that she had been drinking before the accident. See RP 658, 691,702, 772, 782, 785-786.

In final argument, plaintiffs' counsel tried to insinuate that Jeanne Paul drank alcohol at the Smelser residence before the accident, and that she did not go to the hospital with the family afterwards because she was drunk. (RP 1717,1749-1750, 1810) This was in addition to several general aspersions about her general drinking, (RP 1719-1720), which required defense counsel to address the matter in response. (RP 1782-1785)

Under ER 403, even relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value. Such evidence is also inadmissible under ER 404(b), which precludes evidence of other "wrongs" or acts to prove a party's "character," in order to show that she acted in conformity with that "character" at the time of the accident. Plaintiffs' contention that they should be able to challenge Ms. Paul's credibility in her denial of drinking in connection with the accident by cross examining her as to her habits and history does not support the admission of this evidence. Any possible relevance of such "suggestion" would be vastly outweighed by the prejudicial effect of such inflammatory evidence.

If this case is remanded for a new trial, the court should be directed to not allow the admission of this irrelevant and highly prejudicial evidence.

VI. CONCLUSION

The trial court properly submitted to the jury the question of the proportionate share of fault to Dillon and Derrick's father, Ronald Smelser, based on Jeanne Paul's affirmative defense, and properly entered Judgment only against Jeanne Paul for her one-half share of the fault for Derrick's damages.

The trial court did not err in refusing to direct a verdict of negligence against Jeanne Paul. There was clearly evidence in the record from which the

jury could conclude that she was not negligent. When the jury in fact found negligence on the part of Jeanne Paul, any error in not granting the motion was harmless.

The Court's Instruction No. 10, containing an explanation of "unavoidable accident," was supported by substantial evidence and necessary to allow Jeanne Paul to argue her theory of the case. Any error in giving the instruction was not prejudicial, because the jury in fact found Jeanne Paul negligent and the accident thus not "unavoidable." The instruction could not have had any effect on the verdict in favor of Paul on Dillon's "bystander" claim, since the unchallenged instructions and Special Verdict make clear that that verdict was based on lack of proximate cause between Paul's negligence and any recoverable damages for Dillon.

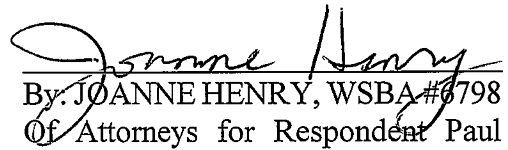
The trial court did not abuse its discretion in admitting the emergency room record containing the brief history of the accident. It was admissible under the hearsay exception for medical diagnosis and treatment and as non-hearsay as an admission of a party opponent. Any error in admitting this liability evidence was not prejudicial, because the jury found Jeanne Paul to be negligent.

The Judgment in this matter should be affirmed. If any error is found in the treatment of the issue of Ronald Smelser's liability, the only

appropriate relief is to amend the Judgment to assess his share of Derrick's damages against Jeanne Paul. If a new trial is ordered on any issue, the court should be instructed to exclude any evidence of Jeanne Paul's drinking as irrelevant and unduly prejudicial.

Respectfully submitted this 6th day of May, 2015

SLOAN BOBRICK, P.S.



By: JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul

APPENDIX A

1 affirmative defense, which he is required to do, which he
2 has not. We don't know whether or not he'll even appear or
3 whether he would be in a default or not. He ultimately did
4 default, so he's lost his ability to defend on any issue in
5 this case; so we didn't know what was going to happen; but
6 at this point in time, we've got Ron Smelser in default. If
7 by some stretch of the imagination that he could be
8 allocated fault, then he's someone that's allocated fault
9 under the -- in the verdict form, and there's joint and
10 several liability; but that's really not the issue before
11 the house. I don't even think we have to reach that issue
12 because, one, we can talk about the issues I've addressed in
13 my brief; but, two, we are not contending that there's any
14 evidence in this record that Ron Smelser was negligent at
15 all.
16 And I want to be very clear about that, and what I'm
17 basing that argument on is the case of Cox vs. Hugo which
18 is --
19 MS. HENRY: Your Honor, are we arguing
20 motions here or not?
21 MR. LINDENMUTH: No. Well, wait a minute.
22 THE COURT: Well, I don't want to argue
23 motions, you know.
24 MR. LINDENMUTH: Well --
25 THE COURT: I mean, the bottom line is:

1 I've been presented with the proposed instructions.
2 Obviously, I'll go through these; but I am going to select
3 basically which ones I think the jury, you know, is entitled
4 to hear, you know. In terms of Mr. Smelser, I think there
5 is sufficient evidence to take it to a jury, that they could
6 determine that he was negligent.
7 MR. LINDENMUTH: I think, as a matter of
8 law, he can't be; and let me explain that because I didn't
9 brief that aspect of it; and I don't want them to come back
10 tomorrow and say, well, we didn't hear that -- read that
11 argument in the brief, therefore, let's come back Thursday;
12 so let me at least make this one point, Your Honor.
13 THE COURT: Well, this is -- you know,
14 it's week four; but I estimated it four weeks to the jury,
15 maybe more; and so we're basically lurking along on
16 schedule; and the problem, of course, is that if it gets to
17 the jury for a verdict for deliberation by Thursday, you
18 know, someone else will be baby-sitting the jury next week
19 because we're on recess.
20 MR. LINDENMUTH: Well, let me -- I just
21 want to -- I want to, one, put them on notice. We are not
22 taking the position that there's any evidence that he was
23 negligent. That position is predicated on the language in
24 the case of Cox vs. Hugo; so if they want to address all of
25 the issues tomorrow, they need to address this issue, too;

1 otherwise, they'll ask for another continuance saying they
2 were surprised which I don't think they are because we're
3 experienced trial lawyers, and we know that there's motions
4 at the end of the evidence.
5 But under the terms of Cox vs. Hugo, it provides, There
6 is no evidence of contributory negligence by Debra's parents
7 unless we are prepared to hold that parents of five-year-old
8 children who let them go out of the house to play and do not
9 keep them under constant surveillance during that period, or
10 during the period they are outside of the house, are
11 negligent in the care of their children. We are not
12 prepared to so hold. The law imposes no such impractical
13 standard. Parents are not required to restrain their
14 children within the doors -- within doors at their peril,
15 period. There's no evidence that goes beyond this holding
16 in this -- in this record with respect to -- the Supreme
17 Court holding in this record with respect to Ron Smelser.
18 He has no duty to constantly surveil his children, know
19 where they are at all times; and as a matter of the law,
20 he's not negligent by not doing so.
21 MS. HENRY: Okay. Your Honor, now that
22 Plaintiffs have elected to not contend negligence against
23 Ron Smelser, then our proposed instructions are No. 33 and
24 not No. 34 and No. 6 and not No. 23. Those are the
25 instructions where Jeanne Paul asserts that Ron Smelser was

1 negligent --

2 THE COURT: All right. Let me --

3 MS. HENRY: -- and she bears the burden of

4 proof.

5 THE COURT: Okay. Run that through for me

6 again.

7 MS. HENRY: Okay. Since I hear

8 Mr. Lindenmuth saying that the plaintiffs are not contending

9 that Ron Smelser is negligent, our proposed instruction on

10 the parties' claims is No. 33.

11 THE COURT: Okay.

12 MS. HENRY: That is that the defendant,

13 Paul, contends that Ron Smelser is negligent; Plaintiff does

14 not. Our proposed instruction on the parties' burdens of

15 proof is No. 6 and not No. 23, that Ms. Paul contends that

16 Ron Smelser was negligent, and she bears the burden of

17 proof.

18 MR. LINDENMUTH: Well, he's in default.

19 No one has the burden of proof because whatever the

20 allegations are, he's already been found negligent as a

21 matter of law if there's enough evidence in the record; but

22 we agree that there's a burden of proof.

23 MS. HENRY: Are the plaintiffs contending

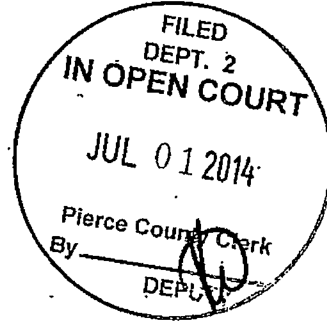
24 that Ron Smelser is negligent or not?

25 MR. LINDENMUTH: No. We didn't contend

1 that in our complaint either. We contended that you were
2 saying that he was, and you had brought him in as an
3 affirmative defense.
4 THE COURT: Well, he was brought in, you
5 know -- I mean, he was brought in. He was, indeed, at
6 fault; and there was, you know, the prior order by Judge
7 Johnson which controls the fact that it can be submitted to
8 the jury, whether you want to call it an empty chair or
9 what, but that they can determine what percentage of fault
10 he may bear, if any, and that that amount can correspond
11 with the -- deducted from the overall award.
12 MR. LINDENMUTH: That's not what he held,
13 Your Honor. That's not the way that order should be --
14 THE COURT: All right. When was that
15 order entered?
16 MR. LINDENMUTH: It said "would be," but
17 it didn't say he is entitled to parental immunity but would
18 be. He would be if he asserted it.
19 THE COURT: Do you remember what date that
20 was, because I want to look that up.
21 MR. LINDENMUTH: November 2, 2012.
22 MS. HENRY: November 2 order --
23 MR. LINDENMUTH: It was printed on
24 November 2 --
25 THE COURT: Of 2012.

APPENDIX B

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



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

ORIGINAL

7/3/2014 17:35 0207

INSTRUCTION NO. 12

The plaintiffs have the burden of proving each of the following propositions:

First, that the defendant Paul acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting or failing to act, the defendant Paul was negligent;

Second, that the plaintiffs were injured:

Third, that the negligence of the defendant Paul was a proximate cause of injury to the plaintiffs.

If you find from your consideration of all the evidence that plaintiffs have proved each of the above propositions as to defendant Paul, your verdict should be for plaintiffs against defendant Paul. On the other hand, if any of these propositions has not been proved, your verdict should be for defendant Paul.

As an affirmative defense against plaintiffs' claims, the defendant Paul has the burden of proving both of the following propositions:

First, that the defendant Ronald Smelser acted, or failed to act, in one of the ways claimed by the defendant Paul, and that in so acting or failing to act, the defendant Ronald Smelser was negligent;

Second, that the negligence of the defendant Ronald Smelser was a proximate cause of injury to plaintiffs.

If you decide that plaintiffs are entitled to a verdict against defendant Paul, then if you find from your consideration of all the evidence that defendant Paul has proved each of the above propositions as to defendant Ronald Smelser, your verdict should include an allocation of a percentage of fault against Ronald Smelser in accordance with instructions set forth in the Special

Verdict Form given to you to record your verdict. On the other hand, if you find that either of these propositions has not been proved, then your verdict should not allocate any percentage of fault to defendant Ronald Smelser.

7/3/2014 17:36 0208

DECLARATION OF FILING AND SERVICE

I certify that on May 6, 2015 I caused to be filed with the Court of Appeals, Division II a copy of RESPONDENT'S BRIEF, to which this Certificate is attached, by ABC Legal Messenger to:

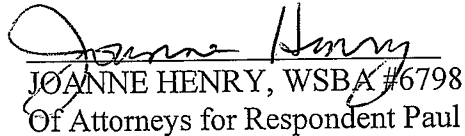
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

And served this Response electronically and by ABC-Legal Messengers on counsel for Appellants:

Ben F. Barcus
Paul A. Lindenmuth
Law Office of Ben F. Barcus & Associates
4303 Ruston Way
Tacoma, WA 98407

FILED
COURT OF APPEALS
DIVISION II
2015 MAY -7 PM 1:06
STATE OF WASHINGTON
BY DEPUTY

DATED May 6, 2015 at University Place, Washington.



JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul