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IN THE COURT OF APPEALS
DIVISION II

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as co-
Personal Representatives of the Estate of Gerald Lee Munce, Deceased

APPELLANTS,

vs.

DENNIS CLINE and "JANE DOE" CLINE, individually, and the marital
community comprised thereof,

RESPONDENTS.

BRIEF OF RESPONDENT

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I.
INTRODUCTION

This is essentially a negligent entrustment case. Appellants allege that Dennis Cline was negligent when he returned eight guns to their owner, Clarence Munce. They claim that Mr. Cline should have known that Clarence Munce would shoot his Gerald Munce, a year after the guns were returned. Mr. Cline was in possession of the guns 2-3 weeks in the summer of 2007. The shooting occurred almost one year later, on June 21, 2008. The jury found that Mr. Cline was not negligent. Because they made this finding, they never addressed the issue of proximate causation, which renders most of the Appellants issues moot.

Gerald Cline took the guns from his father's home in June 2007, while his father was in the hospital, being treated for an injury that occurred at Gerald's home. On June 4, 2007, Clarence Munce, on his return from the hospital, found his eight firearms missing and called the police. Gerald had told his cousin Dennis Cline that he had taken the guns. The same day, Mr. Cline stopped by Clarence Munce's home and found him conversing with Deputy Sheriff Morrison. Clarence's friend Barbara Griebe was also present. Deputy Morrison testified that Clarence was calm and rational at this meeting, but was very unhappy with his son. Clarence told Deputy Morrison that he was planning to sell his guns at a

gun store in Enumclaw, and Mr. Cline offered to take possession of the guns and help Clarence sell them, if that is what he wanted to do. Appellants acknowledge that Mr. Cline was acting as a peacemaker in a family dispute. Deputy Morrison described this as a “family agreement” to resolve the dispute. She confirmed this family agreement in a telephone call with Gerald Munce later that day.

This was not the first discussion of selling some of the guns. Ms. Griebe testified that she and Clarence had discussed selling some of the guns, but her being ill had delayed this. Mr. Cline took possession of the guns from Gerald and, over a period of two to three weeks, tried to arrange a trip to the gun store with Clarence. Clarence apparently changed his mind and demanded the return of his property, saying he would sell them himself. After arguing with Clarence several times, Mr. Cline decided that he was not going to change his mind, and that he was tired of being in the middle of someone else’s dispute. He returned the guns to his uncle. He informed Gerald that he was doing so. Gerald then informed the rest of the family. Clarence had the guns for the next year, although at some point, Clarence got rid of five of the guns. The entire family was aware that Clarence possessed firearms. They admitted that they were not relying on Mr. Cline to protect them from Clarence Munce.

There was no evidence that Clarence Munce was incompetent on June 4, 2007. He was examined by his physician, Ales Matzenauer, M.D., on the same day as the meeting with Deputy Morrison. Dr. Matzenauer noted that he was calm, rational and showed no decline in his cognitive ability. He described Clarence as being in the very early stage of Alzheimer's Disease principally due to short-term memory issues. On three occasions, the last one in October 2007, Dr. Matzenauer gave Clarence notes attesting to his competence.

Appellants' alleged that Gerald took the guns from his father's home for safekeeping, because he did not think Clarence was safe to own guns. There was considerable evidence that this was not his true motive. Deputy Morrison said Clarence clearly did not want Gerald to have them. Clarence had offered to sell them to a neighbor, Allen Keys, and Gerald knew this. He had also discussed selling the guns with Ms. Griebe. Deputy Morrison's notes of her telephone call with Gerald quoted him as saying: "Don't sell the guns. I want the guns." When Mr. Cline picked up the guns, Gerald said: "These guns should be mine." The jury could draw a reasonable inference that this was a dispute about the ownership of property, not an issue of safekeeping.

Gerald¹ was 58 years old at the time of his death. Clarence was 81 years old. Clarence had been widowed since his wife Wretha died in 2003. He lived alone, in his own home. Gerald was Clarence's only son and was also a widower since 2005, and was also retired. Both lived in Spanaway.

Mr. Cline was fairly close to his Uncle Clarence, but was not part of the immediate family circle. He was a merchant seaman for many years and did not live in the same town as his uncle. Appellants' witnesses testified that Mr. Cline was not included in family conferences, or most family functions. When members of the family attempted to persuade the Munce's to move to an assisted living facility in the 1990's, Dennis Cline was not involved or even aware of their actions. The same is true of family members discussing problems with Clarence Munce driving, in 1998. They also testified that they did not tell Mr. Cline of their conflicts with Clarence, or the conflicts between Gerald and Clarence. He was not part of the immediate family.

Clarence Munce and his stepdaughter, Sunny Rhone had been estranged for decades. Mr. Cline testified that, on the few times he saw her, she expressed her dislike of Clarence Munce. There seems to be little

¹ For ease of identification, the two men are referred to by their first names. No disrespect is intended.

doubt that Clarence Munce was socially inept and prone to making rude remarks. This was particularly true prior to his wife's death and before he stopped drinking alcohol. Both Clarence and Wretha Munce were very heavy drinkers, which led to numerous problems. After his wife's death, Clarence reduced and then stopped drinking alcohol. In 2007 and 2008 he was sober.

Gerald and his father had an on and off relationship, both seemed to enjoy provoking the other at times. Witnessed testified that would tease each other and argue, but would then reconcile. Their relationship was complicated. Clarence was also not above goading his son. He often re-wrote his will, and let Gerald know about it. About a month prior to the shooting, Clarence Munce changed the locks on his home, partly because Gerald had the habit of coming into the house uninvited, and going through his father's papers.

There is considerable evidence that the source of the family discord between father and son was Gerald's desire to gain control of his father's money and assets, and Clarence's fears that his son was trying to "put him away," and gain control his property. Dr. Matzenauer testified that his conversations with Gerald in 2007 led him to believe that Gerald was financially motivated when he contacted the doctor. The notes Clarence obtained from his physician were evidence of Clarence's fears.

Clarence was a successful investor in real estate. He bought and sold property at a profit up to the time of the shooting. On April 29, 2006, there was a major falling out arising from the possible sale of a beach-front lot he owned in Ocean Shores, Washington. Some members of the family regarded this as a family property that they used for camping. In 2006, Clarence had spoken to a potential buyer for this property and felt that members of the family interfered in the possible sale, which upset him. There was a heated argument at Gerald's home on April 29, 2006 about this property. Other than Clarence poking his son with his finger, it was a verbal confrontation. Clarence Munce kept repeating: "I'm not dead yet." Kristy Rickey testified this was the last time she spoke to her Grandfather. While Clarence and Gerald kept in touch, this caused a rift with the rest of the family. Mr. Cline had no knowledge of this argument until after the shooting.

There were cordial moments between family members after this falling out in 2006. Clarence occasionally bought gifts for his great-grandchildren. In May 2008, a month before the shooting, Kelley Cavar and her two children visited Clarence at his home, spending several hours at his home and that they got along well. She did note that Clarence appeared more frail and that he was having memory problems, repeating himself often, but he was not dangerous or aggressive.

On the morning of the shooting, Clarence called Gerald's home and left a message on his answering machine in which he asked Gerald to return a Mack Truck hood ornament. The tone of his voice was calm and he referred to himself as "Dad." According to Clarence's call to 911, he was in bed, asleep, when Gerald banged on the door. When he came to the door, Gerald struck him with the hood ornament, which was wrapped in a note. This was a heavy metal item, weighing over a pound. Clarence responded by striking Gerald with a golf putter. As Gerald retreated towards his car, Clarence picked up a carbine he kept by the front door of his home, chambered and fired one round. This struck Gerald, immediately causing a fatal injury. Clarence Munce stated that he did not mean to shoot his son, and that the killing was accidental. This is also the position taken by the Appellants in this action.

Appellants' basic allegation in this case is that Mr. Munce was incompetent on June 4, 2007. They alleged that Mr. Cline should have known this and not returned the guns to his uncle. There is no evidence to support these allegations. The evidence clearly showed that Clarence Munce was competent in 2007. Ales Matzenauer, M.D. was Clarence's physician for 15 years. His testimony conclusively rebutted the allegation that Clarence was incompetent or irrational in June 2007. He examined him on the same day as the gun exchange and testified that Clarence was

competent, rational and able to handle his own affairs in 2007. Dr. Matzenauer gave Clarence a number of notes, on prescription pads, stating that Clarence was competent to handle his own affairs. There is no evidence in the record to support the argument that a lay person could have deduced Clarence was incompetent, particularly in light of the presence of publicly posted notes from Clarence's physician.

Appellants' witnesses, particularly Mr. and Mrs. Rhone, testified that Clarence was mean, violent and a bully. Other witnesses disagreed with these characterizations. Everyone one of Appellants' lay witnesses were asked if they had any personal, first hand knowledge of Clarence threatening anyone with a gun, handling a gun in an inappropriate fashion, assaulting anyone, or being violent with anyone. All replied that they had no first hand knowledge. Appellants never presented any competent evidence on these matters. Their entire case was based on rumor, innuendo, and family legends.

The claims of Appellants and their witnesses that their cousin Dennis Cline should have known that Clarence was dangerous and incompetent. Their own actions, or lack of action rebuts their testimony. If Clarence were that dangerous, they could have taken the same action they alleged Mr. Cline should have. They did nothing. Kelley Cavar took her children to see her Grandfather a month before this shooting occurred.

The evidence did not support their claims that Clarence Munce was a violent, dangerous person. The jury apparently did not find Appellants' witnesses to be credible.

While the jury did not reach the question of proximate causation, there was ample evidence that proved the events of June 21, 2008 were not reasonably foreseeable in June 2007. Mr. Cline possessed these weapons for two to three weeks. Mr. Munce was a competent individual and nobody had the right to confiscate his property. The jury correctly found that Mr. Cline was not negligent.

II. ANSWER TO ASSIGNMENTS OF ERROR

1. The trial court was correct in essentially dismissing Appellants gratuitous undertaking theory. It was not supported by substantial evidence.
2. The trial court acted correctly and in conformance with the evidence and applicable law by declining to give a jury instruction on gratuitous undertaking as a theory of negligence.
3. The trial court did not commit error by declining to give Plaintiff's Proposed Instruction No. 13A, which expressed Plaintiff's theory of gratuitous undertaking as a basis of finding negligence.

4. The trial court did not commit error by giving the Court's Instruction No. 11.5, which is a correct statement of law regarding negligent entrustment.
5. The Court committed no error by excluding incidents which allegedly occurred 15 years before the events in this case, which were based on hearsay and based on allegations that were unsupported by first hand knowledge.
6. The Court should not have dismissed Defendant's Affirmative Defense of voluntary intoxication, which was supported by facts and appropriate law. Since the jury never reached the issue of proximate causation, this is irrelevant.
7. The Court committed no error in declining to exclude Gerald Munce's voluntary intoxication from evidence, in response to Plaintiff's pre-trial motions. The affect of Gerald Munce's voluntary intoxication on his judgment was only relevant to proximate causation. The jury did not reach this question.
8. The trial court did not commit error by allowing Plaintiff's witnesses to be questioned with regard to their actions or inactions regarding Clarence Munce. This was not an attempt to assert an "empty chair" defense. It was simply impeachment, permitted by the Rules of Evidence.

9. Defendant disagrees that Mr. Boldosser, who had a long criminal history was questioned improperly or in a confusing manner. Questioning Mr. Boldosser about his actions while tenant of Mr. Munce was fair impeachment..
10. The trial court did not commit error by allowing Plaintiff's expert on brain function to be questioned about the potential effect of Benadryl on Clarence Munce on June 21, 2008 These were relevant to proximate causation..
11. The trial court correctly denied the Appellants' Motion for a New Trial. There were no factual or legal grounds for granting such a motion. No misconduct occurred.

III. ISSUES PRESENTED

1. Was there any factual or legal basis for Plaintiff's claim that "gratuitous undertaking" could form the basis for a claim of negligence in this case?
2. Did the trial court correctly refuse to give instructions to the jury, based on Appellants' "gratuitous undertaking" claim; since neither the applicable law nor the evidence supported their theory of the case?

3. Did the Court use its inherent power to dismiss Plaintiff's Gratuitous undertaking claim, pursuant to CR 50?
4. Is the Court's Instruction 11.5 correctly state the law of negligent entrustment based on past actions or conduct of the tortfeasor?
5. Did the trial court correctly exclude evidence of Clarence Munce's alleged bad conduct, when the incidents were decades old and the only evidence was hearsay?
6. Did Appellants present any evidence that would justify the granting of a new trial?

IV. STATEMENT OF THE CASE

A. Factual Background and Persons Involved.

This case arises from an altercation between Gerald Munce and his father Clarence Munce, which ended with Clarence Munce accidentally shooting his son. This happened at Clarence's home on the evening of June 21, 2008. Clarence's call to 911 stated that Gerald had assaulted him and that he had defended himself with a putter and then fired a warning shot, which struck his son, killing him. (Exhibit 207)² Clarence was arrested and charged with Murder, but he was found to lack competence to

² A transcript of this call is attached as Appendix A.

stand trial, and the charges were dropped. (RP Defendants Vol. I, Det. Benson, p. 25) There is no evidence that he regained his competence. He spent the remainder of his life in a secure nursing home. He died just after the verdict was returned in this case.

Gerald Munce spent the day of the shooting, June 21, 2008, at the Exchange Tavern. (RP Def. Vol. IV, J. Rohr, p. 32, 44). Gerald Munce's blood alcohol level was 0.10 when he was killed. (CP 1261) Respondent asserted the affirmative defense of voluntary intoxication. (CP 15)

The persons involved in this case are as follows:

1. Clarence Munce

Clarence was 81 years old in 2008. He lived his life as a law-abiding citizen. There was no evidence that he was ever arrested or charged with any crime prior to the shooting. (RP Pl. Vol. IV, Deputy Morrison, p. 149) Clarence Munce was not a party to this action nor did he testify.³ Both Clarence and Gerald were widowers, Clarence's wife Wretha died in 2003, after 54 years of marriage, and Gerald's wife Joanne, in 2005. (RP Vol. VII, K. Cavar, p. 96, 98) Kristy Rickey and Kelley Cavar are Gerald's grown daughters. (CP 1-9) Clarence Munce suffered from painful physical conditions, particularly arthritis in his knee,

³ Ms. Rickey and Ms. Cavar file separate action for wrongful death against their grandfather. That case never went to trial. A default judgment was entered in that case, as a sanction based on Mr. Munce's incompetence, and is currently on appeal.

degenerative disk disease in his spine and gout. (RP Defendant's Vol. III, Matzenauer, p. 83). At one time, both he and his wife were heavy drinkers. Dr. Matzenauer testified that, after his wife's death, Clarence first tapered off, than stopped drinking. (RP Defendant's Vol. III, Matzenauer, p. 68) His mental state improved greatly when he gave up alcohol. (RP Defendant's Vol. III, Matzenauer, p. 84) He suffered from a loss of short-term memory, as do many people in their 80's. (RP Defendant's Vol. III, Matzenauer, p. 85) Dr. Matzenauer diagnosed this as early stage Alzheimer's disease, and very mild. (RP Defendant's Vol. III, Matzenauer, p. 85) He had no evidence of advanced, or even moderate dementia in 2007. (RP Defendant's Vol. III, Matzenauer, p. 88) Dr. Matzenauer testified that Clarence was acting "absolutely rationally" when he examined him on June 4, 2007. (RP Defendant's Vol. III, Matzenauer, p. 89) There is no evidence in the record to support a claim that Mr. Munce was irrational or dangerous on June 4, 2007. There is lay and expert medical evidence that he was competent on that date.

2. Gerald Munce

The relationship between Clarence and Gerald was a complicated one. There was evidence that the two men got along well at times and that they

liked to tease each other. (RP Vol. VII, K. Cavar, p. 126-127) Clarence's message on Gerald's answering machine, on the morning of the day the shooting occurred is calm and cordial. (Exhibit 124A) Witness John Rohr, who knew both men for decades, which included many hunting trips, testified that the two men would have disagreements, but would always make up. (RP Vol. IV, John Rohr, p. 43) He described Clarence as "giving person." (RP Vol. IV, John Rohr, p. 44) He also never saw any physical conflict between Gerald and Clarence. (RP Vol. IV, John Rohr, p. 43). Mr. Rohr felt that underneath the teasing, there was a loving relationship. (RP Vol. IV, John Rohr, p. 43)

3. Sunny Rhone and Bill Rhone

Sunny Rhone, age 66, was Clarence's un-adopted step-daughter. They had been estranged since she moved out at 16 years old, over fifty years. (RP Vol. IV, Sunny Rhone. P. 43) She and her husband, Bill Rhone, expressed a marked hatred for Clarence Munce. This hatred permeated their testimony. (RP Vol. IV, Sunny Rhone. P. 46; RP Defendant's Vol. Bill Rhone, P. 45-46, 50-51) The evidence showed a very dysfunctional family in many aspects. Mrs. Munce disinherited her daughter in 2000. (RP Vol. IV, Sunny Rhone. P. 46) There was much evidence that Clarence and Wretha Munce abused alcohol for many years prior to her passing. The Rhones and Gerald and his wife, Joanne were angry at Clarence in

2003. They went so far as to cut Clarence's photographs out of a picture collage being assembled for Wretha Munce's memorial service. (RP Vol. IV, Sunny Rhone. P. 56, RP Defendant's Vol. Bill Rhone, p. 48-49) They expressed surprise and hurt when Clarence returned or disposed of family photos and mementos after the memorial service. (RP Vol. IV, Sunny Rhone. P. 93-94, pps. 78, 87) Both testified that they had very little contact with Clarence Munce after his wife died in 2003. (RP Vol. IV, Sunny Rhone. P. 66) Mr. Rhone testified that after his mother-in-law died in 2003, "... we had nothing to do with Clarence Munce, whatsoever." (RP Defendant's Vol. Bill Rhone, p. 6) The Rhones were the principal witnesses relied on by Appellants to bring up rumors and innuendo about Clarence.

4. Dennis Cline

Dennis Cline is Clarence's nephew. He is 73 years old. (RP Vol. III, Dennis Cline, p. 5) Mr. Cline's connection to the Munce family was primarily with Clarence. He lived with the Munces for the school year in 1955. (RP Vol. III, Dennis Cline, p. 6) He dropped out of school at age 17 and joined the U.S. Navy, serving from 1958-1962. (RP Vol. III, Dennis Cline, p. 6) From 1965-1979, he sailed as a merchant seaman, and spent most of his time at sea. (RP Vol. III, Dennis Cline, p. 8) In 1979, he took a job as Port Engineer for Sealand, Inc., to allow him to raise his two

daughters, until his retirement in 1991. (RP Vol. III, Dennis Cline, p. 9) He resides in the Gig Harbor area. Mr. Cline had very little contact with most of the extended Munce family. Prior to his Aunt's terminal illness, he saw the family, including Clarence, infrequently, usually at Christmas or some other holiday. (RP Vol. III, Dennis Cline, pgs. 7-8) (RP Vol. III, Sunny Rhone, p. 52-53) Bill Rhone testified that "He [Mr. Cline] was never really in the picture, he stopped by once in a while at Christmas, he didn't know mostly what was happening." (RP Defendant's Vol. Bill Rhone, p. 6) He became somewhat more involved with Clarence and Wretha Munce in 2003, when Mrs. Munce was dying. (RP Vol. III, Dennis Cline, p. 13) Kelley Cavar and Kristey Rickey really did not know him until he spoke at their Grandmother's funeral. (RP Vol. VI, Kristy Rickey, pps. 29, 64-65) (RP Vol. III, Kelley Cavar, p. 143) Kelley Cavar never spoke to Dennis, as far as she could recall, until after the shooting. (RP Vol. III, Kelley Cavar, p. 143) When the family had meetings, Dennis Cline was not included. (RP Vol. VII, Kristy Rickey, p. 65) Much of the hard feelings in the family arose from an argument on April 29, 2006 at Gerald's home. Dennis Cline was not there and was not told about this incident until after the shooting. (RP Vol. VII, Kristy Rickey, p. 62-63) The evidence showed that Dennis was not considered part of the immediate family and was not informed about the various trials

and tribulations of the Munce family, until after the shooting. In September, 2007, Mr. Munce named Mr. Cline as his Attorney in Fact on a Durable Power of Attorney. This Power of Attorney became operational, by its terms, when Clarence was arrested on June 21, 2008. He continued in that role, with the assistance of counsel, until Clarence Munce passed away in 2013. (RP Vol. III, Dennis Cline, pps. 42-54)

5. Ales Matzenauer, M.D.

Ales Matzenauer, M.D., was Clarence's family physician for 15 years. He knew Clarence and Gerald. He testified that, after the death of Clarence's spouse, the relationship between father and son changed. He described it as "not healthy." (RP Defendant's Vol. III, Matzenauer, p. 79) He also testified that the source of their problems was Gerald's desire to control his father's finances and that he was putting "financial pressure" on his father (RP Defendant's Vol. III, Matzenauer, p. 79). Dr. Matzenauer also testified that Clarence Munce was no longer drinking in 2007.

Dr. Matzenauer signed a number of notes, on prescription pads, for Clarence, certifying his competence. (Exhibit 200) These notes were dated July 25, 2005, June 22, 2006, and October 30, 2007. The first two notes stated:

To whom it may concern:

This will confirm that Clarence Munce has been my patient since April 1992. In my opinion, Mr. Munce is capable of making sound decisions.

The third note, on October 30, 2007 stated:

To whom it may concern:

This will confirm that Clarence Munce has been my patient since April 1992. In my opinion, Mr. Munce is capable of making sound decisions. Mr. Munce is capable of taking care of his financial matters.

Clarence Munce was in the habit of posting these notes on a bulletin board in his house, and delivering them to relatives, by leaving them in mailboxes. The notes appear on several photographs admitted in the case. (Exhibit 201).

6. Barbara Griebe

Barbara Griebe was a close personal friend and neighbor of Clarence. She met him after his wife died. (RP Vol. IV, Barbara Griebe, p. 72-73) Eventually she began making his breakfast, helping him with his medications and became his companion. (RP Vol. IV, Barbara Griebe, p. 72-73, Vol. II, p.122) One of Clarence's fears was that his son Gerald would put him in a home, so he obtained notes attesting to competency. (RP Vol. III, Barbara Griebe, p. 143)

7. Allen Key

Mr. Key was Clarence Munce's neighbor for about twenty years. (RP Def. Vol. VIII, A. Key, p. 5) He saw Mr. Munce frequently and

helped him work around his yard on many occasions. (RP Def. Vol. VIII, A. Key, p. 20) He testified that Clarence was even-tempered and mentally competent in June 2007 and June 2008. (RP Def. Vol. VIII, A. Key, p. 22-23) He also had agreed to purchase Clarence's guns just prior to them being taken by Gerald Munce. (RP Def. Vol. VIII, A. Key, p. 14-16)

B. The Events Of June 4, 2007.

The allegations in this case arise from an incident about one year prior to the shooting, on June 4, 2007. (CP 1-9) In 2007, Clarence Munce owned eight firearms. (Ex. 128) (RP Vol. IX Dennis Cline, p.31) These consisted of small Derringer, a .22 caliber revolver, a .22 caliber target pistol, a hunting rifle, a shotgun and two M-1 carbines. One of the carbines was an authentic World War II weapon; the other was a replica, described by witnesses as a "collectors items." (RP Vol. IX Dennis Cline, p. 162) These are the weapons that Dennis Cline had possession of for two to three weeks. (RP Vol. IX Dennis Cline, p. 170)⁴

Clarence Munce was very experienced with firearms. He had been a hunter and gun owner most of his life. He also suffered from a tremor in his hand most of his adult life, but this didn't prevent him from being a

⁴ Only three guns, the Derringer and the two carbines were found in the home by the police. There was no evidence as to what happened to the other five weapons. (RP Vol. I, Benson, p. 134, 141-142, 144-145) (RP Vol. IX Dennis Cline, p. 168)

hunter. (RP Vol. IX Dennis Cline, p. 75) Clarence believed he was entitled to own a firearm for protection. He was in the habit of keeping his Derringer in the pocket of his reclining chair and he kept one of the carbines by the front door, covered by an orange jacket. (RP Def. Vol. VIII, Alan Key, p. 14; Vol. IX Dennis Cline, p. 76) The other firearms were kept in a locked gun cabinet in the closet of the master bedroom of the house. (RP Vol. IX Dennis Cline, p. 75)

At the end of May, 2007, Clarence Munce was injured in a fall at his son's home. (RP Pl. Vol. IV, S. Rhone, p. 66-70) He was hospitalized for several days at the end of May 2007. The family thought he might die from his injuries. (Vol. VIII, K. Rickey, p. 63) While Clarence was in the hospital, Gerald removed the guns from his home. This included the eight guns discussed above plus a MAC 10 pistol. Gerald had given his father this pistol as security for a loan. (RP Vol. IX Dennis Cline, p. 31) On his return home, Mr. Munce noticed that the weapons had been removed from the gun case in his home and called the police to report a theft. Deputy Vicky (Kimbriel) Morrison was dispatched to Clarence Munce's residence on June 4, 2007.

Deputy Morrison spoke to Clarence Munce and determined that this was a family dispute, not a crime. She testified that she saw no evidence that Clarence was impaired mentally, that he was polite, knew

everyone, and seemed normal. (RP Vol. IV, Kimbriel-Morrison, p. 161) She testified that she saw no need to refer Mr. Munce for a mental health evaluation. He did not seem to present a risk of harm to himself or others. (RP Vol. IV, Kimbriel-Morrison, p. 148) The matter was resolved when Dennis Cline, who was aware Gerald had taken his father's firearms, interceded. He agreed to take the guns from Gerald and assist him in selling them, if that is what his uncle wanted. Clarence Munce expressed an interest in selling the guns and Dennis Cline agreed to assist him, by driving him to a gun store. This resolved the problem and Deputy Morrison took no further action. (RP Vol. IV, Kimbriel-Morrison, p. 161) Deputy Morrison called this a civil matter that was settled by a "family agreement."

There is no evidence that Mr. Cline promised, or gave his word to the Deputy that the guns would be sold. Deputy Morrison denied that this occurred. She did not expect anyone to call her if the guns were not sold, or if the deal changed. (RP Vol. IV, Kimbriel-Morrison, p.152, 154) She testified that she was not a "personal Deputy to anyone. (RP Vol. IV, Kimbriel-Morrison, p. 159-160)

Deputy Morrison called Gerald Munce on the same day. Her notes indicate that he told her: "Don't sell the Guns, I want the guns." Exhibit 37, (RP Vol. IV, Kimbriel-Morrison, p. 150-151). When Mr. Cline went

to pick up the guns, he confirmed that they were unloaded and took possession of them. Gerald Munce told him: "Those guns should be mine." (RP Vol. IX Dennis Cline, p. 199). This was not the first time selling the guns had been discussed. Mr. Key had discussed buying the guns from Clarence Munce, and Gerald Munce knew this. (RP Def. Vol. VIII, Alan Key, p. 14-17) Barbara Griebe and Mr. Munce had also discussed selling some of the guns, but they were delayed because she was ill. (RP Defendants Vol. II, B. Griebe, p. 103) A fair inference of the evidence is that Gerald did not take these guns for safety purposes. He wanted them for himself. According to Deputy Morrison, Clarence wanted anyone but Gerald to have the guns. (RP Vol. IV, Kimbriel-Morrison p. 125) This was a dispute about property, not safety.

Mr. Cline only had possession of the guns for two to three weeks. (RP Vol. IX Dennis Cline, p. 170) In those two to three weeks, he called his uncle to see if they could take the guns to the gun shop in Enumclaw, more than once. Eventually, his uncle began to demand the return of his property, saying he would sell them himself. (RP Vol. IX Dennis Cline, p. 170) At this point, Mr. Cline was tired of being caught in the middle of his cousin and his uncle. He testified he was "fed up with being in the middle of the fight..." and he decided to return the guns to Clarence Munce. (RP Vol. IX Dennis Cline, p. 197). He had no concerns about

Clarence owning or possessing guns. (RP Vol. IX Dennis Cline, p. 100, 180, 181) He informed Gerald that the guns were being returned. RP Vol. III Dennis Cline, p. 93-94) This ended Mr. Cline's involvement with the firearms. This was approximately one year before the shooting.

C. There Is No Evidence That Clarence Munce Was Incompetent In 2007.

Appellants' argument is that Dennis Cline should have known that Clarence Munce was incompetent on June 4, 2007. They based this argument on allegations, unsupported by admissible evidence, that Clarence was a violent, dangerous person his entire life. However, when pressed, witness after witness testified that they had never seen Clarence Munce be violent with anyone. After being educated on the concept of first hand knowledge, all of Plaintiff's witnesses admitted they had no first hand knowledge of Clarence Munce assaulting anyone or being violent with anyone. (RP Vol. III, K. Cavar, p. 125; Vol. IV, M. Cavar, p. 66, Vol. VIII, D. Cline, p.78; Vol. II, B.Griebe, p. 42; Def. Vol. VIII, Alan Key, p. 22; Vol. V., J. Rickey, p. 95-96, Vol. VIII, K. Rickey, p. 60; Def. Vol. II, B. Rhone, p. 52; Vol. III, S. Rhone, p. 59-60; Def. Vol. IV, J. Rohr, p. 44).

There is no admissible evidence in the record of Clarence Munce ever handling a firearm in an unsafe manner or of him ever threatening anyone with a firearm. All of Appellants witness were asked if they had

first hand knowledge of Clarence being unsafe with a gun or threatening anyone with a gun, and they all responded that they had no such knowledge. (RP Vol. III, K. Cavar, p. 125; Vol. IV, M. Cavar, p. 66; Def. Vol. VIII, Alan Key, p. 22; Vol. V., J. Rickey, p. 95-96, Vol. VIII, K. Rickey, p. 60; Def. Vol. II, B. Rhone, p. 52; Vol. III, S. Rhone, p. 59-60; Def. Vol. IV, J. Rohr, p. 44) Appellants' entire case was based on the theory that Clarence Munce was a dangerous person and not competent to handle guns, there is no admissible evidence in the record to support this allegation.

Plaintiff's other attempts to portray Clarence Munce as a dangerous, crazy individual were also unproven. One of the allegations was that he had spray painted the neighbors dogs. He did spray paint on the neighbors extremely aggressive Pit Bulls. Mr. Key explained that this was done to protect him from the dogs, while he assisting Clarence in moving a vehicle next to the neighbors' fence. When the dogs tried to attack him, Clarence used the spray paint, which was near at hand, to stop the attack. The dog's owner, Ms. Tolstad, did not witness the attack. (Def. Vol. VIII, Alan Key, p. 17-20)

There is expert medical evidence that conclusively rebuts any allegation that Clarence. Munce was incompetent. Mr. Munce had the same physician for many years. Ales Matzenauer, M.D. was Clarence

Munce's personal physician from 1992 to October 2007. (RP Defendant's Vol. III, Matzenauer, p. 8) He saw Mr. Munce frequently during that time, 10-12 times a year. He had diagnosed Clarence with early onset Alzheimer's Disease, primarily due to short term memory loss. He also testified that short term memory loss is common in patients in their 80's. (RP Defendant's Vol. III, Matzenauer, p. 85) On May 31, 2007, he received a telephone call from Gerald Munce, telling him that Clarence was acting irrationally. Dr. Matzenauer stated several times that Gerald's interest seemed to be gaining control of his father's finances, rather than a concern over his health. (RP Defendant's Vol. III, Matzenauer, pps. 58, 75 79, 90, 96-97) Dr. Matzenauer asked Mr. Munce to come into his office on June 4, 2007. He had a frank discussion with Clarence and conducted an examination. He testified that Clarence was acting "absolutely rationally" and that he saw no deterioration in his mental state or that he had moderate or severe Alzheimer's disease. (RP Defendant's Vol. III, Matzenauer, p. 88) He felt Clarence was competent, could live on his own and was able to handle his own affairs. He stated: "I put here I don't see any signs of worsening mental faculties at that time." (RP Defendant's Vol. III, Matzenauer, p. 60) Plaintiff's argument is that Mr. Cline should have diagnosed Clarence as incompetent, even though Clarence's physician thought he as absolutely rational.

Mr. Munce's neighbor, Alan Key, also disputed the Appellants attempts to portray Clarence Munce as an ogre. So did Mr. Cline and Ms. Griebe. The only witnesses who really tried to vilify Clarence were the Rhones. The jury apparently did not believe them.

D. There Is No Evidence of Mr. Cline being warned of Clarence Munce's allegedly dangerous propensities.

In order for Appellants to prove their negligent entrustment theory they must show that Mr. Munce had dangerous propensities and that Mr. Cline knew or should have known of them. Mr. Cline's was not part of the immediate family circle. He was not invited to family meetings, he was not part of discussions with Dr. Matzenaur in the 1990's. The letter about driving, received from Dr. Matzenauer, was not shown to Mr. Cline. In fact, it was not shown to anyone. (RP Def. Vol. II, B. Rhone, p. 98) The Rhones apparently kept it in a file and unearthed for use at this trial. Appellants attempted to show that Clarence was unstable by discussing carrying a plastic gun in his car and by a run-in he had with some juvenile delinquents at the nearby Fred Meyer. However, even if these events occurred, Mr. Cline did not learn of them until after the shooting. (RP Vol. IX Dennis Cline, p. 145) There is no evidence that Mr. Cline was privy to the various rumors about his uncle.

Mr. Cline knew that the Rhones did not get along with Clarence Munce. (RP Vol. IX Dennis Cline, p. 155) His only visit to the Rhone's home occurred just after his Aunt Wretha died at the end of February, 2003. Mr. Cline testified that the Rhones were always saying bad things about Clarence and that he gave these statements little weight. (RP Vol. IX Dennis Cline, p. 156) The Rhones also alleged that they spoke to Mr. Cline on two other occasions about Clarence Munce. The first time was allegedly at a meeting at their home in the summer of 2003, where they claimed to have told Mr. Cline all Clarence's problems. The second contact was alleged to be a telephone call on June 5, 2007, in which they claimed to have pleaded with Mr. Cline not to return the guns. (RP Defendant's Vol. Bill Rhone, p. 32-34; Vol. III, S. Rhone, p.24) Mr. Cline emphatically denied that either of these things ever occurred. (RP Vol. IX Dennis Cline, p. 58-59) The jury apparently believed Mr. Cline.

E. Benadryl Evidence

After the shooting, numerous photographs were taken of the Munce home. Among these was a picture of his table. Mr. Munce's phone, keys, notes and other personal items were on the table. Also on the table was a open box of Benadryl (Diphenhydramine Hydrochloride) (Exhibit 201). A copy of the photograph is Appendix 2. This is an

antihistamine. Mr. Munce lived alone and it was a fair inference that this was his medication.

Respondent called Sabina Maria von Preyss-Friedman, M.D., an expert in the diagnosis and treatment of dementia.. She was of the opinion that Clarence Munce was not suffering from early Alzheimer's Disease in 2007. She attributed his short-term memory loss to "a combination of multi-infarct and alcoholic dementia, and early, very early onset Alzheimer's." (RP Vol. V, Dr. Von Preyss, p. 88-89) She noted he had no language difficulties and he recognized everyone or other indicators of dementia. She had seen Dr. Matzenauer's notes. (RP Vol. V, Dr. Von Preys, p. 88-89) Dr. Von Preyss also discussed the effect of Benadryl on a person with mild cognitive dementia. Its use is not advisable because it interferes with brain function. She stated: "It often can cause acute or worse confusional states or cause a confusional state." (RP Vol. V, Dr. Von Preys, p. 106) If Mr. Munce were using it, he could have been in a state of confusion on the night of the shooting. This is different from Appellants' allegation that Mr. Munce shot his son because he suffered from a chronic condition, Alzheimer's Disease. It also supports the testimony that Mr. Munce was rational, calm and well grounded on June 4, 2007.

The record in this case contains no evidence that Mr. Munce was incompetent or dangerous in June 2007. There is also no evidence that supports the argument that Mr. Cline should have known Mr. Munce was a danger to anyone. Finally, the events of June 21, 2008 were not reasonably foreseeable a year earlier, when Clarence's guns were returned to him.

V. ARGUMENT

A. Standard of Review

Appellants' arguments in this matter revolve, to a large degree, on the instructions given, or not given, to the jury. Jury Instructions are sufficient if they allow both parties to argue the theory of their case, do not mislead the jury, and when read as a whole, properly advise the trier of fact of the applicable law. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 662 (1995). The failure to give a specific jury instruction is reviewed for an abuse of discretion. *Bulzomi v. Dept. of Labor & Industries*, 72 Wn. App. 522, 526, 864 P.2d 996 (1994). An abuse of discretion occurs when the trial court bases its decisions on untenable grounds or reasons or when the decision is manifestly unreasonable. *Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001). Appellants' proposed instructions on gratuitous undertaking were not supported by

substantial evidence. Instructions may only be given if supported by the evidence in the case and trial courts have wide discretion in this area. *Gammon v. Clark Equipment Company*, 104 Wn.2d 613, 616, 707 P.2d 685 (1985).

Trial court's also have wide discretion in evidentiary rulings and will only be overturned for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The appellate court should not substitute its opinions for that of the trial court, since the trial court is aware of the context of the entire trial. The decision whether or not to exclude evidence is also reviewed for an abuse of discretion.

The granting or denial of a motion to exclude certain evidence is addressed to the discretion of the trial court and should be reversed only in the event of abuse of discretion. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 91, 549 P.2d 483 (1976). A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). It is within the trial court's discretion to exclude evidence, the probative value of which is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). In this case, the Court, in denying Appellants repeated efforts to exclude evidence of Plaintiff's voluntary intoxication, was acting within its sound discretion, and no error was committed.

B. No Instruction On Gratuitous Undertaking Was Required.

Appellants spent a great deal of time and energy attempting to find a legal theory upon which to base their claims. The trial court instructed the jury on several of their theories, but not on those based on gratuitous undertaking. There was no evidence to support such a claim.

In order for a claim of negligence to succeed, certain elements must be proven. This is a negligence claim. In order to prove negligence, one must prove certain elements. All must be proven.

"In order to prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) injury; and (4) that the claimed breach was a proximate cause of the resulting injury." *Lauritzen*, 74 Wash.App. at 438, 874 P.2d 861 (citing *Hansen v. Friend*, 118 Wash.2d 476, 479, 824 P.2d 483 (1992); *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984)). The threshold determination in any negligence case, however, is whether the defendant owed a duty of care to the plaintiff. *Lauritzen*, 74 Wash.App. at 438, 874 P.2d 861. "Whether a defendant owes a duty of care to a plaintiff is a question of law." *Lauritzen*, 74 Wash.App. at 438, 874 P.2d 861 (citing *Hansen*, 118 Wash.2d at 479, 824 P.2d 483; *Pedroza*, 101 Wash.2d at 228, 677 P.2d 166). When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. *Lauritzen*, 74 Wash.App. at 438, 874 P.2d 861.

Webstad v Stortini, 83 Wn. App. 867, 865, 924 P.2d 940, (1996) *rev. denied* 131 Wn.2d 1016, 936 P.2d 301 (1997). The first element of this test is the existence of a duty to the plaintiff. There is no evidence that

Dennis Cline owed a duty to Gerald Munce. The appellants attempted to create one with this theory, but the facts do not support their attempt.

This theory is similar to the “rescue doctrine.” See: *Brown v. McPherson’s, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975) It is based to some degree on Restatement (Second) of Torts, § 324A (1965).⁵ That section of the restatement states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

In this case, two matters necessary for this theory are lacking. First, Mr. Cline was not rescuing anyone. He interceded to prevent Gerald Cline from being arrested. Gerald was in no danger. If any promise was made, it was to Clarence Munce, not Gerald. Second, the element of reliance is missing. Gerald Munce, the Rhones, the Rickey’s and the Cavars all knew, for almost a year, that these guns had been returned to Clarence. They were not relying on Dennis Cline to keep them safe.

⁵ That section of the Restatement has not been adopted in Washington. See: *Webstad v. Stortini*, 83 Wn. App. 857, 874, 924 P.2d 940 (1996), *rev. denied* 131 Wn.2d 1016 (1997)

In order for this doctrine to apply, there must be evidence that the defendant “voluntarily undertook a duty directly to Appellants.” *Burg v. Wilson & Shannon, Inc.*, 110 Wn. App. 798, 809, 43 P.3d 526 (2002). In the *Burg* case, the defendants were an engineering firm hired by the City of Seattle to investigate the stability of land where the plaintiff’s lived. They alleged that they should have been informed of all recommendations given to the City. The Court disagreed. The defendant made no promises to the landowners and they had not voluntarily undertaken any duty. The theory of gratuitous undertaking simply did not apply. *Burg, Supra*, at 809-811. The same is true here. There is no evidence that Mr. Cline ever voluntarily assumed a duty of protecting Gerald Munce from his father, or that he needed protection. He only agreed to assist Clarence in selling his guns, if that is what he wanted to do. He assumed no duty to anyone.

There is no evidence of anyone relying on Mr. Cline. This is essential to prove this theory. *Folsom v. Burger King*, 135 Wn. 2d. 658, 677, 958 p.2d 301 (1998). In *Estes v. Lloyd Hammerstad, Inc.*, 8 Wn. App. 22, 503 P.2d 1149 (1972), cited by Appellants, the Plaintiff’s relied on their real estate broker’s voluntary assumption of the job of putting their name on a fire insurance policy. When the house burned down, they discovered he had failed to do so. There is no evidence of reliance in this case.

It is undisputed that Dennis Cline only had these weapons for two to three weeks. It is also undisputed that Gerald and Appellants knew he had returned them. He informed his cousin of their return, and his cousin, in turn, told every other member of the family. There was nothing preventing Clarence from buying more guns, if that was his desire, or selling the ones he owned. At that point, Gerald was not relying on Dennis to do anything. Gerald Munce could have avoided danger by simply staying away from his father's home. Instead, he chose to go to his father's home on the night of June 21, 2008.

The trial court was acting within its sound discretion in refusing to instruct on this theory because of the absence of any evidence that the theory of gratuitous undertaking applied. This Court should affirm that decision.

C. Instruction 11.5 on Negligent Entrustment is a Correct Statement of the Law.

Appellants' negligent entrustment case was problematic in several ways. First, Mr. Cline did not "entrust" anything to his uncle. He simply returned his uncle's property. Second, Appellants' case was based on allegations that Clarence Munce was a dangerous, violent individual who had a history of threatening people with guns, but they had no proof to support these allegations. None of the Appellants' witnesses had any first

hand knowledge of Clarence Munce threatening anyone with a gun, handling a gun in an unsafe manner, or being violent. ER 602 requires witnesses to testify on personal knowledge, not just repeat rumors. Third, there was no evidence that Mr. Cline had been told of these alleged, and unproven, actions by Clarence Munce. Finally, foreseeability is a key element of negligent entrustment. *Mejia v. Erwin*, 45 Wn. App. 700, 705-706, 726 P.2d 1032 (1986). No reasonable person could have foreseen the events of June 21, 2008.

Appellants argument was that Mr. Cline should have known Clarence Munce was dangerous, based on an alleged history of violence. Instruction No. 11.5 recognizes this. It is based on the case of *Mejia v. Erwin, Supra* at 705. It is not dicta, and has been cited with approval in *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 925, 64 P.2d 280, (1982). In that case, the plaintiff's alleged that the defendant should not have assisted his son in renting a car, despite the fact that the adult son did not live with the defendants and the lack of any evidence that the defendants had knowledge of his reckless driving habits. It is exactly on point and the instruction is a correct statement of law.

Jury Instructions are sufficient if they allow both parties to argue the theory of their case, do not mislead the jury, and when read as a whole, properly advise the trier of fact of the applicable law. *Hue v. Farmboy*

Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 662 (1995). This instruction did not prevent Appellant's from arguing their case. Appellant's case was based on two foundations, past conduct and the allegation that Clarence Munce was incompetent. The past misconduct claim was based largely on the testimony of the Rhones. Both sides were allowed to argue their case. Apparently, the jury did not believe Appellants' witnesses.

The giving of Instruction 11.5 was not an abuse of discretion. It was an accurate statement of the law. This Court should affirm the decision of the trial court.

D. The Trial Court's Exclusion Of Prior Acts Of Bad Conduct, Based On Their Age, And Supported Only By Hearsay, Was Not Error.

The two incidents cited by Appellants, the "Federson" incident, and the "Baughn" incident were properly excluded as hearsay and pursuant to ER 402 and 403. The "Federson" incident was a family legend that Clarence Munce, sometime in the early 1990's had threatened to shoot a man who was flirting with his wife. This allegedly happened at party. None of appellant's witnesses had first hand knowledge of the incident, and like most family legends, it had probably grown with age. It had no relevance to Mr. Munce's condition June 4, 2007. It was simply

an attack on his character, based on hearsay. It was properly excluded under ER 402 and ER 403.

The “Baughn” incident also occurred in the distant past, probably in the 1980’s or 1990’s. This incident was not witnessed by any of Appellants’ witnesses. It also was not proof of anything, and certainly not relevant to the condition of Clarence Munce in 2007. Basically, the story was that Clarence had been away from home and, on his return, saw evidence that his home may have been burglarized in his absence. He went to investigate and took a weapon with him for protection. It turned out that there was not burglary, but Ms. Baughn, who was staying at the house was startled by Clarence Munce. Appellants characterize this as “gunplay”, but no shots were fired and no one was threatened with a weapon. It proves nothing. The Court was correct to exclude this as hearsay, pursuant to ER 803 and as not relevant or probative under ER 402, ER 403 and ER 404.

Evidentiary rulings are viewed under and abuse of discretion standard. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). Weighing the probative value of evidence against unfair prejudice or confusion, pursuant to ER 403 is within the trial court’s discretion. No abuse of that discretion occurred here. Mr. Cline’s third-hand knowledge of rumors and family legends from decades ago would not be relevant to

his state of mind when dealing with his uncle in 2007. The trial court's ruling should be affirmed.

E. The Trial Court Did Not Commit Error by Allowing evidence of Gerald Munce's Intoxication.

There is no real question that Gerald Munce was intoxicated on the night he was killed. He had a blood alcohol of 0.10. One of the affirmative defenses raised by the defense was the bar to recovery provided for in RCW 5.40.060.⁶ The use of alcohol was relevant in regard to this defense and the defense of comparative negligence. Appellants' entire case was based on painting a picture of Clarence Munce as a dangerous, violent man. It is therefore legitimate to ask why Gerald

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

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

Munce would go to his home in the middle of the night and confront him. One explanation would be that his judgment was impaired by voluntary intoxication. This was not a case about operating machinery or cars, it was a case about judgment, and that made the issue of alcohol relevant. The issue for the jury to decide would be whether the intoxication was a proximate cause of the incident and whether Gerald was more than 50% at fault. The jury did not reach the issue of proximate cause. The trial court also dismissed this defense and the jury never had to answer the question of proximate causation. It is a moot point.

The jury's decision that Mr. Cline was not negligent in June 2007, when he returned the guns to their owner. Gerald Munce was killed a year later. Gerald's intoxication in 2008 was not a factor in their decision about events in 2007. Appellant's argument that it was prejudicial is based entirely on speculation. There was no error by the trial court.

F. Impeachment By Showing Failure To Act.

Appellants make the argument that it was improper to point out to the jury that the actions of Appellants and their witnesses did not support their testimony in court. Kelley Cavar took her children to visit her grandfather a month before this shooting. This conduct impeaches any testimony about being fearful of a violent person. The argument that Mr.

Cline had a duty to “do something” about Clarence Munce, when Mr. Cline is not even a member of the immediate family, makes it legitimate to ask why nobody else in the family did anything. One answer is that Clarence Munce really was not as bad as Appellants portrayed. A witness may be impeached by pointing out their conduct is inconsistent with their statements. *State v. Huynh*, 107 Wn. App. 68, 26 P.3d 290 (2001). There conduct was probative evidence relating to the credibility of witnesses.

G. The Curative Instruction Regarding Bolldosser Cured Any Potential Error.

Appellants’ claim that exposing Mr. Bolldosser’s faults as tenant, such as being arrested at 2 AM for waving around a gun and being in possession of drugs and drug paraphernalia was misconduct. Mr. Bolldosser testified he was a good tenant and that Mr. Munce was crazy. Defendant was entitled to impeach Mr. Bolldosser, using the public record of his conduct while he was a tenant, his damage to Mr. Munce’s property, and his non-payment of rent. The impeachment was proper, as were the comments in closing.

ER 607 allows impeachment of any witness, and bias and motive of the witness are never collateral matters and impeachment may go into areas that would not necessarily be relevant to the issues in the case. *State*

v. *McDaniel*, 37 Wn. App. 768, 683 P.2d 231 (1984). When Mr. Boldosser testified that he was a good tenant and his troubles with Clarence Munce were because Clarence had dementia, he opened the door to questions his own conduct.

The Court's limiting instruction is presumed to cure any possible prejudice, and Appellants' have produced no evidence to rebut this presumption. In *Freeman v. Intalco Aluminum Corp.*, 15 Wn. App. 677, 552 P.2d 214 (1977), it was held that any improper argument was remedied by a curative instruction. The Court states, at 216:

We observe at the outset that the primary question presented by a motion for new trial is whether the losing party received a fair trial. *State v. Taylor*, 60 Wash.2d 32, 371 P.2d 617 (1962). In commenting on the deference to be given the trial judge, the court in *Baxter v. Greyhound Corp.*, 65 Wash.2d 421, 397 P.2d 857 (1964), stated at page 440, 397 P.2d at page 869

And, it is in this area of the new-trial field that the favored position of the trial judge and his sound discretion should be accorded the greatest deference, particularly when it involves the assessment of occurrences during the trial which cannot be made a part of the record, other than through the voice of the trial judge in stating reasons for the action taken.

Only when discretion is abused may an order granting or denying a new trial be reversed, *Olpinski v. Clement*, 73 Wash.2d 944, 442 P.2d 260 (1968), except when the grounds given by the trial court are based upon questions of law, *Detrick v. Garretson Packing Co.*, 73 Wash.2d 804, 812, 440 P.2d 834 (1968).

Mr. Boldosser's impeachment was richly deserved. He was not a credible witness and his cross-examination showed that his comments about Clarence Munce were untrue.

H. Questions Regarding Benadryl Were Relevant And Probative.

Clarence Munce lived alone. The Appellants' comment about the open package of Benadryl belonging to someone else is somewhat puzzling. Who else would it belong to? It was relevant because there was expert testimony by Dr. von Preyss that it could cause a state of acute confusion. Since Appellants' argument was that Mr. Munce suffered from Alzheimer's Disease and this is why he shot his son, the presence of other causative factors is certainly relevant.

I. There Were No Grounds For Granting A New Trial.

1) Criteria for granting a new trial.

The test for granting a Motion for a New Trial due to insufficient evidence, based on CR 59(a)(1), is the same standard for granting a Motion for Directed Verdict, under CR 50. These motions are granted only when there is no evidence, or reasonable inferences from the evidence that could sustain the verdict.

The issue before us is whether the trial court erred in denying appellants' motions for directed verdict and judgment n.o.v. A judgment n.o.v. is proper when, viewing the evidence and reasonable inferences therefrom most favorable to the nonmoving party, the court can say as a

matter of law that there is no substantial evidence supporting the verdict. [Citations omitted.] Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise. [Citations omitted.] A similar standard exists for directed verdicts.

Cowsert v. Crowley Maritime Corp., 101 Wn.2d 402, 680 P.2d 46 (1984).

A decision to grant a new trial for insufficient evidence may not be based on the Court's weighing of the credibility of witnesses or the evidence, since that is the exclusive province of the jury. *Johnson v. Washington Department of Labor & Industries*, 46 Wn.2d 463, 281 P.2d 994 (1955). Disagreement with the jury or with an expert does not justify the granting of a new trial. *McEwen v. Tucci & Sons, Inc.*, 71 Wn. 2d 539, 429 P.2d 879 (1967).

A Motion for a new trial, like a challenge to the evidence, or a directed verdict, admits the truth of the opponent's evidence and all inferences that can be reasonably drawn from the evidence and requires that the evidence be interpreted most strongly against the moving party. *Burnell v Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966).

Negligence is a jury question. The trial court may decide negligence as a question of law only under the following two rare circumstances: "(1) where "the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances," and (2) "where the facts are undisputed and but one reasonable inference can be

drawn from them.” If different minds might honestly reach different results, negligence is a question of fact for the jury. *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 426, 397 P.2d 857 (1964). When there is sufficient evidence to support the jury's decision, the trial court abuses its discretion if it grants a new trial for lack of substantial evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997).

As discussed above, there is ample evidence in this case to support the jury's finding. If the jury chose to believe the witnesses who testified that Mr. Munce was competent or appeared competent and that Dennis Cline was not negligent.. That is the jury's function. There was no basis for granting a new trial.

2) There was no misconduct.

Appellants' allegations of misconduct by defense counsel are baseless. They take issue with commenting on the lack of evidence in closing, yet it is undisputed that there was a complete lack of personal knowledge to prove Appellants' allegations about Mr. Munce. Not a single witness called by Appellants had any first hand knowledge of Mr. Munce misusing guns, threatening others with guns, or being violent. Appellants wanted to submit inadmissible evidence of rumors and family legends. ER 602 requires that witnesses have personal knowledge to testify. Witnesses usually cannot testify to things that occurred or did not

occur when they were not present. *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993). There is nothing improper about discussing a failure of proof. Jurors are instructed make their decisions based on admissible evidence. The comment that defense counsel "...exploited an erroneous evidentiary ruling..." (see Appellant's brief, p.50) is somewhat puzzling. Is Appellant arguing that counsel should ignore the Court's rulings on evidence? Discussing the evidence admitted in the case is proper. The jurors are instructed that such arguments are not evidence.

Appellant's other argument is that asking jurors to look at the actions and behavior of witnesses, when those actions impeach their testimony, is improper. Since Appellants' were alleging that Mr. Cline should have known that Mr. Munce was dangerous, and that he should somehow be responsible for events that occurred a year after he returned the guns, it is proper to ask the immediate family why they did nothing to meliorate this danger. Plaintiff Kelley Cavar took her family to visit Mr. Munce a month before the shooting. The inference that was suggested to the jury was that this conduct, or lack of it, could be the basis for an inference that Mr. Munce really was not dangerous. In other words, their conduct was more accurate than their testimony. There was no suggestion that they should shift the blame to any other party.

The Court's instructions specifically limited the allocation of any negligence between Clarence Munce and Mr. Cline. Since the jury found that Mr. Cline was not negligent, the issue of apportionment was never addressed. The Court also gave the standard instruction that that the arguments or statements of the lawyers were not evidence.

Jurors are presumed to follow the Court's instructions on the law. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 948 (2008). In order to reverse a jury verdict, the moving party must overcome the presumption that any alleged misconduct would not be cured by the instructions.

A jury verdict must be reversed only if there is a substantial likelihood that the alleged misconduct affected the jury's verdict. *Carnation Co., Inc. v. Hill*, 115 Wash.2d 184, 186, 796 P.2d 416 (1990). Again, a jury is presumed to follow an instruction directing it to disregard statements of counsel not supported by the law or evidence, and that presumption will prevail until it is overcome by a showing otherwise. *Nichols v. Lackie*, 58 Wash.App. 904, 907, 795 P.2d 722 (1990), *review den' d*, 116 Wash.2d 1024, 812 P.2d 103 (1991)

In this case, both sides were able to argue their theories of the case, based on the evidence admitted by the Court. There was no misconduct and Appellants have presented no evidence to support their claim.

V. CONCLUSION

There is no reversible error in this case. The rulings of the trial court on jury instructions and evidentiary questions are all well within the

trial court's discretion. Appellants completely failed to prove their negligent entrustment theory. They attempted to show that Clarence Munce was not competent and violent in 2007, even though not a single witness had any personal knowledge to support this claim. Their case was essentially assassination of the character of a man who was not able to defend himself in court. Appellants' case was based on rumor and innuendo. The jury chose not to believe these claims.

This accidental shooting happened in Clarence Munce's home. Gerald came to his father's home that night. Clarence Munce's 911 call, and the physical injuries he suffered are evidence that there was a physical confrontation in Clarence Munce's doorway. All of this is evidence to rebut the allegation that Clarence was a violent dangerous person. The jury could have found that he was simply defending himself in his own home. The jury did not have to decide proximate causation, and it cannot be assumed that they would find for Appellant on that issue.

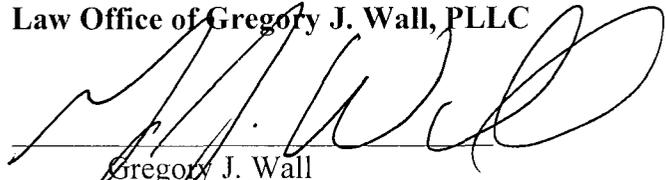
There was substantial evidence, both from lay and expert witnesses, that Clarence Munce was competent and had a right to his own property. There was some expert testimony to the contrary, but jurors are not bound by any expert's testimony. There was substantial evidence that Gerald Munce's reason for taking his father's property was not safekeeping, but a desire to own the guns. He told Deputy Morrision:

“Don’t sell the guns. I want the guns.” There was also substantial evidence that Clarence Munce was could be socially inept and rude and was starting to show signs of physical aging in 2008, but no evidence he was violent or incompetent. The function of the jury is to decide issue of fact. They are the sole judges of credibility. They found the Mr. Cline was not negligent.

The events in this case are tragic. But Dennis Cline’s attempt to be a peacemaker between father and son, which lasted two to three weeks, were simply not the cause of the shooting a year after the guns were returned. The tragic events of June 21, 2008 were not reasonably foreseeable. The Jury reached the correct decision. There was no error by the trial court. The verdict of the trial court and the jury should be affirmed.

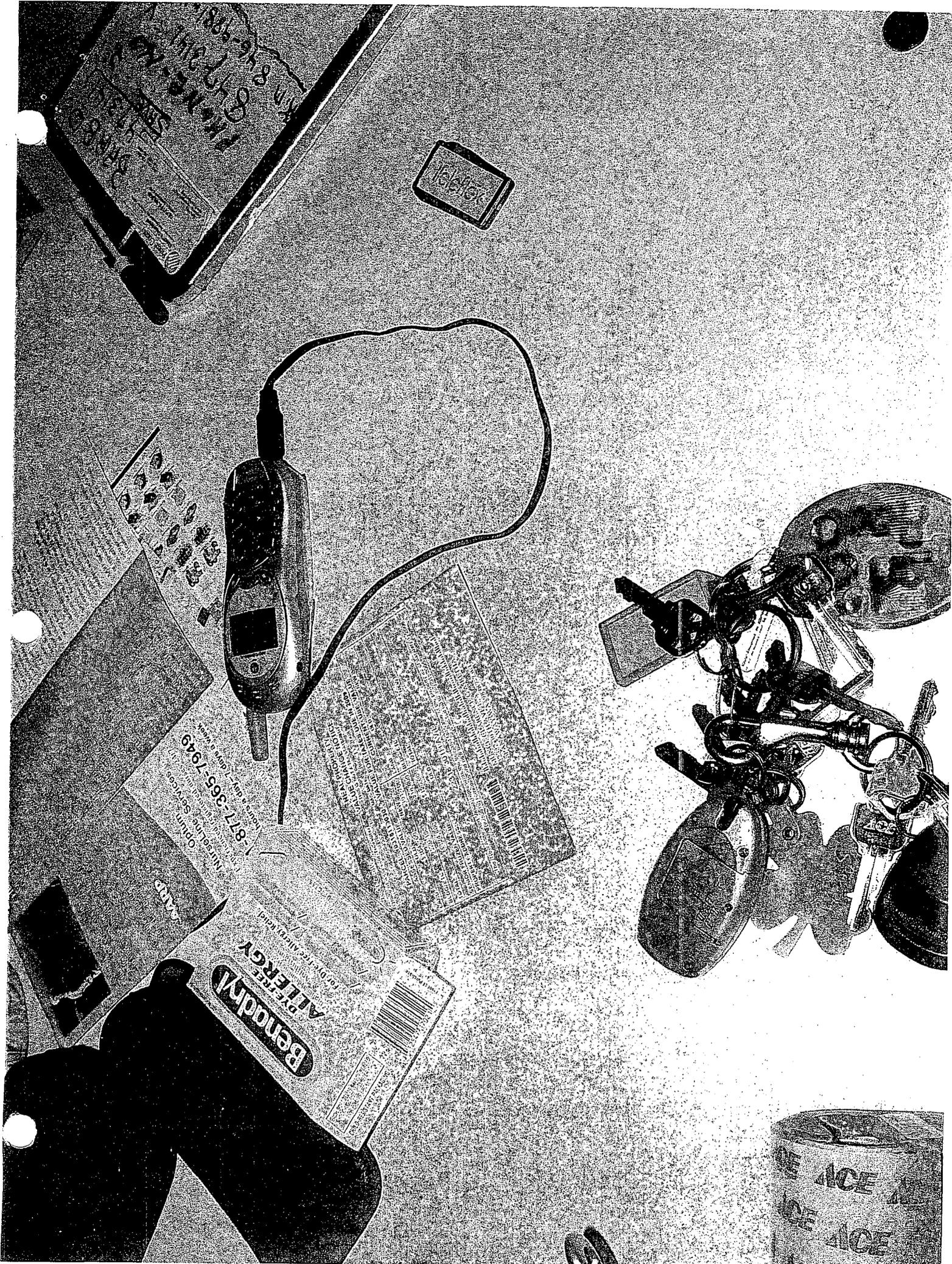
Respectfully submitted this 15th Day of January, 2015.

Law Office of Gregory J. Wall, PLLC



Gregory J. Wall
WSBA 8604
Attorney for Respondent
104 Tremont Street
Suite 200
Port Orchard, WA 98366
(360) 876-1214
gregwall@gjwlaw.com

Appendix – 1



Appendix - 2

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

KRISTY L. RICKEY and KELLEY R. CAVAR, Individually, and As Co-Executrixes of the Estate of Gerald Lee Munce, Deceased,)	
)	
Plaintiffs,)	NO. 08-2-10227-6
)	
vs.)	
)	
MICHAEL B. SMITH as Litigation Guardian Ad Litem for CLARENCE G. MUNCE,)	
)	
Defendant.)	

TRANSCRIPT OF AUDIO RECORDING
OF 911 CALL PLACED BY CLARENCE MUNCE

9:24 o'clock p.m.

June 21, 2008

REPORTED BY:
ALISON LOTT, CCR#2337

1 (The following was transcribed
 2 from an audio CD.)
 3 UNIDENTIFIED SPEAKER: This cassette tape
 4 is recorded from the master [unintelligible] recorder
 5 and leased to communications center by tape
 6 [unintelligible] Lee Severson. It records incident No.
 7 081731426, which was reported at 2124 hours on 6/21/08.
 8 911 OPERATOR: 911. What are you
 9 reporting?
 10 MR. MUNCE: I'm reporting I've just shot my
 11 son. Do you want me to get out here? This is Clarence
 12 Munce.
 13 911 OPERATOR: What's your -- what's your
 14 address?
 15 MR. MUNCE: 22322 -30th Avenue East
 16 [unintelligible].
 17 911 OPERATOR: Did you do it on purpose?
 18 MR. MUNCE: He broke in my house and hit
 19 me, I'm [unintelligible] -- bleeding like a stuck hog.
 20 I don't know whether I killed him or not. He's laying
 21 out here in the middle of the road.
 22 911 OPERATOR: You're in the middle of the
 23 road? He broke --
 24 MR. MUNCE: He's right here on 224th and
 25 33rd --

1 of the road, bleeding like a stuck hog.
 2 911 OPERATOR: Okay. Where did you shoot
 3 him? What part of the body?
 4 MR. MUNCE: No. I'm standing on the front
 5 porch naked. He broke into my house.
 6 911 OPERATOR: Okay, how did he get out to
 7 the middle of the street?
 8 MR. MUNCE: He run. He hit me with -- I'm
 9 bleeding like a stuck hog here myself.
 10 911 OPERATOR: What did he hit you with?
 11 MR. MUNCE: I don't know. He hit me with
 12 something. I'm bleeding, my arm here's bleeding. He's
 13 laying out in the road bleeding to death. He's probably
 14 dead.
 15 911 OPERATOR: Okay. And did you shoot him
 16 as he was running away?
 17 MR. MUNCE: Yeah, he was going
 18 [unintelligible] at me, I'm naked out here on the front
 19 porch. Just tell me you'll get an ambulance to come
 20 here, will you [unintelligible].
 21 911 OPERATOR: Okay, Clarence? Clarence?
 22 MR. MUNCE: Yeah.
 23 911 OPERATOR: We've got the ambulance and
 24 the police on the way, okay?
 25 MR. MUNCE: He's out in the middle of the

1 911 OPERATOR: Okay, sir, I'm going to get
 2 you over to medical aid. What did you do with the gun?
 3 MR. MUNCE: [Unintelligible] Get the cops
 4 out here right now.
 5 911 OPERATOR: I'm going to get the cops
 6 [unintelligible].
 7 MR. MUNCE: [Unintelligible] in the middle
 8 of the road right now.
 9 911 OPERATOR: Okay, all right. Hang on
 10 just a moment, sir.
 11 (Brief pause.)
 12 911 OPERATOR: Okay, sir, you said your
 13 son's in the middle of the road?
 14 MR. MUNCE: Yeah, I think he's dead.
 15 911 OPERATOR: Okay. I thought you told me
 16 he broke into your house.
 17 MR. MUNCE: He did. I'm standing here
 18 [unintelligible]. Will you get somebody out here?
 19 911 OPERATOR: Okay, Clarence, I know
 20 you're upset. The call is in for dispatch
 21 [unintelligible].
 22 MR. MUNCE: [Unintelligible] 30th Avenue
 23 East. [Unintelligible].
 24 911 OPERATOR: Okay. Listen, Clarence?
 25 MR. MUNCE: He's laying right in the middle

1 road.
 2 911 OPERATOR: I know. I know. We're
 3 going to get somebody out there, okay? Stay on the
 4 line.
 5 MR. MUNCE: I think he's dead.
 6 911 OPERATOR: Clarence, I need you to put
 7 the gun away, though.
 8 MR. MUNCE: Don't worry about me, I'm
 9 worried about my --
 10 911 OPERATOR: I know you are. Where --
 11 where is the gun?
 12 MR. MUNCE: I said don't worry about no God
 13 dang gun. It's [unintelligible] in the house.
 14 911 OPERATOR: Clarence, here's the thing.
 15 I don't want the officers to --
 16 MR. MUNCE: [Unintelligible] I'm standing
 17 out here bare-assed naked. I was in bed sleeping when
 18 he pounded, butting my door.
 19 911 OPERATOR: Okay. He kicked in the
 20 door?
 21 MR. MUNCE: Yeah, you got to get somebody
 22 here right now.
 23 911 OPERATOR: Okay.
 24 MR. MUNCE: He's bleeding to death out in
 25 the middle of the road.

1 911 OPERATOR: I know, they're on their
 2 way, Clarence. Is the gun inside or outside?
 3 MR. MUNCE: It's outside up against the
 4 wall. I don't know.
 5 911 OPERATOR: Okay, but you don't have it
 6 in your hand?
 7 MR. MUNCE: No, I don't have it -- I was in
 8 bed sleeping when he started breaking my door down.
 9 911 OPERATOR: Okay. Okay. All right.
 10 And how old is your son?
 11 MR. MUNCE: Oh, he's 53 or 56. I don't --
 12 911 OPERATOR: Okay. Was he high or on
 13 drugs?
 14 MR. MUNCE: Yeah, he was out here cussing
 15 me out, beating on my door, and all like that.
 16 911 OPERATOR: Are you in an apartment
 17 complex?
 18 MR. MUNCE: I'm in a home here, a log cabin
 19 right here at 224th.
 20 911 OPERATOR: It says here 23 -- 22322
 21 30th Avenue.
 22 MR. MUNCE: 22322 -30th Avenue.
 23 911 OPERATOR: 30th Avenue. Okay. And so,
 24 it's not an apartment, correct?
 25 MR. MUNCE: Yeah, it's a log cabin right

1 around the corner from the County Shop.
 2 911 OPERATOR: And he's out in the middle
 3 of 30th Avenue?
 4 MR. MUNCE: He's laying right in my front
 5 door here, dead, bleeding to death. Get somebody here,
 6 for Christ's sake.
 7 911 OPERATOR: All right, so he's at your
 8 front door?
 9 MR. MUNCE: He's laying out in the street
 10 now.
 11 911 OPERATOR: Has he moved out there, in
 12 the road?
 13 MR. MUNCE: He's bleeding to death on the
 14 road. [Unintelligible] in the middle of the road. He's
 15 probably dead.
 16 911 OPERATOR: All right. Clarence?
 17 Clarence, I need to know -- take a big deep breath. Is
 18 he out in the middle of 30th Avenue or is he --
 19 MR. MUNCE: He's out my driveway.
 20 911 OPERATOR: Okay, he's in the driveway.
 21 Okay.
 22 MR. MUNCE: He's out here at 224th and 30th
 23 Avenue. Right across from the County Shop, Pierce
 24 County Shop.
 25 911 OPERATOR: Okay. All right. Okay.

1 MR. MUNCE: He's out there bleeding all
 2 over the God damn road.
 3 911 OPERATOR: I know, Clarence, I know,
 4 stay on the line with me, please. Okay? The
 5 officers --
 6 MR. MUNCE: I think he's dead.
 7 911 OPERATOR: Okay. Everybody's on their
 8 way. I know you're upset, just try to stay calm, okay?
 9 MR. MUNCE: I think I killed him, but I
 10 ain't going to go out and find out.
 11 911 OPERATOR: No, no, no. I want you to
 12 stay right where you are.
 13 MR. MUNCE: He's bleeding all over down the
 14 highway.
 15 911 OPERATOR: I know. It's okay,
 16 Clarence. Are you all right?
 17 MR. MUNCE: Yeah, I'm all right. I'm
 18 standing here in my shorts on my front porch.
 19 911 OPERATOR: Okay.
 20 MR. MUNCE: He come breaking in my house
 21 and throwing shit at me.
 22 911 OPERATOR: Okay. Is he on drugs, and
 23 that's why he did it, do you know?
 24 MR. MUNCE: I don't know. He's probably
 25 been up at the Exchange Tavern, he's probably drunk.

1 911 OPERATOR: Okay. Has he ever done this
 2 before?
 3 MR. MUNCE: Yeah, he -- me and him have
 4 been fighting for a long time.
 5 911 OPERATOR: Okay.
 6 MR. MUNCE: He's waiting for me to die.
 7 I'm 81 years old and he wants everything I got.
 8 911 OPERATOR: Okay. All right. Just --
 9 and just stay put, okay?
 10 MR. MUNCE: He's bleeding like a stuck hog
 11 all over the road.
 12 911 OPERATOR: I know. I know, Clarence.
 13 MR. MUNCE: I'm sure he's dead.
 14 911 OPERATOR: Okay. Clarence, do you see
 15 the officers coming?
 16 MR. MUNCE: No, I don't. I'm standing on
 17 my front porch in my shorts.
 18 911 OPERATOR: Okay.
 19 MR. MUNCE: I was in bed sleeping when he
 20 come beating on my door.
 21 911 OPERATOR: I know. I know. You told
 22 me what happened. He kind of startled you, you didn't
 23 know it was him, did you?
 24 MR. MUNCE: No, I [unintelligible] the hell
 25 out of me, he threw something at me, that's probably

1 [unintelligible] front porch.
 2 911 OPERATOR: Okay. But are you okay
 3 where he -- where he hit you with it?
 4 MR. MUNCE: Well, my arm's bleeding, but I
 5 ain't going to die from it. But he's dead, laying out
 6 here in the middle of the street.
 7 911 OPERATOR: All right. Okay. Stay with
 8 me, okay? The officers will be there shortly.
 9 MR. MUNCE: I hope so, because it's --
 10 911 OPERATOR: I know. I know. Clarence,
 11 can you tell me --
 12 MR. MUNCE: I'm on the porch naked in my
 13 shorts here. He come pounding on my door.
 14 911 OPERATOR: I know. Clarence, is your
 15 rifle leaning up against the wall of the house?
 16 MR. MUNCE: Yeah, it's in the house, I
 17 think. I don't know.
 18 911 OPERATOR: Okay.
 19 MR. MUNCE: I laid it down.
 20 911 OPERATOR: Okay.
 21 MR. MUNCE: It's in the house, I think.
 22 911 OPERATOR: Okay. All righty. And just
 23 wait till -- do you see the officers coming yet?
 24 MR. MUNCE: No, I don't see nobody coming.
 25 [Unintelligible] on the porch, sounding out in my shorts

1 911 OPERATOR: He's pretty upset. I'll get
 2 him to put it down.
 3 MR. MUNCE: Jesus Christ, keep your fucking
 4 head, will you? My son's bleeding to death in the God
 5 damned street. Help him out. Jesus Christ, I've been
 6 trying to get ahold of you on the telephone. I know how
 7 to cooperate, man. He's bleeding to death. Do
 8 something.
 9 (Unintelligible voices.)
 10 911 OPERATOR: It's in the house, he
 11 thinks.
 12 MR. MUNCE: He's laying in the street
 13 bleeding to death, you dumb cock suckers.
 14 (Unintelligible voices and
 15 noise.)
 16 911 OPERATOR: He does not have the gun.
 17 (Unintelligible voices.)
 18 MR. MUNCE: Do something for Christ's sake.
 19 MALE SPEAKER: Don't stand there with the
 20 [unintelligible].
 21 FEMALE VOICE: Let me know who he's talking
 22 to.
 23 911 OPERATOR: All right.
 24 MR. MUNCE: Woke me up and hit me with
 25 something. He's probably dead. I just called you on

1 and he's dead out in the street.
 2 911 OPERATOR: I know. I know.
 3 MR. MUNCE: He got me in the arm there,
 4 with something. I don't know what the hell he did,
 5 but -- but he's dead. He's laying out in the middle of
 6 the road, and the blood's running down the road, so
 7 evidently --
 8 911 OPERATOR: Okay.
 9 MR. MUNCE: -- I got him with the first
 10 shot. I didn't mean to hit him.
 11 911 OPERATOR: I know. I know.
 12 MR. MUNCE: But he's dead. I don't know.
 13 I'm standing on my porch in my shorts, and he's laying
 14 out --
 15 FEMALE SPEAKER: Is it Clarence on the
 16 phone?
 17 (Unintelligible voices.)
 18 FEMALE SPEAKER: Hello, Clarence, can you
 19 hear me?
 20 MR. MUNCE: Yeah, I'm here. I'm talking on
 21 the phone.
 22 FEMALE SPEAKER: Clarence, put the phone
 23 down.
 24 MR. MUNCE: [Unintelligible] in my shorts.
 25 (Unintelligible voices.)

1 the God damn phone.
 2 (Beeping.)
 3 (Unintelligible voices and
 4 noise.)
 5 MR. MUNCE: God damn it. You got to do
 6 something. Do something.
 7 911 OPERATOR: I know. Sounds like they
 8 have -- [unintelligible].
 9 (Unintelligible voices and
 10 noise.)
 11 911 OPERATOR: Clarence?
 12 (Unintelligible voices and
 13 noise.)
 14 MR. MUNCE: He threw something at me.
 15 [Unintelligible] hit me with something.
 16 (Beeping.)
 17 MR. MUNCE: Check him, will you, see if
 18 he's dead or not? [Unintelligible]. Jesus Christ.
 19 (Unintelligible voices and
 20 noise.)
 21 MR. MUNCE: No, just me. I was in bed.
 22 And he comes and knocks at my fucking door. Nobody's in
 23 there, just me, I was in bed sleeping for Christ's sake.
 24 (Unintelligible voices.)
 25 (Dial tone.)

1 (Background noise.)
 2 (Phone ringing.)
 3 FEMALE VOICE: Hi, this is Jennifer at
 4 [unintelligible]. We have a shooting at 22322 -30th
 5 Avenue East.
 6 FEMALE VOICE: You're saying 2322 --
 7 FEMALE VOICE: 30th Avenue East. He's
 8 saying his son's been shot. We're trying to get an age
 9 and where.
 10 FEMALE VOICE: Okay.
 11 (Unintelligible voices.)
 12 FEMALE VOICE: She's checking.
 13 (Unintelligible voices.)
 14 FEMALE VOICE: I think he's in the parking
 15 lot, and --
 16 (Voices in background.)
 17 FEMALE VOICE: Okay. That's 22322
 18 30 Avenue East, correct?
 19 FEMALE VOICE: 30th Avenue, yes.
 20 FEMALE VOICE: Okay. We're doing
 21 [unintelligible] make sure I'm getting it right. Just
 22 hold on a second.
 23 FEMALE VOICE: Okay. He's --
 24 (Beeping and background noise.)
 25 FEMALE VOICE: Hello?

1 CERTIFICATE
 2
 3 STATE OF WASHINGTON)
) ss.
 4 COUNTY OF KING)
 5
 6 I, Alison Lott, Notary Public in and for the State of
 7 Washington, do hereby certify:
 8 That the annexed and foregoing hearing was taken
 9 stenographically by me from an audio CD supplied by the law
 10 firm of McGaughey, Bridges, Dunlap, and reduced to typewriting
 11 under my direction;
 12 I further certify that I am in no way related to any
 13 party to the cause of action concerned, nor to any of counsel,
 14 nor do I have a financial interest in the event of the cause;
 15 I further certify that the hearing as transcribed is
 16 a full, true and correct transcript of the recording to the
 17 best of my ability;
 18 IN WITNESS WHEREOF, I have hereunto set my hand and
 19 affixed my Official Seal this 19th day of October, 2009.
 20
 21
 22
 23
 24
 25 Notary Public in and for the State
 of Washington, residing at Edmonds.
 My Commission expires 1/15/11.

1 FEMALE VOICE: Hi. I guess he -- this
 2 started out as a domestic. He also assaulted his
 3 father, so the father has injuries and he's bleeding,
 4 unknown where. We don't have an age yet, and I guess
 5 this is a house, and he's out in the middle of the road,
 6 the son is.
 7 FEMALE VOICE: Is this one patient?
 8 FEMALE VOICE: Two patients. The son was
 9 the one that was stabbed.
 10 FEMALE VOICE: [Unintelligible] shooting
 11 FEMALE VOICE: I'm sorry, the son is the
 12 one that was shot, and the father was hit by the son
 13 with some sort of object.
 14 FEMALE VOICE: One's shot, he's in the
 15 roadway, and one's hit by an object.
 16 FEMALE VOICE: Right. And now they're
 17 saying here it's a log cabin around the corner from The
 18 County Shop. And we have units arriving as we speak.
 19 FEMALE VOICE: Okay.
 20 FEMALE VOICE: All right?
 21 FEMALE VOICE: Thanks.
 22 FEMALE VOICE: Thank you, bye-bye.
 23 (This ends the audio recording.)
 24
 25

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

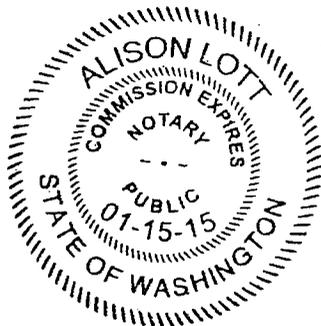
I, Alison Lott, Notary Public in and for the State of Washington, do hereby certify:

That the annexed and foregoing transcript of 911 phone call was reported stenographically by me from an audio CD provided by the law firm of McGaughey, Bridges, Dunlap, and reduced to typewriting under my direction;

I further certify that I am in no way related to any party to the cause of action concerned, nor to any of counsel, nor do I have a financial interest in the event of the cause;

I further certify that the hearing as transcribed is, to the best of my ability, a full, true and correct transcript of the proceedings;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal this 12th day of February, 2013.



Alison Lott

Notary Public in and for the State of Washington, residing at Edmonds. My Commission expires 1/15/15.

Appendix - 3

Telephone: (253) 473-7303

DEA #BM 1822154

ALES MATZENAUER, M.D.

7511 Custer Rd. W.

Lakewood, WA 98499

Name Clarence Munce Date 10/30/07

Address DOB: 2/25/27

R

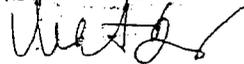
To whom it may concern:

This will confirm Clarence Munce
has been my patient since 1992.

In my opinion Mr. Munce is capable
of making sound decisions. Mr.
Munce is capable of taking care
of his financial matters.

Label

Refill - 0 - 1 - 2 / 3 - 4 - PRN



M.D.

M.D.

Substitution Permitted

Dispense As Written

0136
AM

MAILED

7-25-05

Telephone: (253) 473-7303

DEA #BM 1822154

ALES MATZENAUER, M.D.

7511 Custer Rd. W.

Lakewood, WA 98499

Name Clarence Munce Date 7/25/2005

Address DOB: 2/25/27

R

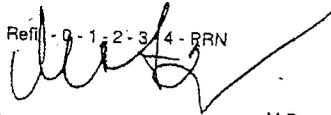
To whom it may concern:

This will confirm Clarence Munce has been my patient since April 1992.

In my opinion Mr. Munce is capable of making sound decisions.

Label

Refill - 0 - 1 - 2 - 3 - 4 - PRN



Substitution Permitted

M.D.

Dispense As Written

M.D.

to pt: 6/22/06

Telephone: (253) 478-7303

DEA #BM 1822164

ALES MATZENAUER, M.D.

7511 Ouster Rd. W.

Lakewood, WA 98499

Name Clarence Munce

Date 6/22/06

Address DOR: 7/25/27

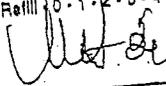
R To whom it may concern:

This will confirm Clarence Munce
is my patient since April 1992.

In my opinion Mr. Munce is capable
of making sound decisions.

Label

Refill 0-1-2-3-4 PRN



Substitution Permitted

M.D.

Dispense As Written

M.D.

Appendix -4

TIME		DISP.
•	<p>Geary asked about THE GUNS → DONT SELL THE GUNS. I WANT THE GUNS</p>	
-	<p>BASED VAN GUN DEALERS HAD HIM SELL.</p>	
-	<p>WENT - 5/30/07 - EE -</p>	
	<p>1000 pm gotta the Van</p>	
	<p>left behind red car</p>	
(O)	<p>GRIEBE, BARBARA J 2-8-41</p>	
	<p>w/r</p>	
	<p>22016 22nd Ave E.</p>	
	<p>Spokane WA.</p>	
	<p>(253) 847-3141</p>	

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 AM 9:18
STATE OF WASHINGTON
BY C
DEPUTY

THE COURT OF APPEALS, DIVISION II
OF THE
STATE OF WASHINGTON

KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,

Plaintiffs/Appellants,

vs

DENNIS CLINE and "JANE DOE" CLINE,
individually, and the marital community
comprised thereof,

Defendants/Respondents.

CERTIFICATE OF SERVICE

Court of Appeals No. 4588730-11

The undersigned certifies that on the 15th day of January 2015, she caused a copy of
the following documents:

1. Brief Of Respondent;
2. and this Certificate of Service

to be served on the parties listed below by the method(s) indicated:

Party/Counsel	Additional Information	Method of Service
Court of Appeals of the State of Washington Division II Attn: Christina, Case Mgr. 950 Broadway, Suite 300, MS TB-06 Tacoma, WA 98402-4454	Venue of Appeal Ph: 253-593-2970 Fax: 253-593-2806 Email: coa2filings@courts.wa.gov	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input type="checkbox"/> Court of Appeals, E-file Notification
Ben Barcus Paul Lindenmuth Law Offices of Ben F. Barcus & Associates, P.L.L.C 4303 Ruston Way Tacoma, WA 98402	Counsel for Plaintiff WSBA #15576 WSBA#15817 Ph: 253-752-4444 Fax: 253-752-1035	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input type="checkbox"/> Pierce Co. E-file Notification <input type="checkbox"/> Email Notification-cc: Paul, Heather and Marilyn

I, certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

Dated at Port Orchard, Washington.



 SANDRA RIVAS
 Legal Assistant