

No. 92675-1

bjh

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Petitioner,

v.

STATE OF WASHINGTON and WASHINGTON
STATE PATROL,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On the evening of August 22, 2009, Deborah Peralta went to a party with friends. When she was ready to leave, she called her brother to come pick her up. She waited for him on a nearby street. Her brother drove up and down the street, but did not see her. Frustrated, he called her on her cell phone and told her step into the roadway where she would be more visible. She complied, but, it turns out, her brother was not driving on the street where she was standing. But unfortunately, a state trooper, Ryan Tanner, was, and Tanner was coming on fast, without any emergency lights or sirens, and according to four eyewitnesses, without his headlights on either. He ran into Peralta, causing severe and permanent injuries, including permanent brain damage.

Peralta brought this action against the Washington State Patrol (WSP), alleging that its trooper, Tanner, was negligent. WSP asserted RCW 5.40.060's intoxication defense. That defense requires proof that the plaintiff was under the influence as defined by RCW 46.61.502. For purposes of the latter statute – and, hence, for purposes of the former statute too – it is not enough simply to be under the influence of alcohol *to any extent*. A person must have either a certain blood-alcohol concentration within two hours of driving or alcohol has impaired the person's ability to act to an appreciable degree. RCW 46.61.502(1)(a) and (c).

At trial, the trial court instructed the jury that plaintiff had admitted that she was under the influence for purposes of RCW 5.40.060's intoxication defense. But plaintiff was only asked to admit that, at the time of the accident, she was "under the influence of intoxicating liquors." She was not asked to admit that, at that time, she was under the influence of intoxicants *within the meaning of RCW 5.40.060* or *to the extent described in RCW 46.61.502*. Accordingly, her response to that request – "plaintiff admits" – does not constitute an admission that she was under the influence *to that extent*.

The jury then found that Tanner was negligent, that Peralta was too, and that her share of the combined negligence was greater than his. The jury also found that her injuries were caused in part by her being under influence. Finally, the jury found that Peralta had suffered \$1,261,000 in damages. The court then entered a judgment dismissing the complaint, based on RCW 5.40.060, which provides a complete defense to an injury action if the plaintiff was legally intoxicated at the time of the injury, as defined by RCW 46.61.502, that her negligence was more than fifty percent of the combined fault, and that intoxication was a cause of the injury.

The Court of Appeals reversed, finding a variety of errors, including that the trial court erred in treating Peralta's response as an

admission that she was under the influence for RCW 5.40.060 purposes and thus preventing her from disputing the intoxication element of that defense. *Peralta v. State of Washington*, 191 Wn. App. 931, 366 P.3d 45 (2015). This court granted WSP's cross-petition for review to determine whether the trial court correctly interpreted Peralta's admission. *Peralta v. State of Washington*, 185 Wn.2d 1027, 2016 WL 3101581, at *1 (2016).

II. STATEMENT OF THE CASE

On June 30, 2011, more than two years prior to trial, WSP submitted requests for admission to Peralta, to which she responded as follows:

REQUEST FOR ADMISSION 2:

Admit or deny that, at the time of the collision that is the subject of this lawsuit, Deborah Peralta was under the influence of intoxicating liquors.

RESPONSE:

Plaintiff admits.

REQUEST FOR ADMISSION 18:

Admit or deny a serum blood test performed on August 22, 2009 at 23:20 hours established that Deborah Peralta had a blood alcohol concentration at that time of 0.167 grams per deciliter.

RESPONSE:

Deny.

CP 72. Peralta was also asked to admit that her judgment was impaired

due to her alcohol consumption, to which she objected. CP 74.¹

Peralta admitted that she was under the influence of alcohol at the time of the collision because she had consumed alcohol beforehand, and intended by her answer to admit consumption, not intoxication. 1 RP 78-79. She denied that the test of her blood after the accident established a blood alcohol concentration of 0.167 grams per deciliter – an amount that would satisfy the legal standard for intoxication under RCW 46.61.502 and thus under RCW 5.40.060 (more on that later) – because that was a serum measurement, not a whole blood measurement.

There is a meaningful difference. The concentration of alcohol in serum is usually much higher than that for whole blood. Proof of intoxication under RCW 46.61.502 requires a whole blood alcohol measurement. And converting a serum measurement to a whole blood measurement is far from an exact science. 5B RP 1234-35.

Peralta assumed that WSP did not know about the difference between a serum measurement and a whole blood alcohol measurement. So in answer to an interrogatory, she explained that serum alcohol concentration is not equal to, nor calculated in the same way as, blood alcohol concentration. CP 80. She also explained to WSP that there is no linear correlation between the two measurements, and no accepted

¹ Full set of Plaintiff's Responses are at CP 71-77.

conversion ratio. Finally, she provided WSP with a copy of the forensic test of 200 subjects showing that the conversion rates ranged by factor of one half to more than one and a half. CP 80. As it turns out, WSP's toxicologist relied on the same forensic test to form his opinion that Peralta's serum measurement likely reflected whole blood alcohol concentration of .11 percent. He acknowledged, however, that converting serum measurements to a whole blood measurements is an inexact procedure. 5B RP 1234-35. He also conceded that in the small sample size that he relied upon for his conversion calculation, the conversion ratios were all over the board, varying from .08 to 1.7. 5B RP 1235.

On March 28, 2012, WSP served Peralta with a follow-up request for admission that her serum alcohol measurements were accurate. CP 43-46. But the tests to determine alcohol concentrations in serum are not as rigorous as those for admissible whole blood tests.² Accordingly, Peralta hired Dr. William Brady, former Medical Examiner for the State of Oregon, as a consulting expert to determine whether the serum test of Peralta's blood was reliable. 1 RP 27. He concluded that it was not:

This note confirms my serious concern about this specimen collection and transmission. An error here clearly challenges the reliability of the laboratory testing that establishes Ms. Peralta's alcohol level.

² The serum blood draw also did not comply with the safeguards required by RCW 46.61.506 and WAC 448-14-020.

CP 302.

Relying on Dr. Brady's opinion, Peralta denied WSP's request to admit that the serum-test result was an accurate measurement of the amount of alcohol in Peralta's blood. When WSP sought the basis for that denial, Peralta asserted the work-product privilege for consulting experts. CP 44, 53-54. WSP filed a motion to compel disclosure, and Peralta responded that Dr. Brady's report was work product under *Mothershead v. Adams* 32 Wn. App. 325, 327-28, 647 P.2d 525 (1982). The trial court granted the WSP's motion, ordered Peralta to disclose the report and sanctioned her for failing to disclose the information by prohibiting Peralta from calling an alcohol expert at trial. CP 106-07.

As to plaintiff's response that she had admitted to consuming alcohol on the night of the collision, after plaintiff responded, she never heard anything more about the admission – that is until more than two years later, on the eve of trial.

WSP's pre-trial motions in limine included a motion requesting that the court rule that Peralta's response to WSP's request for admission "conclusively established" that she was under the influence of alcohol within the meaning of the intoxication defense in RCW 5.40.060, as the motion stated in relevant:

"It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this

condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault.” RCW 5.40.060 . . . Given her admissions, the first element of this defense is conclusively established. CR 36(b). The court should preclude Plaintiff from offering any evidence, argument or comment that indicates or suggests that she was not under the influence of alcohol at the time of her collision.

CP 117 (quotations in original).

This was Peralta’s first notice that WSP had interpreted her discovery response as an admission of intoxication under RCW 5.40.060.³ If WSP believed that Peralta’s response had conclusively resolved this major issue in the case, the proper procedure would have been to move for summary judgment, instead of springing it in a motion in limine on the eve of trial. At least then, Peralta would have been given a fair and full opportunity to be heard.

Peralta opposed the motion, arguing that there is a difference between being under the influence of alcohol and being under the influence for purposes of the statute, which, she explained, requires being under the influence to the extent that it affects a person’s “ability to act” to “an appreciable degree.”

MR. JACOBS: We’re not trying to withdraw that admission that we were under the influence of alcohol at the time, but it’s a different standard under the statute. If you have any alcohol in your

³ Moreover, given that WSP had named a toxicologist as an expert for the purposes of testifying to Peralta’s level of intoxication, Peralta had deposed the toxicologist on his opinions, and he was listed on WSP’s trial witness list, Peralta fully expected that whether Peralta was legally under the influence was still an issue in dispute.

system, whether you're a .02 or .04, you are under the influence. You can't answer that question no if you have any alcohol in your system. . . .

The question [in the request for admissions] didn't say, were you under the influence of alcohol as defined by 46.61.502. It didn't say, were you legally intoxicated. It just says whether you're under the influence, which we admit. We can't deny that, that's going to come in, but we still feel the State has to prove that we were legally intoxicated. And if you look at the statute it refers to the DWI statute, 46.61.502. . . .

But if you look at the WPIC, the DWI Pattern instruction, it talks about the definition of what that means, to be under the influence of alcohol. And it says that – this is 92.10 WPIC – a person is under the influence or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree. And it talks about the fact that even though you consumed alcohol, it's not illegal to drive. . . .

And so you have to show not just that they're under the influence, but they were legally under the influence as defined by that statute. And the case law we've had for 40 years in this state talk about you have to show that their ability to operate a motor vehicle – I realize she was a pedestrian, but that's the statute we refer to was lessened to an appreciable degree.

So we can't truthfully ethically answer a question, were you under the influence, if we have *any alcohol in our system as no*. We have to say yes, but they still could prove that we're legally intoxicated and that's what this is all about, so that's our position.

1 RP 78-79 (emphasis added) (bracketed language added for context).

The trial court granted WSP's motion, ruling that Peralta's response to the request for admission conclusively established that she was intoxicated for purposes of the defense in RCW 5.40.060:

I believe that she ought to be bound by her admission that she's under the influence, but it's up to the jury to determine . . .

[w]hether it was proximate cause of the injuries, number one, and also was it at least – was it over 50 percent.

1 RP 82-83.

The trial court reiterated its ruling after the defense rested and while the parties were discussing instructions:

I believe as a matter of law based upon the response to the CR 36 request for admissions, that that issue has been conclusively established in this case. That the Plaintiff admitted being under the influence of intoxicating liquor at the time of the collision. That's my ruling.

8A RP 1723.

The court incorporated its ruling into the jury instructions on the intoxication defense in RCW 5.40.060. It told the jurors that plaintiff had admitted the under-the-influence element of that defense:

To establish the defense that the person injured was under the influence, the Defendant has the burden of proving each of the following propositions:

First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. *Plaintiff admits this element.*

CP 363 (Instr. 20) (emphasis added). Peralta took exception. 8RP 1722.

WSP claims in its petition for review, that Peralta opposed introducing her response into evidence. WSP's Response and Cross Petition at 19, n. 10. That is untrue. What she opposed was introducing it as an admission that she was not just "under the influence," but under the

influence within the meaning of RCW 5.40.060.¹

III. ARGUMENT

A. Standard of Review

This appeal requires this court to determine, first, what “under the influence” means in RCW 5.40.060. The interpretation of a statute is a question of law that this court reviews de novo, without deference to the trial court’s decision. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 726, 153 P.3d 846 (2007). The Court must then interpret Peralta’s response to

¹ **THE COURT:** *So you’re objecting to their offer or their request for the admissibility of the CR 36 admission?*

MR. JACOBS: *We’re not.*

THE COURT: Oh.

MR. JACOBS: We’re going to admit to the jury that we were under the influence, but he still could prove that was enough under the influence to rise to the level of a criminal conviction, which is required.

So what we’re afraid of is and that’s why we wanted to put the word legally in the advance oral instruction – What we’re afraid of in the *voir dire* the State saying the Court has already established that they were legally intoxicated and, you know, we’ve already conclusively established that by Court rule. That’s what we’re afraid of. We still think they have to put on proof that her influence of alcohol at the time was enough to convict her under this 46.61.502.

1 RP 80. (Emphasis added) *See also* 8 RP 1673 (“MR. JACOBS: And our position hasn’t changed. We intend that it was a factual admission. We admit we’re under the influence, but not legally under the influence, although Your Honor thought that meant that. But that wasn’t our intention, so that’s been our position all along.”).

The portion of the record that WSP cites in its Petition only reflects that WSP did not understand how the jury would be informed about the trial court’s ruling. But both Peralta’s counsel and the court explained to WSP that the jury is told in the instructions, which WSP eventually understood. 8 RP at 1673-80. Later, the court and parties worked together to craft an instruction that reflected the court’s ruling. 1720-26. For convenience, the both discussions are attached in full at App. 1-15.

the request for admission in light of that interpretation of RCW 5.40.060. That, too, is subject to de novo review. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

B. What “Under the Influence” Means in RCW 5.40.060

RCW 5.40.060(1) provides a “complete defense” to an action for injury or death if “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,” if that “condition was a proximate cause of the injury or death,” and if “the trier of fact finds such person to have been more than fifty percent at fault.” The statute goes on to provide that “[t]hat 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,” which prohibits driving while under the influence of intoxicating liquor, marijuana, or other drugs.

RCW 46.61.502 describes two situations in which a person drives while under the influence of intoxicating liquor (as opposed to marijuana or other drugs). Paragraph (1)(a) says that a person is “under the influence” if “the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood.” Paragraph (1)(c) says that a person is “under the influence” if the person “is under the influence of or affected by intoxicating liquor.”

Paragraph (1)(c) is not as tautological as it might appear on first reading. That is because this court has construed that provision to require influence sufficient to impair the ability to act to “an appreciable degree,” *see, e.g., State v. Engstrom*, 79 Wn.2d 469, 474-75, 487 P.2d 205, 209 (1971), and that construction of the statute, like any other, becomes a part of the statute as if it were there from its enactment. *State v. Cronin*, 142 Wn.2d 568, 590, 14 P.3d 752 (2000); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997); *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725 (1982).

The “appreciable degree” standard under RCW 46.61.502 is long-established and undisputed. *See, e.g., State v. Hurd*, 5 Wn.2d 308, 315, 105 P.2d 59 (1940) (The phrase “under the influence of intoxicating liquor” * * * has been defined as *any influence which lessens in any appreciable degree the ability of the accused to handle his automobile.*) (Interpreting predecessor statute, italics in original); *see also State v. Arndt*, 179 Wn. App. 373, 386, 320 P.3d 104 (2014) (“[A] person is under the influence of or affected by the use of intoxicating liquor [as defined by RCW 46.51.502] if the person’s *ability to drive* a motor vehicle is *lessened in any appreciable degree.*”) (citations omitted) (emphasis added); *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995) (“We hold, however, that RCW 46.61.502 is violated if the evidence is sufficient for

the factfinder to infer that the *ability to handle an automobile was lessened in an appreciable degree* by the consumption of intoxicants or drugs.”) (emphasis added). Accordingly, the same standard should apply to the intoxication defense in RCW 5.40.060, which, as noted, incorporates that standard. In other words, for purposes of that defense, a person is “under the influence” if the person has a blood-alcohol concentration over 0.08 or the person’s abilities to act is impaired to any “appreciable degree.”

Washington Pattern Instruction 16.04, drafted for use when a defense is raised under RCW 5.40.060(1), makes that point clear:

A person is under the influence of [alcohol] [or] [any drug] if, as a result of using [alcohol] [or] [any drug], the person’s *ability to act* as a reasonably careful person under the same or similar circumstances is *lessened in any appreciable degree*.

(Emphasis added.)

WSP’s argument to the contrary – that a person is under the influence for purposes of RCW 46.61.502(1)(c) and RCW 5.40.060 if the person is under the influence to *any* extent – is contrary to these statutes. If that were true, then a person who had consumed *any* alcohol would be strictly liable and guilty of driving while under the influence, because a person with *any* alcohol in the person’s blood would be under the influence of alcohol to *some* extent.

In sum, this court should conclude that, as used in RCW 5.40.060, a person is “under the influence” if the person’s ability to act as a

reasonably careful person under the circumstances is impaired to any appreciable degree.²

C. What Peralta Admitted (and Did not Admit)

Peralta admitted what WSP asked her to admit in the first request for admission discussed above – no more and no less. And what WSP asked her to admit was “that, at the time of the collision that is the subject of this lawsuit, [she] was under the influence of intoxicating liquors.” CP 72. She was not asked to admit that, at the time of the collision, she was so influenced by alcohol as to be impaired to an appreciable degree in her ability to act as a reasonably careful person, which, as explained above, is one test for being under the influence within the meaning of RCW 46.61.502 and, hence, under RCW 5.40.060 as well. Nor was she asked to admit that, at that time, she had a blood alcohol concentration of 0.08 or

² WSP may argue to this court that Peralta has waived her argument about the proper interpretation of the under-the-influence element of RCW 5.40.060 because she did not request a jury instruction consistent with that interpretation. At least, that is what WSP argued to the Court of Appeals. *See* WSP’s Response Brief at 24, n 12. But it is not true. Not only did Peralta request that the trial court give WPI 16.04, quoted in the text above, but the trial court actually gave it, as Instruction 21. CP 364, 8B RP 1881. Unfortunately, the instruction did Peralta little good because it followed Instruction 20, which told the jury that Peralta had already admitted she was under the influence for purposes of this defense. Indeed, Instruction 21, coming after Instruction 20, made things worse for Peralta. Instruction 21 told the jurors that a person is under the influence of alcohol if, as a result of using the alcohol, the person’s ability to act as a reasonably careful person is appreciably impaired. Because the jurors were told, by Instruction 20, that Peralta admitted to being under the influence, the jurors must have concluded, after hearing Instruction 21 that she admitted to not acting as a reasonably careful person. And not acting that way, they were told earlier, in Instruction 6, constitutes negligence. Thus, the “admission” in Instruction 20, when combined with the other instructions, told the jurors that Peralta admitted she was negligent, one of the issues in the case.

higher, which is another test for being under the influence under RCW 46.61.502 and RCW 5.40.060. Because she did not admit those things, she should not be deemed to have admitted those things, or deemed to admit anything that she was not asked.

She was asked, in a separate request, to admit that a “a serum blood test performed on August 22, 2009[,] at 23:20 hours established that Deborah Peralta had a blood alcohol concentration at that time of 0.167 grams per deciliter.” But Peralta *denied* that request and thus did not admit anything under it.

In the end, then, Peralta admitted only that she was under the influence to some extent at the time of the accident. She did not admit that she was under the influence to the extent required to prove a crime under RCW 46.61.502 and a defense under RCW 5.40.060. If that is what WSP wanted Peralta to admit, then it should have asked her to admit that – in words that are clear and precise. Alternatively, it should have asked her to admit the facts that establish the crime or defense, which, as explained above, are a blood-alcohol concentration above 0.08 or impairment to an appreciable degree. If WSP had done that, then at least, Peralta would have been on notice that WSP had wanted her to concede both a legal conclusion and factual matter that is central to the lawsuit, something that she was not obligated to do under CR 36:

The purpose of CR 36 requests for admission is to eliminate from controversy factual matters that will not be disputed at trial. *To that extent, a party is not required to concede either factual matters central to the lawsuit or legal conclusions.*

Thompson v. King Feed & Nutrition Serv., 153 Wn.2d 447, 473, 105 P.3d 378 (2005) (emphasis added.).

Alternatively, had she known that was what WSP was asking, although not obligated to do so, she could have responded by admitting so much of the request as was true and denying the rest. In other words, she could have admitted that she was under the influence, because she had consumed some alcohol, but not that she was under the influence to the extent contemplated by RCW 46.61.502 and RCW 5.40.060.

But it was not Peralta's burden to figure out what WSP really wanted to know and then admit or deny it unasked. Likewise, it was not Peralta's burden to explain her admission – to clarify what she is and is not admitting, for example, that she was “under the influence” at the time of the accident, but not to the extent required under whatever unmentioned statutes might interest WSP. To the contrary, the burden was on WSP to craft requests for admission that clearly asked what WSP wanted to know.

D. The Trial Court Misapplied Peralta's Admission

CR 36(b) describes the effect of an admission in response to a request: “Any matter admitted under this rule is conclusively established.” Matters conclusively established do not need to be tried; no evidence is

required to prove them, and none is allowed to dispute them. On top of that, conclusively-established facts can be presented to the jury through instructions. In this case, then, WSP did not have to prove, and Peralta was not entitled to disprove, what she had admitted. WSP was also entitled to an instruction that Peralta had admitted what she had admitted.³

But the trial court gave WSP more than that. Peralta admitted only that she was under the influence of alcohol at the time of the accident. She did not admit that she was under the influence to the extent required to prove the intoxication defense in RCW 5.40.060 – that she had a blood-alcohol concentration over 0.08 or that her ability to act as a reasonably careful person was impaired to an appreciable degree. Even so, the trial court proceeded as if she had admitted that she was under the influence to that extent. It denied her the opportunity to present evidence to the

³ To be sure, Peralta does not concede that her response to WSP's request for admissions was ambiguous. But even it was, meaning it was susceptible to two plausible interpretations, the trial court still erred treating it as if WSP's interpretation is correct. The trial court should not have chosen one interpretation over the other, but instead received the admission into evidence and then allowed each party to argue to the jury for its interpretation. It is no different than any other ambiguous statement by a party before trial, whether in a pleading, a deposition, an affidavit, or a contract. The trial court does not resolve the ambiguity itself; that is the jury's job. Instead, the court receives the statement and lets the parties argue to the jury about what it means. Ambiguous responses to requests for admissions should be treated the same way. They are in federal courts, which have a discovery rule, FRCP 36, that is similar to CR 36. *See, e.g., Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1210 (8th Cir. 1995) ("The conclusive effect envisioned by the [federal] rule may not be appropriate where requests for admissions or the responses to them are subject to more than one interpretation."); *Coca-Cola Bottling Company of Shreveport, Inc. v. Coca-Cola Co.*, 988 F.2d 414, 425 (3rd Cir.) (applying de novo review to affirm trial court decision admitting responses as "mere evidence" rather than treating them as conclusive), *cert. denied*, 126 L. Ed. 2d 239, 114 S. Ct. 289 (1993). If it comes to this, this court should follow that authority.

contrary and, worse, it instructed the jury that she had admitted the under-the-influence element of WSP's RCW 5.040.060 defense, thus relieving WSP of the burden of proving it.

These errors "tainted the entire trial," because the jury was told that Peralta was legally intoxicated, as required by RCW 5.040.060. *Peralta*, 191 Wn. App. at 948-49. She "had evidence," the court explained, "through a witness, Christian Price, that she did not see Peralta consume alcohol, and that Peralta did not seem drunk," but "the trial court did not allow her to present this evidence to the jury." *Id.* at 949. That ruling alone was prejudicial enough to warrant a new trial, because this testimony, if the jury was allowed to consider it, could have persuaded the jury that Peralta was not legally intoxicated.

In the Court of Appeals, WSP argued that the trial court's errors were harmless because there was no evidence to support a finding by the jury that Peralta was not under the influence to the extent RCW 5.40.060 requires. *See* Respondent's Brief 27-29. That argument overlooks the fact that, misinterpreting Peralta's admission, the trial court denied her the opportunity to present evidence in support of that finding. It also overlooks the fact that, notwithstanding the trial court's rulings, the record still contains some evidence that Peralta was not "under the influence." Diana White, who was with Peralta until Christina Price picked her up to go to

the party, testified that she saw Peralta have just one beer and drink only half of it. 4B RP 918. Price herself testified that when she picked Peralta up to go to the party, she did not appear intoxicated. 4A RP 800. She also testified that she did not observe Peralta drinking alcohol while she was at the party. *Id.* This evidence is more than sufficient to support a finding that Peralta was not impaired to an appreciable degree and thus not under the influence for RCW 5.40.060 purposes.

In sum, the trial court misinterpreted Peralta's response to WSP's request for admission. She admitted being under the influence, but not under the influence to the extent required by intoxication defense in RCW 5.40.060. As a result of that misinterpretation, the trial court denied Peralta the opportunity to present evidence on that issue, and instructed the jury that that element of the defense was conceded, two rulings that were prejudicial and require reversal.

E. Scope of the Remand

If this court agrees with the Court of Appeals that the trial court misinterpreted Peralta's admission and that the error was harmful, then it should remand the case to the trial court for a new trial on the issues of Peralta's negligence and comparative fault. There is no reason to disturb the prior findings that Trooper Tanner was negligent, that his negligence caused injury to Peralta, and that she had suffered \$511,000 in economic

damages and \$750,000 in noneconomic damages. The jury was properly instructed on those issues – neither party contends otherwise – and the verdict form contained separate questions on them. The errors discussed above affected only the issues whether Peralta was at fault and, if so, how her fault compared to Tanner’s. Accordingly, those are the only issues that need to be retried. *See Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707-08, 710 P.2d 184 (1985) (limiting trial on remand to issue of liability when jury was properly instructed on the issue of damages and the verdict form addressed the issues separately).

If this court concludes that the trial court did not error in interpreting Peralta’s admission, or that the trial court erred but the error was harmless, then the scope of the remand becomes a little more complicated, because of the other prejudicial errors identified by the Court of Appeals: (1) excluding the testimony of two WSP employees without first ruling on whether they were speaking agents for WSP, *see Peralta*, 191 Wn. App. at 951-52; (2) excluding as hearsay certain eyewitness statements about the trooper’s headlights, *see id.* at 952-53; and (3) compelling Peralta to disclose her consulting expert and his report and sanctioning her for failing to do so. *See id.* at 953-54.

The court can remand to the Court of Appeals to determine whether these errors were prejudicial, or do as requested by WSP, and

make that decision. If the court does make that decision and finds that these errors were not harmless (more on that in the next section of this brief), then it should remand the case to the trial court for a new trial, but limited again to the issues of Peralta's negligence and comparative fault.

On the other hand, if the court concludes that these errors were harmless then the court should remand this case to the Court of Appeals to address, in the first instance, the assignments of error that it did not need to address in its prior opinion. *See id.* at 936 ("We do not reach the remaining issues.")⁴

In the event of a remand to the trial court because of the other errors, Peralta should be entitled to withdraw or amend her response to the request for admissions to clarify what she originally intended. CR 36(b) permits a party to withdraw or amend a response "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining an action or defense on the merits." The purpose of the rule is to simplify cases for trial by identifying facts not in dispute. It is not a vehicle for tripping up parties -- getting them to admit by mistake "facts" they did not intend to admit. Clearly, Peralta did not intend to admit that she was legally intoxicated

⁴ See Peralta's Opening Brief in the Court of Appeals.

within the meaning of RCW 5.40.060, a central issue in the case, and there is no reason to hold her to that admission if the case comes back for retrial. WSP would suffer no prejudice, if Peralta were allowed to withdraw or amend her response, because it would have ample time to prepare to try the intoxication issue.

CONCLUSION

This court should affirm the Court of Appeals and remand the case to the trial court for a new trial on the issues of Peralta's negligence and comparative fault.

s/ Michael H. Bloom
Michael H. Bloom
Donald L. Jacobs
Attorneys for Petitioner

APPENDIX

1 court that withdrawal or amendment will prejudice him in
2 maintaining his action or defense on merits. Any
3 admission made by a party under this rule is for the
4 purposes of the pending action only and is not an
5 admission by him for any other purpose, nor may it be used
6 against him in any other proceeding.

7 MR. PUZ: Right. 26(h) is the one that actually talks
8 about -- the party filing discovery materials on order of
9 the court or for use in the proceeding or trial shall file
10 only those portions upon which the party relies and may
11 file a copy in lieu of the original. So that's the part I
12 was getting at. I understand what the request for
13 admissions rule says. It's just how do we get that in
14 front of the jury?

15 And this is what I was seeing -- what I was reading was
16 the correct way to move that in front of the Court, and
17 that's why we brought the motion pretrial. We had the
18 attachment with the request for admission itself and when
19 that -- there was an objection to the form of that, so
20 what I did is, I simply paraphrased it which, again, this
21 rule allows for, and I just need to have that into
22 evidence pursuant to the rule.

23 MR. JACOBS: And our position hasn't changed. We
24 intend that it was a factual admission. We admit we're
25 under the influence, but not legally under the influence,

1 although Your Honor thought that meant that. But that
2 wasn't our intention, so that's been our position all
3 along. But I have a suggestion, Your Honor. I mean,
4 under the issues instruction, 21 oh three, is typically
5 where you would find something like that. You know, the
6 Defendant -- or the Plaintiff claimed (inaudible)
7 Defendant denies that, the Defendant claims why and the
8 Plaintiff admits that, and that's where it should probably
9 go.

10 THE COURT: So you're saying it should be taken up in
11 the jury instructions as opposed to substantive evidence?

12 MR. JACOBS: Correct.

13 THE COURT: And that was my concern. I thought I heard
14 you say, Mr. Puz, that there was a rule or statute which
15 set forth the proceeding, which was to mark and offer a
16 certain exhibit as to a request for admission. I'm still
17 waiting --

18 MR. PUZ: That's what I was sharing with you, that's
19 what I was reading.

20 THE COURT: And it's your read of --

21 MR. PUZ: 26(h).

22 THE COURT: -- 26(h) -- that's how you interpret 26(h)?

23 MR. PUZ: That's actually what -- I mean, I did a
24 little bit of research on it and that's exactly how they
25 laid it out in Washington Practice, and that's how they

1 laid it out that was needed to be done. I mean, the point
2 of it is obviously --

3 THE COURT: Well, I understand that. Just procedurally
4 it's something new to me.

5 MR. PUZ: It was to me, too, Judge, and that's why I
6 looked it up.

7 THE COURT: Do you have a citation to Washington
8 Practice that I could look at -- is it some of the rules
9 practice, or what would I -- Washington Practice, while
10 not necessarily legal authority, could be persuasive
11 authority to this Court.

12 MR. PUZ: No. I mean, what I did was, I got this
13 from -- I got this from that secondary source and I cited
14 the rule that they sent me to. And the rule -- party
15 filing discovery materials on order of the court or for
16 use in a proceeding or trial shall file only those
17 portions. I mean, that seems to be right on point to me.

18 THE COURT: Well, that's to file within the court file.

19 MR. PUZ: That's what I'm trying to do. I mean, what
20 my whole point is, is that it's --

21 THE COURT: Well, you're allowed to file it in the
22 court file, yeah.

23 MR. PUZ: I get it, but one of the things that I have
24 to do is, I need to make my record. This is a factual --
25 this is a factual determination. It's conclusively

1 established fact and in order for that to be a part of the
2 record, that fact has to be admitted into evidence, it has
3 to be before the Court. Otherwise, if somebody else
4 reviews this later, there's not going to be that factual
5 admission that's going to be in the record.

6 THE COURT: Well, it'll be in the record in the court
7 file. I'm certainly allowing you to file it with the
8 court file.

9 MR. PUZ: Right. And the other piece is that because
10 it is a fact and because it is conclusively established,
11 my goal is to get it to the jury. So the way that you do
12 that is, you have the conclusively established fact and
13 that is admitted into evidence and that goes to the jury,
14 and then the Court instructs the jury as to how they're
15 supposed to be considering it. That's the way that plays
16 out.

17 THE COURT: Well, if you're correct about that, Mr.
18 Puz, then we would have to admit the complaint, for
19 example. In other words, the Court's going to give
20 instructions to the jury and the Court has every
21 inclination of instructing the jury that the Defendant
22 admitted she was intoxicated. So that's going to be there
23 in a jury instruction, I assure you, because I think
24 that's an appropriate use of an admission under CR 36.

25 It frames the issues and you should be able to take the

1 benefit of having conducted that discovery and gained the
2 admission, which you did. So I'm going to allow you to do
3 that. But again, it's a --

4 MR. PUZ: Okay.

5 THE COURT: -- it's a fine legal point and I apologize
6 if I'm not getting it, but it's something with which I'm
7 just not familiar and so (inaudible) --

8 MR. PUZ: I'm happy with that, Judge, and I know that
9 we're going to take care of it and I know that we've been
10 around the block on this a couple times, and I don't want
11 to waste any more time on it.

12 THE COURT: No, go ahead.

13 MR. PUZ: I just wanted to make sure that the record is
14 clear that I've submitted this both as an attachment to my
15 motion and asked that it be admitted, and that was an
16 exact replica of the request for admission, and then I've
17 also summarized it, made an Exhibit 232 and I've also
18 offered that. If I can just get the Court's ruling on
19 that for the record, then we can move on.

20 THE COURT: Okay. Well, let me first find out. Were
21 the request for admissions or the responses to the request
22 for admissions filed with the court file as of this
23 time -- have they ever been filed with the Court? I know
24 sometimes parties -- some attorneys file discovery
25 requests with the court file, most attorneys just do that

1 outside unless and until there's a discovery motion. But
2 in theory, you can file that stuff with the court file.

3 MR. PUZ: I filed it with my motion, Judge.

4 THE COURT: Okay.

5 MR. PUZ: I filed a copy with that particular one with
6 my motion.

7 THE COURT: So it's included. Does the Plaintiff agree
8 as to the substance of what was requested under his CR 36
9 request for admissions and as to the substance of what the
10 response to that was?

11 MR. JACOBS: Well, our position has not changed.

12 THE COURT: I understand the interpretation may be the
13 subject of an issue, but do you agree as to the letter of
14 what was propounded --

15 MR. JACOBS: Correct.

16 THE COURT: -- and the letter of what was responded?

17 MR. JACOBS: We admit we were under the influence, I
18 think, was how it was --

19 MR. PUZ: Not we (inaudible).

20 MR. BLOOM: We did file it, too, Judge. We filed our
21 response in the court file.

22 MR. JACOBS: That wasn't the wording, though. Admit
23 you're under the influence or admit you're intoxicated, I
24 can't recall.

25 MR. PUZ: Under the influence of intoxicating liquors.

1 MR. JACOBS: Is that what it said?

2 MR. PUZ: Yes.

3 MR. JACOBS: All right. (Inaudible) --

4 MR. PUZ: Well, it's in the motion. I submitted a copy
5 of it.

6 THE COURT: Okay.

7 MR. JACOBS: That's what the request for admission
8 says, then we admitted that's the language (inaudible).

9 THE COURT: Okay. So we're on record. This is CR
10 2(a). We have a record now that there was an appropriate
11 and timely request for admission made under CR 36. Can
12 you recite, Mr. Puz, the substance of the request for
13 admission -- do you have that in front of you?

14 MR. PUZ: I do. I keep putting it away because I think
15 we're moving on. Request for Admission Number 2 reads,
16 admit or deny that at the time of the collision that is
17 the subject of this lawsuit, Deborah Peralta was under the
18 influence of intoxicating liquors. Response: Plaintiff
19 admits.

20 THE COURT: All right. And Plaintiff concedes that
21 that is a correct recitation?

22 MR. JACOBS: I trust Mr. Puz to read.

23 THE COURT: All right. So we've made a record there
24 that that was specifically requested as a legal issue in
25 this case, that there was an admission. So I think now

1 the issues are properly framed for the jury and I intend
2 to instruct them to include the fruits basically of the
3 admission thereby obtained. So again, we get back to this
4 question whether the admission itself can be offered as
5 substantive testimony. I believe you impeached Ms.
6 Peralta -- or you cross-examined her using that, did you
7 not, Mr. Puz?

8 MR. PUZ: Did not. Again, because I didn't want to
9 raise the I wasn't really that intoxicated and she had no
10 memory of the event anyway, so.

11 MR. JACOBS: I used it on direct, though.

12 MR. PUZ: But he did raise it on direct.

13 MR. JACOBS: And you read it to --

14 THE COURT: Yeah, I mean, it's certain --

15 MR. JACOBS: -- statement of the case, it was read to
16 the --

17 THE COURT: Yeah. Okay. You know, I'm comfortable
18 that we are covered, both on the testimony that's been
19 elicited, as well as procedurally under CR 36. So I think
20 the appropriate thing to do is to deal with it in jury
21 instructions. And I appreciate your argument. If I'm
22 wrong on this, I'm going to apologize in advance because
23 I'm --

24 MR. PUZ: No, it's okay. It's a difficult -- I mean,
25 it's a different thing.

1 happy to reconsider it before we actually read them to
2 them, okay? All right. So now we get to the more
3 challenging ones here that we momentarily punted.

4 MR. JACOBS: I just got this one from Rhonda. Did you
5 get yours?

6 MR. PUZ: Yeah.

7 MR. JACOBS: That looks fine to us.

8 THE COURT: That's the one that everybody agreed upon
9 in advance --

10 MR. JACOBS: Yeah.

11 THE COURT: -- so that should be okay. That's in the
12 set. And let's not worry about sequencing now. I will
13 work on sequencing --

14 MR. JACOBS: Okay.

15 THE COURT: -- later today or before tomorrow morning
16 in a pretty standard and logical sequence. So we're just
17 talking about substance here.

18 MR. PUZ: So are we going to hit the alcohol ones?

19 THE COURT: Might as well. Let's go right to it.

20 MR. PUZ: Judge, and just context so we're looking at
21 these things and keeping it in mind, this actually also, I
22 think, involves the special verdict form. Because there's
23 three elements to the defense and at least what I saw,
24 both parties were struggling with trying to come up with a
25 verdict form that incorporated that, so.

1 THE COURT: You have a flow chart method of getting to
2 the finish line.

3 MR. PUZ: Right. That's exactly it.

4 THE COURT: Okay. Algorithm, if you will.

5 MR. BLOOM: You know, I think our verdict form that we
6 prepared assumed the worst, meaning we assumed that you
7 would probably instruct that the first element of that
8 alcohol defense had been established conclusively. So
9 what we did at the very end of our verdict form is, once
10 they got down to the comparative negligence, we said, if
11 you find the Plaintiff is more than 50 percent at fault,
12 then you have to go to that last question, and it simply,
13 was alcohol the proximate cause of the collision.

14 But then again, we were assuming you'd rule that the
15 first element, that she's under the influence of alcohol
16 legally, was going to be conclusively established.

17 MR. PUZ: Well, and that --

18 MR. BLOOM: Do you follow me on that, Judge?

19 THE COURT: I think so, yeah.

20 MR. BLOOM: Okay.

21 MR. PUZ: And in that regard, I mean, just if that's
22 true, then the jury has to be told that. They can't
23 simply be told the elements and then not have it included.
24 And that's the whole point. That's the reason I raised
25 this now. That's the reason I kind of said we have to

1 look at this in conjunction.

2 MR. BLOOM: We're not conceding that's the case,
3 though. I just want you to know.

4 THE COURT: Record made, for sure. Understood.

5 MR. PUZ: So looking at Defendant's 12.

6 THE COURT: Again, mine are unnumbered, so can you tell
7 me --

8 MR. PUZ: Oh.

9 THE COURT: -- give me some context?

10 MR. PUZ: The Plaintiff has admitted certain facts are
11 true.

12 THE COURT: Oh, okay. All right. Plaintiff proposed
13 12.

14 MR. BLOOM: No, our 12 says it's a defense to an
15 action.

16 THE COURT: Not Plaintiff's 12, sorry.

17 MR. BLOOM: Oh, Defendant's 12, I'm sorry.

18 THE COURT: Defendant's 12, sorry. We're all pretty
19 fried here.

20 MR. PUZ: So the alternative -- it can either go here
21 or it can go in the --

22 THE COURT: Special verdict form?

23 MR. PUZ: Well, I was going to say in the one where we
24 defined the defense.

25 MR. BLOOM: I mean, we -- I think that we're getting

1 the cart before the horse. We need to find out what
2 you're going to do. If you say it's conclusively
3 established, we'll proceed one way. If you say it's a
4 matter for the Court, we'll proceed the other way -- or a
5 matter for the jury, we'll proceed the other way.

6 MR. JACOBS: We don't need to use the word conclusively
7 established, and conclusively established mean the same
8 thing.

9 MR. BLOOM: Right. But we still, again, aren't
10 conceding that.

11 THE COURT: I believe as a matter of law based upon the
12 response to the CR 36 request for admissions, that that
13 issue has been conclusively established in this case.
14 That the Plaintiff admitted being under the influence of
15 intoxicating liquor at the time of the collision. That's
16 my ruling.

17 MR. PUZ: Okay.

18 THE COURT: Okay.

19 MR. PUZ: So, Judge, what I've handed Joe and Joe has
20 handed to you is the new 14 that takes that ruling into
21 account.

22 THE COURT: To establish the defense?

23 MR. JACOBS: So you're withdrawing your 12, is that
24 what you're thinking?

25 MR. PUZ: I'm sorry.

1 MR. BLOOM: Well, there's two parts to this
2 instruction. One is the elements and the other is what
3 you need to prove. So --

4 MR. PUZ: This is the one (inaudible).

5 MR. JACOBS: I thought these were the same?

6 MR. BLOOM: They're not? What's the difference?

7 MR. JACOBS: Oh, conclusively established for all time
8 (inaudible).

9 MR. PUZ: What? Let me balk at that.

10 MR. JACOBS: Because (inaudible).

11 MR. BLOOM: I only get four more words in there.

12 MR. JACOBS: It's, like, what's the definition of
13 established? Duh. What's the definition of conclusively
14 established? Duh.

15 MR. BLOOM: As opposed to established.

16 MR. PUZ: So this would incorporate the Court's ruling?

17 THE COURT: Yeah, let me get my copy of it -- my clean
18 copy of it, uh-huh.

19 MR. PUZ: Okay.

20 THE COURT: To establish the defense that the person
21 was --

22 MR. PUZ: Okay. Well, look at the end of the first --
23 the second paragraph.

24 THE COURT: Oh, has it been changed?

25 MR. PUZ: Yeah, that's the one I --

1 THE COURT: Okay.

2 MR. PUZ: So that would incorporate the Court's order
3 and if we did that, then we would not need Number 12.

4 THE COURT: I see. Okay.

5 MR. PUZ: Sorry for that confusion.

6 THE COURT: No, no, no, it's --

7 MR. BLOOM: We have 21 oh three. Let me see if this
8 is -- plaintiff has the burden -- this is 21 oh three.
9 What is it?

10 MR. PUZ: It's the same as your 16.

11 MR. BLOOM: 16?

12 MR. PUZ: Except it includes the Court's ruling just
13 now.

14 MR. BLOOM: Just trying to look why I have both 21 oh
15 three and --

16 THE COURT: Here's what I would propose to put there
17 instead. Instead of this element has already been
18 conclusively established, Plaintiff admits this.

19 MR. BLOOM: I think that's more appropriate.

20 THE COURT: Plaintiff admits this element.

21 MR. PUZ: Okay.

22 MR. JACOBS: Okay. We can live with that.

23 THE COURT: Or Plaintiff admits this fact.

24 MR. BLOOM: Yeah, Plaintiff admits --

25 THE COURT: Or Plaintiff admits this, if we just keep

1 it neutral.

2 MR. PUZ: Yeah, your English teacher would --

3 MR. BLOOM: Well, we don't mind --

4 MR. PUZ: -- be giving you grief about that one. Just
5 say fact or element, I don't care which one we do.

6 THE COURT: Element. Plaintiff admits this element.

7 MR. PUZ: Okay.

8 MR. BLOOM: Okay.

9 MR. JACOBS: Okay.

10 THE COURT: So if you can rework that, Mr. Puz --

11 MR. PUZ: Yes.

12 THE COURT: -- and e-mail that to Rhonda, then we'll
13 print a clean version of it.

14 MR. PUZ: Okay.

15 THE COURT: All right. So by including that, then that
16 obviates or eviscerates the need for the inclusion of the
17 Plaintiff's admission --

18 MR. PUZ: That's right.

19 THE COURT: -- okay, as a separate instruction. Okay.
20 Then we get next to the one that I have from Mr. Puz's
21 packet --

22 MR. JACOBS: Hold on a second, hold on. I'm looking at
23 the rest of this instruction. All right.

24 THE COURT: Or if we're really -- I can even e-mail --
25 I'm a pretty quick typist.

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Attached please find Petitioner's Supplemental Brief for filing in the above matter.

Thank you.

Sue Lorange

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