

FILED
SUPREME COURT
STATE OF WASHINGTON
1/2/2020 2:06 PM
BY SUSAN L. CARLSON
CLERK

No. 97325-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, individually,

Petitioner,

v.

THE COVE APARTMENTS, LLC, a Washington corporation; and
WEIDNER PROPERTY MANAGEMENT, LLC, a Washington
corporation,

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON CITIES INSURANCE AUTHORITY

Stewart A. Estes
WSBA No. 15535
Keating, Bucklin, & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104-1518
Phone: (206) 623-8861
Email: sestest@kbmlawyers.com
Attorneys for Amicus WCIA

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 1

 A. A Stipulation to An Allegation Does Not Preclude the Admission of Similar Evidence if it is Relevant to Other Contested Issues. 2

 B. Plaintiff’s Admission of the *Fact* of Her Intoxication Did Not Bar Proof of the *Degree* of Her Impairment..... 3

 C. Medical Blood Alcohol Test Results Are Admissible to Establish Intoxication Under the Non-Per Se Prong of the DUI Statute as “Any Other Competent Evidence,” and There Was No Basis to Exclude it as Unduly Prejudicial. 9

 D. The Trial Court Erred in Excluding Defendant’s Expert Witness..... 17

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. Clark-Munoz</i> , 152 Wn.2d 39, 93 P.3d 141 (2004) ..	11, 16
<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993), <i>review denied</i> , 123 Wn.2d 1011 (1994)	16, 17
<i>Gartman v. Ford Motor Co.</i> , 430 S.W.3d 218 (Ct. App. Ark. 2013).....	13
<i>Gerlach v. Cove Apartments, LLC</i> , 8 Wn.App. 813, 446 P.3d 624 (2019), <i>review granted</i> , 449 P.3d 657 (2019).....	6, 7, 16
<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	7, 8
<i>Harmon v. Auger</i> , 768 F.2d 270 (8th Cir.1985).....	14
<i>Jensen v. Lick</i> , 589 F.Supp. 35 (D.N.D.1984)	14
<i>Murray v. Mossman</i> , 52 Wn.2d 885, 329 P.2d 1089 (1958).....	3
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017)	8, 9, 10
<i>Schmerber v. Cal.</i> , 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)	14
<i>Snyder v. General Electric Co.</i> , 47 Wn.2d 60, 287 P.2d 108 (1955).....	3
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997)	11
<i>State v. Charley</i> , 136 Wn. App. 58, 147 P.3d 634 (2006)), <i>review denied</i> , 161 Wn.2d 1019 (2007)	10, 14
<i>State v. Curran</i> , 116 Wn.2d 174, 804 P.2d 558 (1991)	11
<i>State v. Donahue</i> , 105 Wn. App. 67, 18 P.3d 608 (2001).....	11, 12, 14, 16
<i>State v. Russell</i> , 161 Wn. App. 1002 (2011), <i>aff'd</i> , 183 Wn.2d 720, 357 P.3d 38 (2015).....	14
<i>State v. Smissaert</i> , 41 Wn.App. 813, 706 P.2d 647 (1985) <i>review denied</i> , 104 Wash.2d 1026	6
<i>State v. Walters</i> , 162 Wn. App. 74, 255 P.3d 835 (2011).....	5
<i>Tennant v. Roys</i> , 44 Wn. App. 305, 722 P.2d 848 (1986)	15

Statutes

RCW 4.22	4
RCW 4.22.015	4

RCW 4.22.070(1).....	4
RCW 46.61.502	9, 15
RCW 46.61.502(1)(c)	8, 14, 15
RCW 46.61.502(4).....	14
RCW 46.61.506	14, 15
RCW 46.61.506(2)(c)	10
RCW 46.61.506(3).....	14
RCW 5.40.060	1
RCW 5.40.060(1).....	4, 9
Other Authorities	
Washington State Bar Ass'n, <i>Washington Motor Vehicle Accident</i> <i>Deskbook</i> § 12.2(5) (1988)	8
Rules	
ER 403	10, 11, 12
ER 702	12
ER 703	12
RAP 10.6(b)	1

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Cities Insurance Association (WCIA), is a municipal organization of public entities that joined together to provide liability and property financial protection to its members. Formed in 1981, with nine members as the first liability risk pool in Washington State, WCIA has grown to over 150 members. It has over 38 years' experience in comprehensive Risk Pool Coverages, Claims Administration, Financial Stability, and Risk Management Services.

Amicus previously filed a motion for permission to submit a future brief pursuant to RAP 10.6(b) (“The brief of amicus curiae may be filed with the motion.”). This Court granted Amicus’ motion on December 11, 2019, if timely submitted. Amicus now submits its brief.

II. STATEMENT OF THE CASE

Amicus relies upon the facts set forth in the parties’ briefing, and citations thereto.

III. ARGUMENT

Amicus will focus on the intoxication defense due to the nature of its membership -- cities and other small municipal corporations who are sued by persons who have been injured while they were intoxicated. We will address two issues 1) whether Plaintiff’s medical blood alcohol test results were admissible to establish “intoxication” under RCW 5.40.060 over a

claim of undue prejudice because the true extent of Plaintiff's intoxication would embarrass her, and, 2) whether these test results – and other evidence – are admissible despite a vague “stipulation” by Plaintiff that she was intoxicated.

A. A Stipulation to An Allegation Does Not Preclude the Admission of Similar Evidence if it is Relevant to Other Contested Issues.

Plaintiff was allowed to sanitize the record by a last minute “stipulation” that she was intoxicated. This was likely an effort to lead the jury to mistakenly believe that her blood alcohol level could have been only 0.08, rather than the 0.238 that her hospital test translated to.

As a threshold matter, Defendant contests the existence of a stipulation as being a one-sided nullity. *Suppl. Br. Resp.*, at 16-17. However, even if it had been admitted that Plaintiff was intoxicated, this should not have served to preclude Defendant from offering evidence of the *degree* of her impairment due to intoxication. Intoxication is only one of three prongs of the defense that Defendant was required to prove at trial.

Case law from another context supports this conclusion. If a defendant driver in a motor vehicle accident case admits liability at trial, a plaintiff is still entitled to offer evidence of the speed of the collision and the extent of vehicle damage as these facts could be relevant to the extent of her personal injuries.

“When the defendant in a negligence case admits liability and contests only the question of damages, he is entitled to have excluded from the testimony all references to the manner in which the accident occurred *except such as are relevant to the question of damages.*” (Italics ours.)

Murray v. Mossman, 52 Wn.2d 885, 888, 329 P.2d 1089 (1958) (quoting *Snyder v. General Electric Co.*, 47 Wn.2d 60, 68, 287 P.2d 108 (1955)).

The same would be true in a multi-party tort where one defendant admits liability. The other parties (plaintiff *or* defendant) would be free to offer liability evidence for the purpose of establishing the percentage of “fault” for each party.

A similar rule should exist where a plaintiff seeks to escape the consequences of their actions (minimizing their fault) by concealing the actual degree of their impairment due to alcohol or drugs. A vague concession that “I was intoxicated” does not answer the three questions posed to the jury on the affirmative defense.

B. Plaintiff’s Admission of the *Fact* of Her Intoxication Did Not Bar Proof of the *Degree* of Her Impairment.

Whether an injured party consumed two drinks or eight is plainly relevant to a determination of their degree of impairment, which speaks to their degree of fault, and the causation of their injuries -- the two other statutory elements of its defense. The trial court precluded Defendant from putting on two thirds of its case.

This was a comparative fault trial. The comparative fault statute does not allow a “stipulation” to bar a defendant from proving its case. “The trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages”. RCW 4.22.070(1). The statute also required that the jury be allowed to assess the nature of Plaintiff’s conduct and its connection to her injuries. “A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.” RCW 4.22.015.

Plaintiff’s actual degree of impairment was quite relevant to the two other issues on which Defendants bore the burden of proof: her degree of fault (it must be more than 50%) and causation. Plaintiff’s stipulation to being intoxicated only established one of the three prongs of the intoxication affirmative defense. Plaintiff herself sets the prongs out as follows:

... that Gerlach "was [1] under the influence of intoxicating liquor ... at the time of the occurrence causing the injury." In addition, Weidner had to prove "[2] that such condition was a proximate cause of the injury ... and ... [3] ... [plaintiff was] more than fifty percent at fault."

Petition, at 10 (quoting RCW 5.40.060(1)).

Plaintiff attempts to cabin the intoxication issue to only her *mental* decision to climb the railing. *Suppl. Br. Pet’r*, at 11. She apparently believes

that her physical ability to climb over a balcony railing was not material. However, even the portion of the record cited by Plaintiff, containing a hand-picked sentence from Defendant's closing argument, belies her assertion. Counsel argued that Plaintiff "climbed over [the railing] in a state when she was . . . compromised," and "put herself at risk as a consequence of being intoxicated that night". *Suppl. Br. of Pet'r*, at 13-14 (quoting RP 3639-43).

Defendant challenged her mental and physical capabilities. In any event, an accurate level of impairment is needed to gauge one's mental state. "The only question before us is whether there was sufficient evidence produced from which a jury could find that Mr. Walters' *level of intoxication* affected his ability to form the intent necessary to commit these crimes." *State v. Walters*, 162 Wn. App. 74, 87-88, 255 P.3d 835, 842 (2011) (emphasis supplied). Here, Plaintiff contends that a jury may assess the degree of one's impaired judgment simply by guessing that her blood alcohol level was at least 0.08.

Plaintiff's actual level of impairment took on greater significance given the absence of evidence on this point by testimony. Plaintiff's amnesiac drinking companions conveniently could not remember how much she drank that night. *See, Gerlach v. Cove Apartments, LLC*, 8

Wn.App. 813, 822-23, 446 P.3d 624 (2019), *review granted*, 449 P.3d 657 (2019).

Plaintiff next boldly asserts that evidence of “an increased level (or the claimed ‘precise level’) of intoxication would have told the jury nothing.” *Id.* This is illogical on its face. And, her cited authority is easily distinguished. In *State v. Smissaert*, 41 Wn.App. 813, 815, 706 P.2d 647 (1985) *review denied*, 104 Wash.2d 1026, “[n]umerous witnesses including the defendant testified as to the quantity of alcohol consumed as well as its effect.” We do not have this quality of evidence here, making the “precise level” of her impairment all the more significant. In addition, if Plaintiff’s cramped definition of the intoxication defense is accepted, it makes her degree of impairment even more relevant.

Plaintiff also claims that “The jury’s verdict establishes both that Gerlach failed to exercise reasonable care for her own safety by engaging in ‘risk taking’ while intoxicated” *Pl. Suppl. Br.*, at 14. But one does not flow from the next. The small percentage of fault apportioned to Plaintiff (7%) could more logically be attributed to the jury assigning generic fault to Plaintiff and not crediting her intoxication as being significant. The jury may well have disbelieved Defendant’s evidence (the little of which the trial court admitted) that went to their theory that Plaintiff irresponsibly climbed over the balcony based on the false impression that she only had a couple

drinks and could have been at the minimum 0.08 BAC level for driving. This would have been the difference in the verdict.

As the Court of Appeals held, “[b]ecause Gerlach’s percentage of fault was reserved for the jury, the jury should have been able to consider Gerlach’s level of intoxication and how it may have affected her physical and cognitive abilities.” 8 Wn.App., at 824 (citing *Geschwind v. Flanagan*, 121 Wn.2d 833, 837-38, 854 P.2d 1061 (1993) (the determination of the percentage of total fault attributable to each party is specifically reserved for the trier of fact)).

This was not a case where a 0.08 BAC reading could satisfy Defendant’s burden. While the “intoxication defense” incorporates the criminal DUI standards, the civil affirmative defense covers a multitude of activities in addition to driving a car. Thus, the actual *degree* of impairment is of more significance in the civil arena than in the criminal. Whether one is “buzzed” versus “overbuzzed”¹ may be of great consequence depending upon the activity the party was performing when injured. For example, an injured party’s degree of impairment while climbing a rock wall may have greater significance than if she was struck from behind by a bicycle on a sidewalk.

¹ To borrow the standard for impairment used by the plaintiff in *Geschwind v. Flanagan*, 121 Wn.2d at 836 (court admitted blood alcohol contents of 0.38; and 0.17).

Here, the difference was profound. Defendants' theory of how the fall occurred was that Plaintiff was so intoxicated that she took a significant risk in climbing up when there was no reason to do so. Recall the first person to get to her exclaimed "Why did you do it? I was right behind you!" CP 1181-82. As Defendant's expert would have opined, alcohol impairs more than physical abilities, it also impairs judgment. The greater the consumption of alcohol, the greater the impairment of judgment.

This Court has recognized that fact. After concluding that a passenger's own intoxication was admissible to prove his contributory fault, this Court observed "[t]he rationale for this rule is that intoxication diminishes a passenger's appreciation of danger and renders the passenger more likely to take greater risks than usual." *Geschwind v. Flanagan*, 121 Wn.2d 833, 842, 854 P.2d 1061 (1993) (quoting Washington State Bar Ass'n, *Washington Motor Vehicle Accident Deskbook* § 12.2(5) (1988)).

In *Peralta v. State*, 187 Wn.2d 888, 897, 389 P.3d 596 (2017), this Court approved a jury instruction based on the non-per se prong of RCW 46.61.502(1)(c), that stated a person is under the influence of alcohol "if, as a result of using alcohol, the person's ability to act as a reasonably careful person under the same or similar circumstances is lessened in any appreciable degree." *Id.* at 898-99. Although the Court of Appeals was ultimately reversed, it accurately observed that to establish this prong,

evidence that ‘the ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants or drugs’ must be proved.” *Peralta v. State*, 191 Wn. App. 931, 946, 366 P.3d 45 (2015), *rev'd*, 187 Wn.2d 888, 389 P.3d 596 (2017). It is not possible to establish the “degree” to which one’s abilities were lessened with only a bare and undefined admission of intoxication. The trial court in *Peralta* allowed evidence of the degree of the plaintiff’s impairment, despite her admission of intoxication. “WSP offered substantial evidence supporting its intoxication defense.” *Peralta v. State*, *supra* at 901, n. 6.

Allowing only Plaintiff’s vague concession of intoxication precluded the jury from performing its statutory obligation to compare fault and determine causation. The Court of Appeals should be affirmed on this point.

C. Medical Blood Alcohol Test Results Are Admissible to Establish Intoxication Under the Non-Per Se Prong of the DUI Statute as “Any Other Competent Evidence,” and There Was No Basis to Exclude it as Unduly Prejudicial.

The standard in civil litigation for establishing “intoxication” under the intoxication defense statute is that used in criminal DUI prosecutions. *See*, RCW 5.40.060(1) (“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 ...”).

There are two separate methods to prove intoxication, the first uses the approved State Toxicologist's testing protocols ("per se" method); and second uses "any other competent evidence"² (non-per se method). It is the second method that is at issue here, the use of "non-conforming" test results.³

Plaintiff's frequent characterization of the hospital blood test results as being "unverified" is misleading. *Petition*, at 8-17 (use of term 15 times). They were valid and reliable, both medically and legally. The medical test just did not follow the legal per se method of analysis that would have allowed its automatic admission.

Plaintiff claims that the Court of Appeals erred by holding "that the trial court had no discretion to exclude the evidence." *Petition*, at 8. But, that was not the ruling. The Court held that "[b]ecause the trial court misapplied *Peralta* and ER 403, its exclusion of the blood alcohol evidence was an abuse of discretion." *Id.*, at 821.

Plaintiff suggests that because the medical test result did not comply with the State Toxicologist's protocols, it should be given less weight than

² This standard comes from the statute. "The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug." RCW 46.61.506(2)(c).

³ *State v. Charley*, 136 Wn. App. 58, 62, 147 P.3d 634 (2006), *review denied*, 161 Wn.2d 1019 (2007) (describing test results that did not follow the State Toxicologist's protocols as "non-conforming blood alcohol tests").

a “per se” test when relevance is balanced against undue prejudice under ER 403. “Given that the test here was not admissible per se, the trial court was entitled to weigh *the marginal relevance of the numerical result* and Weidner's expert testimony that the unverified result of the hospital blood draw would result in ‘severe psychomotor impairment’ under ER 403.” *Petition*, at 13 (emphasis supplied). There is no factual or legal basis for this position.

The Legislature amended the DUI statute to make it easier to obtain a conviction.⁴ If law enforcement follows the testing procedures created by the Toxicologist, the test results are automatically admissible – no more debate at trial about validity or reliability. And, the driver is presumed to be legally intoxicated. However, when blood alcohol test results obtained outside of these protocols, they have to be proven to be admissible under the basic rules for the admission of scientific evidence. “[O]ther tests, such as tests done at the instigation of the defendant or for medical treatment... *would be subject to the usual evidentiary checks.*” *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 49, 93 P.3d 141 (2004) (emphasis supplied). This Court has held the same. “Unlike the per se offense, the defendant in this

⁴ “The reason for this change was to make convictions easier by obviating the need to translate breath alcohol test results into blood alcohol standards.” *State v. Curran*, 116 Wn.2d 174, 180, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). *See also, State v. Donahue*, 105 Wn. App. 67, 76, 18 P.3d 608 (2001).

case may attack the accuracy and reliability of the technique or method used in analyzing the blood alcohol level and whether it meets the standards of ER 702 and ER 703.” *State v. Donahue*, 105 Wn. App. at 74.

The DUI statutory framework does not speak as to which method is more reliable. It just provides law enforcement and the prosecutor a road map to gain automatic admission. For example, in *State v. Donahue, supra* at 77, “the Washington State Toxicologist testified that Washington's method of gas chromatography is not necessarily more reliable than the Oregon [medical testing] method of spectrophotometry using the Ektachem machine.”

Thus, a test result obtained using the Toxicologist’s protocols is not automatically admissible because it is the most reliable method known, but rather because it followed a formulaic methodology that everyone has agreed on. A test result using an alternative method could be equally or even more reliable. Plaintiff’s suggestion that a non-per se test result can be excluded as less reliable, and thus less relevant, is not well taken.

In addition to claiming the results to be less reliable, Plaintiff also contends that the admission of these results was highly prejudicial. Her assertion that her blood alcohol level was so high that it should have been excluded under ER 403 is troubling (referring to the number as “pejorative”). *Brief of Resp.*, at 31. Plaintiff boldly asserts that allowing the

jury to know how drunk she actually was would allow it to “pass moral judgment” on her. *Petition* at 14. Plaintiff does not explain what she means by this claim. And, she seems to confuse being found at fault for being a bad person.

An Arkansas court addressed a similar issue. The injured plaintiff argued that even if evidence of his alcohol consumption was relevant, it was more prejudicial than probative “because the trial took place in a dry county, and because there is a ‘negative attitude in this country today toward drinking and driving.’ ” *Gartman v. Ford Motor Co.*, 430 S.W.3d 218, 221 (Ct. App. Ark. 2013). The court bluntly responded: “A dim view of drinking and driving is to be expected no matter what the circumstances or jurisdiction.” *Id.*

An injured party cannot be relieved of their legal responsibility for their injuries simply because others might find their conduct morally wrong, in addition to being tortious. One who caused an accident traveling at 90 MPH cannot conceal that fact from the jury by admitting “I was speeding.”

If Plaintiff’s argument is accepted it would become a windfall for those who become severely intoxicated and injure themselves, and undermine the purpose of the intoxication defense – to not reward those who voluntarily place themselves at risk by their foolish conduct.

Next, Plaintiff asserts that allowing the medical test's admission would result in "a mini-trial on the reliability of the hospital blood draw results under RCW 46.61.502(1)(c)." *Id.* This is without merit as it implies that the test results go to a collateral ("marginally relevant") issue, rather than one of the central contentions of Defendant. Offering and opposing medical or scientific evidence is the everyday work of any trial lawyer, and a significant purpose of a trial. And, the use of blood to determine intoxication is hardly new or novel. In fact, blood testing for alcohol content was described as "common place" as far back as 1966. *Schmerber v. Cal.*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Even if the admissibility of the medical test results was contested, there would hardly be anything approaching a separate "trial" on its admissibility. Many courts have allowed the admission of medical blood and urine alcohol testing.⁵ The accuracy of *medical* test results are just as

⁵ See, e.g., *State v. Donahue*, 105 Wn. App. at 77 (allowing admission of "Oregon method of spectrophotometry using the Ektachem machine" even though it was "not obtained in accordance with the procedures set forth in RCW 46.61.506."); *Charley*, 136 Wn.App. at 65–66 ("The hospital's conclusion that Ms. Charley's blood showed an ethanol level of 0.108 grams per deciliter is admissible as "other evidence" of intoxication under RCW 46.61.502(1)(b)"); *State v. Russell*, 161 Wn. App. 1002 (2011), *aff'd*, 183 Wn.2d 720, 357 P.3d 38 (2015) ("the State instead proffered the medical blood test evidence under RCW 46.61.502(4), which authorizes admission of medical blood alcohol tests obtained in an out-of-state hospital as 'other competent evidence' of intoxication under the non per se prongs, even when the test did not comply with approved State toxicologist's methods as set forth in RCW 46.61.506(3)."); *Jensen v. Lick*, 589 F.Supp. 35, 38 (D.N.D.1984)) (Center for Disease Control determined EMIT urine alcohol tests to be 97 to 99 percent accurate); *Harmon v. Auger*, 768 F.2d 270, 276 (8th Cir.1985) (the EMIT is 95 percent accurate).

important as they are in the legal arena, as they are central to accurate diagnosis and treatment. See, *Tennant v. Roys*, 44 Wn. App. 305, 312, 722 P.2d 848 (1986).

The Court of Appeals followed the clear legal authority concerning the two different methods of proving intoxication and held the results should have been admitted under the non-per se prong. In the face of this, Plaintiff claims:

[T]he Court of Appeals then erroneously failed to distinguish between the methods, holding as a matter of law that the result of an unverified hospital blood draw is *always* admissible in a civil case in which the defense alleges the plaintiffs intoxication as a complete defense to liability.

Petition, at 11 (emphasis in original). But that is not at all what the Court stated:

Notably, only subsection (1)(a) of RCW 46.61.502, which sets forth the standard for “per se” intoxication, refers to specific testing standards that must be met for a person’s measured level of intoxication to be used against him or her at trial. *These testing standards, which are set forth in RCW 46.61.506, need not be met to show that someone is intoxicated under a non-per-se method such as that described in subsection (1)(c) of RCW 46.61.502.*

At trial, Cove specifically argued that Gerlach’s blood alcohol evidence could be proved using the non-per-se method under RCW 46.61.502(1)(c). Because the blood alcohol evidence in this case could be evidence of intoxication under that non-per-se method, the test used need not comply with the requirements of RCW 46.61.506 to be admissible. This was not a proper basis for excluding the evidence.

Gerlach v. Cove Apartments, LLC, 8 Wn.App. 813, 824, 446 P.3d 624 (2019), *review granted*, 449 P.3d 657 (2019) (citing *State v. Donahue, supra* at 76-77) (emphasis supplied).

This Court has reviewed the holding of *Donahue* (that blood testing not performed in accordance with the sampling protocols is admissible as “other competent evidence”) without criticism. “The Court of Appeals determined that the test was admissible as ‘other evidence’ of intoxication even though it did not meet the standards laid out under Washington law because it was not conducted under the authority of Washington law.” *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 50, 93 P.3d 141 (2004) (citing *Donahue*, 105 Wn.App. at 69).

Clearly, an impaired driver can be convicted without *any* evidence of a state toxicologist-approved BAC test. *See, City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994) (affirming conviction based solely on the officer's “detailed testimony about his observations of Heatley's physical condition and performance on the field sobriety tests.”).

In sum, the “non-conforming” medical blood alcohol test result was admissible. Defendant offered evidence as to its validity and reliability. Medical test results (including serum alcohol measurements) are frequently

admitted at trial. Such results need not comply with the State Toxicologist's protocols. The trial court undermined the purpose of the Intoxication Defense -- by using supposed "undue prejudice," combined with the misguided notion that medical test results are less reliable -- to exclude Plaintiff's actual level of impairment. The Court of Appeals should be affirmed on these issues.

D. The Trial Court Erred in Excluding Defendant's Expert Witness.

The above arguments apply equally to the exclusion of Defendant's expert witness.⁶ And, basic expert witness principles do not prevent his testimony. Plaintiff's position is that the effects of alcohol are commonly known and all persons can be presumed to draw reasonable inferences therefrom. Yet this does not require the exclusion of expert testimony. "[E]ven when we assume that the fact finder is generally knowledgeable about a topic, expert testimony may still be of assistance to an understanding of the issue." *City of Seattle v. Heatley*, 70 Wn. App. 573, 580, 854 P.2d 658 (1993), *review denied*, 123 Wash.2d 1011 (1994) ("if a lay witness may express an opinion regarding the sobriety of another, there is no logic to

⁶ The trial court also improperly excluded Defendant's expert witness from testifying in part due to his opinion being based on a blood alcohol level that was not in compliance with the per se testing protocols. Dr. Frank Vincenzi's testimony as to how greater levels of alcohol affect a person's physical and cognitive abilities more would also have been helpful to the jury understanding Plaintiff's actual level of impairment.

limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons”).

The other problem with Plaintiff’s argument is that it presumes that lay people have experience with determining a person’s level of impairment based on an assumed 0.08 BAC reading. Here, this could only be an assumed 0.08 BAC reading. This is the bare minimum objective figure that the jury could assume was accurate based on the vague stipulation to being “intoxicated.” And, few people other than law enforcement officers obtain an exact alcohol reading while they observe a person’s level of impairment. And in this case, the dispute was not as to whether the alcohol reading was 0.08 versus 0.09. That situation might have rendered Plaintiff’s “intoxication” admission adequate. Rather, Plaintiff was very drunk. There is a *qualitative* difference in impairment between a person with a 0.08 reading and one at 0.238. The trial court erred by excluding this evidence.

IV. CONCLUSION

This Court should affirm the Court of Appeals’ decision.

//
//
//
//
//

Respectfully submitted this 2nd day of January 2020.

By: /s/ Stewart A. Estes
Stewart A. Estes, WSBA No. 15535
Keating Bucklin & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104
Telephone: (206) 623-8861
sestes@kbmlawyers.com
*Attorneys for Amicus Curiae Washington
Cities Insurance Authority*

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH,
individually,
Petitioner,

v.

THE COVE APARTMENTS, LLC,
a Washington corporation; and
WEIDNER PROPERTY
MANAGEMENT, LLC, a
Washington corporation,
Respondents.

No. 97325-3

DECLARATION OF
SERVICE

I declare that I am over the age of 18 and am a legal assistant at the law office of Keating, Bucklin & McCormack, Inc. P.S. I further declare that on the below date, a true and correct copy of the foregoing was sent to the following parties of record via method indicated: E-Service/E-Mail.

Attorneys for Respondents

Philip A. Talmadge, WSBA # 6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com
matt@tal-fitzlaw.com

Attorneys for Respondents

Pauline V Smetka, WSBA # 11183
Helsell Fetterman LLP
1001 4th Ave. Ste. 4200
Seattle WA 98154-1154
(206) 292-1144
psmetka@helsell.com

hsims@helsell.com
bkindle@helsell.com

Attorneys for Petitioner

Ben F. Barcus, WSBA No. 15576
BEN F. BARCUS & ASSOCIATES, PLLC
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444
ben@benbarcus.com
paul@benbarcus.com
tiffany@benbarcus.com

Attorneys for Petitioner

Howard M. Goodfriend, WSBA No. 14355
SMITH GOODFRIEND, P.S.
1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974
howard@washingtonappeals.com
cate@washingtonappeals.com

Attorneys for Petitioner

Simon H. Forgette, WSBA No. 9911
LAW OFFICES OF SIMON FORGETTE, P.S.
406 Market Street, Suite A
Kirkland, WA 98033
(425) 822-7778
simon@forgettelaw.com
denise@forgettelaw.com

**Attorneys for Amicus Curiae Rental Housing Association of
Washington**

Christopher Benis, WSBA No. 17972
Hecker Wakefield & Feilberg, P.S.
321 1st Ave W
Seattle, WA 98119

Tel: (206) 447-1900
Fax: (206) 447-9075

DATED this 2nd day of January 2020, at Seattle, Washington



Teresa A. Caceres, Legal Assistant
Keating, Bucklin & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104-1518

Document in ProLaw.docx

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

January 02, 2020 - 2:06 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97325-3
Appellate Court Case Title: Kimberly J. Gerlach v. The Cove Apartments, et al.

The following documents have been uploaded:

- 973253_Briefs_20200102140549SC275335_0362.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Brief of Amicus Curiae WCIA.pdf

A copy of the uploaded files will be sent to:

- Chrisbenis@hotmail.com
- amuul@helsell.com
- andrienne@washingtonappeals.com
- ben@benbarcus.com
- chrisb@heckerwakefield.com
- denise@forgettelaw.com
- howard@washingtonappeals.com
- hsims@helsell.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- psmetka@helsell.com
- simon@forgettelaw.com
- tiffany@benbarcus.com

Comments:

Sender Name: Teresa Caceres - Email: tcaceres@kbmlawyers.com

Filing on Behalf of: Stewart Andrew Estes - Email: sestest@kbmlawyers.com (Alternate Email: tcaceres@kbmlawyers.com)

Address:
801 Second Avenue
Suite 1210
Seattle, WA, 98104
Phone: (206) 623-8861

Note: The Filing Id is 20200102140549SC275335