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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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FRANK T. CARASKA,

Appellant,

v.

THE STATE OF WASHINGTON DEPARTMENT OF
TRANSPORTATION DIVISION OF
WASHINGTON STATE FERRIES,

Respondent.

REPLY BRIEF OF APPELLANT CARASKA

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A. INTRODUCTION

Notwithstanding this Court's clear directions on remand in the first appeal,¹ the trial court virtually disregarded those instructions and went far afield to find a rationale to sustain its earlier decision. Such action was improper, justifying recall of this Court's mandate. RAP 12.9(a).

In its responsive brief, the State of Washington Department of Transportation Division of Washington State Ferries ("WSF") attempts to justify the trial court's wrongful action by misconstruing the Safety Management System ("SMS") policy² in effect on the day walk-on ferry passenger Gary Collins attacked and seriously injured WSF seaman Frank Caraska.

WSF focuses exclusively on testimony suggesting Collins was not acting aggressively or threateningly shortly before he attacked Caraska while ignoring overwhelming evidence that Collins was intoxicated and disruptive. WSF fails to understand that its narrow interpretation of the

¹ *Caraska v. Dep't of Transp.*, 140 Wn. App. 1022, Slip. Op. at *4-5 (2007).

² The SMS policy states:

The police should be contacted and the Master informed of any persons seeking passage who display symptoms of intoxication or illegal drug use **and** who are violent, disorderly, disruptive, or confrontational. This is essential to prevent that customer from causing trouble aboard the vessel in transit where police assistance is not readily available.

SCP 156 (emphasis in original).

SMS policy conflicts with this Court's previous determination that the policy applies whether or not an intoxicated passenger is acting aggressively or threateningly.

Collins was drunk and disorderly, disruptive, *and* confrontational; he should have been reported to the police and the master of the ferry pursuant to the SMS policy. Yet neither of the two WSF employees who came into contact with him before he boarded the ferry complied with that policy. Under the featherweight standard applicable in this Jones Act case, Caraska presented ample evidence that WSF owed him a duty of care and that WSF's breach of that duty caused his injuries.

WSF's narrow reading of the SMS policy carries over into its analysis of Caraska's unseaworthiness claim. Again, WSF too narrowly concentrates on aggression and violence when considering whether its employees were understaffed or ill-trained. WSF employees Betty Lou Anderson and Jack Lane were not properly trained on the parameters of the SMS policy because they did not understand the policy applied to an intoxicated passenger like Collins, who, while perhaps not violent, was nevertheless *disruptive, disorderly, or confrontational*.

Finally, WSF's arguments regarding the foreseeability of Collins' attack speak to its duty under the SMS policy rather than its negligence. WSF's arguments are unavailing where the question to be resolved on

remand was narrowly confined to its breach of that duty given the Court's prior determination that the SMS policy established WSF's duty. Nothing in WSF's brief should dissuade this Court from reversing the trial court order dismissing Caraska's Jones Act and unseaworthiness claims and remanding this case to a different trial judge. On the contrary, WSF's brief supports an order to reverse and remand.

B. REPLY TO WSF'S COUNTERSTATEMENTS OF THE CASE AND THE FACTS³

RAP 10.3(a)(5)⁴ requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." Despite that rule, WSF's introduction and counterstatement of the case contain improper argument and repeated citations to case law. *See, e.g.*, Br. of Resp't at 1 (arguing the SMS policy played a minor role in the trial); at 3-4 n.2-3, 5 (arguing various standards of review; citations to case law); at 8 n.12 (citations to case law); at 8 ("But, of course, as an appellate court, this Court had no ability to order the trial court to enter findings that conflicted with the testimony the trial judge *actually* heard at

³ WSF complains unnecessarily about Caraska's incorporation by reference of his prior briefing. Br. of Resp't at 11 n.15. WSF's citations to *U.S. West v. Washington Util. & Transp. Comm'n*, 134 Wn.2d 74, 949 P.2d 1337 (1997), and *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993), are pointless because Caraska did not incorporate by reference *arguments* contained in his prior briefing to expand the issues subject to appeal. Instead, he merely pointed this Court to the additional factual statements contained in those pleadings for the Court's convenience.

⁴ RAP 10.3(b) requires WSF to comply with the provisions of RAP 10.3(a).

trial”) (“The trial court took its task seriously.”); at 14 (arguing Caraska is ignoring the law of the case doctrine); at 15 (arguing WSF employees Betty Lou Anderson and Jack Lane were the only witnesses whose testimony was relevant to Caraska’s seaworthiness claim).

Additionally, there must be a reference to the record for each factual statement of the case. RAP 10.3(a)(5); RAP 10.4(f). But here, long passages in WSF’s counterstatement of the facts lack *any* references whatsoever to the record. Where a brief contains factual material not supported by the record, such facts should be disregarded. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking portions of a supplemental brief containing factual assertions not supported by the record). In *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992), this Court confirmed that citations to the record are required to enable the Court to properly consider a case. *See also, Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (imposing sanctions for counsel’s failure to comply with the rules). The Court should disregard the “facts” claimed by WSF that are not grounded in the record and impose sanctions under RAP 10.7 for WSF’s failure to meet the requirements of RAP 10.3.

The Court should also disregard WSF's introduction and counterstatement of the case as a transparent form of revisionist history. Contrary to the unusually rosy picture of what occurred in the trial court painted in WSF's brief, the trial court substantially departed from this Court's remand instructions. Br. of Appellant at 12.

Like the trial court, WSF focuses too literally on the vocabulary the witnesses used to describe Collins' behavior rather than on the underlying meaning of the words articulated in the SMS policy.⁵ See, e.g., Br. of Resp't at 1-2, 10, 12-13, 15-16; Br. of Appellant at 21-24. Moreover, WSF's sanitized presentation of the testimony sugarcoats Collins' behavior and ignores uncontroverted evidence that he was causing a reportable public disturbance.

For example, Collins returned to Anderson's ticket window shortly after purchasing his ticket and accused her of taking his money but not

⁵ WSF tries to shift the Court's focus away from the SMS policy by arguing Lane and Anderson were only responsible for contacting the terminal agent if passengers in the terminal facility were "engaging in illegal activity or disruptive behavior" while the master mate or chief engineer were responsible for contacting the police or the master if a passenger was intoxicated and "violent, disruptive, disorderly, or confrontational." Br. of Resp't at 1 n.1. WSF makes this argument for the first time on appeal; accordingly, the Court should disregard it. RAP 2.5(a). Even if true, however, there can be no dispute that Anderson and Lane should have contacted their terminal agent because Collins was engaging in *disruptive behavior*. But they did not.

issuing him a ticket. RP I:74-75;⁶ CP 151.⁷ They argued about it. RP I:75. Collins was spewing obscenities, talking to himself, and pacing as he waited to board the ferry. CP 646-47, 658; RP I:75. He refused Lane's request to tone down his language. CP 658. He visibly disturbed a female passenger in view of a WSF employee (likely Lane); that employee did nothing to assist the woman. RP I:46, 48. Collins' behavior was so disturbing that all conversations around him stopped. CP 647. After he attacked Caraska, passengers and other crew members had to restrain him until the police arrived. RP I:60. He was hogtied and forcibly removed from the ferry by the police. RP I:61; RP II:16-17.

WSF also misleads the Court when it selectively recounts the testimony provided by firefighters Bobby Morse and Lenny Walters. Br. of Resp't at 15. Their testimony clearly contradicts WSF's assertions about the nature of Collins' behavior. For instance, Morse observed that Collins was flailing and carrying on, and was "aggressive in his walk." RP I:40-41. Morse was so concerned about the possible volatility of the situation given Collins' erratic behavior that he avoided eye contact with

⁶ "RP I" refers to the verbatim report of proceedings from October 18, 2005. "RP II" will refer to the verbatim report of proceedings from October 19, 2005. "RP III" refers to the verbatim report of proceedings from the remand hearing held on April 4, 2008. The number following the "RP" designation represents the page number of the particular volume.

⁷ "CP" refers to the clerk's papers Caraska designated in his first appeal under Cause No. 57814-6-I. "SCP" will refer to the supplemental clerk's papers he designated in his second appeal under Cause No. 62636-1-I before the Court granted consolidation.

Collins and was afraid to get too close because he was afraid Collins might try to jump him. *Id.* at 41-42.

Like Morse, Walters had a “real bad feeling” about Collins. *Id.* at 45. Collins’ mumblings about Vietnam and his mannerisms put Walters on the defensive. *Id.* at 45-47. Although Walters was sitting down when Collins approached, he stood up because of the way Collins was acting. *Id.* at 45. Although Collins did not exhibit any threatening or aggressive behavior toward anyone in particular, Walters was concerned that he could be a threat. *Id.* at 47. The testimony from Morse and Walters cemented the disruptive nature of Collins’ behavior.⁸

WSF next contends that no witness was shown the SMS policy or questioned about WSF’s implementation of, or its employees’ compliance with, that policy. Br. of Resp’t at 1-2, 8-10. It even goes so far as to say that Anderson and Lane were the only witnesses whose testimony was relevant to Caraska’s unseaworthiness claim. *Id.* at 16. Even if true, which Caraska disputes, the uncontroverted evidence Caraska presented confirms that Anderson and Lane were not properly trained on the parameters of the SMS policy and did not understand the circumstances

⁸ Morse was a firefighter and emergency medical technician. RP I:38. Walters taught marine firefighting and water survival skills. RP I:44. That firefighters trained in handling emergencies were so affected by Collins’ behavior speaks volumes.

under which they were required to report nonviolent but intoxicated and disorderly passengers like Collins.

For example, Lane was aware of the SMS policy generally and recalled it being implemented; however, he never received training on how to deal with intoxicated passengers. RP I:649-51; CP 650, 652, 663. He also never received training that addressed when to call the police or the terminal agent if he encountered a problem passenger. CP 169. He simply learned to deal with problem passengers on his own because he thought *his method was easier than the training he did receive from WSF*. CP 649-50. He simply walked away from verbally abusive passengers. CP 661.

Anderson did not report Collins because *her training prevented her from refusing passage to an intoxicated passenger as long as the passenger was walking*. RP I:78-79; CP 154.⁹ She felt she had no duty to call her supervisor unless she felt physically threatened; she assumed there was no danger of Collins hurting anyone because he was only a walk-on passenger. RP I:87; SCP 117-21, 131. Anderson later admitted that she would have had the police officer assigned to the terminal speak with Collins if Collins had been driving a car. RP I:81.

⁹ Anderson's adoption of the "vertical passenger" rule contravenes the SMS policy.

WSF also provides an overly selective reading of the testimony from Captains John O'Brien and John Ward, WSF security officer Richard Fife, and WSF employee Erik Trunnell to justify the trial court's departure from this Court's remand instructions. Br. of Resp't at 9-10. Contrary to WSF's factual assertions, Caraska offered evidence that WSF terminal employees were understaffed or ill-trained and that they violated the SMS policy when dealing with Collins. For example, Captain O'Brien explained he was responsible for the safety and health of passengers and crew as the ferry's captain. RP I:62. *He depended on the crew to notify him of unruly passengers so that he could carry out his responsibilities pursuant to WSF policy.* SCP 140; RP I:67-68. As a matter of WSF policy, he refused passage to disruptive and intoxicated passengers. *Id.*; RP I:62. Yet he was never advised by *any* WSF employee that there was a problem drunk trying to board the ferry. *Id.*; RP I:68. He would have prevented Collins from boarding the ferry had he been properly notified of Collins' disruptive behavior on the docks. RP I:62.

Captain Ward helped implement the SMS policy; however, he could not recall ever attending a class or formal training session where he was given instructions on how to deal with disruptive or intoxicated passengers. CP 576-77. More importantly, when he sought help from WSF management to prevent a problem passenger from boarding the

ferry, WSF's response was "diluted" at best. CP 557. WSF employees learned they were "damned if you do and damned if you don't, so you try to avoid situations like that." *Id.*

Fife also helped implement the SMS policy. RP II:593-94. When asked whether he had reviewed the training protocols for disruptive or illegal activities prior to his deposition, he unequivocally stated there was nothing to review. RP II:600. He also admitted *WSF offered no training to help employees identify problem passengers like Collins. Id.* at 610. Despite the language of the SMS policy, Fife did not believe an unruly passenger had to be reported unless the passenger posed a security threat to an employee or the ferry. *Id.* at 606-09.

Even Trunnell, a 25-year employee, testified he was unaware of *any* policy in place for managing difficult passengers. CP 119. Although WSF had a policy on paper for dealing with intoxicated and unruly or disruptive passengers, there was no actual policy in place. *Id.* Even if there was, WSF failed to adequately notify its employees of the policy or to provide them with the necessary resources to implement it. CP 557-58.

WSF fails to mention the fact that its employees were frequently assaulted by ferry passengers and that it was aware of the ongoing problem. For example, Captain O'Brien was assaulted at least two times. RP I:62-64. Trunnell was assaulted three times. RP I:168-71. Although

WSF was aware of the need for security on the docks to ensure employee safety, RP II:132-33; CP 117-18, 131, 179, 555-57, it failed to take the appropriate steps to adequately train its personnel to deal with intoxicated and unruly passengers. CP 557-58.

Finally, WSF's contention in footnote 1 that the SMS policy played a minor role in the trial is patently false, as belied by Caraska's arguments at trial, on remand, and on appeal.

C. ARGUMENT IN SUPPORT OF REPLY

(1) The Trial Court's Decision Does Not Conform to the Mandate

As Caraska stated in his opening brief, the mandate of this Court is binding on the trial court. Br. of Appellant at 11. The trial court *must* take the Court's instructions to heart when addressing any remanded issues; if it does not, this Court may require the trial court to enter an order conforming to the mandate. *Id.* WSF ignores these clear directives when attempting to justify the trial court's erroneous decision.

After reversing the order dismissing Caraska's Jones Act and unseaworthiness claims, this Court provided the trial court with specific instructions on remand. With respect to Caraska's Jones Act claim, the trial court was instructed to "address[] the evidence in the context of WSF's duty as defined by the adopted SMS policy" and to "address

Caraska's claim that the WSF breached its duty to implement the SMS policy by not properly training its employees." *Caraska*, 140 Wn. App. at *4. As for causation, the trial court was directed to apply the Jones Act "slight evidence" causation standard. *Id.* at *5. The court was further instructed to revisit Caraska's unseaworthiness claim and determine whether WSF adequately implemented and trained its employees in the SMS policy. *Id.*

WSF fails to recognize that the trial court's decision exceeds the scope of the remand and ignores the issues this Court directed the trial court to consider. For example, the trial court did not address causation because it found WSF was not negligent. SCP 114. It declined to address WSF's breach of the SMS policy because it found that Caraska failed to carry his burden of proof to establish that Collins was disruptive, disorderly, or confrontational. SCP 122-23. It overlooked the very evidence this Court instructed it to consider. And it ignored the Jones Act slight evidence standard. In the end, the court simply re-characterized the evidence it did consider to justify its earlier erroneous decision.

The trial court erred in failing to follow this Court's clear remand instructions. *See Tacoma Bldg. & Sav. Ass'n v. Clark*, 8 Wash. 289, 290, 36 P. 135 (1894) (finding trial court committed error when it failed to comply with instructions issued by appellant court for retrial on remand).

Consequently, the court's decision does not conform to the mandate and justifies its recall. RAP 12.9(a). This Court should not consider those aspects of the trial court's decision that are out of conformity to this Court's directions on remand, and rule as a matter of law that Caraska established his Jones Act and seaworthiness claims.

(2) The Trial Court Erred in Dismissing Caraska's Claims

Apart from the trial court's disobedience of this Court's instructions on remand, the trial court's decision on the Jones Act and seaworthiness is wrong and should be reversed.

(a) Standard of Review and Burden of Proof

WSF and Caraska agree that this Court reviews a trial court's findings of fact after a bench trial to determine whether they are supported by substantial evidence and, if so, whether they support the trial court's conclusions of law. Br. of Resp't at 20, 23; Br. of Appellant at 16-17.

But WSF inadequately analyzes the burden of proof in a Jones Act case. Br. of Resp't at 20. This is a critical omission because the burden in a Jones Act case is extremely lenient.¹⁰ All that is required to sustain a finding of liability is a showing of "slight negligence." *See Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 662 (9th Cir. 1997).

¹⁰ A seaman subject to the Jones Act is not entitled to file a Washington industrial insurance claim, where no-fault principles apply to on-the-job injuries. Br. of Appellant at 18 n.13.

See also, Comeaux v. T.L. James & Co., Inc., 702 F.2d 1023, 1024 (5th Cir. 1983) (noting the sufficiency of evidence test in a Jones Act case requires less evidence to support a finding). Given this lighter burden, this Court must alter its usual substantial evidence standard accordingly. *See, e.g., In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

(b) The Law of the Case Doctrine Does Not Apply to Preclude Caraska's Arguments on Appeal

WSF initially argues Caraska is precluded from challenging Findings of Fact Nos. 3-5 and 7 because they were verities on appeal and the trial court considered them verities on remand. Br. of Resp't at 21-22. WSF misinterprets the law of the case doctrine and overlooks the effect of RAP 2.5 on this case. Where the trial court exercised its independent judgment on remand to revisit the findings made during the original bench trial and this Court's prior decision did not discuss or decide the propriety of those findings, the law of the case doctrine does not preclude Caraska from challenging them in the appeal now before the Court.

The term "law of the case" means different things in different circumstances. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). In its most common form, the doctrine prevents a party from challenging an appellate holding enunciating *a principle of law* at a later stage in the same proceedings. *Roberson v.*

Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).¹¹ It is also used to indicate the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand. If the trial court on remand fails to conform to the prior determinations of this Court, it commits error subject to further review. *See State ex rel. McBee v. Superior Court for Walla Walla County*, 162 Wash. 695, 697, 299 P. 383 (1931) (reversing trial court judgment that failed to comply with Supreme Court’s directions on remand). The doctrine “seeks to promote finality and efficiency in the judicial process.” *Id.*

But RAP 2.5(c) restricts the application of some of the principles historically grouped under the law of the case doctrine. In particular, RAP 2.5(c)(1) restricts the doctrine as it relates to trial court decisions after a case is remanded by this Court:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

The rule does not permit an appellant to raise a previously undisputed issue in a second appeal unless it was considered by the trial

¹¹ WSF’s reliance on *Folsom v. City of Spokane*, 111 Wn.2d 256, 759 P.2d 1196 (1988), is misplaced. Br. of Resp’t at 21. *Folsom* is inapplicable here because its analysis is limited to RAP 2.5(c)(2), which involves reconsideration of an identical legal issue in a subsequent appeal.

court on remand. *See, e.g., State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) (explaining: “Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question[.]”). *See also, State v. Sauve*, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982), *aff’d by* 100 Wn.2d 84, 666 P.2d 894 (1983) (dismissing appeal where appellant only appealed issues raised during first appeal and not decisions made on remand). The trial court has discretion whether to revisit issues not raised by the appeal. *See Barberio*, 121 Wn.2d at 50-51. If the trial court chooses to consider a previously undisputed issue, this Court may review the resulting decision. *Id.*

Here, this Court originally concluded the trial court erred by ignoring evidence that Collins was disorderly, disruptive, or confrontational. *Caraska*, 140 Wn. App. at *4 (2007). The Court specifically instructed the trial court to consider the evidence supporting Caraska’s Jones Act and unseaworthiness claims on remand. *Id.*

On remand, the trial court re-read the entire record and considered the parties’ remand memorandums and proposed findings of fact and conclusions of law. SCP 117, 124. As WSF admits, the trial court “re-analyzed” the evidence and then affirmed its original findings of fact. Br. of Resp’t at 17. WSF also concedes the trial court supplemented those findings “with new analysis” of the evidence. *Id.* at 24-29. Importantly,

the trial court added to its original findings to make factual corrections that might not have been apparent in its Supplemental Findings of Fact. SCP 124-25 n.11.

More critically, the trial court refused to address Jones Act causation on remand and instead focused on the scope of WSF's duty, which this Court had previously resolved. The court's decision to exceed the scope of the Court's remand instructions was an exercise of its independent judgment. Likewise, a determination that WSF did not breach its duty required the trial court to exercise its independent judgment after reviewing all of the evidence. Caraska raised the issue of WSF's negligence and its failure to adequately implement the SMS policy on remand. The trial court ruled upon those issues.¹² Review of the trial court's determinations are thus properly before this Court.

(c) Caraska's Jones Act Claim Should Be Reinstated

WSF initially argues Caraska cannot create a record on appeal that his trial counsel failed to make below, implying he is somehow manipulating the record on review. Br. of Resp't at 23-24. This argument is nonsense because Caraska has done nothing of the sort. Overwhelming

¹² WSF admits the trial court did not address the slight causation standard, claiming it was unnecessary to do so because Caraska failed to prove negligence. Br. of Resp't at 18 n.25. The trial court's decision not to address this issue on remand involved an exercise of the court's independent judgment, which is subject to further appellate review. Of more concern is the fact that the court's decision contradicts this Court's clear instructions. *See Tacoma Bldg.*, 8 Wash. at 290.

and uncontroverted evidence confirms that Collins was visibly intoxicated and causing a reportable disturbance within the meaning of the SMS policy shortly before he assaulted Caraska. Once again, WSF ignores the evidence and too narrowly construes the policy.

WSF's brief reveals the weakness of its case. Although WSF contends the trial court's findings of fact are supported by substantial evidence, it fails to provide this Court with citations to the actual testimony to support its argument. *See id.* at 24-27. WSF's reliance on the findings in place of the actual evidence begs the question where the sufficiency of the findings is disputed. This Court needs to know what the witnesses actually said and not just what the trial court said they said.

The trial court's findings relating to Caraska's Jones Act claim are not supported by substantial evidence and do not support its conclusions of law.¹³ Br. of Appellant at 21-23. Like the trial court, WSF continues to misinterpret the SMS policy by repeatedly focusing only on whether Collins was acting in a "threatening" and "aggressive" manner. *Id.* at

¹³ To recover on a Jones Act claim, a seaman must establish by a preponderance of the evidence: (1) negligence on the part of his employer; and (2) that the negligence was a cause, however slight, of his injuries. *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993). The evidence necessary to support a finding of Jones Act negligence need not be substantial; instead, evidence of even the "slightest negligence" is sufficient to sustain a finding of liability. *Id.* at 218. Under the Jones Act, negligence is a cause of an injury if it played any part, "however slight" in causing the injury. *Ribitzki*, 111 F.3d at 662.

24-26 (discussing Supplemental Findings of Fact Nos. 9-11).¹⁴ But this Court already determined the policy applies even if an intoxicated passenger is not acting aggressively or threateningly and instead is merely disruptive, disorderly, or confrontational. *Caraska*, 140 Wn. App. at *4. This is the critical detail that escapes WSF's analysis.

As Caraska noted in his opening brief and reiterates in his reply to WSF's counterstatement of the case, Findings of Fact Nos. 3, 5, 7, and 9-11 ignore uncontroverted evidence that Collins was intoxicated and acting in a disorderly, disruptive, or confrontational manner and that his behavior was enough to trigger Anderson and Lane's duty to contact the police.¹⁵ *Supra*, 3-5; Br. of Appellant at 21-22. By refusing to recognize that Collins was causing a reportable public disturbance within the meaning of the SMS policy, the trial court ignored this Court's instructions to more broadly construe the policy on remand. This was error. *See Tacoma Bldg.*, 8 Wash. at 290.

¹⁴ WSF's misreading of the SMS policy carries over into its arguments concerning the conclusions of law. Br. of Resp't at 33-39. Although WSF argues the findings support Conclusions of Law Nos. 6 and 8, it fails to rebut Caraska's argument that Conclusion of Law No. 7 is not supported by the findings. *Compare* Br. of Appellant at 29-31 *with* Br. of Resp't at 33-34, 38-39. WSF concedes the argument by failing to respond to it. *See State v. Evans*, 129 Wn. App. 211, 221 n.7, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007).

¹⁵ The trial court's findings that Anderson and Lane would have followed the SMS policy correctly and contacted the police and the master in the event that Collins had been violent, disorderly, disruptive, or confrontational (Supplemental Findings of Fact Nos. 9 and 12) could not have been made without the benefit of the trial court's undisclosed extra-sensory perceptions (ESP). Moreover, by the time Lane did get around to calling the police, Collins had already attacked Caraska. CP 656-57.

WSF next contends the trial court correctly chose to give little weight to Morse's and Walter's "back of the mind concerns." Br. of Resp't at 25-26 (discussing Findings of Fact Nos. 10-11). Once again, WSF misconstrues the SMS policy by erroneously placing the burden for reporting Collins' erratic behavior on the passengers waiting to board the ferry. *Id.* Morse and Walters were not required to communicate their concerns about Collins to WSF personnel, the police, or the captain. Instead, the burden to ensure the well-being and safety of passengers and crew unequivocally rests with WSF personnel. SCP 155-56. The testimony from Morse and Walters substantiated the disruptive and confrontational nature of Collins' behavior. *Supra*, 4-5.

WSF then focuses on the fact that Caraska failed to provide evidence of what precipitated Collins' attack and that the attack was unprovoked to argue Finding of Fact No. 13 is supported by substantial evidence. Br. of Resp't at 27. That the attack was unprovoked is immaterial. Caraska was not required to present evidence of what precipitated the attack to support his claims.

WSF continues to insist Caraska did not offer any testimony about SMS training or assert that WSF employees were understaffed or ill-trained. Br. of Resp't at 24, 26-29 (discussing Findings of Fact Nos. 9,

12-13, and 15-17). These findings are clearly erroneous and contradicted by the evidence presented. *Supra*, 5-8; Br. of Appellant at 24-25, 27-29.

WSF next argues the unforeseeability of Collins' attack precludes a finding that it is liable for Caraska's injuries. Br. of Resp't at 18, 30 (discussing Finding of Fact No. 7).¹⁶ It advances the identical legal argument here that it did in its unsuccessful motion for reconsideration. Mot. for Recon. at 3-4. WSF ignores the fact that this issue was not legitimately before the trial court on remand since its duty was already established. Even assuming that it was, which Caraska disputes, WSF's argument is unavailing.

One of the problems with WSF's foreseeability argument is that it focuses too narrowly on whether Collins was acting in a *violent* manner. WSF adopted the SMS policy to prevent an intoxicated and unruly passenger from boarding a WSF vessel and causing trouble while the vessel is in transit and police assistance is not readily available. Br. of Appellant at 20. The policy does not limit WSF personnel to reporting only intoxicated and violent passengers; instead, WSF personnel are required to report intoxicated passengers who display *any one* of the unacceptable behaviors listed. The policy thus identifies what conduct may foreseeably result in harm to other passengers and crew. Here,

¹⁶ Contrary to WSF's assertions at page 18 of its brief, the foreseeability of Collins' attack was an essential component of Caraska's first appeal.

Collins was disorderly, disruptive, *and* confrontational; he should have been reported to the police or the captain pursuant to the SMS policy.

Another problem with WSF's foreseeability argument is that the cases it relies upon are easily distinguishable because they relate to the over-service of obviously intoxicated patrons and the liability of commercial hosts for that over-service. Br. of Resp't at 32. The statute at issue in those cases, RCW 66.44.200(1), requires the over-served patron to appear to be under the influence of alcohol. In *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989), the Supreme Court held that a bar was not liable for a drunken patron's assault on another patron because the assailant did not appear to be intoxicated when served by the bar. The Supreme Court also noted that an establishment would not be liable to an assault victim unless it had some notice of harm from the previous actions of the person who committed the assault. *Id.* at 498. This notice may be met if the establishment has notice of similar previous events that could lead to violence, *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), or if the facts lend credence to the reasonable foreseeability of harm. *Parrilla v. King County*, 138 Wn. App. 427, 440, 157 P.3d 879 (2007) (foreseeable that person high on PCP could seize bus and hit car occupied by plaintiffs). In this case, WSF clearly knew of the problem of drunken passengers and established its SMS policy

accordingly. Br. of Appellant at 26-27, 30. Collins' behavior put WSF on notice of the reasonable foreseeability of his attack in light of that policy.

Finally, WSF fails to recognize that Caraska was only required to meet a "featherweight" standard of proof rather than prove proximate cause under the foreseeability test required in tort law. *See Smith v. Trans-World Drilling Co.*, 772 F.2d 157 (5th Cir. 1985). *See also, Ribitzki*, 111 F.3d at 664 (noting the "featherweight" causation standard allows a seaman to survive summary judgment by presenting even the slightest proof of causation). Under the featherweight standard applicable here, the evidence shows that there was a causal connection between WSF's breach of its duty to provide a safe workplace and the injuries Caraska suffered.

The trial court too narrowly construed the SMS policy. Collins was drunk and disorderly, disruptive, *and* confrontational; he should have been reported pursuant to the SMS policy. Yet neither Anderson nor Lane complied with that policy. The evidence conclusively shows that WSF owed Caraska a duty and that its breach of that duty caused his injuries. The trial court erred by dismissing Caraska's Jones Act claim.

(d) Caraska's Unseaworthiness Claim Should Be Reinstated

In arguing the evidence supports the trial court's findings of fact relating to Caraska's unseaworthiness claim,¹⁷ WSF again focuses too narrowly on Collins' lack of aggressiveness without considering whether his behavior was disorderly, disruptive, or confrontational. Br. of Resp't at 38-39. Violence or aggression is only one of the unacceptable behaviors identified in the SMS policy. Accordingly, the policy may be implicated even if the intoxicated passenger is not violent.

There is no dispute that WSF was aware of the need for security on the docks to ensure employee safety. RP II:132-33; CP 117-18, 131, 179, 555-57. But it failed to take the appropriate steps to adequately train its personnel to deal with intoxicated and disorderly passengers. CP 557-58.

Anderson and Lane erroneously believed their duty was to report only *aggressive or threatening* passengers, no matter how intoxicated and disruptive, confrontational, or disorderly those passengers were. *Supra*, 7-8. As WSF concedes, Lane seemed not to remember the substance of *any* prior training sessions he had attended. Br. of Resp't at 39. As their testimony demonstrates, Anderson and Lane were either not adequately

¹⁷ A ship is unseaworthy if its condition proximately causes injury to a seaman. Br. of Appellant at 32. The condition need not be a defective condition of a physical part of the ship; instead, a ship may be unseaworthy if its crew is understaffed or ill-trained. *See Am. President Lines, Ltd. v. Welch*, 377 F.2d 501, 504 (9th Cir. 1967). *See also, Boudoin v. Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336, 75 S. Ct. 382, 99 L.Ed. 354 (1955) (inadequately training or improperly manning a ship presents a classic case of unseaworthiness).

informed of their responsibilities under the SMS policy or were not provided with the necessary resources to implement them. Testimony from other WSF witnesses confirms the gaps in WSF's training. *Supra*, 5-8; Br. of Appellant at 27-29, 35.

Caraska presented overwhelming evidence that WSF employees were understaffed or inadequately trained to deal with an intoxicated and disorderly passenger like Collins. Where WSF failed to provide a competently trained crew, the ferry was unseaworthy. *See American President Lines*, 377 F.2d at 504.

(3) Remand to a New Trial Judge Is Appropriate

As Caraska argued in his opening brief, remand to a different trial judge is warranted here because the current judge has evidenced a clear inability to fairly treat the issues in this case. Br. of Appellant at 35.

WSF makes no attempt to distinguish the cases Caraska cites. Br. of Resp't at 44-46. Instead, it relies on *Hyundai Motor America v. Magana*, 141 Wn. App. 495, 523, 170 P.3d 1165 (2007), to argue Caraska must "show bias or partiality in the part of the judge with actual proof" to warrant remand to another judge. *Id.* at 45. WSF misstates Division II's holding. As the *Hyundai* court stated, "[I]itigants are entitled to a judge that both is, and appears to be, impartial and they must submit proof of

actual or perceived bias to support an appearance of impartiality claim.”

Id. Caraska presented ample evidence the trial judge appears biased.

This is the second time this Court has had to intervene to correct an error of the trial court. In the first appeal, this Court reversed and directed the trial court on remand to address specific evidence in the context of WSF’s duty as defined by the SMS policy and to address Caraska’s claim that WSF breached that duty. The Court also directed the trial court to revisit Caraska’s unseaworthiness claim and determine whether WSF adequately implemented and trained its employees on the SMS policy. But on remand, the trial court failed to address the issues this Court instructed it to consider. In particular, it ignored causation entirely and failed for a second time to properly construe the SMS policy and to consider all of the evidence supporting Caraska’s claims.

WSF relies on *McSherry v. City of Long Beach*, 423 F.3d 1015, 1023 (9th Cir. 2005), to argue reassignment is not appropriate. Br. of Resp’t at 45. But it fails to analyze any of the factors articulated in that case.¹⁸ *Id.* Moreover, *McSherry* is not helpful here where it is evident the

¹⁸ Those factors are:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and

judge will have substantial difficulty in putting out of his mind his previously expressed views. As that court noted, “[i]f either of the first two factors is present, reassignment is appropriate.” *McSherry*, 423 F.3d 1023. Even assuming this Court will draft a careful and detailed remand order, Caraska believes it is unlikely the current trial judge will be able to put his previous rulings out of his mind in addressing the issues raised in this appeal or any other issues going forward.

Finally, WSF suggests that remand to a different judge would be improper because it would require a complete new trial. Br. of Resp’t at 46. This case does have a history; however, that history does not weigh against remand to a different judge. The trial court’s inability to follow this Court’s instructions on remand is more than sufficient to warrant remand to a different judge. *See, e.g., In re Marriage of McCausland*, 129 Wn. App. 390, 394, 401 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Under the circumstances, the Court should remand the case to a different trial judge to make the determinations ordered by this Court and to promote the appearance of fairness.

(4) The Court Should Not Consider the Additional Issues WSF Raises in Its Brief

duplication out of proportion to any gain in preserving the appearance of fairness.

McSherry, 423 F.3d 1023 (citation omitted).

Compounding its complicity in the trial court's departure from this Court's instructions on remand, WSF raises two additional issues in its response brief, one of which was not raised in the trial court. RAP 2.5(a). Br. of Resp't at 40-44. The Court should not consider either one.

(a) This Court Should Not Revisit Its Previous Decision Establishing WSF's Duty Under the SMS Policy

(i) RAP 2.5(c)(2) does not apply

Without analyzing RAP 2.5(c)(2), WSF argues the Court should review its previous decision determining WSF's duty under the SMS policy to prevent the Court from perpetuating its own error. Br. of Resp't at 40-43. The Court should decline that invitation because it did not err.

Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal. *Roberson*, 156 Wn.2d at 41. This rule has been codified as RAP 2.5(c)(2), which provides that “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case, and where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.” The doctrine is discretionary. *See Greene v. Rothschild*, 68 Wn.2d 1, 8, 402 P.2d 356, 414 P.2d 1013 (1965).

Reconsideration of an identical legal issue in a subsequent appeal of the same case will be granted where the holding of the prior appeal is clearly erroneous, the decision would work a manifest injustice to one party, and no corresponding injustice would result to the other party if the erroneous holding were set aside. *See, e.g., Folsom*, 111 Wn.2d at 264. *See also, Greene*, 68 Wn.2d at 10 (noting the doctrine should be used only “rarely, and for cogent reasons, after careful consideration of the situation involved . . . or, more specifically, in a clear case under extraordinary or exceptional circumstances, in the interest of justice.”). *Id.* at 10.

Here, WSF has not demonstrated the Court’s prior decision was clearly erroneous or that refusing to reconsider it would work a manifest injustice to WSF. Equally as important, WSF has failed to show that no corresponding injustice would result to Caraska if the erroneous determination is set aside. WSF crew members like Caraska rely on the SMS policy for protection. The Court should therefore decline to revisit its prior decision establishing WSF’s duty. Even assuming the Court decides to do so, the SMS policy establishes WSF’s duty.

(ii) The SMS policy establishes WSF’s duty

WSF contends, as it did in its unsuccessful motion for reconsideration, that this Court misunderstood the legal significance of the SMS policy and therefore erroneously defined WSF’s duty to Caraska.

Br. of Resp't at 19, 40; Mot. for Recon. at 5-7. In particular, WSF asserts it did not owe Caraska a duty because the SMS policy was voluntary rather than mandatory under Coast Guard regulations. Br. of Resp't at 40. WSF is mistaken.

This Court considered the significance of the SMS policy in Caraska's first appeal. *Caraska*, 140 Wn. App. at *4. Nothing in the Court's analysis of that issue was wrong. WSF was aware that its employees were frequently assaulted by intoxicated passengers and that the assaults were not isolated events. Br. of Appellant at 32-33. It adopted the SMS policy to ensure employee safety. *Id.*

Once again, WSF argues the SMS policy cannot form the basis for the duty it owes to Caraska because the policy is only mandatory in foreign voyages. Br. of Resp't at 40. Even so, WSF's adoption of the policy was no casual matter. It adopted the policy as part of an effort to ensure safe vessel operation. WSF cannot argue it did not owe Caraska a safe work place; it did under the Jones Act. *See Pac. Am. Fisheries v. Hoof*, 291 F. 306, 308 (9th Cir. 1923). The SMS policy does nothing more than implement WSF's duty to provide a safe workplace for ferry workers. Crew members like Caraska rely on the SMS policy, expecting ticket personnel to adhere to that policy to keep passengers like Collins from harassing or harming them. At no point does WSF deny that the

SMS policy is, in fact, its policy for dealing with drunk and disorderly passengers.

Under *Joyce v. State*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005), a state agency's internal directives and department policies may provide evidence of the standard of care and therefore be evidence of negligence. *Id.* at 324. See also, *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 87-88 n.8, 1 P.3d 1148 (2000) (agency's violation of its own manual was further evidence of the Department's negligence in investigating child abuse allegations); *Kelley v. State*, 104 Wn. App. 328, 334-35, 17 P.3d 1189 (2000) (violation of policy directives may be evidence of gross negligence).

But here, the trial court did not properly credit the SMS policy in connection with the duty WSF owed to Caraska. All of the cases WSF relies upon, including those found in footnote 34, are inconsistent with *Joyce*. Although internal policies or directives do not generally create law, a clear policy directive informs the tort duty owed. See *Joyce*, 155 Wn.2d at 323. In this case, WSF's violation of its own SMS policy, a policy which clearly has the force of law with respect to the ferry run between Washington and British Columbia, has all the earmarks of a liability-creating administrative rule as the *Joyce* court discussed. Alternatively, the SMS policy implements WSF's own duty to provide its

employees with a safe workplace. Violation of that policy is evidence of negligence, as this Court has already determined.

WSF also argues that liability based on internal policies could create “a perverse disincentive” for state agencies to either lower their standards or have none at all. Br. of Resp’t at 42. This too is wrong. This Court’s previous opinion held that the SMS policy implemented WSF’s duty to provide a safe place to work for ferry employees like Caraska. *Caraska*, 140 Wn. App. at *4. Far from a “perverse disincentive,” it would be highly inequitable for WSF to establish standards its employees must follow to ensure the safety and well-being of other crew members and passengers and then permit it to renege because it decided long after the fact that the policy had no real meaning at all. WSF crew members like Caraska rely on the SMS policy for protection.

(b) The Court Should Disregard WSF’s *Tegman* Argument

For the first time on appeal, WSF argues *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003), controls the damages award in this case. Br. of Resp’t at 43-44. WSF did not raise this issue during Caraska’s first appeal nor did it raise the issue on remand. In fact, WSF concedes the trial court did not reach the issue. Br. of Resp’t

at 44. WSF's assertion of this issue is frivolous. Accordingly, the Court should decline to consider it for the first time on appeal. RAP 2.5(a).

D. CONCLUSION

WSF's brief does not comply with the requirements of RAP 10.3(a)(5); moreover, it contains factual material not supported by the record. The Court should disregard the nonconforming portions of WSF's brief and impose sanctions against WSF for its failure to comply with the Rules of Appellate Procedure.

For the second time, the trial court erred in dismissing Caraska's Jones Act and unseaworthiness claims. This Court confined the trial court on remand to addressing the question of WSF's negligence rather than its duty. But the trial court went far afield from the Court's remand instructions when it mischaracterized the evidence and determined WSF did not owe Caraska a duty under the SMS policy.

Caraska was only required to demonstrate the "slightest negligence" to establish WSF's liability. He satisfied this negligible burden by providing overwhelming evidence that Collins was obviously drunk and disorderly, disruptive, or confrontational and that WSF terminal employees failed to comply with the SMS policy when they permitted him to board the ferry. He also presented evidence that WSF employees were not equipped to deal with disorderly passengers like Collins and that

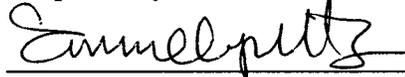
WSF's failure to properly train its employees to handle such passengers created an unseaworthy vessel.

This Court properly determined the SMS policy establishes WSF's duty to employees like Caraska. Nothing in the Court's analysis of that issue was wrong. Where WSF has not demonstrated the Court's prior decision is clearly erroneous or that it works a manifest injustice to WSF, the Court should decline to revisit it. The Court should also decline to consider WSF's *Tegman* argument where it is raised for the first time on appeal.

The Court should reverse the trial court's decision dismissing Caraska's claims against WSF and remand to the trial court with instructions to enter judgment in favor of Caraska. Upon remand, this case should be assigned to a different judge. Costs on appeal should be awarded to Caraska.

DATED this 22nd day of June, 2009.

Respectfully submitted,



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