

69115-5

69115-5

No. 69115-5-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

REBECCA LAMONTE,

Appellant,

v.

THE ESTATE OF SHERMAN LLOYD COOK, JR. and RICHARD
WESTERFIELD and JANE DOE WESTERFIELD, husband and wife and
the marital community composed thereof,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

This appeal presents the issue whether a court errs in allowing, **during trial**, withdrawal of conclusively-established admissions under CR 36(b), when the withdrawal seriously prejudices the party who obtained the admissions. In this personal injury action resulting from a 3-vehicle collision, Respondent/Defendant Richard Westerfield failed to respond to Appellant/Plaintiff Rebecca LaMonte's Requests for Admission ("RFAs" or "admissions"), making them immediately conclusively established under CR 36(a). These admissions conceded facts demonstrating how the accident occurred: Westerfield's vehicle hit the vehicle driven by Sherman Cook, former co-defendant, pushing Cook into LaMonte. Cook had also admitted RFAs on the same facts. The admissions established the facts of Westerfield's negligence and proximate cause for LaMonte's damages and injuries. LaMonte relied on Westerfield's admissions for 12 years¹ and then, before trial, moved to have them deemed admitted. The court expressly deemed the critical RFAs admitted.

After trial commenced before a new judge, the court granted Westerfield's belated motion for reconsideration and withdrew the admitted RFAs, prohibiting LaMonte from relying on the admitted facts in

¹ Trial was delayed for years due to an evidentiary ruling prohibiting LaMonte from presenting evidence that the collision caused her to develop fibromyalgia, an issue that went up to the Washington Supreme Court, after which this case was reactivated. See CP68-69, and discussion below.

her opening statement. The court then allowed Westerfield to present, through new expert testimony, his theory that Cook's car did not hit LaMonte's car after being rear-ended by Westerfield, contrary to the RFAs, in which both Westerfield and Cook said that Westerfield hit Cook into LaMonte. The court also admitted Cook's deposition testimony (Cook died before trial), contradicting the Cook RFAs. The jury concluded Westerfield was negligent but his negligence did not proximately cause LaMonte's injuries.

ASSIGNMENTS OF ERROR & ISSUES

Assignments of Error: LaMonte assigns error to the trial court's decision during trial to grant Westerfield's belated motion for reconsideration and the improper, prejudicial rulings flowing from that decision, including: (1) prohibiting mention of the RFAs (Westerfield and Cook's) and admitted facts in opening statement; (2) admitting Westerfield's and his expert Lewis's testimony that Cook did not directly hit LaMonte, contradicting the RFAs and admitted facts of the accident; (3) admitting Cook's contradictory and confusing deposition testimony, despite his admissions and his contemporaneous statement that Westerfield hit him into LaMonte; (4) allowing Westerfield to argue in closing that he did not cause Cook to hit LaMonte, *i.e.*, no accident

occurred; and (5) rejecting LaMonte's proposed instructions containing the admissions.

Issues: At trial, on Westerfield's belated motion for reconsideration asking the court to withdraw admitted Westerfield's RFAs, the court failed to properly apply CR 36(b) by rulings that ignored the severe prejudice to LaMonte in removing admissions establishing the facts of the accident; favoring presentation of the merits of Westerfield's defense, contrary to CR 36's instructions; and concluding LaMonte "opened the door" to Cook's contradictory deposition testimony. Did the trial court commit reversible legal error in: **(1)** Withdrawing conclusively-established RFAs on the facts of Westerfield's negligence and causation? **(2)** Prohibiting any mention of the RFAs (Westerfield's or Cook's) in opening statement? **(3)** Admitting Westerfield's and his expert Lewis's testimony that Cook's car did not directly hit LaMonte's car when rear-ended by Westerfield, allowing the jury to find that Westerfield's negligence did not proximately cause LaMonte's injuries? **(4)** Admitting decedent Cook's deposition testimony contradicting the established facts of the accident and his signed admissions? **(5)** Allowing Westerfield to argue in closing that no accident occurred involving him and LaMonte ? **(6)** Failing to give jury instructions containing the admissions?

STATEMENT OF THE CASE

On **May 30, 1997**, Richard Westerfield was the last in a line of cars traveling southbound on 1-405 near the 1-5 southbound exit ramp at approximately 12:30 p.m. CP314. Driving in front of Westerfield was Sherman Cook. In front of Cook was Rebecca LaMonte. LaMonte's car stopped for traffic ahead of her, halted due to an earlier accident. Cook abruptly braked too. CP315. Westerfield, driving behind Cook, was unable to stop in time and hit Cook, CP314, which caused Cook to crash into LaMonte, then impacting the car in front of her. The driver of that first car fled and is not identified. CP105.

Westerfield provided a handwritten statement to the responding police officer within an hour after the accident, stating: "Driving behind Volvo [Cook]-rain & wet pavement, Volvo swerved when braking; I could not stop in time - impacted Volvo from rear. No other cars hit me (I was last in line)." CP314. Cook also gave a handwritten statement to the officer within an hour after the accident: **"The car in front of me made an emergency stop for another accident. I was making an emergency stop as well. The car behind me hit my car. I hit the car in front of me"**. CP315. LaMonte suffered immediate injuries which developed into fibromyalgia and other ongoing conditions.

LaMonte filed this case on **March 7, 2000**. On **April 8, 2000**, she served her Complaint, with Interrogatories, Requests for Production and Requests for Admission. No dispute exists that Westerfield received service of the RFAs. CP22 (Decl. of Service listing RFAs). The RFAs stemmed from Westerfield's and Cook's contemporaneous police statements. CP314-15. Westerfield never responded to the RFAs. He filed his Answer on **May 4, 2000**, CP69-71, and served responses to the interrogatories and requests for production on **May 8, 2000**. *See* CP66, 71; CP185-87 (excerpt of Int. Answers).

Cook responded to the RFAs, admitting that Cook's vehicle struck LaMonte's, CP316-25 (*e.g.*, RFA12), and that this happened because Westerfield's vehicle struck Cook's. *Id.*, RFA 13. There was no motion to withdraw or amend these admitted facts.

From this time, the case went through a series of changes of judges and continuances,² ultimately being suspended due to an evidentiary ruling prohibiting LaMonte from presenting evidence that the collision caused her to develop fibromyalgia, an issue that the Washington Supreme Court

² The lengthy procedural history is summarized at CP109-11. Because the documents are not relevant to the issues on appeal. LaMonte cites docket numbers. Westerfield, however, designated some of these documents. LaMonte cites to the CP where designated. On 1/10/01, Judge Lum was assigned, Dkt.#14, then affidavited by Westerfield, Dkt. #16. The case was reassigned 3/26/01, Dkt.#18, and again 10/26/01, Dkt.#50, but that judge recused on 2/4/02. Judge Heavey took over, Dkt.#72, there was another affidavit, and on 2/12/02, Judge Hall was assigned. Dkt.#87.

ultimately resolved, after which this case was reactivated. *See* CP68-69, and discussion below. In the spring of 2001, Cook settled with LaMonte. Based on that settlement and a reasonableness hearing (May 3, 2001), in 2011 pretrial motions, Westerfield successfully moved to dismiss Cook from this action, despite LaMonte's opposition. CP101-02. Trial was continued. (Dkt. #43). Cook, seriously ill at the time, was deposed on May 3, 2001. RP 6-6, p.42; CP363-69 (excerpts). A second deposition was taken on December 26, 2001, this time videotaped. RP 6-6, p.41. In these depositions, Cook gave a contradictory explanation of the accident, doubting his statement and admitted RFAs, disclosing his memory was affected by his declining health.³

Westerfield moved to exclude LaMonte's expert testimony regarding causation of fibromyalgia, under the *Frye* test⁴ for determining the admissibility of "novel scientific evidence." The court granted Westerfield's motion on February 21, 2002. CP1072-75. LaMonte sought discretionary review in the Supreme Court, CP1221-37, which was denied (11/4/02, CP1245-46). But during this period, other trial courts ruled to the contrary, allowing similar causation testimony. CP110.⁵

³ RP 6-6, p. 6, l. 20, to p. 7, l. 20; p. 35, l. 14, to p. 36, l. 9; p. 54, l. 15, to p. 55, l. 24.

⁴ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁵ Trial was continued, CP 1274-76, 1279-81, 1282-84, and the case was stayed on 1/2/06. CP1285-87. On 6/26/07, Judge McDermott was assigned (Dkt. # 152), and a new trial date set, CP1301-03, then continued again. CP1304-07, 1319; Dkt. ## 173, 183.

From November 2008 to May 12, 2009, the parties litigated whether to allow evidence regarding causation of fibromyalgia from the car accident. LaMonte ultimately prevailed on this issue, with the court allowing this evidence on May 12, 2009, in an Order Granting Plaintiff's Motion to Allow Expert Testimony. CP1477-90.⁶

On September 8, 2011, the Washington Supreme Court decided *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011), which limited *Frye's* application and overruled prior decisions governing admissibility of novel scientific evidence. *Id.* at 611-12. Because of the *Frye* issue, LaMonte's case had otherwise been dormant until *Anderson*, which caused the parties to activate the case. *See* CP95-96;⁷ RP 4-20, p. 7, lines 7-10. *See also* CP65, 68, 110.

At that point, Westerfield determined he needed new medical experts and moved to continue the trial date.⁸ CP1494-1500. The court granted that motion on October 24, 2011, and trial was set for May 14, 2012.⁹ Westerfield had initially disclosed accident reconstructionist Richard Chapman (**Dec. 6, 2001**), but Chapman passed away in

⁶ Trial was continued (Dkt.##201,203); Judge McCullough assigned 8/4/10. (Dkt.#206.)

⁷ LaMonte stated to Westerfield on October 26, 2011, in reactivating the case, "In *Anderson* ... the Washington Supreme Court overruled *Grant v. Boccia* and expressly permitted post-traumatic FM cases to be forward. The *LaMonte* case finally is back on track." CP95.

⁸ Westerfield's original counsel retired end of 2010, and died in Sept. 2011. CP37.

⁹ (Dkt. #217).

November 2011, CP39, so Westerfield replaced Chapman with accident reconstruction Charles R. Lewis. Lewis used a type of analysis new to the case, “Human Vehicle Environment” (“HVE”).¹⁰

LaMonte had retained and disclosed accident reconstructionist Bryan Jorgensen, who provided a report dated **Jan. 29, 2002**, relying on the admitted version of the accident in Cook’s and Westerfield’s statements to the police and in the RFAs. With the case set for trial and Lewis’s new analysis, LaMonte retained and disclosed accident reconstructionist Ward Bruington, who understood and also performed an HVE analysis. Bruington confirmed that Westerfield read-ended Cook, who hit LaMonte. RP 5-31, pp. 73-76.

Cook passed away in 2004. Ultimately, his Estate was substituted in his place. CP2022-23. The court granted Westerfield’s motion for summary judgment to dismiss Cook because he was a settling defendant, despite a covenant not to execute and LaMonte’s opposition. CP101-02.

On **March 14, 2012**, having received no response to the RFAs from Westerfield, LaMonte moved to deem them admitted, noting the motion for **March 22, 2012**. CP1-22. Westerfield opposed the motion,

¹⁰ Westerfield was deposed on 11/2/01, and testified Cook was angled to the left and that he struck Cook’s car, which pushed Cook into the left lane. Westerfield speculated that Cook did not hit LaMonte’s vehicle as he was moving to the left. CP212-13 (Dep., 15, 20); CP156-57.

asking the Court to strike (withdraw) the admissions or allow him to respond; that is, requesting relief under CR 36(b). CP23-59.

Four days after the hearing date, with no ruling on the motion to deem the RFAs admitted, **March 26, 2012**, Westerfield deposed LaMonte's expert Bruington, and took Bruington's second deposition **April 4, 2012**. LaMonte deposed Westerfield's new accident reconstructionist (Lewis) on **April 5, 2012**. RP 6-4, p. 76, ll. 13-14. This discovery all occurred after LaMonte had moved to deem the RFAs admitted, on the eve of trial, while awaiting a ruling from the court.

On **April 20, 2012**, the court (Judge McCullough) held a hearing on LaMonte's Motion to Deem the RFAs Admitted. In granting the motion (except for RFAs 19 and 21, on the ground that they asked for a legal conclusion), the court stated:

[T]he materials seem to suggest that the time delay had to do with the--the *Frye* issue and a number of other things that both parties engaged in. **That to me doesn't necessarily mean that the request for admit should not have been responded to...**

So even though it's been 12 years, I'm going to grant the plaintiff motion with the exception of certain requests for admissions ...

...

I see no reason to--for the opposing side not to have responded just because they were appellate issues that were being pursued.

RP 4-20, p. 6, line 20 to p.8, line 4 (emphasis added); CP371-55. The Court confirmed, after continued argument by Westerfield:

I am going to maintain my earlier ruling that with the exception of the admissions concerning liability and the direct cause for fibromyalgia, the--the requests that these admissions be deemed admitted is--is granted.

In the defense brief, there's a statement that says for the 12 years that this case has been pending, defendant has steadfastly disputed these issues, which I think I hear you saying, Mr. Hansen, that plaintiff was on notice that that's not what you thought. But that -- if I use that as a guide, then there's no reason to even have a Rule 36.

Id., p. 19, line 10, to p. 19, line 20 (emphasis added).

The RFAs deemed admitted by Westerfield established the undisputed facts of the accident, which Cook and Westerfield had reported to the police at the time:

12. That on May 30, 1997 at approximately 12:30 p.m., **your vehicle struck Sherman Cook's vehicle prior to his impact with Rebecca LaMonte's vehicle** on southbound I-405 at or near the I-5 southbound exit ramp in King County, Washington.

13. That on May 30, 1997 at approximately 12:30 p.m., **Sherman Cook's vehicle collided with the rear end of Rebecca LaMonte's vehicle** on southbound I-405 at or near the I-5 southbound exit ramp in King County, Washington.

14. That on May 30, 1997 at approximately 12:30 p.m., **your [Westerfield's] vehicle struck Sherman Cook's vehicle, Sherman Cook's vehicle collided with the rear end of Rebecca LaMonte's vehicle** on southbound I-405 at or near the I-5 southbound exit ramp in King County, Washington.

15. That on May 30, 1997, at approximately 12:30 p.m., prior to Sherman Cook's vehicle striking Rebecca LaMonte's vehicle, your vehicle struck Sherman Cook's vehicle on southbound I-405 at or near the I-5 southbound exit ramp in King County Washington.

CP372 (emphasis added). Cook's admissions, signed by him **May 8, 2000**, while a co-defendant, conclusively established the same facts:

REQUEST FOR ADMISSION NO. 12: Please admit or deny that on May 30, 1997, at approximately 12:30 p.m., **your vehicle [Cook's Volvo] collided with the rear end of Rebecca LaMonte's vehicle** on southbound I-405 at or near the I-5 southbound exit ramp in King County, Washington.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 13: Please admit or deny that on May 30, 1997, at approximately 12:30 p.m., **because Richard Westerfield's vehicle collided with your vehicle, your vehicle collided with the rear end of Rebecca LaMonte's vehicle** on southbound I-405 at or near the I-5 southbound exit ramp in King County, Washington.

RESPONSE: Admit.

CP321.

Seventeen days after the court deemed the RFAs admitted, on **May 7, 2012**, Westerfield moved for reconsideration, in two pretrial motions: a motion to withdraw or amend LaMonte's RFAs. CP153-213, and a "Motion in Limine", CP214-17. Westerfield argued that the admissions effectively stripped him of the "ability to defend against LaMonte's liability claims and to assert that Cook's actions were the sole and proximate cause of the subject motor vehicle accident." CP159.

Requests Nos. 12, 14 and 15 **establish liability against defendant Westerfield, as well as expert witnesses retained by him.** Mr. Westerfield has testified that his impact with the Cook vehicle caused the Cook vehicle to be pushed **away** from plaintiff's vehicle, rather than being pushed into it. Defendants' expert witness, Chuck Lewis, has concluded that as a result of his investigation and analysis, that after Cook rear ended the plaintiff, Cook's vehicle was stopped at an angle to the rear of plaintiff's vehicle, and that **when Westerfield rear ended Cook, Cook's vehicle was pushed into a different lane of travel, avoiding contact with plaintiff's vehicle.**

If accepted by the jury, that explanation provides a complete defense to defendant Westerfield to the plaintiff's claims.

CP159 (emphasis added). On **May 10, 2012**, Judge Lum replaced Judge McCullough. Dkt. #293.

Trial commenced on **May 14, 2012**. On **May 15, 2012**, the court first heard argument on Westerfield's motion to withdraw the admitted RFAs. The court agreed with LaMonte that Westerfield's motion in limine "really ... is a motion for reconsideration", and said the prior ruling deeming Westerfield's RFAs admitted was "law of the case":

The law says that he's already ruled on this, and he--there's no way he could have ruled on this other than to be ruling on essentially what you were asking for in a motion to amend your--your legally deemed admission. So he has--this is the law of the case, and he's already ruled.... I can't reconsider his previous order under the guise of me being the trial court deciding motions in limine.

So that's the conundrum that I have, and it's not cleanly submitted.... I'm going to think about this a little bit more

... I am highly disinclined to instruct the jury as to admitted facts or not admitted facts....

RP 5-14, pp. 44-47, line 1. The court incorrectly commented that the issues were disputed (contrary to Judge McCullough's conclusions) and minimized prejudice: "I'm having a little trouble seeing what the actual prejudice is in terms of the plaintiff's case given that you're able fully to present your case, I mean, on these disputed issues." RP 5-14, p. 44, lines 22-25.

On **May 15, 2012**, the court again heard argument on Westerfield's motion, expressing its erroneous belief that even after RFAs have been deemed admitted under CR 36, the law would favor trial on the merits: "[M]aybe it shouldn't be my concern, but I am a little concerned about the kind of the clear policy in the appellate case law favoring resolution on the merits". RP 5-15, p. 17, lines 7- 10. The court then speculated that the RFAs were not forwarded to counsel and mischaracterized the record by stating that liability was "contested"--again, contrary to the RFAs. The court then repeated that Westerfield's motion was too late:

And then you have ... a request to deem these admitted. Then you have litigation in front of Judge McCullough. And as I indicated yesterday, I don't see any other way that this comes down, other than it was a motion to amend your response, I mean, in front of Judge McCullough, and Judge McCullough ruled on that specific issue.

It's hard to parse it any other way or to characterize it any other way.... **Judge McCullough already ruled on this, and so what they're asking you is to reconsider Judge McCullough's ruling....**

... I have a real concern about how the Court of Appeals is going to treat the record in terms of prejudice or lack thereof and in terms of the defense not being able to present the merits of their case.

Now, Judge McCullough gave them half the request, gave them the -- didn't say liability was deemed admitted and gave them a little bit more than that, but essentially, if he allowed the other parts to stand thereby eviscerating their liability defense case.

RP 5-15, p. 17, line 15, to p. 19 line 6 (emphasis added). The court heard brief discussion regarding whether Cook's RFAs could be introduced and were binding on Westerfield, *id.*, pp. 20-21, returning to that issue on May

16, 2012. CP126-28; 139-43. Westerfield claimed, without authority, that Cook's admissions had to be considered "another form of evidence" and were hearsay. RP 5-16, p. 5.¹¹

In the context of considering whether to allow Cook's deposition testimony and precluding LaMonte from introducing Cook's RFAs in their case in chief or opening argument, the court ruled that the admissions were excluded and LaMonte could not refer to them in opening, effectively granting Westerfield's motion to withdraw the deemed-admitted RFAs establishing how the accident happened:

I think we are in a gray area actually.... [A]ll of this testimony is coming in in rebuttal. ... [O]nce you start playing the deposition testimony, then you can start impeaching the—the deposition testimony.

... **The real question is whether the plaintiff gets to pre-rebut it--by way of substantive evidence in their case in chief,** this before the deposition is played ... that's a real issue for me.

MR. OLSON: Because this issue doesn't involve depositions. It involves that issue that you just articulated.

THE COURT: Right. ...[M]y inclination is that I don't--**I'm not going to allow pre-rebuttal.** I mean I think you get to rebut, and you may even be able to rebut--rebut as substantive evidence, **but I don't think you get to anticipate in your case in chief what their case is until you actually hear their case.**

... I think these admissions are going to come in in rebuttal anyway....

¹¹ Cook's admissions were not hearsay because they were conclusively established matters under CR 36(a): "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Assuming the admissions were testimony, Westerfield incorrectly claimed they could not come in under ER 801(d)(2) (admission of a party opponent), RP 5-16, at p. 5; or ER 804 (former testimony or a declaration against interest). RP 5-16, at pp. 6-8.

They may not be substantive evidence, but query whether that will make a difference to the jury or not. But they certainly will be before the jury. Now, I can make a later decision on--on whether or not they actually come in as substantive or--or impeachment evidence, but it seems to me that you have a more basic problem in that you're trying to engage in pre-rebuttal testimony. So **I'm not going to allow it in your case in chief.** ...[I]t almost certainly will be admissible as impeachment evidence in your rebuttal case and may even be admissible depending on some of the other stuff that happens during this trial as substantive evidence....

RP 5-16, p. 17, line 13, to p. 20, line 21 (emphasis added). Thus, in opening argument, LaMonte could not present the version of the accident facts set out in the Cook and Westerfield RFAs and in Cook's and Westerfield's contemporaneous statements to the police. Instead, LaMonte had to address two reconstructions of the accident posed by Westerfield's new expert, Lewis.

On **May 30, 2012**, the court considered whether the RFAs could be introduced through expert testimony. LaMonte's experts had relied on the admissions as a basis for their opinions. RP 5-30, at 14. Westerfield again argued that the admissions were hearsay. *Id.* at 20. There was also discussion whether the deadman's statute applied. *Id.* See also CP141-42. The court allowed Cook's admissions as part of the basis for expert opinion, but not as substantive evidence:

I don't believe the case law allows me to admit it as substantive evidence as a stand-alone piece of substantive evidence. Rather, it needs to be presented--it can be presented to the jury as a basis for

the expert's opinion. It can be shown to the jury as a demonstrative exhibit. ...

...
The reason you're allowed to admit it is because I think Mr. Olson's correct, it technically is hearsay at this point and it's not technically an admission of party opponent, because there's some, for want of a better word, offensive use against Mr. Olson's client [Westerfield] that has that ramification.

... [E]ven if it is hearsay, it's not inappropriate for an expert to rely on that kind of evidence. ...

... [C]an someone then contradict or explain the admission itself In other words, can Mr. Olson then show the expert the deposition testimony to contradict the judicial admission of Mr. Cook and the answer is no. Again, if it had an interrogatory answer, an evidentiary admission, that might be a completely different matter, but if it's a judicial admission that has never been withdrawn, I think that survives the dismissal of a case. Now, if there is ... some effect on the remaining defendant, but the defendant isn't bound by it just because he's affected by it. ...[T]o the extent that Mr. Cook's judicial admission has never been withdrawn, it is binding upon him.

RP 5-30, p. 24, line 21, to p. 27, line 11. The court revisited this issue during Westerfield's expert Lewis's testimony, emphasizing it was Westerfield's burden to show Cook's deposition testimony was not inconsistent with Cook's admissions, even if this meant Cook's admissions were effectively being used against Westerfield. RP 6-4, pp. 64-68.

At trial, LaMonte's experts testified, as had originally been established by the contemporaneous statements and the RFAs, that Westerfield's car hit Cook's, which directly hit LaMonte's, causing damage. RP 5-31 (Jorgenson), pp. 16-23, 25-27; *id.*, (Bruington), 65-67,

69, 72-75, 125-26 (“**There has to be a second impact** that caused the damage to the right front corner of [Cook’s] Volvo and the left rear corner of [LaMonte’s] Chrysler”); p. 129 (“The evidence in this case points towards the impact of Cook into Ms. LaMonte, that separation, and then **Westerfield crashing into the back of Cook** and Cook re-crashing in that second impact back into [LaMonte]”) (emphasis added).

Westerfield, however, testified that he rear-ended Cook, then watched Cook’s car move over to the left but **Cook did not hit LaMonte:**

... I impact Mr. Cook.

Q. And what did you see Mr. Cook's vehicle do after that?

A. Yes. When I impacted Mr. Cook, the back of his Volvo, it shoved him about three feet, maybe, into the I'll call it the left lane, and at the same time he accelerated, continuing on in the left lane, and it concerned me because at that point I thought maybe he was leaving the scene, trying to take off.

...
A. ... **It was all one motion.** I impacted him, shoved him a bit, then he hit the accelerator, continued on in that left lane, and then found a place to park.

Q. Was there any -- **did you observe any movement of his vehicle or any hesitation of his vehicle that would indicate that he had struck another vehicle?**

A. **No. That is in my mind. When I impacted him, shoved him, the motion of his acceleration, there was no change in direction or speed, except for the acceleration. So it was one smooth motion knocking him into the left lane and then he continued on.**

RP 6-4, p. 138, line 17, to p. 139, line 17 (emphasis added); *id.*, 138-45.

Westerfield retracted his contemporaneous version in the RFAs, which Judge McCullough had deemed admitted:

Q. In your statement, do you recall what you wrote with regard to your observations of the Cook vehicle?

A. Yes. It was confusing. I said that the Cook vehicle swerved and was at an angle and then I impacted the Cook vehicle. It was a very brief statement.

Q. What did you mean by, swerve?

A. I have read it since that time, and I think maybe I wrote down--I wrote Volvo about three times. I think maybe I was thinking the van and I wrote down the Volvo. I don't know.

Q. Because the van did swerve, did it not?

A. Yeah. The van changed lanes. It was a quick lane change, yes.

Id., p. 142, line 19.

Of course we know that Mr. Cook impacted Ms. LaMonte. I think the question was at the time of impact could I see if there had been that collision or not, and my point is, and that I've been consistent in, is that **when I hit Mr. Cook from behind it shoved his stationwagon on into the left lane about three feet, and then he didn't stop, but without changing direction or any noticeable bumps, he hit the accelerator and continued going along that same line and then pulled over in the left lane a hundred yards down the road.**

Id., p. 144, line 16 (emphasis added).

Because Westerfield's admission as to how the accident occurred was now withdrawn, the court allowed his expert Lewis to testify—in contradiction to Westerfield's and Cook's RFAs and their contemporaneous police statements—that damage on the left rear quarter panel of LaMonte's car was not direct, but induced by Cook hitting LaMonte's bumper to the right of center, making a V-impression. RP 6-4, at, *e.g.*, p. 17, lines 13-18, pp. 48, 58-59. Importantly, in addition, some

photographs Lewis used were not disclosed to LaMonte until trial. RP 6-4, at pp. 28-29, line 16-18 (LaMonte's objection to Ex. D-65, Volvo rear: "I have never seen this, and I was never provided this.")

Lewis admitted, however, that he did not run a simulation in which Cook hit LaMonte, then Westerfield hit Cook into LaMonte a second time, because he was not asked to do it. *Id.* at pp. 74-75. The first time Lewis admitted considering Cook's RFAs as a version of the accident was during trial. *Id.* at pp.75-77. He was not asked to analyze the contemporaneously and conclusively admitted two-impact version of the accident for his deposition in April 2012. *Id.* at 76-77. By these questionable tactics, LaMonte was unable to conduct full discovery and trial preparation on Westerfield's defense.

But in addition to the admissions, all the evidence demonstrated that Cook, who was stopped when Westerfield hit him, was going straight and turned at the last minute to avoid hitting LaMonte, but slid into her car going forward, not to the left. *E.g.*, RP 5-31, at pp. 16-17, 25-27, 47-48, 52-53 (Jorgensen); *id.*, at pp. 65-67, 69 (Cook was "doing an evasive maneuver to the left"), 72-75, 78-79, 125-27 ("There has to be a second impact"), 129.

On **June 4, 2012**, the court reviewed its rulings as to Cook:

[W]hen the plaintiff offered the request for admission initially one of the bases for the defense objection to that was that it was hearsay, and so subsequently the court ended up agreeing that it was hearsay but that experts could rely on hearsay and that the court allowed the request for admission to be shown.

And then we got into a discussion about whether additional documents or interrogatory answers or could be shown to the jury as well, and it did not appear to be violative of the dead man statute. And then we got into a discussion about whether Mr. Cook's deposition testimony could be offered in addition, and we made a record on that and the court ruled no to the extent that it was inconsistent with the request for admission. We ... had a little bit more discussion about that, and ... about the extent to which the defense were able to offer portions of the deposition. Of course, this came up initially because defense wished to play the entirety of Mr. Cook's deposition, which was a little bit inconsistent with their earlier position that Cook's testimony was hearsay, but presumably that deposition was going to be offered as substantive evidence. The court did not bar, however, the entirety of the deposition from being played, but at that point ruled that the defense needed to demonstrate how the testimony was not inconsistent with the request for admission, in that we wouldn't treat Mr. Cook differently because he was dead than if he were alive here testifying here in open court.

Then we fast-forward to our discussion here with this expert, and clearly what happened here is this expert relied in part on the deposition testimony that Mr. Cook gave in terms of the final resting places of the vehicles and took that into account for his calculation. And what, I believe, Mr. Krafchick was trying to do was limit him, the expert, from relying on that testimony based upon the request for admission, but there are several problems with that. Number one, regardless of what the court's rulings were earlier on, the door could be opened to inadmissible evidence. For example, experts can rely on hearsay

... [D]eposition testimony of the parties is clearly the type of evidence that experts rely on in their field....

... [T]he court ruled that indeed **Mr. Krafchick had opened the door. ...[T]he expert did rely on the testimony of Cook as well as others in terms of formulating his opinion as to where the vehicles ended up, and so the door was open.**

And at least as to the extent of **as to Cook's testimony in his deposition regarding the locations of his vehicle, that particular testimony will be allowed and the expert may rely on that particular portion of the testimony because the door has been opened.** ... I'm not ruling that all of the deposition is completely in bounds at this point, but to the extent that the expert relied on the ... testimony of Mr. Cook as to where the vehicles ended up, I'm going to allow that.

RP 6-4, p. 96, line 15, to p. 100, line 5 (emphasis added).

MS. LEE: Your Honor, I just wanted to get the finer points of your clarification on your ruling. ... Is that the plaintiffs have opened the door with respect to the Mr. Lewis relying on Cook's deposition testimony for the position of the vehicle afterwards, and that's where the ruling in terms is limited to. ...

THE COURT: So **I am not shutting the door on the defense from getting into other portions of the deposition testimony,** because the other portion of the challenge or the other cross-examination theory was that he [Lewis] did kind of a sloppy job by not relying upon--the inference was that he did a sloppy job because he didn't look at this, he didn't look at that....

... **[T]o the extent that it's relevant to his opinion, I think you've opened the door to his--to Cook's deposition testimony.**

RP 6-4, p. 105, line 22, to p. 107 line 17 (emphasis added). On **June 6, 2012**, the court ruled that Westerfield could show the jury Cook's videotaped deposition testimony, contradicting his statement and admissions:

To the extent that it was not inconsistent with the request for admission, you were theoretically always able to introduce portions of the testimony that were not inconsistent with the request for admission. Now, at the time we had this original discussion, you did not cite to me CR 32, and we ... had this dead man statute discussion. And you subsequently cited to me CR 32, which obviously has the court having some discretion to admit prior testimony if the deponent is dead.

... I have to believe that the Supreme Court was aware of the possibility that we might be playing perpetuation deposition testimony of a witness or a party under Civil Rule 32. So that--I'm not sure that the dead man statute then applies to the extent that the court can't exercise its discretion in order to play the videotape perpetuation deposition.

And in this particular case, there's another layer of complication in that the court had very carefully ruled on the uses of this particular request for admission.... **[Y]ou actually did open the door when you challenged the defense accident reconstructionist on the basis for their opinion and thereby opening the door, at a minimum, to the--to the locations of the vehicles after the accident.**

So ... there's the complication of the door being opened, the complication that requests for admission are clearly not binding on--on this defendant. They're binding on Mr. Cook. But Mr. Cook of course never withdrew his admissions, so we can't have any inconsistent testimony, but again I'm not sure it is inconsistent. He's just saying he doesn't remember at the time of the deposition. It doesn't mean he wasn't incorrect. And so, Mr. Krafchick, I think that in fairness, you -- you get to actually show the jury the--the exhibit that was shown to the deponent during the deposition, which, frankly, I'm not sure you could ever get that into evidence in the first place. But if ... this deposition is going to be played, you get to play your part too and you get to show them the--the witness statement as a demonstrative exhibit that was used during the perpetuation deposition, and that gets displayed in front of the jury.

RP 6-6, p. 9, line 17, to p. 11, line 24 (emphasis added). Cook, who was seriously ill at the time of this deposition (he had "flat-lined" and been deprived of oxygen, affecting his memory), first testified as to how the accident happened, deconstructing and contradicting his admissions. RP 6-6, p. 26, line 20, to p. 34. He also testified he did not recall. RP 6-6, p. 34, line 20, to p. 40. In Cook's second deposition, on December 26, 2001 (videotaped), he reviewed his contemporaneous statement, stating he did

not know and could not say for sure whether that was the most accurate recollection of the accident. RP 6-6-12, pp. 44-50; pp. 53-55. Westerfield's counsel asked Cook leading questions whether his statement "was based on **assumptions** rather than anything you **remember** actually happening?" Cook answered, "I don't remember the sequence". *Id.*, p. 50, lines 14-23 (emphasis added).

The court declined to give jury instructions containing the admissions. *Compare* CP2212-2247¹² *with* CP2286-2308.¹³ In closing, Westerfield stated no accident occurred involving Westerfield and LaMonte, and Westerfield did not hit Cook into LaMonte.¹⁴ On **June 8, 2012**, the jury delivered a special verdict concluding that Westerfield was negligent in hitting Cook's vehicle, but his negligence did not proximately cause LaMonte's injuries and damages. CP145-46. This determination adopted Westerfield's defense contrary to the RFAs, which established Westerfield's impact to Cook caused Cook's car to be pushed into LaMonte's, providing the impact resulting in her injuries and damages. Judgment was entered **June 22, 2012**. CP147-48. This appeal timely followed.

¹² LaMonte's Proposed Jury Instructions.

¹³ Court's Instructions.

¹⁴ LaMonte has ordered this supplemental RP and will submit it when received.

SUMMARY OF ARGUMENT

The court erred as a matter of law by allowing Westerfield's conclusively-established admissions to be withdrawn in a series of rulings that eviscerated CR 36 and the prior Order deeming the RFAs admitted. The court improperly granted reconsideration, and failed to properly evaluate the serious prejudice to LaMonte at trial, instead being swayed by the notion that this Court would favor presentation of Westerfield's defense, and believing LaMonte opened the door to Cook's deposition despite Cook's admissions. LaMonte suffered severe prejudice in: (1) being precluded from referring in opening statement to the conclusively-established admissions by Cook and Westerfield that Westerfield hit Cook, who then hit LaMonte; (2) admitting Westerfield's and his expert Lewis's testimony that the accident occurred without Westerfield hitting Cook into LaMonte, which the jury relied on to find Westerfield's negligence did not cause LaMonte's injuries; (3) admitting Cook's contradictory and confusing deposition testimony, despite his admissions and his contemporaneous statement that Westerfield hit him into LaMonte; (4) allowing Westerfield's closing argument that no accident occurred involving him and LaMonte; and (5) failing to give LaMonte's jury instructions containing the admissions (Cook's or Westerfield's). Prejudice is demonstrated by all of these errors occurring during trial, too

late for LaMonte to adequately prepare and impairing presentation of her case in chief. LaMonte asks this Court to reverse and remand for a new trial.

ARGUMENT

A. Failure to Respond to CR 36 Requests For Admission Automatically Results in Conclusively-Established Admissions.

1. Admissions By Default Are Conclusively Established. CR

36(b) establishes the effect of an admission:

Effect of Admission. Any matter admitted under this rule is **conclusively established unless the court on motion permits withdrawal or amendment of the admission.** ...[T]he court may permit withdrawal or amendment 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 him in maintaining his action or defense on the merits.**

CR 36(b) (emphasis added). Thus, admissions by a party who does not respond to RFAs¹⁵ are immediate and self-executing. *E.g.*, *Switchmusic.com., Inc. v. U.S. Music Corp.*, 416 F. Supp. 2d 812, 817 (C.D. Cal. 2006).¹⁶ Accordingly, the party obtaining the admissions need not move for them to be deemed admitted.

Stated another way, an admission, deliberately drafted by counsel for the express purpose of limiting and defining the facts at issue, is

¹⁵ Also known as “admissions by default.”

¹⁶ Because CR 36 is identical to its federal counterpart, the court may look to analysis of the federal rule. *Santos v. Dean*, 96 Wn. App. 849, 859, 982 P.2d 632 (1999).

regarded as conclusive. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 105 (D. Del. 1988). Requests for admission presuppose that the propounding party knows or believes the facts sought and seeks a concession on that fact from the other party. *See, e.g., Workman v. Chinchinian*, 807 F.Supp. 634, 648 (E.D. Wash. 1992) (“Rule 36 is not to be used as a discovery device”; citing 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2253 (1970)).¹⁷

Courts recognize that Rule 36 can have harsh results, to the point of effectively depriving a party of the opportunity to contest the merits of a case. *See, e.g., United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987). Acknowledging this, the law places a strict burden on the party moving to withdraw (Westerfield) and requires courts to be "cautious in exercising their discretion to permit withdrawal or amendment of an admission." *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985). The Comment to the Washington Pattern Jury Instruction on CR 36, WPI

¹⁷ “CR 36 permits requests for the admission of, among other things, ‘statements or opinions of fact or the application of law to fact.’” *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 472, 105 P.3d 378 (2005) . “[A] party who believes a request for admission relates to ‘a genuine issue for trial or a central fact in dispute may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.’” *Id.*

6.10.02,¹⁸ warns courts and parties that once a party has obtained conclusive admissions, it is reversible error for the jury to disregard them:

Washington case law establishes that it may be reversible error for a jury to disregard facts that were conclusively established in answers to requests for admissions. See *Nichols v. Lackie*, 58 Wn.App. 904, [907,] 795 P.2d 722 (1990) (reversible error for the jury to award \$2,217.65 in damages when damages of \$3,774.97 were conclusively established by requests for admissions).¹⁹ Thus, the jury should be advised as to the effect of a CR 36 admission to avoid the possibility of reversible error.

Id. (emphasis added.) The Advisory Committee to the federal rule specifically considered the conclusive effect of admissions in adopting subsection (b) in 1970:

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance **a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to evidentiary admission of a party.... Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.** Field & McKusick, *Maine Civil Practice* § 36.4 (1959); Finman, [*The Request For Admissions in Federal Civil Procedure*,] 71 Yale L.J. 371, 418-426 [(1962)]; Comment, 56 N.W. U. L. Rev. 679, 682-683 (1961).

Provision is made for withdrawal or amendment of an admission. **This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in**

¹⁸ WPI 6.10.02, Use of Admissions Under CR 36(b), provides: “The [*defendant*] has admitted that certain facts are true. You must accept as true the following facts: ...” LaMonte proposed instructions based on WPI 6.10.02.

¹⁹ No subsequent cases cite this holding in *Nichols*.

preparation for trial will not operate to his prejudice. *Cf. Moosman v Joseph P. Blitz, Inc.*, 358 F.2d 686 (2d Cir 1966).

Fed.R.Civ.P. 36, Advisory Comm. Notes, 1970 (certain citations omitted; emphasis added).

2. The Court Committed Reversible Legal Error In Treating Conclusively-Established Admissions As Evidence To Be Weighed.

“A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011) (a trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons; **an error of law constitutes an untenable reason**).

“**Admissions are conclusively binding on parties at trial, and carry more weight than a witness statement, deposition testimony, or interrogatories, because once made, admissions cannot be countered by other evidence.**” *McNeil v. AT&T Universal Card*, 192 F.R.D. 492, 494 (E.D. Pa. 2000) (emphasis added; citing *Airco v. Teamsters Health and Welfare Pension Fund of Philadelphia and Vicinity*, 850 F.2d 1028, 1036 (3d Cir. 1988) (citing cases)). An admission of facts under Rule 36 “**is not merely another layer of evidence, upon which the district court can superimpose its own assessment of weight and validity,**” but

rather is an "unassailable statement of fact that narrows the triable issues in the case." *Airco*, 850 F.2d at 1037 (emphasis added; court's factual finding, which contradicted a party's admission, was clearly erroneous).

The leading case of *McSparran v. Hanigan*, 225 F. Supp. 628, 636 (E.D. Pa. 1963), *aff'd sub nom. McSparran v. Subers*, 356 F.2d 983 (3d Cir. 1966) (cited in the Advisory Comm. Notes) holds:

An answer to a request under Rule 36 is **unlike a statement of fact by a witness made in the course of oral evidence at a trial, or in oral pre-trial depositions, or even in written answers to interrogatories. It is on the contrary a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact** pointed out by the request for admission. The purpose of the Rule is not the discovery of information but the **elimination at trial of the need to prove factual matters which the adversary cannot fairly contest.**

*Id.*²⁰ (granting defendant's motion for judgment notwithstanding the verdict where an "issue [that] had been removed from controversy by plaintiff's admission of [defendant]'s request" was erroneously submitted to the jury).²¹ "Evidence is the means by which facts are proven.

²⁰ (Quoted in *Murnan v. Joseph J. Hock, Inc.*, 274 Md. 528, 534 (1975)).

²¹ Instructing the jury that admissions are conclusive "is supported by cases from other jurisdictions that have addressed the issue under the rules similar to CR 36. *See Brooks v. Roley & Roley Engineers, Inc.*, 144 Ga.App. 101, 240 S.E.2d 596 (1977) (trial court erred in failing to charge the jury, on request, that the facts admitted were conclusively established); *Gore v. Smith*, 464 N.W.2d 865 (Iowa 1991) (jury was properly instructed that matters admitted in response to request for admissions are conclusively established); *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986) (jury should be instructed to use admissions for such appropriate purpose as the trial court shall direct)." Comment to WPI 6.10.02 (emphasis added.) Here, the Court

Requests for admission deal therefore with admissions of facts rather than the evidentiary circumstances by which they may be established.” *Id.* at 636 (emphasis added).

Because admissions are conclusive, the factfinder may not weigh them against competing evidence, as the court erroneously allowed here. There should have been **no evidence** (including Westerfield’s and Lewis’s alternative-version testimony, or Cook’s depositions) competing with the RFAs. "Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record." *In re Carney*, 258 F.3d 415, 420 (5th Cir. 2001) (affirming summary judgment for defendant where the "validity of the tax deficiencies stated in the IRS's proof of claim has been conclusively established" by default admissions).

The frequently-quoted commentary on Rule 36, Finman, *The Request For Admissions In Federal Civil Procedure*, 71 Yale L.J. 371 (1962), explains that if the rule is “to fulfill its unquestioned function, to eliminate the need to prove factual matters at trial which the adversary cannot fairly contest, **the admission produced by the rule must be conclusively binding. A contrary interpretation would reduce the rule**

rejected LaMonte’s proposed jury instructions containing the admissions. *Compare* CP2212-2247 *with* CP2286-2308 (Court’s Instructions).

to a ‘useless appendage.’” *Murnan*, 274 Md.at 534 (quoting Finman, *supra* at 421; emphasis added). The court here, during trial, reduced CR 36 to a useless appendage, requiring a new trial.

B. The Court Erred As A Matter of Law In Granting Reconsideration Of The Order Deeming the RFAs Admitted.

CR 59(b) requires a motion for reconsideration to be filed “not later than 10 days after the entry of the ... order” to be reconsidered. A trial court may not extend the time period for filing a motion for reconsideration. *Schaefco, Inc. v. Columbia River Gorge Comm.*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (citing CR 6(b); *Moore v. Wentz*, 11 Wn. App. 796, 799, 525 P.2d 290 (1974)). The trial court in this case acknowledged Westerfield made a late motion for reconsideration of Judge McCullough’s order deeming the RFAs admitted, but then ultimately granted reconsideration without citing any authority for the extension. This alone is reversible error.

C. The Court Erred As A Matter Of Law In Failing To Evaluate The Prejudice to LaMonte At Trial.

1. The Standard of Review Required A Stricter Prejudice Test.

Though the court of appeals reviews the trial court's decision to permit withdrawal of admissions under CR 36 for abuse of discretion, *Santos v. Dean*, 96 Wn. App. 849, 857-58, 982 P.2d 632 (1999), that discretion must be exercised by applying a two-part test inquiring: (1) whether

permitting the withdrawal “subverses the presentation of the merits of the case;” and (2) whether the withdrawal will prejudice the opposing party—in this case, LaMonte. CR 36(b); *Santos*, 96 Wn. App. at 858-59 (citing *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994); *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)).

Although the rule itself is permissive, **the Advisory Committee clearly intended the two factors set forth in Rule 36(b) to be central to the analysis. Accordingly, a district court's failure to consider these factors will constitute an abuse of discretion.** See *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1313 (8th Cir. 1983) (“[T]he district court erred in not considering the factors set out in [R]ule 36(b).”).

Conlon v. United States, 474 F.3d 616, 625 (9th Cir. 2007) (emphasis added; footnote omitted).

A court’s reliance on an erroneous legal premise and failure to consider the CR 36(b) factors in ruling on a belated motion to withdraw RFAs during trial constitutes an abuse of discretion. *Id.* at 625. The Ninth Circuit has instructed courts to be “cautious in exercising their discretion to permit withdrawal or amendment of an admission.” *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985).

The first part of the test is not at issue here. That prong “is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.” *Hadley*, 45 F.3d at 1348. Westerfield acknowledged that the RFAs “establish liability against” him.

CP159, lines 7-12. This is because Westerfield's theory as to the facts of the accident—that Cook's vehicle "missed" LaMonte's vehicle completely, and caused "induced" damage—contradicted the conceded admissions as to how the accident occurred—Westerfield hit Cook, who hit LaMonte directly. Had the Order stood, Westerfield would not have been able to have his expert (Lewis) testify as to any other theories because his admissions made them impossible.

Rather, this case concerns the court's error, as a matter of law, in failing to properly evaluate the second factor of prejudice **at trial**, when the harm from withdrawing admissions is far more serious than before. Once trial begins, a more restrictive prejudice standard applies to withdrawal of an admission. 999, 776 F.2d 866 (citing *Brook Village North Associates v. General Electric Co.*, 686 F.2d 66, 70-73 (1st Cir. 1982)); *Santos*, 96 Wn. App. at 860. "The Rule understandably imposes a more restrictive standard ... on the granting of a request to avoid the effect of an admission once trial had begun." *Brook Village*, at 71. The closer the matter is to trial, the greater the likelihood of prejudice. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F2d 1242 (9th Cir. 1981).²²

²² (In buyer's suit to recover for damage to purchased equipment; railroads failed to respond to RFAs, including liability, which were deemed admitted; railroads could have adequately protected their interests by objecting or denying; no abuse of discretion.)

Here, the court found no prejudice: “I’m having a little trouble seeing what the actual prejudice is in terms of the plaintiff’s case given that you’re able fully to present your case, I mean, on these **disputed issues.**” RP 5-14, p. 44, lines 22-25 (emphasis added). The problem was that the factual matters conceded by Westerfield and Cook were **not** disputed. LaMonte relied on both sets of admissions until the court withdrew Westerfield’s admissions, starting with opening argument, followed by the cascade of erroneous rulings, including allowing Lewis’s contradictory expert testimony and Cook’s deposition testimony. The minimal previous discovery did not somehow effect withdrawal or amendment of the admissions. Lewis’s deposition did not even occur until early April 2012, little over a month before trial, after LaMonte affirmatively requested the RFAs be deemed admitted, to preclude Lewis’s contrary analysis. Had Westerfield sought to withdraw the admissions during the years before trial, LaMonte would have had the opportunity to obtain different and additional discovery, including alternative analyses and devices to confirm, corroborate, and to perpetuate Cook’s contemporaneous statement to the police, which Cook **did** admit three years afterwards in 2000. But because the case was inactive from 2002 until the October 2011 due to the stay, conflicting decisions regarding admissibility of “novel scientific evidence” on causation of

fibromyalgia, and continuances, little discovery occurred until 2012, with Westerfield producing an entirely new analysis through Lewis.

Moreover, the court erred in considering decedent Cook's admissions to be inadmissible hearsay, and then allowing the jury to hear Cook's contradictory and confusing deposition testimony, based on the misconception that LaMonte had opened the door. RP 6-4, pp. 96-100, 105-07; RP 6-6, pp. 9-11. Cook not only said he failed to recall what happened; he attacked his statement to the police at the scene, claiming it all happened in one swift motion and providing testimony that could be interpreted as supporting his vehicle missing LaMonte a second time. RP 6-6, at pp. 44-50, 53-55. Because Cook died, LaMonte could not call him to rebut any statement made by Westerfield or Lewis at trial.²³ Compounding this was Westerfield's "no accident" closing argument. This is precisely the type of prejudice that requires denial of a motion to withdraw admissions. These legal errors, individually or together, require reversal and a new trial.

2. Proper Evaluation of Prejudice To LaMonte Establishes Reversible Error.

²³ LaMonte attempted to refresh Cook's recollection at his depositions by showing him his contemporaneous statement, but the effect cast doubt on the admissions, allowed Cook to critique his statement, likely confused the jury, and opened up the possibility that Lewis's contradictory reconstruction might actually have happened. Lewis had considered Cook's deposition testimony, but not the admissions.

While *Santos*, together with *Nichols*, requires the strict prejudice test for withdrawal of admissions at trial, *Brook Village*, adopted by this Court in *Santos* and a leading case on Rule 36, is directly on point in applying that test: “The instant case poses the question of the discretion of a district court to permit withdrawal or amendment of an admission by default once trial has commenced.” *Id.* at 70. In *Brook Village*, plaintiffs (a housing association and equity company) sued a modular housing company for breach of contract. At a bench trial, the judge declined to give conclusive effect to the defendant’s pretrial admissions, though they had not been amended or withdrawn as proof of damages. Instead, the court awarded plaintiffs a lower sum based on evidence produced by the defendant at trial. On appeal, the court reversed, holding that the district court disregarded the higher threshold of prejudice for opening up admissions after trial begins:

The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.

Id. at 70. *See also, e.g., Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007) (“When undertaking a prejudice inquiry under Rule 36(b), the

district courts should focus on the prejudice that the non-moving party would suffer **at trial**"; emphasis added).

The trial court in *Brook Village* had based its erroneous decision on factors almost identical to those cited by the court in this case: first, the trial court in *Brook Village* believed: (1) the plaintiffs had waived reliance on the admissions by presenting evidence overlapping with them, and (2) withdrawal of the admissions would aid presentation of the merits without prejudicing plaintiffs.

Similarly, here, on the first point, the court determined LaMonte had opened the door to deposition testimony from decedent Cook which contradicted the admitted sequence of the accident. The court ruled that this happened when LaMonte presented the sequence of the accident in Cook's admissions to Westerfield's expert (Lewis), who then evaluated those facts. RP 6-4, pp. 96-100, 105-07; RP 6-6, pp. 9-11. But the court ignored that LaMonte would never have asked Lewis his opinion about Cook's admitted version of the facts if the admissions had been part of LaMonte's case in chief, and permitted on opening.

Second, the court believed the law required it to permit Westerfield's defense to go to the jury, despite the order deeming Westerfield to have admitted the facts of the accident.

The First Circuit in *Brook Village* held that the trial court's "analysis stands at odds with the intendment of Rule 36":

The first rationale on which the district court relied, namely that **if a plaintiff presents evidence which overlaps questions controlled by admissions by default he thereby waives the right to rely on the matters controlled by the admissions, works an unfair disadvantage on parties who properly seek to take advantage of Rule 36.** Generally, the proof of a plaintiff's case may involve establishing a number of facts, some of which will be controlled by admissions and some of which will not. **The party who obtains the admissions by default may be unsure what other facts must be established for him to prevail. Or he may, as in the present case, wish to present supplemental evidence in order to recover damages beyond those established by admission. In such cases, the waiver rule applied by the district court would either discourage parties from introducing additional evidence or would completely vitiate the conclusive effect of admissions by default obtained under the Rule.**

Id. at 71 (emphasis added; footnote omitted). This Hobson's choice is impermissible:

Requiring a party thus to elect between relying on admissions by default and introducing no evidence, and introducing evidence but foregoing the binding force of the admissions, unfairly forces a party who chooses to make use of admissions by default to limit his proof at trial to the scope of his request for admissions. We therefore hold that a party who obtains an admission by default does not waive his right to rely thereon by presenting evidence at trial that overlaps the matters controlled by the admission.

Id. at 72 (emphasis added). LaMonte did not waive the right to introduce **in her case in chief** (including opening) the admissions or other evidence, even if it overlapped with the RFAs. LaMonte did not open the door to

Cook's deposition testimony. Lewis's contradictory theory and Cook's deposition should have been excluded.

In *Brook Village*, the First Circuit, rejecting the trial court's second rationale (that withdrawing the admissions would aid in presenting the merits), noted the trial judge's concern for "substantial justice over mere technical contentions" but reiterated that the standard for opening up admissions is higher once trial begins:

The [trial] court concluded, in effect, that having determined as fact finder that defendant's witnesses were more credible than plaintiffs', justice would be served if the court were free to consider anew the matters governed by the admissions.

To the extent that the court's analysis equates the standard for permitting withdrawal or amendment of admissions pre-trial with the standard for opening up admissions once trial has begun, we reject it. **Rule 36 plainly contemplates a more restrictive standard for foregoing the conclusive effect of admissions once trial has begun.**

Id. at 72 (emphasis added). The trial court in *Brook Village* had improperly relied on cases addressing the standard **before trial** to conclude it would be manifestly unjust to allow the defendant's admissions to stand when the court found "evidence presented by the party bound by the admission to be more credible than the evidence presented by the party having the benefit of admission." *Id.* The First Circuit refused to bend Rule 36 and allow a court to weigh credibility on the merits of the dispute in the face of conclusively-established admissions:

Rule 36 plainly contemplates that a party seeking to avoid at trial the force of admissions obtained by default faces a higher burden than does a party seeking identical relief prior to the entry of the pre-trial order. We do not believe that the situation presented by this case, where the district court sitting as fact finder simply finds more credible the witnesses of the party against whom the admissions operate, rises to the level of "manifest injustice" required for relief from the effect of admissions, although permitting such relief may well subserve the presentation of the merits. **To so hold would eradicate the distinction created under the Rules between pre-trial and post-commencement of trial requests for relief from admissions....**

We therefore hold that a district court is not free to permit amendment or withdrawal of admissions by default after trial merely because the parties presented evidence touching on matters governed by the admissions and the court finds more credible the evidence of the party against whom the admissions operate.

Id. at 73 (emphasis added).

Here, the court was improperly influenced by the belief that allowing Westerfield to present his defense (permitting the jury to weigh his credibility) would promote justice and be fair. RP 5-15, at pp. 17-19. But Rule 36 already explicitly considers the goal of presenting the merits, under the first prong of the test for withdrawal. That goal never obliterates the prejudice factor, as the court stated in the frequently-cited case of *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 108 (D.Del. 1998):

A per se rule that a court must permit withdrawal of an admission simply because it relates to an important matter in the litigation is inappropriate in light of the discretionary language of the Rule and

its purpose: to narrow the issues, thereby avoiding litigation of unessential and undisputed facts.

Id.

In *Santos v. Dean*, 96 Wn.App. 849, 982 P.2d 632 (1999), the question was whether **before trial**, during summary judgment proceedings, the court could extend the time for responding to RFAs by a mere 7 days. The court used CR 36(b)'s test to allow the extension, noting the stricter prejudice test would apply when the request came during trial: "this is not a case where the extension was requested at trial or at the brink of trial. Ample time existed to undergo the normal rigors of trial preparation." *Id.* at 861.

As *Santos* recognizes, no time exists when, as occurred here, the withdrawal happens during trial. Under the lower-level prejudice test, the *Santos* court rejected the argument that Santos relied on admissions for his summary judgment: "We conclude such a standard too narrowly limits a trial court's discretion to confront the infinite fact situations presented during the discovery process and design appropriate remedies." *Id.* at 860. Santos failed to show how a 7-day extension impaired his ability to argue the merits. *Id.* But LaMonte did rely on the RFAs, until withdrawn at trial.

This case presents practically the opposite of that in *Santos*: when Westerfield belatedly asked the court to reconsider the Order deeming the

RFAs admitted, trial had commenced; the court prohibited LaMonte from citing the admissions during opening statement, causing her to abruptly change her theory of the case and address Lewis's new alternative theories. And the court continued to revisit and aggravate the error. It was too late to change trial preparation or delve into any possible ramifications of Lewis's testimony or the withdrawal of the admissions or Cook's contradiction, with the latter deceased and unavailable to explain. LaMonte, unlike the plaintiffs in *Santos*, had no discovery opportunities at that point because she had legitimately relied on Westerfield's and Cook's admissions, asking the court to deem them admitted in an abundance of caution when Westerfield provided Lewis's new opinions. The case, and discovery along with it, had already been extended numerous times, including at Westerfield's request. Even with all the additional time, though Westerfield managed to appear, answer, and respond to interrogatories, he neglected the RFAs. The court egregiously erred in penalizing LaMonte at trial for Westerfield's failure to answer.

A more recent example applying the proper strict prejudice standard is *Pedroza v. Lomas Auto Mall*, 258 F.R.D. 453, 463 (D.N.M. 2009), holding that "[w]ithdrawal of the admission here would cause substantial prejudice to the Plaintiffs because it would come on the eve of trial, after discovery has closed, and two months after USAA had agreed

that it would not withdraw its admission.” In *Pedroza*, the court went to great lengths to explain why the result of preventing resolution on the merits alone **did not require** withdrawing admissions, especially at trial:

Not permitting USAA to withdraw its admission will undoubtedly strike USAA as harsh. **Procedural rules, however, exist for a reason. These rules help ensure the efficient and fair resolution of disputes. It is not the Court's practice to lightly apply procedural rules when it could mean preventing a resolution on the merits.** The Court strongly prefers to seek the truth and to resolve cases on the merits, and **if there were more time before trial, the Court might once again revert to its usual practice of being lenient about the rules if they block the Court's path to the truth.** Nonetheless, the Court believes such liberal treatment is not warranted here. USAA has had ample opportunity to withdraw its admission. Its decision to reverse course and seek withdrawal for a second time at the eleventh hour will cause substantial prejudice to the Plaintiffs. In such a situation, rule 36(b) is not satisfied. Indeed, **the prejudice the Plaintiffs would suffer would effectively prevent them from presenting their case with all the evidence they might have been able to marshal had USAA not followed the course it did. Granting USAA's request would in fact not serve to further resolution on the merits but would instead create an artificially unbalanced scenario favoring USAA rather than the Plaintiffs....**

...[B]ecause this motion comes on the eve of trial, there is no reasonable way to cure the prejudice at this late date. These three factors are intertwined. Any factor alone might allow the Plaintiffs to avoid prejudice. Taken together, however, substantial prejudice is unavoidable.

Pedroza, 258 F.R.D. at 465-67 (emphasis added).

Similarly, Westerfield had ample time to withdraw his admissions before trial: 12 years. As in *Pedroza*, instead of furthering resolution on the merits, the withdrawal created “an artificially unbalanced scenario

favoring” Westerfield, who was allowed to present Lewis’s contradictory theory and Cook’s retrospective contradiction long after the contemporaneous statements and admissions.

The *Pedroza* court noted that “Rule 36(b)’s provision for withdrawal or amendment of an admission ‘emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.’” *Id.* at 462 (quoting Fed.R.Civ.P. 36(b) Advisory Comm. Notes). But “[i]n deciding whether to grant a rule 36(b) request to withdraw or amend a discovery response, **‘[t]he court’s focus must be on the effect upon the litigation and prejudice to the resisting party rather than [] on the moving party’s excuses for an erroneous admission.’**” *Id.* (emphasis added; quoting *Kirtley v. Sovereign Life Ins. Co. of California*, 212 F.3d 551, 556 (10th Cir. 2000)).

In *999 v. C.I.T. Corp.*, 776 F.2d 866, 869-70 (9th Cir. 1985), involving breach of an agreement to provide financing, resulting in loss of an opportunity to acquire a corporation, plaintiff 999 obtained an admission from CIT that its letter constituted an agreement. At trial, the court excluded another letter from 999 to CIT, stating there was no agreement, on the ground that the second letter was inconsistent with the CIT admission. The court also denied CIT’s motion during trial to

withdraw the admission. The Ninth Circuit affirmed the denial under the more restrictive prejudice test, rejecting CIT's argument that both letters should have gone to the jury and that the trial court's exclusion of the second was an abuse of discretion: "Evidence inconsistent with a Rule 36 admission is properly excluded." 999, at 869-70 (citing Advis Comm. Note). "An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." *Cook v. Allstate Ins. Co.*, 337 F.Supp.2d 1206, 1210 (C.D. Cal. 2004) (quoting *Am. Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991)). See also *Stewart v. Wachowski*, 574 F.Supp.2d 1074, 1089-90 (C.D. Cal. 2005).

In *Switchmusic.com., Inc. v. U.S. Music Corp.*, 416 F. Supp. 2d 812, 817-19 (C.D.Cal.2006), the court rejected a similar attempt:

The Court will not allow the consequences of Defendants' non-compliance with the rules of procedure to now be circumvented by introducing evidence that is contradictory to their default admissions. [*United States v.*] *Kasuboski*, 834 F.2d [1345,] 1350 [(1987)] (holding that while failure to respond to admissions can deprive a party of the chance to contest the merits of the case, **such a result is necessary to insure compliance with the rules of procedure and the orderly disposition of cases).**

(Emphasis added.)

Westerfield's explanation for not responding to the admissions was inadvertence. His lawyer claimed the requests for admission "never got turned over to Mr. Westerfield's insurance carrier, and they never ... got to our office." RP 5-14-12, p.33, ll.1-5. He asserted he could not find the RFAs in searching the office files. CP37-38 (¶¶6-7). The court improperly considered Westerfield's answer to the complaint and retention of an expert to counter the admissions:

But what we have here is a request for admission which apparently wasn't forwarded to counsel, then went unanswered. So it was deemed admitted, a significant period of time went by. You know, through no fault of these counsel, a significant period of time went by. Now we're at trial.

Clearly there was originally a denial on several bases in the original answer and actually motion practice and multiple instances in which the plaintiff was put on notice that liability was contested on various grounds, including possible attribution to other nonparties for fault.

RP 5-15, p. 17, line 15, to p. 18, line 1. This is exactly the opposite of the previous court's proper conclusion that "if I use that [notice] as a guide, then there's no reason to even have a Rule 36." RP 4-20, p. 19, ll. 15-21.

To the contrary, answering the complaint does not overcome Rule 36 admissions, and it is error to base withdrawal on this reason. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 650-653, 579 S.E.2d 151 (Ct. App. 2003) ("The trial court's decision to allow GHA to withdraw the admissions was based on the judge's **erroneous belief that requests for**

admissions could not displace answers in pleadings. The court failed to consider the prejudice that would and did result to Scott due to the withdrawal of the admissions”; reversing jury verdict; emphasis added).

The court also erred in concluding that Westerfield’s hiring an expert and desire to allocate fault could defeat the admissions. Nothing occurred to challenge the conclusive effect of the admissions until Westerfield, in opposing LaMonte’s motion to deem the RFAs admitted, asked the court for relief from them, which the court denied. This opposition constituted a motion to withdraw under CR 36(b). The court carefully considered Westerfield’s brief and declaration and rejected his excuses, stating it would not allow the argument that “plaintiff was on notice” of Westerfield’s arguments to eviscerate the rule: “if I use that as a guide, then there's no reason to even have a Rule 36.” RP 4-20, at p.19, ll. 15-21.

And in requesting withdrawal, Westerfield did not offer credible, competent evidence to contradict the admissions, as Rule 36 requires. *See, e.g., Branch Banking & Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 658-59 (E.D.N.C.1988); *Coca-Cola*, at 103.²⁴ Discovery of Lewis occurred too late, **after** LaMonte moved to deem the RFAs admitted.

²⁴ “In considering whether the presentation of the merits will be improved by permitting an admission to be revised, courts have generally sought to determine whether the admission is contrary to the record of the case. *See, e.g., Branch Banking*, 120 F.R.D. at

The court may consider the fault of the party seeking withdrawal, *Pickens v. Equitable Life Assurance Soc.*, 413 F.2d 1390, 1394 (5th Cir. 1969), the timing of the motion for withdrawal as it relates to the party's diligence, and the adequacy of time remaining for additional discovery before trial. *See, e.g., Branch Banking*, 120 F.R.D. at 660 (denying withdrawal where party, with due diligence, could have accessed the information needed to respond to request for admissions yet failed to). In *Wilson v. John Crane, Inc.*, 385 Md. 185, 215-16, 867 A.2d 1077 (2005), the court rejected a similar excuse of inadvertence:

We are not prepared at this time to find that a court has committed an abuse of its broad discretion in denying a party's motion to withdraw or amend its admissions where that party's only excuse as to why it did not timely respond to a request for admissions amounts to a plea that, because the particular attorney or firm has undertaken a large number of clients or cases, he or it cannot adequately control or oversee the proper responses to pleadings. **Attorneys are required not to undertake representations unless they can adequately monitor the pleadings....**

However characterized, Garlock's failure to respond to petitioners' request for admissions was a result of oversight.

Id. (emphasis added). Westerfield did not exercise due diligence. The court had no basis for granting his motion for reconsideration, withdrawing Westerfield's and Cook's admissions from use in LaMonte's case in chief, allowing Lewis's contradictory opinion, admitting Cook's

658-59 (disallowing amendment of admission since no affidavit, verified pleading or other evidence suggests admission, if left standing, would render unjust result)".

contradictory deposition testimony, permitting Westerfield's testimony contrary to the admissions and permitting Westerfield's closing argument that he was not involved in LaMonte's injuries, and rejecting LaMonte's jury instructions with the admissions.

3. The Rulings Severely Prejudiced LaMonte. In summary, relieving Westerfield of the deemed admissions caused enormous, incurable prejudice to LaMonte, going beyond requiring her to prove at trial the truth of how the accident occurred: with two impacts including Westerfield pushing Cook into her a second time. Cook's deposition testimony and Lewis's expert opinion completely contradicted the admissions. LaMonte served the RFAs at the beginning of these proceedings, in plenty of time to seek alternative proof of liability had Westerfield denied them. Westerfield's failure to answer for 12 years foreclosed that opportunity, and allowing withdrawal during trial made it impossible to reverse the process.

The admissions were based on statements at the scene of the accident when memories were fresh. Cook's deconstruction of events at his depositions in 2001 came years later, following serious illness. Lewis's testimony in 2011 rests purely on his interpretation of data and photographs, some only shown to LaMonte for the first time at trial. Had Westerfield's admission that he hit Cook into LaMonte stood, Lewis

would not have been allowed to testify, in direct contradiction, that the photographs showed Cook missed LaMonte and Westerfield did not cause Cook to hit LaMonte. The court's errors forced LaMonte into the impossible position of not being able to support her case in chief with admissions she had relied on since 2000, and not being able to adequately counter Westerfield's new defense.

CONCLUSION

The trial court committed reversible error in reconsidering the Order deeming Westerfield's RFAs admitted, failing to properly evaluate the severe prejudice of withdrawing admissions during trial, removing the RFAs from LaMonte's opening and case in chief, allowing contradictory opinions from Westerfield's expert, admitting contradictory testimony from Westerfield and Cook, refusing instructions based on the admissions, and permitting closing argument on Westerfield's version that he did not hit Cook into LaMonte. LaMonte respectfully requests reversal and remand for a new trial.

DATED: January 25, 2013.


Steven P. Krafchick, WSBA # 13542

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COURT OF APPEAL OF WASHINGTON
DIVISION I

REBECCA LAMONTE, a single individual,
Plaintiff,

v.

THE ESTATE OF SHERMAN LLOYD
COOK, JR. and RICHARD WESTERFIELD
and JANE DOE WESTERFIELD, husband
and wife and the marital community
composed thereof,
Defendants.

NO. 00-2-06015-7 KNT

CERTIFICATE OF SERVICE OF
APPELLANT'S BRIEF

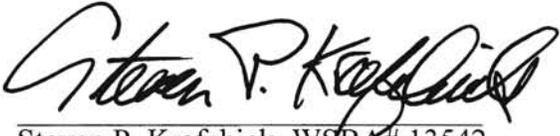
FILED
2013 JAN 25 PM 4: 11
COURT OF APPEALS DIV I
STATE OF WASHINGTON

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On January 25, I caused to be served, via messenger service, a copy of Appellant's Brief on the following counsel of record: David Hansen and William A. Olson, Aiken St. Louis & Siljeg, 1200 Norton Building, 801 Second Avenue, Seattle, W A 98104, Attorneys for Defendant Westerfield, and via U.S. mail, Dalynne Singleton, 1521 SE Piperberry Way #103, Port Orchard, WA, 98366, Attorney for defendant The Estate of Cook.

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DATED this 25th day of January, 2013.

KRAFCHICK LAW FIRM PLLC

By: 
Steven P. Krafchick, WSBA# 13542
Pamela S. Van Swearingen, WSBA #23895
Sarah L. Lee, WSBA# 27364
Attorneys for Plaintiff

1 **Certificate of Service**

2 The undersigned certifies under the penalty of perjury under the laws of the State of
3 Washington that I am now and at all times herein mentioned, a citizen of the United States, a
4 resident of the state of Washington, over the age of eighteen years, not a party to or interested
5 in the above-entitled action, and competent to be a witness herein.

6 On January 25, I caused to be served in the manner noted below a copy of
7 the foregoing on the following counsel(s) of record:

- 8 U.S. Mail
9 Telecopier (Fax)
10 Messenger
11 Hand Deliver
12 ECF Filing
13 Federal express
14 Electronic Mail

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17 Aiken St. Louis & Siljeg
18 1200 Norton Building
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22 Phone: (206) 624-2650
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24 DATED this 25 day of January, 2013.

25 
26 _____