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DIVISION II

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STATE OF WASHINGTON
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No. 45575-7-II

COURT OF APPEALS DIVISION 2
OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE PATROL,

Respondents.

APPELLANT'S REPLY BRIEF

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I.
INTRODUCTION

The primary error in this case concerns the trial court's decision to enter WSP's proposed judgment, which dismisses Peralta's complaint, instead of Peralta's proposed judgment, which provides her the damages that the jury awarded in proportion to WSP's comparative fault. The trial court's judgment is inconsistent with the jury's intent and the law of this case, as set out in the unchallenged jury instructions and verdict form.

WSP contends that the voluntary intoxication defense codified in RCW 5.40.060 requires judgment in its favor, notwithstanding the jury's award, because Peralta's fault exceeded 50%. The flaw in this argument is that the instructions given to the jury form the law of the case, not RCW 5.40.060. And because the instructions given to the jury permitted the jury to award Peralta damages, without regard to whether her fault exceeded 50%, the trial court should have entered Peralta's proposed judgment, which provides her the damages that the jury awarded in proportion to WSP's comparative fault instead of WSP's judgment, which dismisses Peralta's complaint.

If judgment is not entered in Peralta's favor, then a new trial is required. The other errors in this case, involving the exclusion of evidence bearing on the allocation of fault between the parties and an instruction that Peralta was intoxicated as a matter of law, were prejudicial. Moreover, the near-parity in the jury's allocation of fault, 42% to WSP

and 58% to Peralta, militates against finding any error harmless, especially in light of the 50% threshold imposed by the intoxication defense.

In other words, notwithstanding the evidence that was kept from the jury and the fact that the jury was instructed that Peralta was intoxicated as a matter of law, the jury still found the WSP 42% negligent. Putting this in perspective, if any of the excluded evidence would have caused the jury to find Peralta only 8% less negligent or the WSP only 8% more negligent, then the allocation of fault between the parties would have been equal, 50–50, and the first assignment of error would be moot. Thus, if the court finds that the decision to instruct the jury that Peralta was intoxicated as a matter of law was error or any of the assigned evidentiary rulings were error, then, in all likelihood, that error would have affected the outcome of the trial. *In re Det. of West,* 171 Wn.2d 383, 256 P.3d 302 (2011) ("An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'") (internal quotation omitted).

II.
REPLY ARGUMENT

A. *Reply Argument on Assignment of Error No. 1: The trial court erred in entering WSP's form of judgment and not Peralta's form of judgment.*

This court reviews the legal effect of a jury verdict *de novo,* without any deference to the trial court. *Estate of Dormaier v. Columbia*

Basin Anesthesia, P.L.L.C., 177 Wn. App. 828, 866, 313 P.3d 431 (2013).

This court's duty in interpreting a jury verdict is to ascertain the intent of the jury and, as long as it is consistent with the law, implement it:

> In the construction of a verdict, the first object is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict, if consistent with legal principles, as will most nearly conform to the intent.

Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 344, 109 P.2d 542 (1941).

The law of the case here is set out by the unchallenged instructions given to the jury. *See, e.g., State v. Perez-Cervantes*, 141 Wn.2d 468, 475-76, 6 P.3d 1160 (2000) ("Unchallenged jury instructions become the law of the case."); see discussion at Appellant's Brief at 34-36.

As a result, this court's analysis in interpreting the verdict is twofold: first, determine the intent of the jury; and second, determine whether that intent is consistent with the instructions that were given to the jury. If the jury's intent is consistent with the instructions given to the jury, then the court must enter a judgment that gives effect to that intent.

1. The jury's intent was to award Peralta damages.

WSP does not dispute that the jury's intent was to award Peralta damages. It challenges whether the court can consider the post-trial declarations submitted by the foreman and other jurors to support the jury's intended verdict. But it does not dispute that the jury's verdict answers, especially in light of the instructions given, reflect an intent to

award Peralta damages.[1] Nor can it.

That the jury intended to award Peralta damages cannot seriously be disputed. The jury was told in Instruction No. 22 that it is only to award Peralta damages "[i]f your verdict is for the plaintiff," and the jury responded by answering the damage question on the verdict form with an award of damages. That it took the time to assess damages necessarily reflects an intent to award Peralta money and render a verdict in her favor. A task they were not only allowed to do under Instruction 22 unless they *found* in Peralta's favor. *See Espinoza v. Am. Commerce Ins. Co.*, __ Wn. App. ___, 336 P.3d 115, 127 (2014) ("that the jury took the time to assess damages, illustrat[es] a desire to award money to the [plaintiffs]" despite its finding on the verdict form that resulted in a defense verdict.] Thus, Peralta's judgment, which awards Peralta damages in proportion to WSP's comparative fault, is consistent with the jury's intent.

On the other hand, there is nothing to suggest that the jury intended to deny Peralta any compensation. There is no evidence, no instruction or verdict answer, that supports such an inference. Thus, the trial court's judgment, which dismisses Peralta's complaint and awards her no damages, is clearly contrary to the jury's intent.

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[1] *See* Respondent's Brief at 36-39. WSP's argument is limited to whether the juror declarations in *support* of the verdict inhere to the verdict.

2. The jury's award of damages is consistent with the law of the case.

WSP does not dispute that the unchallenged jury instructions form the law of the case. *See* Respondent's Brief at 31, *see also* Appellant's Opening Brief at 34-36. Nor does it dispute that those instructions permit the jury to award Peralta damages, notwithstanding the fact that her fault exceeded 50%. Yet WSP fails to explain how it is that those instructions support a judgment that awards Peralta no damages. For good reason, the instructions do not support such a judgment.

Instead, WSP argues that what matters is whether the jury's damage award is consistent with RCW 5.40.060, not with the instructions given to the jury. In essence, WSP claims that the trial court was obligated to determine the legal effect of the jury's damage award under the voluntary intoxication statute, RCW 5.40.060 – not under the instructions that were given to the jury. *See* Respondent's Brief at 34-35.

But this is contrary to the well established rules for interpreting verdicts and the law of the case doctrine. Verdicts must be interpreted in light of the instructions given to the jury, not some statute that contains consequences which the jury was never informed about. *See, e.g., Meenach v. Triple E Meats, Inc.*, 39 Wn. App. 635, 639, 694 P.2d 1125 (1985), *rev. denied*, 103 Wn. 2d 1031 (1985); *Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866, 313 P.3d 431 (2013).

See discussion in Appellant's Opening Brief at 34-36.

3. RCW 5.40.060's bar to recovery is not the law of this case.

In short, RCW 5.40.060's bar to recovery does not apply to this case. It is not the law of this case. The same is true for WSP's explanation about how under RCW 5.40.060 the defendant is entitled to judgment, if the jury finds that the plaintiff's intoxication contributed to her injuries and her share of fault exceeds 50%. That is all beside the point. *See* Respondent's Brief at 16. No doubt that would be a correct judgment under *that* law. But that law is not the law for *this* case, because the jury was instructed otherwise.

In this case, the jury was instructed – with WSP's consent, because it did not object – that plaintiff's fault would reduce her recovery, not eliminate it, even if her share of the fault was greater than defendant's and even if her intoxication contributed to her injuries. Again, as WSP concedes, unchallenged instructions become the law of the case, even if inaccurate. *See* Respondent's Brief at 31. Thus, for *this* case, it does not matter what RCW 5.40.060 provides, but only what the jurors were instructed. WSP's argument about the statute's meaning and the intent is beside the point.

So is WSP's argument that Peralta was intoxicated and that her intoxication contributed to her injuries. WSP spends nine pages of its

brief summarizing its view of the evidence and Peralta's admissions in an attempt to prove those things. *See* Respondent's Brief at 20-29. But for purposes of this assignment of error, Peralta accepts that she was "intoxicated."[2] She also accepts that her intoxication was one of the causes of her injuries (along with WSP's negligence). Contrary to the suggestion in WSP's brief, Peralta does not challenge those findings. What she challenges is the judgment that the trial court entered based upon those findings in light of the law of this case. WSP's efforts to prove to this court that Peralta was intoxicated and that her intoxication was a cause of her injuries does not speak to this issue on appeal.

4. WSP's waiver and preservation arguments are without merit.

WSP's argument that Peralta "waived" or "invited" any error in the instructions also does not speak to this issue on appeal. *See* Respondent's Brief at 18-19. It should be clear from Peralta's law-of-the-case argument that she is *not* challenging the instructions. Unlike the WSP – Peralta *accepts* them. What she is challenging, is the trial court's failure to follow the instructions when rendering its judgment. There is no point, then, to

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[2] Actually, what she admitted is what defendants asked her to admit: that she was "under the influence of intoxicating liquors at the time of the accident." CP 72. Relying on that admission, the trial court held that plaintiff was "intoxicated" within the meaning of RCW 5.40.060(1) as a matter of law. That ruling is the subject of plaintiff's seventh assignment of error, but for purposes of the present assignment of error, plaintiff accepts that she was "intoxicated."

address the WSP's waiver and invited-error arguments.

For that matter, if there was any jury confusion, it was the WSP who invited it, not Peralta. The trial court used the WSP's proposed intoxication defense instruction, and the trial court used WSP's proposed verdict form. Peralta objected to the verdict.[3]

Likewise, there is no point to WSP's argument that "plaintiff failed to preserve the error she alleges in the jury's verdict." *See* Respondent's Brief at 35. In the first place, juries cannot err; only judges can. So there cannot be an error in the verdict, only in what the judge does with the verdict – accepting it, rejecting it or translating it into a judgment.

Peralta does not challenge the verdict or the jury's findings contained therein. She accepts those findings. What she is challenging, again, is the trial court's judgment based upon those findings and the law of the case as announced in the instructions. And there can be no dispute that that challenge was preserved; Peralta objected to the judgment before

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[3] In fact, in objecting to WSP's proposed verdict form, Peralta noted, among other problems, the potential for jury confusion:

> "THE COURT: We're going to accept these verdict forms. I understand and appreciate there may be some risk of confusion, but we're going to go with the ones proposed.
>
> "MR. JACOBS: We just need to make sure we've got a good clean record and the Plaintiff does take exception to that because of those reasons.
>
> "THE COURT: Exception noted. Thank you."

8B RP 1810.

it was entered and proposed an alternative judgment that was consistent with the jury's intent and the unchallenged instructions given to the jury.

5. Peralta's judgment is consistent with jury's intent and the law of the case; the trial court's judgment is not.

As explained more fully in Peralta's opening brief on pages 36-39, the instructions given to the jury told the jurors that plaintiff's fault, whether alcohol-related or not, would reduce her recovery proportionally but not bar it altogether, *see* Instruction 7; that intoxication and fault above fifty percent was a "defense," but not a "complete defense," *see* Instruction 19; and that plaintiff's intoxication was just one "factor" to consider in determining whether she was negligent, s*ee* Instruction 18.

Nowhere do the instructions suggest that the effect of the intoxication defense would result in anything other than a proportional reduction of damages. In fact, Instruction No. 7, that "[y]our answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any[,]" indicates just the opposite.

Under the instructions given to the jury, Peralta was entitled to recover her damages to the extent of WSP's fault, notwithstanding her fault and her intoxication. And that, of course, is exactly how the jurors understood the instructions. See Peralta's Opening Brief at 26-28, 32-33. (discussing jurors' post-verdict declarations and conversations with judge in support of their verdict).

The instructions on the verdict form conveyed the same message: a finding of intoxication and fault above fifty percent would not bar plaintiff's recovery. That much is clear from the instruction to skip Question 7 (what are plaintiff's damages?) *only if* the answer to either Question 1 (was defendant negligent?) or Question 2 (did defendant's negligence cause plaintiff's injuries?) was "no." In other words, the jurors were required to determine plaintiff's damages *unless* they found that defendant was either not negligent or that the defendant's negligence was not a cause of plaintiff's injuries. But any other finding, including a finding that plaintiff was intoxicated and that her fault exceeded defendant's, still required the jurors to determine damages – indicating that, even in that scenario, plaintiff would recover. Which is exactly what Instruction 22 said: "If your verdict is for the plaintiff, then you must determine [her damages]" and "If you find for the plaintiff, your verdict must include [$127,583.99 in damages for her past medical bills]." The trial court's judgment dismissing Peralta's complaint and awarding no damages is not consistent with those instructions and verdict form.

WSP's reaction to the verdict when it was returned in open court supports Peralta's contention about the controlling law. WSP did not object to the jurors' award of damages – to their answer to Question 7. It did not say that the jurors could not award damages, as it now contends. It

did not say that Peralta could not recover under the law of the case based on the jurors' answers to Questions 5 and 6. And for good reason. As noted above, Instruction 22 told the jurors not to award damages, or answer Question 7, unless their verdict was "for" plaintiff – unless they *found* for her. In other words, the jury had obviously made up its mind that Peralta had prevailed, and she was entitled to an award of damages.

If, as WSP now contends, the findings of intoxication and fault-above-50-percent precluded recovery, then it should have objected to the verdict awarding Peralta damages and asked the judge to direct the jurors to resume deliberations. In fact, it was obligated to do so. *See Gjerde v. Fritzsche*, 55 Wn. App. 387, 393-94, 777 P.2d 1072 (1989) (inconsistences in verdict must be raised before the trial court discharges the jury, or they are waived.). But instead, WSP remained silent. Its failure to object is at odds with the instructions and with WSP's view of the law of the case.

It is also telling that WSP now describes those instructions as "unfortunate," see Respondent's Brief at 33, which is nothing more than a subtle way of conceding that the instructions do not support the trial court's judgment. And, indeed, they do not support its judgment. But those instructions do state the law of this case. The trial court should have followed that law and, therefore, should have rejected WSP's proposed

judgment and instead entered Peralta's proposed judgment.

B. *Reply Argument on Assignment of Error No. 2: The trial court erred in excluding Tanner's statement to the paramedic as hearsay.*

This assignment involves the trial court's exclusion of Trooper Tanner's statement to a paramedic about his speed. The trial court excluded the statement because it was not certain whether it was Tanner or another officer at the scene who made the statement.

1. If the evidence permits a reasonable inference as to the identity of the declarant, then the court must admit the evidence.

If the admissibility of evidence depends upon whether the declarant can be identified, then it is a preliminary question for court. See *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 170-71, 758 P.2d 524 (1988). But that burden is not great. It is "met if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Danielson*, 37 Wn. App. 469, 472, 681 P.2d 260 (1984). And the proof can come in the form of either direct or circumstantial evidence. *Id.* at 472. If the proof permits a reasonable inference as to the identity of the declarant, then "[t]he court should admit the evidence" and allow the jury to decide the ultimate issue of fact. *State v. Rodriguez*, 103 Wn. App. 693, 701-02, 14 P.3d 157 (2000).

2. Here, the evidence permitted a reasonable inference that Tanner was the declarant.

WSP argues that the paramedic's statement, alone, is not sufficient to permit a reasonable interference that Tanner was the declarant. It argues, as the trial court noted, that the statement could have came from one of the other two officers that were present at the scene. But Peralta's offer of proof contained more than just the paramedic's statement. CP 225, 308. It also contained Tanner's deposition testimony where he admits to having a conversation with the paramedic about his speed:

> I recall one of the paramedics asking at some point -- and I believe they were exiting the rear of the ambulance -- for the approximate speed of the vehicle. And I recall saying about 40 miles per hour. I don't believe I said 48 to 50 miles per hour. That could have been somebody else she asked. I'm not sure. I don't know.
>
> But I recall telling them, or one of the –at some point, somebody asked me. I thought it was one of the paramedics. It could have been one of the deputies exiting. I don't know. I recall answering that question with it about 40 miles per hour.

CP 216-17.

Although Tanner disagrees with the content of the statement, he does not dispute that he was the one who made the statement.[4] Reading the paramedic's statement in conjunction with Tanner's own statement

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[4] Again, the preliminary question of fact is not whether Tanner said 40 mph or 50 mph, as WSP argued below. That is a matter for the jury. The preliminary question of fact is limited to whether there is sufficient evidence to permit the inference that Tanner was the declarant.

permits more than a "reasonable inference" that Tanner was the declarant who spoke to the paramedic about his speed.

3. Peralta was prejudiced by the exclusion of the evidence.

WSP also claims that the excluded evidence did not prejudice Peralta because she introduced evidence that Tanner was exceeded the posted speed limit through her accident reconstructionist. But that misses the point. Tanner's credibility was a central issue in the case. Had the paramedic been allowed to testify, she would have contradicted Tanner's trial testimony with Tanner's own statement. It would have been powerful impeachment evidence that would have undermined Tanner's credibility.

In addition, as a matter of simple math, at 50 mph, a driver travels 23 feet more per second faster than a driver traveling at 35 mph. According to Peralta's accident reconstructionist, that difference was significant; it was the difference between Tanner hitting Peralta and avoiding her. 4A RP 734-35.

C. *Combined Reply Argument on Assignment of Error Nos. 3 & 4: The trial court erred in excluding the deposition testimony of WSP Sergeant Rhine and WSP Detective Ortner as hearsay.*

1. Sergeant Rhine and Detective Ortner are party opponents.

WSP does not dispute that Sergeant Rhine and Detective Ortner are party opponents. Nor do they dispute that their deposition testimonies are admissible as party opponent statements under ER 801(d)(2). Instead,

it maintains, as the trial court did, that CR 32 (a)(3)'s unavailability requirement applies to party opponents' depositions, apparently trumping the evidentiary rule.[5] WSP is wrong on both counts.[6]

2. The unavailability requirement does not apply to statements by party opponents.

The admission of party opponent statements is governed by ER 801(d)(2). That Rule does not require the offering party to first establish that the party opponent is unavailable for trial before admitting the party opponent's statement.

The unavailability requirement applies only to the admission of certain types of hearsay. *See* ER 804. Statements by party opponents are not hearsay. ER 801(d)(2). Sergeant Rhine's and Detective Ortner's statements are not hearsay; they are party admissions. As such, they are admissible without the need to establish their unavailability for trial.

3. CR 32 does not impose an unavailability requirement on party opponent statements.

WSP claims that CR 32(a)(3) states the unavailability requirement applies to the admission of party opponent depositions. That is not

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[5] See Supp. App. A for full text of CR 32.

[6] WSP also suggests that the trial court excluded the evidence on the additional discretionary grounds that it was cumulative and improper rebuttal. The trial court made no such findings or rulings. The reason the trial court excluded the deposition testimony of Sergeant Rhine and Detective Ortner was that Peralta could not demonstrate their unavailability. 8B RP 1852-53.

correct. In fact, CR 32(a)(3)'s language says just the opposite – that it applies to non-parties:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds [the following conditions].

CR 32 (a)(3). *See* Supp. App. A.

WSP attempts to alter that provision's meaning by moving the phrase "whether or not a party" from modifying the party's status to modifying the unavailability requirement, stating:

> CR 32(a)(3) (requires the party offering the deposition to demonstrate the witness, whether or not a party, is not available to testify.)

Respondents Brief at 42 (parentheses in original). But, again, that is not what the provision states.

If there is any doubt, reading CR 32(a)(3) in context of the full rule makes clear that the unavailability requirement applies only to non-parties. CR 32(a)(2), the provision that precedes CR 32(a)(3), specifically addresses the depositions of parties. It states that "[t]he deposition of a party . . . may be used by an adverse party for any purpose." And CR 32(a)(2) does not require the offering party to establish the adverse party's unavailability prior to offering the adverse party's deposition. CR 32(a)(3) follows and it addresses all other depositions, stating that regardless of whether the witness is a party, the witness's deposition is admissible if

certain conditions, including unavailability, are met. *See* Supp. App. A.

In sum, the trial court erred in requiring Peralta to first demonstrate that Sergeant Rhine and Detective Ortner were unavailable for trial before she could admit their deposition testimonies at trial. Sergeant Rhine and Detective Ortner are party opponents. As such, their sworn statements were admissible as party opponent statements without the need to establish their unavailability for trial.

4. Peralta was prejudiced by the exclusion of the evidence.

a. The exclusion of Sergeant Rhine's testimony prejudiced Peralta.

WSP claims that even if Sergeant Rhine's testimony were admissible, there was no prejudice because Sergeant Rhine's report was admitted into evidence. That is incorrect for several reasons. First, a written police report is not as persuasive as the sworn testimony of a deponent who is represented by his counsel at the time he is questioned. A deposition under those circumstances, as opposed to a report, leaves little room for misunderstandings as to the witness's intended meaning.

Second, Sergeant Rhine's deposition testimony not only clarified and supplemented his written report, but it provided important context and certainty on a critical issue in dispute – whether Tanner's headlights were on at the time of impact.

Tanner testified that he not only saw Peralta, but that he saw her far

enough away that he was able to react and maneuver his vehicle to the left before hitting her. For that to have happened, Tanner would have had to have his headlights on at the time of the collision.

Sergeant Rhine's deposition testimony was unequivocal that Tanner did not see Peralta prior to impact:

> Q. Is that a pretty accurate statement of what he said to you?
>
> A. Yes, very accurate.
>
> Q. And the reason I'm -- I look at this and I get the impression from this statement that he may not even have seen the person, if at all, until impact.
>
> A. That's my perception, as well.
>
> . . . . .
>
> A. He told me firsthand, "I didn't see a person there."

CP 514-15.

> Q. That's what it reads like. Because the last sentence you say, "He said to that point, he wasn't sure what he had hit, that he didn't see them prior to impact."
>
> A. And that's his words.
>
> Q. And when you say he didn't see them prior to impact, I assume he's referring to the human being.
>
> A. Yes.
>
> Q. And you're certain those were his words?
>
> A. Yes.

CP 516.

Sergeant Rhine's sworn deposition testimony lends credence to the fact that Tanner did not have his headlights on at the time of impact. Equally important, it undermines Tanner's credibility by impeaching his sworn testimony with his own inconsistent statements.

b. The exclusion of Detective Ortner's testimony prejudiced Peralta.

The WSP's rendition of the facts makes obvious how much important it places on Peralta's alleged hospital bed admissions to Detective Taylor. Without her alleged admissions that she saw Tanner's headlights on at the time of the collision, Tanner's testimony would have stood alone against the four independent witnesses.

WSP claims that Peralta's mother's testimony that Peralta was sedated and not alert at when she gave her statement to Detective Taylor is just as good as WSP's chief investigator's statement that "it was pretty obvious that she was a little bit groggy."

WSP is wrong. Here, the source of the opinion makes a significant difference. It is hard to imagine any less persuasive testimony than that of Peralta's own mother testifying on her behalf. It is equally hard to imagine any more persuasive testimony than that of the WSP's chief investigator who admits a critical fact against the WSP's own interest.

Had the jurors believed that Tanner was driving without his headlights on at the time of the collision, they likely would have assessed

him a greater percentage of fault. That would have affected the case's outcome. It is no wonder that the WSP named both Detective Ortner and Sergeant Rhine on its witness list, but failed to call either of them at trial. 8B RP 1847-48.

D. ***Reply Argument on Assignment of Error No. 5: The trial court erred in excluding as hearsay the testimony of Luann Pfleiger that two eyewitnesses had made prior consistent statements to her about Tanner driving without his headlights.***

1. The record reflects that WSP made an implied charge of fabrication.

The admission of Luann Pfleiger's testimony turns on whether the WSP made an express or implied charge that the eyewitness accounts were recently fabricated. WSP claims it "did not make any express or implied charge of fabrication by Mr. Kirchgatter or Mr. Ridell." Respondent's Brief at 44. WSP's statements to the jury, however, tell a different story.

In its opening statement, WSP's counsel stated:

> Now, unlike some of the witnesses whose testimony you will hear in this case who came up with their story several years after the event . . ..

1 RP 127. Accusing someone of "coming up with their story several years after the event" is an accusation that the story was fabricated.

2. Peralta was prejudiced by the exclusion Ms. Pfleiger's testimony.

Peralta was prejudiced by the exclusion of Ms. Pfleiger's testimony. Without Ms. Pfleiger's testimony that the eyewitnesses gave

consistent accounts on the night of the collision, WSP was free to argue in its closing argument that the eyewitness accounts were not only fabricated, but fabricated with the help of Peralta's investigator:

> [T]heir statements and their collective recollection, aided with the help of Mr. Bloom's investigator some three years after the incident . . ..

8B RP 1922.

Had the jurors believed the fact witnesses who testified that Tanner was driving without his headlights on at the time of the collision, they likely would have assessed him a greater percentage of negligence. Thus, the excluded evidence would have made a difference in the jury's allocation of fault and would have affected the case's outcome.

E. ***Reply Argument on Assignment of Error No. 6: The trial court erred in excluding the deposition testimony of WSP Trooper Riddell on the grounds that its probative value was outweighed by ER 403 considerations of prejudice, confusion and delay.***

The trial court excluded the testimony of WSP Trooper Riddell under ER 403: "Rule 403 allows the Court wide latitude to exclude on the basis of prejudice, confusion or a waste of time. And the Court is inclined to deny the offer on that basis." 8B RP 1854.

The testimony of Trooper Riddell was important rebuttal evidence. It would have rebutted the WSP's charge that Rick Riddell fabricated the story "several years after the event." Trooper Riddell would have established that shortly after the collision, Rick Riddell told Trooper

Riddell that he in fact witnessed the collision. That alone would have gone a long way in rebutting WSP's charge of recent fabrication. In addition, coming from one of WSP's own Troopers, the testimony would have carried significant weight with the jury.

F. ***Reply Argument on Assignment of Error No. 7: The trial court erred in ruling that Peralta's discovery admission that she was under the influence of alcohol constitutes an admission that she was impaired to an appreciable degree as required by RCW 46.61.502.***

1. RCW 5.40.060 incorporates the level of intoxication required under RCW 46.61.502.

WSP begins it response by denying that RCW 5.40.060 requires the level of intoxication necessary to establish a conviction under RCW 46.61.502. Respondent's Brief at 23-24. But RCW 5.40.060(1)'s text makes clear that it does:

> (1) . . . The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

RCW 5.40.060(1).

2. RCW 46.61.502 requires impairment to an "appreciable degree."

WSP next claims that the statutory phrase "under the influence," as used in RCW 46.61.502, does not require proof of impairment to an

"appreciable degree." WSP's Response at 25. Again, WSP is wrong.

Judicial construction of a statute becomes a part of the statute as if it were part of the statute from its enactment. *State v. Cronin*, 142 Wn.2d 568, 590, 14 P.3d 752 (2000); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997); *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725 (1982).

The authority construing the statutory phrase "under the influence," as used in RCW 46.61.502, to require proof of impairment to an "appreciable degree" is not only extensive, but undisputed. *See, e.g., State v. Hurd*, 5 Wn.2d 308, 315, 105 P.2d 59 (1940) (The phrase "'under the influence of intoxicating liquor,' . . . has been defined as *any influence which lessens in any appreciable degree the ability of the accused to handle his automobile*.") (interpreting predecessor statute) (italics in original) (underlining added for emphasis); *State v. Arndt*, 179 Wn. App. 373, 386, 320 P.3d 104 (2014) ("[A] person is under the influence of or affected by the use of intoxicating liquor [as defined by RCW 46.51.502] if the person's ability to drive a motor vehicle is lessened in any appreciable degree.") (citations omitted) (bracketed language added for context) (emphasis added); *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995) ("We hold, however, that RCW 46.61.502 is violated if the evidence is sufficient for the factfinder to infer that the ability to

handle an automobile was lessened in an appreciable degree by the consumption of intoxicants or drugs.") (emphasis added).

WSP next makes some sort of waiver argument, claiming that "[p]laintiff did not offer an instruction that defined the first element of RCW 5.40.060 with the additional element she now advocates." WSP's response at 24, n 12. Whatever argument WSP is trying to make does not matter, because it is based on a false foundation.

Not only did Peralta request WPI 16.04, which requires proof of impairment to an appreciable degree, but the trial court gave WPI 16.04 as Instruction 21. CP 364, 8B RP 1881. Unfortunately, the instruction did little good because the court had already ruled and directed the jury that Peralta's intoxication had been established as a matter of law.

Finally, WSP claims that it is Peralta's fault for only admitting what the WSP asked her to admit: that she was "under the influence of intoxicating liquors" at the time of the accident." CP 72. Apparently, WSP believes that Peralta was also obligated to include in her response whether she was admitting or denying that her alcohol consumption impaired her abilities to an appreciable degree or that it had risen to a level that violated the intoxication statute. That is not Peralta's obligation.

It is the WSP's obligation to craft a request for admission that addresses the issue it seeks to be admitted or denied. That is especially

true when the issue that the WSP sought to have admitted is complex – whether Peralta violated a statute that contains different factual and legal requirements for conviction.[7]

3. Disputed issues of fact prevent this court from concluding that Peralta was intoxicated as a matter of law.

WSP claims that even if the trial court erred in removing the intoxication issue from the jury's consideration, the error was harmless because the record contains no evidence that would allow the jury to find that Peralta was *not* impaired by alcohol to an appreciable degree.[8] *See* Respondent's Brief at 27-29. That is not true.

The record contains more than sufficient evidence to support a reasonable inference that Peralta was *not* impaired by alcohol to an appreciable degree. *See Chaney v. Providence Health Care*, 176 Wn. 2d 727, 739, 295 P.3d 728 (2013) (judgment as a matter of law is only warranted in the absence of evidence or reasonable inferences from the evidence to sustain a verdict in favor of the nonmoving party. *Id.* at 732.).

In fact, neither of the two eyewitnesses who testified about Peralta's condition prior to the collision testified that she appeared

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[7] For example, RCW 46.61.502 states that being under the influence of alcohol can also be established by proving the driver's whole blood "alcohol concentration of 0.08 or higher." In fact, WSP requested that Peralta admit that she "had a blood alcohol concentration at that time of 0.167 grams per deciliter," and she denied it. CP 76.

[8] The trial court did not make a factual finding that Peralta was intoxicated, either. Its ruling was based solely on Peralta's discovery response.

intoxicated, let alone impaired to an appreciable degree. Diana White testified that she was with Peralta until Christina Price picked her up. 4B RP 918. Ms. White bought Peralta a beer but only observed her consume about half of it. *Id.*

Christina Price testified that when she picked Peralta up to go to the party, she did not appear intoxicated. 4A RP 800. Ms. Price also testified that she did not observe Peralta drink any alcohol while at the party. *Id.* This evidence is more than sufficient to create an issue of fact as to whether Peralta was impaired by alcohol to an appreciable degree.

4. The error was prejudicial.

The resulting prejudice is obvious and significant. The trial court's ruling not only relieved the WSP of having to establish one of the primary elements of its RCW 5.40.060 defense, but it also told the jury that plaintiff's intoxication constituted negligence as a matter of law.

Had Peralta been allowed to contest whether her alcohol consumption impaired her abilities to an "appreciable degree" as is required by RCW 46.61.502 (1), then the jurors would have been free to believe Ms. Price's testimony that Peralta was not impaired by alcohol to an appreciable degree. 4A RP 800. And had the jurors found that Peralta was not impaired by alcohol to an appreciable degree, that would have eliminated the WSP's intoxication defense. It also would have likely

resulted in the jurors assessing a smaller percentage of fault to Peralta, which also would have affected the outcome of the case.

G. *Reply Argument on Assignment of Error No. 8: The trial court erred in compelling Peralta to disclose her consulting expert's report and sanctioning her by barring her from presenting an alcohol expert at trial.*

1. WSP makes unsupported factual assertions.

WSP responds to Peralta's eighth assignment by ignoring the legal arguments and instead focusing on facts that are not in the record. Most prominent is WSP's claim that the sanction Judge Wulle imposed was actually a "compromise" that was "proposed" by Peralta's counsel and agreed to by the parties. Respondent's Brief at 48. The record does not support this claim.[9]

Morever, if the sanction was in fact a "compromise" that Peralta's counsel "proposed" and that the parties agreed to, as WSP's counsel claims in its response, you would think that that would have been an important enough fact to bring to the attention of the trial court during the discussion on WSP's motion in limine on this very issue. Although Mr. Puz explained to the trial court that he was present at the motion to compel hearing and recounted in detail what transpired, he did not once mention,

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[9] WSP claims that Mr. Jacobs' failure to object to the Order's language somehow supports the fact that the sanction was agreed to by the parties. Mr. Jacobs signed the "approved to form" portion of the Order, but that is it. See Order at Supp. App. B. Doing so, however, does not waive a party's right to contest the ruling.

as he claims here, that the sanction was actually a "compromise" that was "proposed" by Peralta's counsel, Mr. Jacobs, that agreed to by the parties. 1 RP 27-30. Supp. App. C.[10]

WSP also makes it sound like Judge Wulle's Order was issued on the eve of trial and well after the WSP had disclosed ti was calling an alcohol expert for trial. In fact, the sanction Order was issued on June 29, 2012, only two months after the WSP first informed Peralta that it would be calling an alcohol expert. CP 42. It was also more than three months away from the then scheduled October 1, 2012 trial date.[11] Trial did not commence until September 9, 2013.

2. WSP ignores the legal arguments

More importantly, WSP fails to respond to any of Peralta's legal arguments challenging the propriety of the Judge Wulle's ruling and sanctions. It fails to provide a single case, statute or even argument rebutting Peralta's assertion that Dr. Brady was a consulting expert, and as such, the WSP was not entitled to discover his opinions. Nor can it. The

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[10] Although not material, WSP's trial by ambush account and that it forced Peralta to disclose her experts is also not supported by the record. The fact of the matter is that Clark County Court does not issue a scheduling order that includes expert disclosure dates like other counties. But what is in the record is that WSP requested it be allowed to disclose its experts *three weeks after Peralta disclosed her experts*. And although Peralta was under no obligation to do so, she extended that courtesy to WSP. CP 42.

[11] To the extent that it is necessary, Peralta requests that this court take judicial pursuant to ER 201 of the April 27, 2012 Amended Trial Setting Order in this matter rescheduling the trial date to October 1, 2012.

law is crystal clear. CR 26(b)(5)(B); *Mothershead v. Adams,* 32 Wn. App. 325, 327-28, 647 P.2d 525 (1982). Peralta was not required to disclose this evidence and the trial court erred in assessing the resulting sanctions.

WSP also fails to point out where it requested the evidentiary sanction that Judge Wulle imposed – because it did not.[12] Thus, Peralta had no prior notice that such a harsh sanction was even at issue.

WSP also fails to point to anywhere in the record where Judge Wulle considered lesser sanctions, made findings of willfulness, or findings of any prejudice that may result. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (relying on *Burnet*, 131 Wn.2d at 494) (When imposing a severe sanction such as witness exclusion, "the record must show three things – the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it."). The reason is that there is no record of Judge Wulle following these requirements.

Finally, the WSP claims that Peralta was not harmed because she was not intending to call Dr. Brady anyway. WSP misses the point. Judge Wulle's Order precluded Peralta "from calling any expert" on alcohol. CP 106-07. (Emphasis added). Peralta could have named a different expert.

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[12] WSP's motion to compel only sought the disclosure of the protected report and attorney fees. CP 98.

Peralta also could have challenged the serum lab findings or cross examined WSP's toxicologist on the material errors in lab tests. All this could have lessened the impact of intoxication on the allocation of fault, which, as stated above, would have affected the case's outcome.

III.
CONCLUSION

This court should reverse the trial court's judgment and direct the trial court to enter a new one, in favor of Peralta, and in the form she presented below. The trial court's judgment is contrary to the jury's intent and inconsistent the law of this case, as set out in the unchallenged jury instructions and verdict form. Peralta's proposed judgment, on the other hand, is consistent with the jury's intent and the law of the case.

Alternatively, this court should remand the case back to the trial court for a new trial. The other assigned errors all have merit. Moreover, they all have a direct bearing on the jury's allocation of fault between the parties. And given the near-parity in the jury's allocation of fault, any of one of them is enough to affect the outcome of the case, especially in light of the 50% threshold imposed by the intoxication defense.

Respectfully submitted,

Michael H. Bloom, WSB # 30845
Donald Jacobs, WSB # 9300
Attorneys for Appellant

SUPPLEMENTAL

APPENDIX

Rule 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) ***Use of depositions.*** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(5) The deposition of an expert witness may be used as follows:

(A) The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

(B) The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and

duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.

(b) ***Objections to admissibility.*** Subject to the provisions of rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) ***Effect of taking or using depositions.*** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) ***Effect of errors and irregularities in depositions.***

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

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SCOTT G. WEBER, CLERK
CLARK COUNTY

STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT

DEBORAH PERALTA, Plaintiff, v. THE STATE OF WASHINGTON, and WASHINGTON STATE PATROL, Defendants.	NO. 10-2-04894-8 ORDER GRANTING WSP'S SECOND MOTION TO COMPEL ~~PROPOSED~~

This second motion to compel filed by Defendant Washington State Patrol (WSP) came on regularly for hearing before the Honorable John P. Wulle on June 29, 2012. WSP appeared by and through its attorney, Robert M. McKenna, Attorney General, and Steve Puz, Assistant Attorney General; Plaintiff Deborah Peralta appeared by and through her attorney, Michael Bloom.

The Court, having reviewed the pleadings, declarations and exhibits submitted, as well as the records and files herein, and listened to oral argument presented, finds that Plaintiff improperly refused to answer interrogatories 2-3 and requests for production A-B of WSP's Fifth Interrogatories and Requests For Production of Documents. Now, therefore, **IT IS**

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ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-01
(360) 586-6300

HEREBY ORDERED, ADJUDGED, AND DECREED:

1. WSP's Second Motion to Compel is **GRANTED** as set forth below;

2. Plaintiff shall fully and completely answer and serve the subject interrogatories and requests for production of documents to counsel for WSP by Tuesday July 3, 2012.

3. Should Plaintiff fail to answer the subject discovery by this date, then, pursuant to CR 37(b)(2)(A), jury shall be instructed that the following fact has been established for the purpose of the action:

> A serum blood test performed on August 22, 2009 at 23:20 hours by the Southwest Washington Medical Center established that Deborah Peralta had a serum blood alcohol level of 0.167 grams per deciliter.

4. Pursuant to CR 37(a)(4), Plaintiff shall pay to the State of Washington the sum of $ Reserved Such payment shall be due and payable by July 3, 2012.

DONE IN OPEN COURT this 29 day of June, 2012.

JUDGE JOHN P. WULLE

Presented by:

ROBERT M. MCKENNA
Attorney General

STEVE PUZ, WSBA No. 17407
Assistant Attorney General
Attorneys for WSP

2. Plaintiff shall disclose the specific reasons for her denials of the requests for admissions. To the extent Plaintiff challenges the validity of the blood test she shall disclose each and every reason she contends the test was invalid.

3. Plaintiff shall be precluded from calling any expert not already disclosed on this issue.

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0-000000107

Approved as to form:

~~MICHAEL BLOOM~~, WSBA No. ~~30845~~ 9300
Attorney for Plaintiff

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CERTIFICATE

I certify that I mailed a copy of APPELLANT'S REPLY BRIEF to Steve Puz and Patricia Todd, State of Washington, AAG. PO Box 40126 Olympia, Washington 98504-1103, Attorneys for Respondents, postage prepaid, on January 16, 2015.

Michael H. Bloom
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 PM 1:12
STATE OF WASHINGTON
BY _____
DEPUTY