COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 45575-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE PATROL,

Respondent.

RESPONDENT'S BRIEF

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(ii) Plaintiff Proposed Instruction 16

(iii) Court Proposed Instruction 19

(iv) Court Proposed Instruction 20

(v) WPI 6.10.02

(vi) WPI 16.01

(vii) WPI 16.03

(viii) WPI 21.09

I. INTRODUCTION

Just before 11:00 p.m. on August 22, 2009, Appellant Deborah Peralta (Plaintiff), who was heavily intoxicated and wearing dark clothing, intentionally walked into the middle of a pitch black street so she could stand in front of the headlights of the vehicle she saw coming down the hill towards her. Plaintiff erroneously concluded that vehicle was driven by her brother, Jorge Peralta.

Unfortunately, the vehicle traveling towards her was not driven by her brother. Instead, Plaintiff emerged from the darkness, and walked directly in front of the fully marked Washington State Patrol (WSP) vehicle driven by Trooper Ryan Tanner. Although he steered sharply to avoid her, the combination of Plaintiff's sudden appearance and her deliberate act to position herself in front of his vehicle made it impossible for Trooper Tanner to avoid her.

In response to Plaintiff's subsequent lawsuit, WSP asserted the "alcohol defense" afforded by RCW 5.40.060(1). This statute bars a plaintiff from recovering damages in a civil suit if she was: (1) under the influence of intoxicating liquor at the time her accident, (2) the intoxication was a proximate cause of her injury, and (3) she was more than 50 percent at fault. Plaintiff freely admitted she was under the influence of alcohol at the time of her accident. CP at 72. At trial, the jury specifically found the other two elements of the alcohol defense.

CP at 388. Once WSP established all three elements of the alcohol defense under RCW 5.40.060(1), the trial court properly entered judgment for WSP and dismissed Plaintiff's lawsuit. RCW 5.40.060; CP at 496-97. That ruling is the crux of this appeal.

As for Plaintiff's challenges to the evidentiary rulings, the trial court did not abuse its discretion. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937, 944 (1994); *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728, 315 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014). Moreover, Plaintiff has failed to demonstrate prejudice. *Mutual of Enumclaw*, 178 Wn. App. at 729 ("An error will be considered not prejudicial and harmless unless it affects the outcome of the case."). Unable to establish reversible error, the judgment should be affirmed.

Finally, with regard to the alleged exclusion of her expert, Dr. William Brady, Plaintiff repeatedly represented to the trial court and WSP that she had no intention of calling Dr. Brady at trial, and designated him as a consulting expert. *See* CP at 107. Inexplicably, and in direct contradiction to the position she took below, Plaintiff now claims it was error for the trial court to prevent her from calling the very witness that she repeatedly indicated she had no intention of calling. CP at 102, 466-67; RP at 29. Initially, Plaintiff, not the trial judge, was responsible for her strategic decision not to call Dr. Brady at trial. Plaintiff cannot now be

heard to complain about the imagined error she invited by her own litigation decision. *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 774, 320 P.3d 77 (2013), *review denied*, 180 Wn.2d 1026 (2014) ("Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. . . . The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal.").

For each of these reasons, WSP respectfully asks this Court to affirm the judgment that, based on the jury's findings, dismissed Plaintiff's lawsuit with prejudice.

II. COUNTERSTATEMENT OF THE ISSUES

1. Beginning with its Answer and continuing all the way through trial, WSP argued that RCW 5.40.060(1) barred Plaintiff's recovery of damages in this lawsuit. CP at 8, 117. Both parties proposed identical Washington Pattern Instructions (WPI) that set forth the elements and effect of this defense. *Cf.* CP at 324, 328 and 362-63; RP at 1740-41. Plaintiff admitted she was under the influence of intoxicating liquor at the time of her accident. CP at 72. The jury determined Plaintiff's intoxication was a proximate cause of her accident and that she was 58 percent at fault. Did the trial court correctly dismiss Plaintiff's lawsuit?

Answer: Yes. The jury was properly instructed on the statutory

alcohol defense, and all three statutory elements were established. As a matter of law, Plaintiff cannot recover damages from the accident that was proximately and primarily caused by her own intoxication. RCW 5.40.060(1).

2. Plaintiff sought to have a paramedic testify about a statement made by an unknown person concerning the estimated speed of Trooper Tanner's vehicle. Did the trial court abuse its discretion by excluding this testimony as hearsay?

Answer: No. Plaintiff did not lay a foundation that the statement was made by Trooper Tanner or any WSP employee. The trial judge properly precluded the witness from testifying to the hearsay statement of an unidentified person. ER 802.

3. Although she identified former WSP Sergeant Roy Rhine and Detective David Ortner as witnesses, Plaintiff did not call either one in her case in chief. She did, however, introduce, and the trial court admitted, Sergeant Rhine's report into evidence in her rebuttal case. RP at 1841. Thereafter, Plaintiff sought to also introduce portions of Sergeant Rhine's and Detective Ortner's discovery depositions on rebuttal. Did the trial court abuse its discretion by excluding this cumulative deposition testimony on rebuttal?

Answer: No. Plaintiff did not demonstrate that Sergeant Rhine and Detective Ortner were unavailable to testify, as required by

CR 32(a)(3). Further, she failed to show how Sergeant Rhine's deposition testimony differed from his report, which was already in evidence. *See* RP at 1919-20, 1923, 1970. Finally, the offered excerpts were cumulative of other evidence in the record. Thus, even if it was an abuse of discretion to exclude the deposition excerpts, which it was not, such error was harmless. *Mutual of Enumclaw*, 178 Wn. App. at 729.

4. Rick Riddell and Guy Kirchgatter testified that when they looked into the street after the accident the headlights on Trooper Tanner's vehicle were off. Plaintiff attempted to have Luanne Pfleiger testify to out of court statements made to her by Mr. Riddell and Mr. Kirchgatter that repeated this same testimony. Did the trial court abuse its discretion by excluding this testimony?

Answer: No. The trial court properly ruled that Ms. Pfleiger could not testify to the hearsay statements of others. ER 802. Furthermore, the exclusion of this evidence had no impact on the outcome of this trial, and, thus, any error by the trial court was harmless. *Mutual of Enumclaw*, 178 Wn. App. at 729.

5. Plaintiff presented the testimony of Rick Riddell in her case in chief. He testified to the post-accident events he witnessed. He also testified that he relayed the occurrence of this accident to his brother, Greg Riddell, a WSP Trooper in Spokane. RP at 235-36. WSP did not

question Rick about his conversations with Greg.[1] Did the trial court abuse its discretion by rejecting Plaintiff's attempt to introduce the deposition testimony of Greg Riddell on rebuttal?

Answer: No. Plaintiff allegedly sought to introduce this testimony to "rebut" the unchallenged testimony elicited from Rick Riddell in her case in chief. If Plaintiff believed Greg's deposition was important to a full understanding of Rick's testimony, she could and should have introduced it in her case in chief. She did not. It was not an abuse of discretion for the trial court to exclude this cumulative evidence on rebuttal. *Havens v. C. & D. Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).

6. Through her own actions and express representations to the trial court, Plaintiff made it clear she had no intention of calling Dr. Brady or any other alcohol expert at trial. Did the trial court abuse its discretion by entering an order that conformed with Plaintiff's stated position?

Answer: No. At every turn Plaintiff made it clear she had no intention of calling Dr. Brady or any other alcohol expert at trial. Her attempt to create an appealable issue by misstating the position she took below is wholly without merit and should be rejected.

[1] For clarity, the Riddells are referred to by their first names. No disrespect is intended.

III. COUNTERSTATEMENT OF THE CASE

A. Plaintiff's Accident

On Saturday, August 22, 2009, then 21 year old Plaintiff met up with friends at the Tip Top Tavern in downtown Vancouver for drinks. In addition to the beer she consumed at the Tavern, Plaintiff was given two small bottles of vodka.[2] RP at 936-37. While at the tavern, Plaintiff received a text from her best friend, Christina Price, who asked if Plaintiff wanted to attend a party in the Hazel Dell area of Vancouver. RP at 815. Plaintiff knew she had consumed alcohol and intended to drink more, so she asked Christina to give her a ride to the party. RP at 1343. Plaintiff did not know the host of the party, and was not familiar with the area of Hazel Dell where the party took place. RP at 862, 1345.

Once at the party, Plaintiff admittedly consumed more beer, as well as some unknown quantity of vodka.[3] RP at 870-71, 1344. Unfortunately, given the state she was in, Plaintiff got into an argument with several people at the party who she had just met. RP at 862, 1143. Plaintiff's reaction to this encounter was telling—without knowing where she was or which direction was "home," Plaintiff abruptly left the party without telling her best friend, and began aimlessly walking around

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[2] At the time of her accident, Plaintiff only had one bottle of vodka left. RP at 1335-36.

[3] WSP expert toxicologist, Dr. Tack Lam, testified the number of alcoholic beverages that Plaintiff reported she consumed the night of her accident was consistent with her blood alcohol concentration of 0.13 to 0.16. RP at 1270.

Hazel Dell.[4] RP at 816, 1145.

Lost, disoriented and drunk, Plaintiff called her younger brother, Jorge, to come pick her up. RP at 862-63. However, Plaintiff did not know where she was and was unable to direct Jorge to her location. So, Jorge had Plaintiff read him the name on the street sign where she then stood. The cross streets Plaintiff read to her brother were And***resen*** and 74th. RP at 863. Jorge dutifully drove to Andresen, but soon realized that it did not intersect with 74th. RP at 865. Jorge called his sister back. However, recognizing that his sister had been drinking, this time Jorge made sure he was given the correct street name—he made Plaintiff *spell* the street name. When forced to spell the name of the street, Jorge discovered that Plaintiff was actually standing on And***ersen*** Street, which is several miles away from Andresen. RP at 865-66, 1427. With this corrected information, Jorge drove to Andersen Street. RP at 866.

Andersen Street is accessed by turning south off NW 78th Street. RP at 1428. It is a two-lane rural street with a downhill grade as it moves away from NW 78th Street. Jorge went to Andersen Street but did not see his sister. He called Plaintiff on her cell phone. Plaintiff told Jorge that she was walking "down the hill now." RP at 871. Jorge responded that he was driving down the hill, and directed his sister to remain on the phone.

[4] Significantly, four days after her accident, Deputy Taylor interviewed Plaintiff at the hospital. Plaintiff told Deputy Taylor that, even if she had a car, she knew she was too intoxicated to drive by the time she left the party, a fact her blood test subsequently confirmed. RP at 1347.

RP at 873. Plaintiff reported that she could see the headlights of Jorge's vehicle traveling down the hill towards her. RP at 873. Jorge responded that he still did not see her, and asked his sister to walk into the street. RP at 874. Dressed in her brown boots, blue jeans and black sweater, Plaintiff walked into the middle of the street in front of the car traveling down the hill towards her.

However, Plaintiff was not on Andersen Street at the time of this conversation. Without telling her brother, Plaintiff left Andersen Street and began walking down NW 78th Street. RP at 872-73. NW 78th Street runs east/west from I-5 to Lakeshore Blvd. It has four travel lanes (two in each direction), separated by a ten foot center turn lane. Each side of NW 78th Street is bordered by a bike lane and sidewalk. RP at 1412. Like Andersen Street, NW 78th Street has a significant downhill grade as it moves west towards Lakeshore Boulevard. RP at 1098-99. There were no street lights or other illumination on the NW 78th Street hill. Indeed, according to the residents who lived on that street, NW 78th Street was "pitch black" the night of her accident. *See* RP at 237, 295, 1417-19.

Moving from the south side of NW 78th Street, Plaintiff crossed the bike lane, two eastbound lanes and the center turn lane so she could position herself directly in front of the headlights of the westbound vehicle she saw coming down the hill towards her. RP at 1350.

On the phone with his sister, Jorge told Plaintiff that he *still* could

not see her. Plaintiff replied she was right in front of him, and that she saw Jorge's car and the two cars behind him.[5] RP at 875. Jorge responded that there were not two cars behind him. At that point Jorge heard a scream, and the cell phone connection with his sister ended. RP at 876.

Plaintiff did not walk in front of her brother's car. She intentionally walked in front of the headlights of a fully marked WSP patrol car driven by Trooper Tanner. Trooper Tanner was driving westbound, down the NW 78th Street hill on his way to assist Sergeant Rhine, who had stopped a driver with an outstanding misdemeanor warrant. RP at 1091. Sergeant Rhine told him not to hurry, and Trooper Tanner followed that direction. RP at 1096-97. Trooper Tanner did not have his emergency lights or his siren turned on. RP at 1097. Although Trooper Tanner did not look at his speedometer, he estimated his speed at approximately 40 m.p.h., or 5 m.p.h. above the posted speed limit.[6] RP at 1143-44. Other than Trooper Tanner's patrol car, it is undisputed, there

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[5] Jorge did not have his own car. He had to borrow a friend's vehicle to pick his sister up. RP at 866. Plaintiff had no idea what kind of car her brother was driving and could not possibly have known whether the "lead car" was driven by her brother.

[6] David Karlin, a certified accident reconstruction expert who received both a Bachelor of Science and a Master's Degree in Mechanical Engineering from the Massachusetts Institute of Technology, testified that Trooper Tanner was traveling approximately 34 m.p.h. (with plus/minus a possible margin of error of 6 m.p.h.) at the point in time when Plaintiff was first seen. RP at 1408. Plaintiff presented an opposing expert who estimated Trooper Tanner's speed at between 45 and 50 m.p.h. RP at 615, 707-14, 1165-72.

were no other vehicles traveling in either direction of NW 78th Street at the time of Plaintiff's accident. RP at 1100.

As he drove down the NW 78th Street hill in the number two westbound lane, Trooper Tanner suddenly saw a pair of blue jeans appear out of nowhere, moving slowly from his left to his right (from the south to north side of NW 78th Street), directly in front of his patrol car. RP at 1101-02. Trooper Tanner applied his brakes and steered hard to the left. He reasoned the person was moving to his right. If he turned right he would strike the person head on. In the split second he had to react, Trooper Tanner concluded that turning left provided the best chance to avoid a collision. RP at 1104-05. Unfortunately, there was simply not enough time to avoid Plaintiff. RP at 1105.

Just prior to the collision, Plaintiff pivoted back towards the south side of the street. The push bar of the patrol car hit her left thigh. RP at 1105-06. Plaintiff was vaulted onto the hood of the patrol car where she hit the front windshield and landed in the left westbound lane of NW 78th Street. RP at 1101-02. Trooper Tanner stopped his patrol car in the center turn lane, and immediately called for medical assistance. RP at 1102, 1106.

He then got out of his car and ran to Plaintiff, who was lying partially on her side. She was unconscious, although Trooper Tanner could see she was still breathing. Trooper Tanner ran back to his car and

turned on the overhead emergency light bar on his patrol car. He then went back to Plaintiff and looked closer to see if there were any physical injuries. As he bent down, he smelled a strong odor of alcohol coming from Plaintiff. RP at 1113, 1185. Knowing that aid would ask for her age, Trooper Tanner opened Plaintiff's nearby purse, located her wallet and determined she was 21 years old. He also found a small, partially consumed bottle of Grey Goose Vodka in her purse. RP at 1110, 1184-86. While he tended to Plaintiff, a pedestrian, later identified as Rick Riddell, arrived on the scene. Mr. Riddell directed traffic away from Plaintiff. RP at 1112.

The Clark County Sheriff's Department arrived just minutes after Trooper Tanner's call for aid. RP at 1114-15. The first deputy to arrive, Albin Boyse, was a trained EMT. RP at 1202-03. Soon after, Deputy Jon Shields arrived. Deputy Shields was a certified paramedic and licensed practical nurse. RP at 1222. Both tended to Plaintiff until the ambulance arrived. RP at 1209-12, 1224-27. Because of the seriousness of her injuries, Plaintiff was immediately taken to the Southwest Medical Center in Vancouver.

Because the accident involved one of its troopers, WSP asked, and Clark County agreed, to assume responsibility for investigating the accident. The matter was assigned to Clark County Deputy Ryan Taylor. RP at 1304. In conducting his investigation, Deputy Taylor documented

the accident scene and physical evidence, and spoke with a number of different people, including, but not limited to, Trooper Tanner, Christina Price, Jorge Peralta, and Plaintiff. RP at 1302, 1306, 1339-50.

Sometime after Clark County finished its investigation, four individuals came forward. Each said when they looked up the NW 78th Street hill after the accident Trooper Tanner's headlights were off.[7] *See* RP at 220, 279, 318, 943. These witnesses' statements stood in sharp contrast to the statements of the only two people who actually witnessed the accident: Plaintiff and Trooper Tanner.

Both Plaintiff and Trooper Tanner agreed the headlights on his patrol car were on at the time of the accident. RP at 818 (following the accident Plaintiff told Christina Price she thought the headlights coming towards her were from the vehicle driven by her brother), 875 (Plaintiff told her brother she saw the headlights from his car coming towards her immediately before the accident occurred), 1099 (Trooper Tanner testified the lights on his vehicle were turned on), 1351 (Plaintiff and Trooper Tanner both told Deputy Taylor that the patrol vehicle's headlights were on at the time of the accident).

Once at the Southwest Medical Center, Plaintiff's blood was drawn and tested. This blood test took place within thirty minutes of the accident. RP at 1239. One panel of that blood test established that

[7] This information was not revealed to WSP until after the lawsuit was filed.

Plaintiff had a 0.167 serum blood alcohol level.[8] CP at 158. Using the mathematical formula for converting this serum alcohol level to blood alcohol concentration (BAC), Dr. Lam calculated, to a 67 percent certainty, that Plaintiff's BAC fell between the range of 0.13 to 0.16. RP at 1234, 1242.

> To give you a perspective, this is in respect to a legal limit of 0.08, so that's about 1½ to 2 times the legal limit.

RP at 1234.

Moreover, taking the same formula out two standard deviations, Dr. Lam determined, to a 95 percent certainty, that Plaintiff's BAC was at least 0.11, or almost 1½ times the legal limit at the time of her accident. RP at 1258. Dr. Lam testified, on a more probable than not medical certainty, that Plaintiff was impaired by alcohol at the time of her accident. RP at 1254.

B. Relevant Procedural History

Plaintiff filed the present lawsuit in December, 2010. CP at 1. In its Answer, WSP raised the alcohol defense as one of its affirmative defenses. CP at 08. On June 30, 2011, in response to a request for admission, Plaintiff admitted she was "under the influence of intoxicating

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[8] Plaintiff submitted documentation of this blood test in her original ER 904 submission, asserting it was both "authentic and admissible." CP at 11. WSP agreed, and the trial court admitted the blood test report into evidence. CP at 15-19, 385; RP at 1073, 1140-41, 1144, 1238-39. Plaintiff did not assign error to the admission of this report, and, thus, waived whatever objection she had to its contents. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

liquors" at the time of her accident.[9] CP at 72.

After it was continued twice, an eight day jury trial with more than 30 witnesses took place between September 9 and September 19, 2013. The jury was instructed on both the alcohol defense and contributory negligence. *See* CP at 350, 362-63. On September 20, 2013, the jury returned a verdict that found: (1) WSP was negligent and that negligence was a proximate cause of Plaintiff's injury, (2) Plaintiff was negligent and her negligence was a proximate cause of the injury and damage she suffered, (3) Plaintiff's intoxication was a proximate cause of her injury, (4) Plaintiff was 58 percent at fault for her accident, and (5) Plaintiff sustained a total of $1,261,000 in damages. CP at 387-88.

Having met all three elements of the statutory "alcohol defense" set forth in both the jury instructions and RCW 5.40.060, the trial court entered judgment for WSP:

> 1. Pursuant to RCW 5.40.060, the Complaint and Claims of the Plaintiff against Defendant State of Washington, Washington State Patrol shall be and the same are **DISMISSED WITH PREJUDICE.**
>
> 2. Judgment is hereby entered in favor of the Defendant State of Washington, Washington State Patrol and against Plaintiff, and Defendant State of Washington, Washington State Patrol is hereby awarded its costs and statutory attorney fees in the amount of $836.37.

CP at 497 (emphasis in original).

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[9] Plaintiff declared, under penalty of perjury, that she read her answer to this request for admission, knew its contents, and believed it to be "true and correct." CP at 77.

From this judgment, Plaintiff filed a timely appeal.

IV. ARGUMENT

A. The Trial Court Properly Entered Judgment For WSP And Dismissed Plaintiff's Complaint With Prejudice

As a matter of law, a person cannot recover damages for personal injuries if: (1) that person was "under the influence of intoxicating liquor" at the time of her accident, (2) that intoxication was a proximate cause of her own injury, and (3) she was more than 50 percent at fault. RCW 5.40.060(1). Plaintiff conceded the first element of this statutory defense when she admitted, under oath, she was "under the influence of intoxicating liquor" at the time of her accident. CP at 72, 77. The jury unanimously found Plaintiff's intoxication was a proximate cause of her injury, and that she was more than 50 percent at fault. CP at 388; RP at 1986-87. Having established all three elements of the alcohol defense, the trial court properly entered judgment for WSP. That judgment should now be affirmed.

First, the trial court properly instructed the jury concerning the alcohol defense. Second, the trial court correctly ruled that Plaintiff's admission satisfied the first element of RCW 5.40.060(1), and properly included that admission in Instruction 20. CP at 363. Third, the trial court properly instructed the jury on both the alcohol defense and contributory negligence. Fourth, the trial court correctly ruled that all three elements of

the alcohol defense were established and entered judgment for WSP.

1. Instruction 19 Correctly Stated The Elements And Impact Of RCW 5.40.060

Jury instructions are sufficient if they allow the parties to argue their theories of the case, and, when taken as a whole, properly inform the jury of the law that must be applied. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 91-92, 896 P.2d 682 (1995). Even if an instruction is misleading, reversal is not appropriate unless prejudice is shown. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529-30, 730 P.2d 1299 (1987). Error is not prejudicial unless "it presumptively affects the outcome of the trial." *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 322, 284 P.3d 749, 771 (2012), *review denied*, 176 Wn.2d 1014, 297 P.3d 707 (2013); *see also Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 144, 856 P.2d 746 (1993) ("An error is not prejudicial unless it is likely the outcome would have been different without it."). Alleged errors in instructions are reviewed by this Court de novo. *Hickok-Knight*, 170 Wn. App. at 322.

Here, Plaintiff challenges Instruction 19, which provided:

> It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person was more than fifty percent at fault.

CP at 362.

Plaintiff concedes this instruction mirrors WPI 16.03. CP at 324.

Nevertheless, she claims Instruction 19 was inadequate because it did not go far enough in explaining that, if found, the alcohol defense barred her recovery of damages. She argues the instruction should have included the word "complete" before the word "defense" in the first line. Appellant's Opening Brief (Opening Br.) at 36-37. Plaintiff's argument lacks merit, and should be rejected.

First, Instruction 19 is a correct statement of the law. Instruction 19 correctly listed the three elements of RCW 5.40.060(1), and properly informed the jury that finding all three elements constituted a defense to Plaintiff's "*action* for damages." CP at 324. Thus, as a matter of law, Instruction 19 was legally sufficient. *Hue*, 127 Wn.2d at 91-92.

Second, Plaintiff waived whatever error she now attributes to Instruction 19. The trial court adopted the exact wording that Plaintiff offered for this instruction. CP at 324. Significantly, Plaintiff's proposed instruction did not include the phrase "complete defense," nor did Plaintiff take exception to Instruction 19. Accordingly, Plaintiff's unpreserved objection to Instruction 19 cannot be considered on appeal.

> Our rules require that exceptions to instructions shall specify the paragraphs or particular parts of the charge excepted to and shall be sufficiently specific to apprise the trial judge of the points of law or question of fact in dispute. The purpose is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial. Where such exception is not taken, the alleged error will not be considered on appeal.

Ryder's Estate v. Kelley-Springfield Tire Co., 91 Wn.2d 111, 114, 587 P.2d 160 (1978) (citing *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975)); *see also* CR 51(f).

Third, under the invited error doctrine, Plaintiff cannot be heard to challenge the adequacy of the instruction that she, herself, proposed. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358, 360 (2000) (invited error doctrine bars a party from challenging a jury instruction on appeal that she proposed); *see also In re Breedlove*, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999) (the doctrine of invited error prohibits a party from setting up an error at trial and then complaining about it on appeal). For these reasons, as well, this Court should reject Plaintiff's challenge to the trial court's Instruction 19.

Fourth, "defense" and "complete defense" are, by in large, interchangeable.[10] More to the point, Plaintiff certainly understood the significance of RCW 5.40.060 and Instruction 19: "defense to an action for damages" meant that, if all three elements were found, she could not recover any damages. If she was truly concerned the jury might not understand the full impact of the alcohol defense, Plaintiff could have devoted some portion of the two opportunities she had in her closing remarks to address the impact of the alcohol defense. Tellingly, Plaintiff chose not to

[10] Notably, the same language Plaintiff objects to here is found in WPI 16.01, the instruction for the statutory felony defense. RCW 4.24.420. WPI 16.01 provides: "*It is a defense to an action for damages* that the person injured was then engaged in the commission of a felony, if the felony was a proximate cause of the injury."

clear up whatever confusion she now imagines Instruction 19 created. Indeed, she did not mention or reference Instructions 19 or 20 in her closing argument at all. *See* RP at 1917-32, 1966-75.

The trial court did not err by giving Instruction 19. That instruction contained a correct statement of the law and allowed WSP to argue the statutory alcohol defense, which was supported by substantial evidence in the record. Moreover, Plaintiff not only offered the language adopted in Instruction 19, she did not timely challenge its adequacy. For each of these reasons, the Court should reject Plaintiff's challenge to Instruction 19.

2. Plaintiff Admitted The First Element Of RCW 5.40.060

The jury unanimously found that Plaintiff's intoxication was a proximate cause of her injury and that Plaintiff was 58 percent at fault for her accident. CP at 72; RP at 1986-87. Plaintiff does not challenge these findings. Instead, she contends she is not bound by her admission that she was under the influence of alcohol, and, further, that her admission should not have been included in Instruction 20. Plaintiff is mistaken on both counts.

a. Plaintiff's Admission "Conclusively Established" She Was Under The Influence Of Intoxicating Liquors At The Time Of Her Accident

In her June 30, 2011 response to a request for admission, Plaintiff admitted she was under the influence of intoxicating liquors at the time of her accident. CP at 72. Importantly, the language of her admission

mirrored the first element of RCW 5.40.060(1).

> **Request For Admission 2:**
> Admit or deny that, *at the time of the collision* that is the subject of this lawsuit, Deborah Peralta was *under the influence of intoxicating liquors*.
>
> **Response:**
> Plaintiff admits.

CP at 72 (emphasis added); *Cf.* RCW 5.40.060(1) (it is a defense to an action for personal injury that the person injured was "under the influence of intoxicating liquor" at the time of the accident).

As a matter of law, Plaintiff's admission "conclusively established" she was under the influence of intoxicating liquors at the time of her accident, and the jury was required to accept this fact as true. CR 36(b) (an admitted fact is deemed "conclusively established").

> Conclusively established means that the admission cannot be contradicted or rebutted at trial, and the factfinder must accept the admission as accurate and proven.

3 Karl B. Tegland, *Washington Practice*: *Rules Practice CR 36* (7th ed. 2003).[11]

Plaintiff now contends it was wrong to bind her to her own admission. She argues, without citation to the record or legal authority, that her admission does not *really* mean she was under the influence of intoxicating liquor. *See* Opening Br. at 8. Plaintiff argues, she should

[11] Similarly, the Washington Pattern Instructions treat Plaintiff's admission as proven fact which the jury must accept as true. *See* WPI 6.10.02 ("The [plaintiff] has admitted that certain facts are true. You must accept as true the following fact: [admitted fact]").

have been allowed to present evidence that "explained" and marginalized her admission. Plaintiff's argument is contrary to the purpose of CR 36, and the plain language of her admission. It should, therefore, be rejected.

The purpose of CR 36 is to "eliminate from controversy matters which will not be disputed." *Lakes v. von der Mehden*, 117 Wn. App. 212, 218, 70 P.3d 154 (2003), *review denied*, 150 Wn.2d 1036 (2004). Such admissions:

> [P]romote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements.

Lakes, 117 Wn. App. at 218 (quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure,* § 2252 at 522 (1994) (quoting Finman, *The Request for Admission in Federal Civil Procedure,* 71 Yale L.J. 371, 376 (1962)).

CR 36 admissions narrow the issues and avoid "unnecessary delays and expenses, benefiting the court and all parties to the proceedings." *Lakes,* 117 Wn. App. at 218-19. The purposes and effect of this rule would be rendered meaningless if, as Plaintiff argues here, a party were allowed to admit a material fact in response to a request for admission, wait two years until trial, and then suddenly offer testimony

that qualified and rebutted her earlier admission. Plaintiff was "under the influence of intoxicating liquors" at the time of her accident. She could neither rebut nor invite the jury to ignore this conclusively established fact. CR 36(b).

Moreover, had she wanted to limit the effect of her admission, Plaintiff could have qualified and explained her answer in the original discovery response. CR 36(a) ("[W]hen good faith requires that a party qualify his answer or deny only a part of the matter for which an admission is requested, he shall so specify so much of it as is true and qualify or deny the remainder."). However, although she qualified a large majority of her responses to the requests for admissions, she added no explanation or qualification to her admission that she was under the influence of alcohol at the time of her accident. CP at 72.

Furthermore, if Plaintiff truly believed the "merits of the action" would be "subserved" by allowing her admission to stand, she could have moved the trial court to withdraw or amend her admission. CR 36(b). Plaintiff never brought such a motion. Indeed, just before trial, Plaintiff again confirmed that she did not want to withdraw her admission, nor did she object to its admissibility. RP at 84, 86.

Unable to escape her admission, Plaintiff next attempts to redefine the first element of RCW 5.40.060(1). In perhaps her most unusual argument, Plaintiff invites this Court to redefine "under the influence of

intoxicating liquor" to require proof that her *ability to drive a vehicle* was lessened by some appreciable degree by her alcohol consumption. Opening Br. at 55-56. Plaintiff's statutory interpretation is inconsistent with the plain language of the statute, undermines its purpose, and should be rejected.[12]

The interpretation of a statute presents a question of law that is reviewed de novo. *Morgan v. Johnson*, 137 Wn.2d 887, 891, 976 P.2d 619, 621 (1999). It is well established that courts do not construe clear, unambiguous statutory language; it simply applies the language as written. *Morgan,* 137 Wn.2d at 891; *Coronado v. Orona*, 137 Wn. App. 308, 315, 153 P.3d 217 (2007); *see also Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Here, both the Supreme Court and this Court have already held that RCW 5.40.060 is clear and unambiguous. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840-41, 854 P.2d 1061 (1993); *Hickly v. Bare*, 135 Wn. App. 676, 686-87,145 P.3d 433 (2006), *review denied*, 161 Wn.2d 1011 (2007). RCW 5.40.060(1) does not require proof of a plaintiff's diminished ability to drive, and this Court should reject Plaintiff's attempt to judicially graft such an amendment onto this statute. *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987) (the drafting of a statute is a legislative, not a judicial function).

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[12] Tellingly, Plaintiff did not offer an instruction that defined the first element of RCW 5.40.060 with the additional element she now advocates here.

Moreover, Plaintiff's proposed interpretation simply makes no sense. RCW 5.40.060 is not limited to plaintiffs who were operating a vehicle. *See Geschwind*, 121 Wn.2d at 835 (RCW 5.40.060 prevented intoxicated passenger from recovering damages). Thus, it is illogical to add a new element that would require the factfinder to speculate about how a non-driver's alcohol consumption *might* have impacted her ability to drive. *See State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014) (statutes are construed in a manner "that avoids strained or absurd consequences").[13]

In summary, Plaintiff conceded the first element of RCW 5.40.060 when she admitted she was "under the influence of intoxicating liquors" at the time of her accident. CP at 72; RCW 5.40.060.

b. The Trial Court Properly Included Plaintiff's Admission In Instruction 20

By way of background, WSP repeatedly attempted to get Plaintiff's admission into evidence as an exhibit. *See* RP at 83, 1679. Plaintiff objected to each attempt, and, instead, convinced the trial court to include it in the final instructions to the jury.

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[13] Plaintiff argues that *State v. Arndt*, 179 Wn. App. 373, 320 P.3d 104 (2014), defines the term "intoxication" in RCW 5.40.060(1) to mean that her ability to drive was diminished. Opening Br. at 55-56. Plaintiff's reliance on *Arndt* is misplaced. *Arndt* was a criminal case that concerned the impact of a defendant's Oregon convictions on the offender score used to calculate his Washington sentence. *Arndt,* 320 P.3d at 108. *Arndt* did not involve, nor did it even reference RCW 5.40.060. More importantly, even in the criminal context, *Arndt* does not require the prosecutor to prove a defendant driver's ability to drive was compromised by her alcohol consumption. *Id.* at 112 n.6; *see also* RCW 46.61.502(1)(a), .506(2)(c); *State v. Charley*, 136 Wn. App. 58, 63, 147 P.3d 634 (2006), *review denied*, 161 Wn.2d 1019 (2007).

> THE COURT: So you're saying [Plaintiff's admission] should be taken up in the jury instructions as opposed to substantive evidence?
>
> MR. JACOBS: Correct.

RP at 1682.

However, when it came time to share her proposed instructions, Plaintiff did not include one that addressed her admission, nor did she offer any alternative instruction that explained how the jury should treat her admission in its consideration of the alcohol defense. Ultimately, the trial court included Plaintiff's admission in Instruction 20. CP at 363.

> **Instruction 20**
>
> To establish the defense that the plaintiff was under the influence, the defendant has the burden of proving each of the following propositions:
>
> First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. *Plaintiff admits this element.*
>
> Second, that this condition was a proximate cause of the injury; and
>
> Third, that the person injured was more than fifty percent at fault.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

CP at 363 (the italicized portion is the only part that differs from the WPI Plaintiff offered).

Plaintiff does not directly assign error to Instruction 20. Instead, she limits her challenge to whether the trial court correctly ruled that her admission satisfied the first element of RCW 5.40.060(1). Opening Br. at 54-56. As demonstrated above, her admission conclusively established she was "under the influence of intoxicating liquor" at the time of her accident, which satisfied the first element of RCW 5.40.060(1). CP at 72; CR 36(b). However, even if the trial court erred by including her admission in Instruction 20, it was harmless.

First, again, Plaintiff admitted she was under the influence of alcohol at the time of her accident. CP at 72. Whether this conclusively established fact was captured in Instruction 20 or a separate, stand-alone instruction, the jury was required to accept this fact as true. CR 36(b); *see also* WPI 6.10.02. Plaintiff cannot show the outcome of the trial would have been different had the jury learned of her same admission in an alternate instruction. For this reason alone, this Court should reject Plaintiff's suggestion that she was prejudiced by Instruction 20.

Second, Plaintiff's admission was only one small piece of the largely unchallenged evidence of her intoxication. In addition to her admission, Plaintiff told her brother and Deputy Taylor that she consumed numerous alcoholic drinks the night of her accident, and believed she was too intoxicated to operate a vehicle. RP at 870-71, 1343-44, 1347. Also, the hospital blood test taken shortly after her accident established that

Plaintiff's BAC was between 1½ and 2 times the legal limit.[14] RP at 1234, 1258. Even her own IME physician agreed Plaintiff had a "high alcohol content" at the time of the accident. RP at 522-23.

To the extent any doubt remained, Plaintiff's own self-described actions show her significant intoxication. They include, but are not limited to, the following:

- Plaintiff got into an argument with people she just met, and left the party late at night in an area she did not know, without informing Christina Price, Plaintiff's best friend and the person who gave Plaintiff a ride to the party (RP at 816, 1145);

- Plaintiff was unable to correctly read the street name on the sign next to her, which caused her brother to drive to the wrong location (RP at 865-66, 1427);

- After correctly spelling the name of the street for her brother, Plaintiff left that location and wandered down an entirely different street without telling her brother (RP at 872-73);

- In her intoxicated state, Plaintiff claimed to see headlights from three vehicles when there was only one (RP at 875);

- Without knowing what kind of car her brother was driving, Plaintiff walked across a pitch black, four-lane street so she could deliberately position herself directly in front of the headlights of the car she saw coming down a steep hill towards her (RP at 1350);

- Even if it was reasonable to walk into the middle of a pitch black street to flag the car down she thought was driven by her brother,

[14] Plaintiff suggests, without citation to the record, this blood test "did not comply with the safeguards" set forth in RCW 46.61.506(3). Opening Br. at 6. As a matter of law, this blood test was admissible to establish Plaintiff's intoxication regardless of whether it was performed in accordance with the statutory safeguards she references. *State v. Donahue*, 105 Wn. App. 67, 74, 18 P.3d 608 (2001), *review denied*, 144 Wn.2d 1010 (2001) (blood test that did not conform with the methods approved by the Washington State Toxicologist are admissible to prove the person was under the influence of alcohol).

> Plaintiff took this action despite being repeatedly warned by her brother that he could not see her (RP at 874-75).

Instruction 20 properly instructed the jury on the elements of the statutory alcohol defense. Plaintiff admitted the first element of this defense. In addition, the jury was required to accept her admission as true regardless of whether it was included in Instruction 20. Finally, her admission was just one piece of a large body of evidence that established Plaintiff's significant intoxication. The trial court did not err by including Plaintiff's admission in Instruction 20. Moreover, Plaintiff cannot show she was prejudiced by including her admission in Instruction 20. Accordingly, Plaintiff's challenge to Instruction 20 should be rejected. *Hickok-Knight*, 170 Wn. App. at 322.

3. The Trial Court Properly Instructed The Jury On Both The Alcohol Defense And Contributory Negligence

Plaintiff argues that, by instructing the jury on contributory negligence, the trial court somehow negated WSP's right to pursue the statutory alcohol defense. Although it is anything but clear, Plaintiff appears to argue that inclusion of the contributory negligence instruction rendered Instructions 19 and 20 meaningless. *See* Opening Br. at 36 (the contributory negligence instructions "permitted the jury to award damages to Peralta even if her intoxication-related fault exceeds 50 percent"). Plaintiff did not support her summary conclusion with legal authority, nor does any exist.

While both involve fault by the plaintiff, RCW 5.40.060(1) and contributory negligence provide two separate and distinct defenses. RCW 5.40.060(1) provides a *defense to the action itself*, whereas contributory negligence impacts the *amount* of damages Plaintiff can recover. *See* RCW 5.40.060(1) (intoxication defense serves as complete bar to Plaintiff's recovery, even where the defendant is also found negligent); RCW 4.22.005 (Plaintiff's damages reduced by their own contributory fault). Contrary to Plaintiff's unsupported suggestion, WSP was not required to choose between these defenses, nor was it error for the trial court to instruct the jury on both defenses. *Morgan*, 137 Wn.2d at 895 (RCW 5.40.060 was intended to work within Washington's comparative fault scheme); *Hickly*, 135 Wn. App. at 689-90.

> A party is entitled to instructions on the party's theory of the case if substantial evidence supports the theory. Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.

Herring v. Dep't of Soc. & Health Servs., 81 Wn. App. 1, 25, 914 P.2d 67, 81 (1996) (internal citations omitted); *see also Amrine v. Murray*, 28 Wn. App. 650, 654-55, 626 P.2d 24 (1981) (defendant can submit multiple defenses to the jury if justified by the totality of the evidence); *see also* CR 8(e)(2) (defendant may "state as many separate claims or defenses as he has regardless of consistency).

As demonstrated above, there was sufficient evidence to justify

instructing the jury on the alcohol defense. The trial court did not err by instructing the jury on both defenses, and, contrary to Plaintiff's unsupported conclusion, the contributory negligence instruction did not negate or otherwise render Instructions 19 and 20 meaningless.

4. The Jury Found The Final Two Elements Of RCW 5.40.060 And The Trial Court Properly Dismissed Plaintiff's Lawsuit

The trial court properly instructed the jury on the alcohol defense. Those instructions are the law of this case. In addition, the verdict findings are consistent and establish the alcohol defense. As required by RCW 5.40.060(1), the trial court properly gave legal effect to the jury's findings and entered judgment for WSP. This Court should affirm that judgment.

a. Instructions 19 And 20 Are The Law Of The Case

Plaintiff correctly points out that, generally, jury instructions that are not objected to become the law of the case. Opening Br. at 34.

> In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as properly applicable law for purposes of appeal. In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process.

Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (citing *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998)); *but see* RAP 2.5(c)(2) (codifies exceptions to law of the case doctrine).

Plaintiff offered the instruction that was later adopted as the trial court's Instruction 19. CP at 324, 362. In addition, she offered WPI 21.09, which listed the elements of the alcohol defense. CP at 328. Except for the inclusion of her admission to the first element of this defense, Plaintiff's instruction was identical to Instruction 20. CP at 363. As demonstrated above, these instructions correctly reflect the elements and effect of RCW 5.40.060(1), and are the law of this case. *Roberson*, 156 Wn.2d at 41.

b. The Verdict Findings Are Consistent And Support The Judgment

The jury's findings that established the alcohol defense are consistent with its later assessment of Plaintiff's damages, and support the judgment entered by the trial court. Accordingly, this Court should affirm that judgment.

As demonstrated above, the trial court instructed the jury on both the statutory alcohol defense and contributory negligence. *See* CP at 350, 362-63. Accordingly, the special verdict form addressed both defenses.

- Question 1 asked whether WSP was negligent (Answer: yes)
- Question 2 asked whether WSP's negligence was a proximate cause of Plaintiff's injury (Answer: yes)
- Question 3 asked whether Plaintiff was negligent (Answer: yes)
- Question 4 asked whether Plaintiff's negligence proximately caused her injury or damage (Answer: yes)

- Question 5 asked whether Plaintiff's intoxication proximately caused her injury (Answer: yes)

- Question 6 asked the jury to apportion fault between the parties (Answer: Plaintiff 58 percent; WSP 42 percent)

- Question 7 asked the jury to determine the Plaintiff's total damages (Answer: $1,261,000).

CP at 387-88.[15]

The answers on the verdict form simply reflects the jury's determination of the two defenses it was instructed to decide. CP at 362-63 (alcohol defense), 350 (contributory negligence). Once the jury determined that both parties were at fault, it was required to answer questions 5-6. CP at 387-88. Unfortunately, the special verdict form did not allow the jury to skip question 7 once it found the elements of alcohol defense. So, as required by Instruction 25 ("You must answer the questions in the order in which they are written"), the jury also answered question 7, *after* it already found the elements of RCW 5.40.060. CP at 368; *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866, 313 P.3d 431 (2013) (reviewing court presumes the jury properly followed the instructions it received).

[15] After consideration of several versions, this verdict form was finalized just minutes before the instructions were read to the jury. Neither party took exception to the special verdict form. RP at 1893-95.

Plaintiff contends the jury's assessment of her damages in response to question 7 necessarily means that she should be awarded damages. Her argument misunderstands the relationship of the two defenses raised by WSP. No one questions that Plaintiff was injured in her August 22, 2009 accident, and the jury's assessment of damages in question 7 reflects that fact. However, the analysis does not end there. Contrary to the theme that underlies Plaintiff's entire argument, the application of RCW 5.40.060(1) does not mean the plaintiff was not damaged. Indeed, this statutory defense all but presumes the plaintiff was injured and did incur damages. Rather, the alcohol defense serves a complete legal bar to the plaintiff's *recovery* of whatever damages she would otherwise receive from her lawsuit. RCW 5.40.060(1); *Hickly*, 135 Wn. App. at 687. Similarly, in the present case, the jury recognized that Plaintiff was injured in her accident. However, the jury also found that Plaintiff's injuries were primarily caused by her own significant intoxication. Therefore, as a matter of law, she cannot recover any damages, and the trial court properly dismissed her lawsuit with prejudice. CP at 388; RCW 5.40.060(1).

c. The Trial Court Properly Determined The Legal Effect Of The Verdict And Entered Judgment For WSP

Once a jury renders a verdict, the trial court must declare its legal effect and enter a judgment upon it. *McRae v. Tahitian, LLC*, 181 Wn. App. 638, 326 P.3d 821, 824 (2014). The legal effect of a jury verdict is

reviewed de novo. *McRae,* 181 Wn. App. at 638. Here, the jury found that Plaintiff's intoxication was a proximate cause of her injury, and that she was 58 percent at fault, the two remaining elements of the alcohol defense. *See* CP at 388. The legal effect of these findings is inescapable. In accordance with Instructions 19-20, these jury findings served "as a complete defense precluding recovery of damages altogether." *Hickly*, 135 Wn. App. at 687; RCW 5.40.060(1). Accordingly, the trial court properly entered judgment for WSP. *McRae*, 326 P.3d at 824.

d. Plaintiff Failed To Preserve The Error She Alleges In The Jury's Verdict

Again, because the jury found both of the final two elements of the alcohol defense, the trial court properly entered judgment for WSP. CP at 497; RCW 5.40.060(1); *Hickly*, 135 Wn. App. at 687. Plaintiff assigns error to this judgment. Opening Br. at 1. She contends the jury's findings that established the alcohol defense were inconsistent with its determination of damages, and, thus, the trial court should not have entered judgment for WSP. Opening Br. at 39-42. Initially, for the reasons stated above, Plaintiff's argument should be rejected. In addition, this Court should not reach the merits of Plaintiff's irreconcilable verdict argument because she failed to bring the issue to the trial court's attention after the jury reached its verdict, but before it was discharged.

Washington courts decline to consider challenges based on allegedly inconsistent answers to jury interrogatories where the appealing party did not raise the alleged inconsistencies prior to the discharge of the jury. *Mears v. Bethel School Dist. No. 403*, __ Wn. App. __, 332 P.3d 1077, 1082 (2014) ("We have declined to consider challenges based on seemingly inconsistent answers to jury interrogatories where the appealing party did not raise the alleged inconsistencies prior to the discharge of the jury") (citing *Gjerde v. Fritzsche,* 55 Wn. App. 387, 393, 777 P.2d 1072 (1989), *review denied*, 113 Wn.2d 1038 (1990)). Plaintiff's failure to timely preserve her objection to whatever inconsistency she believed existed in the verdict form prevents this Court from considering her challenge in this appeal. *Mears,* 332 P.3d at 1082.

e. The Jurors Declarations And E-mails Inhere In The Verdict And Cannot Be Considered On Appeal

Plaintiff next contends the judgment is inconsistent with the jury's "true" intent. As she did below, Plaintiff relies on the post-verdict declarations and e-mails of four jurors in an attempt to undermine the jury's alcohol defense findings and impeach the judgment.[16] Opening Br. at 26-28, 32-33. As a matter of law, this Court cannot consider documents that look into the mental processes of the jurors and seek to impeach the

[16] The trial court properly determined it could not consider these declarations. *See* RP at 2001-04.

final verdict. *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003) (a trial court "may not consider post-verdict juror statements that inhere in the verdict"); *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 765-66, 260 P.3d 967 (2011). Accordingly, this Court may not consider the declarations and e-mails cited by Plaintiff. *McCoy,* 163 Wn. App. at 765-66.

> Lacking the principle that every action will one day terminate in a final adjudication, subject no longer to re-examination, the judicial system would likely disappear. For that reason and other good reasons, the courts have long accepted the premise that jurors may not impeach their own verdict. *Smith v. American Mail Line, Ltd.*, 58 Wash.2d 361, 363 P.2d 133 (1961)-a salutary principle contributing greatly to the finality of judgments and stability of the courts.
>
> Thus, courts may consider only such facts asserted in the affidavits of jurors which relate to the claimed misconduct of the jury and do not inhere in the verdict itself. *The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.*

Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515, 519-20 (1967) (emphasis added); *Breckenridge*, 150 Wn.2d at 205.

As the Supreme Court correctly concluded, allowing jurors to impugn the verdict would not only permit, but encourage the losing party to attack the verdict. That, of course, is precisely the goal Plaintiff hopes to

achieve here—use the statements from a handful of jurors to impugn the jury findings that preclude her recovery of damages.[17]

Here, there is no allegation of juror misconduct. Rather, Plaintiff relies on the statements of a few jurors to try and explain the motivations and intentions of *every* juror's answers to the questions on the special verdict form.[18] By definition, these statements inhere in the verdict and cannot be considered by this Court. *Cox,* 70 Wn.2d at 179-80; *see also Gardner v. Malone*, 60 Wn.2d 836, 842-43, 376 P.2d 651 (1962) (If the statements "are linked to the juror's motive, intent, or belief, or describe their effect upon him . . . the statements cannot be considered for they inhere in the verdict and impeach it.").

Furthermore, the exhibits offered by Plaintiff do not lead to the result she advocates. At best, the juror declarations suggest that one or more jurors may have misinterpreted the judge's instructions.[19] As a matter of law, this is insufficient to support reversal. *Ayers By & Through Ayers v. Johnson & Johnson Baby Products Co.,* 117 Wn.2d 747, 769, 818 P.2d 1337, 1348 (1991) ("[A] a verdict may not be affected by the circumstances that some

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[17] Plaintiff's assertion that she offered the declarations to "support, not impeach, the verdict" contradicts the arguments she advances on appeal. She seeks to use the declarations of a few jurors to not only show that Instructions 19-20 were meaningless, but to undermine the jury's findings concerning the alcohol defense. Opening Br. at 32.

[18] The declarations also purport to describe the intent and motivation of other, unidentified jurors. Obviously, this Court should disregard those inadmissible hearsay statements. *See* ER 802, 805.

[19] Tellingly, none of the e-mails or declarations state or suggest that any of the four jurors would have altered how they answered Questions 5 and 6 had they known the alcohol defense barred Plaintiff's recovery of damages.

jurors misunderstood the judge's instructions. A juror's failure to follow the court's instructions inheres in the verdict, and affidavits relating to such alleged misconduct may not be considered.").

For each of these reasons, this Court should not consider the post-verdict e-mails and declarations submitted by Plaintiff.

B. The Trial Court's Evidentiary Rulings Were Correct

This Court reviews a trial court's evidentiary ruling for abuse of discretion, and that ruling will only be overturned if it was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Burnside*, 123 Wn.2d at 107. Even if an abuse of discretion is found, "the question on appeal becomes 'whether the error was prejudicial, for error without prejudice is not grounds for reversal.' " *Mutual of Enumclaw*, 178 Wn. App. at 728-29 (citing *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)). An error is harmless and not prejudicial unless it affects the outcome of the case. *Id.*

The exclusion of evidence that is cumulative or has speculative probative value is harmless and not a basis for reversal. *Id.*

> The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted.

Havens, 124 Wn.2d at 169-70; *see also Miller v. Arctic Alaska Fisheries*

Corp., 133 Wn.2d 250, 261-62, 944 P.2d 1005 (1997) (no reversible error where the evidence did no more than reiterate other evidence presented to the jury); *Moore v. Smith,* 89 Wn.2d 932, 941-42, 578 P.2d 26 (1978) (no reversible error where "the substance" of the excluded evidence, an exhibit, came out at trial in testimony).

Finally, this Court may affirm an evidentiary ruling on any basis that is supported by the record and the law. *In re Det. of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013), *review denied*, 178 Wn.2d 1020 (2013).

Here, the trial court did not abuse its discretion. Moreover, the alleged errors Plaintiff attributes to the trial court are harmless.

a. The Trial Court Properly Excluded The Hearsay Of The Paramedic

The trial court granted WSP's pre-trial motion to prevent a paramedic who treated Plaintiff at the accident scene from testifying to a statement made from an unknown individual.[20] As the trial court correctly ruled:

> Well, the ambulance driver heard somebody, but the ambulance driver doesn't know who stated it. It's just—that to me is, again, you know, classic hearsay. There's a statement out there that we don't have sufficient attribution evidence identifying who said it or under what circumstances. And I think it would be inappropriate.

[20] In her report the paramedic states "I stuck my head out and asked the speed of travel – *someone* yelled 40-50 m.p.h." CP at 116 (emphasis added).

RP at 19-20.

The trial court did not abuse its discretion by excluding the hearsay statement of the paramedic. ER 802. Moreover, Plaintiff was not prejudiced by the exclusion of this unattributed statement. Plaintiff introduced evidence from other witnesses concerning the different estimates of speed Trooper Tanner provided the night of the accident, as well as the testimony of an accident reconstruction expert that showed Trooper Tanner was driving faster than his estimated speed. RP at 615, 707-14, 1165-72. The trial court did not err, and, moreover, Plaintiff was not prejudiced by the exclusion of the paramedic's hearsay testimony.

b. The Trial Court Properly Rejected The Depositions Of Sergeant Rhine And Detective Ortner

Plaintiff identified, but chose not to present the testimony of Sergeant Rhine and Detective Ortner in her case in chief. Instead, she sought to introduce excerpts from their depositions on rebuttal, which the trial court properly rejected. RP at 1871-75. Again, Plaintiff failed to demonstrate error or prejudice by these rulings.

Rebuttal evidence is generally admissible if not cumulative and it answers new points raised by the defense. *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172, 178 (2010), *review denied*, 171 Wn.2d 1013 (2011). The decision whether to admit evidence on rebuttal is within the

trial court's discretion and will not be overturned absent a manifest abuse of discretion.

> Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case.

State v. White, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968) (internal citation omitted).

Here, citing CR 32(a)(3), the trial court properly rejected Plaintiff's attempt to introduce excerpts of the depositions of Sergeant Rhine and Detective Ortner in her rebuttal case because she did not demonstrate the witnesses' unavailability. RP at 1871-75; CR 32(a)(3) (requires the party offering the deposition to demonstrate the witness, "whether or not a party," is not available to testify). Further, a party seeking to introduce the deposition of a witness under this rule must show that due diligence was exercised in attempting to procure the attendance of the witness at trial. *Sutton v. Shufelberger*, 31 Wn. App. 579, 585, 643 P.2d 920 (1982) ("In the absence of such a showing the refusal to permit the introduction of the deposition is not an abuse of discretion.").

The trial court determined that both witnesses were available and could have been compelled to appear and testify had Plaintiff acted

diligently. RP at 1871-75. Plaintiff does not dispute this point. Instead, she argues the depositions were admissible under CR 32(a)(1) because deponents were speaking agents of WSP. Opening Br. at 47-48. She is mistaken. By its very terms, CR 32(a)(3) requires the person seeking to introduce the deposition excerpt to demonstrate the unavailability of the witness, regardless of whether that person is a party. Accordingly, the trial court did not err in rejecting the deposition excerpts.

Further, Plaintiff was not prejudiced by the exclusion of Sergeant Rhine and Detective Taylor's deposition excerpts. First, Plaintiff was not precluded from presenting the live testimony of either witness in her rebuttal. She simply chose not to. Thus, she created whatever prejudice she now attributes to the trial court's evidentiary rulings. Second, the trial court allowed Plaintiff to introduce Sergeant Rhine's report into evidence on rebuttal. RP at 1840-41; CP 514-18. Thus, the proposed testimony of Sergeant Rhine was cumulative, and, for this reason as well, was properly excluded. *Moore*, 89 Wn.2d at 941-42.

Third, Plaintiff claims she was prejudiced by the exclusion of Detective Ortner's deposition testimony that she was "*a little bit* groggy" when interviewed at the hospital shortly after the accident. CP at 522 (emphasis added). She contends this testimony was necessary to rebut Deputy Taylor's assessment that Plaintiff was coherent, alert, and able to reflect on what had occurred when interviewed. Opening Br. at 51;

see also CP at 1386. Plaintiff introduced other evidence disputing that she was "alert" when interviewed by Deputy Taylor. Melissa Cornelison, who was in the room during the interview, testified to Plaintiff's alleged lack of awareness. RP at 902-08. Thus, the offered evidence was cumulative, and its exclusion was, as a matter of law, harmless. *Havens*, 124 Wn.2d at 169-70.

c. The Trial Court Properly Excluded The Testimony Of Luanne Pfleiger As Inadmissible Hearsay

Ms. Pfleiger is the mother of Guy Kirchgatter. Plaintiff attempted to have her testify concerning statements made by her son and Rick Riddell "about the police officer didn't have headlights on that night." RP at 335. The trial court correctly prevented Ms. Pfleiger from testifying to these hearsay statements. RP at 335-37; ER 802. Plaintiff contends this testimony was offered to rebut an implied charge of recent fabrication, and not hearsay. Opening Br. at 16; *see* ER 801(d)(1)(ii). Plaintiff is mistaken. First, WSP did not make any express or implied charge of fabrication by Mr. Kirchgatter or Mr. Riddell. It simply argued their perception of the events was inconsistent with Plaintiff's own description of the events. For this reason alone, her argument fails. Second, even if it was error to exclude this evidence, such error was harmless and certainly is not a basis for reversal. Again, Plaintiff, not WSP, called the testimony Mr. Riddell and Mr. Kirchgatter into question.

RP at 818 (Plaintiff told her best friend that she saw the headlights of the car that struck her), 875 (at the time of her accident, Plaintiff told her brother that she saw the headlights of the vehicle that ultimately struck her), 1351-52 (Plaintiff told Deputy Taylor that Trooper Tanner's headlights were turned on at the time of her accident). Moreover, Plaintiff presented two additional witnesses, Arthur and Gwen Ashe, who supported the testimony offered by Mr. Riddell and Mr. Kirchgatter. RP at 311-12; 943-44. Thus, Plaintiff was able to, and did argue that the jury should believe the testimony of Mr. Riddell and Mr. Kirchgatter rather than the repeated statements Plaintiff made to her brother, best friend, and the investigating officer. RP at 1921-23. Thus, whatever error she attributes to the trial court's evidentiary ruling was harmless.

d. The Trial Court Properly Excluded The Deposition Excerpts Of Greg Riddell

Plaintiff waited until rebuttal to try and introduce excerpts from the deposition of Greg Riddell, a WSP trooper in Spokane and Rick Riddell's brother. The deposition excerpts verified only that Rick called Greg and reported the occurrence of an accident sometime after it occurred. However, Rick never told Greg that WSP was involved in the accident, nor, for that matter, is there any indication in the offered excerpts that Rick reported that the vehicle's headlights were off at the time of the

accident. CP at 538-42. The trial court properly rejected Plaintiff's attempt to introduce this testimony:

> I think we're getting far out on the relevance plank. It's fairly thin relevance and this is in Plaintiff's rebuttal case. It would have seemed more appropriate to bring that up during Plaintiff's case in chief. Plus Rule 403(b) 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.

RP at 1878.

Nevertheless, Plaintiff contends that Greg's testimony was necessary to demonstrate that Rick reported "what he saw to the police." Opening Br. at 54. Importantly, WSP did not question Rick about this statement, nor did it introduce any evidence disputing that he called his brother. Thus, the offered testimony was not only cumulative, it did not rebut any new evidence or claim raised in WSP's defense. Accordingly, the trial court properly excluded the evidence on rebuttal. *White*, 74 Wn.2d 386, 394-95; *Young*, 158 Wn. App. at 719.

C. Plaintiff Made The Strategic Decision Not To Call Dr. Brady At Trial

As demonstrated by her actions and express representations to the trial court, Plaintiff chose not to call Dr. Brady at trial. Plaintiff, not the trial court, is responsible for that strategic decision. Unable to demonstrate error or prejudice by the trial court, this Court should reject Plaintiff's meritless challenge here.

From very early on, Plaintiff attempted to conceal the experts she intended to call at trial. Indeed, Plaintiff initially refused to disclose the identity of *any* expert witness until right before trial. CP at 37-38, 88, 466. When WSP objected to Plaintiff's "trial by ambush" strategy, she yielded and agreed to the following expert disclosure deadline: Plaintiff would disclose her trial expert witnesses by March 13, 2012, and WSP would disclose its trial experts by April 3, 2012. CP at 38, 88, 466. Plaintiff never identified Dr. Brady or any other alcohol expert by this agreed upon deadline. CP at 466; RP at 29.

Then, on March 28, 2012, more than two weeks after her expert disclosure deadline, Plaintiff denied a request for admission concerning the serum blood alcohol findings from the hospital's blood test. CP at 44. Because she denied these requests for admission, Plaintiff was required to answer corresponding interrogatories that asked her to explain the basis for her denial. However, she refused to explain the basis for her denial, claiming that information was "work product and privileged." CP at 53-54. Because Plaintiff's blood alcohol level findings also concerned contributory negligence, WSP brought a motion to compel. CP at 88. WSP argued that Plaintiff could not simultaneously deny a material issue of fact and refuse to explain the basis for her denial. CP at 89. In response, Plaintiff claimed her denial was based on information received from Dr. Brady, a *consulting* expert. Importantly, Plaintiff

represented to the court that she had "no intention" of calling Dr. Brady at trial.

> Although Defendants have provided a lengthy memorandum in support of their motion, the discovery issue before this court is very simple.
>
> **Question:** Are defendants entitled to discover the opinions and identity of one of plaintiff's consulting experts *that she does not intend to call as a witness at trial*?
>
> **Answer:** No.

CP at 102 (emphasis added).

The hearing on this motion was held June 29, 2012. After listening to the arguments of counsel, the judge asked the attorneys to meet briefly outside the courtroom to see if a compromise could be reached. CP at 467. During those discussions, Don Jacobs, one of Plaintiff's trial attorneys, proposed the language that was ultimately incorporated into the final order:

> 1. WSP's Second Motion To Compel is **GRANTED** *as set forth below.*
>
> *2. Plaintiff shall disclose the specific reasons for her denials of the requests for admissions. To the extent that 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.*

CP at 107 (the italicized portion was handwritten into the order), 467.

This agreed resolution of WSP's motion was submitted to the trial

judge for his signature, which he signed. CP at 467. Understandably, Plaintiff did not object to the language in the order that she proposed.

Plaintiff's discovery responses were also consistent with her strategic decision not to call an alcohol expert at trial. Although, she was required to identify her experts and the basis for their opinions, Plaintiff never identified an alcohol expert. CP at 118, 171-72.

Then, just before trial, Plaintiff deposed WSP's toxicology expert, Dr. Tack Lam. During that deposition Plaintiff questioned Dr. Lam about Dr. Brady's opinions. Plaintiff still had not expressed any intent to convert this consulting expert to a trial expert, nor, for that matter, had she ever identified any other alcohol expert. Concerned that Plaintiff would attempt to introduce Dr. Brady's opinions at trial under the guise of cross examination, WSP brought a motion in limine to preclude her "from introducing any evidence or questioning any witness concerning any opinions, criticisms, comments or statements of Dr. Brady." CP at 119.

The trial judge agreed, preliminarily, that he was bound to follow the June 29, 2012, order. However, he invited Plaintiff to bring a motion to modify that order.

> Well, I think I have to follow the previous order that's been entered in this case, *unless there's some motion to do otherwise*."

RP at 30 (emphasis added).

Plaintiff chose not to seek modification of the earlier order, and the court properly granted WSP's motion in limine. RP 31-32.

First, the trial court did not abuse its discretion by following an order that not only conformed with Plaintiff's express representations, but was drafted by her own attorney. Second, whatever error she imagines the trial court made by following her express wishes was invited error. *Grange Ins. Ass'n*, 179 Wn. App. at 774. Even if she could demonstrate error, which she cannot do, Plaintiff can hardly claim she was prejudiced by an order that conformed to the very representations she made to the trial court and WSP. Unable to establish error or prejudice, this Court should reject Plaintiff's meritless claim. *Mutual of Enumclaw*, 178 Wn. App. at 728-29.

V. CONCLUSION

For each of the foregoing reasons, WSP asks this Court to affirm the order that granted judgment to WSP and dismissed Plaintiff's lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

ROBERT W. FERGUSON
Attorney General

STEVE PUZ, WSBA #17407
Senior Counsel
Attorneys for Defendant
Washington State Patrol
OID #91023

CERTIFICATE OF FILING AND SERVICE

I, Amanda Trittin, certify that on November 3rd, 2014, I sent for filing of Respondent's Brief via US Mail to:

Washington State Court of Appeals, Division II.

I also served a full, true, and correct copy of the document to the attorneys for Appellants, by US mail and electronic mail to the addresses below:

Michael H. Bloom Donald Jacobs Attorneys for Appellant One Centerpointe Dr, Ste 570 Lake Oswego, OR 97035 bloomc@easystreet.net	[**X**] United States Mail [X] Email: jmessina@messinalaw.com

DATED this 3rd day of November, 2014, at Tumwater, Washington.

AMANDA TRITTIN, Legal Assistant

APPENDIX

A

Graphic Version | *[No disponible en español]*

RCW 5.40.060
Defense to personal injury or wrongful death action — Intoxicating liquor or any drug.

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. 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.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

[1994 c 275 § 30; 1987 c 212 § 1001; 1986 c 305 § 902.]

Notes:

Retroactive application -- 1994 c 275 § 30: "Section 30 of this act is remedial in nature and shall apply retroactively." [1994 c 275 § 31.]

Short title -- Effective date -- 1994 c 275: See notes following RCW 46.04.015.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

APPENDIX

B

NO. 12

It is a defense to an action for damages for personal injuries that the plaintiff was then under the influence of alcohol that this condition was a proximate cause of the injury, and that the plaintiff was more than fifty percent at fault.

WPI 16.03

NO. 16

To establish the defense that the plaintiff was under the influence, the defendants have the burden of proving each of the following propositions:

First, that the plaintiff was under the influence of alcohol at the time of the occurrence causing the injury;
Second, that this condition was a proximate cause of injury; and
Third, that the plaintiff was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

WPI 21.09

INSTRUCITON NO. 19

It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault.

INSTRUCTION NO. 20

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

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

Second, that this condition was a proximate cause of the injury; and

Third, that the person injured was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

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Washington Pattern Jury Instructions--Civil
Washington State Supreme Court Committee on Jury Instructions

Part
I. General Instructions
Chapter
6. Oral Instructions During Trial

WPI 6.10.02 Use of Admissions Under CR 36(b)

The *[plaintiff] [defendant]* has admitted that certain facts are true. You must accept as true the following facts:

(The judge or attorney should read the admitted evidence.)

NOTE ON USE

Use this oral instruction for any admission under CR 36(b). The instruction may be reworded to address an agreement of the parties that conclusively establishes evidence for the jury. For non-conclusive admissions or agreements, use WPI 6.10.01, Stipulations.

This oral instruction is not intended to preclude the judge from exercising discretion as to whether the admission is sufficiently complex that it should also be given to the jury in writing, whether it is incorporated into the final set of written jury instructions or into an exhibit that could go back to the jury room. See the Comment for further discussion.

COMMENT

CR 36(b) provides in part that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

There are no Washington cases directly addressing whether a trial court is required to instruct a jury that admissions under CR 36(b) are conclusively established. However, 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, 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). Thus, the jury should be advised as to the effect of a CR 36 admission to avoid the possibility of reversible error.

The giving of this type of instruction 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 conclus-

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ively 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).

The pattern instruction above is to be given orally. Depending on the facts in the case, it may be appropriate to also provide this information to the jury in writing, such as by incorporating the admission into an exhibit, which could go back to the jury room during deliberations. If the admitted facts relate directly to the elements of the cause of action, then the admitted facts may be more properly addressed in the final set of written jury instructions. Indeed, for cases of admitted liability, the pattern instructions already recognize that the admission needs to be reflected in the final set of written instructions. See WPI Chapter 23, Admitted Liability. For a related discussion in the criminal context about the multiple options for informing jurors about binding stipulations and admissions, see the Comment to WPIC 4.77, Stipulation asto Undisputed Facts or Elements of Offense.*[Current as of June 2009.]*
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Part
II. Negligence—Risk—Misconduct—Proximate Cause
Chapter
16. Defenses

WPI 16.01 Felony—Defense

It is a defense to any *[action] [claim]* for damages that the person *[injured] [killed]* was then engaged in the commission of a felony, if the felony was a proximate cause of the *[injury] [death]*.

NOTE ON USE

Do not use this instruction for an action brought under 42 U.S.C. § 1983.

Use this instruction with WPI 16.02 (Felony—Elements), WPI 21.08 (Burden of Proof—on the Issues—Felony Defense), and WPI 15.01 (Proximate Cause—Definition).

Use the bracketed material as applicable.

COMMENT

RCW 4.24.420.

The statute provides that:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

The applicable quantum of proof to establish the commission of a felony in a civil case is a preponderance of the evidence. See Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co., 20 Wn.App. 503, 507, 581 P.2d 167 (1978) (proof of a willful and unlawful killing under the slayer's statute need only be by the preponderance of the evidence); cf. Cook v. Gisler, 20 Wn.App. 677, 582 P.2d 550 (1978).

It appears that a conviction for the felony involved is not required for the assertion of the defense. See Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co., 20 Wn.App. at 507 (criminal trial not necessary to show a willful and unlawful killing for purposes of the slayer's statute). Likewise, an acquittal on the

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felony charge would not appear to bar the assertion of this defense. See Young v. City of Seattle, 25 Wn.2d 888, 895, 172 P.2d 222 (1946) (acquittal on a charge of criminal negligence not a bar to a civil action for negligence on the very same evidence).*[Current as of June 2009.]*
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Part
II. Negligence—Risk—Misconduct—Proximate Cause
Chapter
16. Defenses

WPI 16.03 Intoxication of Person Injured or Killed—Defense

It is a defense to an action for damages for *[personal injuries] [wrongful death]* that the *[person injured] [person killed]* was then under the influence of *[alcohol] [or] [any drug]*, that this condition was a proximate cause of the *[injury] [death]*, and that the *[person injured] [person killed]* was more than fifty percent at fault.

[This defense does not apply, however, in an action against the driver of a motor vehicle if you find that:

(1)
the driver was then under the influence of *[alcohol] [or] [any drug]*;

(2)
such condition of the driver was a proximate cause of the *[injury] [death]*;

(3)
the *[person injured] [person killed]* was also under the influence of *[alcohol] [or] [any drug]*; and

(4)
such condition of the *[person injured] [person killed]* was not a proximate cause of the occurrence causing the *[injury] [death]*.]

NOTE ON USE

Use this instruction only if there is an issue of intoxication on the part of the person injured or killed. Use WPI 16.04 (Under the Influence of Alcohol or any Drug—Definition), WPI 21.09 (Burden of Proof on the Issues—Intoxication Defense), and WPI 15.01 (Proximate Cause—Definition) with this instruction.

Use the bracketed second paragraph only if there is an issue of intoxication on the part of both a defendant driver of a motor vehicle and the person injured or killed. It may aid juror comprehension to use a more fact-specific term than "occurrence" in the second paragraph.

Use other bracketed material as applicable. Use the person's name instead of "person injured" or "person killed" whenever doing so will make the instruction easier to understand.

COMMENT

RCW 5.40.060.

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RCW 5.40.060(1), enacted as part of the 1986 Tort Reform Act, states the general rule that it is a complete defense in a personal injury or wrongful death action that the person injured or killed "was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault."

In 1994, the Legislature added RCW 5.40.060(2), creating an exception to that general rule:

> In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, [RCW 5.40.060(1)] does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

By enacting RCW 5.40.060(2), the Legislature effectively abrogated the holding of Geschwind v. Flanagan, 121 Wn.2d 833, 854 P.2d 1061 (1993), that RCW 5.40.060 can provide a complete defense in an action against an intoxicated driver for injuries to an intoxicated passive passenger.

RCW 5.40.060 applies only to cases based on fault as defined in RCW 4.22.015 and, thus, is inapplicable in an intentional tort case. Morgan v. Johnson, 137 Wn.2d 887, 976 P.2d 619 (1999).*[Current as of June 2009.]*
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Part
III. Issues—Burden of Proof
Chapter
21. Burden of Proof

WPI 21.09 Burden of Proof on the Issues—Intoxication Defense

To establish the defense that the [person injured] [person killed] was under the influence, the defendant has the burden of proving each of the following propositions:

First, that the [person injured] [person killed] was under the influence of [alcohol] [or] [any drug] at the time of the occurrence causing the [injury] [death];

Second, that this condition was a proximate cause of the [injury] [death]; and

Third, that the [person injured] [person killed] was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established [unless you find that this defense does not apply].

[This defense does not apply in an action against the driver of a motor vehicle if you find that each of the following propositions has been proved:

First, that the defendant driver was under the influence of [alcohol] [or] [any drug] at the time of the occurrence causing the [injury] [death];

Second, that such condition of the defendant driver was a proximate cause of the [injury] [death];

Third, that the [plaintiff] [person injured] [person killed] was also under the influence of [alcohol] [or] [any drug]; and

Fourth, that such condition of the [plaintiff] [person injured] [person killed] was not a proximate cause of the occurrence causing the [injury] [death].]

NOTE ON USE

Use this instruction only if evidence has been submitted to the jury of intoxication on the part of the person injured or killed. With this instruction, use WPI 16.03 (Intoxication of Person Injured or Killed—Defense), WPI 16.04 (Under the Influence of Alcohol or Any Drug—Definition), and one of the proximate cause instructions

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from WPI Chapter 15.

Use the bracketed paragraph beginning "This defense does not apply ..." only if there is an issue of intoxication on the part of both a defendant driver of a motor vehicle and the person injured or killed. Juror comprehension may be aided by using a more fact-specific term than "occurrence" in this paragraph.

Use other bracketed material as applicable.

Jurors may find it helpful if the instruction uses a person's name rather than "person injured" or "person killed."

COMMENT

RCW 5.40.060. For additional discussion of RCW 5.40.060, see the Comment to WPI 16.03, Intoxication of Person Injured or Killed—Defense.*[Current as of October 2010.]*
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