FILED

2007 JUN -8 PM 4:28

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

HONORABLE MICHAEL SPEARMAN
HEARING DATE: JULY 6, 2007
HEARING TIME: 11:00 A.M.
[WITH ORAL ARGUMENT]

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARIA C. FEDERICI, a single woman,

Plaintiff,

vs.

U-HAUL INTERNATIONAL, INC., a foreign corporation, U-HAUL CO. OF WASHINGTON, a Washington corporation, CAPRON HOLDINGS, INC., d/b/a LAKE HILLS TEXACO, a Washington corporation, and JAMES HEFLEY and JANE DOE HEFLEY, individually and the marital community thereof,

Defendants.

NO. 06-2-11563-5SEA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT TO STRIKE ANY AFFIRMATIVE DEFENSE ALLEGING THAT MARIA FEDERICI WAS COMPARATIVELY AT FAULT OR INTOXICATED AT THE TIME OF HER INJURIES

I. INTRODUCTION AND RELIEF REQUESTED

COMES NOW Plaintiff, Maria Federici, by and through her attorneys, and moves the Court for an order (1) excluding from admission into evidence at trial any reference to Maria Federici having consumed alcohol prior to her injuries and any reference to the results of the ETOH test conducted at the Harborview Laboratory on February 23, 2004; and (2) striking as affirmative defenses in this matter any allegation that Maria Federici was comparatively at fault for her injuries or intoxicated at the time of her injuries.

//

//

ORIGINAL

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

II. FACTS

The facts leading up to Federici's catastrophic injuries -- permanent blindness, brain damage and resulting deficits -- are not materially in dispute. February 22, 2004 was a Sunday. On that day, Federici worked as a bartender/waitress at the Foghorn Restaurant in Kirkland, Washington from approximately 3:30 p.m. to 11:30 p.m. According to the restaurant manager that evening, Mr. Mason Blackwell, he and Federici each had a 4-1/2 ounce steak with mashed potatoes and broccoli between about 9:30 and 9:45 p.m. *See* Allen Decl. Exhibit 1 at 73:104-105. The last customer left the restaurant at about 10:30 p.m., and Federici stayed to assist Blackwell in closing up between 10:30 and 11:15 p.m. or so. *Id.* at 72-75, 105. During this period Blackwell and Federici had a "shift drink" of one glass of wine each while they did their closing chores. *Id.* at 73-75, 106.[1]

Federici and Blackwell left the restaurant in separate vehicles at about 11:30 p.m. Their cars were parked together and both were going to southbound I-405. As a result, Blackwell followed Federici to I-405 where they traveled southbound, with either Federici behind Blackwell or vice versa, until Blackwell took the I-90 exit at which time Blackwell and Federici waved to each other and Federici continued southbound on I-405. *Id.* at 75, 78-81. Blackwell testified that, up to that point, Federici was operating her vehicle in a safe manner. *Id.* at 81-83.

Maria continued southbound on I-405 toward her own exit (Exit 6). Just past the exit ramp for Exit 7, on a portion of I-405 called Kennydale Hill, Federici's vehicle was struck by some portion of an entertainment center that had flown or fallen out of a U-Haul open trailer rented by Defendant James Hefley.[2] It is unclear how much of the entertainment center struck Federici's vehicle. It appears from police photographs that the portion of the entertainment center that did strike Federici's vehicle was airborne at the time that it hit her car.[3]

---

[1] The Foghorn Restaurant allowed employees one free drink at the end of their shift, but no more whether they paid or not. This was called a "shift drink". Allen Decl. Exhibit 1 at 11.

[2] Although U-Haul's customers are predominantly do-it-yourself movers, U-Haul did not provide any type of load securing system with their open trailers or advice on how to secure loads. The U-Haul open trailer rented by Hefley had no rear tie down points on the trailer deck, tailgate, or interior corners.

[3] *See* Allen Decl. Exhibit 2 (photos of the front end of Federici's Jeep Liberty showing no damage to her front bumper, only damage above the bumper).

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

Eyewitness Anthony Cox

At the time Maria's vehicle was struck, she was traveling in the outside lane of southbound I-405 next to the shoulder of the roadway. Mr. Anthony Cox was traveling behind Maria, but in the inside lane. Cox was approximately 300 to 400 feet behind the Federici vehicle. There were several other vehicles on the highway with them. Cox testified at his deposition that all the vehicles, including Maria's, were going approximately the speed limit of 60 miles per hour. *See* Allen Decl. Exhibit 3 at 11.

In the statement he provided the Washington State Patrol, Cox described seeing a box, sparks shooting out on the roadway and Maria Federici's car hood flying open. However, at his deposition, ***Cox clarified that he did not actually see the box or the box breaking apart upon impact with Federici's vehicle.*** He saw the debris from the entertainment center only ***after*** the impact, and ***assumed*** thereafter that it was some sort of "box". At his deposition, Cox testified as follows:

> Q. Again, I'm trying to get the sequence of things here. You refer to it as a box, but we'll just use the term item. Did you see the item hit her car and then break up? Because it says here the hood flew open, the box broke apart, how you have it written.
> A. I cannot say I seen the box break apart because I saw it on the ground as we -- as the vehicle went over it. So I didn't see it, it was such a fast time.
> Q. But you did see the hood go up.
> A. Yes.
> Q. So if we have the sequence up to this point, it's sparks, kind of silhouetting an item, and then the hood coming up.
> MR. FORGETTE: Object to the form; misstates.
> Q. (By Mr. Hermsen) I'll go back because I'm not trying to misstate anything, I'm trying to get the sequence of events here. It's obvious you see things on the ground and maybe you assume that they hit the car and that gets into your narrative here; I'm just trying to get the things that you saw. We've established you first saw the sparking, you then saw an item. Is the next thing you saw, did you see the item break up or was the next thing you saw the hood coming up?
> MR. FORGETTE: Object to the form again. I'm objecting for the record to the form of the question. I'm sorry if that upsets you.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

A. It happened so fast; the sparks, the hood, the breakage of the box. It was all almost simultaneously at the same time. Then we're passing up the vehicle and I see the debris on the ground.

Q. (By Mr. Hermsen) You had a couple of places here in these statements, on Exhibit 124, you say the box broke apart. Did you see it break apart?

A. I have to say no.

Allen Decl. Exhibit 3 at 30-32. When Mr. Cox was asked if he actually saw debris go into the engine compartment or windshield of Federici's vehicle, he testified as follows: "It was so fast, shotgun type fast. I cannot see it because everything happened so fast." *Id.* at 33. Moreover, Cox testified that it was only ***after*** Hefley's entertainment center or some portion of it struck Federici's vehicle that Cox and other drivers on the roadway put on their brakes. *Id.* at 45-46.

Witness Evelynn Gamboa

Ms. Evelynn Gamboa was driving her vehicle in the lane directly behind Maria Federici's vehicle. She testified at her deposition that traffic was light at the time and that the vehicles in the area, including her vehicle and Maria's, were all traveling at about the speed limit of 60 miles per hour. *See* Allen Decl. Exhibit 4 at 16-17. The next thing Gamboa recalled seeing was:

> Wood flying everywhere and her [Maria's] car slowed down and started smoking. I slowed down after wood hit my car and turned on my flashers and followed her to the side of the road.
>
> [...]
>
> There were pieces of wood coming from the left and the right around her car. I ran over some of the wood. As far as going over her car, I don't remember anything going over, but there was coming from the left and the right. I mean, it hit my car as well.

Id. at 18, 19. Gamboa also testified that she ran over some of the debris, but was not able to see the debris before actually hitting it. *Id.* at 30.

No Evidence of Alcohol

Cox was the first person to enter the passenger compartment of Federici's vehicle once it came to a stop. As established by the attached Declaration of Anthony Cox, he did not detect the odor of alcohol either on Maria or in her vehicle. *See* Cox Declaration at 1. Moreover, the

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

paramedics who responded to the scene filled out paperwork regarding their care of Maria Federici. On the "King County - Medical Incident Report Form" that they filled out, the box for "Suspected alcohol/drugs" is checked "no". *See* Allen Decl. Exhibit 5.

Subsequent Blood Serum Test at Harborview

By the time Ms. Federici arrived at Harborview Medical Center, emergency medical personnel had infused saline intravenously. The EMTs also administered a paralytic drug called Vecuronium following her intubation. *See* Allen Decl. Exhibit 6. Upon arrival at the Harborview emergency department it was determined that both Carotid arteries were torn and that Maria was in severe shock from substantial blood loss. *See* Allen Decl. Exhibit 7. Valium and additional medications were administered. Blood was then drawn to determine the state of Maria's body chemistry. It was from this initial blood sample that the only blood alcohol test was conducted. The test was conducted on blood serum rather than whole blood, and the value derived from this test was 124 milliliters per deciliter. *See* Allen Decl. Exhibits 8 and 9, Copass Decl. ¶ 2, Chandler Decl. ¶ 2. Only ***after*** the blood sample was drawn did Maria receive 12 units of blood products and more volume solution. *See* Allen Decl. Exhibit 10. One of the Harborview records contains a contemporaneous note entered by one of Maria's attending physicians, indicating "BAL neg." meaning blood alcohol level negative. *Id.* (HMC000767). Maria's condition was so grave that treating doctors at Harborview determined her injuries were not survivable, and their goal was to stabilize her body to a point where her family could say goodbye and her organs prepared for donation. Copass Decl. ¶ 4.

Harborview does not attempt to satisfy the requirements of the State toxicologist for conducting blood alcohol tests

The State of Washington has established a regulatory system controlling the taking of blood alcohol tests for evidentiary purposes in legal proceedings. RCW 46.61.506, entitled "Persons under influence of intoxicating liquor or drug - Evidence - Tests - Information concerning tests", requires that blood alcohol analysis be conducted "by an individual possessing a valid permit issued by the state toxicologist for this purpose." RCW 46.61.506(3) also requires

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

that blood analysis be "performed according to methods approved by the state toxicologist." WAC 448-14-010 sets "criteria for approved methods of quantitative analysis of blood samples for alcohol." WAC 448-14-020, entitled "Operational Discipline of Blood Samples for Alcohol", states that the analytical procedure should include (1) a control test; (2) a blind test; and (3) duplicate analyses that should agree to within 0.01 blood alcohol deviation from the mean. With regard to the required permit, WAC 448-14-030 lists the necessary qualifications for a blood alcohol analyst.

However, as established by the attached Declaration of Wayne L. Chandler, M.D., the Head of Laboratory Medicine at Harborview, the Harborview Laboratory does not attempt to comply with the requirements of Washington Administrative Code 448-14-010 for "Criteria for approved methods of quantitative analysis of blood samples for alcohol." Chandler Decl. at ¶ 4. Neither does the Harborview Laboratory attempt to comply with the requirements of Washington Administrative Code 448-14-020 for "Operational discipline of blood samples for alcohol." *Id.* Moreover, there is no person working at the Harborview Laboratory that satisfies the requirements of WAC 448-14-030 for "Qualifications for a blood alcohol analyst." *Id.* The Harborview Laboratory does not have any policy or procedure by which a chain of custody is enforced or recorded for the blood samples that are tested in the lab. *Id.* at ¶ 5. Dr. Chandler confirms that it would be impossible today to reproduce the chain of custody for the blood serum test that was run on Maria Federici's blood on February 23, 2004. *Id.* The Harborview Laboratory's policies and procedures are designed to facilitate clinical testing for purposes of medical assessment and treatment, and are not designed to satisfy the requirements of forensic testing of blood products or the requirements of civil or criminal proceedings. *Id.*

III. ISSUES PRESENTED

1. Should the Court exclude from admission into evidence at trial any reference to Maria Federici having consumed alcohol prior to her injuries and any reference to the results of the ETOH test conducted at the Harborview Laboratory on February 23, 2004, where (a) evidence that Maria Federici had a glass of wine an hour or so before her injury is not admissible

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

by itself to prove intoxication; (b) the blood alcohol test of Maria Federici's blood on February 23, 2004 should not be admitted into evidence because it is scientifically unreliable and therefore inadmissible; and (c) the blood alcohol analysis of Maria Federici's blood should not be admitted into evidence because it is "invalid" under RCW 46.61.506?

2. Should the Court strike as an affirmative defense in this matter any allegation that Maria Federici was comparatively at fault or intoxicated at the time of her injuries where there is no evidence that any action or inaction on her part at the time of the accident was a proximate cause of those injuries?

IV. EVIDENCE RELIED UPON

Plaintiff relies upon the records and files herein, as well as the accompanying Declarations of Timothy E. Allen, Michael Hlastala, Ph.D., Michael Copass, M.D., Wayne Chandler, M.D., Mark Firestone, Ph.D., and Anthony Cox, and the exhibits attached thereto.

V. ARGUMENT

A. The Court has the Authority to Grant Plaintiff's Motion

CR 56(c) provides that summary judgment should be granted "[i]If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c) (2007). A defendant who asserts an affirmative defense has the burden of proving the legal elements of the defense. *Brougham v. Swarva*, 34 Wn. App. 68, 74, 661 P.2d 138 (1983); *Haslund v. Seattle,* 86 Wn.2d 607, 619, 547 P.2d 1221 (1976); *Fulle v. Boulevard Excavating, Inc.,* 20 Wn. App. 741, 743, 582 P.2d 566 (1978). In *Young v. Key Pharmaceuticals, Inc.*, the Supreme Court of Washington ruled that on a motion for summary judgment, once the moving party meets its initial burden of showing the absence of a material fact, the burden of proof shifts to the non-moving party to produce admissible evidence to establish the legal claims or defenses on which it will have the burden of proof at trial:

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

> In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party... meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial[.] If, at this point, the [party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion.
>
> In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Young, 112 Wn.2d at 225-226 (citations omitted).

Moreover, motions in limine are governed by the usual rules governing motion practice. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 665, 709 P.2d 774 (1985). A trial court should grant a pretrial motion to exclude evidence in a civil case if the motion "describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial, and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial." *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). "The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." *State v. Sullivan,* 69 Wn. App. 167, 170-71, 847 P.2d 953, *review denied,* 122 Wn.2d 1002, 859 P.2d 603 (1993) (citing *State v. Kelly,* 102 Wn.2d 188, 193, 685 P.2d 564 (1984)).

B. The Court should Exclude at Trial Any Reference to Maria Federici having consumed alcohol prior to her injuries on February 22, 2004, and any reference to the results of the ETOH test conducted at the Harborview Laboratory on February 23, 2004.

1. The Court should exclude any evidence of Maria Federici's consumption of one glass of wine prior to the incident on February 22, 2004.

Initially, evidence that Maria Federici had a glass of wine an hour or so before her injury is not admissible by itself to prove intoxication. Mere evidence of consumption of small

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

amounts of alcohol without other evidence of intoxication is insufficient to present a jury question on intoxication. *Amrine v. Murray*, 28 Wn. App. 650, 657, 626 P.2d 24 (1981). This rule is well-established in Washington law. *See, e.g., Bohnsack v. Kirkham*, 72 Wn.2d 183, 192-193, 432 P.2d 554 (1967) (where there is a complete absence of any evidence that driver involved in accident was under influence of alcohol it is error to permit jury to consider whether driver was under the influence of, or affected by, intoxicating liquor, even though there was evidence that he had consumed some alcohol prior to the accident); *Cameron v. Boone*, 62 Wn.2d 420, 425, 383 P.2d 277 (1963) ("it can be said, categorically, that evidence of one drink of whisky, volume undisclosed, if submitted to the jury, would result in speculation and prejudice. Some quantum of additional proof was necessary to raise a jury question."); *White v. Peters*, 52 Wn.2d 824, 827, 329 P.2d 471 (1958) ("There is no evidence in this case that plaintiff White was affected in any way by the two drinks, and no evidence of conduct or appearance, from which a fair inference could be drawn, that he was under the influence of intoxicating liquor prior to or at the time of the accident. It is prejudicial error for the trial court to submit an issue to the jury when there is no substantial evidence concerning it.").

2. The blood alcohol test of Maria Federici's blood on February 23, 2004 should not be admitted into evidence because it is scientifically unreliable and therefore inadmissible.

In order to be admissible, the ETOH reading of 124 derived from the test of Maria Federici's blood serum must be reliable. Under ER 402, "[e]vidence which is not relevant is not admissible." It is well established under Washington law that "[i]nherently unreliable evidence is not relevant[.]" *State v. Justesen*, 121 Wn. App. 83, 95, 86 P.3d 1259 (2004); *see also In re Perry County Foods, Inc.*, 313 B.R. 875, 892 n.15 (Bkrtcy. N.D. Ala. 2004) ("If admissible evidence is not reliable, it is not relevant. This is because encompassed in legal relevancy for the subset denominated as admissible evidence is the necessity of its reliability.").

Here, the ETOH value obtained from the blood serum test is unreliable and therefore inadmissible. Dr. Michael Copass is the Director of the Emergency Department, Director of

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

Emergency Services, and Director of the Trauma Center at Harborview Medical Center. *See* Copass Decl. at ¶ 1. Dr. Wayne L. Chandler is the Head of Laboratory Medicine at Harborview and Professor of Laboratory Medicine, University of Washington School of Medicine. *See* Chandler Decl. at ¶ 1. Both Dr. Copass and Dr. Chandler confirm that the laboratory machine used to test Maria's blood serum for ethanol was a Beckman LX-20 analyzer. *See* Copass Decl. ¶ 2, Chandler Decl. ¶ 2. ***This machine measures the presence and amount of ethanol in blood serum by means of an enzymatic test.*** *See* Chandler Decl. ¶ 2. The enzymatic test is distinguished from the gas chromatography test. Forensic labs use the more accurate gas chromatography test for purposes of identifying ethanol levels for use in subsequent criminal proceedings.[4]

As established in the attached Declaration of Michael Copass, M.D., the medical workup Maria received at the time of her admission to the Harborview ED, as well as the physiological and metabolic processes at work in Maria's body both prior to and at the time of her admission, render unscientific and unreliable the "ETOH" and "alcohol" readings obtained from her blood serum drawn at that time and subsequently measured in the Harborview lab on the Beckman LX-20 analyzer. *See* Copass Decl. ¶ 2. Dr. Copass explains that upon admission, Maria was in a catastrophic metabolic condition. *Id.* at ¶ 4. As reflected in the records, the surgical team declared her dead and preparations were underway for the harvesting of her organs. *Id.* The blood draw from which the ETOH reading of 124 was obtained (M27689) was drawn from Maria upon her arrival at the ED. *Id.; see also* Chandler Decl. at ¶ 3, Allen Decl. Exhibit 9. Other blood was drawn simultaneous with that draw and tested on the portable whole blood analyzer that was at Maria's bedside (G7292). Copass Decl. ¶ 4, Chandler Decl. ¶ 3, Allen Decl. Exhibit 9. The results of the whole blood analysis conducted on that blood reveal the severity of

[4] *See, e.g.,* Barry K. Logan & A.W. Jones, *Endogenous Ethanol Production in a Child with Short Gut Syndrome,* Journal of Pediatric Gastroenterology 36 (3) (March 2003) 419-420 ("There are important differences between gas chromatographic and enzymatic procedures, which have an impact on this case. ***Gas chromatography (GC) is the preferred method because of its higher selectivity for ethanol,*** which allows positive identification by comparison of retention time with known standards. Mass spectral analysis would definitely prove the presence of ethanol. ***Enzymatic assays are less specific than GC for the analysis of ethanol."***).

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

Maria's metabolic crisis. Copass Decl. ¶ 4. Her hemoglobin level, a measure of the protein molecule in red blood cells which carries oxygen from the lungs to the body's tissues and returns carbon dioxide from the tissues to the lungs, was only 4.8 out of a normal range of 11.5-15.5. *Id.* Her hematocrit level, a measure of the percentage by volume of packed red blood cells in a given sample of blood after centrifugation, was a life-threatening low 15 out of a normal range of 36-45. *Id.* These values confirm that Maria was severely hypoxic, meaning Maria had an extreme deficiency in the amount of oxygen reaching her body tissues, including the vital bodily organs. *Id.* When the body is deprived of oxygenation by means of the blood, the body attempts to derive energy by metabolizing glucose stored at the cellular level. *Id.* This process leads to the buildup of lactic acid in the blood. At the time of her admission to the Harborview ED, Maria was well advanced in the process of metabolic acidosis, as indicated by the extremely high lactate level found in the blood drawn at the same time as the blood drawn on which the ETOH test was performed. *Id.* Maria's lactate level was 13.5 out of a normal range of .4 to 1.0. *Id.; see also* Allen Decl. Exhibit 9.

Dr. Copass notes that there is a well-recognized relationship in the medical literature between certain metabolic disturbances such as lactic acidosis and false positive ETOH readings when automated enzymatic assays are used to determine ETOH levels. *See* Copass Decl. at ¶ 5 and literature cited therein;[5] *see also* Hlastala Decl. at 4. The Beckman LX-20 that generated a reading of 124 on the blood serum drawn from Maria uses an enzymatic assay, so it is subject to the problem of false positive ETOH levels in the presence of lactic acidosis. Copass Decl. at ¶ 5, Hlastala Decl. at 4.

[5] Dr. Copass cites to the following medical literature relating high lactate levels to false ETOH readings: B.K. Logan & A.W. Jones, *Endogenous Ethanol Production in a Child with Short Gut Syndrome*, 36 (3) Journal of Pediatric Gastroenterology 419, 419-20 (March 2003); B. Jeffrey, S. Nine *et al. Serum-ethanol Determination: Comparison of Lactate and Lactate Dehydrogenase Interference in Three Enzymatic Assays*, 19(3) Journal Analytical Toxicology Vol. 19 (May-Jun 1995) 192-196; C. Stephen B. Karch, THE DRUG ABUSE HANDBOOK, 2d ed (CRC Press, 2006), 340-341; N.R. Badcock and D.A. O'Reilly, *False-Positive EMIT-st Ethanol Screen with Post-Mortem Infant Plasma*, Clinical Chemistry, 38:3 (1992), 434; F. Kathy Thede-Reynolds and George Johnson, *False Positive Ethanol Results by EMIT*, Clinical Chemistry, 39:6 (1993), 1143.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

Dr. Copass also testifies that there is another interfering factor that renders the ETOH test results invalid. A sudden discharge of the contents of the stomach into the large intestines caused by trauma to the torso, such as that experienced by Maria Federici, may artificially elevate the ETOH and alcohol reading taken on the patient after the time of the trauma. Copass Decl. at ¶ 6. This phenomenon is recognized in the medical literature as "gastric emptying." *Id.*[6] By suddenly dumping the contents of the stomach and any consumed alcohol into the large intestines, the body metabolizes a sudden infusion of alcohol that does not reflect the level of alcohol in the blood or blood serum at the time of the trauma. *Id.* As such, the ETOH reading obtained from Maria Federici's blood serum upon her arrival at the Harborview ED, even if not disregarded as unreliable due to her extraordinarily high lactate levels, is an unreliable indictor of her blood alcohol content at the time of her injury. *Id.*

Based on the above, Dr. Copass, as the Director of the Emergency Department, Director of Emergency Services, and Director of the Trauma Center at Harborview Medical Center, ***and the person in charge of the actions of those physicians who ordered the ETOH test and recorded the ETOH reading in Maria's medical records,*** concludes that, given the facts of Maria's condition at the time of the blood draw on which the ETOH test was conducted, ***the ETOH reading is "unreliable and unscientific and should be completely disregarded."*** Copass Decl. at ¶ 7. Dr. Copass notes that the Harborview ED does not obtain ETOH readings for any forensic purpose or for the purpose of being reliable evidence for use in a later civil or criminal proceeding. *Id.* at ¶ 3. Rather, ETOH readings are obtained for the purpose of determining whether any proposed medical treatment may be contraindicated and for the purpose of relating

[6] Dr. Copass cites to the following medical literature on gastric emptying: *See, e.g.*, Kechagias S. *et al.*, *Impact of Gastric Emptying on the Pharmacokinetics of Ethanol as Influenced by Cisapride*, Brit J Clin Pharmacol, 48 (1999) 728-732, 731 ("The higher Cmax and AUC [area under blood-ethanol curve] observed after pretreatment with cisapride can be explained by a more rapid emptying of the stomach and thereby a swifter absorption of ethanol[.]"); Edelbroek MAL *et al.*, *Effects of Erythromycin on Gastric Emptying, Alcohol Absorption and Small Intestinal Transit in Normal Subjects*, J Nucl Med 34 (1993) 582-588; Amir I *et al.*, *Ranitidine Increases the Bioavailability of Imbibed Alcohol by Accelerating Gastric Emptying*, Life Sci 58 (1996) 511-518.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

to patients who are severely inebriated that their inebriation may have contributed to their condition. *Id.* Neither of those purposes were relevant to Maria Federici's case. *Id.*

Dr. Michael Hlastala is a Professor of Physiology and Biophysics and of Medicine at the University of Washington, working in the Division of Pulmonary and Critical Care Medicine. Hlastala Decl. at 1. As established in his attached Declaration, when a patient is in hemorrhagic or hypovolemic shock due to massive loss of blood, as was Maria Federici, blood alcohol concentration can be increased and be inconsistent with the actual amount of alcohol consumed prior to measurement, thus leading to erroneous conclusions about the alcohol concentrations at the time of trauma. *Id.* at 2. Dr. Hlastala notes that this phenomenon is well established in the medical literature.[7] Based on the interference of hemorrhagic shock on blood alcohol concentrations, Dr. Hlastala concludes that the ETOH value derived from Maria Federici's blood serum is not reliable and therefore not valid. *Id.* at 5. Dr. Hlastala also shares Dr. Copass' opinion that Maria's extremely high lactate levels render the results of the Beckman LX-20's enzymatic test unreliable and invalid. *Id.* at 4.[8]

3. The blood alcohol analysis of Maria Federici's blood should not be admitted into evidence because it is "invalid" under RCW 46.61.506.

RCW 46.61.506, entitled "Persons under influence of intoxicating liquor or drug - Evidence - Tests - Information concerning tests", provides in pertinent:

> (1) Upon the trial of ***any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug,*** if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

---

[7] Dr. Hlastala cites to the following medical literature: Beck, *Blutalkohol nach Blutverlust und Blutersatz,* Munchener medizinische Wochensschrift, Vol 103 (1961) 200-203; Brettel, *Animal experiments in the blood alcohol curves in shock,* Blutalkohol, 21 (1984) 338-346; Kugelburg, *Codeine and Morphine Concentrations Increase During Blood Loss,* J. Forensic Science, 48:3 (2003) 664-667; Johnson, *The Influence of Hemorrhagic Shock on Propofol,* Anesthesiology, 99(2) (2003) 49-420.

[8] Citing to Logan and Jones, *supra* note 4.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) ***Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist any by an individual possessing a valid permit issued by the state toxicologist for this purpose.*** The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

RCW 46.61.506 (2007) (emphasis added). RCW 46.61.506(3) makes specific reference to three separate statutes: RCW 46.61.506 in its entirety "...under the provisions of this section..."; RCW 46.61.502 (entitled "Driving Under the Influence"), and RCW 46.61.504 (entitled "Physical Control of Vehicle Under the Influence"). RCW 46.61.506(3) also makes it clear that the analysis of a person's blood will not be considered "valid" under any of these statutes unless it is done by a person possessing a permit from the Washington State Toxicologist for this purpose and according to methods approved by the State Toxicologist.

Here, the analysis done at Harborview on Maria Federici's blood was ***not*** performed by a person possessing a permit from the State Toxicologist or pursuant to methods approved by the State Toxicologist. *See* Chandler Declaration at ¶¶ 5, 6. It therefore cannot be considered "valid", and should not be admitted into evidence under the clear provisions of RCW 46.61.506(3).

It is anticipated that defendants will argue that Federici's blood alcohol test result should be admissible under paragraph RCW 46.61.506(2) based upon the Division II case of *State v. Donahue*, 105 Wn. App. 67, 18 P.3d 608 (2001). That case involved a prosecution for vehicular homicide. The accident occurred in Washington, but Donahue was treated at an Oregon hospital, and ***his blood was analyzed there in a manner that comported with Oregon law.*** *Donahue*, 105 Wn. App. at 71-72. The Court in *Donahue* found that Donahue's Oregon blood alcohol test was

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

admissible under RCW 46.61.506(2) as being "other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor..."

Plaintiff has found no published Washington case allowing a blood alcohol test conducted ***in the State of Washington*** into evidence under RCW 46.61.506(2) that did not meet the requirements of RCW 46.61.506(3). Undoubtedly, this is because the restrictions in RCW 46.61.506(3) are clear regarding blood analyses done in Washington State. In *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991), a paramedic took a blood test for routine medical purposes, and the arresting officer subsequently ordered the paramedic to take a second blood test for purposes of evidence in a criminal proceeding. *Id.* at 177-178. The second sample was tested in compliance with the requirements of 46.61.506. *Id.* at 178. However, the Supreme Court affirmed the trial court's granting of a motion to ***exclude any reference to the first test or to the results of its analysis on the basis that it was drawn for routine medical purposes.*** *Id.* at 179-180.

RCW 46.61.506(2), which does ***not*** mention blood alcohol testing, cannot be read to trump RCW 46.61.506(3), which specifically references blood alcohol testing and establishes requirements for validity established by the Washington State Toxicologist. Any blood alcohol test conducted in the State of Washington would have to comport with those requirements. *Donahue* stands only for the proposition that a blood alcohol test conducted ***outside*** the State of Washington, ***but pursuant to the laws of another state,*** may be admissible in evidence under RCW 46.61.506(2). Using the *Donahue* case to support the admissibility of Maria Federici's blood alcohol analysis, which was conducted in Washington under the authority of Washington law, would render paragraph 3 of RCW 46.61.506 meaningless. In *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d (141) (2004), the Supreme Court of Washington noted that the Court of Appeals in *Donahue* had allowed admission of the Oregon blood alcohol analysis because it was not conducted under the authority of Washington law:

> *Donahue* involved the admissibility of a blood test done on an injured driver for the purposes of medical diagnosis and treatment in an Oregon hospital following a

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

> fatal car accident in Washington. Donahue, 105 Wn. App. At 70. Not surprisingly, the Oregon hospital did not use the standards set forth by the Washington State Toxicologist. The Court of Appeals determined that the test was admissible as "other evidence" of intoxication even though it did not meet the standards laid out under Washington law because it was not conducted under the authority of Washington law. Donahue provides scant support for admitting non-conforming breath tests [administered in the State of Washington].

Clark-Munoz, 152 Wn.2d at 49-50 (emphasis added).

In sum, the ruling in *Donahue* does not apply to this case because: (1) allowing a Washington blood analysis into evidence under RCW 46.61.506(2) would render RCW 46.61.506(3) meaningless; (2) for the reasons set forth in the preceding section, the test of Maria Federici's blood was not scientifically valid and therefore not "other competent evidence"; and (3) there is no "other evidence" that Maria Federici was intoxicated or in any way impaired at or prior to the time of her injury. Moreover, other courts have held it reversible error to apply a statutory presumption of intoxicate based on a serum-blood test result. *See, e.g., People v. Green*, 689 N.E.2d 385, 390 (Ill. App. Ct. 1997) (trial court committed plain error by admitting expert's testimony that defendant's blood serum-alcohol concentration level meant that he was legally intoxicated at time of automobile accident; when converted to proper whole blood equivalent, .114 serum alcohol concentration fell to level that was not a basis upon which to conclude nor presume legal intoxication) (attached as Allen Decl. Exhibit 11).

C. Proximate Cause

Defendants have alleged the affirmative defenses of comparative fault/contributory negligence and Plaintiff's intoxication under RCW 5.40.060(1).[9] With respect to both affirmative defenses, Defendants have the burden of proving that any alleged fault on the part of Maria Federici, including her alleged intoxication, was the proximate cause of her injuries. *See, e.g.,*

Hickly v. Bare, 135 Wn. App. 676, 687, 145 P.3d 433 (2006) ("Under the plain language of

[9] *See* UHI's Second Amended Answer to Complaint, attached as Allen Decl. Exhibit 12 at 10-11; UHW's Second Amended Answer to Complaint, attached as Allen Decl. Exhibit 13 at 14; Capron Holding's Second Amended Answer to Complaint, attached as Allen Decl. Exhibit 14 at 16.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

RCW 5.40.060(1), where the *plaintiff* was intoxicated, the plaintiff's intoxication is a complete defense precluding recovery of damages altogether ***if*** the defendant establishes that (1) the plaintiff was under the influence of alcohol or drugs when injured; (2) ***the plaintiff's intoxication proximately caused her own injuries***; and (3) the plaintiff was more than 50 percent comparatively at fault in causing her injuries.") (emphasis added); WPI 21.03, "Burden of Proof on the Issues—Contributory Negligence—No Counterclaim" (2005) ("The defendant has the burden of proving both of the following propositions: First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent; Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own *[injuries] [and] [property damage]* and was therefore contributory negligence."). Here, because any such claim must necessarily be based on speculation and conjecture, Defendants cannot meet their burden, and the Court should strike the affirmative defenses.

In *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281-282, 78 P.3d 177 (2003), Division I of the Court of Appeals summarized Washington law regarding the requirements for proving proximate causation:

> "A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred." *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wash.App. 326, 330, 966 P.2d 351 (1998) (citing *Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 935, 653 P.2d 280 (1982))[.]
>
> ***But evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility***. *Reese v. Stroh*, 128 Wash.2d 300, 309, 907 P.2d 282 (1995). ***A jury is not permitted to speculate on how an accident or injury occurred when causation is based solely on circumstantial evidence and there is nothing more substantial to proceed on than competing theories*** with the defendant liable under one but not the other. *Sanchez*, 95 Wash.2d at 599, 627 P.2d 1312; *Jankelson v. Sisters of Charity*, 17 Wash.2d 631, 643, 136 P.2d 720 (1943).

Conrad, 119 Wn. App. at 281-282; *see also Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 258, 978 P.2d 505 (1999) (a finding of causation cannot be made on the basis of "mere speculation"). In order to make the required showing, a party must set forth "specific and

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

material facts to support [the causation] element of his or her prima facie case." *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Summary judgment as a matter of law is appropriate, and submission of the issue of proximate causation to the jury is not warranted, where there exist "too many gaps in the chain of factual causation." *Walters v. Hampton*, 14 Wn. App. 548, 555, 543 P.2d 648 (1975). Where inferences from the facts are remote, factual causation cannot be established as a matter of law, and the Court can rule accordingly. *Id.* at 556.

Here, Defendants have alleged that Maria Federici was contributorily negligent by failing to take any evasive action ***prior*** to making contact with the entertainment center (disclosed opinions of John Habberstad, attached as Allen Decl. Exhibit 15) and for failing to take any evasive action ***after*** making contact with the entertainment center but prior to the entertainment center crashing into her face and nearly decapitating her (disclosed opinions of Dr. Catherine Corrigan, attached as Allen Decl. Exhibit 16). These allegations cannot rise above the level of speculation and conjecture, and must be dismissed as a matter of law.

As established by the attached Declaration of Marc Firestone, Plaintiff's expert witness regarding accident reconstruction, it is impossible for a reasonably prudent accident reconstruction expert, applying the standard of care and principles applicable to the profession, to reconstruct with any reasonable scientific basis the circumstances of the accident in which the entertainment center that exited from the U-Haul open trailer towed by James Hefley collided with the Jeep Liberty driven by Maria Federici on February 22, 2004. *See* Firestone Decl. at ¶ 4. Because there is no evidence that can be scientifically analyzed and no identified witness saw the entertainment center exit the trailer, and further no one saw what happened to the entertainment center immediately after it exited the trailer, it is impossible to determine the distance between the U-Haul trailer and Maria's vehicle, or the time available to Maria to react to the entertainment center's exiting of the U-Haul trailer. *Id.* Moreover, it is impossible to reconstruct, with any degree of reasonable scientific certainty, the physical orientation of the entertainment center as it exited the vehicle or the position of the entertainment center in the roadway at the time of the collision. *Id.* Based upon the standard of care and the principles

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

applicable to the profession of accident reconstruction, any opinions offered on these topics would necessarily amount to ***nothing more than speculation, conjecture, or mere possibility.*** *Id.* at ¶¶ 4, 5. Moreover, it is also Dr. Firestone's professional opinion that any opinion offered as to the specific circumstances of the collision of the entertainment center with Ms. Federici's vehicle, her available reaction time, and the options available to her at the time of the collision to avoid or mitigate her catastrophic injuries, would necessarily be based on ***nothing more than speculation, conjecture, or mere possibility.*** *Id.* at ¶ 6.

With respect to the issue of Maria's alleged intoxication, courts have found that, even where there is evidence of pre-accident consumption of alcohol, the plaintiff's conduct is too remotely related to the accident to satisfy the requirements of proximate cause. In *Lewis v. Horace Mann Ins. Co.*, 442 So.2d 526 (La. Ct. App. 1983) (attached as Allen Decl. Exhibit 17), the Court of Appeal of Louisiana for the First Circuit reversed a trial court's finding that alcohol was a substantial contributing cause of an accident, when the plaintiff testified that the defendant was not using his turn signal and was within 20 or 30 feet when he suddenly turned into the plaintiff's vehicle. *Id.* at 528. The Court noted the following:

> We agree with the trial judge's factual finding that the plaintiff was under the influence of alcohol to some degree and was exceeding the speed limit. However, the record is void of evidence that these were substantial factors contributing to the accident. ***We find absolutely no evidence offered by the defendant that tends to prove that the accident could have been avoided had the plaintiff been going within the posted speed limit or if he had not consumed alcohol. The only evidence offered as to the extent of plaintiff's intoxication was plaintiff's own admission that he consumed three to five beers during the four hour period preceding the accident and the investigating officer's testimony that he smelled alcohol on the plaintiff's breath following the accident.*** Plaintiff testified he could have been going as fast as 45 miles per hour-10 miles in excess of the posted speed limit. Lamar Picou, a witness in the vicinity, estimated the plaintiff's speed to be "well over 55" by how it sounded as plaintiff drove by. However, Picou did not see the accident. ***The defendant never observed plaintiff prior to the accident...***
>
> ***Based on this evidence alone, we cannot conclude that the plaintiff's speed nor the fact that he had consumed an undetermined amount of alcohol was a substantial contributory cause of the accident. We therefore find it necessary to***

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

> ***conclude that the negligence of defendant, Paul A. Ivanyisky, was the sole legal and proximate cause of the accident.***

Lewis, 442 So.2d at 528. Similarly here, the only available eyewitness testimony is that Maria was driving within the speed limit and in a prudent manner. Moreover, contrary to the facts in *Lewis*, here the undisputed evidence is that there was ***no smell of alcohol*** on the plaintiff's breath following the accident.

Here, it is patently impossible in the first instance for the Defendants to reconstruct, in a manner that would satisfy the foundational requirements for admissibility of scientific expert opinion, what would be required of a reasonably prudent driver in Maria Federici's situation in order to avoid a claim of contributory negligence. Lacking that foundational requirement, it is ***equally*** impossible for Defendants to establish that Maria's alleged intoxication proximately caused her to be unable to take the unspecified actions expected of a non-intoxicated driver. On these issues Defendants can offer only rank speculation. As such, their affirmative defenses must be stricken for Defendants' failure to fulfill their burden of establishing proximate cause with regard to those affirmative defenses.

D. Even if evidence of Maria Federici's consumption of one glass of wine prior to her injuries and the results of the ETOH test were otherwise admissible, the Court should exclude them from introduction into evidence under ER 403 due to their lack of probative value on the issue of proximate cause, and thereby strike Defendants' specified affirmative defenses.

Washington Evidence Rule 403 provides the following:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403 (2007). Under ER 403 , even relevant evidence may be excluded if its prejudicial effect outweighs its probative value. "Evidence may be unfairly prejudicial under ER 403 if it is evidence 'dragged in' for the sake of its prejudicial effect or is likely to trigger an emotional response rather than a rational decision among the jurors." *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 618, 20 P.3d 496 (2001). A trial court's decision to exclude evidence under

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

ER 403 is reviewed for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). Abuse of discretion occurs if the decision is "manifestly unreasonable or based upon untenable grounds or reasons." *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d 520 (1990) (quoting *Davis v. Globe Machine Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)).

On similar facts, other courts have excluded evidence of a plaintiff's alcohol consumption where the introduction of the evidence at trial would have a prejudicial effect that substantially outweighed the evidence's alleged probative value. *Straley v. United States*, 887 F.Supp. 728 (D.N.J. 1995) (attached as Allen Decl. Exhibit 18), is a case directly on point. In that case, Judge Debevoise of the United States District Court for the District of New Jersey excluded, under ER 403, evidence of the plaintiff's blood alcohol level, which was, on the basis of the serum test taken at the hospital, 147 at the time of the accident, ***higher than the 124 serum blood value reported on Maria Federici in this case.*** *Straley*, 887 F.Supp. at 732. Judge Debevoise noted that there was eyewitness testimony that Straley did not appear to be intoxicated at the time of the accident and no "on-the-scene evidence that Straley was actually impaired," two facts that are again true of Maria Federici. *Straley*, 887 F.Supp. at 739. Because of the necessity of converting serum alcohol values into whole blood values, even the defense experts in *Straley* agreed that the .147 serum blood alcohol level taken at the hospital was probably an artificially high reading, due to Straley's considerable loss of blood following the accident. As such, the blood serum evidence of Straley's alleged impairment was excluded under ER 403. The Court also rejected the alleged relevance of the evidence to the issue of proximate cause, holding it was "not sufficiently corroborative of actual impairment and, therefore, its probative value is substantially outweighed by its potential for unfair prejudice." *Id.* Finally, ***because the Court had ruled inadmissible any evidence that Straley was intoxicated at the time of the accident, the Court also struck the products liability defendants' affirmative defense of Straley's comparative negligence.*** *Id.* at 742.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

Kempe v. Dometic Corp., 866 F.Supp. 817 (D. Del. 1994) (applying Maryland law) (attached as Allen Decl. Exhibit 19), is another case on all fours with the instant case. In *Kempe*, the husband and wife sued the manufacturer of an alcohol-fueled stove in strict liability when the wife was severely burned while using the stove on a sailboat. *Kempe*, 866 F.Supp at 818-819. The plaintiff had consumed two vodka tonics approximately 2.5 to 3 hours prior to the accident. *Id.* at 818. Her friends on an adjoining boat, one of whom was a nurse, testified that immediately after the accident the plaintiff's breath did not smell of alcohol. *Id.* at 819. A blood serum alcohol test conducted approximately two hours after the accident revealed a serum alcohol level of 75 mg/dl. *Id.* The defendants pleaded an affirmative defense of plaintiff's contributory negligence due to alcohol impairment, and the plaintiffs sought to exclude the blood serum reading as well as the evidence of alcohol consumption prior to the accident. *Id.* at 818-819. Plaintiffs presented expert testimony that the blood serum alcohol value was unreliable due to Ursula Kempe's metabolic condition at the time of the blood draw, causing an artificially elevated measurement of alcohol, and that the blood serum value would have to be converted into a whole blood value in order to have any meaning to the jury. *Id.* at 820. Applying Fed.R.Evid. 403, Senior District Judge Shwartz excluded the results of the blood serum tests, noting the following:

> Plaintiffs first contend that the extent and severity of burns suffered by Ursula Kempe produced an artificial elevation of the serum alcohol level...
>
> Muddying the waters even further is the fact that the alcohol test was performed on serum and not whole blood. Serum has a higher percentage of water than whole blood, ***thus the percentage of alcohol in serum will be higher than what would have been found in a sample of whole blood.*** The benchmark assay for determining intoxication in Maryland, as in most states, is performed on whole blood, not serum.
>
> [...]
>
> Expert testimony would be required for the jury to correlate the result of the serum alcohol test to the degree of possible impairment or intoxication. ***Expert testimony would also be necessary on the issues of fluid loss and hemoconcentration from burn trauma and shock, hemodilution from***

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

> ***intravenous fluid administration, and appropriate conversion factors for serum to blood alcohol equivalents.***
>
> There is no supplementary independent evidence that plaintiff was intoxicated or impaired. Adding this to all of the above considerations makes it sufficiently clear that ***the probative value of the serum alcohol is outweighed by its potential for unfair prejudice.***
>
> ***Admitting evidence of plaintiff's serum alcohol would necessitate a mini-trial on the issue of the validity, extrapolation, conversion and contextual meaning of plaintiff's serum alcohol level. Such conjectural evidence would be highly prejudicial to plaintiff and only serve to confuse and distract the jury from the pivotal issue in this case, i.e., whether defendant is strictly liable in tort for failure to provide warnings regarding the use of its product.***

Kempe, 866 F.Supp. at 820-821 (emphasis added, citations omitted). *See also Rovegno v. Geppert Bros., Inc.*, 677 F.2d 327, 331 (3d Cir. 1982) (in wrongful death and survival action by widow of deceased truck driver, trial court did not abuse its discretion in excluding evidence of plaintiff's decedent's blood alcohol level of .158 at time of accident in view of absence of evidence that driver was unfit to drive, despite jury's ultimate finding that driver was negligent and despite evidence that truck was partly in passing lane at time of impact.).

Here, there is little, if any, probative value to the evidence Defendants seek to introduce of Maria Federici's consumption of alcohol prior to the accident that caused her injuries and the ETOH level obtained from an enzymatic test of her blood serum. However, given the overwhelmingly negative perception of alcohol-impaired drivers in our society, there is ***significant*** risk that an emotional response rather than a rational decision will be triggered among the jurors should that evidence be introduced. Moreover, the blood serum value reflects a ***higher number*** than Maria Federici's actual whole blood alcohol content, if any. The medical literature notes that the conversion factor for translating serum blood alcohol values into whole blood alcohol values ranges as high as 1.35.[10] Moreover, as noted by Wu and McKay (eds), *Recommendations For The Use Of Laboratory Tests To Support Poisoned Patients Who Present*

[10] *See, e.g.*, Walter J. Frajola, *Blood Alcohol Testing in the Clinical Laboratory: Problems and Suggested Remedies*, Clin. Chem., 39(3) (1993) 377-379, 378 (attached as Allen Decl. Exhibit 20).

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

To The Emergency Department, Monograph, National Academy of Clinical Biochemistry (2005), 23 (attached as Allen Decl. Exhibit 21):

> The water content for serum or plasma is typically 98%, whereas for whole blood, the water content is ~86% (with a normal hematocrit). Therefore, whole blood alcohol concentrations are lower than serum or plasma values. ***However, a constant conversion factor cannot be applied because the hematocrit can dramatically change from individual to individual.*** It should be noted that these legal definitions have little or no clinical meaning in the ED.

These issues have a high potential to confuse and mislead the jury as well as prejudice Plaintiff:

> The difference between a serum alcohol and a whole-blood alcohol concentration has been the subject of many courtroom arguments. When this difference is not understood by the judge, the attorneys, the jurors, and, sometimes, not even by clinical chemists, the problem can result in a serious miscarriage of justice.[11]

As such, and in keeping with the federal courts that have analyzed the issue on very similar facts, the Court should exclude the evidence and strike Defendants' affirmative defenses of comparative negligence and "per se" negligence based on alleged intoxication.

VI. CONCLUSION

For the aforementioned reasons, the Court should grant Plaintiff's Motion. A Proposed Order accompanies the Court's working copy of this motion.

DATED this 8th day of June, 2007.

BENNETT BIGELOW & LEEDOM, P.S.

By _____
William J. Leedom, WSBA #2321
Elizabeth A. Leedom, WSBA #14335
Timothy E. Allen, WSBA #35337
Attorneys for Plaintiff

[11] Frajola, Clin Chem 39(3) at 378.

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986

SIMON H. FORGETTE, P.S.

By _____
Simon Forgette, WSBA #9911
J. Murray Kleist, WSBA #1465
Attorneys for Plaintiff

w:\wdclient\2153\00000\mm714720.doc

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 F: (206) 622-8986