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El Paso County 2017CV31772	
Plaintiff-Appellant: **CELENA ESTHER JEAN BERNACHE** v. **Defendant-Appellee:** **GARY BROWN**	▲ **COURT USE ONLY** ▲
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PLAINTIFF'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

■ It contains 3160 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

■ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

□ In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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II. ARGUMENT

Plaintiff-Appellant Celena Esther Jean Bernache, by and through her Attorneys McDivitt Law Firm, P.C. submit the following Reply Brief pursuant to C.A.R. 31 (a). In the Opening Brief, Plaintiff-Appellant raised two intertwined issues: a hearsay statement and juror misconduct. Defendant-Appellee has failed to directly address either of those issues or the material effect on the outcome of the trial.

A. PLAINTIFF-APPELLANT STIPULATED TO THE TRAFFIC ACCIDENT REPORT, NOT THE HEARSAY STATEMENT BY THE UNIDENTIFIED WITNESS THEREFORE PLAINTIFF-APPELLANT DID NOT WAIVE THE ISSUE FOR APPEAL

Plaintiff-Appellant does not dispute that we stipulated to the admission of the traffic accident report. In fact, we had no objection to the admission of the traffic accident report. The Motion *in Limine* was not to strike the traffic accident report, but the hearsay statement contained within the traffic accident report. This appeal is *not* about the admission of the Traffic accident report, it is about the hearsay statement contained within the traffic accident report.

The argument that Plaintiff-Appellant stipulated to the entire traffic accident report ignores the real issue. Prior to any stipulations, Plaintiff-Appellant raised the

issue of the hearsay statement within the traffic accident report in a Motion *in Limine* and in three separate objections during the preservational deposition Defendant-Appellee's witness, Dr. Stanley Ginsburg. *See Plaintiff's Amended Opening Brief; CF, pp 181-185; CF, pp 278-281.* The Court ruled on the motion (but failed to address the outstanding motions made during Dr. Ginsburg's testimony), ordering that the statement included in the report was admissible with the appropriate certificate and cover sheet. *CF, pp 343.*

It was clear from the Court's order that the entire traffic accident report was coming into evidence, and the inclusion of a certificate and/or cover sheet would not change the content of the report. The certificate and cover sheet would not provide new information that suddenly makes the hearsay statement of an unknown, unidentified witness an admissible statement under the rules of evidence.

Given that the Court *had already ruled on the* issue, objecting and fighting about it would have been a waste of the Court and the Jury's time. Any further objection on an issue previously raised, ruled on, and preserved for the record would have been frivolous at best, and unethical at worst. Courts in Colorado favor stipulating to as many exhibits as possible before trial to make for a more efficient presentation of evidence. There was no reason to not stipulate to a traffic accident report that was already ruled admissible in its entirety.

B. PLAINTIFF-APPELLANT DID NOT OPEN THE DOOR FOR THE HEARSAY STATEMENT TO COME IN BECAUSE THE TRIAL COURT ALREADY RULED THAT IT WAS ADMISSIBLE AND THE APPEAL IS NOT BARRED BY THE DOCTRINE OF INVITED ERROR.

This appeal is not barred by the Doctrine of Invited Error for the sheer fact that no error was invited in this case. Defendant-Appellee argues that the error was invited because the traffic accident report was stipulated to, discussed in opening arguments, and after the stipulations, Plaintiff-Appellant took responsibility for the jury notebooks.

Objections to the hearsay statement had been raised several times (as noted above and below) prior to the Court's ruling. Any use of the hearsay statement was not invited by Plaintiff-Appellant or otherwise induced by the actions of Plaintiff-Appellant as implied by Defendant-Appellee, rather the use was sanctioned by the Court over Plaintiff-Appellant's explicit objection.

Counsel had no recourse other than to take the evidence as the Court allowed it in. Plaintiff-Appellant had no choice but to discuss the statement in the opening statement. As a matter of trial strategy, not discussing the statement would be ignoring the entire basis of the Defendant-Appellee's defense. Counsel had no

justification to not stipulate to a document that had already been ruled admissible by the Court, and as such, should have been included in the jury notebooks.

Plaintiff-Appellant did not open the door to the hearsay statement, nor is this appeal barred by the Doctrine of Invited Error.

C. PLAINTIFF-APPELLANT MADE THREE SEPARATE CONTEMPORANEOUS OBJECTIONS DURING THE PRESERVATIONAL DEPOSITION OF DR. STANLEY GINSBURG

The argument that Plaintiff made no contemporaneous objections is patently false. Plaintiff-Appellant's objections were made during the preservation testimony of Dr. Stanley Ginsburg.

Objection 1:

> And let's get the exact language for the jury. You wrote, "Based on the information available in these reports, it is highly likely that a medical event took place at the time of the accident, which resulted in the patient losing control of his vehicle. There is a comment from an observer whose identity is not known that raises suspicion that, in fact, an event took place which resulted in altering consciousness of Mr. Brown, but this is not the only reason I am stating that."
>
> MR. LOMENA: I'm going to object. That statement is likely hearsay.
> MR. BURTZOS: I'm going to continue.

MR. LOMENA: I'm talking about the statement by the individual who said he didn't see the medical event. *See TR 01/29/19, pp 30:18-25; pp 31: 1-5*[1]

Objection 2:

All right. And then, as to the report by the witness, how does that corroborate your opinion?
MR. LOMENA: I'm just going to object because I believe that the report from the witness is hearsay and not admissible. *See TR 01/29/19, pp 31:11-14*[2]

Objection 3:

And just to wrap up here – and you know we've got the objection on the hearsay – your opinion 1 is that something happened and he lost consciousness and you also have information on the witness that something appeared to have happened to that driver, correct?
That's correct.
MR. LOMENA: Not to belabor the point, but I'm going to make the objection, obviously, for the record. *See TR 01/29/19, p 33:25; pp34: 1-6*

The objections were not edited out of the video. As such, the objections should have been ruled on. However, Judge Miller having already ruled on the admissibility of the statement, improperly ignored the objections.

Plaintiff-Appellant *did* raise contemporaneous objections and preserve the issue prior to the Court's ruling on the statement. As such, Defendant-Appellee's

[1] Here, Plaintiff-Appellant went so far as to clarify that the hearsay objection was not to the report itself *but rather the specific statement*.
[2] Again, Plaintiff-Appellant made it clear, contemporaneously, the issue raised is with the individual statement.

argument that the Plaintiff-Appellant failed to make any contemporaneous objections is moot.

D. DEFENDANT-APPELLEE DOES NOT ADDRESS THE MAIN ISSUE OF THE ADMISSIBILITY OF THE HEARSAY STATEMENT

Defendant-Appellee fails to address the admissibility of the hearsay statement because the law is clear that each statement in the traffic accident report has to meet its own hearsay exception. It is undisputed that the statement by the unidentified witness does not meet any hearsay exception. The Court even noted this fact in its ruling on this issue. *CF, pp* 343.

Under both C.R.E. 803(8) and FRE 803(8) a statement to a police officer is not an exception to the hearsay rule. This issue was addressed in Leiting v. Mutha, 58 P.3d 1049, 1053 (Colo.App. 2002) and Parsons v. Honeywell, Inc., 929 F.2d 901 (2d Cir.1991). In Leiting, the Court held that Statements are not automatically admissible under C.R.E. 803(8) merely because they are contained in a public report. In *Parsons* the Court held that while the traffic accident report itself would be admissible as a public record under Fed.R.Evid. 803(8), statement made to officer was inadmissible unless it qualified under some other exception to the hearsay rule. Since C.R.S § 42-2-121 does not address witness statements, we should follow the guidance provided to us by the Colorado Court of Appeals in Leiting v. Mutha, 58

P.3d 1049, 1053 (Colo.App. 2002) and The United States Court of Appeals, 2nd Circuit in Parsons v. Honeywell, Inc., 929 F.2d 901 (2d Cir.1991).

Based on the above, the District Court erred in allowing the statement from the unidentified witness to be admitted at trial

E. DEFENDANT-APPELLEE DOES NOT ADDRESS THE ISSUE OF WHETHER THE HEARSAY STATEMENT IS MORE PREJUDICIAL THAN PROBATIVE

Again, Defendant-Appellee does not address the fact that the hearsay statement was demonstratively more prejudicial than probative in the Response Brief. As stated in the opening brief, the outcome of the trial was based solely on the statement that the Defendant-Appellee looked like he was having a heart attack. There was no evidence at trial that the Defendant-Appellee had a heart attack or any other sudden medical emergency.

The Jury was swayed, and prejudiced, by the medical opinion of the unidentified witness that Defendant-Appellee looked like he was having a heart attack. Before a witness may offer opinion testimony, the proponent of the testimony must demonstrate, to the court's satisfaction, that the witness is qualified to offer such opinions, that the opinions themselves are reliable, and that the opinions will help the jury determine a fact in issue. *See* C.R.E. 702; People v. Lanari, 926 P.2d

116, 120 (Colo. App. 1996); People v. Ramirez, 155 P.3d 371, 378 (Colo. 2007); C.R.E. 104. Defendant-Appellee offers no evidence or argument that the unidentified witness was qualified to give the opinion that Defendant-Appellee was having a heart attack.

Plaintiff-Appellant does not know anything about this witness, including whether he/she is a physician, nurse or other medical professional, or if they were even able to see Defendant-Appellee at the time of the accident. The witness is not an expert and is not qualified to give his opinion as to whether the Defendant-Appellee was having a heart attack. The Defendant-Appellee should have been precluded from offering the statement or any testimony about it at trial. People v. Shreck, 22 P.3d 68 (Colo. 2001), as modified (May 14, 2001); C.R.E. 702.

F. PLAINTIFF-APPELLANT DID NOT WAIVE FURTHER VOIR DIRE JUROR LANGFELS WHEN STATED SHE KNEW OF THE WITNESS AND THIS STATEMENT HAD A MATERIAL EFFECT ON THE OUTCOME OF THE TRIAL

Plaintiff-Appellant did not waive or otherwise chose to not conduct additional *voir dire* in order to determine whether or not there was a bias or other grounds for exclusion of Juror Langfels as Defendant-Appellee claims. Plaintiff-Appellee

questioned Juror Langfels on the specific issue of bias and impartiality, and was able to illicit statements from Juror Langfels during *voir dire*.

Defendant-Appellee is absolutely correct in stating that *voir dire* is vitally important "to develop the whole truth concerning the prospective juror's state of mind," Photostat Corp. et al. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964).

The usefulness of *voir dire* hinges entirely on prospective jurors *telling the truth during questioning*. In order to determine whether or not a challenge for cause is appropriate or if a preemptory strike is necessary, counsel *must* rely on the information provided by the prospective jurors themselves. The Court and counsel has no ability to fact check or otherwise verify the information provided other than asking for additional information from the prospective juror. Which is what happened in this case.

After Juror Langfels admitted she knew Officer Steele, she was questioned further by the Court, and then by counsel. She stated that she knew of him but had no relationship with him herself, and that her husband's relationship with the witness would not affect her decision making abilities. *See TR 01/28/19, p 44:5-12.* As previously noted in the Opening Brief, this relationship radically changed upon the conclusion of the trial.

Given the additional questioning first by the Court, and then by counsel, Plaintiff-Appellant did not waive *voir dire*. Counsel was able to question and illicit a statement from Juror Langfels regarding Officer Steele that turned out to be false, and had a material effect on the outcome of this case. It cannot be stressed enough that decisions regarding *voir dire* rest entirely on the information that prospective jurors share.

Had Ms. Langfels been honest with Court about her relationship with Corporal Steele, counsel could have moved to strike for cause, or at the very least, allowed Plaintiff-Appellant to use a peremptory strike to remove Ms. Langfels from the jury pool.

Ultimately, the issue of Juror Langfels dishonesty would likely not had an impact on the outcome of the trial if not for the hearsay statements presentation at trial. Defendant-Appellee's entire case-in-chief rested on the hearsay statement given to Officer Steele, and Juror Langfels closer than stated relationship with Officer Steele likely affected the credibility and weight given to that hearsay statement.

III. CONCLUSION

Defendant-Appellee ignores the main issue of the admissibility of the hearsay statement because it is undisputed based on both C.R.E 803 (8) and Fed.R.Evid. 803(8) that the statement should have been excluded. Arguments that Plaintiff-Appellant stipulated to the report and opened the door fail because the trial court explicitly and incorrectly ordered that the statement was admissible prior to the trial. As such, Plaintiff-Appellant chose not to waste the Court's time by making them lay foundation for admissibility and just stipulated. Knowing that the hearsay statement was going to be admitted into evidence, Plaintiff-Appellant had to address it in his opening. To ignore it would have been detrimental to the case.

The argument that Plaintiff-Appellant made no contemporaneous objections about the statement was just wrong. The objections made in the deposition of Dr. Stanley Ginsburg were ignored and not ruled on by the trial court.

As stated in the opening brief, it is undisputed that the statement is hearsay and does not fall into any statutory hearsay exception. The District Court's decision to rely on C.R.S § 42-2-121, which only allows for the admission of the traffic accident report but is silent on the witness statements contained within is erroneous.

The admission of the statement from the unidentified witness was more prejudicial than probative. The District Court allowed the jury to hear essentially an

expert opinion about Defendant-Appellee's medical condition without knowing anything about the witness. Without any evidence of any medical credential and without even knowing the location of the witness prior to the incident. The Defendant-Appellee's entire defense was based on the unidentified witness statement that he looked like he was having a heart attack. There was no other evidence presented of a medical emergency. Defendant-Appellee's Doctor, Stanley Ginsberg, could not testify with any certainty that there was any medical emergency. *See TR 01/29/19, p 63.* The jury relied solely on the statement from the unidentified witness to decide the Defendant-Appellee had a medical emergency.

The admission of the unidentified witness statement was improper because it does not meet the standards set by the Colorado Rules of Evidence, was speculative, not reliable and more prejudicial than probative. The prejudicial nature of this admission was compounded by the dishonest conduct of a juror during *voir dire*.

Appellant request this Court to remand this case back to the District Court for re-trial and to preclude any testimony about the statement made in the traffic accident report by the unidentified witness.

Respectfully submitted, this 14th day of October 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff-Appellant's Reply Brief was served via CCEF upon the following on this 14th day of October 2019.

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