COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

Deann I. Tinnon,	)	
	)	
Appellant,	)	No. 45934-5-II
	)	
v.	)	RESPONDENT'S RAP 18.9
	)	MOTION TO DISMISS
White River School District,	)	APPEAL AS FRIVOLOUS;
	)	MOTION FOR ATTORNEYS'
Respondent.	)	FEES; AND,
	)	ALTERNATIVELY,
	)	RAP 18.14 MOTION ON
	)	THE MERITS

I. IDENTITY OF MOVING PARTY

Respondent White River School District asks for the relief designated in Part 2.

II. STATEMENT OF RELIEF SOUGHT

Respondent seeks:

1. Dismissal of plaintiff's appeal as frivolous in accordance with RAP 18.9(c) because all of the assignments of error are contrary to controlling authority;

2. An award of attorneys' fees incurred on this appeal as sanctions; and

3. Alternatively, dismissal on the merits in accordance with RAP 18.14(a).

III. FACTS RELEVANT TO MOTION

This appeal arises from a personal injury action from a two vehicle collision. Appellant Deann Tinnon was the favored driver when she approached an uncontrolled intersection where a White River School District bus stopped. The bus driver testified that after he stopped the bus, he checked for traffic in both directions. RP, Vol. 5, at 11. There was no traffic, and he proceeded to make a left turn into the intersection. RP, Vol. 5, at 11. The bus driver was in the process of straightening the bus out when he first saw plaintiff's car approaching. RP, Vol. 5, at 12. He attempted to accelerate the bus, but was not able to avoid the collision. RP, Vol. 5, at 12.

Respondent White River School District denied that the bus driver was negligent and asserted plaintiff's comparative fault as an affirmative defense. CP 2. During trial, appellant moved for a directed verdict on the issue of comparative fault or contributory negligence. The court denied that motion.

The court's instructions to the jury included Washington pattern instructions on negligence, proximate cause and comparative fault. CP 12. The court also gave instruction no. 15 which describes the duty of the drivers at an uncontrolled intersection. That instruction states that the primary duty rests upon the driver of the entering vehicle, which in this

case was the bus driver. CP 12. The court's instruction no. 15 was proposed by plaintiff as its instruction no. 29 and is a modification of WPI 70.02.05. The only modification was the substitution of the words "side road or residential district" in the instruction given for the words "private road or driveway" in the pattern instruction.

The trial court did not give plaintiff's proposed instruction no. 15 which includes a statement that it is not sufficient to attempt to prove comparative negligence by means of split second computations of time, speed and/or distance. CP 3.

The court also gave the jury a special verdict form. CP 14. The first question the jury was asked to answer on that form was:

> Was the defendant negligent?
>
> ANSWER: _____ (Write "yes" or "no")
>
> (DIRECTION: If you answered "no" to Question 1, sign this verdict form and do not answer any more questions. If you answered "yes" to Question 1, answer Question 2.)

The jury answered question 1, "No" and in accordance with the court's instruction, did not answer any further questions, including those pertaining to the issue of whether plaintiff was contributorily negligent. CP 14.

Appellant's opening brief contains three assignments of error, all of which pertain only to the issue of plaintiff's contributory negligence.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Any Error by the Trial Court Related to the Issue of Contributory Negligence was Harmless Because the Jury Never Reached That Issue.

Appellant's opening brief contains the following assignments of error:

> 1. The trial court erred in instructing the jury on contributory negligence;
>
> 2. The trial court erred when it denied the plaintiff's motion for directed verdict on the issue of contributory fault; and,
>
> 3. The court erred when it refused to submit Plaintiff's proposed jury instruction 15, which appellant says "explained the juxtaposition of contributory negligence, reasonable reaction time and point of notice."

Appellant's Opening Brief, p. 3. There are two reported Washington decisions directly on point that provide controlling authority that any error by the trial court related to the issue of contributory negligence must be considered harmless because the jury never decided that issue.

In *Bertsch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982), the appellant contended that the trial court erred by denying her motion for directed verdict on the issue of contributory negligence because there was no evidence from which the jury could reasonably determine she was contributorily negligent in a manner which caused or contributed to her injury. *Bertsch*, at 91. Appellant in that case, like appellant here, also contended that the jury instructions regarding contributory negligence were such prejudicial error that a new trial was warranted.

The *Bertsch* court first noted the rule on contributory negligence stated in *Crisp v. Nursing Homes, Inc.*, 15 Wn. App. 599, 605, 550 P.2d 718 (1976), quoting from *Bauman v Complita*, 66 Wn.2d 496, 497, 403 P.2d 347 (1965):

> The issue of contributory negligence is generally one for the jury to determine from all of the facts and circumstances of the particular case. It is only in rare cases that the court is justified in withdrawing the issue of contributory negligence from the jury.

Bertsch, at 91.

The *Bertsch* court then held that if there was any error by the trial court, it was harmless.

> The jury found no negligence on [defendant's] part and, therefore, never reached the issue of Bertsch's contributory negligence. The instruction and special verdict form used clearly informed the jury that the issue of contributory negligence was not to be considered until an initial

> conclusion as to [defendant's] negligence had been made. **Because the jury found no negligence on [defendant's] part, they presumably never reached the issue of Bertsch's contributory negligence.** See *Municipality of Metropolitan Seattle v. Kenmore Properties, Inc.*, 67 Wash.2d 923, 410 P.2d 970 (1966) [holding the jury is presumed to follow the court's instruction]. The error, if any, was **harmless**. (Emphasis added.)

Bertsch at 91-92.

In the subsequent case of *Ford v. Chaplin*, 61 Wash. App. 896, 812 P.2d 532 (1991), Division I of the Court of Appeals, applying the holding of *Bertsch*, also held that any error related to the issue of contributory negligence would be harmless in a case where the jury reached a verdict that defendant was not negligent. The appellant in *Ford* contended that the trial court erred by giving a contributory negligence instruction. As was the case in *Bertsch*, the trial court in *Ford* gave the jury a special verdict form. The Court of Appeals in *Ford* said, at 848:

> In answer to the first question, "Was there negligence by defendants which was a proximate cause of injury or damage to the plaintiff?", the jury responded, "No."

The verdict form then instructed the jury that if their answer to the first question was "no" they were not to answer any further questions, including Question 3 that asked if plaintiff was negligent. *Ford*, footnote 1, at 902.

When rejecting the contention that the trial court erred by giving a contributory negligence instruction, the *Ford* court quoted the reasoning of the *Bertsch* court cited above that because the jury found defendant was not negligent, they presumably never reached the question of plaintiff's contributory negligence so any error in giving a contributory negligence instruction was harmless. The court then said:

> In this case, we have serious doubts concerning the sufficiency of the evidence to support a contributory negligence instruction. However, the special verdict form set out a series of four questions for the jury to consider. The first question asks if the defendants were negligent. The verdict form clearly stated that if the answer was "no", the jury should not go on to the next three questions dealing with damages, negligence of the plaintiff, and percentage of contributory negligence. **As in *Bertsch*, the jury here never needed to reach the issue of contributory negligence and hence any error would be harmless.** (Emphasis added.)

Ford, at 901.

Although both *Bertsch* and *Ford* were medical malpractice cases, there is no reason why the same analysis and holdings should not apply here. The jury in this case decided that defendant was not negligent and it never reached the question of whether plaintiff was contributorily negligent. Consequently, even if the court erred by denying the directed verdict, giving an instruction on contributory negligence or not giving

plaintiff's proposed instruction on contributory negligence, that error was harmless.

The *Bertsch* and *Ford* decisions are controlling authority on all three of Appellant's assignments of error. Appellant did not cite either *Bertsch* or *Ford* in her opening brief, nor did Appellant cite any authority or provide any explanation of how the assigned errors related to contributory negligence could be anything other than harmless when the jury never reached the issue of plaintiff's contributory negligence. Accordingly, plaintiff's appeal is clearly without merit.

B. The Court Should Dismiss This Appeal as Frivolous and Award Respondent its Attorneys' Fees as Sanctions.

RAP 18.9(a) gives this court the following authority to impose sanctions for filing a frivolous appeal:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(c) provides that the court will dismiss a frivolous appeal on a motion of a party. When determining whether an appeal is frivolous,

justifying the imposition of terms and compensatory damages, the court should consider:

> (1) that a civil appellant has a right to appeal under RAP 2.2; (2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) that the record should be considered as a whole; (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous; and, (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal.

Public Employees Mut. Ins. Co. v. Rash, 48 Wash. App. 701, 706-7, 740 P.2d 370 (1987). (Citations omitted.)

More recently, the Washington Supreme Court held in *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010) that:

> An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. ...
>
> Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. (Citations omitted.)

Despite the very heavy burden placed upon respondent to show that this appeal is frivolous, the court should hold that respondent meets that burden here. Both *Bertsch* and *Ford* are controlling authority for the rule that even if the trial court erred as Appellant contends, it was harmless

error. There are no debatable issues on which reasonable minds might differ. There is also no possibility of reversal. The court should find that appellant's appeal is frivolous and under RAP 18.9, the court should dismiss the appeal and award respondent all of its attorneys' fees.

C. Alternatively, the Trial Court's Judgment Should be Affirmed on the Merits.

Even if this Court determines that appellant's arguments are not so frivolous as to warrant dismissal and an award of attorneys' fees under RAP 18.9, respondent requests the court to affirm the trial court on a Motion on the Merits. RAP 18.14(a) permits the appellate court on its own motion or on motion of a party to affirm a decision on the merits. The grounds for affirming a trial court judgment on the merits are set forth in RAP 18.14(e) Considerations Governing Decision on Motion, which states:

> (1) *Motion to Affirm.* A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

This case fits within section (a).

As stated above, both the *Bertsch* and *Ford* decisions hold that where the special verdict form shows the jury found there was no negligence by the defendant, and thus never reached the issue of contributory negligence, all assigned errors related to the issue of contributory negligence cannot be anything other than harmless. Appellant's assignments of error here all relate to contributory negligence and are clearly controlled by the settled law stated in *Bertsch* and *Ford*. Consequently, the trial court judgment should be affirmed on the merits in accordance with RAP 18.14.

DATED this 4th day of September, 2014.

VANDEBERG JOHNSON & GANDARA, LLP

By _____
H. Andrew Saller, Jr., WSBA #12945
Attorneys for Respondent

Declaration of Service

I declare that on September 4th, 2014, I served the foregoing Respondent's Motion to Dismiss Appeal via ABC Legal Messengers and via email on:

Mr. G. Parker Reich
Ms. Anne R. Vankirk
Attorney at Law
Jacobs & Jacobs
114 E. Meeker Ave.
Puyallup, WA 98371

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of September, 2014.

Rachel A. Schweinler