COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

Deann I. Tinnon,	)	
	)	
Appellant,	)	No. 45934-5-II
	)	
v.	)	RESPONDENT'S REPLY
	)	BRIEF IN SUPPORT OF
White River School District,	)	MOTION ON THE MERITS
	)	TO AFFIRM
Respondent.	)	
	)	

I. LAW AND ARGUMENT

A. Appellant's "Someone is at Fault" Contention is Contrary to Current Washington Law.

Respondent White River School District is asking this court to affirm the trial court's judgment based upon settled case law that where a jury finds by special verdict that a defendant was not negligent, any errors pertaining to plaintiff's contributory negligence are harmless. See,

Bertsch v. Brewer, 97 Wn.2d 83, 640 P. 2d 711 (1982); *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532 (1991).

Appellant argues that despite the special verdict form, the jury must have found there was contributory negligence. Appellant relies upon a statement in *Nelson v. Blake*, 72 Wn.2d 652, 653, 434 P.2d 595 (1967) that "the jury, by its verdict for the defendant, of necessity must have found the favored driver contributorily negligent" as controlling precedent. Appellant's Response Brief, p. 2-3. Appellant's reliance on *Nelson* is misplaced for several reasons.

First, unlike here, the jury in *Nelson* did not find that defendant was not negligent. *Nelson* involved a collision at the intersection of two non-arterial streets with no traffic controls. *Nelson*, at 653. The supreme court said the only issue on appeal was whether:

> ... the contributory negligence of the favored driver (the driver on the right) [was] a jury question where there was testimony that he was traveling 40 miles per hour (he says 20 to 25; the legal limit was 25 miles per hour) on a street covered with compact snow and ice (as were all streets in the area) and was within 30 feet of the intersection when he first saw the disfavored driver's car some 60 feet from the intersection. (The disfavored driver's testimony places the favored driver 100 feet from the intersection when the disfavored driver was 67 feet from it.)
>
> On this conflicting testimony, the trial court submitted the issue of the favored driver's contributory negligence to the jury; and the jury by its verdict for the defendant of

> necessity must have found the favored driver contributorily negligent.

Nelson, at 653.

The court noted, "The disfavored driver's negligence in failing to yield the right of way is clear, and we are not concerned on this appeal with any attempt on his part to recover damages." *Nelson*, 654.

That statement was accurate because when *Nelson* was decided in 1967 violation of a statute was negligence per se. See, *Portland-Seattle Auto Freight v. Jones*, 15 Wash.2d 603, 607, 131 P.2d 736 (1942) (violation of traffic rules is negligence per se). That changed in 1986 when the legislature enacted RCW 5.40.050 which provides:

> A breach of a duty imposed by statute, ordinance, or administrative rule should not be considered negligence per se, but may be considered by the trier-of-fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance or administrative rule relating to: (1) electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se. [current enactment]

In addition, *Nelson* was decided when Washington followed a pure contributory negligence approach where any negligence by the plaintiff resulted in a verdict for defendant. As explained in a footnote in *Gregoire*

v. City of Oak Harbor, 170 Wn.2d 628, 633, 244 P.3d 924 (2010), cited by appellant in her response:

> Before April 1, 1974 contributory negligence was a complete bar to plaintiff's recovery in Washington if the damage suffered was considered partly the plaintiff's fault. *See* Laws of 1973, 1st Ex. Sess., Ch. 138, §1, *codified at* RCW 4.22.010, *repealed by* Laws of 1981, Ch. 27, §17.

The contributory fault doctrine explains the following statement by the *Nelson* court, at 654:

> The favored driver, having the right of way, would have recovered in this case but for the finding of the jury that he, too, was negligent and that his negligence was a contributing cause of the collision. We have frequently, as in *Robison v Simard*, 57 Wn.2d 850, 350 P.2d 153 (1961), held that a favored driver may not recover where he has failed to operate his car in a careful and prudent manner under prevailing conditions.

In 1981, the legislature abolished contributory negligence as a complete bar to plaintiff's recovery by enacting RCW 4.22.005:

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Because violation of a statute is no longer negligence per se, the mere fact that an automobile collision occurred does not mean the jury is

required to find that one of the parties involved was negligent. For example, in *Morse v. Antonellis*, 149 Wn.2d 572, 70 P.3d 125 (2003), the Washington Supreme Court reversed a court of appeals decision holding a disfavored driver negligent as a matter of law for violation of her statutory duty to yield right of way. *Morse*, at 575.

In that case, defendant stopped at an intersection, did not see plaintiff's car approaching so she turned left in front of plaintiff. A collision resulted. *Morse*, at 573. Following trial, a jury found that defendant did not negligently cause the accident.

Plaintiff moved for judgment not withstanding verdict and the superior court denied that motion. *Morse*, at 573. The court of appeals reversed, concluding defendant was negligent as a matter of law because she had a statutory duty to yield to oncoming traffic and a common law duty to see what a reasonable person would see. *Morse*, at 574.

The Supreme Court said, at 574:

> In analyzing this reasoning, we start with the proposition that the breach of a statutory duty is no longer considered negligence per se, but may be considered as evidence of negligence. RCW 5.40.050. Even so, the court can find negligence as a matter of law if no reasonable person could decide that the defendant exercised due care. *Pudmaroff v. Allen*, 138 Wn.2d 55, 68, 977 P.2d 574 (1999). A party is entitled to such a finding when, viewing the evidence most favorably to the non moving party, 'there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party.' *Sing v. John L. Scott, Inc.*, 134 Wn.2d

> 24, 29, 948 P.2d 816 (1997). A jury is free to believe or disbelieve a witness since credibility determinations are solely for the trier of fact.
>
> ... In order to determine whether [defendant] acted reasonably, the jury simply had to decide who to believe. The jury apparently decided to believe [defendant's] version of the events, concluded she acted reasonably, and returned a verdict in her favor.

The court's ruling in *Morse* is contrary to appellant's contention that the only way a jury can conclude there was no negligence by a favored driver is if it finds contributory negligence on the part of the favored driver. Appellant's argument that someone must have been at fault is not a correct statement of current Washington law.

As in *Morse*, the jury here concluded that even though Respondent's bus driver was the disfavored driver, he was not negligent. There is no reason why the jury would first have to determine that appellant was contributorily negligent in order to reach that verdict. There is no factual or legal basis to conclude that the jury did anything other than follow the court's instructions to first decide whether defendant was negligent. Having decided defendant was not negligent, the jury did not address the question of contributory negligence.

B. The Holdings of Bertsch and Ford are Applicable to This Case.

Neither the Washington Supreme Court, nor the Court of Appeals limited the holdings of *Bertsch* or *Ford* to medical negligence cases. Nor is there any reason why the logic applied in those cases should be limited to medical negligence. *Bertsch* and *Ford* apply to all negligence cases where the jury answered "No" to a special verdict form question of whether defendant was negligent and then answered no further questions.

Appellant cites *Gregoire v City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) as "finding that the instruction on contributory negligence to the jury was reversible error in cases regarding prison suicides regardless of a verdict of no negligence against the defendant." App. Response, at 3-4. That case has no application here.

The estate of Edward Gregoire sued the City of Oak Harbor for negligence after Gregoire hanged himself in a jail cell. *Gregoire*, at 632. Oak Harbor asserted affirmative defenses of assumption of risk and contributory negligence and the court instructed the jury on those theories. *Id.* at 633.

The Supreme Court held that jury instructions on contributory negligence and assumption of risk were improperly given because the defendant "had a specific duty to protect Gregoire from injuring himself,

and both contributory negligence and assumption of risk defenses must yield to that affirmative, non delegable duty." *Gregoire*, at 644.

The court explained:

> Here, the jury found that Oak Harbor negligently failed to fulfill its duty to protect Gregoire. However, the jury concluded that the City's negligence was not the proximate cause of Gregoire's death. It seems likely that the jury reached this verdict because the trial court described contributory negligence in a way that bore directly on proximate cause, an issue with which the jury struggled. Jury instruction 6 read, 'Defendant further claims that Mr. Gregoire was contributory negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death.' CP at 32. Instruction 19 added, 'Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.' CP at 45. The interplay between these instructions supports the finding that if Gregoire assumed the risk of death and contributed negligently when he hanged himself, his conduct became the sole proximate cause of his death. It follows that the given instructions would lead jurors to the inevitable conclusion that Gregoire's own conduct was the sole proximate cause of his death. These instructions absolve Oak Harbor of its duty, and any action against the City would necessarily fail.

Gregoire, at 643.

Unlike the jury in *Gregoire*, the jury here did not find that defendant was negligent, but that defendant's negligence was not the proximate cause of injury or damages to appellant. Instead, the jury found defendant was not negligent.

II. CONCLUSION

All of Appellant's assignments of error relate to contributory negligence. Under *Bertsch* and *Ford*, any such error was harmless. Those cases are controlling precedent requiring the trial court's judgment be affirmed. Respondent's motion on the merits should be granted.

DATED this 17th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify that on September 17, 2014, I served the foregoing Respondent's Reply Brief in Support of Motion on the Merits to Affirm with ABC Legal Messengers on:

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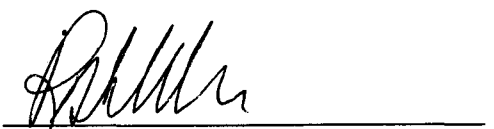

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