SUPREME COURT NO. 92208-0

Court of Appeals No. 70761-2-I

CHANNARY HOR,
Appellant

v.

CITY OF SEATTLE,
Respondent

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Channary Hor asserts that the trial court abused its discretion via its instructions and verdict form, and that the Court of Appeals mistakenly affirmed. But Rule of Appellate Procedure 13.4(b) applies an exacting standard for when this Court may grant review, which Ms. Hor's petition does not meet.

As the Court of Appeals observed in its unpublished decision, Ms. Hor's assertion that omitting the names of two officers from the verdict form constituted a "de facto dismissal" arises from a "mischaracterization of the record." *Hor v. City of Seattle*, No. 70761-2-1, slip op. at 15 (Wash. Ct. App. Aug. 3, 2015). She doubles down on this inaccuracy by repeating it in her petition, recasting it as a violation of her state constitutional right to a jury trial, something that she undisputedly received.

Over the span of nearly four weeks, a jury sat in judgment of Ms. Hor's assertions that two officers violated departmental policy, pursued Tammam's vehicle at high speed, and proximately caused the collision that injured her. The jury rejected this evidence, finding instead that the City, the officers' employer, who was admittedly responsible for their actions, was not negligent based on a set of instructions that allowed her to argue her full theories of liability. This process cannot be transformed

into a jury trial violation under article 1, § 21.

There is no allegation that the officers acted outside the scope of their employment, and the jury could not conclude that the officers were negligent but the City was not. Ms. Hor's reliance upon *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), and *Jones v. Sisters of Providence in Wash., Inc.*, 140 Wn.2d 112, 994 P.2d 838 (2000), is misguided. And her other allegations of instructional error are equally without merit, to the extent that they have been preserved. This Court should deny the petition.

II. COUNTERSTATEMENT OF ISSUES

There is no basis for this Court to accept discretionary review. Accurately framed, however, the issues presented should be as follows:

(1) Did the trial court err and was Ms. Hor prejudiced by the omission of two individual officers from the fault apportionment section of the verdict form when Petitioner had originally agreed to remove them from the caption, and, despite the fact that the officers were not formally dismissed, the trial court instructed the jury that their employer, City of Seattle, could only be found negligent through the acts or omissions of its officers who, undisputedly, were acting within the scope of their employment at all times?

(2) Has Ms. Hor preserved her alleged instructional errors and, if so, did the trial court abuse its discretion by giving legally correct instructions that were supported by the facts and, when taken as a whole, allowed both sides to argue their theories of the case?

III. COUNTERSTATEMENT OF THE CASE

A. Factual History

Ms. Hor presented her theory of a negligent pursuit by the City of

Seattle and its officers to a jury for multiple weeks. She testified about the proximity of the patrol cars to the speeding Cadillac that co-defendant Omar Tammam drove as he and Ms. Hor jettisoned out of Seward Park: the officers were right behind them with "lights flashing and sirens blasting." (CP 3537-49 at ¶ 9.)[1] She testified that the Cadillac crested "the top of the incline where Seward Park Ave. S. intersects Wilson . . . ," with the "cruisers' flashing lights right behind us." (CP 3537-46 at ¶ 17.)

The officers testified, however, that after the initial attempt at contact in the parking lot, Officers Thorp and Grant lost sight of the Cadillac as it sped away. (RP v. 22, pp. 13-14; v. 26, pp. 155-56; CP 3889-90; CP 3465-68.)[2] Upon turning around, exiting the park, and reaching the intersection of Juneau and Seward Park Avenue, Officer Grant stopped near the stop sign (RP v. 26, p. 155). He inched forward and saw distant taillights—which he did not know were Tammam's—disappear around a bend. (RP v. 26, pp. 158-160.) Officer Grant testified

[1] In her declaration, Ms. Hor testified that as Tammam sped out of the park, Officer Thorp "jumped back into his car and raced after us with his emergency lights and siren activated." *Id.* In her deposition, however, she admitted that she did not actually see what Officer Thorp did, but was "sure he did like any officer would if someone pulled off like that." (CP 4220-57 at pp. 66; RP v. 42, pp. 78-80.) In her deposition, she could not recall whether Officer Grant was in the park, at the entrance to the park, or already at the intersection of Seward Park Avenue and Juneau when they passed. (CP 4220-34 at pp. 91-94; CP 4235-57 at pp. 67-75.) Ms. Hor relevantly testified that Tammam "drove quickly but methodically," (CP 3537-46 at ¶ 12), and that the officers remained directly behind Tammam at the same rate of speed. (*Id.* at ¶ 11.) Tammam did not slow for any stop signs, but continued accelerating up Juneau. (CP 4235-57 at pp. 74-75.)

[2] Standing outside his vehicle, Officer Thorp observed the Cadillac turn left up Juneau Street. (RP v. 22, pp. 13-14.) Officer Grant, in the process of executing a three-point turn, did not see the Cadillac exit, but later turned left on a hunch. (RP v. 26, p. 156.)

about turning off his emergency lights. (RP v. 27, p. 167.) Then, as he crested the hill, he saw the Cadillac crashed into a rock retaining wall near the intersection of Seward Park and S. Morgan. (RP v. 27, pp. 178-79.)[3]

Based upon available physical evidence including: (1) photographs and on-scene measurements (RP v. 33, pp. 20-33, 38, 45); (2) information about the vehicles and their relative weights and speed capabilities (RP v. 33, pp. 34-35, 54-55); and (3) data retrieved from the Cadillac's "black box" system (RP v. 33, pp. 40-44), defense expert Nathan Rose testified about the physical limits of events as shown by computer modeling. (RP v. 33, pp. 66-99.) He opined that the proximity described by Ms. Hor between the Cadillac and the lead police car was physically impossible because of the significant difference in acceleration rates and capabilities between the vehicles. (RP v. 33, pp. 99-100.) Ms. Hor challenged Mr. Rose through hours of cross- and re-cross examination. (RP v. 34, pp. 115-182; v. 35, pp. 1-80; v. 36, pp. 81-121,156-160; v. 37, pp. 161-171.)

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[3] After observing the crashed car, Grant activated his emergency equipment before stopping and tending to Ms. Hor. (RP v. 27, pp. 179-81.) As Officer Thorp approached the collision, he saw Tammam running uphill on S. Morgan Street away from the crash. (RP v. 23, pp. 33-34; CP 4019-22.) He continued towards the intersection, parked, and ran after Tammam on foot before realizing he could not catch him. (RP v. 23, p. 35; CP 4019-22.) A K9 officer eventually tracked Tammam to a partially open garage, and Tammam told the arresting officer that he fled because he had outstanding arrest warrants. (RP v. 48, pp. 88-89, 93.) Officers transported Tammam to the South Precinct, where drug recognition screening showed Tammam to be under the influence of cannabis and a hallucinogen. (RP v. 9, pp. 41-42; CP 3473-89.) En route to Harborview for a mandatory blood draw, Tammam also told an ambulance technician that he had taken Ecstasy a couple of hours before the crash and that he smokes marijuana daily. (CP 3469-72, RP v. 48, p. 117.)

As summarized by the Court of Appeals, Mr. Rose's partner William Neale also "compared the scene to the photographs from the time of the incident to make sure there were not significant differences. Based upon this data, Neale calculated the lines of sight on the roadway . . . ," and relying upon computer simulations, "determined the vehicles' lines of sight." (*Slip. Op.* at 19.) The court continued that according to Neale, "Tammam would not have been able to see the officers after he turned from Juneau Street to Seward Park Avenue South." (*Id.*)

As summarized, Neale also "measured the decibel level of sirens from various locations . . . including while being inside a car with the windows rolled up and the windows rolled down." (*Slip Op.* at 19.) He calculated the "amount of noise Tammam's car likely made, taking the readings from a similar car . . . while driving at a variety of speeds." (*Id.*) Then, using this information, Neale "testified that Tammam would not have been able to hear the officers' sirens for 15 to 18 seconds before the crash." (*Id.* at 19.)

Ms. Hor does not challenge the admissibility of Mr. Rose's or Mr. Neale's opinions in her petition. And there is no argument that the jury, which deliberated on the competing evidence, was somehow improperly composed or committed misconduct. Rather, it simply rejected Ms. Hor's theory of liability. On May 18, 2006, Tammam, high on ecstasy and

marijuana, proximately and exclusively caused catastrophic injuries to Ms. Hor when he drove the Cadillac into a rock wall at more than 60 miles per hour. (Pet. App. A. at 42-44.)

B. Challenge to Court of Appeals' Decision

Ms. Hor asserts four types of instructional error: (1) that the special verdict form improperly omitted the names of Officers Thorp and Grant, (Pet. at 11-14); (2) that the trial court improperly refused to give Ms. Hor's proposed instruction 27 (*id.* at 14-16); (3) that the trial court incorrectly issued instructions 26 and 27 (*id.* at 16-18); and (4) that the trial court erred by giving instructions 23, 24, and 25 (Pet. at 19-21.)

(1) Verdict Form

The Court of Appeals affirmed that the trial court did not abuse its discretion by omitting the names of the officers in the fault allocation portion of the verdict form: Ms. Hor characterizes the omission from the form as a "'de facto dismissal' of the officers as defendants in this action. This characterization is inaccurate and the claim has no merit." (*Slip Op.* at 14-15.) The court observed that Ms. Hor's sole reason for including the officers was "for the purpose of apportioning liability. But the jury verdict rendered apportionment of liability among the City defendants moot because the jury determined there was no liability of the City. Because it was uncontested that the officers were acting within the scope of their

employment, the City was the ultimate source of Hor's claim for damages. Absent liability, there was simply no claim for damages." (*Slip Op.* at 15.)[4] The jury never reached proximate cause because it did not find negligence as to the City or its officers. The court found no prejudice, since Ms. Hor "agreed to omit the names of the officers from the caption, provided they remained as defendants." (*Id.*)

(2) Proposed Jury Instruction 27

Regarding the refusal to give proposed instruction 27, the Court of Appeals held that it was inapplicable because there had been no determination that the police cars were "emergency vehicles" as a matter of law. (*Slip Op.* at 6 & n.12) (citing 6 WASH. PRACTICE: WASH. PATTERN JURY INST.: Civil 71.06 (6th ed. 2012).) Ms. Hor appears to resurrect the argument that Judge Middaugh's ruling *in limine*, which precluded the City from claiming a privilege, actually operated as an affirmative ruling that the police cars were not "emergency vehicles." (Pet. at 4, 6 & n.4.)

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[4] As stated in her original Response to the City Defendants' Motion to Amend the Case Caption: "Plaintiff has *no objection* to the request of Officers Thorp and Grant that their names be removed from the 'case caption.' *The city defendant, as their employer, is ultimately liable for the events giving rise to this action, including alleged negligent training.* Based on the city's representations that their motion is limited to the case caption, that any judgment against the officers can be collected against the city, and the officers' concerns about the adverse consequences of a public judgment being against them personally, *plaintiff does not oppose this part of defendants' motion.* However, if defendants' request is a disingenuous ruse to exclude evidence (and they are invited to explain if this is so), plaintiff would object to any change in the 'case caption' that would have such effect on the eve of trial." (CP 4096-97; *see also* CP 4142-44) (emphasis added).

But as the Court of Appeals observed: ". . . the court did not rule as a matter of law that the officers were not operating their cars as emergency vehicles." (*Slip Op.* at 6.) Because there was an ongoing dispute of fact as to whether the lights and sirens were off, i.e., the City's position, or on, as was Ms. Hor's position, actually giving petitioner's proposed instruction "would likely have been a comment on the evidence . . . ," an additional reason that the trial court did not abuse its discretion. (*Id.* at 7.)

On this issue, Ms. Hor appears to abandon her challenge to Jury Instruction 17, which she originally offered (and to which she later took exception) in conjunction with proposing Jury Instruction 27.[5] As the Court of Appeals observed: "Hor initially proposed this instruction . . ,"

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[5] Instruction 17 provided:

> A statute provides that:
>
> > The driver of an emergency vehicle, when in the pursuit of an actual or suspected violator of the law shall use visual signals, and audible signals when necessary, to warn others of the emergency nature of the situation. The driver of an emergency vehicle may exceed the maximum speed limit so long as life or property is not endangered.
> >
> > The driver of an emergency vehicle has a duty to drive with due regard for the safety of all persons under the circumstances. The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under the circumstances. A driver of an emergency vehicle shall be responsible for the consequences of his disregard for the safety of others.
>
> (CP 2924.)

number 17, which "deals with emergency vehicles." (*Slip Op.* at 4.) The court ruled that "Instruction 17 is supported by the evidence in the record of Hor's theory of the case. Hor presented evidence at trial that the officers were negligent by engaging in a high speed pursuit of Tammam's car with their vehicles . . . ." (*Slip Op.* at 5.) Thus the Court of Appeals affirmed that the trial court did not err by refusing to substitute Instruction 27 for 17.

(3) Jury Instructions 26 and 27

Jury Instruction 26 provided that "Defendant City of Seattle had no duty to control Omar Tammam's acts," which, as the Court of Appeals observed, Ms. Hor conceded is a statement of law that is "'generally true.'" (*Slip. Op.* at 7.) The Court of Appeals continued, however, by distinguishing cases that Ms. Hor cited to that court but does not analyze in this petition. (*Compare* Pet. at 16-17 *with Slip Op.* at 8-10.) Ms. Hor currently argues that this instruction is the equivalent of a directed verdict (Pet. at 17), but the Court of Appeals observed that it actually refrained from stating that the City's actions "had no effect on Tammam's actions, or that they did not in fact control him." (*Slip Op.* at 9-10.) The court ruled that "this instruction was not a comment on the evidence," and Ms. Hor has no authority for the existence of such a duty. (*Id.* at 10.)

Jury Instruction 27 provided that "Defendant City of Seattle owed

Plaintiff Channary Hor no duty to protect her from Omar Tammam's criminal acts." (CP 2934.) Ms. Hor again concedes that this is a "general truism," but claims that this instruction was confusing or misleading. (Pet. at 17-18.) The Court of Appeals addressed this type of conclusory argument: "she contends this instruction is both factually and legally erroneous. She is wrong. . . . This statement of law is correct, and Hor fails to make a persuasive argument that any exception applies in this case." (*Slip Op.* at 10.)

(4) Jury Instructions 23, 24, and 25

Before the Court of Appeals, Ms. Hor argued that the trial court abused its discretion by giving instructions 23, 24, and 25. The court ruled, however, that pursuant to Civil Rule 51(f), Ms. Hor had waived any direct challenge to jury instructions 23, 24, and 25: "We first note that Hor formally excepted to the court's instructions, 17, 19, 26, 27, 29, and the jury verdict form. She did not except to the courts instructions 23, 24, or 25, as CR 51(f) requires." (*Slip Op.* at 11.)[6]

Rather, in a post-verdict motion footnote, Ms. Hor took issue with instructions 23, 24, and 25: "she has preserved the issue for review, *but only with respect to whether the trial court abused its discretion in*

[6] Ms. Hor's current argument that the trial court pressured the parties to forego taking formal exceptions to instructions is simply not supported in the record and belies the court's offer to allow her to submit additional exceptions in writing.

denying the motion for a new trial." (*Id.*) (emphasis added). In her petition, Ms. Hor again appears to prefer a direct challenge, but does not contest the Court of Appeals' ruling that the trial court did not abuse its discretion by denying her motion for a new trial.

(5) Additional "Contentions"

Ms. Hor insinuates numerous additional mistakes with the trial proceeding, but her approach in this regard is flawed and improper. For example, she intimates alleged error and misconduct by the City regarding discovery of video evidence. (Pet. at 7.) Ms. Hor implies incorrect evidentiary rulings by the trial court on that issue, and the denied admissibility of a probable cause affidavit. (*Id.* at 7-8.) Ms. Hor insinuates that Officer Thorp was less than truthful during his deposition (*id.* at 5), or that witnesses were permitted to mislead the jury. (*Id.* at 6.)

Ms. Hor appears to claim the trial court did not afford her adequate time for closing, or that the court schedule hindered timely exceptions. (Pet. at 8-9; *see also* Pet. at 18-19.) But because Ms. Hor does not raise any of the foregoing within the scope RAP 13.4(b), or otherwise identify her self-serving characterizations as proper or preserved issues for review, this Court should disregard these impermissible attempts to paint the record in her favor.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Rule of Appellate Procedure 13.4(b) states that "[a] petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Ms. Hor broadly invokes all of these provisions in her petition, though focuses on RAP 13.4(b)(1) and (3). Because the issues presented do not raise a significant constitutional question, otherwise conflict with prior appellate decisions, or give rise to any basis to accept review, the petition should be denied.

A. The Trial Court Did Not Abuse Its Discretion in Its Jury Instructions or Special Verdict Form

In general, "[j]ury instructions are . . . sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the

applicable law." *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Courts review legal errors in a jury instruction *de novo*. *Id.* (internal citation omitted). If a jury instruction correctly states the law, however, courts review for an abuse of discretion whether a certain jury instruction should be given. *Id.* at 802 (citing *Christensen v. Munsen*, 123 Wn.2d 234, 248, 867 P.2d 626 (1994)).

A trial court's refusal to give an instruction is also reviewed under the abuse of discretion standard. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 194 (1996). The facts of the particular case govern the propriety of a jury instruction. *Fergen*, 182 Wn.2d at 803 (citing *Housel v. James*, 141 Wn. App. 748, 759, 172 P.3d 712 (2007)). An erroneous instruction is reversible only if it is prejudicial to a party and, unless that instruction contains a clear misstatement of law, the party challenging an instruction bears the burden of establishing prejudice. *Id.* (internal citations omitted).

(1) The Verdict Form Was Proper and Fair.

Courts review special verdict forms under the same standard as other jury instructions: "[w]hen read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded and fair manner." *Capers v. Bon Marche*, 91 Wn. App. 138, 142, 955 P.2d 822 (1998) (internal citations omitted). Here, Ms. Hor does not relevantly challenge that the jury was properly instructed

that "[a] City can act only through its employees. The knowledge gained and the acts and omissions of city employees while acting within the scope of their authority are deemed to be the knowledge, acts and omissions of the City." (CP 2910.) Nor does she contest that the jury was properly instructed that "[t]he law treats all parties equal whether they are government entities or individuals . . . ." (CP 2911; *see also* CP 2909 & 2020.)

Ms. Hor also does not challenge that she was required to show the negligence of the City *via* the negligence of its employees: that "co-defendant City of Seattle, *through its employees*, acted or failed to act . . . and in so acting . . . was negligent." (CP 2914) (emphasis added). Indeed, as stated Ms. Hor's non-objection to removing the officers from the caption, "*the city defendant*, as their employer, is *ultimately liable* for the events giving rise to this action, including alleged negligent training." (CP 4096-97) (emphasis added).

And because the City could *only* be negligent through the acts and omissions of its officers, the jury *could not* find the officers negligent while the City was not. Having found that the City was not negligent in answer to Question 1 in the Special Verdict Form (Pet. App. at 42), the jury never reached the issue of proximate cause as to the City. It thus correctly followed the directive in Question 4 to only allocate fault "to

each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the injury to the plaintiff." (Pet. App. at 43.) Since a jury is assumed by law to have followed the instructions, it would have been inherently inconsistent for it to have made these findings and yet have attempted to allocate fault to individual city employees.

There was no dispute that all of the officers' actions fell within the scope of their employment. *Cf. Niece v. Elmview Group Home*, 131 Wn.2d 39, 47-49, 929 P.2d 420 (1997); *Kuehn v. White*, 24 Wn. App. 274, 277-78, 600 P.2d 679 (1979). And Ms. Hor's primary reliance on both *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), and *Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn.2d 112, 118-19, 994 P.2d 838 (2000), to invoke article 1, § 21 simply misses the mark. (Pet. at 12-13.)

For example, *Davis* holds that the anti-SLAPP statute, which created a non-summary judgment procedure to weigh evidence and otherwise dismiss claims that fail show a probability of prevailing, was unconstitutional. *Davis*, 183 Wn.2d at 289-94. The procedure violated article 1, section 21 because it resolved non-frivolous factual issues without a trial. *Id.* at 294. The anti-SLAPP statute, however, has no bearing here and *Davis'* procedural posture is unique. Ms. Hor was afforded a lengthy trial by which a jury resolved factual disputes. Simply because it decided that the City was not negligent by and through its

officers acting within the scope of their employment does not give rise to a reviewable issue of constitutional significance.

Jones is equally unhelpful because it holds that permitting an alternate juror to participate in jury deliberations violated Civil Rule 47(b). 140 Wn.2d at 117. The Court presumed prejudice because the "sanctity of the jury room" had been breached. *Id.* at 117-19 (internal citation omitted). Jones also had not waived the issue by failing to timely object due to the gravity of the issues raised, including "the integrity of the jury process itself." *Id.* at 118-120 (internal citation omitted). But *Jones* cannot be fairly construed as instructive on the standard of review for an alleged error on a verdict form. It also cannot be cited within the ambit of RAP 13.4(b) as a veritable conflict of law, or basis to expose an issue of constitutional significance. *Jones* is procedurally and factually inapposite.

Ms. Hor previously agreed to remove the officers from the caption. (CP 4096-97.) Her continued reliance on an "inaccurate" characterization of the record belies the weakness of her petition. (*See Slip. Op.* at 15 *and* Pet. at 9.) When read as whole, the verdict form was not "clouded" or unfair and Ms. Hor has not been prejudiced. It clearly permitted the jury to find the City negligent based on the actions of its officers and, had the jury found negligence to be a proximate cause of injury, attribute it by percentages. The jury thus properly decided the ultimate issue, and the

Court of Appeals appropriately affirmed. Ms. Hor's right to a jury has not been violated by this jury's verdict.

(2) Proposed Instruction 27 Was Properly Refused.

Ms. Hor proposed Instruction 27 as a substitute for her previously offered and accepted Instruction 17. Though she later took exception to Instruction 17 and appealed that issue below, in her petition, Ms. Hor assigns no error to the Court of Appeals' ruling that 17 was a proper instruction, or that the trial court did not abuse its discretion by using it. (Pet. at 14-16.) The Court of Appeals ruled Instruction 17 was appropriately given because Hor "presented evidence at trial that the officers were negligent by engaging in a high speed pursuit . . ." and that she "argued this theory to the jury during closing." (*Slip op.* at 15.)

Instruction 17 informed the jury about the scope of the emergency vehicle privilege and duty owed by emergency vehicle drivers. However, as the court observed, there was a fundamental dispute over whether the police vehicles were operating as emergency vehicles. (*Slip Op.* at 7.) Pursuant to the note on use of WPIC 71.06, Ms. Hor's proposed Jury Instruction 27 should be used when a court has decided as a matter of law that a vehicle is not an emergency vehicle. 6 WASH. PRACTICE: WASH. PATTERN JURY INST.: CIVIL 71.06 (6th ed. 2012). The dispute in the evidence appropriately disqualified its use and the Court of Appeals

correctly affirmed.

(3) Instructions 26 and 27.

With respect to Jury Instructions 26 and 27, Ms. Hor has conceded that 26 is "'generally true'"[7] and 27 a "general truism."[8] These instructions were legally correct. Ms. Hor cites no binding authority to the contrary in her petition, and the Court of Appeals already distinguished other authorities upon which Ms. Hor previously relied. (*Slip Op.* 7-10.) Ms. Hor instead asserts that Instructions 26 and 27 confused, mislead, or "suggested to the jury that Petitioner's theory was legally unworthy of consideration." (Pet. at 17.) These conclusory assertions do not satisfy RAP 13.4(b).

To overemphasize one party's theory of the case, "the instructions on a particular point must be so repetitious as to generate 'extreme emphasis' that 'grossly' favors one party over the other." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 38, 864 P.2d 921, 935 (1993) (internal citations omitted). Viewed as a whole, there is simply no basis to conclude that legally accurate instructions "grossly" overemphasized the City's theory of the case. Instructions 26 and 27 are not repetitious, and the Court of Appeals correctly and thoroughly addressed this issue.

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[7] *Slip Op.* at 7; App. Br. at 34.
[8] Pet. at 17-18.

(4) Instructions 23, 24, and 25 Cannot Be Directly Challenged.

This Court has observed that an "appeal of alleged erroneous instruction in the trial court depends on the action appellant took in that court." *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn. 2d 111, 114, 587 P.2d 160, 162 (1978). Civil Rule 51(f) unambiguously states the procedure to preserve alleged instructional error:

> *Before instructing the jury*, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph, or particular part of the instruction to be given or refused and to which objection is made.

CR 51(f) (emphasis added). Ms. Hor appropriately concedes that CR 51(f) operates to require a party to sufficiently apprise the trial court of any alleged error so that it may be afforded the opportunity of avoiding a new trial. (Pet. at 18); *see also Ryder's Estate*, 91 Wn.2d at 114 (quoting *Roumel v. Fude*, 62 Wn.2d 397, 383 P.2d 283 (1963): "[t]he purpose is To enable the trial court to correct any mistakes . . . *in time to prevent the unnecessary expense of a second trial.*"). Ms. Hor "formally excepted to the court's instructions, 17, 19, 26, 27, 29, . . . [but] did not except to the courts instructions 23, 24, or 25, as CR 51(f) requires." (*Slip Op.* at 11.) She claims that this approach places "form over substance," or that CR

51(f) is ambiguous and she should be permitted to move forward. (Pet. at 18-19.) But this Court's prior guidance actually safeguards against the injustice of a party inviting instructional error only to request a second bite at the apple. The Court of Appeals did not err in concluding Ms. Hor had waived any direct challenge to these instructions. They were proper.

V. CONCLUSION

To the extent that Ms. Hor has preserved the alleged errors raised, her petition fails to meet the standard of RAP 13.4(b). The instructions were legally proper and gave both sides the ability to argue their theories of the case. Ms. Hor has not been prejudiced in her presentation of her theory of a negligent pursuit, which she vigorously advocated through experienced counsel. The jury verdict in favor of the City after weeks of trial should remain as the final disposition of this case, which does not involve any question of constitutional magnitude. The Court of Appeals correctly analyzed the issues raised. This Court should deny the petition.

Respectfully submitted this 1st day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2015, I caused the foregoing document to be delivered via electronic mail and U.S. Mail to the following:

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DATED this 1st day of October, 2015.

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Dear Clerk -

Attached please find the Answer to Petition for Review to be filed in the following matter:

Channary Hor, Appellant, v. City of Seattle, Respondent
Supreme Court No. 92208-0
Court of Appeals No. 70761-2-I

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