Supreme Court No.: 92208-0

Court of Appeals State of Washington Division I - No.: 707612

King County Superior Court No: 10-2-34403-9 SEA

CHANNARY HOR,

Petitioner,

vs.

CITY OF SEATTLE,

Respondents.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

The Law Offices of Ben F. Barcus & Associates, PLLC
Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile: (253)752-1035
paul@benbarcus.com

ORIGINAL

I. PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

A. The Individual Defendants Were Effectively Dismissed By the Trial Court When the Trial Court Refused to Include Their Names On the Verdict Form In This Case.

Respondent's assertion that the individual officers, who were parties throughout the proceedings before the trial court, were not dismissed from this case when the trial court refused to place their names on the verdict form is absurd. Far from a "mischaracterization of the record", the fact that the Court of Appeals could not articulate exactly what the trial court did in refusing to include the officers on the verdict form, serves to highlight the procedural irregularity which occurred. An agreement to remove the individual officers from the caption, is a far cry from failing to include their names on the verdict form, particularly in a case involving allocation of fault.

Without attempting to be unduly facetious ,it is noted that if it quacks like a duck, walks like a duck – it's a duck. It is hard to imagine how failing to place the individual officers on the verdict form would be anything but a "de facto dismissal", given the fact that under such a scenario no verdict nor judgment could be entered against them. The result is the same as when a judge grants a motion to dismiss their individual liability as would have been the granting of a motion pursuant

to CR 12(b) or dismiss pursuant to CR 41, or CR 50 (directed verdict), and/or CR 56 (summary judgment).

The weakness of the Respondent's position is emphasized by the fact that it does not deny that both Officers Thorp and Grant were proper parties in this case. The law is clear on this subject – a plaintiff has the prerogative under respondent superior principles to sue either the employer, or the employee, or both. *Owick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12 (1992), citing, *James v. Ellis*, 44 Wn. 2d, 599, 605, 296 P.2d 573 (1954).

Further, it is respectfully suggesting that if anyone is engaging in "mischaracterization", it is the City when addressing Petitioner's contention that the trial court's actions violated Petitioner's state constitutional right to a jury trial. Petitioner, within her opening brief before the appellate court clearly raised issues regarding due process and the constitutional right to a jury trial. (Appellant's opening brief Pages 39-40). Unfortunately noticeably absent from the court of appeals' opinion is any acknowledgement that such issues had even been raised.

This is significant because when a denial of a right to a jury trial is at issue, the party who is adversely affected by such error is entitled to a presumption of prejudice unless it affirmatively appears that there was not, and could not have been, any prejudice." *Jones v. Sisters of Providence in*

Washington, Inc., 141 Wn. 2d 112, 118-19, 994 P.2d 838 (2000) citing to *State v. Cuzick*, 85 Wn. 2d 146, 150, 530 P.2d 288 (1975). A "harmless error" is an error which is trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affects the outcome of the case." See, *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn. 2d 302, 311, 898 P.2d 284 (1995).

It respectfully suggest that contrary to the City's assertion a party's right to a jury trial **is not satisfied by a partial jury trial on only some of the issues which was properly should have been presented to the jury**. There clearly were triable issues of fact with respect to the individual police officers' liabilities, issues which the jury was denied an opportunity to consider. While one could play semantics and/or procedural characterization games addressing what transpired before the trial court, the bottom line is the Petitioner had valid claims against these individual officers which were not subject to consideration, (despite factual merit) based on procedural peculiarities and improprieties which never should have transpired.

Given what transpired, it is simply unknowable exactly how having the individual officers on the verdict form could have impacted the jurors' deliberation and the direction such deliberations might have taken. Under such circumstances prejudice should have been presumed by the

appellate court and shall now be presumed by the Supreme Court now. What transpired before the trial court was well outside of normal procedures and the court rules.

Under such circumstances, at a minimum such procedural irregularities warrant examination, correction and guidance by the Washington State Supreme Court and involve a matter of "public interest" within the meaning of RAP 13.4(b)(4). The denial of Petitioner's right to a jury trial is clearly a matter which should be addressed under the terms of RAP 13.4(b)(3). The City's position that the right to a jury trial protected by our State Constitution can be satisfied by a partial jury trial on some of the issues presents "a significant question" within the meaning of RAP 13.4(b)(3).

B. The Trial Court Was Fully Apprised With of Petitioner's Exceptions/Objections To The Court's Jury Instructions.

Ignored by the Court of Appeals, and the City, is the fact that on June 26, 2013 the parties engaged in an extensive, **on the record** preliminary instructional conference. During the course of that conference, the trial court was fully apprised that Petitioner objected to jury instructions Nos. 23, 24, and 25, because they overemphasized Omar Tammam's actions by characterizing them as being "reckless", compared to negligent. (CRP Vol 49 p. 189-230). The trial court was clearly

apprised that it was the Petitioner's counsel's position that instructions turned out to be instructions No. 23, 24, and 25 served to do nothing more than to unfairly overemphasize the City's theory of the case at the expense of Petitioner. (Id. Page 189).

There is nothing within CR 51 with respect to the timing of when the trial court should be "apprised" of a party's concerns, and/or objections "exceptions" to a Court's Instructions. All that is required under the terms of CR 51(f), is that "counsel should be afforded an opportunity ..." to make such exceptions known.

It was simply error for the Court of Appeals to not **recognize plaintiff's exceptions to the court's instructions not only span the "formal exceptions," which were taken on June 27, 2013, but also were inclusive of the information conveyed to the trial court on June 26, 2013 during the preliminary instructional conference.** Otherwise the preliminary instructional conference was a waste of court time despite the trial court's obvious intellectual engagement at the time.

As discussed within Petitioner's original petition, the inclusion of these instructions so slanted the jury instructions that a defense verdict in favor of the City was almost a fate accompli.

The position taken by the Court of Appeals with respect to the absence of "exceptions" is factually inaccurate, and ignores the record.

The Court of Appeals further ignored the record when assessing whether or not the petitioner was provided an adequate and appropriate time for the taking of exceptions, if one excludes the relatively lengthy preliminary instructional conference where such exceptions were made known. The fundamental premise of CR 51(f) is that the counsel be provided adequate time for the taking of exceptions. The adequacy of such time should not have been considered by the Court of Appeals in a vacuum. It is undisputed that the court called for exceptions after the lunch break on June 28, 2013 after commanding that closing argument be completed by 4:00 p.m. **This was a four-week trial**. Many witnesses were called and the issues were complex. Counsel should not be required to make the "Hobson's choice" foregoing objections/exceptions to instructions, (which had already been discussed on the previous day) versus having a sharply curtailed closing argument in a very complex case.

From Petitioner's perspective, this case was exceptionally important and potentially life altering. It was undisputed below that as a byproduct, of what only can be truly characterized as a "police pursuit", she was left a quadriplegic. In other words she received a lifetime sentence even though she did no wrong.

While it is acknowledged that the trial court has substantial discretion in managing the affairs which come before it, as discussed at

Pages 10-11 of Petitioner's petition, this innocent victim of tort received an inherently flawed trial marred by a number of abuses of discretion. Not only were there procedural abuses of discretion, as emphasized here, but also a number of abuses of regarding the admission and/or non-admission of evidence, and with respect to the whole approach the trial court took with respect to instructions. Contemporaneous video tapes went missing – videotapes that the plaintiff could have determined the outcome of the case. The trial court refused to admit Seattle Police Department internal documents which were directly contrary to the City's litigation position. The trial court allowed the admission of expert testimony that pushed well beyond the margins of ER 702 – ER 705. The individual officers, escaped the jury's assessment of their fault, despite the fact that plaintiff had named them as parties to the lawsuit and had brought meritorious, non-frivolous claims against them.

In this case where the Supreme Court is the final bastion of justice for this innocent victim. Her final hope that our court system will see that "justice" is done.

C. The Trial Court's Instructions Were Schizophrenic, Misleading, Confusing And Inherently Contradictory.

Ignored by the Court of Appeals and by the City, is that a jury instruction may set forth a correct statement of the law, but giving it can be absolutely erroneous in the context of the particular case.

The Court of Appeals observed that "whether a jury instruction is appropriate is 'governed by the facts of the particular case.'", citing to *Fergen v. Sestero*, 182 Wn. 2d 794, 803, 346 P.3d 708 (2015) (Slip. Op. Page 3-4). Unfortunately, it failed to apply this principle when analyzing what transpired in this case.

Again it is emphasized that the Petitioner's entire theory of liability was predicated on the notion that by "pursuing," the police are influencing, or (for lack of better terms), "controlling" the actions of the fleeing driver. In the police pursuit context, the relationship between the pursuers and the pursued has been characterized as being "essentially symbiotic". *Suwanski v. Village of Lombard*, 794 N.E. 2d 1016, 1022 (Ill. App. 2006). A similar analysis is provided in this court's opinion in *Mason v. Bitton*, 85 Wn. 2d 321, 534 P.2d 1360 (1975) which analyzes such scenarios under "concurrent negligence" principles.

Given Petitioner's theory of the case, it is hard to imagine how Court's Instruction No. 26, which provided that the "defendant City of

Seattle had no duty to control Omar Tammam's acts," did not serve to fully negate the defendant's duty in the eyes of the jury, at a minimum, misleading to the jury or at least confusing. This, in combination with Court's Instruction No. 27, which provided that the city had "no duty to protect her from Omar Tammam's criminal acts", were absolutely unnecessary given the facts of this case, and were not needed for the defense to argue its theory of the case (that it engaged in no pursuit and/or that plaintiff's injuries were the entirely the fault of Omar Tammam). These instructions served to do nothing but overemphasize the City's theory of the case at the expense of plaintiff. It did so in a manner which resulted in instructions which were internally contradictory, and at a bare minimum were misleading and confusing.

In sum, simply because something may be a correct statement of the law in one context does not mean it is an appropriate instruction in another. It is humbly suggested that this case presents an appropriate opportunity for the Supreme Court to provide guidance on such an issue to ensure that what transpired in this case is not subject to repetition.

D. The Court Of Appeals Failed To Recognize That Under The Unique Facts Of This Case That, At a Minimum, Both WPI 71.01 and WPI 71.06 Should Have Been Given.

During the course of pretrial proceedings an earlier trial judge had ruled that the City had essentially denied their way out of the coverage of RCW 61.035, it did so by denying that they were engaging in a pursuit falling under the terms of the Seattle Police Department's pursuit policy. The prior trial judge reasoned that the City simply could not have it both ways.

Even assuming for the sake of discussion that the trial judge had the authority to modify the earlier trial judge estoppel-based decision, it simply was an abuse of discretion for the trial court, not to also instruct with RCW 71.06. Under the unique facts of this case, where the evidence suggested that the police, at various points and times were engaging in a pursuit falling under the terms of RCW 46.61.035, while at other times, if one gives credit to the City's position, **were not engaging in a pursuit falling under the coverage of RCW 46.61.035 because they turned their lights and sirens off.** If the jury, based on the evidence, concluded that with lights and sirens off the police officers nevertheless continued to pursue the Tammam vehicle, at a high rate of speed, than it did so without the privilege afforded by RCW46.61.035 thus subject to the rules of the road as any other driver. Given such competing evidence, the jury should

have been informed that if the police were pursing without lights and sirens, (thus not falling under the coverage of RCW 46.61.035), that they should be treated as any other motorist using the highway, and were required to abide by the rules of the road.

The giving of WPI 71.01, standing alone, without also providing WPI 71.06, denied the Petitioner a full and complete opportunity to argue her theory of the case.

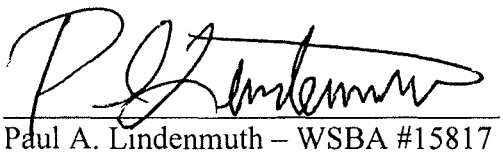
CONCLUSION

For the reasons stated above, the Petition for Review in this matter should be granted. This case, which was fully litigated below, presents substantial and important issues with respect to a trial court's prerogative to dismiss parties, without a determination of factual and/or legal merit and important questions with respect to the law relating to jury instructions.

The Petitioner in this matter, who unquestionably was a innocent victim who was catastrophically injured, she received an inherently flawed trial.

In the interests of justice, the Supreme Court should provide her the requested relief.

Dated this 5th day of November, 2015.



Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile:(253)752-1035
paul@benbarcus.com

DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this 5th Day of November, 2015, I caused to be served delivered to the attorney for the Respondents, a copy of **PETITION'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Supreme Court of the State of Washington via email at:

supreme@courts.wa.gov

Washington State Supreme Court
415 12th Ave. SW
Olympia, WA 98501-2314

These documents were provided to Respondents' attorneys, via email and delivery via ABC Legal Messenger:

Rebecca Boatright, Esq.
Seattle City Attorney's Office
600 Fourth Ave, Fourth Floor
Seattle, WA 98124

Robert L. Christie, Esq.
The Christie Law Group, LLC
2100 Westlake Ave N, Suite 206
Seattle, WA 98109

DATED this 5th day of November, 2015, at Tacoma, Pierce County, Washington.

Tiffany Dixon, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

OFFICE RECEPTIONIST, CLERK

To: Tiffany Dixon
Cc: Paul Lindenmuth; Ben Barcus
Subject: RE: Supreme Court No. 92208-0, Channary Hor v. City of Seattle

Received 11/5/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tiffany Dixon [mailto:Tiffany@benbarcus.com]
Sent: Thursday, November 05, 2015 3:28 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Paul Lindenmuth <Paul@benbarcus.com>; Ben Barcus <ben@benbarcus.com>
Subject: Supreme Court No. 92208-0, Channary Hor v. City of Seattle

Attached for filing is Petitioner's Reply to Respondent's Answer to Petition for Review.

Tiffany Dixon
Paralegal
Law Offices of Ben F. Barcus and Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444
tiffany@benbarcus.com