91541-5

No. PR 11649

Court of Appeals, Division II No. 45934-5-II

SUPREME COURT
OF THE STATE OF WASHINGTON

DEANN I. TINNON,

Petitioner,

v.

WHITE RIVER SCHOOL DISTRICT,

Respondent

ANSWER OF RESPONDENT TO PETITION FOR REVIEW

H. Andrew Saller, Jr.
Attorney for Respondent

VANDEBERG JOHNSON & GANDARA, LLP
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791
WSBA # 12945

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

A. IDENTITY OF RESPONDENT

Respondent White River School District requests this Court to deny review of the Court of Appeals decision terminating review designated in Part B of this Answer.

B. COURT OF APPEALS DECISION

Petitioner is seeking review of the March 12, 2015 Court of Appeals Order Denying Motion to Modify the Commissioner's Ruling Granting Motion on the Merits to Affirm. (Order attached as Appendix 1 and Commissioner's Ruling attached as Appendix 2 to the Petition for Review.)

C. ISSUES PRESENTED FOR REVIEW

1. Is this case clearly controlled by settled law that any error related to contributory negligence is harmless when the jury never reached that question?

2. Did the trial court abuse its discretion when it rejected plaintiff's proposed jury instruction on the duties of both drivers at an uncontrolled intersection?

D. STATEMENT OF THE CASE

On May 14, 2008 plaintiff Deann Tinnon's car collided with a White River school bus near the intersection of A.P. Tubbs Road and 157th Street East in Pierce County, Washington. The school bus driver, David Vawter, was driving the same route he had driven during the preceding school year and that school year. Report of Proceedings (RP) Jan. 28,

2014, 8. The accident occurred near the end of his regular route that he drove twice every day. RP Jan. 28, 8.

When Vawter came to the intersection with A.P. Tubbs Road, he made a complete stop. RP Jan. 28, 10. He checked traffic in both directions. When he saw there was no traffic, he began making a left turn. RP Jan. 28, 11. As he was straightening the bus out near the end of his turn, he first saw Tinnon's vehicle approaching from his left. RP Jan. 28. 11-12. He tried to accelerate the diesel engine bus, but was unable to avoid the collision. RP Jan. 28, 12-13.

Tinnon filed a complaint against White River on May 13, 2011, alleging that Vawter was negligent in failing to yield the right of way to her vehicle and that his negligence proximately caused the collision and her injuries. Clerk's Papers (CP) 1. White River denied that Vawter failed to yield the right of way and that the collision and Tinnon's injuries were proximately caused by any negligence by Vawter. CP 4. White River also pleaded as an affirmative defense that Tinnon's injuries and damages, if any, were proximately caused or contributed to, Tinnon's own comparative fault. CP 4.

This case was tried to a jury in Pierce County Superior Court. At the close of defendant's case, Tinnon moved for judgment as a matter of law on the issue of White River's negligence and her own contributory negligence. RP Jan. 28, 4-7. Tinnon argued that White River was negligent because the driver failed to yield to oncoming traffic as required

by statute. She also argued that there was insufficient evidence to support White River's affirmative defense of contributory negligence. The court denied Tinnon's motion because there were issues of fact where reasonable jurors could differ regarding each party's alleged negligence and the proximate cause of the accident. RP, Jan. 28, 12.

The court's instructions to the jury included Washington Pattern Instructions on negligence, contributory negligence, proximate cause, and violation of a statute as evidence of negligence. CP 61-65. Instruction No. 15 was a modified version of WPI 7.02.05 which was proposed by Tinnon as her supplemental instruction No. 29. CP 52, 73. It describes the duties of both drivers at an uncontrolled intersection such as the one involved here. That instruction states that the driver entering onto a public street or highway from a side road or residential district shall yield the right away to all vehicles approaching on the highway. CP 73.

The court's instructions also included a special verdict form that included six separate questions. CP 84-85. The first question was, "Was the defendant negligent?" The jurors answered that question "No." The verdict form instructed the jurors not to answer any further questions in the event they answered the first question "No." Consistent with that instruction, the jury did not answer any additional questions, including those regarding Tinnon's contributory negligence.

Tinnon did not take exception to the giving of any of the court's instructions. The only exception she took was to the court's failure to give

her proposed jury instruction No. 15 which addressed issues regarding comparative fault of Tinnon as the favored driver at the intersection. RP Jan. 29, 13.

Plaintiff appealed the court's judgment on the jury's verdict in favor of defendant. Tinnon made three assignments of error, all of which pertain to the issue of plaintiff's contributory fault.

White River filed a Motion on the Merits to Affirm pursuant to RAP 18.14 because Tinnon's appeal was clearly controlled by settled law. Specifically, White River relied upon *Bertsch v. Brewer*, 97 Wn.2d 83, 640 P. 2d 711 (1982) and *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532 (1991), that hold where a jury finds the defendant was not negligent and the jury was instructed not to answer any questions regarding plaintiff's contributory negligence, then any error by the trial court on the issue of contributory negligence is necessarily harmless because the jury never reached that issue.

Tinnon opposed that motion, arguing that *Bertsch* and *Ford* were not controlling authority because they were medical negligence cases. Tinnon also argued that the jury must have considered the issue of plaintiff's contributory negligence because the collision could not have occurred unless there was negligence by either the bus driver or Tinnon.

The Court Commissioner rejected Tinnon's arguments and granted White River's Motion on the Merits to Affirm. The Commissioner ruled that *Bertsch* and *Ford* were not restricted to medical negligence claims

and were controlling authority for this case. Additionally, the Commissioner ruled that this Court's decision in *Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369, 207 P.3d 1282 (2009), *aff'd by*, 171 Wn.2d 88, 249 P.3d 607 (2011) is clearly controlling settled law that because Washington is a pure comparative negligence jurisdiction where defendant can be liable even if plaintiff bears the majority of fault, a plaintiff cannot attribute a jury's negative finding as to defendant's negligence to its finding that plaintiff must have been at fault. Commissioner's Ruling, 9.

Tinnon next filed a Motion to Modify the Commissioner's ruling in which she again argued that the subject accident could not have occurred unless one of the two parties was negligent so the only basis for the jury's determination that defendant was not negligent is that it must have concluded plaintiff was negligent. Tinnon also contended that her proposed Jury Instruction No. 15 did not pertain to contributory negligence, but instead was a statement of the relative duties of the two drivers involved.

On March 12, 2015, the Court of Appeals issued its Order Denying the Motion to Modify. In that order, the Court clarified that it reviewed the trial court's decision not to give Tinnon's proposed jury instruction No. 15 for abuse of discretion and found that the trial court did not abuse its discretion. Tinnon's Petition for Review followed, in which she again

argues that the jury must have addressed the issue of contributory negligence in order to find that defendant was not negligent.

E. ARGUMENT

1. Under Washington Law, The Mere Fact That an Automobile Collision Occurred Does Not Mean The Jury Must Find One of The Two Drivers Was Negligent.

Tinnon bases her Petition for Review upon the flawed premise that this case presents "a situation where negligence must reside with one of two parties." Petition, 6. It has long been settled law in Washington that a plaintiff cannot base a claim of negligence solely on the fact that an accident occurred. *See, Hawley v. Mellem*, 66 Wn.2d 765, 405 P.2d 243 (1965). In that case, plaintiff contended that the jury verdicts in two separate actions were inconsistent because the juries found no negligence on the part of either driver in a two-car collision. This court rejected that argument:

> The fallacy in this argument is that the jury could have denied damages to the parties in both actions because they failed to sustain the burden of proof. **Negligence is not presumed simply because there was an accident.** One who asserts negligence has the burden of proving it to the satisfaction of the jury by a fair preponderance of the evidence. *Wilson v. Northern Pac. Ry. Co.*, 44 Wn.2d 122, 265 P.2d 815 (1954); *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953). (Emphasis added.)

Hawley, 771-72.

Tinnon cites only *Nelson v. Blake*, 72 Wn.2d 652, 434 P.2d 597 (1967) as authority for her argument that someone must have been negligent in this two-vehicle collision case. Tinnon's reliance on *Nelson* is misplaced because of two significant changes to the law of negligence after *Nelson* was decided.

In *Nelson*, the jury rendered a verdict for defendant, but it did not find that the defendant, who was the disfavored driver, was not negligent. As noted by the Court, at 654:

> 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.

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, in pertinent part:

> 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; ...

Here, the jury was properly instructed on the statutory duties of the drivers and that it could consider a breach of those duties as evidence of negligence.

In addition, *Nelson* was decided when Washington followed a strict contributory negligence scheme 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):

> 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 negligence doctrine explains the following statements by the *Nelson* Court:

> 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 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 the rule that contributory negligence is 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.

Nelson is not applicable here so Tinnon has no authority for her premise that the jury must have concluded she was negligent in order to find defendant was not negligent.

As noted by the Commissioner in her ruling granting respondent's motion on the merits to affirm, "Tinnon's argument that the jury must have reached the issue of contributory negligence because the jury found for White River fails, as this too is clearly controlled by settled law." *Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369, 372, 207 P.3d 1282 (2009), *aff'd by* 179 Wn.2d 88, 249 P.3d 607 (2011).

In *Veit*, plaintiff, like Tinnon here, argued that the jury must have considered plaintiff's own contributory negligence in order to be able to reach a defense verdict. This court rejected that argument stating:

> Washington is a pure comparative negligence jurisdiction, in which a defendant can be held liable and negligent even where the plaintiff bears the majority of the fault. RCW 4.22.005. Thus, [plaintiff] cannot attribute the jury's negative finding as to [defendant's] negligence to its finding that [plaintiff] was a poor driver who is not in compliance with applicable traffic safety laws.

Veit, 171 Wn. 2d at 117.

The fact that the driver of the school bus was the disfavored driver is not a sufficient basis for concluding that the jury must have found

Tinnon at fault. In a similar case, *Morse v. Antonellis*, 149 Wn.2d 572, 70 P.3d 125 (2003), 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. Even though defendant was the disfavored driver, the jury found defendant did not negligently cause the accident.

This Court reversed the court of appeals conclusion that 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. This court stated:

> 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 events, concluded she acted reasonably, and returned a verdict in her favor.

Morse, at 574.

As in *Morse*, the jury here concluded that even though the bus driver was the disfavored driver, he was not negligent. There is no reason why the jury would first have to determine that Tinnon was contributorily negligent in order to reach that verdict.

2. The Rule that Error on an Issue not Reached by the Jury is Harmless is Not Limited to Medical Malpractice Cases.

In *Bertsch* and *Ford*, the courts held that any error regarding contributory negligence must be harmless because the jury found the defendant in each case was not negligent so the jury never addressed the issue of contributory negligence. Tinnon suggests that when this court referenced *Bertsch* as a medical malpractice case in *Hizey v. Carpenter*, 119 Wn.2d 251, 270, 830 P.2d 646 (1992), it may have intended to limit the application of *Bertsch* to medical malpractice actions. In fact, *Hizey* which was not a medical malpractice case, makes it clear that there is no such limitation.

In *Hizey*, plaintiff claimed that the trial court erred in its instructions regarding damages and contributory negligence. *Hizey*, 269. The jury was given a special verdict form that instructed it not to answer any questions if it answered "No" to the first question of whether the defendant was negligent. The jury did answer that question "No" and, as instructed, did not answer the remaining questions. *Hizey*, 269. This court said, at 269-70:

> The jury is presumed to follow the court's instructions. *Bordynoski v. Bergner*, 97 Wn.2d 335, 342, 644 p.2d 1173 (1992). Therefore, the jury never even reached the issue of damages. Error relating solely to the issue of damages is harmless when a proper verdict reflects nonliability. *American Oil Co. v. Columbia Oil Co.*, 88 Wn.2d 835, 842, 567 P.2d 637 (1977).

This Court in *Hizey* then applied the same analysis to plaintiff's claim of error regarding instructing the jury on contributory negligence when the defense presented no evidence of contributory negligence:

> As with damages, the jury did not address the issue of contributory negligence. The jury was instructed, on the special verdict form, not to answer the question of whether plaintiffs were contributorially negligent if they found [defendant] was not negligent. Again, we presume the jury obeys the court's instructions. *Bordynoski*, 97 Wn.2d at 342. In a medical malpractice case, we declined to consider the sufficiency of evidence of contributory negligence because the jury had found the physician was not negligent, and, therefore, "presumably never reached the issue of [the plaintiff's] contributory negligence." *Bertsch v. Brewer*, 97 Wn.2d 83, 92, 640 P.2d 711 (1982). Here, the jury did not reach the issue and therefore any error in giving the instruction was harmless.

Hizey, at 270. Rather than limiting the application of *Bertsch*, this court's opinion in *Hizey* makes it clear that in this case, error on an issue that a jury never reaches is harmless.

Tinnon cites *Bordynoski* as authority that an error in jury instructions regarding contributory negligence is not harmless even though the jury was instructed not to answer questions regarding contributory negligence if it found the defendant was not negligent. However, Tinnon failed to include the following from her quotation of *Bordynoski*:

> Furthermore, the jury did, in fact, answer the questions on the special verdict form pertaining to plaintiff's negligence and its causal connection to the injuries, and their answers were consistent with the trial judge's rulings on these issues. These answers support our conclusion that the jury's verdict may have been prejudicially colored by the erroneous rulings and instructions given by the trial judge.

Bordynoski, at 342-343. *Bordynoski* is not an exception to the rule that the jury is presumed to follow the court's instructions. Instead, it is a case where the jury simply did not follow those instructions. It has no application here.

Similarly, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924, (2010), relied upon by Tinnon, does not provide support for her position that any errors relating to contributory negligence were not harmless even if the jury found defendant was not negligent. In *Gregoire*, the City of Oak Harbor asserted affirmative defenses of assumption of risk and contributory negligence to claims made on behalf of the estate of a jail inmate who hanged himself while in custody. Contrary to Tinnon's assertion, the jury did not find that defendant was not negligent.

> 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 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.

Gregoire, at 643.

This court said, "It follows that the given instructions would lead the jurors to the inevitable conclusion that Gregoire's own conduct was the sole proximate cause of his death." *Gregoire*, at 643. In addition, this

Court held that the instructions did not properly inform the jury of the applicable law because the city had a specific duty to protect Gregoire from injuring himself, and both contributory negligence and assumption of risk defenses must yield to that affirmative, nondelegable duty. *Gregoire*, at 643-44. None of those circumstances applies here.

3. Tinnon's Proposed Jury Instruction Does Relate to Contributory Negligence.

Tinnon's third assignment of error is:

> The trial court erred when it refused to submit plaintiff's Proposed Instruction 15 which would have fully informed the jury of the **duties of the favored driver**. (Emphasis added.)

Appellant's Opening Brief, 3. That proposed instruction includes the following:

> The favored driver is, however, entitled to reasonable reaction time after it becomes apparent, in the exercise of due care, that the disfavored driver will not yield the right of way. **It is not sufficient to attempt to prove comparative negligence on the part of the favored driver** by means of split-second computations of time, speed and/or distance. (Emphasis added.) CP 31.

Tinnon now argues the proposed instruction is a separate issue on the duties of the parties and not a contributory negligence instruction. Pet. for Review, 15. It is not.

Tinnon cites *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2002) as authority that to show proximate cause, a party claiming

negligence must produce evidence from which the trier of fact can infer the favored driver's approximate point of notice. *Bowers*, at 506. The issue of point of notice relates to the conduct of the favored driver. In *Bowers*, plaintiff Colin Bowers was a passenger in a car driven by his brother, Walter Bowers. Walter failed to stop at a stop sign and was then struck by a truck driven by Marzano. *Bowers*, at 500. Bowers sued Marzano for damages resulting from Marzano's alleged negligence based on inattentiveness and speeding. The trial court granted summary judgment for Marzano, the favored driver, because Bowers failed to establish that the favored driver had sufficient time from the point of notice to take reasonable steps to avoid the collision.

The Court of Appeals pointed out that the driver with the right of way is the favored driver and the disfavored driver bears the primary duty to avoid a motor vehicle accident. *Bowers*, at 506. The court said:

> A favored driver may assume the disfavored driver will yield the right of way; and, this assumption continues until the favored driver becomes aware, or in the exercise of reasonable care should have become aware, that the disfavored driver will not yield the right of way. The point where a favored driver realizes a disfavored driver will not yield the right of way is the point of notice. (Citations omitted.)

Bowers, at 506.

Here, Tinnon was the favored driver. Consequently, the issue of point of notice when the disfavored driver would not yield the right of way applies solely to Tinnon's contributory negligence.

4. The Trial Court Did Not Abuse Its Discretion.

Even if the trial court's failure to give plaintiff's proposed jury instruction 15 is not considered harmless error because it related to the issue of contributory negligence never reached by the jury, Tinnon has failed to show abuse of discretion. In *Rekhter v. State, Dept. of Social & Health Services*, 180 Wn. 2d 102, 117, 323 P.3d 1036 (2014), this court said:

> Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn. 2d 726, 732, 927 P.2d 240 (1996).

Tinnon asserts that the jury did not have the benefit of a full understanding of the relevant duties of the favored driver and cites *Poston v. Mathers*, 77 Wn.2d 329, 333-34, 462 P.2d 222 (1969) as authority that the complete duties of the favored and disfavored drivers must be presented to the jury. The court's jury instructions here satisfy that requirement.

In *Poston*, this Court said, at 333:

> It is error to instruct the jury that all rights-of-way are relative and that the duty to avoid accident at intersections rests upon both drivers, unless such instruction is qualified by the statement that the primary duty to avoid collision rests upon the disfavored driver. *Huber v. Hemrich Brewing Co.*, 188 Wash. 235, 62 P.2d 451 (1936).

The Court's Instruction No. 15 here includes precisely that statement. That instruction first states that a statute provides that a driver about to enter onto a highway from a side road or residential district shall yield the right of way to all vehicles approaching on the highway. It then states:

> This right of way, however, is not absolute but relative, and the duty to exercise ordinary care rests upon both parties. **The primary duty, however, rests upon the driver of the entering or crossing vehicle,** which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times. (Emphasis added.)

This instruction is a correct statement of law and Tinnon took no exception to it. It was not misleading and allowed Tinnon to argue her theory of the case. Tinnon has not established that the trial court abused its discretion by not giving her proposed instruction.

F. CONCLUSION

The errors assigned by Petitioner relate solely to the issue of plaintiff's contributory negligence. The jury never reached that issue. Therefore, under clearly settled controlling authority, even if there was any error by the trial court, it must have been harmless. Petitioner's entire premise is that the jury was required to find one of the two parties in this case to have been negligent so it must have found plaintiff contributorily

negligent in order to render a verdict in favor of defendant. Petitioner's premise is inconsistent with current Washington law and is directly contrary to this court's decision in *Veit v. Burlington Northern Santa Fe Corp.* In addition, petitioner has not shown the trial court abused its discretion.

Tinnon fails to show that this case involves an issue of substantial public interest that should be determined by this Court. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 14 day of May, 2015.

VANDEBERG JOHNSON & GANDARA, LLP

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

1201 Pacific Ave., Ste. 1900
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791
Facsimile: (253) 383-6377

CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandeberg Johnson & Gandara LLP. On the 7th day of May, 2015, I caused to be delivered via electronic mail to Petitioner Deann Tinnon and G. Parker Reich, attorney for Petitioner, a copy of the Respondent's Answer to Petition for Review at:

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

Email: preich4@seanet.com

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

Dated this 7th day of May, 2015, at Tacoma, Washington.

Rachel Schweinler

OFFICE RECEPTIONIST, CLERK

To: Schweinler, Rachel
Cc: Saller, Andrew; preich4@seanet.com
Subject: RE: Tinnon v White River School District

Received 5-7-2015

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: Schweinler, Rachel [mailto:Rschweinler@vjglaw.com]
Sent: Thursday, May 07, 2015 10:16 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Saller, Andrew; preich4@seanet.com
Subject: Tinnon v White River School District

Please find attached Answer of Respondent to Petition for Review
Case Name: Tinnon v White River School District
Case Number: PR 11649 (COA Div. II No. 45934-5-II)
Filing Party: H. Andrew Saller, Jr.
(253) 383-3791
WSBA # 12945
email: asaller@vjglaw.com; rschweinler@vjglaw.com
Thank you.