COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

DEANN I. TINNON,

Appellant,

vs.

WHITE RIVER SCHOOL DISTRICT,

Respondent.

NO: 45934-5-II

APPELLANT'S RESPONSE TO RESPONDENT'S MOTION ON THE MERITS TO AFFIRM

I. IDENTITY OF PARTY

Appellant, Deann Tinnon, respectfully requests the relief sought in part II.

II. RELIEF REQUESTED

Appellant respectfully requests that the motion on the merits to affirm be denied and any applicable sanctions associated with this motion be resolved in favor of the appellant.

III. GROUNDS FOR RELIEF AND ARGUMENT

1. The Motion on the Merits to Affirm Should Be Denied Because Both Issues Raised by the Appellant Have Merit and Are Supported By Both Facts and Relevant Case Law.

a. None of the case law cited by the respondent is relevant or controlling to the issues in this case.

The respondent grossly misrepresented the applicability and relevance of medical malpractice standards to this case. Washington courts do not apply the rule, developed for medical malpractice cases, that a finding of no negligence for the respondent bars an appeal on contributory negligence in an automobile case of this nature. The reason for this is apparent with the application of the only logical conclusion in a disfavored driver/favored driver collision such as presented by Ms. Tinnon: Someone is at fault. But for the negligence of a party, the collision could not have occurred under these facts. There is no claim in this case, and no testimony or facts presented at trial, relating to any other proximate cause of the collision other than negligence of the respondent or contributory negligence of the appellant. *See generally*, RP, CP. Unsurprisingly, this is the exact analysis from the Washington Supreme Court from a case—discussing an intersection collision between a favored driver and disfavored driver—that truly is on point. *Nelson v. Blake*, 72 Wn.2d 652, 653, 434 P.2d 595 (1967) ("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.**") (emphasis added). The respondent here is asking the Court to make a ruling that flies in the face of common sense, logic, and controlling precedent.

The special verdict form does not support the repondent's suggestion that contributory negligence was not reached by the jury. *Respondent's Motion to Dismiss* at 7. The converse is true however, in that the special verdict form would prevent the jury from noting the only possible finding they had to come to in order to find no negligence on behalf of the respondent in this case. See CP 84.

Although the respondent did note that the cases cited by it were all medical practice cases, it is telling that the respondent offered no case law support for the contention that the medical malpractice standard should be applied universally. *Respondent's Motion to Dismiss Appeal* at 7. As recently as 2010, the Washington Supreme Court has held that factual circumstances dictate the appropriateness of contributory negligence errors when no negligence was found against the defendant. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (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).

A simple walk through of the cases cited by the respondent reveals why the medical malpractice rule works in fact patterns that support no negligence on the part of any party involved. In *Bertch*, the Court looked at a medical malpractice claim on the issue of informed consent, so if the defendant was found not negligent, there was consent and there is no necessary contributory negligence on the part of the plaintiff. *Bertch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982). In *Ford*, the Court looked at a medical malpractice question on the issue of the potential failure to perform a follow up x-ray after surgery, so the finding of no negligence was in relation to the necessity of the x-ray and did not necessitate a finding of contributory negligence on the part of the plaintiff. *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532 (1991). In *Crisp* and in *Bauman*—premises liability and auto collision respectively—there was no application of the rule that contributory negligence errors are always harmless errors. *See generally*, *Crisp v. Nursing Homes*, Inc., 15 Wn. App. 599, 550 P.2d 718 (1976); *Bauman v. Complita*, 66 Wn.2d 496, 403 P.2d 347 (1965).

The only case that Appellant can find that applies the rule stated by respondent in any auto collision accident is an unpublished opinion from the Court of Appeals Division One. *Osborn v. Mathern*, 63232-9-I (2010) (unpublished). The Court applied the rule because the appellant in that case proposed and agreed to an emergency doctrine instruction which left open the avenue of a non-negligent finding against all parties. *Id.*

b. The issue regarding the application of plaintiff's proposed instruction 15 is not a simply contributory negligence issue; rather, it is a question of the duties of the parties.

The question raised by the lack of plaintiff's proposed instruction 15, is whether the jury had full knowledge of the rights and duties of both drivers when determining fault for the collision. *See Brief of Appellant* at 12-15. The jury was not instructed on duties and rights of Ms. Tinnon. *Id.* As cited in Appellant's opening brief, the duty of the disfavored driver and favored drivers do not exist in a vacuum independent from each other. *Id.* at 13. The jury should have been instructed on the full duties and rights of each party in order to completely understand the corresponding duty and rights of the opposing party. *Id.* In this case, the jury was not instructed on the reasonable point of notice which is the precise point at which Ms. Tinnon had a duty to react to avoid the collision. *Id.* at 12-15. Until that point is reached, the duty rests on the disfavored driver to avoid the collision. If for any reason the Court decided to apply a medical

malpractice rule to contributory negligence in this case, the appellant would continue to require resolution on this separate issue of the duty instructions to the jury.

2. The appellant should be granted fees and costs associated with the respondent's motion to on the merits to affirm.

The gross misstatements and misrepresentations in the respondent's motion are a clear attempt to mislead the Court and cause undue expense and litigation during this appeal. Specifically, the appellant takes issue with the respondent's contention that Appellant should be sanctioned for not bringing medical malpractice standards to the attention of the Court. Respondent's Motion at 8-10. Expenses and attorney fees may be awarded as to a litigant whose opponent acts in bad faith when conducting litigation. *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997).

> RAP 18.9 authorizes an award of terms or compensatory damages against a party who "uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules...." In addition, CR 11 discourages filings that are not "well grounded in fact and ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [are] not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The rule permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986).

Id. at 510.

The statement that the cases cited by respondent are "directly on point" and that those cases tell us 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" are completely false and, as shown above, contrary to established law. *Respondent's Motion on the Merits to Affirm* at 4. Additionally, the respondent demanded an award of attorney's fees as sanctions against Ms. Tinnon stating, "Both *Bertsch* and *Ford* are controlling authority for the rule that even if the trial court erred as Appellant contends, it was harmless error." *Id.* at 9-10. Again, a complete misstatement of the actual controlling authority in this case as discussed above. Therefore, Appellant respectfully requests that if any sanctions are awarded as a result of this unnecessary motion, they be in favor of Ms. Tinnon.

IV. CONCLUSION

The respondent's misdirection to medical malpractice analysis is completely inapplicable to this case. There was negligence here by a party. It had to have been the favored driver or the disfavored driver, or logically, no collision would have occurred. In the absence of negligence, there must be an intervening proximate cause to a collision of this

particular nature. No intervening cause was plead or argued by either party. The only applicable case law on point directly supports this position.

Additionally, the appellant's argument on plaintiff's proposed jury instruction 15 is an argument of relevant duties, not simple contributory negligence as the respondent claimed. This issue standing alone supports the appeal.

The appellant brought a claim with merit both factually and supported by case law. Therefore, the appellant respectfully requests that any award of sanctions in this case be resolved in favor of the appellant and against the respondent.

Dated this 12th day of September, 2014.

Respectfully submitted by,

G. PARKER REICH, WSBA #35500
ANNE R. VANKIRK, WSBA #47321
Attorneys for Appellant
Jacobs & Jacobs
114 East Meeker Avenue
Puyallup, WA 98372
WSBA #35500

DECLARATION OF SERVICE

I certify that on the 12th day of September, 2014, I caused a true and correct copy of the foregoing pleading to be served on the following in the manner indicated below:

H. Andrew Saller via Hand Delivery
Vandeberg Johnson Gandara
1201 Pacific Avenue, Suite 1900
Tacoma, WA 98401-1315

Court of Appeals, Division II, via Hand Delivery
950 Broadway, Suite 300
Tacoma, WA 98402

DATED this 12th day of September, 2014, at Puyallup, Washington.

Alexandria Gust
Legal Assistant