No.: 46509-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

DILLON SMELSER, individually, and DERRICK SMELSER, a minor child, by and through his parent/guardian, MARIA SELPH,

Appellants,

v.

JEANNE PAUL and "JOHN DOE" PAUL, individually, and the marital community comprised thereof, and RONALD SMELSER, individually,

Respondents.

APPELLANT'S OPENING BRIEF

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I. TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

I. Washington Cases

II. Statutes

III. Court Rules

Constitutional Provisions

I. ASSIGNMENT OF ERROR

1. The trial court erred in giving Court's Instruction No. 10, which was an "Unavoidable Accident" instruction when the facts and circumstances of the case did not warrant such an instruction. (See *Appendix No. 1* – Court's Instruction No. 10).

2. The trial court erred in failing to grant judgment as a matter of law on the issue of defendant Paul's negligence.

3. The trial court erred by entering a judgment severally when under the terms of RCW 4.22.070(1)(b) the verdict should have been joint and several with respect to two codefendants when the plaintiffs in the action as a matter of law were fault free.

4. The trial court erred in providing codefendant Paul the benefit of Ron Smelser's "parental immunity" which he waved by failing to appear in the action thus subjecting himself to an Order of Default.

5. The trial court erred in dismissing Ronald Smelser from the case when there was no evidence he breached an actionable duty.

6. The trial court erred in admitting a medical record containing unattributed hearsay statements regarding the facts and circumstances of the accident.

7. The trial court erred by refusing to consider plaintiff's Motion for Judgment as a matter of law because it erroneously believed

that it was bound by a different judge's earlier summary judgment decision.

II. ISSUES

1. Did the trial court err in failing to grant judgment as a matter of law at the close of the evidence on the issue of defendant Pauls' negligence, parental immunity and the potential liability of the plaintiff's father, Ron Smelser, who breached no actionable duty?

2. Did the trial court err by entering judgment essentially "severally" when, despite plaintiff's objections Ron Smelser, the father of the plaintiffs, was included in the verdict form and assigned a 50% allocation of fault by the jury?

3. Did the trial court err in admitting a medical record containing unattributable hearsay statements regarding the facts and circumstances of the accident when the foundation for the admission of such evidence was lacking?

4. Did the trial court err in refusing to consider plaintiff's motion for judgment as a matter of law at the close of the evidence based on an erroneous belief that it was bound by a prior trial court judge's summary judgment determination?

III. STATEMENT OF FACTS

A. Historical Background of Case

This case arises out of an April 16, 1998 auto vs. pedestrian collision which occurred in the driveway of Ronald Smelser's rental home located in Orting, Pierce County, Washington. Also residing at Mr. Smelser's Orting residence was Derrick Smelser, Date of Birth: August 10, 1995 (2 years old) and his older brother Dillon, Date of Birth: January 29, 1993 (5 years old). The rental house sat on a relatively large piece of property. On April 16, 1998 Ronald Smelser had a dating relationship with defendant Jeanne Paul. Late in the afternoon on April 16th Ms. Paul, who was driving a lifted Ford Bronco, arrived at the Smelser's residence to visit Ronald Smelser. At the time of her arrival, Ronald was working on a car in the driveway area, and young Derrick and Dillon were playing in the adjacent field. Ms. Paul visited Ronald for a time, went in and out of the house and to the car Ronald was working on. While Ron Smelser and the defendant were visiting, Derrick left the field and began playing in a mud puddle in the middle of the driveway making "mud pies".

Ms. Paul, after a period of time, returned to her vehicle and at a rapid rate of speed accelerated down the driveway. For inexplicable reasons, she had failed to observe that Derrick was playing in a mud

puddle in the middle of the driveway. As observed by Derrick's brother, Dillon, who saw the entire accident, as Ms. Paul proceeded down the driveway and she ran directly over Derrick, trapping him beneath the vehicle.

Dillon was the only eyewitness to the events surrounding the accident. According to Dillon, after Ms. Paul arrived at the Smelser's Orting residence Derrick went from the adjacent field to begin playing in the mud located in the residence driveway. (RP 1306). According to Dillon, as Ms. Paul reentered her Bronco to leave that day Derrick was standing in the middle of the driveway and Ms. Paul drove directly over him, trapping Derrick underneath her Bronco. (RP 1309-10). Dillon screamed and began running towards the truck. (Id). Alerted by Dillon's screams, Ron Smelser was able to observe Derrick trapped underneath Ms. Paul's Bronco.

Ron Smelser was alerted to the fact that his son Derrick had just been run over by Ms. Paul's Bronco by Dillon's screams. (RP 304). In response he grabbed Derrick, placed him in one of his automobiles and promptly tried to acquire emergency medical aid for him. (Derrick's forehead had been torn open exposing bone). Mr. Smelser, who was also accompanied by Dillon, first took Derrick to a nearby urgent care which

indicated that it could not help him and he was directed to take Derrick to Mary Bridge Hospital.

Inexplicably, the records generated from this visit to Mary Bridge Hospital created a substantial amount of confusion during the course of trial. The "Emergency Room Services Note" from that visit provides:

> Derrick is a 3-year-old male who was brought in by his father with possible head injury and scalp laceration. He is a usually healthy child who was playing on the front bumper of a raised 4x4 truck which was being driven by his father's girlfriend. She did not know he was there and accelerated forward. He let go, actually tumbled under the truck a couple of times, not getting injured by the wheels. When he came out from under the truck after having landed on the gravel road, however, his father noticed a large scalp laceration and rushed him in the car to the emergency department. The father states he has been normal on the way here, although he seems to be falling asleep. The accident was not really witnessed by anyone. The only injuries seem to be the upper body and head. The patient is moving all of his extremities. The patient last ate at 11:30. (Ex. 119) *(Appendix No. 2).*

The author of this note, Margaret Hood M.D., was called to testify at time of trial. Dr. Hood could not attribute the statements regarding the facts surrounding the accident to any particular individual, and nor could it be explained how the details of the accident could have been somehow relayed to her given the fact that according to the note "the accident was really not witnessed by anyone". (RP 952).

Similarly, a consultation note by a plastic surgeon, Dr. Thomas Griffith M.D., provided similar unattributed historical information regarding the accident, "Derrick is a 3-year-old male who apparently on the front bumper of a car when it was moving, he fell off, and the car ran over him without actually crushing him." (Ex. 124A). Dr. Griffith also was called at time of trial and could not explain what or who the source of this information was but it likely was just repeated information from the emergency room services note. (RP 1047).

Ms. Paul was called as an adverse witness at the time of trial. Ms. Paul admitted that she knew that there were two small boys in the area at the time she began her drive to exit the Smelser property. (RP 661). She had no personal knowledge with respect to any allegation that Derrick was actually on her bumper at the time or immediately prior to her running him over. (Id., P. 670). Ms. Paul provided testimony which strongly showed that she had initially backed her vehicle and continued to be looking to the rear at the time she began moving forward striking Derrick. (RP 680-81).

Subsequent to the accident Dillon was diagnosed as suffering from post-traumatic stress disorder as a byproduct of witnessing the injury to his brother.

B. Procedural History

This case was filed on October 25, 2011, initially with Ms. Paul as the sole defendant.[1] (CP 1-5).

Following substantial discovery the appellants (hereafter plaintiffs) moved for summary judgment on the issues of liability, comparative fault, and the existence of any empty chair defenses. (CP 23-49; CP 50-114). Specifically, it was argued that as a "matter of law" that neither Derrick nor Dillon given that they were below the age of 6 could be found contributorily or comparatively at fault. Plaintiff also argued that given that Ronald Smelser would be entitled to "parental immunity" he could not be an empty chair. Finally it was argued that the evidence established as a matter of law that Ms. Paul had been negligent. Id.

Defendant Paul opposed plaintiffs' motion. (CP 127-139). Ms. Paul disputed plaintiffs' contention that she was liable as a matter of law and argued that even though the children were incapable of contributory fault that their actions could be the "sole proximate cause" of the injury-producing event. Additionally it was argued that even if Mr. Smelser was entitled to "parental immunity" that he nevertheless

[1] While generally this is a personal injury action governed by the three year Statute of Limitation applicable to such claims, RCW 4.16.080, the applicable Statute of Limitation was tolled due to the plaintiff's minority under the terms of RCW 4.16.190(1). Thus, both Dillon and Derrick had until their 21st birthday to bring this action against Ms. Paul. There was and is no issue in this case with respect to Statutes of Limitation.

could be subject to a fault allocation under the terms of RCP 4.22.070 which, according to the trial court was permissible because if he was entitled to parental immunity he would be a" immune entity" towards whom fault could be allocated. See RCP 4.22.070(1). The trial court's order granting in part and denying in part plaintiffs' motion for summary judgment provided:

> ORDERED as follows:
> 1. That the plaintiffs, Derrick Smelser and Dillon Smelser, who were 2 1/2 and 5 years old of age at the time of the accident at issue, are incapable of comparative or contributory fault and plaintiffs' motion for partial summary judgment re comparative/contributory fault of plaintiffs is hereby GRANTED; however, the trier of fact will determine whether the contact of the plaintiff Derrick Smelser was a cause in fact of accident **deeming the accident unavoidable**;
> 2. That there are genuine issues of material fact as to defendant Jeanne Paul's negligence for the accident at issue and plaintiffs' motion for partial summary judgment as to liability is DENIED;
> 3. That there are genuine issues of material fact as to non-party Ron Smelser's negligence for the accident at issues and plaintiffs' motion for partial summary judgment striking the defendant's affirmative defense as to this non-party is DENIED;
> 4. That there was been no showing of willful or wanton conduct on the part of non-party Ron Smelser, the father of the plaintiffs, and he would be entitled to assert parental immunity from suit by his two sons, the plaintiffs herein, however, while Mr. Smelser is entitled to assert immunity from pursuit by his children, the court does find that Ron Smelser is a potential non-party at fault whose negligence, if any, is to be determined by the trier of fact, pursuant to RCW 4.22.070. That any percent of fault attributed by the trier of fact to Mr. Smelser shall be

reduced from the total amount of the verdict, if any. (emphasis added). (CP 246-248). *(Appendix No. 3).*

Promptly following the entry of this order plaintiffs sought reconsideration/or revision as it related to the question of whether nor not Ronald Smelser, despite potential parental immunity could be an entity towards whom fault could be allocated under the terms of RCW 4.22.070(1) (CP 251-265). On reconsideration plaintiffs argued that Ron Smelser if he was entitled to "parental immunity" could not be a party towards whom "fault" within the meaning of RCW 4.22.015 could be attributed to. Plaintiff reasoned that "parental immunity" is simply a shorthand indication that a parent breaches no actionable duty and that there is no tort of "negligent parental supervisor" recognized within the State of Washington. Similarly it was pointed out that to recognize such tort would be contrary to the terms of RCW 4.22.020 which precludes the imputation of negligence of a parent onto that of a child. Plaintiff urged the court to recognize that by reducing a verdict in favor of a child because of parental negligence would be nothing more than imputation of parental fault. Id.

On December 7, 2012 the trial court denied plaintiffs' motion for reconsideration. In response plaintiffs, had no choice, but to amend their compliant to include a claim against Ronald Smelser as a defendant. (CP

289-290) Following service of the amended complaint upon Mr. Smelser, he ultimately defaulted and an order of default was entered by the trial court.[2] (CP 293-302; 337-338; 329-332; 339-347; 364-365).

Trial in this matter commenced on June 2, 2014 and concluded on July 1, 2014 with a jury verdict in favor of Derrick Smelser and in favor of defendant Paul with respect to Dillon's claim for bystander negligent infliction of emotional distress. (CP 1644-1646).

Prior to verdict and at the close of all the evidence plaintiffs' counsel moved for a directed verdict on a variety of issues. (CP 1495-1592). Unfortunately, the trial judge, Judge Stolz believed that she was bound by the previous trial judge's summary judgment order, denied plaintiffs' motion for a directed verdict on the issues of Mr. Smelser's liability. (RP 56-60; 1636-1637). And in particular plaintiff argued that the court should grant a directed verdict on the issue of whether or not this was an "unavoidable accident". The court declined to rule on that issue as a matter of law instead finding that it was a jury question.

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[2] In plaintiffs' amended complaint it was made clear that the only reason that Ronald Smelser was being named as a defendant in his children's case was the fact that "he was identified by the defendant Paul as being an entity at fault for plaintiffs' injuries and in order to preserve joint and several liability." As discussed below it is plaintiffs' position that even if we assume that there could be an argument that Ronald Smelser was negligent in the supervision of his children there **is no cause of action for negligent supervision of children by a parent in the State of Washington.**

Following the denial of plaintiffs' motion for a directed verdict the court heard exceptions to jury instructions. Plaintiffs' counsel specifically excepted to the court's giving of the court's Instruction No. 10 which included language regarding "unavoidable accident" because the giving of such instruction was and is disfavored, and was unsupported by the facts of this case which clearly indicated that it was the type of accident that would only have occurred had some individual been negligent. (RP 1652) (Appendix No. 1). Plaintiff also excepted to court's Instruction No. 12 which included Ronald Smelser in the case and as an individual toward whom fault could be allocated. (Id., 1653).

Based on the court's instructions the jury entered a rather parsimonious verdict in this case awarding Derrick Smelser $30,225.40 in general and special damages and Dillon Smelser nothing on his PTSD claim. The jury allocated fault amongst defendant Paul and Ronald Smelser on a 50/50 percentage basis. *(Appendix No. 4).*

Despite the fact that at the defendant's behest Ronald Smelser was a named party in this case and he was allocated fault in the court's jury verdict, the Court refused to enter a verdict against him ignoring "joint and several" liability principles still encapsulated within RCW 4.22.070, and entered a judgment against Jeanne Paul only in the amount of $15,112.70 -

50% of the verdict. (CP 1644-1646). *(Appendix No. 5).* This appeal followed. (CP 1679-1684).

IV. ARGUMENT

A. Standards of Review

A trial court's decision regarding jury instructions are reviewed de novo if they are based on matters of law, or for an abuse of discretion, if they are based on matters of fact. See *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d, 289 (2009). Jury instructions are sufficient when they allow counsel to argue those juries of the case, do not mislead the jury, and when taken as a whole properly inform the jury of the law to be applied. *Thompson v. King Feed Nutrition Serv., Inc.*, 152 Wn.2d 447, 453, 105 P.3d 378 (2005). Giving an instruction which contains an erroneous statement of the applicable law is a reversible error when a prejudice to the party. *Thompson*, 153 Wn.2d App. 453. A jury instruction is deemed to be prejudicial if it substantially affects the outcome of a case. See, *RWR Mgmt., Inc. v. Citizen's Realty Co.*, 133 Wn.App. 265, 278, 135 P.3d 955 (2006). When the record discloses an error in an instruction given on behalf of the party whose favor the verdict was returned, the error is presumed to have been prejudicial and it furnishes a ground for reversal unless it firmly appears that it was harmless. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1985). This is

particularly so when it affects the burden of proof. Id. A "harmless error" is an error which is trivial, formal or merely academic, and was not prejudicial to the interest, rights of a party asserting it and in no way affects the final outcome of a case. Id. When a trial court provides an instruction which fails to properly set forth the party's burden of proof, or alters in any way the elements of the claim, such an error is presumptually prejudicial and supplies a ground for reversal. Id. A new trial is an appropriate remedy for a prejudicial error in jury instructions. See *Furfaro v. City of Seattle,* 144 Wn.2d 363, 382, 27 P.3d 1160 (2001).

When fashioning instructions a trial court should take great care to account for the dangers of unduly emphasizing any portion of the testimony, or one side's theory of the case versus another. See *State v. Monroe*, 107 Wn.App. 637, 27 P.3d 1249 (2011). Instructions must be supported by the evidence and not mere speculation. *Hoffman v. Damach*, 1 Wn.App. 833, 465 P.2d 203 (1970). It is prejudicial error to give an instruction not supported by the evidence. *Midill v. Los Angeles Sea Otter Motor Express, Inc.*, 64 Wn.2d 548, 392 P.2d 821 (1964).

Here, as discussed below, it was both legal and factual error for the trial court to give an "unavoidable accident" instruction in this case.

CR 50, under the heading of "Motions for Judgment as a Matter of Law and Actions Tried by a Jury," states in its relevant part as follows:

> (1) *Nature and Effect of Motion.* If, during trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third-party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment and the law and facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.
>
> (2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

Judgment as a matter of law is appropriate where "a party has been fully heard on the issue during a jury trial and the Court finds that a reasonable jury would not have legally sufficient evidentiary basis to find for the party on a specific issue." See, CR 50(a). See also, *Anderson v. Liberty Lobby*, 47 U.S. 242, 251 (1986) (a court need not submit an issue to the jury when there is no evidence "upon which a jury could properly proceed to find a verdict for the party producing it, on whom the onus of proof is imposed"), (citations omitted). When "there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict." *Los Angeles Memorial Coliseum Commission v. NFL,* 726 F.2d 1381, 1387 (9th Cir. 1984). A mere scintilla of evidence

is not sufficient to present a question for the jury. See, *Westinghouse Electrical Corp. v. CX Processing Labs, Inc.*, 523 F.2d 668, 673 (9th Cir. 1975) (affirming granted judgment as a matter of law and stating "substantial evidence is more than a mere scintilla"). The quantum of evidence necessary is defined in *Hojem v. Kelly*, 93 Wn.2d 143 (1980) which provides as follows:

> *There must be substantial evidence as distinguished from a mere scintilla of evidence to support the verdict, i.e., evidence of a character: 'which would convince an unprejudiced, thinking mind of*
>
> *the truth of the fact in which the evidence is directed.' A verdict cannot be founded upon mere theory or speculation.*

A motion for judgment as a matter of law is considered under the principles of summary judgment. In discussing the classification of the motion in *Bratton v. Calkins,* 73 Wn. App. 492 (1994), the Court of Appeals stated:

> *It makes no substantive difference whether the procedural mechanism for the trial court to arrive at its results was a motion for summary judgment (CR 56), a motion for directed verdict (CR 50(a)), or a motion for judgment notwithstanding the verdict (CR 50(b)). The issue before us is the same: whether as a matter of law, Mr. Calkins acted within the scope and course of his employment by having a sexual relationship with a student.*

The Washington Supreme Court explained the standard of review on a motion for judgment as a matter of law following a jury verdict in *Goodman v. Goodman*, 128 Wn.2d 366, 371 (1995):

> *In reviewing a JNOV, this Court applies the same standards as the trial court. A JNOV is proper only when the court can find 'as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict.' A motion for a JNOV admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence to be interpreted most strongly against the non-moving party and in a light most favorable to the opponent.*

(Internal citations omitted), see also, *Ayers v. Johnson & Johnson,* 117 Wn.2d 474 (1991); *Lecy v. Bayliner Marine Corp.*, 94 Wn. App. 949 (1999); *Mathis v. Ammons,* 84 Wn. App. 411 (1997); *Hill v. BCTI Income Fund,* 144 Wn.2d 172 (2001); and *Esparza v. Skyreach Equipment, Inc.,* 103 Wn. App. 916 (2000).

On proper application of such standards the trial court erred in failing to grant plaintiff's motion for judgment as a matter of law with respect to Ron Smelser's alleged liability, on the issue of parental immunity and Geanne Paul's negligence in this action.

B. The Trial Court Erroneously Believed That It Was Bound By A Prior Trial Court's Decision With Respect To Summary Judgment And Should Have Fully Considered Plaintiff's

Motion For Judgment of A Matter of Law Prior To The Close Of All The Evidence

As touched on above, the actual trial judge, Judge Stoltz, repeatedly indicated that she believed she was bound by Judge Johnson's prior ruling on summary judgments which is quoted above. Such a position by the Judge Stoltz was in error. This is particularly so in light of the fact that the case was in entirely different procedural posture by the time plaintiff was moving for judgment as a matter of law compared to Judge Johnson's summary judgment decision which occurred **before** Ronald Smelser was named as a party in the case and subject to an order of default.

A trial court is generally entitled to reexamine the issues and to reconsider a ruling unless it is a final decision. See *Cent. Reg'l. R Transit Authority v. Heirs and Divisees of Estey* 135 Wn.App. 446, 464-65, 144 P.3d 322 (2006) (Cox, J. concurring); *Accord MGIC Fin. Corp. v. H.A. Briggs Co.* 124 Wn.App. 1, 8, 600 P.2d 573, review denied 92 Wn.2d 1038 (1979). Under CR 54(b), a decision that adjudicates fewer than all claims that an action is not final unless a trial court makes a written finding that there is no just reason for delay of entry of the judgment. In the absence of such a finding, or ruling resolving fewer than all claims, is subject to revision at any time. Moreover a trial court has authority to

modify *sua sponte* its initial judgment and, where a case is transferred to a new judge at the same court, the transferee judge is not foreclosed from revising the ruling the previous judge has made. *In re Estate of Jones*, 170 Wn.App. 594, 604-05, 287 P.3d 610 (2012).

As discussed in *Teter v. Deck*, 174 Wn.2d 207, 216 n7, 274 P.3d 336 (2012) for analytical purposes the trial court would not have been reviewing and/or revising Judge Johnson's decision but rather a decision which technically would have been her own. As the *Teter* court explained in Footnote 7 "The succession of judges cannot be considered by this court; the office is a continuing one, the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it than to perpetuate an error than would have to be corrected by this court.", quoting *Chepard v. Gove* 26 Wn. 452, 454, 67 P. 256 (1901). (Holding that it was not error for a successor judge to direct a judgment for defendant based on the statute of limitations where the initial judge had denied a motion for summary judgment on the same issue).

To the extent the trial court did not believe it had the authority to review Judge Johnson's prior rulings (which analytically must be viewed as its own), is a position which is not supported by the law. It is deemed

to be an abuse of discretion for a trial court to fail to recognize that in fact it has discretion. A failure to exercise discretion is an abuse of discretion. See *Almalgamted Transit Union Local No. 1576 v. Home Bridge County Public Transportation Benefit Area*, 178 Wn.App. 566, 577 n.29, 316 P.3d 1103 (2013). Additionally, and significantly "an error of law" constitutes an untenable reason and thus can be a predicate for a finding abuse of discretion. *Brateng*, 180 Wn.App. 368, 375, 321 P.3d 1255 (2014).

Further as it is, it appears that Judge Stoltz was misinterpreting the import and impact of Judge Johnson's prior summary judgment decision. At no time did Judge Johnson ever rule that Mr. Smelser was entitled to "parental immunity" as a matter of law. Thus, to the extent that the trial judge deducted his fault from the judgment in this case such an action was based on the erroneous assumption that "parental immunity" was even at issue given the fact that Mr. Smelser clearly waived such immunity by failing to appear in this action and by exposing himself to entry of a default order.

Under the terms of RCW 4.22.070(1)(b) "If the trier of fact determines the claimant or part suffering bodily injury or incurring property damage was not at fault, the defendants against whose judgment is entered shall be jointly and severally liable for the sum of the proportionate shares of the claimant's total damages". Thus it was

erroneous for the trial court to enter only a judgment against Ms. Paul for 50 percent of the jury verdict in this case. It should have been 100 percent under the above-referenced joint and several liability principals which were preserved under the terms of RCW 4.22.070(1)(b) which is clearly applicable to this case given the fault-free status of the plaintiffs because at the time of their injury they were incapable of negligence and/or contributory fault. See *Price v. Kitsap Transit*, 125 Wn.2d 456, 462-63, 886 P.2d 556 (1994) even after the adoption of RCW 4.22.070 children under the age of 6 are incapable of fault within the meaning of RCW 4.22.015).

C. The Trial Court Should Have Directed A Verdict On The Issue Of Ronald Smelser's Liability Because He Did Not Breach Any Actionable Duty Under Washington Law.

RCW 4.22.070(1) provides that even "immune" entities can be allocated fault. The presence of such a provision in Washington law tends to beg the question as to what is an "immune" entity subject to allocation of fault under the terms of this statute. Secondarily would such immune entities include parents who are subject to the "parental immunity" doctrine? It is respectfully suggested that under reasoned analysis, parents who have an entitlement to parental immunity are **not** the kind of entities who have an "immunity" which can be subject to such allocation.

In the seminal case of *Zellmer v. Zellmer,* 164 Wn.2d 147, 188 P.3d 497 (2008), the Supreme Court explored the nature of "parental immunity" and in such exploration clearly suggested that parental immunity is not a true immunity at all, but rather is recognition that a parent breaches no actionable duty by failing to supervise children (**unless there is proof of wanton and willful misconduct**). As observed by *Zellmer* 157, parental immunity can be justified as a limited form of immunity, parental privilege, or **"lack of an actionable parental duty to supervise,**" citing to *Holodock v. Spencer*, 36 N.Y.2^{d} 35, 325 N.E.2nd 338, 364 N.Y.S.2^{d} 859 (1974) (declining to recognize cause of action for parental supervision claim following abrogation of parental immunity doctrine); see also, 6 A.L.R.4th 1066, § 14 (1981) (collecting cases where negligent supervision claims are barred notwithstanding abolition of parental immunity doctrine). In *Zellmer,* the Court was less than clear as to what Washington's view is with respect to the nature of "parental immunity," i.e., whether or not it is a true immunity, a privilege, or simply a recognition that a parent who negligently supervises their children does not breach any actionable duty.

However, in surveying its own prior case law, the Supreme Court in *Zellmer,* observed that: "this Court has consistently held a parent is **not liable for ordinary negligence in the performance of parental**

responsibilities." (Emphasis added). *Id* at 155, citing to *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 104 Wn.2d 99, 713 P. 2nd 79 (1989); see also *Talarico v. Foremost Ins. Co.*, 104 Wn.2d 114, 712 P.2nd 294 (1986). This is because the parent under such circumstances breaches no actionable duty. Plaintiffs' counsel has been unable to unearth any case that directly states that there is a cause of action for negligent parental supervision of a child in Washington.

It is respectfully suggested that if one actually looks to the language of *Talarico,* it is rather clear that Washington is amongst those states were there exists no actionable duty on the part of the parent to engage in the non-negligent supervision of their children. *Talarico* at Page 116. The Supreme Court clearly provided: "in order for the conduct of parents in supervising their children **to be actionable in tort**, such conduct must rise to the level of willful and wanton misconduct; if it does not then the doctrine of parental immunity precludes liability." (Emphasis added). In other words, if parental immunity applies, the parent engaged in no action which is "actionable in tort," (breached no duty), **unless the parent's action rises to the level of willful and wanton misconduct**.

This is a significant distinction. This is significant because under the terms of RCW 4.22.015 in order to be an entity towards whom "fault" can be allocated, one must have engaged in some kind of negligence or breached

some form of duty. If it is recognized that a parent who is subject to "parental immunity" has breached no actionable duty, then as a matter of course they cannot be subject to a fault allocation under the statutory scheme set forth within RCW 4.22 et seq.

Additionally, such a construction is necessary in order to harmonize the terms of RCW 4.22.070, with prior common law and RCW 4.22.020, which despite not being a model of clarity, has been consistently interpreted to mean that the negligence of a parent cannot be imputed onto their children. See *WPI* 11.04; see also, *Vioen v. Cluff*, 69 Wn.2d 305, 418 P.2nd 430 (1966).

It has long been recognized that statutes which are in derogation of the common law must be strictly construed. See *Topline Builders, Inc. v. Bovenkamp*,179 Wn.App. 794, 320 P.3d 130, (2014). Well-recognized rules of statutory construction provide that when interpreting statutes the court should read it in its entirety, and if possible each provision must be harmonized with other provisions, and statutes must be construed in a manner as to give effect to the entirety of the language, rendering none of it meaningless or superfluous. See *Coulter v. Asten Group, Inc.*, 155 Wn.App.1, 9, 230 P.3d 169 (2010). It is respectfully suggested that the only way to interpret RCW 4.22.070(1)'s "immunity" language in a manner consistent with the common law, and which harmonizes with

RCW 4.22.020, is to recognize that "immunity" under its terms, **does not include "parental immunity,"** which is nothing more than a shorthand method of stating that a parent violates no legally actionable duty by failing to supervise their children. Otherwise, it is respectfully suggested that the statute would be in conflict with not only the common law, but also the provisions of RCW 4.22.020 which have not be abrogated and which according to a recently Supreme Court opinion, continues to have vitality. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 614-15, 260 P.3d 857 (2011).

Mr. Smelser breached no actionable duty in this case and should have been dismissed as a matter of law in response to plaintiff's motion for judgment as a matter of law. There is simply no tort of "negligent parental supervision" within the State of Washington. In the absence of an actionable duty Mr. Smelser simply cannot be found negligent.

D. No Party Had Standing To Assert "Parental Immunity" As Their Affirmative Defense In This Action.

Even if we assume some form of duty exists, any issue regarding the breach of such duty is not before the Court. Generally, any defense based on "immunity" is an affirmative defense which must be specifically pled

and proved by the party claiming it.[3] Under the terms of CR 8(c) an affirmative defense within the meaning of the rule is, "... any other matter constituting avoidance or affirmative defense." Under Washington law, all forms of "immunity" are treated as "affirmative defenses". See for example *Evans v. Thompson*, 124 Wn. 2d 435 879 P.2d 938 (1994) (Immunity from suit by a co-employee of the plaintiff under workers' compensation law is an affirmative defense upon which the defendant has the burden of proof); *Foxworthy v. Puyallup Tribe*, 141 Wn. App. 221, 169 P.3d 53 (2007) (Tribal sovereign immunity is an affirmative defense subject to waiver); *Cregan v. Fourth Memorial Church*, 175 Wn. 2d 279 825 P.3d 860 (2012) (Recreational land use immunity is an affirmative defense and the landlord asserting it had the burden of proof); *Malagrine v. Washington Jockey Club*, 60 Wn. App. 823, 826, 807 P.2d 901 (1991) (Discretionary immunity and quasi-judicial immunity are affirmative defenses); see also *Pleas v. City of Seattle*, 112 Wn. 2d 794, 774 P.2d 1158 (1989) (Justification of privilege that would excuse an intentional interference with a known business expectancy must be pled as an affirmative defense).

[3] As discussed below above, "parental immunity" is not a true "immunity" but is rather a indirect way of stating that a parent has no duty as a matter of law to be non- negligent in the supervision of their children.

While there is no case expressly stating that "parental immunity", like any other "immunity" is an affirmative defense, it obviously is an "affirmative defense" because it allows for an "avoidance" of liability where liability otherwise would be imposed. Further, the case of *Romero v. West Valley School District*, 123 Wn. App. 385, 392, 98 P.3d 96 (2004), overruled on other grounds *Barton v. State Dept. of Transporation,* 128 Wn.2d 1983, 208, 208, P.3d 597 (2013), strongly suggests, without deciding, that parental immunity can be waived.

Here, Ronald Smelser is in default. Thus, he has not affirmatively pled any defenses whatsoever. By failing to comply with the terms of CR 8(c) any claim of parental immunity on the part of Mr. Smelser is waived. If an affirmative defense is not plead as required by CR 8(c), (or the subject of a CR 12(b) motion), it is waived and may not be considered as a trial issue in this case. See *Farmers Ins. V. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). Further, Mr. Smelser who testified at trial did not assert an entitlement to parental immunity, (even if he could do so given his status as a party in default). Thus, not only as a matter of law but factually he has waived parental immunity.

As Mr. Smelser has not asserted "parental immunity" as a defense, co-defendant Paul cannot do it for him, nor can she indirectly claim the benefit of this highly personalized defense. The common law doctrine of

standing prohibits a litigant from asserting another's legal rights. See *Garrett County Fire Protection District v. Moses Lake*, 150 Wn. 2d 791, 802, 83 P.3d 419 (2005). Such a doctrine precludes a party from asserting the legal rights of another even if that party might otherwise gain a litigation advantage by doing so. See *Cassell v. Portelance, M.D.*, 172 Wn. App. 156, 294 P.3d 1 (2012).

Here, defendant Paul clearly does not have any "standing" to assert Ronald Smelser's parental immunity in this case. The defendants cannot cite a scintilla of authority supportive of such a proposition, and cases from other jurisdictions which have actually considered such issues soundly reject the proposition that parental immunity can be asserted by anybody other than a parent. Comment "h" to Restatement (Second) of Torts, 395G, which addresses "parental immunity," expressly states (after collecting cases), the following:

> **Another exception now generally recognized is that the immunity of the parent or child is a personal one that does not protect a third party who is liable for the tort of either.** Thus, when a parent within the scope of his employment by another negligently inflicts personal injury upon his own child, his employer is not protected by the parent's immunity and is subject to liability to the child as if the negligence had been that of the employer himself. (See Restatement, Second, Agency § 217). This is also true of any other defendant who is liable for the tort of the

> parent, as in the case of a joint tortfeasor acting in concert with them (see Section 876), or a partnership or association of which he is a member, or the owner of an automobile who is made liable by statute for the negligence of one whom he allows to operate the car. (Emphasis added).

The annotations to Comment "h" note that: "The weight of authority is now heavily in support of this". The cases supportive of such a proposition are numerous. *Mi-Lady Cleaners v. McDaniel*, 179 So. 908 (Ala. 1938); *Bagley v. Kohl and Madden Printing Inc. Co.*, 254 A.2d 907 (Conn. 1969); *Fields v. Synthetic Ropes, Inc.*, 125 A.2d 427 (Del. 1965); *Stapleton v. Stapleton*, 70 S.E.2d 156 (Ga. App. 1952); *Hary v. Arney*, 145 N.E.2d 575 (Ind. App. 1957); *Cody v. J.A. Dodd and Sons*, 110 N.W.2d 255 (Iowa 1961); *Tobin v. Hoffman*, 96 A.2d 957 (Md. 1953), and the list goes on.

Thus, under no set of circumstances, nor upon application of case law, can defendant Paul assert Mr. Smelser's parental immunity - a defense which only a parent can possess.

It was the defendants who pointed to Ronald Smelser as being a potential "empty chair" in this case leaving plaintiffs no alternative but to name him in this lawsuit in order to try to preserve "joint and several" liability under the terms of RCW 4.22.070(b)(1). Thus assuming arguendo that Mr. Smelser did breach an actionable duty (he did not) it

was error for the trial court to permit Defendant Paul to essentially gain the benefit of such parental immunity when Mr. Smelser himself did not assert it in his answer and who effectively waived it by permitting an order of default to be entered against himself.

E. There Is No Evidence Mr. Smelser Engaged In "Willful And Wantonous Conduct" When Supervising His Children Thus It Was Error For The Trial Court Not To Dismiss Him As A Matter Of Law.

As discussed in *Zellmer* at page 155, parental immunity has application to any claim that a parent was negligent in the supervision of their child, unless the parent wholly steps outside of his or her parental capacity, or engages in wanton and willful misconduct. See also, *DeWolf & Allen*, 16 WA PRAC § 11.4 (3rd Ed. 2012).

As explained in *Zellmer* at pages 155-56, (collecting cases), otherwise parental immunity applies to garden variety claims of negligent supervision, (which are non-actionable in Washington).

In *Zellmer* the Supreme Court determined that parental immunity applied to a claim against a step-parent who was supposed to be watching a 3-year child but who fell asleep allowing the child to wander off and drown in a family pool. In *Zellmer,* the Supreme Court reaffirmed its previous holdings in a variety of other cases which found parents are immune from suit for negligent parental supervision, but not for willful

and wanton misconduct in supervising a child. See, *Jenkins v. Snohomish County Public Utility District No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986). In order to establish "willful misconduct" something must be shown more than gross negligence, and rather, the parental actions must be either **"deliberate, intentional," or "wanton conduct with knowledge or apprehension or knowledge or appreciation of the fact that danger is likely to result"**. See *Jenkins* 105 Wn.2d at 105, citing to *Stevens v. Murphy* 69 Wn.2d 939, 948, 421 P.2d 668 (1966). As catalogued in *Zellmer,* at Page 155-56, the Supreme Court has found parental actions far more egregious than what occurred herein as being "ordinary negligence" as a matter of law.

In this case, it is hard to imagine how even a factual issue could be made as to whether or not Mr. Smelser engaged in what could be characterized as "ordinary negligence" as it related to the injury producing event. There is simply no requirement that a parent keeps their children under "constant surveillance," nor are they required to keep them restrained within doors. See *Cox v. Hugo*, 52 Wn.2d 815, 819 329 P.2d 467 (1958).

The only relevant recognizable duty in Washington is that **a parent cannot engage in willful and wanton misconduct when supervising**

children, which was defined in the case of *Adkison v. City of Seattle* 42 Wn.2d 676, 258 P.2nd 461 (1953) in the following terms:

> *"Willful misconduct is characterized by intent to injure while wantonness implies indifference as to whether an act will injure another. Graphically expressed, the difference between willfulness and wantonness is that between casting a missile with an intent to strike another and casting a missile with reason to believe that it will strike another, but with indifference as to whether it does or not."*

Adkison at 684; see also *WPI 14.01*; see also, *Segura v. Cabrera 179* Wn.App. 630, 319 P.3d 98 (2014).

Again it is noted in this case there is simply no evidence that Ron Smelser engaged in any kind of exaggerated misconduct, and the defense has repeatedly conceded this point.

F. Based On The Undisputed Evidence Presented At The Time Of Trial In Particular Defendant's Own Admissions Defendant Paul Should Have Been Found Negligent As A Matter Of Law.

In analyzing the liability in this case one need not go much further than examining the distilled teaching set forth within the WPI's. Initially, it is noted that WPI 70.01 under the heading of "General Duty – Driver or Pedestrian" provides:

> It is the duty of every person using the public street or a highway [whether a pedestrian or a driver of a vehicle] to exercise ordinary care to avoid placing [herself] or others in danger and to exercise ordinary care to avoid a collision.

Additionally, WPI 12.06 under the heading of "Duty of Seeing" provides:

> To the extent necessary, every person has the duty to see what would be seen by a person exercising ordinary care.

Indeed, defendants own proposed jury instruction No. 13 provides:

> A driver of a motor vehicle is required to exercise care to avoid colliding with any child she sees, or in the existence of ordinary care she should see, in proximity to the vehicle.
>
> Ordinary care in relation to a child means that the driver is bound to anticipate the ordinary behavior of a child, having in mind that the apparent age of the child, his proximity to the vehicle and apparent activity. **The driver must realize that a child will not exercise the same degree of care as an adult.**
>
> If a driver has reason to anticipate that a child **might** be near her vehicle, ordinary care requires that she determine that the way is clear before starting the vehicle into motion. However, if she has no reason to anticipate the presence of children near the vehicle, she is not negligent merely because she started the vehicle and the child was injured.

See, *Larson v. Puyallup School District,* 7 Wn.App. 736, 741, 502 P.2d 1258 (1972); *LaMoreaux v. Fosbet*, 45 Wn.2d j249, 255-256, 273 P.2d 795 (1954).

Here, by her own admissions, Ms. Paul had to have known one or both of the children might be near her vehicle at the intended route of travel.

According to the defendant's own testimony which has now been presented in open court, she violated both of these duties. During the course of her examination in this case Defendant Paul provided at Page 751 Line 7 through Line 15 the following:

> Q: However, you personally, for the last 16 years and even now as you sit here today, as I understand it, are not accepting responsibility for the injury to Derrick or Dillon Smelser?
> A: I was the one that was driving the vehicle that hit the kid. There was nobody else driving, so I don't understand what the question – where you're going with this. I mean, **I have to be responsible. I was the one driving.**

(Emphasis Added). (RP 751).

It is respectfully suggested that the Court should accept Ms. Paul's admission that "... I have to be responsible. I was the one that was driving."

Additionally, at Page 781, Ms. Paul provided the following testimony:

> Q: You didn't know where they [the boys] were when you got in your truck?
> A: No. As I was getting into the truck, no.
> Q: **You were simply not paying attention to where they were**. Isn't that the bottom line? Isn't that the bottom line?
> A: **Yes.**

(Emphasis Added).

Thus, Ms. Paul readily admits that she was not paying attention, and did not see what was there was to be seen prior to running over

Derrick Smelser, who was playing in the mud in the middle of the driveway. Ms. Paul admits that when she first backed up, then moved her car forward, she did not look to see where the boys were.

Q: If you had exercised that opportunity, you agree, more likely than not, you never would have run over Derrick Smelser?

Ms. Bobrick: Object to the form.

The Court: I'll sustain the objection

Q: Would it have been reasonable and prudent for you to have made sure where these boys were, Derrick and Dillon, before you moved your vehicle, to make sure you didn't run one of them over?

A: Yes.

Q: Thank you. You never, at any time, saw Derrick touching your Bronco, did you?

A: No.

Q: And to be very clear, you cannot, from your personal knowledge, testify here in this court of law that Derrick in any way ever touched your Bronco.

A: No.

Q: When you got into your truck, you simply didn't pay attention to where the boys were, isn't that true?

A: As I was getting into the truck, I saw them out in the field.

Q: All right. Can you go to page 34 of your deposition, and I'm referring you to line 11; and at that time, we were having a discussion about your interrogatory answer, to put it in context. Were you asked the following question and provided the following answer?

Ms. Bobrick: Is this – did you page 34?

Mr. Barcus: Yes, Page 34, Line 11

Q: All right. And your answer, also – when it says, going on, quote, When I exited the house, Derrick and Dillon Smelser were playing in the field adjacent to the house, end quote, that's incorrect, also, because you didn't see them; correct?

A: I saw them out there while I was – had talked. But as I was getting into the truck, no, I didn't pay attention to where they were.

Was that your testimony?

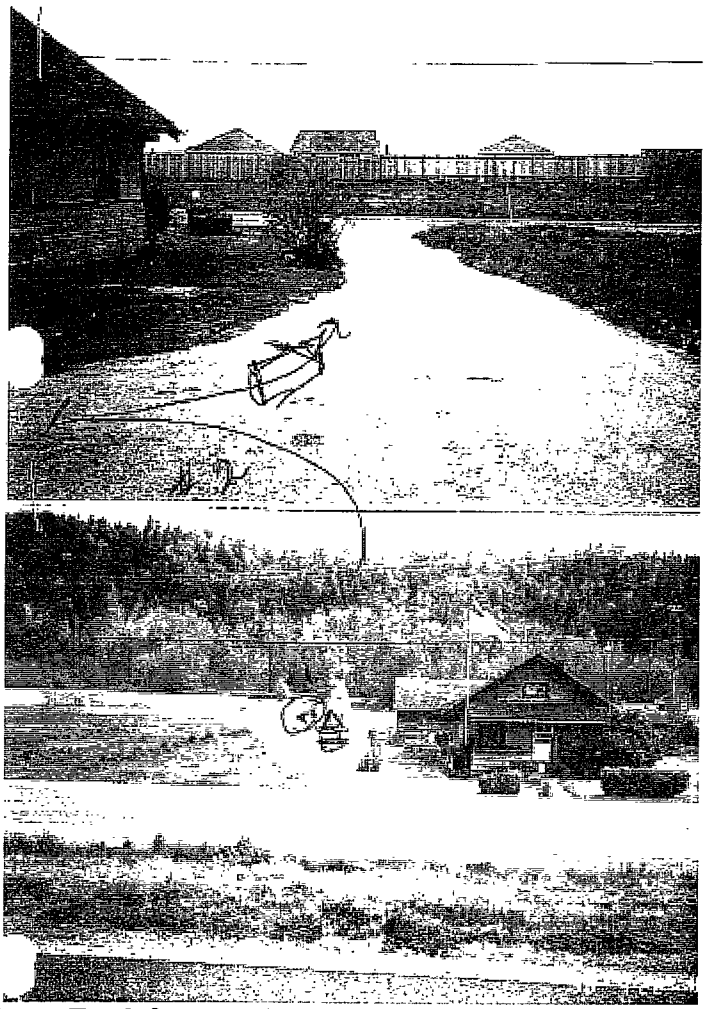
A: Yes.
Q: Thank you. And specifically when you walked over to the truck, and you got into the truck, you did not know the location of Derrick and Dillon; correct?
A: As I was getting into the truck?
Q: When you walked over to your truck and got into your truck.
A: When I walked over to the truck, I saw them out in the field. When I was getting into the truck, I didn't look for them, no, because I saw them out in the field a few seconds prior.
Q: Turn to page 36, line 6.
A: (Witness complies.)
Q: Question: Okay. And you walked over to your truck, got in your truck?
A: Uh-huh.
Q: Yes?
A: Yes.
Q: Okay. **And when you got in your truck, you didn't know the location of Derrick and Dillon; correct?**
A: Answer: Correct.
Q: Okay.
A: **Correct.**
Was that your testimony?
A: **Yes**.
Q: You walked about **three car lengths** from where you had been with Ron at his car to where your truck was; isn't that right?
A: Approximately, **yes**.
Q: And when you did that, you cannot say where Derrick or Dillon were, either; isn't that correct?
A: I can remember when I went between the truck, looking out in the field, they were out playing the field as I was walking back toward the truck.
Q: On page 37, if you would.
A: (Witness complies.)
Q: Question: And how far was it from where you left Mr. Smelser at the car to where you got into your truck? Truck lengths. In truck lengths?
A: Answer: **Probably three.**

Q: All right. So you walked the normal rate of speed from where you were with Mr. Smelser to get into your truck; is that correct?
A: Uh-huh.
Q: Yes?
A: Yes.
Q: All right. And during the period of time, you cannot say under oath –
A: Answer: I don't –
Q: -- from personal recollection the location of Derrick and Dillon Smelser?
A: And your answer was: That's correct.
Is that your testimony?
A: Yes.

(RP 685 line14 to 689 line 6).

Q: I want to make sure that we get your testimony here, and we're clear about that. Okay?
A: Okay.
Q: All right. Now, when you went over to Mr. Smelser's home, I know you parked essentially where the RV is in this photo; right?
A: Yes.
The Court: It's up on the ceiling now.
Mr. Barcus: Uh-oh.
Q: All right. When you got ready to go, you backed up between the brown car and the garage; right?
A: Correct.
Q: Okay. **You backed up, what, about a couple of truck lengths?**
A: **Yeah. Three total, probably**.
Q: **Three**?
A: **I suspect that would be, yes.**
Q: All right. So when you **stopped before you went forward, you had three car lengths** in front of your truck to see what was there to be seen?
A: **Yes**.
Q: Okay. And if you had bothered to look to the left, you could have seen what was in the driveway; correct?
A: There was nothing in the driveway.

Q: Okay. Well let's talk about that. You indicated – and in your deposition – this is your – this is Exhibit 2 to your deposition and Exhibit 112 here in court. Okay. And you were asked, were you not, to draw – you were asked to draw in the position of your truck when you heard the thunk and stopped; isn't that right?



(Photo, Ex. 2 from Paul Dep/Trial Ex. 112) *(Appendix No. 6)*

A: Yes.
Q: This is your drawing –
A: Yes.
Q: -- showing where you first went back where the arrow shows?
A: Mm –hmm

Q: And you just clarified about three car lengths?
A: Yes.
Q: And then you went – you turned to your left?
A: Correct.
Q: And went forward?
A: Correct.
Q: So when you went forward, you went forward, what, about three car lengths before you heard the thunk?
A: No, not even that far.

Q: Okay, well the distance here that you've drawn in where you – is that where you stopped your truck where it's drawn in there –
A: Yes.

Q: -- where you've drawn in there? Okay. That's, of course, after you heard the thunk; and then you tried to stop as fast as you could?
A: Correct.
Q: How far did you travel after you heard the thunk?
A: Not very far.
Q: Did you skid at all –
A: No.
Q: -- on the gravel?
A: No. I wasn't going that fast.
Q: Okay, so where you struck the – or where you ended up, you agree that Derrick was about the middle of your truck; right?
A: Correct.

(RP 777 line 9 to 779 line 22). (Emphasis added).

She admitted moving three truck lengths before hitting Derrick. At three truck lengths, Derrick clearly was capable of being seen from Ms. Paul's perspective.

The only possible basis which the Court could decline to find Ms. Paul was not negligent, is the content of an emergency room record and an

alleged subsequent statement Dillon Smelser made when he was only 5 years old. Yet, when properly analyzed, even the defendant herself admits that as to what these statements may or may not mean is something that cannot be analyzed without engaging in rank conjecture and speculation:

Q: You were getting intoxicated pretty much every day?
A: Your point?
Q: Such that most people, when they're intoxicated, their powers of perception change, do they not?
A: Yes.
Q: You're not any different in that regard?
A: No.
Q: So if somebody is going out to the bar and getting intoxicated and coming home, their ability to perceive what's going on would be impaired; correct?
A: In my home? Yeah. Okay.
Q: Now, concerning this – the incident that you recall at the park, you recall that Dillon said, you ran over my brother?
A: Yes
Q: Was he anxious or in any way emotional when he expressed that to you?
A: He was anxious, yes.
Q: All right. He was pretty nice little boy, wasn't he –
A: Yes
Q: -- from what you saw, even though you didn't really know him very well?
A: Yes
Q: And the same was true with Derrick?
A: Yes
Q: And you said that – you recall something about "skiing" related to this?
A: Yes
Q: But you have no idea – assuming that was said, you have no idea what that would have meant to a little five-year old boy?
A: No. I didn't elaborate on it.
Q: You didn't ask him –
A: I had an assumption of what I pictured "skiing" was.

Q: Your assumption is based purely on speculation –
A: I understand that.
Q: -- guess, or conjecture?
A: I understand that.
The Court: Okay. One at a –
A: I assumed
The Court: One at a time. Let him finish the question before you answer –
A: Sorry
The Court: and let her finish her answers before you ask the next question.
Q: (By Barcus) **Your assumption that "skiing" meant or had anything to do with the bumper of your car is based purely upon guess, speculation, and conjecture; isn't that right?**
A: **Yes**.
Q: **It's not factual in any way?**
A: **No.**
Q: **And we can't rely upon that as evidence in a court of law, can we?**
A: **Yes.**
Q: **Excuse me?**
A: **Yes. No, you can't**.
Q: **You never saw Derrick until you heard the thunk and saw him under the car; correct?**
A: **Correct.**
Q: **Okay. And you're aware that neither Mr. Smelser, as he's testified, nor Dillon, nor Derrick, have any idea what you're talking about when you use the term "skiing"?**

Ms. Bobrick: Object to the form.
The Court: I'll sustain the objection
Q: (By Barcus) **That term, very well, could be consistent with Derrick in the driveway, playing in the mud, standing up, seeing our vehicle coming at him and trying to block; isn't that correct?**
A: No. My –
The Court: Okay. Don't answer it.
A: That's not my opinion.
The Court: Your attorney is standing up.

Witness: Oh.
The Court: I think she's going to object to something.
Ms. Bobrick: Objection, Your Honor; speculation.
The Court: I'll sustain the objection. It's speculation, Counsel.

Q: (By Mr. Barcus) **It's a good objection because you just simply don't know, do you?**
A: (No audible response.)
Q: **The answer is no?**
A: **No**.
Q: Thank you. When you moved your truck, and you backed up, you have a recollection of looking toward the back, do you not, where you were backing?
A: Yes
Q: Okay, so you were, what – what do you usually do, look over your right shoulder while you're – while you're backing up?
A: Mirror.
Q: Mirror.
A: I rely on my mirrors.
Q: Side mirrors.
A: Both of them.
Q: So you look in the side mirror, and so you were looking to your right as you were backing up to the left?
A: Mm-hmm.
Q: Yes?
A: I was using my left – my driver's side mirror.
Q: To look to the rear?
A: Correct.
Q: **Okay. And you don't recall looking forward, do you?**
A: **No, I was backing up.**
Q: After you changed gears and went forward, you don't have a recollection of looking forward?
A: I had to look forward, so I wouldn't drive off the driveway.
Q: **Based upon your training and experience as a driver, at that time for some 23 years, when you're going forward in a driveway, and you know there's small children around, it makes common sense to look where you're driving; correct?**

A: Do you mean, I need to get out of the rig and look around in the front to see if anything is in front of me –
Q: Just –
A: -- or just out the front window?
Q: Just look out the front window.
A: Well, yes.
Q: Okay. To make sure you don't run something over?
A: Yes.
Q: Either a dog or a young child?
A: Yes
Q: **So would experience tell you that you should have looked to your front where you were going?**
A: **Yes**
Q: As far as the distance that the boys were in the field, you candidly admit that you're not good with distances; correct?
A: No.
Q: So that's a pure guess on your part, isn't it?
A: You mean, what was in my deposition?
Q: Yes.
A: Yes.
Q: **When you backed up before you went forward, you can't say where Dillon and Derrick were at that time?**
A: **As I was backing up, no.**
Q: **There was nothing that obscured your vision through your window or to your left had you looked to see what was there to be seen in the driveway; correct?**
A: **Correct.**

(RP 786 line 2 to 791 line 14). (Emphasis Added).

It is respectfully submitted that the undisputed evidence submitted below was unequivocal and on a matter which reasonable minds simply could not differ – Mrs. Paul failed to observe Derrick who was there to be seen prior to running him over in the driveway of Ron Smelser's residence. The trial court, erred by failing to direct a verdict with respect to this issue.

G. The Trial Court Erred By Instructing The Jury That It Could Find That This Matter Involved A "Unavoidable Accident".

The Court can take note that allegations of an "unavoidable accident" are disfavored under the laws of the State of Washington. Indeed, as indicated by WPI 12.03 there are no recommended jury instructions on this subject matter "because of the great possibility of prejudice arising in the usual case from the giving of such an instruction the committee recommends that no instruction should ordinarily be given and that the matter be left to argument of counsel." As noted in the comment to WPI 12.03 the Washington Supreme Court has never reversed a trial court for refusing to give a defendant an unavoidable accident instruction. **Indeed, often it is found that the giving of such an instruction is erroneous, justifying the grant of a new trial.**

An unavoidable accident is "one which could not have been prevented by the exercise of due care by both parties under the circumstances prevailing." *Van Ry v. Montgomery*, 58 Wn.2d 46, 48 – 9, 360 P.2d 573 (1961).

The doctrine and the reasons why it is disfavored are discussed in detail in *Zook v. Baer*, 9 Wn.App. 708, 714-716, 514 P.2d 923 (1973).

UNAVOIDABLE ACCIDENT

> [10][11] The trial court declined to give an instruction on unavoidable accident. The landmark case of *Cooper*

v. Pay-N-Save Drugs, Inc., 59 Wash.2d 829, 835, 371 P.2d 43, 47 (1962), held:

***715** it is proper to give the instruction if there is affirmative evidence than an unavoidable accident occurred; stated negatively, it is error to give the instruction if there is no evidence of an unavoidable accident or if the only issues possible under the facts is that of negligence and contributory negligence.

Thus, the trial court must examine the evidence; and, if it indicates that the cause of the accident was negligence rather than happenstance, then the issue concerns how the accident was avoidable by the exercise of prudence, foresight and caution and the instruction can be refused. *Jackson v. Seattle*, 15 Wash.2d 505, 513, 131 P.2d 172 (1942). When the evidence would support a jury finding that there was no negligence on the part of either party, the instruction can be properly given. *Flaks v. McCurdy*, 64 Wash.2d 49, 390 P.2d 545 (1964); Annot., 65 A.L.R.2d 12 (1959).

The danger that exists if an instruction of "unavoidable accident" is given is that it interposes as the supposition or concept of the trial court that neither party was at fault. This is an improper intrusion into the jury function to be avoided when there is evidence that the jury was caused by one or both parties acting with a lack of due care. When the evidence indicates that either or both failed to exercise their volition according to the requirements of **930 due care, then people were at fault-not luck, chance or an act of God. When the evidence on the issue is in the posture, an unavoidable accident instruction may be refused as injection confusion rather than enlightenment. *Zenith Transport, Ltd., v. Bellingham Nat'l Bank,* 64 Wash.2d 967, 395 P.2d 498 (1964); *Van Ry v. Montgomery*, 58 Wash.2d 46, 360 P.2d 573 (1961); *Herrick v. Washington Water Power Co.*, 75 Wn. 149, 162, 134 P.

> 934 (1913); W. Prosser, Torts s 29 (3d ed. 1964); 57 Am.Jur2d Negligence ss 16-19 (1971).
>
> [12] In *Flaks and Bennett v. McCready*, 57 Wash.2d 317, 356 P.2d 712 (1960), "unavoidable accident" instructions were approved when gien in situations involving snow and slippery roads. However, in both of those cases, there was evidence that neither party was at fault and that the defendants were surprised by the sudden change of circumstances. ***716** which were other than reasonably should have been anticipated. The distinction is sufficient to permit the instruction to have been refused in the discretions of the trial court. *Flaks v. McCurdy, Supra; Carraway v. Johnson*, 63 Wash.2d 212, 386 P.2d 420 (1963).

By its very nature the accident in this case could have been avoided had Ms. Paul simply exercised due care, as she has admitted during her testimony. There is simply no evidence of any cause outside the actions of either the plaintiff children, (who cannot be negligent as a matter of law as they were under the age of six), or that the defendant which could have caused or contributed to this accident.[4] It would be fundamental and absolute error to give an "unavoidable accident instruction" under such circumstances because clearly this is an accident which **could have been prevented had Defendant Paul simply engaged**

[4] For the sake of this argument, it is suggested we must presume the same standard apply that would be applicable to adults or children capable of fault. This defendant's theory (which is factually unsupported and made up), is that the Plaintiff was "playing on the bumper", if the plaintiff was an adult, that arguably would be comparatively negligence – or even comparative, such negligence precludes an unavoidable accident instruction.

in "ordinary care". To suggest otherwise is preposterous, and against her clear admissions during the course of trial.

It is respectfully suggested that the giving of such an instruction should be viewed as presumptively prejudicial particularly as it relates to the bystander infliction of emotional distress claim brought on behalf of Dillon. Armed with such instruction the jury reasonably could have believed that, although Ms. Paul clearly was negligent, (it so found), in running over Derrick, it was simply "unavoidable" that someone might observe such an event and suffer emotional trauma as a result. The mere presence of such instruction undoubtedly resulted in the "injection of confusion rather than enlightenment". Id.

It was prejudicial error for the trial court to propound this instruction to the jury and given the result it clearly cannot be said as a matter of fact that it was "harmless".

H. The Trial Court Erred In Admitting Unsubstantiated Hearsay Evidence From Derrick's Medical Records.

As discussed above Derrick's emergency room medical records from Mary Bridge Hospital from the date of his accident included unsubstantiated and without attribution a description of the accident which appears to otherwise have no factual foundation.

While it is generally true that under ER 803(a)(4) statements which are "statements made for the purpose of medical diagnosis or treatment" fall within the hearsay exception, this exception of the hearsay rule is "based upon the belief that the declarant's desire for proper diagnosis and treatment supplies the necessary elements of trustworthiness." See 5 C WAPRAC § 803.19 (Fifth ed. 2013). Further, even though it has been well recognized that even when a hearsay exception applies nevertheless the reliability of such statement (hence admissibility) is presumed only when the hearsay statement "contains particularized guarantees of trustworthiness." *Warner v. Regent Assisted Living*, 132 Wn.App. 126, 136, 130 P.3d 865 (2006).

Here, the problem with the admission of the above-referenced "emergency service note" and the statements within Dr. Griffith's emergency room records are multiple. First of all, it is somewhat hard to imagine that Derrick, a 2 year old even if he made such statements could be ascribed of having a "treatment motive" when making such statements. When a very young child is involved a specific test is applied in making determination as to whether the child's statements to a medical provider is admissible under the above-referenced exception. See *State v. Kilgore*, 107 Wn.App. 160 182, 26 P.3d 308 (2001); citing to *State v. Florczak*, 76 Wn.App. 55, 82 P.2d 199 (1994). When a very young child is involved

under the *Florczak* test a very young child's statement will be admissible if there is "corroborating evidence to the statement and it appears unlikely that the child would fabricate the cause of the injury". Citing to *Florczak*, 76 Wn.App. 65. See also *State v. Carol M.D.*, 89 Wn.App. 77, 948 P.2d 837 (1997). Inadequate foundation for admission of very young child's hearsay statement to therapist).

Here, there is no way to establish that a 2½ year old such as Derrick would have a "treatment motive" and as indicated above all evidence from the scene of the accident is to the contrary to the statement thus there is simply no corroboration of the accuracy of the statement at all.

Further, any statements regarding the facts surrounding the accident were clearly not necessary for any medical and/or diagnostic treatment. They do not describe symptoms and undoubtedly it can be noted that the statements are internally contradictory in that at one point in time it is stated that the child is "playing on the front bumper of a raised 4 by 4 truck which is being driven by his father's girlfriend" while at the same time, in the same note, it states "the accident was really not witnessed by anyone". Generally such causation information is not necessary for medical diagnosis and/or treatment. Generally statements which attribute fault are not statements pertinent to diagnosis or treatment

thus are not admissible under the terms of ER 803(a)(4). See *State v. Redmond*, 150 Wn.2d 49, 496, 78 P.3d 1001 (2003).

Finally, and perhaps most significantly we simply have no idea as to who is speaking and providing the information which found itself into the "emergency services note". Under the terms of the notes itself it indicates that the accident was "unwitnessed". Given the speculative nature of the statement as evidenced by the text of the note, and the lack of any attribution regarding the above-emphasized statement, it is respectfully urged that such a statement cannot be admissible under ER 803(a)(4) because there is no way of knowing who the speaker was or whether or not they were making statements for medical treatment and/or diagnostic purposes, or if it was based on a scintilla of personal knowledge.

In the case of *Stull v. Fuqua Industries*, 906 F.2d 1271 (8th Cir. 1990) the court had to address a similar set of circumstances. In *Stull* the court rejected the statement within the hospital record which read:

> *Apparently he was riding a lawnmower when he got into a bunch of wasps and jumped off the lawnmower and got his heel under the lawnmower.*

The court found that this statement did not fall within the medical records exception to the hearsay rule, because the rule says the person making the statement is the person who is actually seeking treatment, or in

some instances, someone who has a special relationship with the person seeking treatment, such as a parent.

Here, as in *Stall*, the statement is at best equivocal and has the potential of being nothing more than speculation. In *Stall* this factor is evidenced by the use of the word "apparently" in the hospital record. Due to the speculative and conjectural nature in the entirety of the "emergency service note," is evidenced by the fact that even within its own text it states that "the accident was not really witnessed by anyone." In *Fuqua* the statement at issue in that case was found to be inadmissible because "it may be said to represent conjecture on the part of the person filling out the record." Here, the same is also true.

We have no idea who made the above-referenced statements. We have no idea as to what is the source of their knowledge. The record itself indicates that it is based on speculation and conjecture with respect to an accident which was otherwise unwitnessed by the individuals who were at the hospital with Derrick.

The statement is so speculative and conjectural, that it simply does not have the kind of inherent indicia of trustworthiness in the liability supportive of its admission under this exception to the hearsay rule, or any other rule. The trial court should have barred any testimony regarding this statement, and it surely should not have been admitted into evidence given

the above-referenced infirmities. Simply because a statement is contained within the medical record only establishes the fact that the statement was made, and not the truth of the underlying events at issue. See also *Morris v. Players Lake Charles, Inc.*, 76 So.2d 27 (La.App. 2000).

Unfortunately, the defense in this case used said unattributable hearsay as a sword throughout the proceedings. Despite the fact that Ms. Paul did not witness Derrick's position at the time or immediately prior to her plowing over him nor did Ronald Smelser, the defense repeatedly argued that Derrick was "playing on the bumper" and/or "skiing" on the bumper immediately prior to being run over.(RP 251; 253-54; 1774; 1779; 1781). This is directly contrary to the testimony of the only eyewitness Dillon who indicated that his brother was playing in a mud puddle and was simply plowed over by an inattentive Ms. Paul, who admittedly was not watching where she was going. The admission of such record permitted the defense to make wildly speculative and unsupported factual arguments clearly in a manner which was highly prejudicial to plaintiff's cause.

Generally an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 644, 688, 230 P.3d 583 (2010).

Here, the admission of the subject medical record was highly prejudicial in a case where a 5-year-old child was apparently the only eyewitness. It interjected a speculative and unsupportable factual theory in this case which ultimately had no factual support. This is particularly so that given how the defense used such otherwise inadmissible evidence, and the risk of prejudice created by the use of such evidence there is simply "no way to know what value the jury placed upon the improperly admitted evidence and a new trial is necessary." *Thomas v. French*, 88 Wn.2d 95, 105, 659 P.2d 1097 (1983).

In this case the subject information in the subject medical record should have never been admitted into evidence. They lack any kind of indicia of reliability which would otherwise support the hearsay exception embodied in ER 803(a)(4). Standing alone the admission of this highly prejudicial, unsupportable hearsay evidence should be deemed as grounds for a new trial.

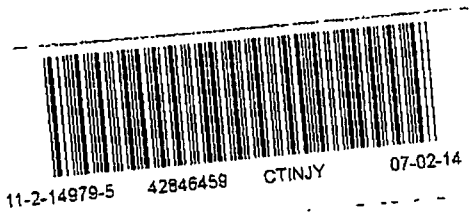
CONCLUSION

For the reasons stated above the decisions of the trial court should be reversed and this matter should be remanded for a full new trial.

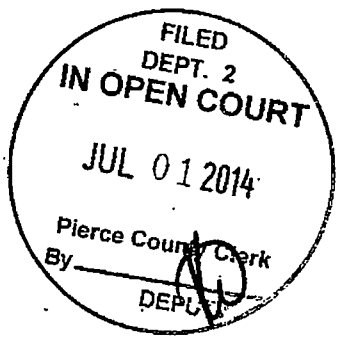
Dated this 14th day of April, 2015.

Paul Lindenmuth of Attorneys for
Appellants WSDA #5817

APPENDIX 1



The Honorable Katherine M. Stolz
Trial Date: June 2, 2014



THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DILLON SMELSER, individually, and DERRICK SMELSER, individually,

Plaintiffs,

vs.

JEANNE PAUL ~~and "JOHN DOE" PAUL~~, individually ~~and the marital community comprised thereof~~, and RONALD SMELSER, Individually,

Defendants.

NO. 11-2-14979-5

COURT'S INSTRUCTIONS TO THE JURY

DATED this 25th day of June, 2014.

Katherine M. Stolz, Judge
Department 2

ORIGINAL

INSTRUCTION NO. 10

A child under the age of six years is incapable of contributory negligence. Therefore, there is no issue of contributory negligence on the part of plaintiffs Dillon Smelser or Derrick Smelser in relation to the accident.

However, the conduct of a child under the age of six years may be a cause in fact of an accident. The fact that an accident involving a child under the age of six has occurred does not establish that the adult participant was negligent and proximately caused the accident. The conduct of the child involved in the accident may be such as to render the accident unavoidable as to the adult participant. An unavoidable accident is one that could not have been prevented by the exercise of the reasonable care which the law requires of the adult under all of the circumstances.

APPENDIX 2

EMERGENCY SERVICES NOTE

Derrick is a 3-year-old male who was brought in by his father with possible head injury and scalp laceration. He is a usually health child who was playing on the front bumper of a raised 4x4 truck which was being driven by his father's girlfriend. She did not know he was there and accelerated forward. He let go, actually tumbled under the truck a couple times, not getting injured by the wheels. When he came out from under the truck after having landed on the gravel road, however, his father noticed a large scalp laceration and rushed him in the car to the emergency department. The father states he has been normal on the way here, although seemed to be falling asleep. The accident was not really witnessed by anyone. The only injuries seemed to be to the upper body and head. The patient is moving all his extremities. The patient last ate at 11:30.

PAST MEDICAL HISTORY: Reveals the patient has no known medical problems. No allergies. Immunizations are up to date. Currently on no medications.

FAMILY & SOCIAL HISTORY: Remarkable as mentioned above.

REVIEW OF SYSTEMS: Negative for all other remaining systems.

PHYSICAL EXAMINATION: Reveals a blood pressure of 122/84, pulse 117, O2 saturation 98%, weight of 14.5 kg.
GENERAL EXAM: Reveals crying, dark-skinned child who seems to know his father.
SKIN: Shows abrasions over the left shoulder, left back and left sternocleidomastoid. There is a very large defect in the frontal scalp involving two lacerations, one approximately 4 cm long and the other V-shaped, jagged 5x3 cm. The wounds are contaminated, flayed open to expose the skull. Bleeding is controlled.
HEENT: PERRL, no subconjunctival hemorrhage is noted. The right TM is erythematous and bulging/opaque. The left TM is seen after cleaning of debris from the external canal (negative for glucose) and shows a red TM as well. The oropharynx shows teeth in good position. Occlusion is good. No loose teeth. Oropharynx is pink and moist. Nares show clear rhinorrhea, no epistaxis.
NECK: Immobilized in C-collar but without any noticeable palpable tenderness.
CHEST: Clear to auscultation with good respiratory excursion.
CARDIOVASCULAR: Regular rate and rhythm without murmur.
ABDOMEN: Soft to palpation without any hepatosplenomegaly, masses or tenderness. Pelvic rock is negative.
GU: Shows no trauma.
EXTREMITIES: Full range of motion without any abrasions or ecchymosis noted.
NEURO EXAM: Shows motor 5/5. Sensory intact to light touch. The patient is slightly irritable and nonverbal but does withdraw to pain.

IMPRESSION AT THIS TIME: Possible head trauma with complex scalp laceration.

873.0
E 819.7
382.9
380.10
86.59
12032

SMELSER, DERRICK J
MR#: 00668707
ACCT# 434985875
4/16/98
MARGARET E. HOOD, M.D.

EMERGENCY SERVICES NOTE

Tacoma General Hospital
Mary Bridge Children's Health Center

MultiCare

PO Box 5299, Tacoma, WA 98415 253.552-1000
I:\MEDDB\MASTREPT\0002\041798\0142316.WPD

86-0155-1

2. Bilateral otitis media with left external otitis.

EMERGENCY DEPARTMENT COURSE: The patient was admitted to the ED where he was immediately placed on the cardiorespiratory monitor. IV hep lock was placed and at 1800 the patient was taken to X-Ray for cervical spine films. The patient returned from X-Ray without odontoid views as these were reviewed by both myself and the radiologist. These were thought to be normal without any bony abnormalities noted. CBC - White count of 20,200, hemoglobin of 13.3, hematocrit 40.3 with 56 segs, 11 bands, 30 lymphs. This is consistent with a stress reaction.

Plastic Surgery was consulted after the patient returned from C-spine and it was clear the patient would need sedation for this. Dr. Griffith arrived at 1930. IV had infiltrated and a second hep lock was placed. The patient remained on the cardiorespiratory monitor and at 1940 the patient was given Propofol 20 mg IV push. At 1941 the patient was given an addition 20 mg peripheral IV in order to complete sedation and the patient actually reached deep sedation with stable vital signs, oxygenation and breathing. The patient remained sedated to local infiltration until 2013 when he started waking, especially with stimulation of debridement. He was then given an additional 20 mg of IV push Propofol and continued to be monitored with stable vital signs. At 2035 the suture procedure was complete after approximately one hour of procedure time by Dr. Griffith. The patient was then transferred to CT where a CT of the head was performed. This showed no abnormalities of the skull or brain. The patient returned form CT and at 2115 had 30 cc of urine output which was dip negative for blood, and the patient received Ancef 350 mg IV at 2140. He drank fluid, was watching videos, was responsive. At this point, with stable vital signs and normal CT, I think it is acceptable to discharge the patient to outpatient care. For his otitis media as well as his dirty and complex scalp laceration he will be placed on Augmentin 150 mg p.o. t.i.d. x 10 days. Will also use Cortisporin Otic 1 dropperful AS q 8 hrs x 3 days. Since the patient does not have a pediatrician and has just used urgent care in the past, we will given them a pediatrician list and ask them to follow up in 10 days. They will also follow up with Dr Griffith in 2 to 4 days as noted in Dr. Griffith's consult note. The patient was then discharged home in good condition, fully awake and alert with his father having full understanding of the discharge instructions.

Dictated & Authenticated By:

lh
dd: 4/17/98
dt: 04/17/98

MARGARET E. HOOD, M.D.
Pediatric Emergency Medicine

APPENDIX 3

Judge Garold Johnson
Hearing Date: September 14, 2012
Hearing Time: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

DILLON SMELSER, individually, and DERRICK SMELSER, a minor child, by and through his parent/guardian, MARIA SELPH, Plaintiff, vs. JEANNE PAUL and "JOHN DOE" PAUL, individually and the marital community comprised thereof, Defendants.	NO. 11-2-14979-5 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come on regularly for hearing before the Court on the 14th day of September, 2012 on Plaintiff's Motion for Partial Summary Judgment seeking an Order (1) determining that defendant Jeanne Paul was negligent as a matter of law, (2) striking the defendant's affirmative defense of non party fault of the plaintiffs' father, Ron Smelser, and (3) determining as a matter of law that the two plaintiffs were not comparatively/contributorily at fault due to their age; and

The Court having considered the following materials:

1. *Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment Re: Liability; Contributory and Comparative Fault; and "Empty Chair" Defense*

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PO Box 65590 7610 - 40TH ST W.
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2. Plaintiff's Reply to Defendant's Opposition Plaintiff's Motion for Partial Summary Judgment Re: Liability; Contributory and Comparative Fault; and "Empty Chair" and in Support of Plaintiffs' Motion to Strike

3. Declaration of Paul A. Lindenmuth Authenticating Exhibits

4. Declaration of Paul Lindenmuth Re: Exhibits – Deposition Transcripts of Ronald Smelser and Jeannie Paul

5. Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment

6. Declaration Re: Deposition Excerpts of Jeanne M. Paul

7 Declaration Re: Deposition Excerpts of Ronald W. Smelser

8. Declaration of Defendant's Attorney Re: Emergency Service Record

8. Declaration of Sandra B. Bobrick Re: Emergency Services Record

9. Supplemental Declaration Re: Deposition Excerpts of Jeanne M. Paul;

and the Court having heard the arguments of counsel, having the records and files before it and deeming itself fully advised in the premises, now, therefore, it is hereby

ORDERED as follows:

1. That the plaintiffs, Derrick Smelser and Dillon Smelser, who were 2-1/2 and 5 years of age at the time of the accident at issue, are incapable of comparative or contributory fault and plaintiffs' Motion for Partial Summary Judgment Re: Comparative/Contributory Fault of Plaintiffs is hereby GRANTED; however, the trier of fact will determine whether the conduct of plaintiff Derrick Smelser was a cause in fact of the accident deeming the accident unavoidable;

2. That there are genuine issues of material fact as to defendant Jeanne Paul's negligence for the accident at issue and plaintiffs' Motion for Partial Summary Judgment as to her liability is DENIED;

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3. That there are genuine issues of material fact as to non party Ron Smelser's negligence for the accident at issue and plaintiffs' Motion for Partial Summary Judgment striking the defendant's affirmative defense as to this non party is DENIED.

4. That there has been no showing of willful or wanton conduct on the part of non party Ron Smelser, the father of the plaintiffs, and he would be entitled to assert parental immunity from suit by his two sons, the plaintiffs herein; however, while Mr. Smelser is entitled to assert immunity from suit by his children, the Court does find that Ron Smelser is a potential non party at fault whose negligence, if any, is to be determined by the trier of fact, pursuant to RCW 4.22.070. That any percentage of fault attributed by the trier of fault to Mr. Smelser shall be reduced from the total amount of the verdict, if any.

DONE IN OPEN COURT this 1 day of November, 2012

JUDGE GAROLD E. JOHNSON

FILED
DEPT. 10
IN OPEN COURT
NOV - 2 2012
Pierce County Clerk
By _____ DEPUTY

Presented by:
SLOAN BOBRICK, P.S.

SANDRA B. BOBRICK, WSBA #11359
Of Attorneys for Defendant

BEN F. BARCUS & ASSOCIATES PLLC

PAUL LINDENMUTH, WSBA #15817
Of Attorneys for Plaintiffs per telephone + Email approval 10/31/12

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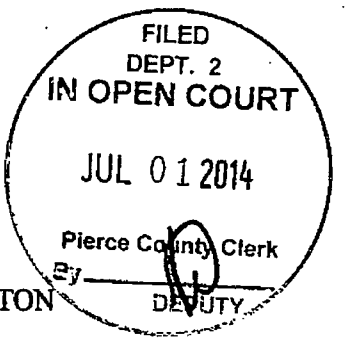
APPENDIX 4



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DILLON SMELSER, individually, and DERRICK SMELSER, individually	)	NO. 11-2-14979-5
Plaintiffs,	)	SPECIAL VERDICT FORM
vs.	)	
JEANNE PAUL, individually, and RONALD SMELSER, individually	)	
Defendants.	)	

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: **Were either of the defendants negligent?**

ANSWER:

Defendant Jeanne Paul YES (Write "yes" or "no")

Defendant Ronald Smelser YES (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" as to either defendant, answer Question 2 and Question 3.)

QUESTION 2: **Was such negligence a proximate cause of injury or damage to plaintiff Dillon Smelser?**

ANSWER:

Defendant Jeanne Paul: NO (Write "yes" or "no")

Defendant Ronald Smelser No (Write "yes" or "no")

QUESTION 3: **Was such negligence a proximate cause of injury or damage to plaintiff Derrick Smelser?**

Defendant Jeanne Paul: YES (Write "yes" or "no")

Defendant Ronald Smelser: YES (Write "yes" or "no")

(DIRECTION: If you answered "no" to both Question 2 and Question 3, sign this verdict form. If you answered "yes" to Question 2 answer Question 4. If you answered "yes" to Question 3, answer Question 5.)

QUESTION 4: **What do you find to be plaintiff Dillon Smelser's amount of damages?**

$ N/A

QUESTION 5: **What do you find to be plaintiff Derrick Smelser's amount of damages, in addition to the undisputed past and future medical expenses set forth in Instruction No. 16?**

$14,225.40 (undisputed amount)

$ 16,000.00

(DIRECTION: If you answered Question 4 with any amount of money, answer Question 6. If you answered Question 5 with any amount of money, answer Question 7. If you found no damages in Question 4 or Question 5, sign this verdict form.)

QUESTION 6: **Assume that 100% represents the total combined fault that proximately caused plaintiff Dillon Smelser's injury. What percentage of this 100% is attributable to the negligence of defendant Jeanne Paul, and what percentage of this 100% is attributable to the negligence defendant Ronald Smelser? Your total must equal 100%.**

ANSWER:

To defendant Jeanne Paul:	0 %
To defendant Ronald Smelser:	0 %
TOTAL:	**100%**

QUESTION 7: **Assume that 100% represents the total combined fault that proximately caused plaintiff Derrick Smelser's injury. What percentage of this 100% is attributable to the negligence of defendant Jeanne Paul, and what percentage of this 100% is attributable to the negligence defendant Ronald Smelser? Your total must equal 100%.**

ANSWER:

To defendant Jeanne Paul:	50 %
To defendant Ronald Smelser:	50 %
TOTAL:	**100%**

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: 7-1-2014

Presiding Juror

APPENDIX 5

Hon. Katherine M. Stolz

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

DILLON SMELSER, individually, and DERRICK SMELSER, individually Plaintiff, vs. JEANNE PAUL, individually and RONALD SMELSER, individually Defendants.	NO. 11-2-14979-5 JUDGMENT ON JURY VERDICT **(Clerk's Action Required)**

JUDGMENT SUMMARY

Judgment Creditor: Derrick Smelser
Judgment Debtors: Jeanne Paul
Judgment Principle: $15,112.70
Interest Accrued: $0.00
Costs: $ 610.00 - issue on pages of deposition used in trial for Ron Smelser + Jeanne Paul reserved.
Interest Rate: 5.25%
Attorney for Judgment Creditor: Ben F. Barcus and Associates

THIS MATTER having come on regularly for trial before the Court and a jury of twelve on June 2, 2014, the parties' having presented their evidence and made their arguments, the jury having deliberated and returned their Verdict in their answers to the Special Verdict Form,

ORIGINAL

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awarding money damages to plaintiff Derrick Smelser and finding on defendant Jeanne Paul's affirmative defense that Ronald Smelser was responsible for 50% of the fault which proximately caused damage to plaintiff Derrick Smelser, and finding that the negligence of defendants Jeanne Paul and Ronald Smelser was not a proximate cause of damage to plaintiff Dillon Smelser, and the plaintiffs not having made a claim against Ronald Smelser, the Court having accepted and filed such Verdict, now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that plaintiff Derrick Smelser shall have Judgment against defendant Jeanne Paul in the amount of $15,112.70, plus costs in the amount of $ 610.00 (part reserved), all of such Judgment to bear interest at the rate of 5.25% from the date of entry hereof until paid; and it is further

ORDERED ADJUGED AND DECREED that plaintiff Dillon Smelser's claim against defendant Jeanne Paul is dismissed with prejudice.

DONE IN OPEN COURT this 18th day of July, 2014

JUDGE KATHERINE M. STOLZ

Presented by:

SLOAN BOBRICK, P.S.

JOANNE HENRY, WSBA #6798
Of Attorneys for Defendant Paul

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7/21/2014 2004

Approved as to form:

BEN F. BARCUS & ASSOCIATES PLLC

BEN F. BARCUS, WSBA #15576
PAUL A. LINDENMUTH, WSBA #15817
Of Attorneys for Plaintiffs

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APPENDIX 6

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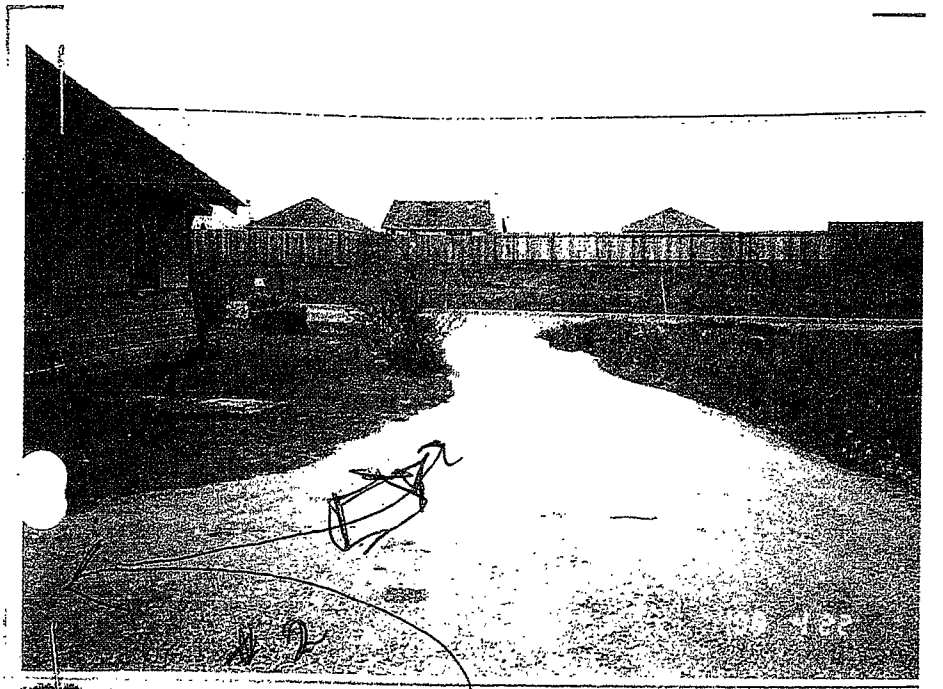

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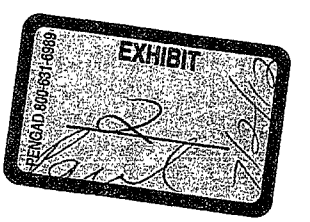

CERTIFICATE OF FILING & SERVICE

I, Sheri McKechnie, hereby declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

On the 6th day of April, 2015, a true and correct copy of the ***Appellant's Motion for Extension of Time for Filing Appellant's Brief*** was filed ~~via E-mail~~ in person to the Court of Appeals, Division II:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
coa2filings@courts.wa.gov

In addition, a true and correct copy was sent via email and legal messenger service to:

Attorneys for Respondent:
Sandra Bobrick
Sloan Bobrick, P.S.
7610 40th Street W
University Place, WA 98466
sbobrick@sloanbobricklaw.com

DATED at Tacoma, Washington this 6th day of April, 2015.

Sheri McKechnie, Paralegal