FILED
SUPREME COURT
STATE OF WASHINGTON
12/3/2020 12:36 PM
BY SUSAN L. CARLSON
CLERK

No. 99203-7

SUPREME COURT
OF THE STATE OF WASHINGTON

REBEKAH L. HART, individually,

Appellant,

v.

EMILY PRATHER and "JOHN DOE" PRATHER, individually and the marital community comprised thereof; PARKER J. KNAUER, individually; STEVEN KNAUER and PAMELA KNAUER, individually and the marital community comprised thereof; BRAYDEN STANTON and "JANE DOE" STANTON, individually and the marital community comprised thereof; TODD EVANS and "JANE DOE" EVANS, individually and the marital community comprised thereof; ERIC NELSON and "JANE DOE" NELSON, individually and the marital community comprised thereof; DAVID W. BARKER and "JANE DOE" BARKER, individually and the marital community comprised thereof,

Respondents.

RESPONDENT BARKER'S
ANSWER TO APPELLANT'S PETITION FOR REVIEW

Timothy R. Gosselin, WSBA #13730
GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Ave., Suite 304
Tacoma, WA 98402
Attorney for Respondent David Barker

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes, Rules and Other Authorities

A. IDENTITY OF RESPONDING PARTY

David Barker, defendant in the trial court and respondent in the Court of Appeals, hereby responds to Plaintiff/Appellant Hart's Petition for Review.

B. STATEMENT OF THE CASE

This lawsuit involves four car accidents: March 1, 2009 involving the Prather and Knauer defendants; December 22, 2009 involving the Stanton, Evans, Nelson and Barnes defendants; April 7, 2013 involving this responding defendant, David Barker; and March 22, 2014, involving the Powell defendant.

Plaintiff Hart filed suit for damages from the first two lawsuits in November, 2012. In 2015, she filed a separate lawsuit for damages from the April 7, 2013, accident involving Barker. Later that year, she asked and was allowed to consolidate that lawsuit with the first lawsuit over the first two accidents. Then, in November, 2016, Hart amended her complaint in the consolidated action to seek damages from the fourth, March 22, 2014, accident.

Before trial, the court dismissed Hart's claims against Barnes arising out of the second accident. Hart's case against the remaining defendants was tried to a jury. Before submitting the case to the jury, the

court dismissed Hart's claim against Powell for the last accident.

The jury found in Hart's favor against all defendants except defendant Nelson, and imposed damages on each. The jury specifically found that the injuries from the various accidents were divisible. Because of that finding, the court ordered the judgment to be paid severally instead of jointly and severally.

Hart appealed contending the judgment should be joint and several. She also argued a new trial should be ordered because the court erred by allowing the jury to apportion damages to the last accident and by giving certain instructions, and because the jury engaged in misconduct. The Court of Appeals rejected her arguments.

She seeks review by this court of only two of the issues she presented to the appellate court: (1) Whether, as a matter of law, the defendants should be jointly and severally liable for the judgements she got against them; (2) claimed errors in the verdict form. Importantly, she does not contend the evidence did not support any of the jury's decisions.

C. ARGUMENT

1. Standard of Review

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in

conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)

Hart does not state the basis on which she seeks review. Presumably she is contending that RAP 13.4(b)(1) and (b)(4) apply to her first issue. None of the considerations apply to her second issue.

2. Hart's contention that the trial court should have imposed joint and several liability is unsupportable, illogical, unreasonable, and in conflict with RCW 4.22.070 and established case law. It does not merit review by this court.

The rule applicable in cases where multiple but separate accidents cause injury was stated in *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966). The Court held that defendants are severally but not jointly liable for a plaintiffs' divisible injuries. *Id.* at 483-84. Liability is joint and several only where multiple accidents cause indivisible injuries. *Cox v. Spangler*, 141 Wn.2d 431, 446, 5 P.3d 1265 (2000). To mitigate hardship to a plaintiff injured in multiple accidents, the defendant bears the burden of establishing that injuries from separate events are divisible. *Id.* Hart in effect wants this court to overrule those decisions.

Hart tries to support her argument by relying on a hyper-technical

reading of RCW 4.22.070(1)(b). In pertinent part, that statute provides:

> "In all actions involving fault of more than one entity, . . . [t]he liability of each defendant shall be several only and shall not be joint except: . . . If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages."

Hart contends this statute allows her to create joint and several liability simply by joining defendants in one action. In other words, all she had to do to create joint and several liability was find two defendants who injured her in some way, establish their "fault," then join them in a lawsuit, regardless of whether the injuries she suffered by each were related. According to her, that allows her to collect all her damages from any defendant. Under her theory, if a plaintiff suffered a cut on the hand from a defective jar, and is rendered quadriplegic in a car accident years later, she could hold the jar maker liable for her quadriplegia by suing it in the same action as the driver of the at-fault vehicle. She would argue both caused her some injury, albeit separate, and therefore both are "at fault." And, both are defendants in the same action, so the conditions of the statute are met.

The Court of Appeals recognized that neither RCW 4.22.070 or public interest supports such an absurd result. That decision was correct.

First, Hart misreads RCW 4.22.070(1). The only entities relevant to the inquiry under RCW 4.22.070(1) are those entities who "caused the claimant's damages," not merely entities who caused the claimant some damage at some time. The use of the possessive "the claimant's damages" means the damages for which the claimant is seeking to recover. The only damages a plaintiff can seek from a defendant are those damages for which the defendant was a proximate cause, whether in whole or in part.

In this case the jury decided that Hart's injuries were divisible between the various defendants, meaning that Barker was not a proximate cause of Hart's injuries from her other accidents. Hart does not challenge that decision. Therefore, Barker did not "cause the claimant's damages" from those accidents. Thus, RCW 4.22.070(1) does not apply.

But, even if RCW 4.22.070(1) could be read as Hart wants, the inquiry does not stop. Statutory wording is not absolute. Statutes are to be interpreted as they are plainly written, "unless a literal reading would contravene legislative intent by leading to a strained or absurd result." *Public Utility Dist. No. 1 of Klickitat County v. Walbrook Ins. Co. Ltd.*, 115 Wn.2d 339, 343, 797 P.2d 504 (1990), quoting *Marine Power & Equip. Co. v. Dept. of Transp.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984)(citing *State v. Keller*, 98 Wn.2d 725, 657 P.2d 1384 (1983)). This requires Hart to support her reading with both common sense and

legislative purpose. She cannot.

First, her interpretation is directly contrary to legislative purpose. Washington courts have consistently recognized that RCW 4.22.070 provides that several, or proportionate, liability is intended to be the general rule. *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 110, 75 P.3d 497 (2003). Hart's interpretation not only stands that purpose on its ear, it would expand joint and several liability beyond any bound previously known.

Second, her interpretation conflicts with established application of the law. That application is reflected in the comment to pattern jury instructions relating to proximate cause, which states:

> The acts of different persons, though otherwise independent, may concur in producing the same injury. In such a case all would be liable. Whether or not the actors are held jointly or severally liable is dependent upon a number of factors set forth in RCW 4.22.030 and 4.22.070 (both enacted as part of the 1986 Tort Reform Act).

Comment, 6 Wash. Pract., Washington Pattern Jury Instructions 15.04 (7th Ed. 2019)

The rule Hart proposes would re-write negligence law. Under established principles of negligence, for a defendant to be liable to a plaintiff, the defendant's conduct must be a proximate cause of the resulting injury. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d

675 (1986). Under Hart's theory, however, individuals and entities are held liable for damages they played no role in causing and that did not result from their conduct. That, simply reads proximate cause out of tort claims.

Third, Hart's argument leads to absurd results. For one thing, as stated above, it holds parties liable for injuries they did not cause. For another, it elevates form over substance. Under Hart's theory, a plaintiff can force liability to be shared for unrelated torts simply by joining the tortfeasors in one suit. And, for another, it forces parties, including defendants to search a claimant's past to find tortfeasors to join in a lawsuit. If plaintiffs like Hart can force liability to be shared just by joining people or entities who injured them, defendants should have the same right. RCW 4.22.070(1) provides that in determining fault the jury should consider the fault of "the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant . . .." Under Hart's theory, this provision would allow the defendants to scour a plaintiff's past to find any person liable to her for any injury or loss, whether or not related to the injuries at issue in the lawsuit, and include them in the computation of fault. No logic or legitimate policy

objective could support such a result.

Hart's interpretation even conflicts with the purpose of joint and several liability. Joint and several liability is based on the policy that as between an innocent injured party and parties who caused the injury, it is fair that the parties who caused the injury bear the burden of multiple causation. See generally *Cox v. Spangler*, 141 Wn.2d 431, 444-46, 5 P.3d 1265 (2000). Hart seeks to extend that principle to parties who were not a cause of her injuries, just because she has joined them in one lawsuit.

To make her argument more plausible, Hart erroneously represents the case. Her petition repeatedly suggests that she suffered some overlapping injuries. See Petition at 14 ("It is possible that the Appellate Court's formulation of its statutory construction analysis was motivated by its concern that application of the plain meaning of the statute would result in the harsh consequences of a tortfeasor being held liable for injuries for which their contribution, at best, was only slight."); at 15 ("As it is, there is no rule within the State of Washington that joint and several liability cannot be applied where there have been two accidents otherwise separated by distance or time, particularly if there is an overlap of injury.") In this case, the jury found there was no overlap of injury and no contribution among the various groups of defendants. This case falls squarely within the holding in *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d

741, 423 P.2d 934 (1966). This would be a different case, with different applicable law, if there had been overlap or contribution.

None of the decisions on which Hart relies support her argument. In each, the defendants were a proximate cause of indivisible injury to the plaintiff. See *Kottler v. State,* 136 Wn. 2d 437, 446-47, 963 P. 2d 834 (1998); *Washburn v. Beatt Equip. Co.*, 120 Wn. 2d 246, 294, 840 P. 2d 860 (1992).

Put simply, Hart's arguments are unsupportable, illogical, and unreasonable. RCW 4.22.070 does not apply. No public policy supports holding parties liable for damages they neither caused nor contributed to. No rationale supports a conclusion that in seeking to limit joint and several liability through RCW 4.22.070, the legislature actually expanded it to overrule this Court's decision in *Smith v. Rodene,* 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966). Hart's arguments do not merit review by this court.

3. Claimed error regarding the verdict form does not merit review.

Hart contends the trial court improperly allowed the jury to allocate fault to Brittany Powell, the driver in the fourth accident, and caused the jury to render inconsistent decisions, by *sua sponte* revising the verdict form. The arguments are without merit.

First, Hart has not shown how the issues merit review by this court. A trial court's decision regarding a special verdict form based on the facts of the case is reviewed for abuse of discretion. *Boyd v. State*, 187 Wn. App. 1, 16, 349 P.3d 864 (2015). Hart has failed to show how the trial court abused that discretion.

Second, her arguments are simply incorrect. For one thing, the revised verdict form did not address allocation of fault to Brittany Powell. The trial court directed a verdict in favor of Powell on Hart's negligence claim; the verdict form specifically stated that Powell was not negligent and bore no fault for the March 22, 2014 accident. (CP 2560) The revision pertained to question 10 on the verdict form, and simply asked the jury to identify Hart's damages occurring after the fourth accident. CP 2562; see generally RP 2-20-19. As the court said: "I'm not allocating to Brittany Powell. I am asking them to divide damages in accordance with four accidents, regardless of who is at fault." (See RP 2-20-18 at 13)

Regarding her contention that the court erred by "sua sponte revising the verdict form," she neither argued nor cited authority for the proposition to the appellate court, and therefore waived the issue. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Even if she had, her argument would be in error. Trial judges are not prevented from supplementing or revising instructions even after

deliberations have begun. See *State v. Watkins*, 99 Wn.2d 166, 660 P.2d 1117 (1983)(trial court supplemented instructions with one it proposed after jury said it was deadlocked).

Hart's real argument seems to be that the court erred in allowing the jury to apportion damages to the fourth accident when noone was liable for that accident. It did not. At trial, all of Hart's injuries from all four accidents were presented to the jury. Hart argued that the first three accidents caused all of her injuries, none was caused by the fourth, and the injuries were indivisible. RP 4376-77. Defendants, on the other hand, argued that Hart was injured in all four accidents and the injuries were divisible. According to defendants, Hart was seeking to hold them liable for injuries she sustained in the fourth accident. The argument entitled defendants to allocate damages to that accident. See, *Phennah v. Whalen*, 28 Wn. App. 19, 26-27, 621 P.2d 1304 (1980)("[W]hen the harm is indivisible as among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves.") Both arguments called into question the nature and extent of damages attributable to the fourth accident, if any. (See RP 2-20-18 at 11.) Therefore, asking the jury to apportion damages was both reasonable and appropriate.

Neither is the verdict inconsistent. The jury was asked questions

which allowed it to give a decision that allocated damages among the various accidents. It gave specific amounts regarding past loss. It was allowed to and did attribute percentages to future loss. That is precisely the obligation imposed when a plaintiff claims her injuries from multiple accidents are indivisible while the defendants claim they are divisible. See *Cox v. Spangler*, 141 Wn.2d 431, 446, 5 P.3d 1265 (2000). The allocation for Hart's damages would have been joint and several had the jury determined the injuries were indivisible. The allocation turned out to be several when the jury determined the injuries were divisible. Hart's confusion is unfounded.

But, even if there was error in the verdict form, it was harmless. An erroneous jury instruction is harmless if it is not prejudicial to the substantial rights of the part[ies] ..., and in no way affected the final outcome of the case. *Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). Here, the jury determined that the injuries from each accident were divisible. That meant that each party was severally liable for the damages he or she caused. The verdict form allowed that. Hart can show no harm from the jury simply apportioning injury to an accident for which no defendant would be liable.

Moreover, if there was error, Hart either invited it or failed to

preserve it. Under the invited error doctrine, a party may not set up an alleged error and then complain about the error on appeal. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 823, 274 P.3d 1075 (2012). To preserve error when the trial court fails to give a proposed instruction, or gives an improper instruction, the aggrieved party must take exception using the procedure in CR 51(f). *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000). This procedure ensures that the court "is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial." *Goehle*, 100 Wn. App. at 615. "'The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.'" *Goehle*, 100 Wn. App. at 615 (quoting *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)). "The objection must apprise the trial judge of the points of law involved and where it does not so advise the court on any particular point of law, those points will not be considered on appeal." *Haslund v. City of Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

Here, the record shows that the revised verdict form was the result of a collaborative effort among counsel and the court to respond to apparent jury confusion. See generally RP 2-20-18. During the

discussion of how best to respond, counsel for Hart proposed essentially the same language that was ultimately used. (RP 2-20-18 at 16) Moreover, when Hart objected, it was not because of the revisions. (RP 2-20-18 at 19-21)

Thus, Hart waived or failed to preserve the error she now claims.

D. CONCLUSION

Because Hart has failed establish any of the considerations governing review by this Court, Respondent Barker respectfully asks that her Petition for Review be denied.

Dated this 3rd day of December, 2020.

s/ Timothy R. Gosselin
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Respondent Barker

CERTIFICATE OF SERVICE

I certify that on the 3rd day of December, 2020, I caused a true and correct copy of the foregoing document to be served on the following via ECF Service:

Alina Polyak
Moore & Davis
19909 120th Ave. NE, Suite 201
Bothell, WA 98011-8224

Jeffrey D. Coats
Law Offices of Mark M. Miller
15500 SE 30th Pl., Suite 201
Bellevue, WA 98007-6347

Maggie Eileen Diefenbach
Yvonne Marie Benson
Gordon Thomas Honeywell LLP
600 University St., Suite 2100
Seattle, WA 98101-4161

Joseph R. Kopta
Kopta & Macpherson
5801 Soundview Dr., Suite 258
Gig Harbor, WA 98335-2200

Benjamin Franklin Barcus
Paul Alexander Lindenmuth
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA 98402-5313

Karen Marie Kay
Lockner, Crowley & Kay, Inc., P.S.
524 Tacoma Ave. S.
Tacoma, WA 98402-5416

Coreen Rebecca Wilson
Wieck Wilson, PLLC
400 112th Ave. N.E., Suite 340
Bellevue, WA 98004-5528

Nathaniel J.R. Smith
Soha & Lang, P.S.
1325 4th Ave., Suite 2000
Seattle, WA 98101

Gregory S. Worden, WSBA #24262
Taliah S. Ahdut, WSBA #53987
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP
1111 3rd Ave., Suite 2700
Seattle, WA 98101

Suzanna Shaub
Reed McClure
1215 4th Ave., Suite 1700
Seattle, WA 98161-1087

The Original has been filed with the Washington State Supreme Court, also via ECF Service.

Signed this 3rd day of December, 2020 at Tacoma, Washington.

s/ Timothy R. Gosselin
TIMOTHY R. GOSSELIN

GOSSELIN LAW OFFICE PLLC

December 03, 2020 - 12:36 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99203-7
Appellate Court Case Title:	Rebekah L. Hart v. Emily Prather, et al.
Superior Court Case Number:	12-2-14762-6

The following documents have been uploaded:

- 992037_Answer_Reply_20201203123432SC397811_2174.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.Barker.pdf

A copy of the uploaded files will be sent to:

- Gregory.Worden@lewisbrisbois.com
- ben@benbarcus.com
- jeffrey.coats@farmersinsurance.com
- joe@koptamacpherson.com
- karen@524law.com
- mclifton@rmlaw.com
- mdiefenbach@gth-law.com
- michelle.burnell@lewisbrisbois.com
- pamela.miller@farmersinsurance.com
- paul@benbarcus.com
- smith@sohalang.com
- sshaub@rmlaw.com
- thomas@sohalang.com
- tiffany@benbarcus.com
- ybenson@gth-law.com

Comments:

Sender Name: Timothy Gosselin - Email: tim@gosselinlawoffice.com
Address:
1901 JEFFERSON AVE STE 304
TACOMA, WA, 98402-1611
Phone: 253-627-0684

Note: The Filing Id is 20201203123432SC397811