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NO. 73569-1-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

VICTORY LONNQUIST,

Respondent

vs.

PATRICK M. KIBE and "JANE DOE" KIBE, husband and wife, both
individually and on behalf of their marital community comprised thereof,

Appellants

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Jean Rietschel, Judge

BRIEF OF RESPONDENT VICTORY LONNQUIST

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I. INTRODUCTION

This case involves a motor vehicle collision between two automobiles driven by Victory Lonnquist and Patrick Kibe, respectively. The details of that collision were disputed, as was liability. Both parties submitted instructions and a proposed special verdict form. The Court decided to give the special verdict form submitted by Ms. Lonnquist. Mr. Kibe neither objected to that verdict form nor voiced an exception to the Court's failure to give his proposed verdict form.

The jury deliberated and determined that although Mr. Kibe had caused the collision and was responsible for Ms. Lonnquist's injuries, he had not been negligent. The latter conclusion was inconsistent with the Court's instructions and the evidence in the case. Upon Ms. Lonnquist's motion, the trial court granted a new trial, stating that:

...both [parties'] experts testified that, basically, if the defendant caused the injury, the defendant would have been the one who entered the line of travel of the plaintiff. And given that, it is hard to see how, under the facts of this particular case, how the jury could have found proximate cause for the accident; that is, the defendant therefore entered the lane of the plaintiff[,] without finding negligence.

(RP 807:14-21). Mr. Kibe filed a motion for reconsideration, which was denied, "for reasons stated previously on the record and in Plaintiff's Response" (CP 112). Mr. Kibe then filed a timely appeal to this Court.

II. RESTATEMENT OF THE CASE

A. The Facts Were In Dispute

Mr. Kibe asserts that the circumstances of the collision at issue in this case were “undisputed,” conflating bits of his testimony with portions of Ms. Lonquist’s testimony to craft a depiction of the event which obfuscates what truly happened. (App. Br. p. 3). For example, Mr. Kibe claims that the “right-hand bumper of Plaintiff’s Honda hit the driver’s side door of Mr. Kibe’s Nissan,” without explaining that Mr. Kibe’s Nissan spun out of control in front of Ms. Lonquist’s car so that he made the collision inevitable (cf. App. Br. p. 3 with RP 48:16-49:21). The weight of credible evidence shows that Mr. Kibe caused the accident. The following is what occurred:

On September 6, 2010, Ms. Lonquist was driving eastbound in the left-hand lane on Highway 18 in Auburn, Washington, when she observed what appeared to be a disabled vehicle in the road ahead (RP 47: 11-16). She slowed, as did other vehicles around her (RP 48:4-5). To her right, a vehicle “flew” past her (RP 47: 21-22-48:7).¹ When the car was about 6-8 car-lengths ahead of her, Ms. Lonquist observed the driver apply the

¹ The commute from Mr. Kibe’s home to his place of employment is about “14-15 minutes if ...driving slowly” (RP 330:3-4). Mr. Kibe is required to show up on time for his 11:00 p.m. shift meeting (RP 498:13-19). Given that dispatch records establish that the report of the collision came at 10:53 p.m. (RP 500:2-15), it is apparent that Mr. Kibe had reason to be speeding so as not to be late for work.

brakes; he then spun into her lane and collided with her vehicle. (RP 50:22-24). Ms. Lonnquist blacked out and her car “limped” to the side of the highway (RP 51:6-8).²

Mr. Kibe told a different story. He stated that he was driving slowly in the right-hand lane where he remained until Ms. Lonnquist’s car turned into his lane and hit his car (RP 380:10-18). He denied being in the other driver’s lane (RP 382:3-5).³

Washington State Trooper Orlowski, with eight years of experience with the State Patrol and who had received advanced training in collision investigation, concluded that Mr. Kibe had lost control of his automobile and spun into Ms. Lonnquist’s lane, thereby causing the collision (RP 159:15-18).

Accident analyst Richard Cook testified on behalf of Ms. Lonnquist. His expert opinion was that the pattern of damage to the vehicles and the physics of how vehicles move through an accident sequence established, as Trooper Orlowski found, that Mr. Kibe had spun into the left-hand lane, creating an obstruction in that lane, causing Ms. Lonnquist’s vehicle to collide with Mr. Kibe’s car (RP 525:20-22).

² Mr. Kibe claims that Ms. Lonnquist “pulled [her] vehicle[] to the right.” (App. Br. p. 3).

³ The diagram hand drawn by Mr. Kibe in his deposition shows Ms. Lonnquist making a 90 degree turn into Mr. Kibe’s automobile, Ex. 38 (Trial Exhibit List, CP 146) (Copy of drawing included in the Appendix to this brief).

John Hunter, an accident reconstructionist, testified on behalf of Mr. Kibe.⁴ He opined that the collision could have occurred either way: Mr. Kibe spun into Ms. Lonnquist's lane or Ms. Lonnquist turned into Mr. Kibe. He could offer no definite opinion as to what in fact happened (RP 644:10-645:16).

In rebuttal, Mr. Cook explained that it would be scientifically impossible for Ms. Lonnquist's vehicle to have turned into Mr. Kibe's vehicle as Mr. Kibe and Mr. Hunter claimed (RP 681:22 – 687:16).

B. The Jury Instructions and Special Verdict Form Were Not Challenged by the Defense

Both parties submitted proposed jury instructions and a proposed special verdict form (CP 63, 67). Plaintiff submitted five pattern instructions defining ordinary care (WPI 10.02), negligence (WPI 10.01), use of public highways (WPI 70.01), driving under hazardous conditions (WPI 70.05), and assumption of ordinary care (WPI 70.06). Defendant submitted only one instruction on such issues – that related to use of public highways (CP 67, Instruction No. 4).⁵

Following up on Plaintiff's five issue instructions, Plaintiff proposed a Special Verdict Form that asked three questions about causation,

⁴ Ms. Lonnquist moved unsuccessfully to disqualify Mr. Hunter as an expert based on a ruling from Kitsap County Superior court disqualifying Mr. Hunter as an expert due to two perjurious declarations (RP 633:23-636:15).

⁵ Defendant's Proposed Instruction No. 4 is identical to Plaintiff's Proposed Instruction No.13, and was given by the Court as Instruction No. 13.

negligence and proximate cause (CP 92). The Court held a hearing on the jury instructions on April 13, 2015 (RP 617-620). Plaintiff expressed no objections to the Court's instructions, which included the special verdict form that she had proposed (CP 94; RP 617: 15-17).

Mr. Kibe's counsel stated that he had an objection, "just on one issue" (RP 617: 21-23). His objection was Plaintiff's proposed Instruction No. 11 related to following too closely, which was not included in the Court's Instructions to the jury and therefore moot (CP 94; RP 617:25 – 619: 1). Mr. Kibe's counsel then objected to a supplemental proposed instruction regarding an eggshell plaintiff, but withdrew that objection after the Court informed him that such instruction would not be given (RP 619:7 – 620:8). The Court then asked: "Okay – any other exceptions?" Mr. Kibe's counsel responded: "No, your honor" (RP 620:10).

Shortly thereafter, the Court read the instructions to the jury and gave the entire packet to each one (RP 705-717). After the jury retired for deliberations, the Court asked if there was anything else to address (RP 717:18). Mr. Kibe's counsel for the first time raised an issue about the special verdict form, but only with regard to the absence of contributory negligence language (RP 717:19-718:25). The Court noted that Defendant had not submitted any instructions on contributory negligence and therefore had waived that issue (RP 717:23-25; 718:24). Defense counsel

never objected to the Court's special verdict form and never took exception to the Court's failure to give the Defendant's proposed special verdict form (RP 617-620).⁶

Mr. Kibe's counsel had one more opportunity to challenge the special verdict form, but again failed to do so. On April 14, 2015, the jury posed a question to the Court: "To consider question 4, is it required to have the same answer for questions 1, 2, and 3?" (RP 784). During the ensuing conference before the judge, Mr. Kibe's counsel made no objection to the Court's decision to refer the jury to Instruction No. 7 (at Kibe's request) and Instruction No. 10 (at Lonquist's request) and the second page of the verdict form (RP 784-85). The Court explained that "it's pretty clear" that the second page should answer the jury's question, to which Mr. Kibe's counsel responded: "All right." (RP 785).

C. The Court Properly Ordered a New Trial

Shortly thereafter, the jury announced that it had reached a verdict but expressed concern about "whether they have filled out the verdict correctly" (RP 788:7-9). The Court proposed that "[i]f there is some obvious error in the way it's filled out, something that doesn't make sense, what I think I will do before we poll them is just excuse them and take that

⁶ Defendant's Proposed Special Verdict Form (CP 58-59) is contained in the Appendix to this brief.

issue up with you in terms of how you'd like me to poll them" (RP 788:9-13). Both counsel agreed (RP 788:14, 20).

The jury's verdict did not make sense in that it answered "yes" to causing the collision, "yes" to proximately causing injuries, "no" to negligence, and yet it awarded damages (CP 150; RP 790:4-7). Accordingly, the Court, with consent of counsel, polled the jury. At least 10 jurors agreed on each question.

Mr. Kibe's counsel orally moved to conform the verdict to reflect the award of zero damages since the jury awarded damages without a finding of negligence (RP 801:6-9). The Court permitted Plaintiff an opportunity to respond in writing and established a mutually agreeable briefing schedule (RP 801:10-802:25).

Plaintiff subsequently filed her Response to Defendant's Motion for Dismissal and Cross Motion for a New Trial (CP 96). Defendant replied to Plaintiff's pleading, opposing her cross motion for a new trial and renewing his request for an award of zero damages (CP 100). Plaintiff timely filed her reply regarding the requested new trial (CP 102).

Counsel presented oral argument before the Court on May 8, 2015 (RP 804-815). The Court granted Plaintiff's motion for a new trial, saying, *inter alia*:

But **looking at the facts** of this particular case, which is what the court has to do in determining whether that's consistent under the facts of this particular case — first of all, the question of negligence is, negligence is defined in the instructions. It's not the broad category of negligence, which was the duty to exercise ordinary care.

And when I look at **the facts of the case**, the real difference in the expert testimony was who ran into who. ...

But both experts did testify that, basically, if the defendant caused the injury, the defendant would have been the one who entered the lane of travel of the plaintiff. And given that, it is hard to see how, **under the facts of this particular case**, how the jury could have found proximate cause for the accident; that is, the defendant therefore entered the lane of the plaintiff[,] without finding negligence.

So in looking at the facts of this particular case, I have to come to the conclusion that the verdict is inconsistent.

(RP 807:1-7, 14-23)(emphasis added). Accordingly, the Court granted Ms. Lonnquist's motion for a new trial (CP 220-21), and denied Mr. Kibe's subsequent motion for reconsideration (CP 107; 112).

III. RESTATEMENT OF ISSUES

1. Did the trial court properly exercise its discretion in ordering a new trial based on the facts of this case and the jury's responses, which were inconsistent with both the verdict form and the court's instructions.
2. Does Mr. Kibe's failure to object in the trial court to the giving of the proposed special verdict form that he now challenges on appeal preclude him from raising issues related to that form in this court.
3. If there was an "invited error," was it Mr. Kibe, rather than Ms. Lonnquist, who was responsible for it.

IV. ARGUMENT

A. The Court Below Did Not Abuse Its Discretion in Ordering a New Trial Herein

1. The Standard of Review is Abuse of Discretion

As shown by the trial court's oral ruling granting a new trial, the determination that the verdict was inconsistent with the court's instructions was based on the facts of this particular case, especially the testimony of the two experts (RP 807:14-23). The standard of review in such circumstances is abuse of discretion:

...an order granting or denying a new trial is not to be reversed, except for an abuse of discretion. *Huntington v. Clallam Grain Co.*, 175 Wash. 310, 27 P.(2d) 583. This principle is subject to the limitation that, to the extent that such an order is predicated upon rulings as to law, such as those involving the admissibility of evidence or the correctness of an instruction, no element of discretion is involved [citations omitted]. A much stronger showing of abuse of discretion will ordinarily be required to set aside an order granting a new trial than denying it. *McUne v. Fuque*, 42 Wn.2d 65, 253 P. (2d) 632.

Johnson v. Howard, 45 Wn.2d 433, 436, 275 P.2d 736 (1954); *accord: O'Brien v. Seattle*, 52 Wn.2d 543, 545, 327 P.2d 433 (1958); *Coleman v. George*, 62 Wn.2d 840, 841, 384 P.2d 871 (1963). This case is controlled by such authority.

Nonetheless, Mr. Kibe contends that the "superior court's decision was based on two legal grounds: invited error and inconsistent verdict" (App. Br. p. 12). There is no support in (a) the court's oral ruling, (b) the

court's order granting a new trial, or (c) in the court's order denying reconsideration, for the contention that the court based its ruling on an alleged invited error.⁷ Nor does Mr. Kibe's description of "inconsistent verdict" as an issue of law make it so. It is evident from the record herein that the trial court's conclusion that the verdict was inconsistent was based on the court's knowledge of the testimony from having presided over the trial and her consideration of the facts of this particular case. *See*: RP 807:1-7, 14-23, *supra*, at p. 8.

Accordingly, in order to prevail in this appeal, Mr. Kibe must show that the trial court manifestly abused its discretion by ordering a new trial. *Coleman*, at 841; *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989). He has not made such a showing and cannot do so on the facts in this record.

2. The Trial Court Did Not Abuse Its Discretion

A new trial is the only proper recourse when, due to irreconcilable inconsistency in the jury's findings, it is impossible for the court to determine the jury's resolution to the ultimate issue. *Blue Chelan Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 515 (1984); *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121 (1994). In both *Blue Chelan* and *Myhres v. McDougall*, 42 Wn. App. 276 (1985), the juries answered

⁷ Mr. Kibe's "invited error" theory was waived in the court below and thus not properly before this Court. See *infra*, pp. 16-18.

both yes and no to the essential questions, making the resolution of the ultimate issue impossible to determine. *Blue Chelan*, at 514-515 (jury answering NO to whether Plaintiff was totally and permanently disabled, but also answering NO to whether Plaintiff is capable of obtaining and performing gainful employment on a reasonably continuous basis); *Myhres v. McDougall*, (in an auto collision involving two vehicles on a one-lane road, jury answering that both parties were negligent and were the proximate cause of their own damages, but not the proximate cause of the other party's damages).

The jury in this case likewise gave contradictory answers by finding that Mr. Kibe did cause the collision with Ms. Lonquist's vehicle and his actions proximately caused her injuries, but inexplicably answering that he was not negligent. It is thus apparent that the jury did not understand or disregarded 1) Instruction No. 11 which states that a person using a highway has a duty "to exercise ordinary care to avoid a collision;" 2) Instruction No. 9 which states that negligence is "the failure to exercise ordinary care;" and 3) Instruction No. 12 which states that a "driver shall control speed to avoid colliding with others."⁸

⁸ The jury also disregarded Instructions 8, and 13, and violated the express instructions in the verdict form not to answer question no. 4 on damages unless it answered questions 1 - 3 affirmatively.

The jury's findings that Defendant proximately caused both the collision and Plaintiff's injuries simply cannot be reconciled with the foregoing instructions on duty and negligence. Given the inconsistency in the Special Verdict Form responses, it is impossible to determine that Mr. Kibe proximately caused both the collision and Ms. Lonquist's injuries and not find that he was negligent. The jury's answers are internally contradictory.

Although a jury is presumed to follow jury instructions, that presumption is overcome when it is shown otherwise. *Nichols v. Lackie*, 58 Wn. App. 904 (1990), at 907 (citing *Carnation Co. v. Hill*, 54 Wn. App. 906 (1989); *Tennant v. Roys*, 44 Wn. App. 305 (1986)). A new trial is proper where a verdict indicates that a jury disregarded the court's instructions. *Id.* (citing *Zorich v. Billingsley*, 52 Wn.2d 138 (1958); *State v. Davenport*, 100 Wn.2d 757 (1984)).

In *Nichols*, the court granted a new trial when the jury did not follow the jury instruction to award the listed special damages. *Id.* Here, the jury instructions clearly indicated that the jury is to answer Question 4 only if it had answered "yes" to Questions 1, 2, **and** 3 (emphasis added). Given that the jury ignored this instruction clearly stated on the verdict form, and gave responses that are inconsistent with the trial court's

instructions, the proper remedy was to declare a mistrial and direct a new trial.

3. The Jury's Verdict Is Not Consistent with the Evidence

In support of his contention that the verdict was not inconsistent, Mr. Kibe cites *Estate of Stalkup v. Vancouver Clinic, P.S.*, 145 Wn. App. 572, 187 P.3d 291 (2008) (App. Br. p. 22). That case is clearly distinguishable from the facts herein. First, the *Stalkup* Court determined that plaintiff had elicited the testimony that confused or mislead the jury – a factor not extant herein. Second, the Court held that a verdict based on one necessary element and not another is not necessarily inconsistent “if there is evidence in the record to support a finding of negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant’s actions (citing *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 667 P.2d 78 (1983)).

In the instant case, there was no evidence that if defendant proximately caused the collision and proximately caused plaintiff’s injuries – both of which the jury found – that he was the exercising ordinary care which Instruction No. 9 required, so as to avoid a finding of negligence. Indeed, the jury’s finding of proximate cause but no negligence cannot be reconciled because Defendant's vehicle did not just

collide into Plaintiff's without some other factor - negligence. Even if neither expert was able to give opinion about speed, just the fact that he lost control of his vehicle on a rain-slick highway, crossed over from his lane into the lane in which Plaintiff was driving and caused the collision meant that he was not driving in a prudent manner under the weather conditions regardless of his speed. As the trial court said:

... both experts did testify that, basically, if the defendant caused the injury, the defendant would have been the one who entered the lane of travel of the plaintiff. And given that, it is hard to see how, **under the facts of this particular case**, how the jury could have found proximate cause for the accident; that is, the defendant therefore entered the lane of the plaintiff[,] without finding negligence.

Instruction No. 11 expressly stated that “It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing himself or others in danger and to **exercise ordinary care to avoid a collision** (emphasis added).” Obviously, since the jury found that defendant had caused the collision, pursuant to Instruction No. 11 it could not logically find that he was exercising ordinary care. Inasmuch as Mr. Kibe was not exercising ordinary care, Instruction No. 9 required a finding of negligence.⁹ The jury’s responses to the verdict form questions were internally inconsistent, contrary to the jury instructions, and could not be

⁹ “Negligence is the failure to exercise ordinary care . . .”

reconciled by the court below.¹⁰ The trial court's decision to grant a new trial fell well within her discretion and should be upheld.

B. The “Invited Error” in this Case, If Any, Was Caused By Mr. Kibe

The doctrine of “invited error” prohibits a party from setting up an error at trial and then complaining about it at trial. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984); *State v. Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (Div. I, 1998); *Nania v. Pacific NW Bell*, 60 Wn. App. 708, 709-10 (Div. III, 1991). Here, Mr. Kibe's counsel reviewed the verdict form that he now claims was erroneous and failed to raise any objection or propose any change in language at a time when the court was considering the language of the form to be submitted to the jury. He remained silent.¹¹

By so doing, Mr. Kibe invited the error that now forms the basis of his appeal. Where, as here, “all counsel reviewed the [verdict] form before it was submitted to the jury and there were no objections, a party cannot [thereafter] claim error, having invited it.” *Nania*, at 710. Accord, *Gaff* at

¹⁰ The jury's award of some damages to Ms. Lonquist means that they did find Mr. Kibe at fault to a degree, despite their unclear answer to Question 3.

¹¹ Ms. Lonquist's attorney, her mother, was making her first foray into the field of personal injury law (RP 801:11-13), whereas Mr. Kibe's attorney specializes in, and has substantial experience in personal injury law. See the footer to CP 107, describing Mr. McPherson as an “employee of [State Farm's] Corporate Law Department.” He presumably understood the importance of making objections and taking exceptions to the special verdict form, but instead opted to “lay in behind a log” and seize the opportunity to complain if the verdict was not to his liking.

845 (where all parties agreed to the language, the invited error doctrine therefore precludes review). In *City of Bellevue v. Raum*, 171 Wn. App. 124, 147-48, 286 P.3d 695 (Div. I, 2012), the Court held that under the doctrine of invited error, a party cannot obtain relief on a claim that a special verdict form was erroneous if the party did not object to the form before it was submitted to the jury. Regardless of which party submitted the form, it was incumbent upon the party seeking review to have raised an objection and/or proposed a suitable alternative form. Having failed to do so, Mr. Kibe cannot now successfully complain that Ms. Lonquist invited the error that resulted in the mistrial. By failing to raise a timely objection, Mr. Kibe invited the error, if one exists herein.

C. Mr. Kibe Has Waived His Right to Review

Even assuming *arguendo*, there is an error in the Special Verdict Form given to the jury herein which led to a mistrial, Mr. Kibe waived his right to review. CR 51(f) provides, in pertinent part:

Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction.

In *Raum, supra* at 144-45, this Court held that “the rules for properly objecting to special verdict forms are, by analogy, governed by CR 51(f), which governs jury instructions, citing *Queen City Farms, Inc. v. Cent.*

Nat'l Insur. Co. of Omaha, 126 Wn.2d 50, 63, 882 P.2d 703, 891 P.2d 718 (1994). The Respondent in *Raum* argued that Appellant had waived his challenge to the verdict form when he failed to provide a legally sufficient alternative form. While acknowledging that a party dissatisfied with a special verdict form has a duty to propose an alternative, citing *Wickswat v. Safeco Ins., Co.*, 78 Wn. App. 958, 966-67, 904 P.2d 767 (1995), this Court allowed the appeal because the Appellant had “properly excepted by ‘stat[ing] distinctly the matter to which he objects and the grounds of his objection.’” Here, Mr. Kibe did neither.

In *Roumel v. Fude*, 62 Wn.2d 397, 399-400, 383 P.2d 283 (1963), the Court stated:

Our rules require that exceptions to instructions shall specify the paragraphs or particular parts of the charge excepted to and shall be sufficiently specific to apprise the trial judge of the points of law or questions of fact in dispute. The purpose *is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.*

(emphasis in original); see also: *Trueax v. Ernst Home Center*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). Where such exception is not taken, as here, the alleged error will not be considered on appeal. *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975). Accord: RAP 2.5(a) (appellate court may refuse to review any claim of error which was not raised in the trial court). Having failed to raise a timely objection to the special verdict

form, Mr. Kibe cannot now seek relief from the trial court's order granting a new trial.

D. Nothing in the Cases Cited by Mr. Kibe Derogates from the Propriety of the Trial Court's Decision

Citing *Christy v. Davis*, 71 Wn.2d 81, 426 P.2d 493 (1967), Mr. Kibe argues that the trial court's order should be reversed because it failed to state definite reasons of law and facts pursuant to CR 59(f). In *Christy*, the court articulated the reason for such a statement, to wit: that "objective criteria will take the place of subjective impressions." Here, however, the trial court in its oral ruling set forth, at length, the bases for ordering a new trial (RP 807-809), following which the court entered the order granting a new trial (RP 809:9-10). In the court's subsequent ruling, denying Mr. Kibe's motion for reconsideration, the trial expressly referred to "the record" as a basis for such ruling (CP 112). In so doing, the trial court complied with the purposes of CR 59(f). The order is well founded and should not be reversed.

Next Mr. Kibe cites *Gordon v. Deer Park School District*¹² for the proposition that "negligence is never presumed; it must be established by a preponderance of the evidence by the plaintiff." In *Horner v. Northern*

¹² 71 Wn.2d 119, 122, 426 P.2d 824 (1967).

Pacific Beneficial Assoc. Hospitals, 62 Wn.2d 351, 382 P.2d 518, the Court challenged the concept that “negligence is never presumed,” stating:

This doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception to, or perhaps more accurately a qualification of, the general rule that negligence is not to be presumed, but must be affirmatively proved. By virtue of the doctrine, the law recognizes that an accident, or injurious occurrence, may be of such a nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part [citing *Morner v. Union Pac. R. Co.*, 31 Wn.2d 282, 196 P.2d 744].

Accord: Chase v. Beard, 55 Wn.2d 58, 346 P.2d 315 (1959). Mr. Kibe introduced no exculpatory evidence to overcome the inference of negligence on his part, opting instead to blame Plaintiff for causing the collision – a proposition expressly rejected by the jury.

The *Gordon* case is also distinguishable because it did not involve instructions imposing a duty “to exercise ordinary care to avoid a collision” (Instruction No. 11); defining negligence as “the failure to exercise ordinary care” (Instruction No. 9); and requiring that a “driver control speed to avoid colliding with others” (Instruction No. 12).

Similarly, the *Osborne* and *Rickert* cases cited by Mr. Kibe (App. Br. p. 19) are distinguishable on the facts and the nature of the instructions

given.¹³ The *Osborne* case involved an automobile that skidded into a pedestrian. The appeal was based upon allegedly inconsistent jury instructions, including a *res ipsa loquitur* instruction, with which the reviewing court disagreed. None of those factors is extant herein. The *Rickert* case was a contributory negligence case that involved none of the inconsistent jury findings in the special verdict form that hallmark this case. Although there is *dicta* in the cases on which Mr. Kibe apparently relies, the holdings of these cases provide no support for Mr. Kibe's appeal.

In *Schooley v. Pinch's Deli*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998),¹⁴ the Court cites the proposition that "in order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury." Each of those requirements was met herein. The duty described in Instruction No. 11, the breach was described in Instruction No. 12, the resulting injury was determined by the jury to have been caused by Mr. Kibe as was proximate cause. Nonetheless, Mr. Kibe relies upon case-specific language that loss of control – skidding, spinning – is not negligence (App. Br. 19). In this case, however, it was not alleged

¹³ *Osborne v. Charbneau*, 148 Wash. 359, 268 P. 884 (1928); *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964).

¹⁴ Cited page 19 of Appellant's brief.

that skidding was the sole act of negligence, but rather that there were sequential acts of negligence. Mr. Kibe's acts of crossing over into plaintiff's lane in which she had every right to presume that another driver would operate his vehicle so as to avoid a collision, combined with not driving with appropriate caution and losing control, thereby making the collision unavoidable, taken together, were negligent acts.

The jury's express findings that Mr. Kibe caused both the collision and the injuries simply cannot be reconciled with its finding that Mr. Kibe was not negligent under the law (Instructions No. 13 and 12).¹⁵ As the trial court properly concluded, "both experts did testify that, basically, if the defendant caused the injury, the defendant would have been the one who entered the lane of travel of the plaintiff. And given that, it is hard to see how, under the facts of this particular case, how the jury could have found [that] ... the defendant entered the lane of the plaintiff[,] without finding negligence." (RP 807).

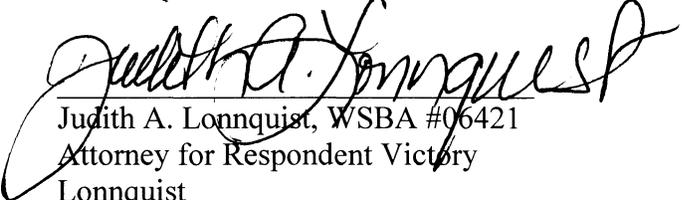
CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court hold that the court below properly exercised its discretion, that the decision of the trial court should be upheld, and that this case be remanded for a new trial.

¹⁵ Mr. Kibe's discussion about what the jury "must have concluded" (App. Br. p. 23), is simply speculation and should be disregarded.

Dated this 11th day of January, 2016.

LAW OFFICES OF JUDITH A.
LONNQUIST, P.S.



Judith A. Lonquist, WSBA #06421
Attorney for Respondent Victory
Lonquist

Appendix

(Corrected)

13-2-31208-5 SEA
Victory Lonnquist v. Patrick Kibe

Plaintiffs Exhibit 38

FILED
KING COUNTY, WASHINGTON
APR 18 2015
SUPERIOR COURT CLERK
BY David Witten
DEPUTY

TRIAL

Cause No. 13-2-31208-5 SEA

Caption: Victory Lonnquist Patrick Kibe

No.	Π	Δ	Description	A AN R	Date	Re-O & A	I D	R e t
31	X		Photo(s)	A	4/6/15			
32	X		Property Damage Appraisal [Withdrawn By And Returned To Counsel]					X
33	X		Medical Records and Bills	A	4/6/15			
34	X		Medical Records and Bills	A	4/6/15			
35	X		List of Medical Expenses				X	X
36	X		Photo(s)	A	4/8/15			
37	X		Hand Drawn Diagram	A	4/13/15			
38	X		Hand Drawn Diagram	A	4/13/15			
39	X		Hand Drawn Diagram	A	4/13/15			
40		X	Photo(s)	A	4/13/15			
41		X	Photo(s)	A	4/6/15			
42		X	Photo(s)	A	4/6/15			
43		X	X-Ray Report(s)	A	4/6/15			
44		X	X-Ray Report(s)	A	4/6/15			
45		X	X-Ray Report(s)	A	4/6/15			
46		X	Resume	A	4/6/15			
47		X	Internet Print Out	A	4/6/15			
48		X	Print Out of Facebook Page [Withdrawn By And Returned To Counsel]					X

CP 146

Trial Date: April 6, 2015

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

VICTORY LONNQUIST, an
individual,

Plaintiff,

vs.

PATRICK M. KIBE, and "JANE
DOE" KIBE, husband and wife,
both individually and on behalf of
their marital community composed
thereof,

Defendants.

No. 13-2-31208-5 SEA

VERDICT FORM

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

QUESTION 1: Was there negligence by the defendant that was a proximate cause of injury or damage to the plaintiff?
ANSWER: (Write "yes" or "no") _____

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

QUESTION 2: What is the total amount of the plaintiff's damages?
ANSWER: \$ _____

QUESTION 3: Was there negligence by the plaintiff that was a proximate cause of the injury or damage to the plaintiff?
ANSWER: (Write "yes" or "no") _____

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

QUESTION 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of the parties' negligence is attributable to the plaintiff?

ANSWER: % _____

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

DATE: _____

Presiding Juror

WPI 45.02 (6th Edition)

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

VICTORY LONNQUIST,
Appellee,
v.
PATRICK M. KIBE, and "JANE
DOE" KIBE, husband and wife, both
individually and on behalf of their
marital community comprised thereof,
Appellant.

NO. 73569-I

CERTIFICATE OF SERVICE

I, Philip J. Ammons, hereby certify that a true and correct copy of the
Brief of Respondent Victory Lonnquist dated January 11, 2016, has been sent to
the persons listed below:

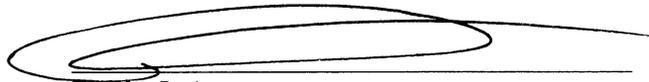
Marilee C. Erickson
Reed McClure Attorneys at Law
1215 Fourth Avenue, Suite 1700
Seattle, Washington 98161

VIA REGULAR MAIL
VIA CERTIFIED MAIL
VIA LEGAL MESSENGER
VIA HAND DELIVERY

Thomas J. McPherson
Thomas J. Whitters & Associates
720 Olive Way, Suite 1500
Seattle, Washington 98101

VIA REGULAR MAIL
VIA CERTIFIED MAIL
VIA LEGAL MESSENGER
VIA EMAIL

DATED this 11th day of January, 2016.



Philip J. Ammons
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Phone (206) 622-2086

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