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COURT OF APPEALS  
DIVISION II

2015 FEB 17 PM 3:28

No. 46~~535~~3-II

STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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DEBBIE K. BALTZAR,

Appellant,

v.

DONALD PARADISE and "JANE DOE" PARADISE,  
husband and wife,

Respondents.

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BRIEF OF RESPONDENT

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ORIGINAL

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## I. OVERVIEW

Debbie Baltazar was injured in a recreational boating accident. She sued her friend and employer Donald Paradise for her injuries. She asserted Donald Paradise was negligent for causing the boat to collide with a wave causing her injury. The jury returned a defense verdict on July 2, 2014, finding Donald Paradise fault free.

Appellant contends the court erred in giving Jury Instruction 16 (Emergency Doctrine), Jury Instruction 17 (Act of God) and Jury Instruction 18 (Comparative Negligence).<sup>1</sup> Notably, plaintiff did not assign error to the verdict or the special verdict form.<sup>2</sup>

Appellant's argument of error on the act of God and emergency doctrine instructions are fatally flawed because she did not assign error the verdict or verdict form.

Even if error laid for instructing on comparative negligence it is moot because the jury found respondent fault free; the jury did not reach the issue. (Question 1)(CP 1108-1110). Appellant concedes the alleged error is harmless. (App. Brief at page 36).

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<sup>1</sup> Appellant improperly omitted a copy of the jury instructions for review pursuant to RAP 10.4(c) "If a party presents an issue which requires study of a ...jury instruction finding of fact, [or] exhibit...the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief."

<sup>2</sup> Plaintiff did offer two general verdict forms neither of which addresses the error she relies on for appeal. The only objection she made was that the form referenced comparative fault. (VRP 862-867, 890-898)

There was substantial evidence supporting all of the instructions given and all were correct statements of the law. There was no error.

## II. ARGUMENT

### A. PLAINTIFF DID NOT ASSIGN ERROR TO THE VERDICT OR JURY'S DECISION AND MAY NOT NOW CHALLENGE IT ON APPEAL FOR THE FIRST TIME.

Given the instructions, there were three ways the jury could find Mr. Paradise not negligent: (1) he simply did not fail to exercise reasonable care under the basic negligence instruction; (2) he was responding to a sudden act of God and therefore his conduct, even if not perfect, was not negligent; or (3) he was responding to an emergency, therefore the choice he made was not negligent even if “not the wisest choice.”

The trial court, without any exception by appellant, put one question to the jury on this issue: was Mr. Paradise negligent. The jury's answer: no.

Appellant did not assign as error the jury verdict finding Mr. Paradise was not negligent. Appellant therefore accepts that finding as established on appeal. See Fowels v. Sweeny, 41 Wn.2d 182, 187 (1952).

The problem that creates for appellant, and why the verdict must be affirmed, is out of the three ways the jury could have found Mr.

Paradise not negligent, appellant has only appealed and assigned as error two.

Not assigning error to the verdict itself or the finding of no negligence, the appellant may not peer inside the jury room to speculate it was either the act of God or emergency doctrine instructions she assigns as error that was the cause of the jury's finding Mr. Paradise not negligent, and not the simple fact the jury found Mr. Paradise did not fail to exercise reasonable care under the basic negligence instruction.

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict. Cox v. Charles Wright Academy, 70 Wn.2d 173, 180 (1967); see also Conrad v. Alderwood Manor, 119 Wn. App. 275, 292 (2003).

The jury was instructed both the act of God and emergency instructions were the burden of Mr. Paradise to prove. Appellant took no exception to the Trial Court not breaking the primary question of negligence out from that burden of Mr. Paradise. (VRP 897-898) The

failure to take exception to that verdict form precludes finding error, even if this Court might find it would be better practice to submit the issue in separate questions to the jury. Lahmann v. Sisters of St. Francis of Philadelphia, 55 Wn. App. 716, 723, 780 P.2d 868 (1989) (citing J.C. Motor Lines, Inc., v. Trailways Bus Sys., Inc., 689 F.2d 599 (5th Cir. 1982) (Failure to object to the form of a special verdict while the trial court still has control over the form precludes consideration of the issue on appeal); Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 966–67 (1995) (citing Queen City Farms v. Central Nat'l Ins., 126 Wn.2d 50 (1994)).

Appellant assented to the question of primary negligence as opposed to an act of God or an emergency being submitted as one, consolidated question on negligence. (VRP 897-898). There is nothing wrong with that. The questions are compatible even if they can be broken out.

Appellant may not gamble on the verdict and after receiving an unfavorable outcome complain there was error. Nelson v. Martinson, 52 Wn.2d 684, 689 (1958).

Thus the issue, although not preserved or assigned as error by appellant, is whether the instructions as a whole were based on substantial evidence and allowed the parties to argue their case. See Lahmann v. Sisters of St. Francis of Philadelphia, 55 Wn. App. 716, 723 (1989).

When the instructions “read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury” there is no error.

Merely providing a jury instruction that should not have been given is not error if the giving of the instruction is moot. Or said another way, if the jury gave its verdict without having to rely on or resort to the instruction, the verdict need not be disturbed. Cf. Boeke v. International Paint Co., 27 Wn. App. 611, 615 (1980). This is similar to the erroneous instructing on comparative negligence; where the court erroneously instructs on comparative negligence but the jury finds no negligence by the defendant, the jury “presumably never reached” the allegedly erroneous instruction. In that event, error in giving the instruction is harmless. Bertsch v. Brewer, 97 Wn.2d 83, 92 (1982).

Turning to this case, even if it was error to give the act of God or emergency instructions, that is error that requires reversal only if the jury in fact decided the case based on them. If not, the error is harmless. Appellant asserts giving those instructions prejudiced her, but that may be true only if the jury relied on them. That is why appellant was required to have taken exception to the special verdict form consolidating those questions, assigned error to the jury finding Mr. Paradise not negligent, and assigned as error a lack of substantial evidence supporting that

finding. Absent that, it requires speculating about the “mental processes” of the jury that “inhere in the verdict itself,” and assuming by guessing the jury made its verdict based on the two allegedly erroneous instructions and not the instruction and basis to which appellant assigns no error.

Appellant’s argument she was prejudiced because the act of God and emergency instructions gave the jury a way to find Mr. Paradise not negligent is circular reasoning. She must show that is why the jury reached its verdict before she may make that argument – arguing the jury might have is not sufficient. See Boek and Bertsch.

It is well settled and no authority need be cited for the proposition appellant may not assign new error or make new argument in reply that the finding of no negligence was error and not supported by substantial evidence.

It is a fundamental tenet of appellate procedure the court will not consider an assignment of error where the appellant's brief contains no argument in support thereof. State v. James, 36 Wn.2d 882 (1950); Goehle v. Fred Hutchinson Cancer Research Center, 100 Wn. App. 609 (2000). See also RAP 10.3(g):

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made

must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(Underline added).

The jury might have, or might not have, internally found defendant negligent but obviated it by applying an affirmative defense. Or, perhaps it was defendant that was horribly prejudiced by not having a question to allow the jury to find the defense.<sup>3</sup> Lucky for him, he was found not negligent.

Exceptions must be made to the giving of the special verdict form no differently than any other instruction. CR 51. Appellant had no problem with and took no exception to the special verdict form used when the affirmative defenses were condensed into one general question to the prejudice of respondent. (VRP 897-898). But even if she did, the form is not error.

The factors for considering the adequacy of special interrogatories to the jury are (1) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury; (2) whether the submission of the issues to the jury was “fair”; and (3) whether the “ultimate questions of fact” were clearly

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<sup>3</sup> Understanding the unfairness of the given special verdict form Defendant offered three forms all of which asked the jury to answer whether the wave was an act of God.

submitted to the jury. Lahmann v. Sisters of St. Francis of Philadelphia, 55 Wn. App. 716, 723 (1989).

The special verdict form did all of those things; it (1) addressed the issues before the jury, (2) the form was fair, although one could easily argue any unfairness fell on defendant and not plaintiff, and (3) the ultimate questions of fact were clearly submitted. Plaintiff did not merely not take exception to the form; she encouraged it (VRP 897-898).

In Marsh-McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636 (1999), Division 1 held the tenant defendant could not address on appeal the fact the trial court's general verdict form did not permit the court to know how the jury resolved the factual issue of whether the attorney fee provision of written lease agreement was incorporated into the oral month-to-month tenancy after lease expiration.

[T]he special verdict form which Clapp proposed would not have accomplished that end, and Clapp objected below neither to the general form, nor to the court's failure to give his proposed special form. Clapp cannot now complain that the court, instead of the jury, resolved the interpretation of the holdover clause.

Id. at 649. Similar to the appellant in Clapp, Mrs. Paradise sat on her rights and has only taken issue with the general verdict form after receiving an unfavorable result.

Smith v. Sturm, Ruger & Co., 39 Wn. App. 740 (1985), a products liability case, is also on point with the instant case and supports the proposition a party cannot assign error to a sequence of questions on a verdict form after failing to do so at trial or on appeal. Specifically, the court in Smith refused to consider whether the trial court erred by instructing the jury to consider appellant's conduct prior to reaching the issue of the manufacturer's liability, as the appellant failed to preserve the issue for appeal.

Because Debra Baltazar did not take exception or assign error to the special verdict form, the consolidation of the issues inhere in the verdict and is another verity on appeal.

**B. APPELLANT'S ASSIGNED ERROR TO CONTRIBUTORY NEGLIGENCE AND ACT OF GOD DEFENSES ARE HARMLESS AS A MATTER OF LAW BECAUSE THE JURY DID NOT FIND ANY NEGLIGENCE**

**1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONTRIBUTORY NEGLIGENCE**

*Jury Instruction No. 18 reads as follows:*

*"Contributory Negligence is negligence, on the part of a person claiming injury or damage, which is a proximate cause of the injury or damage claimed."*

Appellant concedes instructing on contributory negligence is harmless error. (App. Brief at 36). Her argument future guidance is needed is likewise without merit. See Bertsch v. Brewer, 97 Wn.2d 83, 92

(1982); Tope v. King County, 189 Wn.463, 471-72 (1937); Hizey v. Carpenter, 119 Wn. 2d 251, 270 (1992) (any error in giving instruction concerning contributory negligence was harmless where jury was instructed on special verdict form not to answer contributory negligence if defendant not negligent).

We presume juries obey the court's instructions. Bordynoski v. Bergner, 97 Wn.2d 335, 342 (1982). When a jury does not get to a particular issue by way of its verdict form it is deemed harmless error. Bertsch v. Brewer, 97 Wn.2d 83, 92 (1982) (Instruction on contributory negligence was harmless as jury found no negligence on physician's part and, therefore, as instructed, never reached issue of contributory negligence). See also Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 276-77 (1990) (An erroneous instruction is harmless if the jury does not reach the issue addressed in the instruction); Connor v. Skagit Corp., 99 Wn. 2d 709 (1983) (Even though assumption of risk instruction in products liability action misstated the law, error was harmless because jury returned a general verdict for defendants and did not reach the issue of damages).

Here, the jury did not reach the issue of contributory negligence and therefore any error in giving the instruction was harmless.

**2. THERE WAS SUBSTANTIAL EVIDENCE ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE**

This issue of contributory negligence was briefed in advance of trial, was supported by the evidence and trial testimony and would have been appropriate for the jury to consider had Mr. Paradise been found negligent. (CP 1014, 481-492, 649-661).

It was undisputed at trial plaintiff of her own volition wrapped a rope around her wrist when she got in the boat. She decided to sit in the bow of the boat despite being a boater with experience knowing the bow of the boat bounces the most. (VRP 766-767) She did not tell Mr. Paradise she wrapped her wrist with a rope, multiple times. (VRP 281, 368, 767-768) Doing that, sitting in the bow of the boat was negligent; at the very least, the jury was entitled to find that based on appellant's own evidence. Id. This was not mere negligence in the air.

Plaintiff claimed in trial one of her injuries was carpal tunnel syndrome. She also claimed surgery as a result of this condition. Plaintiff's treating doctor unequivocally related the mechanism of injury for carpal tunnel to plaintiff wrapping her wrist with a rope. (CP 856-859, 865-867).

**3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ACT OF GOD DEFENSE IN INSTRUCTION 17 – THE INSTRUCTION WAS CORRECT AND THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT IT**

**Jury Instruction No. 17** reads as follows:

*“Phrases such as “rogue wave,” and “sneaker” are synonymous for “an act of God.”*

*An “act of God” is a natural phenomenon of such unanticipated force and severity that it cannot be reasonably anticipated or guarded against by ordinary care.*

*If you find from the evidence that the defendant has proved by a preponderance of the evidence that an act of God was the sole proximate cause of the Baltazar’s injuries and damages, then the Baltazar cannot recover.”*

Appellant argues the Court’s rogue wave instruction was a misstatement of the law and “misleading.” Her argument appears to be the instruction is partially a misstatement of the law. (App. Brief at page 23). Appellant takes issue with the rogue wave being described synonymously with an act of God. Appellant also criticizes the third sentence of the instruction.

Appellant claims the Court erred and misunderstood Wyler v. Holland Am. Line – United States, Inc., 348 F. Supp. 2d 1206 (2003). She claims the Trial Court took this case “out of context” and contorted Wyler implying the Court did not understand the case. Appellant alleges Wyler relied on irrelevant case law and is inapplicable.

The Court spent a lot of time considering exactly what instruction on the rogue wave would be appropriate. (VRP 867-876)(CP 341-344, 24-32, 56-61). It is clear in the record a rogue wave instruction of one

kind or another would be given and was anticipated since Mr. Paradise's motion for summary judgment was denied on March 9, 2012. (CP 159-160). Plaintiff had years to draft a proposed instruction. Yet she never did nor did she ever offer an alternate.

Instructing the jury that a rogue, sneaker or freak wave is synonymous with an act of God does not take away from the jury the requirement that they would have to conclude whether the wave encountered was even rogue in the first place. They were not directed that it was nor did the Trial Court find it appropriate to define for the jury the definition of what a rogue wave is. (VRP 867). Instead the jury was left with the testimony of two experts, Sylvester and Shoemaker both of whom defined in their testimony what they believed to be the definition of rogue wave and whether the wave at issue was in fact rogue. Perhaps not surprisingly plaintiff's expert Sylvester said it was not and defendant's expert said it was. (VRP 548, 552-553, 563-564, 570).

Mrs. Baltazar argues that the Wylor court was entirely wrong, thus implying that this trial court was likewise wrong because it relied on an irrelevant case. This is essentially a veiled attempt to use an "out-of-context" argument as a façade to levy a back-door critique on the merits of

Wyler itself.<sup>4</sup> Yet the merits of Wyler are not at issue. It is good law and was analyzed by the trial court when Judge Sutton ruled on the issue by way of summary judgment when the rogue wave defense was first brought to the court's attention. (CP 238-239).

The reliance on Wyler was heavily argued by the court and counsel at trial as well. (VRP 639-646, 674-678, 867-876). Appellant seems to think that because Wyler dealt with much larger waves than the wave at issue in our case, the analysis of the case does not support the giving of the instruction. That is a twisting of the evidence and the law.

While the experts in this case disagreed on whether the wave was just a large wave or "rogue", the principal is that if rogue it is an act of God, and to be rogue, the waves cannot just be rough seas. They cannot just be larger than the other waves in the area; they must be considered in light of the totality of the circumstances. This requires the fact finder to look at the wind conditions, the water in the surrounding area, the boat traffic, and seismic activity. The list is long but to just assert out of hand that a three foot wave could never be rogue was not supported by the

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<sup>4</sup> Claiming a principle is wrongly applied because it was taken "out of context" means that the cited principle actually means something different given the context of its formulation in the case from which the statement came. See State v. Willis, 67 Wn.2d 681, 686 (1996).

testimony. Yet, even that is not the turning point as the jury may or may not have found the wave at issue to be rogue. Further as the jury was instructed that to exonerate defendant the rogue wave, if in fact it was rogue at all, must be the sole proximate cause is exactly in accordance with the law. Ultimately, the Court's instruction was too narrow to the prejudice of respondent.

Appellant directs this Court to several out of jurisdiction cases and provides for the first time (not raised at trial) a variety of new authority to address what a correct statement of the law would be in instructing a jury on a correct act of God defense. The cases referred to support the Trial Court's instruction; they do not support Appellant at all. The instruction as given does not run afoul of the specific characteristics that have been associated with hurricanes, heavy rains, or other phenomenon which present a possible act of God. In brief the authority cited suggests the following factors: (1) abnormal or unusual in occurrence, (2) a force strictly of nature, with no human assistance or influence, and (3) of such severity that human prudence or precaution could not have avoided the damage thereby caused." 6 Am. Jur. Proof of Facts 3d 319. See also briefing on the same issue set forth in defendant's motion for summary judgment and trial brief. (CP 24-32, 56-61, 341-344) This is in

accordance with the authority relied on by appellant and certainly is not contrary to our own Washington and maritime authority.

One thing can be said, every jurisdiction has a slightly different wording on instructions or the legal statement of what qualifies as an act of God. Most of the cases appellant cites were not even jury trials; they were bench trials that did not challenge the correctness of a jury instruction. Yet, to the extent they comment on the doctrine it is clear the Trial Court's instruction is in sync with the principal as a whole.

Not just Wylor has referred to rogue waves as synonymous with acts of God; others courts have as well. Wendelboe v. Exxon Shipping Co., 6 So.3d 882, 886 (2009) (“[n]otwithstanding the correctness of the trial court's classification of the wave as a “rogue wave” or act of God, the record amply provides a reasonable factual basis for its finding that neither the plaintiff nor the defendants were negligent in this incident.”).

Like the emergency instruction, the jury does not even reach the act of God defense nor does it serve any assistance to the defendant if there is a finding of negligence, thus rendering any alleged error harmless. See Bertsch, 97 Wn.2d at 92; Tope v. King County, 189 Wash. 463, 471-72. See also Blaney v. Int'l Assn. of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203 (2004) (An erroneous jury instruction is harmless if it is “not prejudicial to the substantial rights of the

parties...and in no way affected the final outcome of the case.”). As in Bertch, Tope, and Blaney, the jury’s finding of non-negligence inures in the verdict and any alleged errors fail to prejudice the substantial rights of the parties.

The instruction as given was clear. To exonerate Mr. Paradise based on an act of God, it had to be the sole proximate cause. Otherwise it does not result in exoneration and, as the jury found Mr. Paradise without fault, even if the instruction was in error, it was harmless as a matter of law.

**C. THE COURT PROPERLY INSTRUCTED THE JURY ON THE EMERGENCY DOCTRINE BECAUSE MR. PARADISE PROVIDED EVIDENCE OF A SUDDEN EMERGENCY WHERE HE CHOSE TO DECELERATE AND WARN HIS PASSENGERS**

**1. MR. PARADISE PROVIDED SUBSTANTIAL EVIDENCE OF AN EMERGENCY THAT AROSE WITHOUT HIS NEGLIGENCE**

**Jury Instruction 16 reads as follows:**

*“A person who suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.”*

The Trial Court’s decision to give an emergency instruction is reviewed for abuse of discretion. Kappelman v. Lutz, 167 Wn.2d 1, 6 (2009). An abuse of discretion occurs only when the trial court’s decision is based on untenable grounds or untenable reasons. Id.

instruction is clearly not available if Mr. Paradise was negligent and the jury is held to have read the instructions and followed them and found no negligence, any error in giving the instruction would be harmless.

Jury instruction 16 is appropriate if parties present conflicting evidence as to whether the underlying accident arose from negligence or unpreventable circumstances. If conflicting evidence exists regarding the defendant's negligence that might have led to an emergency, the jury must be instructed on the emergency doctrine. See Bell v. Wheeler, 14 Wn. App. 4, 6 (1975). ("A conflict of evidence on the applicability of the doctrine of sudden emergency requires submission of the theory to the jury."); Kappelman v. Lutz, 141 Wn. App. 580 (2007), aff'd, Kappelman v. Lutz, 167 Wn.2d 1, 10 (2009) (an instruction on the emergency doctrine is appropriate when the trier of fact is presented with facts that could lead to the conclusion that the emergency arose through no fault of the defendant). Here, Paradise presented conflicting evidence of a sudden emergency that did not arise from his negligence. Because conflicting evidence exists, the trial court properly submitted the emergency doctrine instruction to the jury and the WPI 12.02 was a correct statement of the law.

Appellant next argues that the emergency doctrine only applies if the defendant has a choice of action when facing an emergency. Appellant

alleges that Paradise conceded that the wave(s) appeared “instantaneous[ly],” thereby precluding him any choice but to “slam through it.” While Mr. Paradise clearly used the adjective “instantaneous” to describe the large wave which came out of nowhere he clearly had time to take some evasive action including shouting a warning and decelerating. Plaintiff criticized Mr. Paradise for his speed and the angle of hitting the wave, but the testimony did not bear that out. So while in some respects the accident happened fast, it did not happen so fast that there was no time to react. It is for the jury to decide whether the event encountered was an emergency. The theory of defendant’s case was this was an accident without fault.

Even if the instruction was error, which it was not, to require reversal prejudice must be shown. Caruso v. Local Union No. 690, 107 Wn.2d 524, 529-30 (1987). Error is not prejudicial “unless it affects, or presumptively affects, the outcome of the trial.” Caruso v. Local Union No. 690, 107 Wn.2d 524, 529-30 (1987) (quoting Brown v. Spokane Cy. Fire Protec. Dist. 1, 100 Wn.2d 188, 196 (1983)).

If the jury instruction properly states the law, then prejudice is not presumed. Blaney v. Int’l Ass’n of Machinists and Aerospace Workers, Dist. No. 167, 151 Wn.2d 203, 211 (2004). There is no dispute the instruction is a correct statement of the law. Yet even a misleading

instruction will not be deemed prejudicial. See Caruso v. Local Union No. 690, 107 Wn.2d 524, 529-30 (1987). See also Magana v. Hyundai Motor America, 123 Wn. App. 306, 318 (2004) (holding that while it is not possible for a reviewing court to with certainty “determine what evidence or instruction influenced the jury's decision,” when alternate theories support the jury’s finding, the instructions may not be prejudicial).

Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92 (1995). After Mr. Paradise testified the Court concluded this instruction was appropriate.

Mr. Paradise faced an emergency that required a quick decision on how to navigate an unforeseeable wave safely. The court clearly acknowledged the sufficiency of the evidence when allowing the emergency doctrine instruction. (VRP 900). There was “substantial” evidence, which is evidence sufficient “to persuade a fair-minded person of the truth of the declared premise.” Caruso v. Local Union No. 690, 107 Wn.2d 524, 529-30 (1987).

Appellate courts review a trial courts’ decision to give a jury instruction on emergency for abuse of discretion, and afford a strong presumption that jury findings are correct. Kappelman v. Lutz, 167 Wn.2d

1, 6 (2009); Bunch v. King County Dept. of Youth Services, 155 Wn.2d 1654, 189 (2005).

Kappelman illustrates a remarkably similar case where the court found that the emergency doctrine instruction was appropriate. Kappelman, 141 Wn. App. at 589. A motorcycle driver and his passenger struck a deer at night, resulting in injuries to the passenger. Id. at 583. On appeal, the passenger argued that the court erroneously gave the emergency instruction because the driver created the emergency by his own negligence. Id. at 588. The court rejected the passenger's argument acknowledging there was evidence on both theories as either the driver created the emergency by his negligence or, alternatively, the emergency itself (not negligence) caused the accident. The defendant driver argued that the accident was caused when he was unable to avoid hitting the deer either by stopping or moving around it. He tried to avoid the deer, but when he determined that was not going to work, he applied his brakes. So to the case at bar. Mr. Paradise shouted a warning, decelerated with the throttle and decided to take the wave head on without changing his course.

Kappelman parallels both the facts and arguments in this case. Just as the passenger in Kappelman, Appellant argues that Mr. Paradise's negligence created the emergency. (App. Brief at 16.) Yet just as the driver in Kappelman, Mr. Paradise presented evidence that he was

and yell a warning to his passengers. Mr. Paradise's choice almost exactly resembled the motorcyclist's in Kappelman, where the Washington Supreme Court held that the emergency doctrine was proper. Kappelman v. Lutz, 167 Wn.2d 1, 10 (2009). As the court decided Brown over thirty years ago, the more accurate and applicable holding is Kappelman. The trial court properly instructed the jury on the emergency doctrine. There was no error.

Yet even if this court finds that Brown governs, the apparent factual inconsistency between Brown and Kappelman are exactly why Washington courts review the trial court's decision to give an emergency doctrine instruction for abuse of discretion. See Kappelman v. Lutz, 167 Wn.2d 1, 6 (2009). The trial court is in the unique position of deciding whether the specific facts of the specific case warrant the instruction. Id. A trial court abuses its discretion if its decision is manifestly unreasonable, is based on untenable grounds or is decided upon untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47 (1997).

Here, the trial court's decision was not manifestly unreasonable or was based on untenable grounds for untenable reasons. Not only did the evidence support the rise of a sudden emergency when Mr. Paradise faced the rouge or unexpected wave, but the State Supreme Court had applied the emergency doctrine on a nearly identical set of facts. It is not only

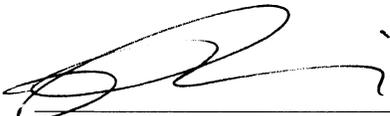
reasonable, but required, for lower courts to follow precedent established by higher courts. The trial court did not abuse its discretion.

### CONCLUSION

Substantial evidence supported all of the instructions given and they correctly stated the law. But even if that is not true, appellant's failure to assign as error the jury's finding respondent engaged in no negligence is a fatal flaw: if there is any basis to support the decision below, this Court must affirm. State v. Zunker, 112 Wn. App. 130, 140 (2002). Appellant's both failing to assign error to the verdict and take exception to the special verdict form or assign the form as error simply precludes the argument for reversal she now makes.

DATED this 17<sup>th</sup> day of February, 2015.

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