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No. 49580-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BRIANNA P. CHANDLER, as personal representative
for estate of KAHIL M. MARSHALL,
Appellants/Plaintiffs,

v.

THE STATE OF WASHINGTON; DEPT. OF TRANSPORTATION,
SHELTON SCHOOL DISTRICT #309, a municipal corporation;
SUZAN J. MONTANO-FELTON and JOHN DOE MONTANO-
FELTON, husband and wife and their marital community comprised
thereof; NATHEN R. WRIGHT and JANE DOE WRIGHT,
husband and wife and the marital community comprised thereof, et al.

Respondents/Defendants.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant/Plaintiff Brianna Chandler, on behalf of Estate of Kahil Marshall, appeals the verdict of the jury herein finding Respondent/Defendant Shelton School District negligent, but not the proximate cause; finding Respondent/Defendant Suzan Montano-Felton not negligent.

The Appellant/Plaintiff established that Ms. Montano-Felton had a history of negligent acts during her operation of the Shelton School District vehicle; that she had previously been involved in harming others. The trial court failed to see the direct correlation between the actions of Respondent/Defendant Suzan Montano-Felton during that fatal trip and the duty of Respondent/Defendant Shelton School District to prevent the underlying death that resulted herein in that they had a duty to know, based on Ms. Montano-Felton's prior violations, that an accident of this nature would occur.

The trial court failed to find that Shelton School District by direct cause of Ms. Montano-Felton's actions was the proximate cause of the

death of Kahil Marshall despite finding Shelton School District negligent by those same facts.

Further, the jury failed to complete their duty by not addressing the subject of damages entirely and/or the division between the parties whatsoever. That the jury failed to do its duty is irreconcilable.

II. ASSIGNMENTS OF ERROR

- A. The jury's finding that Shelton School District negligence was not a proximate cause of injury and damage in the death of Kahil Marshall.
- B. The Special Verdict form was not proper in that it established a bias not expected or perceived.
- C. The jury's failure to complete their duty as to the Special Verdict form by not addressing Question 3 in any manner.
- D. The trial court erred in not setting aside the jury verdict and granting plaintiff a new trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err in finding defendant Shelton School District negligent by reason of its employees' actions, but that said negligence was not the proximate cause of injury and damage in the death of Kahil Marshall, a verdict supported by substantial evidence?
- B. Did the trial court err in including specific language on the Special Verdict Form that created bias by the jury toward defendant Nathan Wright?

- C. Did the trial court fail to complete its duty by failing to address Question three of the Special Verdict Form?
- D. Did the trial court err in denying Plaintiff's motion for a new trial based on the jury's uncompleted verdict?

IV. STATEMENT OF THE CASE

On the morning of October 27, 2010, defendant, SUZAN MONTANO-FELTON was driving defendant SHELTON SCHOOL DISTRICT School Bus No. 120 South on Highway 101 on her regular route. (CP at 541) Consequently, NATHAN WRIGHT was also traveling on Highway 101 from Shelton to Olympia with his girlfriend, KAHIL MARSHALL, who was sitting in the front passenger seat. Mr. Wright was transporting Ms. Marshall to a medical appointment in Olympia, Washington. (CP at 541)

At some point, prior to 6:32 a.m. and prior to its entry into the gusset/turn lane at Hurley-Waldrup Road, the school bus changed lanes and was impacted in the left lane by a car driven by defendant Nathan Wright. (CP at 541; CP12 at 511) The vehicle's front-seat passenger, Kahil Marshall, died at the scene upon impact. Mr. Wright was transported to Harborview in Seattle for his injuries. The bus driver, defendant Suzan Montano-Felton, received minor injuries and was treated at the scene and released.

Defendant Nathan Wright was initially convicted under criminal statute for his actions that resulted in Ms. Marshall's death. (CP 110-137) That conviction was appealed, and his conviction was overturned prior to the trial herein. The court entered a default against him under the civil action herein. (CP at 479.)

The court submitted jury instructions to the jury that included a Special Verdict form that set defendant Nathan Wright apart from the other defendants by containing language that biased the jury against defendant Nathan Wright. (CP at 24-25)

The jury returned a special verdict finding defendant Suzan Montano-Felton not negligent and finding defendant Shelton School District was negligent on Question 1. On Question 2, they did not find such negligence as a proximate cause of injury and damage to the Plaintiff. Further, the jury did not make any finding or award as to damages with regard to the death of Kahil Marshall despite instructions to the contrary. (CP at 25) Effectively, the jury failed to complete their duty by ignoring the issue of damages herein.

The court denied plaintiff's post-trial motion for a new trial. (CP at 26-32, at 4, at 5-8)

V. ARGUMENT

A. The trial court in the case at bar erred in finding that Suzan Montano-Felton was not negligent in the exercise of her duties as an employee of Shelton School District for her willful failure to comply with District and State requirements while operating the school bus, including standard driving procedures, use of cell phones, and other distracted-driving practices, which this writer believes provided the perfect atmosphere for the tragedy that occurred on the early morning of October 27, 2010. Distracted driving is a growing epidemic across the State of Washington as evidenced by the Governor's recent law prohibiting cell phone usage, beverages, and food consumption, and other activities that detract from the driver's number one task—to pay attention to the road and other vehicles around them. Respondents claim that she was “not on her cell phone” that fateful morning. However, it is unknown what distracted her as the camera was disconnected prior to the accident, leading one to think it was to hide her actions while operating the school bus.

Plaintiff proved that Ms. Montano-Felton was negligent in the operation of her vehicle both that specific morning and many others. She testified at trial that she was very well aware of the dangers of trying to

make the crossing at the Hurley-Waldrip intersection; that she wholly focused on gauging the oncoming traffic in the Northbound lanes to avoid having to sit for up to nine minutes before continuing her route. (Verbatim Report of Proceedings, Volume 2, page 210, lines 6 – 22, page 261, lines 15 – 25, and page 262, lines 1 – 10.) She failed to give equal attention to or exercise reasonable care for the vehicles behind her when she pulled into the left lane and attempted to then turn into the gusset lane without giving the driver in the left lane proper time to react.

Ms. Montano-Felton stressed that she was focused only on the northbound traffic, to be able to gauge her opportunity to make the turn across the Northbound lanes to continue her route. She signed a statement under penalty of perjury not less than 30 minutes after the collision, stating that she was stopped in the gusset, minding her own business and focused on the Northbound traffic so she could make the turn and continue her route. She freely states that she did not see or know of any vehicles behind her. She had a duty to know if there were any vehicles behind her prior to entering the left lane of travel in preparation for entering the gusset lane. She testified that it was her “normal practice” to enter the left turn lane much further back than where the accident occurred. However, less than thirty minutes after the impact, she swore under oath that she was in fact already in the gusset lane when she was hit. That sworn statement

changed when the facts revealed that she was much further back in the left lane of travel. It is clear that Ms. Montano-Felton did not know where she was at the time of impact. The jury failed to find that she was distracted in her driving, and that distraction led to the death of Kahil Marshall.

The trial court failed to weigh all the evidence that showed Ms. Montano-Felton's consistent disregard for operational rules established by the State of Washington and by Shelton School District #403 when operating defendant Shelton School District's bus that included disconnecting the video camera in the bus that morning; that she failed to follow procedure while completing her pre-check before departing the bus barn; and all the violations noted in her employment records prior to that fateful day. She had numerous incidents that created dangerous and/or resulted in injurious situations for not only her riders but for those traveling the roadways with her, including pedestrians. (Verbatim Report of Proceedings, Volume 2, page 311, line 19 through page 320, line 16; Volume 3, page 474, line 11 through page 479, line 23;)

Ms. Montano-Felton exhibited autonomous behavior in that she excluded herself from an expected standard of care, including sudden lane changes without regard for vehicles behind her. Her actions are negligent, and by that, Shelton School District was negligent. That negligence

contributed to the proximate cause of the injury and damages resulting in the death of Kahil Marshall on October 27, 2010.

Ms. Montano-Felton's disregard for those around her is negligence, and that negligence contributed to the death of Kahil Marshall in that she did not exercise the basic standard-of-care required of her as the driver of the school bus, beginning with the unproven Pre-check report on the morning of Ms. Marshall's death before taking the bus out on the road that fateful morning. That negligence transfers to her employer, defendant Shelton School District, and therefore, translates into the employer's direct negligence, both of which are the proximate cause of damages and injury to Kahil Marshall.

The School District had a duty to exercise reasonable care and vigilance to protect the public from reasonably foreseeable injury. While the court found Shelton School District negligent by reason of its employees' negligent acts herein, the trial court failed to properly weigh the evidence that established the defendants' negligence and find it as the proximate cause in the death of Kahil Marshall.

The lone eye-witness to this tragic collision, Steven Cole, testified that there were power lines just before the Hurley-Waldrip intersection, then the road curves to the left, and around the corner it appeared to him the school bus was in the left lane; that the vehicle was behind the school

bus, then after a while it hit the school bus. He later admitted that he was a little ways behind both vehicles and he could not see all of the details. (Verbatim Report of Proceedings, Volume 3, page 513, line 6 through 515, line 1; page 516, line 17 -24.)

The jury ignored evidence as established by the accident reconstructionist, Ed Wells when he testified that Mr. Cole could not have seen the vehicles as he described them because it was still too dark to see anything other than the lights on the vehicles; nor that he could make the determination which lane either vehicle had been in prior to the collision because of the curve in the roadway, including any determination about which lane the turn signal pertained to the gusset or the left drive lane. The jury further ignored Mr. Wells's expert opinion that Mr. Wright was not the "following driver" but a victim of Ms. Montano-Felton's negligence as the bus was in the right lane until less than 5.0 seconds prior to suddenly switching to the left lane leaving Nathan Wright without time to notice and then react timely. (Verbatim Report of Proceedings, Volume 1, page 62, line 21 through page 64, line 20, page 66, line 17 – 23, page 81, line 13 through page 82, line 11.)

B. The court erred when it submitted a Special Verdict form to the jury for their use that contained specific language setting one

defendant apart from the others, and an unspoken expectation that the jury reasonably understood the difference.

The jury sought clarification on the requirement for a finding of negligence prior to rendering its decision. They were referred back to the jury instructions solely for their answer.

It can then only be found that the jury determined the presumption that based on his default, Mr. Wright was wholly negligent and that his negligence was the sole proximate cause of the injury and damage caused to Plaintiff herein. This reaction by the jury was not reasonably expected and is irreconcilable. The harm is immense.

C. The court erred in abdicating its duty when it did not complete the Special Verdict Form. The jury stopped after Question 2 and ignored Question 3. The Special Verdict form was incomplete. They are remiss in completing their duty. The jury's failure to do its job to completion is irreconcilable. Its verdict is incomplete and void on its face.

The jury had a duty to address the award damages to the plaintiff—even if that award was "zero." The jury in the case before this court failed in their duty. They failed to render any decision by remaining silent as to whether plaintiff was entitled to damages or not entitled to damages. This is irreconcilable.

D. The trial court erred in denying Plaintiff's motion for a new trial. (CP at 4-8; 26-32)

The trial court erred in that it abused its discretion by excluding defendants, SUZAN MONTANO-FELTON and SHELTON SCHOOL DISTRICT by deeming their negligence was not the proximate cause of injury and damages that resulted in the death of KAHIL MARSHALL and thereby making an award of damages in any amount, even zero, based on that finding. The trial court entered a Special Verdict finding defendant Shelton School District negligent but not finding that negligence was a proximate cause of injury and damage to the Plaintiff in regarding Ms. Marshall's death, and Nathan Wright, guilty by default entered against him prior to the trial.

The court held in *Manzanares v. Playhouse Corp*, 25 Wn.App. 905 (Wash. App. Div. 1 1980) 611 P.2d 797 that

A challenge to the sufficiency of the evidence in the form of either motion admits the truth of the nonmoving party's evidence and all reasonable inferences which can be drawn therefrom. *Jeffries v. Clark's Restaurant*, 20 Wash.App. 428, 580 P.2d 1103 (1978); *Moyer v. Clark*, 75 Wash.2d 800, 454 P.2d 374 (1969). Such motions will be granted only where it can be held as a matter of law that there is no competent evidence or inferences to be drawn which would sustain a jury verdict in favor of the nonmoving party. *Jeffries v. Clark Restaurants, supra; Shelby v. Keck*, 85 Wash.2d 911, 541 P.2d 365 (1975.) **[611 P.2d 800]** a tavern keeper, though not an insurer of the safety of his patrons, owes them the duty to exercise reasonable care and vigilance to protect them from reasonably foreseeable injury, mistreatment or

annoyance at the hands of other patrons. *Potter v. Madison Tavern*, 74 Wash. 2d 704, 446 P.2d 320 (1968); *Waldron v. Hammond*, 71 Wash.2d 361, 428 P.2d 589 (1967.)

...Under these circumstances the trier of fact could reasonably conclude that Junior should have foreseen the possibility of violence. In permitting the assailant to join the heated discussion, the jury could have concluded that Junior was not exercising reasonable care and vigilance and that this negligence was the proximate cause of Manzanares' injuries. (Emphasis added.)

A Judgment as a Matter of Law is available under CR 50, and a new trial is available under CR 59(a) (7) if “there is no evidence of reasonable inference from the evidence to justify the verdict or the decision, or [the verdict] is contrary to law.”

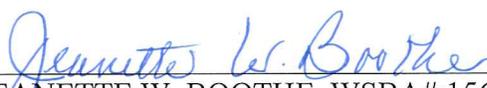
In the case at bar, the verdict rendered herein found one defendant not negligent, one defendant negligent, but that their negligence was not a proximate cause of injury and damage to the plaintiff, and one defendant guilty by default. (CP at 50-51) All of the defendants were guilty of negligence as a proximate cause of the injury and damage to the plaintiff which was the death of Kahil Marshall. The jury failed in their duty to complete the Special Verdict Form, and therefore, the court had a duty to grant the plaintiff an award for damages or in the alternative, order a new trial. The court's denial was a denial of justice in this matter.

VI. CONCLUSION

The plaintiff is entitled to just compensation for the negligence of the defendants which was the proximate cause of injury and damages resulting in the death of Kahil Marshall, including but not limited to presumptive lost earnings, loss of the parent-child relationship and loss of consortium. Said damages should be awarded because of the negligence of all of the defendants herein.

Given the jury's utter failure to consider all of the evidence presented, and to complete their duty in that they failed to complete the Special Verdict form, the plaintiff is entitled to a judgment as a matter of law or in the alternative, a new trial as the jury's verdict in this matter was not supported by substantial evidence that was presented at trial.

RESPECTFULLY SUBMITTED this 11th day of December 2017.


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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I arranged for the originals of the preceding Appellant's Brief to be filed electronically and by US Mail, postage prepaid, in Division II of the Court of Appeals at the following address:

Court of Appeals of Washington, Division II
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And that I arranged for a copy of the preceding Appellant's Brief to be served on Respondents by service on Brian A. Christensen, counsel for Respondents via email at:

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DATED this 11th day of December 2017 at Shelton, Washington.

/s/ SUSAN F. BURNS

JEANETTE W. BOOTHE INC PS

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