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Division II
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No. 52271-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

REBEKAH K. HART, individually

Appellant,

v.

EMILY PRATHER and "JOHN DOE" PRATHER, individually and the marital community comprised thereof; PARKER J. KNAUER, individually; STEVEN KNAUER and PAMILA 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.

BRIEF OF RESPONDENT ERIC NELSON

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I. INTRODUCTION

The right to a jury determination of liability and damages is sacred to plaintiffs and defendants, which is why a jury's verdict is presumed valid and the party challenging it bears a heavy burden. Plaintiff has not met that burden here. The Court should affirm the jury's verdict, which was rendered after a trial spanning nearly two months.

Plaintiff asks this Court to do what no other Washington court has done: reverse a trial judge's discretionary ruling that denied a motion for a new trial based on a juror's discussion of his life experience in traveling a roadway by necessity due to its location to his residence – life experience that was disclosed in voir dire. Not only did that discussion inhere in the verdict because it reflected the juror's thought processes, it was not misconduct.

Jury Instruction Nos. 23 and 24 are accurate statements of the law that permitted both parties to argue their theories of the case. With regard to Instruction No. 24, only after the jury rendered its verdict did Plaintiff argue that the instruction was not warranted under the facts of the case. Plaintiff is precluded from making that argument for the first-time post-verdict and on appeal. Additionally,

Jury Instruction Nos. 23 and 24 were not erroneous because they were supported by the evidence.

Finally, the trial court did not err in denying Plaintiff's Motion for Judgment as a Matter of Law because there was ample evidence and inferences therefrom supporting the jury's verdict that Defendant Stanton's driving was the sole proximate cause of the December 22, 2009, one car accident.

II. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in denying Plaintiff's Motion for a new trial based on alleged juror misconduct when the juror's life experience, which was disclosed during voir dire, was part of the internal process by which the jury reached its verdict and when the juror's discussion of his life experience was not misconduct?

2. Did Plaintiff waive the argument that Jury Instruction No. 24 was not warranted under the facts of the case by failing to raise the argument until after the jury rendered its verdict?

3. Did the trial court abuse its discretion in giving Jury Instruction Nos. 23 and 24, which are accurate statements of the law, supported by the evidence, and which allowed the parties to argue their theories of the case?

4. Did the trial court err by affirming the jury's defense verdict in favor of Respondent Nelson and refusing to grant Plaintiff's post-verdict Motion for Judgment as a Matter of Law and Motion for New Trial, when the evidence and reasonable inferences therefrom provide substantial evidence to support the jury's finding that Defendant Stanton's driving was the sole proximate cause of the accident?

III. RESTATEMENT OF THE CASE

Plaintiff, having been involved in numerous motor vehicle accidents, sued a plethora of Defendants, arguing that they were jointly and severally liable for her alleged injuries and damages. Respondent Nelson's restatement of the case addresses the facts applicable to the jury's determination that Respondent Nelson is not liable for Plaintiff's alleged injuries and damages.

A. Factual Background

1. Evidence regarding prank occurring prior to December 22, 2009, motor vehicle accident excluded from the jury at Plaintiff's request.

On December 22, 2009, Plaintiff was a backseat passenger in a Nissan Titan driven by Defendant Stanton. RP 1555-1556, RP 1560. Defendant Stanton's vehicle and another vehicle sped past Respondent Nelson's house in the dark with the headlights turned

off. CP 3257 – 3258. Respondent Nelson and his sons, Matthew Wencel and Alan Sluka, were seated in their living room and witnessed the vehicles speed past. CP 3246, 3257, 3258. Respondent Nelson and his sons went outside to investigate. CP 3263.

Respondent Nelson and his sons saw that Defendant Stanton, Plaintiff, and others had placed a metal newspaper stand and traffic cones on their property. CP 3257. Knowing that the vehicles were headed towards a dead end and would have to pass Respondent Nelson's house again, Matthew Wencel and Alan Sluka placed the traffic cones across the street in an attempt to stop the vehicles, and to force the occupants to retrieve the rubbish they left on Respondent Nelson's property. CP 3263

In addition to placing the cones in the roadway – Respondent Nelson's then girlfriend / now wife, Allison Sluka, stood in the middle of the street, in between the traffic cones, in order to force the vehicles to stop some distance in front of her. When the vehicles returned, the headlights were still off. CP 3264 – 3265. After pausing for a few minutes, Defendant Stanton and Chris Patton revved their engines and sped toward Ms. Sluka, nearly missing her as they ran over the traffic cones. CP 3265.

Respondent Nelson's sons were upset by the disregard to Ms. Sluka's safety, and they got in their vehicles and drove after them in an effort to get the drivers to return and apologize to Ms. Sluka. CP 3269 – 3270. Ms. Sluka asked Respondent Nelson to go find their sons and escort them home. CP 3270 – 3271.

At Plaintiff's request, the trial court excluded the above evidence. CP 1068-1072, RP 253 – 264, RP 1668 – 1669. Plaintiff argued, and the trial court agreed, that the "attenuated facts and circumstances with respect to what transpired earlier in the evening on December 22, 2009," were irrelevant and highly prejudicial. CP 1068-1072, RP 253 – 264, RP 1668 – 1669.

2. Defendant Stanton causes one-car accident.

Respondent Nelson left his house in an effort to get his sons – who were 17-year-old boys – back to the house. RP 3738, RP 3742. Respondent Nelson witnessed Alan Sluka chasing Defendant Stanton's vehicle down the street, the location of which was marked on a map for the jury. RP 3743, Ex. 217. Respondent Nelson was traveling westbound when he first saw Alan Sluka and Defendant Stanton's vehicles traveling eastbound. RP 3743. Respondent Nelson witnessed Alan Sluka and Defendant Stanton run a red light. RP. 3744. When Alan Sluka drove by Respondent

Nelson, Respondent Nelson threw his thumb over his shoulder in a gesture to indicate to Alan Sluka that he needed to get back to the house. RP 3743 – 3744. After seeing Defendant Stanton and Alan Sluka go through a red light and after seeing the anger in Alan Sluka, Respondent Nelson turned his vehicle around at 56th and Olympic Drive in an effort to retrieve Alan Sluka. RP 3745.

Alan Sluka and Defendant Stanton were driving at speeds in excess of the posted speed limit. RP 3745. In order to catch up to Alan Sluka, Respondent Nelson had to exceed the speed limit. RP 3745. Respondent Nelson caught up to the 17-year-olds near Erin Rockery, a company in Gig Harbor, Washington. RP 3745 – 3746; Ex. 217. Respondent Nelson flashed his headlights at Alan Sluka, but Alan Sluka continued his pursuit. RP 3746. At that juncture, Respondent Nelson made a judgment call to intervene by placing his vehicle in front of Alan Sluka's vehicle in order force Alan Sluka to stop the pursuit. RP 3746, Ex. 217. Respondent Nelson began pumping his brakes and looking at Alan Sluka in his rear-view mirror. RP 3748. When he looked forward, the light at the intersection was turning red. RP 3748. Respondent Nelson was unable to stop in time for the light, while Alan Sluka stopped at the light. RP 3748. Having stopped the pursuit, Respondent Nelson

turned onto East Bay Drive to go back to his residence. RP 3749. East Bay Drive was the first opportunity for Respondent Nelson to safely turn back towards his residence. RP 3750.

Defendant Stanton confirmed that the last time he saw headlights behind him prior to the one car accident was at East Bay Drive. RP 1600. Over 100 yards after East Bay Drive is a sharp turn to Artondale Drive. RP 1713; Ex . 217. Defendant Stanton slowed down significantly – to under 30 miles per hour – in order to make the sharp turn onto Artondale Drive. RP 1715 – 1716. After making the turn, and after Respondent Nelson had turned off to return home, Defendant Stanton began increasing his speed again – to at least 45 miles per hour. RP 1719. Defendant Stanton lost control of his vehicle, which he believed was due to dew on the roadway. RP 1719. Officer Todd Donato testified that there is an approximate two-mile distance between East Bay Drive and the 6900 block of Artondale Drive, where the one-car accident occurred. RP 2111.

3. Jury renders verdict against Plaintiff and in favor of Respondent Nelson.

On February 22, 2018, the jury rendered a verdict in favor of Respondent Nelson, concluding that he was not the proximate

cause of Plaintiff's injuries and damages stemming from the one-car motor vehicle accident, in which Defendant Stanton was the driver. CP 2559 – 2562.

B. Procedural Background

Plaintiff filed this case on or about November 13, 2012. CP 1-7. Over five years later, on January 8, 2018, trial commenced, and jury selection began. RP 326 – 327.

1. Members of venire disclose living in close proximity to accident scenes.

Plaintiff's claims arise out of four separate accidents, two of which occurred in the same location. RP 634, CP 1067-1068. Prior to the commencement of voir dire, the trial court informed the jury that the case arose out of four motor vehicle accidents. RP 435. Additionally, the trial judge explained the selection process to the jury:

In order that the case be tried before an impartial jury, the lawyers and I are going to ask you questions, not to embarrass you or to pry into your private affairs, but to determine if you are unbiased and without preconceived ideas which might affect this case.

RP 433.

All parties had the opportunity to inquire into the prospective jurors' life experiences and opinions. RP 444 – 599. Plaintiff

specifically inquired about which prospective jurors lived in the general area of Gig Harbor, Pierce County, Washington. RP 459. Numerous prospective jurors disclosed that they lived in the general area. RP. 459. Plaintiff then asked additional questions about where prospective jurors lived in relation to the first and third accidents. RP 459. Plaintiff chose not to ask the prospective jurors about where they lived in relation to the second accident – the one-car accident that occurred on December 22, 2009.

2. Plaintiff's limited exception in jury instructions.

Trial continued with the parties calling witnesses until February 12, 2018. RP 4030. On February 13, 2018, Plaintiff took exceptions to disputed jury instructions. RP 4199 – 4200. With regard to Instruction Nos. 23 and 24, Plaintiff stated that the Court should “give one or the other.” RP 4200. Plaintiff took the position that the “superseding cause really relates to the December 22nd accident, but assuming the Court’s inclined to give a superseding cause instruction regarding all the accidents, I believe Instruction No. 23 encompasses that, and by giving Instruction No. 24, it is repetitive.” RP 4200-4201. The trial court gave the jury both instructions, and following closing arguments, the jury received the case. CP 2524 – 2558.

On February 15, 2018, the jury posed the following question: “what does the general field of danger mean from Instruction 24.” RP 4405. All parties agreed, under Washington case law, that the question of what was “the general field of danger” is something for the jury to interpret and determine. RP 4414. The trial court instructed the jury accordingly. RP 4414.

3. Plaintiff’s post-verdict exception to Instruction No. 23.

On February 22, 2018, the jury rendered its verdict in the case, finding that Respondent Nelson’s negligence was not the proximate cause of Plaintiff’s alleged injuries and damages. CP 2559 – 2562.

Almost one month later, on March 19, 2018, Plaintiff – for the first time – argued that the trial court should not have given Instruction No. 24, because it was not warranted under the facts of the case. CP 2871, 2892 – 2897.

4. Plaintiff’s post-trial attempt to impeach the verdict.

After the verdict, Plaintiff approached jurors and provided them with additional facts that were excluded from trial – at Plaintiff’s request. CP 1068 – 1072; CP 2762 – 2763. In an attempt to impeach the verdict, Plaintiff submitted post-trial declarations on pleading paper for Plaintiff’s attorneys. CP 3024 –

3027, CP 2755 – 2767. One of those declarations stated that “one of the jurors lived on the route [where the one-car accident occurred, and] made comments” based upon his living in the area. CP 3025. Another declaration confirmed that one of the juror’s lived “on or near” the route where the one-car accident occurred. CP 2759.

Plaintiff moved for a new trial, based in part, on misconduct. Plaintiff’s motion was based on a mischaracterization of the declarations, arguing that “one of the jurors was effectively ‘going to the scene.’” CP 2879. By way of Order dated April 16, 2018, the trial court denied Plaintiff’s motion for a new trial based on alleged juror misconduct. CP 3058 – 3062.

IV. ARGUMENT

A. The Trial Court did not Abuse its Discretion when it Denied Plaintiff’s Motion for a New Trial Based on Alleged Juror Misconduct.

1. The information regarding the one-car accident that occurred on December 22, 2009, inheres in the verdict and cannot be used to impeach it.

Plaintiff’s effort to impeach the jury verdict with the trial court failed, with good reason. Parties are not permitted to claim juror misconduct and introduce evidence of jury deliberations, because such evidence generally inheres in the verdict and is inadmissible.

See *Gardner v. Malone*, 60 Wn.2d 836, 840-41, 376 P.3d 651 (1962). A party cannot use a juror's post-verdict statements about how the jury reached its verdict to support a motion for a new trial. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 205, 75 P.3d 944 (2003).

Appellate courts generally do not inquire into the internal process by which a jury reaches its verdict due to the interest in the "secret, frank[,] and free discussion of the evidence by the jury[.]" *Breckenridge*, 150 Wn.2d at 204-05 (citing *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)). There are good reasons for this. "Our judicial system rests upon the idea of finality in judgment given by the courts." *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179, 422 P.2d 515 (1967). [T]he Courts have long accepted the premise that jurors may not impeach their own verdict." *Id.* This makes abundant good sense:

A different rule, one permitting jurors to impugn the verdicts which they have returned by asserting matters derogatory to the mental processes, motivations and purposes of other jurors or purporting to explain how and why a juror voted as he [or she] did in arriving at his [or her] verdict, would inevitably open nearly all verdicts to attack by the losing party and thwart the courts in achieving a long held and cherished

ambition, the rendering of final and definitive judgments.

Id. at 180.

In *Breckenridge*, the plaintiff alleged medical malpractice in the failure to order a computerized tomography (“CT”) scan. 150 Wn.2d at 198-99. After a defense verdict, the plaintiff claimed that there was jury misconduct about extrinsic evidence pertaining to the standard of care. *Id.* at 199. The Court held that a statement explaining a juror’s reasons for weighing the evidence in the case, believing what he/she did about how the evidence related to the question of liability, and explaining why he/she concluded that the defendant was not liable was an explanation of the juror’s mental process, a factor that inhered in the jury’s process in reaching the verdict. *Id.*

The same is true here. The declarations do not refer to an act of jury misconduct. Evidence regarding the location of the one-car December 22, 2009, accident as well as the surrounding locations – including the distance between various locations – was admitted into evidence through the testimony of witnesses and through a map of the surrounding location. Ex. 217, RP 3743 – 3750, RP 1600, RP 2111. There is no evidence that any juror

performed outside research; instead, one juror lived on or near the route where the one-car accident occurred. CP 2759, CP 3025. Like the juror in *Breckenridge*, the juror in this case brought knowledge into the deliberations based on his life experience. The juror's oral deliberations regarding the location of the accident was gained through his personal life experience going to and from his home and was intrinsically linked to his belief regarding liability. Such information and discourse inheres in the verdict and cannot impeach it.

2. Because the juror disclosed living in Gig Harbor during voir dire, the discussion of his life experience was not misconduct.

Even if this Court were to hold that the above-referenced discussion did not inhere in the verdict, there is no juror misconduct. It is not misconduct to draw upon one's life experience. Jurors may "rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. *Breckenridge*, 150 Wn.2d at 199 n.3. When a juror's background is disclosed in voir dire, there is no prohibition on the juror's reference to life experiences. A juror does not commit misconduct by bringing knowledge and experiences known to the parties into deliberations.

McCoy v. Kent Nursery, Inc., 163 Wn. App. 744, 761, 260 P.3d 967 (2011); see also *Breckenridge*, 150 Wn.2d at 204 n. 11.

In *Breckenridge*, a juror discussed his wife's experience with migraine headaches and trips to the hospital. *Breckenridge*, 150 Wn.2d at 205. Such a use of life experience "to evaluate the evidence presented at trial is what jurors are expected to do during deliberations." *Id.*

In *Richards*, a juror applied her medical knowledge when reviewing documents that had been admitted into evidence. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 274, 796 P.2d 737 (1990). In affirming the trial court, the appellate court noted that the juror's background was disclosed in voir dire, and the plaintiff did not remove her from the jury. *Id.*

Both *Breckenridge* and *Richards* are similar to this case. In voir dire, a number of jurors disclosed that they lived in Gig Harbor, the location of the first, second, and third motor vehicle accidents. RP 459. Plaintiff chose not to ask any questions regarding where they lived in relation to the second accident – the December 22, 2009, accident, instead focusing on questions related to the location of the first and third accidents. RP. 459 – 463. Plaintiff had the chance to obtain the information and seek to challenge the

juror for cause or exercise a preemptory challenge. Plaintiff chose not to.

The juror's discussion of his disclosed life experience – his knowledge of the distance between two points due to its proximity to his residence in Gig Harbor – even if it were characterized as “specialized knowledge” – was not misconduct. Under *Breckenridge* and *Richards*, this Court should affirm.

3. There was no abuse of discretion in the trial court's denial of Plaintiff's Motion for a New Trial based on alleged juror misconduct.

The trial court correctly denied Plaintiff's motion for a new trial based on alleged juror misconduct. There is no abuse of discretion. A trial court cannot overturn a verdict based upon juror misconduct unless the party seeking a new trial makes a “strong, affirmative showing of misconduct[.]” *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994), citing *Richards*, 59 Wn. App. at 271-72. Appellate courts do not reverse a trial court's ruling on a motion for a new trial unless the trial court abused its discretion. *E.g., Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993). Even if misconduct were found, the appellate courts give “great deference” to the trial court's determination that no prejudice occurred. *Richards*, 59 Wn. App. at 271. There was

no strong, affirmative showing of misconduct here, and no abuse of discretion in denying Plaintiff's motion for a new trial.

Here, a juror referred to or drew upon his life experience in order to evaluate the evidence that was presented at trial. If this Court were to remand for a new trial based on Plaintiff's challenge, the result would undermine trial court discretion and impair the trial courts' functioning by undermining the public's trust in the finality of verdicts. Reversal would create an overwhelming and irresistible incentive for losing trial lawyers to do exactly what Plaintiff's counsel did here: chase down jurors and obtain declarations from them in an attempt to get a second chance at a more favorable verdict, simply because a juror referred to a life experience. Plaintiff has failed to show any reason for this Court to divert from its well-reasoned, established precedent.

B. Plaintiff Failed to Object to Jury Instruction No. 24 on the Basis that it was not Supported by the Facts of the Case Until After the Jury Rendered its Verdict. Plaintiff Failed to Preserve the Issue for Appeal.

As a threshold question, the appellate court must review whether the alleged instructional error was properly preserved by Plaintiff. Appellate courts look to the record generally to determine

whether the trial court was sufficiently apprised of the issue and argument against the instruction:

A party who objects to a jury instruction must “state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused.” CR 51(f). **This gives the trial court the opportunity to remedy instructional error and reduces unnecessary appeals and retrials.** The objection must be “sufficient to apprise the trial judge of the nature and substance of the objection.” **Failure to make an adequate objection may preclude appellate review of that instruction.**

Hypertechnicality is not required. As long as the trial court understands why a party objects to a jury instruction, the objection is preserved for review. We have found “extended discussions” on the record about a particular jury instruction sufficient to preserve the objection. Similarly, an objection to a trial court’s failure to give a competing instruction may preserve an objection to the instruction actually given, **so long as the challenger clearly informed the court of the basis of the objection.**

Millies v. LandAmerica Transnation, 185 Wn.2d 302, 310–11, 372 P.3d 111 (2016) (emphasis added). Although an explicitly stated or written objection to the instruction given is not necessarily required in order to preserve the issue, a general objection to the jury

instructions given or broad objections that could encompass several different issues are not sufficient. *Id.* at 313 (holding appellant's general objection to instructions and brief footnote stating that claim should be instructed separately did not sufficiently inform the trial court of possible problem with specific instruction and therefore appellant did not preserve alleged instructional error for appeal).

In this case, Plaintiff did not object to Instruction No. 24 on the ground that there was not sufficient evidence to support an instruction on superseding cause until **after** the jury rendered its verdict in this case. In fact, Plaintiff affirmatively represented to the trial court that the superseding cause instruction related to the December 22, 2009, accident. RP 4200. The only objection made with regard to giving Instruction No. 24 was that – combined with Instruction No. 23 – it was cumulative and prejudiced the Plaintiff by over emphasizing the various Defendants' theories of the case. RP 4200 – 4201. Because the objection advanced on appeal was not made by Plaintiff during the time in which to take exceptions to the jury instructions, the issue was not properly preserved for appeal and should not be considered by the court.

C. Even if This Court Considers Plaintiff's Objection, Jury Instruction No. 23 and Jury Instruction No. 24 Correctly State the Law of Washington on Superseding Cause, and the Trial Court did not Abuse its Discretion in Giving the Instructions.

"Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole." *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 379-80 (2009). Taking the jury instructions as a whole, their primary purpose is to allow both parties to argue their theories. See, e.g. *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 616-18, 707 P.2d 685 (1985). Jury instruction wording is within the trial court's discretion. *Payne v. Paugh*, 109 Wn. App. 383, 403, 360 P.3d 39 (2015).

Instruction No. 23 allowed Plaintiff, who was involved in four separate motor vehicle accidents, and Defendants, to argue their differing theories on damages, and stated:

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that a defendant was negligent but that the sole proximate cause of the injury was a later independent intervening cause, including but not limited to the accidents of December 22, 2009, April 7, 2013, or March 22, 2014, that a defendant, in the

exercise of ordinary care, could not reasonably have anticipated, then any negligence of a defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that a defendant was negligent and that in the exercise of ordinary care, a defendant should reasonably have anticipated the later independent intervening cause, then that act does not supersede a defendant's original negligence, and you may find that a defendant's negligence was a proximate cause of the injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which a defendant should reasonably have anticipated.

Instruction No. 24 related to the liability argument between Plaintiff, Defendant Stanton, and Respondent Nelson, and stated:

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that defendant Eric Nelson was negligent but that the sole proximate cause of the injury was a later independent intervening cause that defendant Eric Nelson, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of defendant Eric Nelson is superseded and such negligence was not a proximate cause of the injury. If,

however, you find that defendant Eric Nelson was negligent and that in the exercise of ordinary care, defendant Eric Nelson should reasonably have anticipated the later independent intervening cause, Brayden Stanton's driving, then that act does not supersede defendant Eric Nelson's original negligence, and you may find that defendant Eric Nelson's negligence was a proximate cause of the injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which defendant Eric Nelson should reasonably have anticipated.

1. This Court reviews the trial court's decision to give two superseding cause instructions under an abuse of discretion standard.

The court reviews a challenge to a jury instruction de novo if it is based upon a matter of law. *Albertson v. State*, 191 Wn. App. 284, 295, 361 P.3d 808 (2015). The court reviews whether the trial court abused its discretion by giving or refusing to give certain instructions. *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 520, 870 P.2d 999, 1001 (1994). Instructions are not erroneous if they permit each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law

when read as a whole. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014).

Erroneous jury instructions can be harmless error. An erroneous jury instruction is reversible error only if the error was prejudicial. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). The party challenging the jury instruction bears the burden to demonstrate prejudice. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). The court will not presume prejudice if an instruction was misleading but did not misstate the law. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015).

2. Whether Defendant Stanton's actions constituted an intervening, superseding cause was properly submitted to the jury.

Plaintiff had the burden of proving that Respondent Nelson's negligence was the proximate cause of her injuries. The issue of proximate cause is usually a question for the trier of fact.

The intervening act of another can supersede a defendant's negligence and break the causal chain, relieving a defendant of liability for a plaintiff's injury. *Travis v. Bohannon*, 128 Wn. App. 231, 242, 115 P.3d 342 (2005). A defendant's negligence cannot be the proximate cause if the plaintiff's injury is "the result of an

intervening cause which came into active operation after the negligence of the defendant has ceased.” *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975). Whether the intervening actions of another constitute a concurrent proximate cause or a superseding cause is a question for the jury. *Travis*, 128 Wn. App. at 242. (“Washington courts have consistently held that **it is for the jury to determine whether the act of a third party is a superseding cause or simply a concurring one.**”) (emphasis added).

Whether an intervening act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 430–31, 40 P.3d 1206 (2002). Generally, the question of whether the intervening act is foreseeable is a question of fact for the jury. *Id.* at 431; *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 358, 961 P.2d 952 (1998); *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 521, 870 P.2d 999 (1994); see also Restatement (Second) of Torts § 453 cmt. b (1965) (when undisputed facts leave room for reasonable difference of opinion, question whether intervening act was

foreseeable is for the jury). In cases where there is mixed evidence on the matter of foreseeability, the question is properly submitted to the jury. See e.g., *Travis*, 128 Wn. App. at 243 (reversing summary judgment and holding that it was for the jury to decide whether mother's consent to allow child to operate dangerous machinery at school sponsored activity was a superseding cause of school district's negligence); *Riojas v. Grant Cnty PUD*, 117 Wn. App. 694, 695, 701, 72 P.3d 1093 (2003) (reversing summary judgment based on superseding cause as a matter of law and remanding for jury consideration of whether third party driver's negligence was a superseding cause relieving defendant of its negligence in permitting traffic to enter hazardous construction area); *Micro Enhancement Intern., Inc.*, 110 Wn. App. at 432-33 (holding trial court was correct to give superseding cause instruction where there was evidence indicating that plaintiff's own negligence could have caused its injury and that the "earlier (or subsequent) negligence of the defendants did not proximately cause" plaintiff's injury); *Estate of Keck By & Through Cabe v. Blair*, 71 Wn. App. 105, 112-13, 856 P.2d 740 (1993) (reversing summary judgment and holding that jury would have to decide whether third party driver was a superseding proximate cause where plaintiff was struck by third party driver

while attempting to assist defendant during aftermath of accident caused by defendant's negligence).

3. The trial court's superseding cause jury instructions were not erroneous, because they were supported by the evidence and did not misstate the law.

The trial court's instructions on superseding cause were not erroneous because they allowed each party to argue their theory of the case, were not misleading, and properly informed the trier of fact of the applicable law. *Rekhter*, 180 Wn.2d at 117.

The argument made by Plaintiff on appeal – that superseding cause instructions were not warranted because Respondent Nelson did not demonstrate as a matter of law that the injury was unforeseeable – was already rejected by the court in *Cramer*. In *Cramer*, a case involving a one-vehicle accident – the court characterized plaintiff's challenge to the giving of instructions on superseding/intervening cause as arguing that "intervening negligence must be established as unforeseeable as a matter of law before the court may give jury instructions on proximate and intervening causation." *Id.* at 520-21. Plaintiff argued that his motorcycle accident was exactly the type of harm that would be expected to result from the defendant state's negligence (failure to maintain a safe roadway) and therefore his injury was foreseeable

and his own negligent driving could not have been a superseding cause. The court rejected the argument and held the trial court did not err in instructing the jury on intervening causation because the “foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury.” *Id.* at 521 (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 442, 739 P.2d 1177 (1987)).

Plaintiff’s arguments on appeal track the arguments rejected by court in *Cramer*. Plaintiff argues that Defendant Stanton’s one-car accident must have been foreseeable as a matter of law to Respondent Nelson because it was not “highly extraordinary or unexpected.” Plaintiff’s argument ignores the evidence that Respondent Nelson stopped his sons from continuing their pursuit of Defendant Stanton and then ceased pursuit, turning on East Bay Drive miles prior to the location of the one-car accident. RP 3745 – 3749. Plaintiff’s argument also ignores the evidence that Defendant Stanton slowed his vehicle to under 30 miles per hour in order to turn onto Artondale drive – well after he last saw headlights behind them – and then increased his speed to at least 45 miles per hour prior to losing control of his vehicle and causing the one-car accident. RP 1713 - 1719. From the evidence, the jury could –

and did – conclude that Respondent Nelson’s negligence had ceased and Defendant Stanton’s own independent act of driving too fast for conditions and going off of the roadway was a superseding cause of the single car accident.

The evidence related to the December 22, 2009, accident raised legitimate questions as to whether Respondent Nelson’s negligence was the proximate cause of Defendant Stanton’s one-car accident given the fact that Respondent Nelson’s negligent acts ceased miles before the location of the one-car accident. RP 3749, RP 1600, RP 2111. From the evidence, the jury could – and did – conclude that the causal chain between Respondent Nelson and the injury was broken when Respondent Nelson stopped the pursuit, and Defendant Stanton’s subsequent driving and recklessness acted as an independent cause of Plaintiff’s injury.

Plaintiff reliance on *Alberston v. DSHS*, 191 Wn. App. 284, 295, 361 P.3d 808 (2015) is misplaced. *Alberston* involved a suit against DSHS for negligent investigation after an infant suffered injuries at the hands of his parents who had previously faced abuse allegations and investigation. 191 Wn. App. at 291. At trial, the jury was given a superseding cause instruction which allowed DSHS to successfully argue that the parents’ abusive conduct was a

superseding proximate cause of the child's injury that broke the causal chain between DSHS's negligent investigation and the child's injury. *Id.* at 298. The court of appeals held that it was error to instruct the jury on superseding cause because – under those unique set of facts – the plaintiff's suffered abuse “was precisely the kind of harm that would ordinarily occur as a result of a faulty or biased investigation of child abuse that results in a harmful placement decision by DSHS—further child abuse by the abuser.” 191 Wn. App. at 298. The court found that the subsequent abuse could not be a superseding cause, because it was not only foreseeable but exactly the type of harm DSHS has a duty to prevent. If the court had ruled otherwise, DSHS would effectively be absolved of liability in any case where its negligent placement led to further abuse. Accordingly, the unique circumstances and legal claim at issue in *Albertson* were key forces driving the court's opinion in that case and distinguishes *Albertson* from this case.

D. The Trial Court did not Err by Denying Plaintiff's Post-Verdict Motion for Judgment as a Matter of Law, Because the Evidence and Reasonable Inferences therefrom Provide Substantial Evidence Supporting the Jury's Finding that Defendant Stanton's Driving was the Sole Proximate Cause of the One-Car Accident.

The Court reviews a trial court's denial of a motion for judgment as a matter of law using the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn. App. 661, 668, 158 P.3d 1211 (2007). A trial court can only grant a motion for judgment as a matter of law when, viewing all the evidence most favorable to the nonmoving party, the trial court can conclude there is no evidence or reasonable inference therefrom to sustain a verdict for the non-moving party. *Id.* A motion for judgment as a matter of law admits the truth of the opponent's evidence and all reasonable inferences therefrom. *Id.* Here, there is substantial evidence supporting the jury's finding that Respondent Nelson's alleged negligence was not a proximate cause of the December 22, 2009, one-car accident.

In viewing the evidence in the light most favorable to Respondent Nelson, the court must accept as true Respondent Nelson's testimony and all reasonable inferences drawn from it. Respondent Nelson testified that he intervened in Alan Sluka's pursuit of Defendant Stanton in order to terminate Alan Sluka's pursuit and to force Alan Sluka to return home. RP 3743 – 3745. Respondent Nelson testified that he ended the pursuit after he intervened between the vehicles and Alan Sluka stopped his

pursuit. RP 3748 – 3759. Respondent Nelson testified that he turned off to return home on East Bay Drive, which is consistent with the location that Defendant Stanton last saw headlights. RP 3749, RP 1600. Officer Donato testified that it is approximately two miles between East Bay Drive and the 6900 block of Artondale – the location of the one-car accident. RP 2111. Approximately 100 yards after the turn off to East Bay Drive, there is a large turn onto Artondale. Ex. 217, RP 1713. Defendant Stanton testified that he slowed to under 30 miles per hour to make the turn but was going at least 45 miles per hour prior to the one-car accident – well-after Respondent Nelson turned off to return home. RP 1715 – 1716. The jury could infer that Defendant Stanton saw Respondent Nelson intervene and prevent Alan Sluka from further pursuing Defendant Stanton. Based on the testimony that Respondent Nelson turned off to go home two miles prior to the location of the one-car accident, the jury could infer that sufficient time had passed for Defendant Stanton to realize that he should not be driving at high speeds. The jury could infer that Defendant Stanton's driving was not being influenced by Alan Sluka or Respondent Nelson. Finally, the jury could infer from Defendant Stanton's earlier driving behavior exhibited when he drove past Respondent Nelson's

residence that Defendant Stanton was a reckless driver generally, regardless of other circumstances.

Accordingly, viewing the evidence and inferences in the light most favorable to Respondent Nelson, there is substantial evidence supporting the jury's finding that Defendant Stanton's driving was the sole proximate cause of the accident, and that Respondent Nelson was not a proximate cause of Plaintiff's alleged injuries and damages. Because there is substantial evidence supporting the jury verdict, the trial court properly denied Plaintiff's post-verdict motion for judgment as a matter of law.

V. CONCLUSION

After Plaintiff lost a seven-week trial on her negligence claim against Respondent Nelson, Plaintiff claimed that a juror committed misconduct by orally discussing his knowledge of the distance between two points on a map, knowledge that was based on his residence being located near the accident scene, which was disclosed in voir dire. The statements inhere in the verdict and cannot impeach it. The juror referred to disclosed life experience that did not constitute misconduct or affect the verdict. Plaintiff received a fair trial; she is not entitled to a second trial. This Court should affirm the decision of the trial court.

Plaintiff's post-verdict objection to Instruction No. 24 as not being warranted by the evidence in this case is belied by Plaintiff's statements during exceptions to jury instructions where she said the intervening superseding cause instruction applied to the December 22, 2009, accident. Even assuming Plaintiff did not waive the argument, Instruction Nos. 23 and 24 are accurate statements of the law and not erroneous.

Finally, there is ample evidence and inferences therefrom supporting the jury verdict in favor of Respondent Nelson and supporting the jury's finding that Defendant Stanton's driving was the sole proximate cause of the December 22, 2009, one-car accident.

The jury's verdict in favor of Respondent Nelson should be affirmed.

RESPECTFULLY SUBMITTED this 7th day of June, 2019.

GORDON THOMAS HONEYWELL

By: 

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DECLARATION OF SERVICE

I, Hannah Gilbert, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on June 7, 2019, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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