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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 330583

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

JOSEPH LETTRICK,
Appellant-Plaintiff,

v.

KRISTINA JOHNSON,
Respondent-Defendant

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Respondent is Kristina Johnson (“Johnson”). The Appellant, Joseph Lettrick (“Lettrick”), seeks reversal of the jury’s verdict finding Mrs. Johnson not negligent, the decision of the trial judge to not allow a discovery deposition of one of Mr. Lettrick’s physicians into evidence, and the post-trial award of costs.

II. ASSIGNMENT OF ERRORS

1. Whether the trial court erred in denying Mr. Lettrick’s motion for a new trial and for judgment notwithstanding the verdict.

2. Whether the trial court erred in not allowing Dr. Brian O’Grady’s discovery deposition to be read at trial.

3. Whether the trial court erred in awarding Mrs. Johnson medical records costs of \$1,288.01.

III. COUNTERSTATEMENT OF THE CASE

This lawsuit arises out of an automobile accident that occurred on March 30, 2011 in the Costco parking lot in Kennewick, Benton County, Washington, at approximately 11:15 a.m. See CP 2. Mrs. Johnson and Mr. Lettrick were parked on opposite sides of an aisle in the parking lot and at some point the vehicles contacted back to back. CP 225. The remaining facts were in dispute and the parties and witnesses gave varying accounts of what they believed occurred. The factual disputes essentially centered on whether

both vehicles backed out of their parking spots at approximately the same time, whether both vehicles were both moving backward when the accident occurred or only Ms. Johnson's vehicle was moving, whether Johnson was keeping a proper outlook and where was the point of impact.

At trial, Mr. Lettrick testified that "I got in my car. I looked and I backed out of my stall completely, getting ready to go forward, and then I felt a very hard and sudden hit". VRP 241, ln. 14 – 16. He also testified that the vehicles were "at least three spaces" apart and "on opposing sides." VRP 242, ln. 19 – 24. He clarified that there were "Not three spaces between us, three total spaces." VRP 243, ln. 4 – 5.

Mrs. Johnson, however, testified as follows regarding the events leading up to the collision:

Q. Okay. Walk us through what happened when you started backing up?

A. I looked both ways. I always put my hand on the back of the seat. So, I turned around to look. So, I didn't see anything. I started to back out, and when I was about halfway out of the stall and just starting to turn I was hit.

VRP 325-26, ln 22-3. She then described how the backup sensor on her vehicle acted leading up to the accident.

Q. Tell us what happened with the sensor when you were backing up?

A. Well, the sensor went from – I heard it, and we hit. There was no, um, reaction time available. It just was all at the same time pretty much.

Q. So, basically the first thing you heard on the signal was the beep and then hit?

A. Correct.

Q. There wasn't the pulse?

A. No.

Q. It didn't give you any warning?

A. No.

VRP 326-27, ln. 21-7. She also described her actions as she was backing her vehicle out.

Q. Okay. You just said that by the time – by the time of impact you were already starting to face forward.

A. I had turned my body forward.

Q. Okay.

A. Yes.

Q. You were no longer looking backward?

A. Correct.

Q. Do you rely on your back up sensor when you're getting close to the end of your back up?

A. No. I still have my mirrors that I can see.

VRP 337-38, ln 17-1. Mrs. Johnson's passenger Jennifer Siwicki Simper also testified as to what happened that day and mirrored what Mrs. Johnson testified to.

Q. Walk me through and the jury through what happened after that.

A. Once everyone was seated and ready to go, we started to reverse out of the of the parking stall. There was one beep, and then there was a bump.

Q. OK. How far had the car, vehicle, moved out of the stall? Or was it completely out of the stall?

A. It was not completely out of the stall.

Q. How far out of the stall was it?

A. It was about a third to a halfway out.

VRP 8-9 (October 10), ln. 18-2. She was then asked about Mrs. Johnson's positioning prior to the accident.

Q. And so do you recall where she was looking at the time of the

collision?

A. She would have been reversing, so she would have been looking back.

Q. OK. If she testified that she was looking forward, would you disagree with that?

A. You know what? If she testified she was looking forward, I would have assumed she was looking back.

VRP 12-13 (October 10), ln. 25-7.

At trial, and based on the foregoing testimony of the parties and witness, the jury unanimously found that Mrs. Johnson was not negligent. CR 1411-12. Mr. Lettrick then filed a post-trial “Motion for Judgment as a Matter of Law Notwithstanding the Verdict and for a New Trial”. CR 1444-1454. That motion was denied. CR 1519. Mr. Lettrick has now filed this appeal in which he repeats, in part, his post-trial motion and argues in essence that Mrs. Johnson’s testimony at trial regarding the accident essentially amounts to negligence as a matter of law. Additionally, on appeal, Mr. Lettrick takes issue with the Trial Court’s decision to exclude the discovery deposition of Dr. O’Grady from being read to the jury and also argues that a portion of the post-trial award of costs to Mrs. Johnson exceeded the amount legally owed.

IV. ARGUMENT

A. Standards of Review

The standard of review for rulings on motions for a new trial is to look for an abuse of discretion. 15 Wash. Prac., Civil Procedure § 38:30

(2d ed.). The same abuse of discretion standard applies to the Court of Appeals' review of an award of attorney fees and costs. *Ernst Home Center, Inc. v. Sato*, 80 Wash.App. 473, 910 P.2d 486 (1996).

B. Mr. Lettrick Never Moved for Judgment as a Matter of Law During Trial and thus has no Remedy thereby.

Mr. Lettrick argues for judgment notwithstanding the verdict pursuant to CR 50. CR 50 provides the rules for when a party can move for judgment as a matter of law. CR 50(a)(1) states that:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim...that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50(a)(1) (Emphasis Added). In this case, the record is clear that Mr. Lettrick never moved for judgment as a matter of law during the trial. After the jury verdict was given and the jurors were polled, Mr. Lettrick's counsel did move for Judgment Notwithstanding the Verdict (JNOV), which is the same request. VRP 79 (October 10), ln 5-6. The portion underlined above clearly demonstrates why this is critical. A motion for judgment as a matter of law, or JNOV, may only be made before submission of the case to the jury. CR 50(a)(2). Because this was not done, Mr. Lettrick has no recourse under this rule and his citation to it is

improper. As a result, the standard of review for such a case also does not apply herein.

C. Mr. Lettrick Never Preserved his Right to Appeal by Objecting at Trial.

To prevail on a motion for a new trial, the movant must have properly objected to the misconduct asserted as grounds for the motion, and the misconduct must not have been cured by court instructions. *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wash.App. 511, 105 P.3d 400 (2004). Failure of a party to object to instructions or a special verdict form precludes that party's later argument that the party was denied substantial justice under the rule governing granting of a new trial. *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wash.App. 572, 187 P.3d 291 (2008). Instruction defects which are not brought to the attention of the trial court in some manner may not serve as the basis for a new trial. *Trueax v. Ernst Home Center, Inc.*, 124 Wash.2d 334, 878 P.2d 1208 (1994).

Pursuant to CR 51(f) before instructing the jury, the court is required to supply each party with copies of the proposed instructions and each attorney is then afforded an opportunity in the absence of the jury to make distinct objections to the giving of any instruction and to the refusal to give a requested instruction. In *Trueax*, supra, the appellant failed to

“sufficiently” object to a jury instruction and the Court found that as a result the appellant did not preserve her right to appeal. 124 Wash.2d at 340. Here Mr. Lettrick’s attorneys failed to object at all let alone with the specificity required by CR 51(f). The Instructions of the Court are set forth in CP 1384-1410.

Here, Mr. Lettrick’s appeal is based solely on his argument that Mrs. Johnson, by the actions she testified to on the day of the accident, is negligent as a matter of law. Whether that is the case or not, and Mrs. Johnson will argue that it is not, Mr. Lettrick allowed the court to instruct the jury that Mrs. Johnson could be found not to be negligent and failed to offer an instruction based upon the legal standard he now argues to the Court. The special jury verdict form included a space for the jury to find that Mrs. Johnson was either negligent or not. CP 1411-1412. Prior to the jury instructions being read to the jury the trial court judge and the parties had the following discussion pursuant to CR 51(f):

The Court: I’ve provided to each counsel a copy of the Court’s Instructions, and I would ask each counsel if there are any exceptions or objections thereto.

Mr. Stratton: Your Honor, I just have one and I know Mr. Miller has an be argument against, but numbers 11 and 13 state close to the same thing to me, except for 11 adds, “The plaintiff has failed to mitigate her damages, if any.” And I don’t remember them even arguing mitigation of damages.

VRP 15-16 (October 10), ln. 19-2. Mr. Lettrick's counsel never objected to or took exception to the special verdict form, never offered a special verdict form that did not give the jury the ability to find Ms. Johnson to not be negligent and never offered an instruction based upon the law he now argues governs this case. *Id.* In fact Mr. Lettrick's counsel proposed jury verdict also asked the jury to decide whether Mrs. Johnson was negligent or not. CP 732-33. No objection or exception was taken by Mr. Lettrick to the jury instructions except those made relating to mitigation of damages. Mr. Lettrick never moved for summary judgment before trial regarding liability. Mr. Lettrick never moved for a directed verdict during the trial regarding liability.

When no error is assigned to an instruction, it becomes the law of the case on appeal. *Brown v. Quick Mix Co.*, 75 Wash.2d 833, 454 P.2d 205 (1969). Further, a party cannot request an instruction and then claim error because it was given. *Vangemert v. McCalmon*, 68 Wash.2d 618, 414 P.2d 617 (1966). In the absence of a request to instruct, a court's failure to do so is not error. *Seattle v. Love*, 61 Wash.2d 113, 377 P.2d 255 (1962).

Instructions 5, 6, and 7 of the Instructions of the Court contained in CP 1391-1393 set forth the law on negligence as instructed by the court to the jury in this case. They consist of the standard Washington Practice

Instructions 10.01, 10.02 and 12.06 that state that negligence is the failure to use ordinary care and that ordinary care means the care a reasonably careful person would use under the same or similar circumstances. At no time did the Plaintiff request or offer an instruction that the defendant was obligated to constantly look to the rear while backing up and that the failure to do so constituted negligence. See Plaintiff's Proposed Jury Instructions at CP 711-733 and Plaintiff's Supplemental Proposed Jury Instructions at CP 734-736.

Mr. Lettrick never asked for an instruction stating that an individual is negligent if they fail to continuously look to the rear as he argues is the law. Because Mr. Lettrick never objected or took exception to the instructions given by the Court, as he offered the same language in his verdict form and failed to offer this additional instruction, he cannot, by law, prevail on a motion for a new trial on the basis of negligence as he did not preserve an appeal. CR 51(f); *Seattle*, 61 Wash.2d 113, 377 P.2d 255. The burden is on the parties to a lawsuit to propose jury instructions covering their respective theories of the case and if parties fail to request proper instructions that theory cannot be reinstated on appeal or by a motion for judgment n.o.v. *Browne v Cassidy*, 46 Wash. App. 267, 728 P.2d 1388 (1986).

D. Should the Court find Mr. Lettrick Preserved his Right to Appeal, he is still not Entitled to a New Trial because Mrs. Johnson was not Negligent as a Matter of Law.

CR 59(a) provides the grounds for a new trial and lists nine (9) categories under which such a ruling imposing a new trial would be proper. Those that Mr. Lettrick relies on herein include (7) that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law and (9) that substantial justice has not been done. A motion for a new trial is addressed to the sound discretion of the trial court, and the manner of exercising that discretion will not be disturbed by the appellate court except for manifest abuse. *Fuller v. Ostruske*, 48 Wash.2d 802, 296 P.2d 996 (1956); *Bohnsack v. Kirkham*, 72 Wash.2d 183, 432 P.2d 554 (1967). Courts view ‘the evidence in the record in the light most favorable to the nonmoving party. *Lian v. Stalick*, 106 Wn.App. 811, 824, 25 P.3d 467 (2001).

1. The Evidence Justified the Verdict and was not Contrary to Law.

Mr. Lettrick contends that Mrs. Johnson negligently caused the March 30, 2011 accident. A claim for negligence consists of duty, breach, causation, and damages. *Roth v. Kay*, 35 Wn.App. 1, 664 P.2d 1299 (1983). Mr. Lettrick has the burden of presenting sufficient evidence to show that

Mrs. Johnson's actions in connection with the motor vehicle accident rose to the level of negligence and that any such negligence was a proximate cause of his injuries. *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997).

Duty arises both from the common law and by statute. The existence of a duty is a question of law, while breach and proximate cause are generally questions of fact for a jury; though, a court may determine breach and proximate cause as a matter of law where reasonable minds could not differ about them. *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). A driver has a duty to exercise the degree of care that a reasonably prudent person would have exercised under the same or similar circumstances. *Robison v. Simard*, 57 Wn.2d 850, 360 P.2d 153 (1961).

A plaintiff has the burden of proof in a negligence action. *Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 758, 522 P.2d 829, 833 (1974). As a general rule, a defendant's negligence is not presumed, but must be affirmatively proved. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wash. App. 374, 397, 305 P.3d 1108, 1120 (2013). Courts never presume negligence; a party alleging negligence bears the burden of proving it by substantial evidence. *Johnson v. Aluminum*

Precision Products, Inc., 135 Wash. App. 204, 208, 143 P.3d 876, 879 (2006).

Negligence cannot be assumed merely because the evidence shows that an accident happened. *Hughes v. Oregon Improvement Co.*, 20 Wash. 294, 55 P. 119 (1898); *Sellman v. Hess*, 15 Wash.2d 310, 130 P.2d 688 (1942); *Evans v. Yakima Valley Transportation Co.*, 39 Wash.2d 841, 239 P.2d 336 (1952). It must be established by evidence or by a legitimate inference from the established facts. *Evans*, 39 Wash.2d 841.

Sellman, supra, is illustrative. There, the court, in discussing a factually similar case, stated as follows:

‘Negligence is not a positive thing; it is to be found according to the circumstances of each case, and must be determined in view of all the facts and conditions attendant at the time and place of the accident. Common sense is a better yardstick by which to measure the facts to determine the reasonableness of conduct in a given situation than any generalization laid down in the text-books or decisions.’ *Pinckard v. Pease*, 115 Wash. 282, 197 P. 49, 50.

While it is true that certain underlying principles of law must apply to all cases in which negligence is concerned, it is equally true that each case must be determined to a very large extent upon the pattern of its own facts.

In this case it is apparent that respondent did not produce any evidence of negligence on the part of appellant, either directly or by way of inference. Appellant was driving on an arterial highway on a dark, rainy night, well within the speed allowed by law, his lights and brakes were in good condition and were being used in the proper manner. There is no evidence or inference permissible from the facts in the

present case that appellant did not have his car under control or was not operating it in a careful or prudent manner, or had any reason to anticipate the presence of respondent at the point of collision, or that appellant saw him or should have seen him in time to avoid the accident.

Sellman, 15 Wash. 2d 310, 314-15, 130 P.2d 688, 689-90.

Here, as will be discussed, there is no evidence or inference permissible from the facts that Mrs. Johnson did not have her car under control or was not operating it in a careful or prudent manner, or had any reason to anticipate the presence of Mr. Lettrick at the point of collision, or that Mrs. Johnson saw him or should have seen him in time to avoid the accident. In fact, from the testimony of the parties and the apparent point of impact, the evidence also suggests that Mr. Lettrick's vehicle was moving at the time of impact and raises serious question as to Mr. Lettrick's story as to how the accident occurred.

The primary basis, however, of Mr. Lettrick's Appeal is his submission that because Mrs. Johnson testified that she was not turned around and looking back at the exact moment the accident occurred she was essentially negligent as a matter of law or at least in violation of the rules of the road. As demonstrated above, Mr. Lettrick failed to request that the court hold Ms. Johnson negligent as a matter of law or ask the court to instruct the jury with his theory or the law as he now argues to this court. However, as will be shown, the rules of the road relied upon by Mr.

Johnson do not apply to what occurred in this accident. Further, the law does not establish in this situation that failure to continuously look while backing up is per se negligence. This case presented a genuine issue of fact for the jury on the issue of negligence and it was for the jury to decide.

a. The Rules of the Road

RCW 46.61 provides the “Rules of the Road.” RCW 46.61.005 states that “The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways”. RCW 46.04.197 defines a highway as “the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.” This statute, taken at face value clearly does not pertain to private parking lots like the Costco parking lot. This is echoed by numerous treatises on the subject. Corpus Juris Secundum on Highways (Section 407) provides that “The law of the road extends to all public highways, however created, and may also be applicable to roads which are not public highways if used for travel. However statutory rules of the road for public highways are inapplicable to roads which have not been opened to the public. Further, the rules of the road do not apply to private parking lots.” The American Law Reports come to a similar conclusion. Generally, the duty of a vehicle

driver within a private parking lot is defined by the ordinary rules of negligence and the statutory rules of the road are ordinarily held inapplicable. 62 A.L.R.2d 288. See also 46 AMJUR POF 2d 647.

In claiming otherwise, Mr. Lettrick can only cite to an opinion of the Washington State Attorney General from 1963 that is not on point. That opinion is in regard to a question that asks, “In view of the definition of "public highway" contained in RCW 46.04.430, what is the geographical application of chapters 46.20, 46.48, 46.52, 46.56 and 46.60 RCW?” RCW 46.61 contains the rules of the road and was not addressed in that opinion. Further, RCW 46.61 does not apply to “public highways” which is no longer a statutorily defined term, but applies merely to “highways” as defined above. The law is clear that the rules of the road do not apply to private parking lots.

b. No Absolute Requirement to Continuously Look Backward.

Mr. Lettrick also claims that Washington case law requires a person to continuously look backward while backing a vehicle in all situations. In making this claim he relies on *Cleveland v. Grays Harbor Dairy Products*, 193 Wash. 122, 125, 74 P.2d 909, 911 (1938). *Cleveland*, a case decided by the bench and not a jury, deals specifically with a truck that backed into a person in an alley. *Id.* An alley is defined by RCW 46.04.020 as “a

public highway not designed for general travel and used primarily as a means of access to the rear of residences and business establishments.” An alley is thus considered a public highway, whereas a parking lot is not. The court found that a driver backing up must use ordinary care and that duty requires that the driver use sufficient means to determine whether others are in the vicinity and could be struck by the backing vehicle. Additionally, the court there, in reaching its conclusion, found a violation of a city ordinance regarding backing a vehicle that is not applicable here. It is apparent that the facts of that case are not on point here.

The same is true for the other two cases Mr. Lettrick relies on. *Jellum v. Grays Harbor Fuel Co.*, 160 Wash. 585, 586, 295 P. 939, 939 (1931), involved a vehicle backing onto a city street. *Taulborg v. Andresen*, 119 Neb. 273, 228 N.W. 528, 529 (1930) similarly involved the backing of a truck onto a highway. All of these cases involve situations where the rules of the road apply, are distinguishable factually and thus there are more specific duties for each party. *Taulborg* was a Nebraska case and is where the case law in *Jellum* and *Cleveland* originated. The quotation from *Taulborg* in full is as follows:

The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure

others by the operation, and this duty requires that he adopts sufficient means to ascertain whether others are in the vicinity who may be injured. It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway.

Jellum, 160 Wash. 585, 591, 295 P. 939, 941 (quoting *Taulborg*, 119 Neb. 273, 228 N.W. 528, 529). Clearly this only applies to backing vehicles on streets or highways and not in parking lots. However, this citation also merely requires a driver to “look backward”. It does not require the driver to turn around and do so and leaves open the option of looking backward with the use of a mirror. This is precisely what Mrs. Johnson testified to doing. VRP 338, ln 1. This citation would also presumably mandate that both parties honk their horns as they back up to warn of their intention to do so, which was not done by either party in this case. As stated, the duty is to back up using ordinary care and Mrs. Johnson presented testimony from which a jury could find and did find that she backed up using ordinary care. None of the cases cited by the Plaintiff requires the Defendant to continuously for every split second look back while backing out of a parking stall in a parking lot. To do so would surely violate the driver’s other obligations while operating the vehicle to use ordinary care in keeping an outlook to all sides.

**c. Negligence was a Genuine Factual Dispute for the
Jury to Decide.**

Where evidence is conflicting and it is manifest that opinions of reasonable men might differ as to where lies the preponderance of evidence, error cannot be assigned on refusing a new trial for insufficiency of evidence. *Dahl v. Moore*, 169 Wash. 443, 14 P.2d 28 (1932). It is not abuse of discretion to refuse a new trial for insufficiency of evidence where testimony was in direct conflict and made questions for the jury, which were submitted on instructions that were not excepted to. *Swafford v. Carnation Lumber & Shingle Co.*, 108 Wash. 305, 183 P. 92 (1919); *Fleming v. Buerkli*, 164 Wash. 136, 1 P.2d 915 (1931). See also *Wilson v. Pacific Power & Light Co.*, 171 Wash. 232, 17 P.2d 846 (1933). If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain a jury verdict, the question is for the jury and a trial court has no discretion to disturb a verdict by ordering a new trial. *Herriman v. May*, 142 Wash.App. 226, 174 P.3d 156 (2007).

Mrs. Johnson's duty was to use ordinary care in backing her vehicle. This was the only question for the jury and they definitively answered that Mrs. Johnson did so with ordinary care. The Plaintiff offered no further instruction to the jury as to what ordinary care required of Ms. Johnson. Her duty requires her to adopt sufficient means to ascertain

whether others were in the vicinity who may be injured. This required her to not only look back, but look in all directions as she backed. Mrs. Johnson testified that:

A. I looked both ways. I always put my hand on the back of the seat. So, I turned around to look. So, I didn't see anything. I started to back out, and when I was about halfway out of the stall and just starting to turn I was hit.

VRP 325-26, ln 24-3. However, she also described her actions as she was backing her vehicle out.

Q. Okay. You just said that by the time – by the time of impact you were already starting to face forward.

A. I had turned my body forward.

Q. Okay.

A. Yes.

Q. You were no longer looking backward?

A. Correct.

Q. Do you rely on your back up sensor when you're getting close to the end of your back up?

A. No. I still have my mirrors that I can see.

VRP 337-38, ln 17-1 (Emphasis Added).

This testimony is clear that although she was no longer facing backward she was still relying on her mirrors. See VRP 338, ln 1. Mr. Lettrick conveniently ignores this part of Mrs. Johnson's testimony.

Wooldridge v. Pac. Coast Coal Co., 22 Wash. 2d 314, 155 P.2d 1001 (1945), shares some important similarities with this case. There, the court found that a truck driver, who was alternately looking to his rear and in his rear view mirror as he backed his truck slowly up a narrow, unpaved

dead end street toward the intersecting boulevard until he saw a child, who was struck by his truck, lying in front of it, whereupon he stopped immediately, was not negligent, as matter of law, in failing to look or to do so with proper attention and see the boy before striking him. *Id.*

Similarly here, Mrs. Johnson testified that she backed out slowly alternately looking to her rear and in her mirrors and she too is not negligent as a matter of law. VRP 325-26, ln 24-3; 337-38, ln 17-1. As such the law in this state is clear that in similar situations a driver can reasonably reverse using their mirrors and doing so is not negligence as a matter of law. This testimony left a genuine question of fact for the jury. Mrs. Johnson and her passenger Jennifer Siwicki-Semper clearly testified that the vehicle only moved half way out of her parking stall and that the lack of warning from her back-up sensor made it clear to both of them that Mr. Lettrick had backed into her. When first backing a vehicle out of a parking stall that is surrounded by other vehicles it is not possible to see oncoming vehicles as the view is obstructed. This does not make Mrs. Johnson negligent as a matter of law.

Additionally, testimony from both parties regarding the point of impact makes clear that there was a legitimate factual dispute as to where Mr. Lettrick was in the roadway and whether he was moving at the time of the accident. Mrs. Johnson testified that she had backed out approximately

halfway from her parking stall and her backup sensor only gave her one beep of warning that Mr. Lettrick was behind her. VRP 8-9 (October 10), In. 18-2. This would indicate that Mr. Lettrick's vehicle was still moving when the accident occurred. Mr. Lettrick also testified that he initially believed that the contact between the vehicles was with Mrs. Johnson's hitch. CP 286-288, In. 9-17; 291-293, In. 3-9. The point of impact on Ms. Johnson's vehicle was on her passenger side rear bumper. VRP 331-32, In 19-16 If that was the case and Mrs. Johnson was only halfway out of her parking spot as she testified, and there were only a few spots separating the vehicles as both parties testified, then the only way for "close to parallel" contact to occur is if Mr. Lettrick was still backing up from his parking stall as both vehicles would just be turning from their spot.

It is Mr. Lettrick's burden of proof to establish negligence and the law is clear that negligence cannot be assumed merely because the evidence shows that an accident happened. Mr. Lettrick would like the court to believe otherwise, but the reality is he did not meet his burden and is not entitled to relief from the Court. Mr. Lettrick must establish that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law. He cannot.

2. Substantial Justice was Done.

A trial court's conclusion that a failure of substantial justice has occurred may not be based upon a mere disagreement with the credibility given testimony or the interpretation of evidence by the trier of fact. *Larson v. Georgia Pacific Corp.*, 11 Wash.App. 557, 524 P.2d 251 (1974). When a new trial is granted upon the ground that substantial justice was not done, the reasons must be found in the record. *Lunz v. Neuman*, 48 Wash.2d 26, 290 P.2d 697 (1955). An order granting a new trial on the ground that substantial justice had not been done will be reversed where it was not supported by definite reasons of law and facts. *Follis v. Brinkman*, 51 Wash.2d 310, 317 P.2d 1061 (1957).

The foregoing paragraphs make clear that the jury herein decided a question of fact regarding the negligence of both parties. That decision was made after hearing two very different takes on the events that led to the subject accident. In doing so the jury weighed the credibility of the parties and the facts presented to them and determined that Mrs. Johnson was not negligent. Mr. Lettrick did not meet his burden. As a result substantial justice was done.

E. The Deposition of Dr. Brian O'Grady was a Discovery Deposition and not Proper to Present to the Jury.

At trial, Mr. Lettrick, in reliance on CR 32 (a)(3)(B) and ER 804(b) sought to read into the record the deposition of Dr. O’Grady. Mrs. Johnson opposed the use of the transcript at trial and the judge ordered that the deposition could not be admitted. Mr. Lettrick now appeals that decision, however the decision is moot. This case was decided strictly on liability as the jury found Mrs. Johnson was not negligent. Dr. O’Grady was one of Mr. Lettrick’s treatment providers and his testimony had nothing to do with liability. As such, whether Mr. Lettrick was improperly prohibited from reading his discovery deposition or not has no merit on this appeal and should not be considered by this Court.

Assuming, arguendo, that this Court believes otherwise, the trial court’s decision to exclude the discovery deposition of Dr. O’Grady was proper. CR 32 governs the use of depositions in court proceedings. It states in pertinent part:

At the trial..., any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions...

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:...(B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party

offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule;

A party seeking to introduce the deposition of a witness under CR 32 (a)(3)(B) is required to make a showing that due diligence was exercised in attempting to procure the attendance of the witness at trial. *Sutton v. Shufelberger*, 31 Wash.App. 579, 643 P.2d 920 (1982) quoting *Palfy v. Rice*, 473 P.2d 606 (Alaska 1970); 8 C. Wright & A. Miller, Federal Practice s 2146 (1970). In the absence of such a showing the refusal to permit the introduction of the deposition is not an abuse of discretion. *Id.*

In this case, Mr. Lettrick was aware that Dr. O'Grady no longer lived in Washington for a substantial amount of time preceding trial and in that time could have conducted a perpetuation deposition of Dr. O'Grady. Further, Mr. Lettrick did not and cannot assert that he exercised due diligence in attempting to procure the attendance of Dr. O'Grady at trial. When counsel made this same argument during trial Mr. Lettrick's counsel Brian Anderson, in his declaration, merely asserted that he was diligent in searching for Dr. O'Grady. CP 709-10. Otherwise, Mr. Lettrick's counsel merely asserted that they had one phone conversation with Dr. O'Grady's staff and were informed that he would not be available. *Id.* Simply stated, this does not rise to the level of diligence in

attempting to procure his attendance. This is made clearer by the fact that Mr. Lettrick's counsel did not even bother to include these details in his appeal. As such, Dr. O'Grady's deposition transcript was properly excluded.

1. ER 804(b)

ER 804(b) is a hearsay exception that permits the admission of a deposition when the witness is unavailable at trial and where the party, against whom the testimony is now offered, had an opportunity and similar motive to develop the witness's testimony by direct, cross, or redirect examination. ER 804(b)(1).

In this case, the deposition of Dr. O'Grady was taken December 5, 2012, nearly two years prior to trial, for the purposes of discovery. CP 703. It was not taken for the purposes of being presented to a jury and to be used at trial. It simply consisted of an examination very early on in the discovery period of the medical care provided by Dr. O'Grady to Mr. Lettrick. Further, the deposition was requested by Mrs. Johnson, at Mrs. Johnson's sole cost, and there was no examination by Mr. Lettrick's counsel at the deposition. CP 703. This does not meet the requirement that Mrs. Johnson must have had "opportunity and similar motive" to develop the witness' testimony in any sense. As such, Dr. O'Grady's deposition was properly excluded.

2. Not an Original

Pursuant to ER 1002, an original of the deposition transcript is required to be entered at trial. The rule specifically states that “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required”. Pursuant to ER 1003, a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

In this case it would be unfair to allow Mr. Lettrick to enter the deposition transcript because the deposition was paid for by Mrs. Johnson and all costs associated with it were incurred by Mrs. Johnson. CP 703. Mr. Lettrick never paid for an original and had over a year to acquire one from the court reporter, but never did. *Id.*

3. Cumulative

Lastly, the deposition transcript of Dr. O’Grady was properly excluded because it was cumulative. ER 403 provides that evidence may be excluded “by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Dr. O’Grady was a partner with Dr. Wahl who actually testified at trial and the testimony of Dr. O’Grady would have been cumulative of that of Dr. Wahl. VRP 156-220. At the time of trial Dr. Wahl was the caretaker and possessor of all of Dr. O’Grady’s files

regarding Mr. Lettrick and testified, based on the records, as to the care provided. *Id.* Further, Mr. Lettrick also called Dr. Coker and Dr. Croft to testify to the same opinions. This is clearly cumulative and as such, Dr. O'Grady's deposition transcript was properly excluded.

Mr. Lettrick could not admit the transcript of the deposition of Dr. O'Grady as evidence in the place of Dr. O'Grady's live testimony. Mr. Lettrick was not diligent in attempting to procure his attendance and should not be rewarded for his complacency. Further, Mr. Lettrick could not meet the hearsay exception that would allow a deposition transcript in as evidence because Mrs. Johnson did not have the opportunity and similar motive to develop Dr. O'Grady's testimony at the time the deposition was taken. Additionally Mr. Lettrick could not meet the requirement of presenting an original as he is not in possession of one. Lastly, any testimony of Dr. O'Grady would have been cumulative and improper. As such, Dr. O'Grady's deposition transcript was properly excluded.

F. Mrs. Johnson was Entitled to the Costs she received from the Court Pursuant to Washington Law.

Mr. Lettrick also appeals the award of costs to Mrs. Johnson. Again, this case was decided on liability and the award of costs has no bearing on that outcome. Additionally, the award of costs was proper and should this

Court find otherwise, the sole remedy to Mr. Lettrick would be a remand to the trial court to fix the award.

The prevailing party is entitled to fees for reasonable expenses incurred in obtaining reports and records which are admitted into evidence at trial, including but not limited to medical records pursuant to RCW 4.84.010(5). Mrs. Johnson obtained the medical records and billings of Mr. Lettrick from Physicians Immediate Care at a cost of \$626.39 and those records and billings were admitted into evidence at trial. CP 1383. Mrs. Johnson also obtained the medical records and billings of Mr. Lettrick from Kadlec Regional Medical Center at a cost of \$661.62 and those records and billings were admitted into evidence at trial. *Id.* On Friday, November 7, 2014 Mrs. Johnson presented a cost bill to the Trial Court judge which included these costs, and the costs were properly awarded to Mrs. Johnson. CP 1427-1430.

Mr. Lettrick cites to *Andrews v. Burke* and RCW 4.84.010(5) for the proposition that costs for medical records may only be recovered for portions of the medical records obtained that were admitted into evidence. However, that case and the RCW only discuss a pro rata cost for depositions that were used at trial, not medical records. *Andrews v. Burke*, 55 Wash. App. 622, 630-31, 779 P.2d 740, 745 (1989).

As to the Kadlec Medical Center records Mr. Lettrick has not and cannot show that the trial court judge abused his discretion in allowing these costs. While the only record from Kadlec Medical Center that was admitted at trial was Defendant's Exhibit 144, Mr. Lettrick is unable to cite any law that calls for a pro rata split of the costs in acquiring the records that corresponds with how many of the records were admitted.

As to Physicians Medical Center, while Mrs. Johnson offered two sets of records from Mr. Lettrick's treatment there that were admitted into evidence, the Plaintiff admitted the entire record into evidence. CP 1381-83. Pages 1381-83 of the Clerk's Papers list all the exhibits offered and admitted at trial. *Id.* Page 1383 contains Defendant's 140 and 141 which are records corresponding to two individual days of treatment at Physicians Medical Center. CP 1383. When Mrs. Johnson moved to admit 141, Mr. Lettrick's counsel argued that it should not be admitted because it had already been admitted as part of Plaintiff's exhibit 9. See VRP 204, ln 3-15. Plaintiff's exhibit 9 was the entire record from Physicians Medical Center. *Id.* In fact, in his appeal, Mr. Lettrick does not even discuss these records. Thus, because the entire record from Physicians Medical Center was admitted at trial, and Mr. Lettrick makes no specific objection about the records, Mrs. Johnson is entitled to recover the full costs in obtaining the records.

V. CONCLUSION

To properly move for JNOV, Mr. Lettrick had to do so during trial. Because he did not, he has no recourse thereunder. Additionally, Mr. Lettrick's appeal fails outright because he did not preserve his right to appeal by objecting to the jury instructions. Those instructions included a verdict form which specifically allowed the jury to find Mrs. Johnson not negligent. Mr. Lettrick now claims that she was negligent as a matter of law, but did not object to that instruction to preserve his right to appeal.

Should the Court find he did preserve his right to appeal, Mrs. Johnson was not negligent as a matter of law. The law is clear that negligence cannot be assumed merely because the evidence shows that an accident happened. Further the rules of the road do not apply to private parking lots, so any claim that Mrs. Johnson violated the rules of the road is not proper. Additionally, the case law cited by Mr. Lettrick regarding looking backward while backing up does not apply to parking lots and there is no requirement to continually do so. The parties provided conflicting testimony of what happened the day of the accident and the jury properly decided who was at fault based on their testimony.

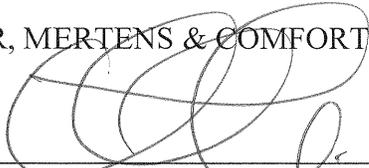
As to the discovery deposition of Dr. O'Grady, Mr. Lettrick could not admit the transcript as evidence in the place of Dr. O'Grady's live testimony. Mr. Lettrick was not diligent in attempting to procure his

attendance and could not meet the hearsay exception that would allow a deposition transcript in as evidence because Mrs. Johnson did not have the opportunity and similar motive to develop Dr. O'Grady's testimony at the time the deposition was taken. Mr. Lettrick also could not meet the requirement of presenting an original as he is not in possession of one. Lastly, any testimony of Dr. O'Grady would have been cumulative and improper. As such, the deposition transcript was properly excluded.

As to the costs, Mrs. Johnson, as the prevailing party was entitled to fees for the expenses incurred in obtaining the medical records which were admitted into evidence at trial. The entirety of one set of records and portion of another were admitted at trial and Mrs. Johnson was properly awarded the costs of obtaining those records. Mr. Lettrick has not met his burden of showing that the trial court judge abused his discretion in allowing these costs.

DATED: August 7, 2015

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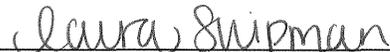
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 10th day of August, 2015, I caused a true and correct copy of the foregoing document, "Brief of Respondent", to be sent via Pronto Legal Messenger to the following counsel of record:

Counsel for Appellant-Plaintiff:

Ned Stratton
Brian Anderson
Anderson Law
5861 W Clearwater Ave.
Kennewick, WA 99336

DATED this 10th day of August, 2015, at Kennewick, Washington.



Laura Shipman