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Division III
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NO. 35473-3 III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

**SPOKANE COUNTY, PUBLIC WORKS/DEPARTMENT
OF ENGINEERING & ROADS, a municipal corporation, Appellant,**

v.

**MADELYNN TAPKEN, Cross Appellant/Respondent; CONRAD
MALINAK, Respondent.**

**CONRAD MALINAK'S RESPONSE TO MADELYNN M. TAPKEN'S
OPENING BRIEF ON CROSS APPEAL**

Lawrence W. Garvin, WSBA # 24091
Witherspoon Brajcich McPhee, PLLC
601 West Main, Ste. 714
Spokane, WA 99201
Telephone: (509) 455-9077
Fax: (509) 624-6441
lgarvin@workwith.com

David E. Michaud, WSBA #13831
Michaud Law Firm, PLLC
11306 N. Whitehouse Street
Spokane, WA 99218
Telephone: (509) 321-7526
davemeshow@msn.com

Attorneys for Respondent Conrad Malinak

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I. INTRODUCTION

Conrad Malinak, by and through counsel, submits this response to Madelynn M. Tapken's Opening Brief on Cross-Appeal. Mr. Malinak's position at trial was that he was not negligent and Ms. Tapken was not negligent. Mr. Malinak argued to the jury based on the evidence presented at trial that Spokane County was the only negligent party and its negligence was the sole and proximate cause of the injury sustained as a result of the unsafe and hazardous road the day of this unfortunate accident. However, it was for the jury to determine the comparative fault of each party based on the evidence presented at trial and the instructions provided by the Trial Court. While Mr. Malinak disagrees with the theory presented by the County it was for the jury to make the ultimate determination and its verdict should not be disturbed on appeal.

II. ISSUE PRESENTED

A. Restatement of Issue

1. Did the County present sufficient evidence to permit the jury to consider and determine the County's theory of contributory negligence on the part of Ms. Tapken?

III. ARGUMENT

A. **The Trial Court properly instructed the jury regarding Spokane County's allegation of contributory fault.**

The issue of contributory negligence is a question of fact for the jury. *Schooley v. Pinch's Deli Market, Inc.* 134 Wn.2d 468, 483, 951 P.2d 749 (1998). See also *Gorman v. Pierce County*, 176 Wn.App. 63, 87-88. 307 P.3d 795 (2013). While Mr. Malinak does not agree with the jury's decision that he and Ms. Tapken were contributorily negligent, the issue is whether the jury was properly instructed as to the County's theory of contributory fault.

Each party to a lawsuit is entitled to have its theory of the case presented to the jury through proper instructions if evidence to support them exists. *Gammon v. Clark Equipment Co.*, 104 Wn.2d 613, 616, 707 P.2d 685 (1985). See also *Thorgerson v. Heiner*, 66 Wn.App. 466, 473-474, 832 P.2d 508 (1992) (A party is entitled to an instruction on their theory of the case if they have presented sufficient evidence to a jury to an issue on the facts underlying that theory.) The test of sufficiency of instructions is whether (read as a whole) they allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *Id.* at 617 citing *State v. Mark*, 94 Wn.2d 520, 618

P.2d 73 (1980) and *Braxton v. Rotec Indus. Inc.*, 30 Wn.App. 221, 6333 P.2d 897 (1981).

The Trial Court should give instructions that enunciate the basic elements of the legal rules necessary for a jury to reach a verdict. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969). The decision whether to give a particular instruction is reviewed for abuse of discretion. *Clark County v. McManus*, 185 Wn.2d 466, 470-471 (2016). Only prejudicial error requires reversal of a case. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of trial and the moving party must show that the prejudicial error affected the outcome of the trial. *Id.*

Furthermore, the Appellate Court cannot substitute its judgment for that of the jury. *Gorman v. Pierce County*, 176 Wn.App. at 87. Instead, this Court (after viewing the evidence in a light most favorable to the County) must determine as a matter of law that there was no substantial evidence or reasonable inference to sustain the verdict. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* citing *Brown v. Superior*

Underwriters, 30 Wn.App. 303, 306, 632 P.2d 887 (1980). See also *Gorman* at 87 (A jury's verdict cannot be overturned unless it is clearly unsupported by substantial evidence that, if believed, would support the judgment.)

In this case, the County submitted evidence to the jury regarding their affirmative defense of contributory negligence including, but not limited to, Ms. Tapken's response and movements when Mr. Malinak attempt to avoid an accident on an unsafe and dangerous road. As discussed at length at trial and in this appeal, the jury considered the evidence and lay and expert testimony regarding Ms. Tapken's experience as a motorcycle passenger, Mr. Malinak's instructions to her prior to their ride, and Ms. Tapken's actions at the time of the accident on this tragic day. The jury was properly instructed regarding the definition of negligence (CP 2617), contributory negligence, (CP 2618), proximate cause (CP 2626), the definition of burden of proof and the burden of each party regarding their theory of the case (CP 2627, CP 2630), the theories of each party regarding negligence and contributory fault (CP 2628), and was properly instructed that if the jury found contributory negligence, to determine the percentage of that negligence. (CP 2619) While Mr. Malinak disagrees with the jury's ultimate decision regarding Mr.

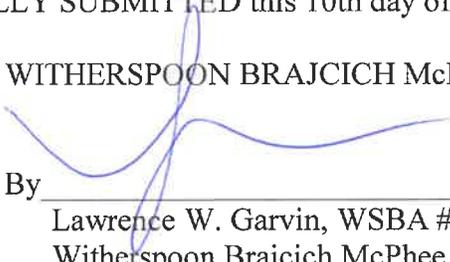
Tapken's contributory negligence and his own contributory negligence, viewed in the light most favorable to the County, it presented sufficient evidence to submit the question of contributory fault to the jury, the Trial Court properly instructed the jury, and its verdict should not be overturned on appeal.

IV. CONCLUSION

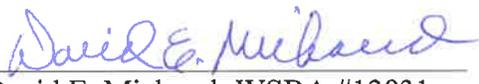
Based on the foregoing, the jury verdict should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of May, 2018

WITHERSPOON BRAJCICH McPHEE, PLLC

By 

Lawrence W. Garvin, WSBA # 24091
Witherspoon Brajcich McPhee, PLLC
601 West Main, Ste. 714
Spokane, WA 99201
Telephone: (509) 455-9077
Fax: (509) 624-6441
lgarvin@workwith.com

By 

David E. Michaud, WSBA #13831
Michaud Law Firm, PLLC
11306 N. Whitehouse Street
Spokane, WA 99218
Telephone: (509) 509-321-7526
davemeshow@msn.com

Attorneys for Respondent Conrad Malinak

CERTIFICATE OF SERVICE

I, Lawrence W. Garvin, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 10th day of May, 2018.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- E-mail to:
gregj@fjtlaw.com
johnn@fjtlaw.com
miket@fjtlaw.com
KathieF@fjtlaw.com

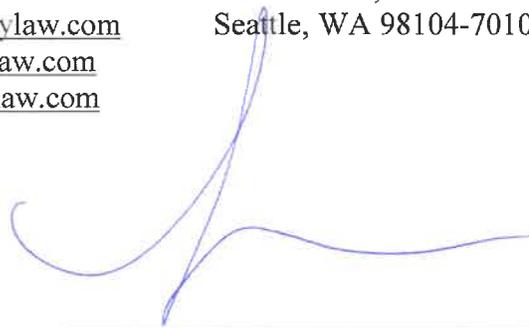
Freimund Jackson & Tardiff,
PLLC
Gregory Jackson
John R. Nicholson
701 W. 5th Ave., Suite 3545
Seattle, WA 98104

- U.S. Mail
- Hand Delivered
- Overnight Mail
- E-mail to:
roger@felice-law.com

Felice Law Office
Roger A. Felice
505 W. Riverside Ave., Suite
Spokane, WA 99201

- U.S. Mail
- Hand Delivered
- Overnight Mail
- E-mail to:
scarpelli@carneylaw.com
durkin@carneylaw.com
kniffin@carneylaw.com

Casey Badley Spellman, PS
Jason W. Anderson
Nicholas P. Scarpelli
701 5th Ave., Suite 3600
Seattle, WA 98104-7010



Lawrence W. Garvin

WITHERSPOON BRAJCICH MCPHEE, PLLC

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