

FILED
Court of Appeals
Division III
State of Washington
7/10/2018 10:43 AM

No. 354733

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

MADLYNN M. TAPKEN,

Respondent/Cross-Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Appellant/Cross-Respondent,

and

CONRAD MALINAK,

Respondent.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable Timothy B. Fennesy

**MADLYNN M. TAPKEN'S REPLY BRIEF ON CROSS-
APPEAL**

FELICE LAW OFFICES, P.S.
Roger A. Felice
505 W. Riverside Ave, Suite 509
Spokane, Washington 99201-0518
(509) 326-0510

CARNEY BADLEY SPELLMAN, P.S.
Nicholas P. Scarpelli, Jr.
Timothy J. Parker
Jason W. Anderson
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Respondent & Cross-Appellant Madelynn M. Tapken

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION	1
II. REPLY ARGUMENT	1
A. The County failed to satisfy its burden of proof on its affirmative defense.	1
1. The County presented no evidence that Tapken exercised volition when Malinak suddenly reversed course.	1
2. The County presented no evidence that Tapken had sufficient time to react.	5
B. The County’s failure-to-preserve and invited-error arguments are meritless.....	7
C. This Court should vacate the finding that Tapken was contributorily negligent and remand for amendment of the judgment.	10
III. CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Caulfield v. Kitsap County</i> , 108 Wn. App. 242, 29 P.3d 738 (2001)	7
<i>Draszt v. Naccarato</i> , 146 Wn. App. 536, 192 P.3d 921 (2008).....	6
<i>Golub v. Mantopoli</i> , 65 Wn.2d 361, 397 P.2d 433 (1964).....	1
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001)	1
<i>Haydon v. Bay City Fuel Co.</i> , 167 Wash. 212, 9 P.2d 98 (1932).....	5
<i>Herrick v. Wash. Water Power Co.</i> , 75 Wash. 149, 134 P. 934 (1913).....	2
<i>Jellum v. Grays Harbor Fuel Co.</i> , 160 Wash. 585, 295 P. 939 (1931).....	5
<i>Kaplan v. Nw. Mut. Life Ins. Co.</i> , 115 Wn. App. 791, 65 P.3d 16 (2003)	8, 9
<i>Kilde v. Sorwak</i> , 1 Wn. App. 742, 463 P.2d 265 (1970)	5
<i>Liesey v. Wheeler</i> , 60 Wn.2d 209, 373 P.2d 130 (1962).....	5
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 108 P.3d 768 (2005)	3
<i>Murray v. Amrine</i> , 28 Wn. App. 650, 626 P.2d 24 (1981)	6
<i>Ruff v. Fruit Delivery Co.</i> , 22 Wn.2d 708, 157 P.2d 730 (1945).....	4

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Sanchez v. Haddix</i> , 95 Wn.2d 593, 627 P.2d 1312 (1981)	4
<i>State v. Wakefield</i> , 130 Wn.2d 464, 925 P.2d 183 (1996)	9
Other State Cases	
<i>City of Lake Elmo v. Metro. Council</i> , 685 N.W.2d 1 (Minn. 2004)	4
<i>Kuhlmann v. Rowald</i> , 549 S.W.2d 583 (Mo. Ct. App. 1977)	2, 5
<i>Stokes v. Carlson</i> , 362 Mo. 93, 240 S.W.2d 132 (1951).....	5
Constitutional Provisions, Statutes and Court Rules	
CR 50(a)	7
RAP 2.5(c)(2)	7, 9
RCW 4.22.070(1)(b)	10
Treatises	
RESTATEMENT (SECOND) OF TORTS § 2 (1965)	2
Other Authorities	
Inertia, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Inertia&oldid=848352324 (permanent link).....	3
The Centripetal Force Requirement, THE PHYSICS CLASSROOM, http://www.physicsclassroom.com/class/circles/Lesson-1/The-Centripetal-Force-Requirement (last visited July 9, 2018)	3

I. INTRODUCTION

Similar to its argument that its duty to warn is eliminated when a road user confronts a known or obvious condition, the County in responding to Tapken's cross-appeal ignores established Washington law on negligence. No evidence supported a finding that Tapken exercised volition or had the opportunity to do so when Malinak unexpectedly changed course. The law requires both before negligence may be found.

Tapken's cross-appeal is properly before this Court. The issue of Tapken's contributory negligence should never have been submitted to a jury, but the trial court on remand had no discretion under this Court's decision in the first appeal. This Court may review the sufficiency of the evidence under a different opinion of the law than expressed in its first decision. It should do so, vacate the finding that Tapken was contributorily negligent, and remand for amendment of the judgment.

II. REPLY ARGUMENT

A. **The County failed to satisfy its burden of proof on its affirmative defense.**

1. **The County presented no evidence that Tapken exercised volition when Malinak suddenly reversed course.**

Contributory negligence must be shown by substantial evidence; a scintilla of evidence will not do. *Golub v. Mantopoli*, 65 Wn.2d 361, 364, 397 P.2d 433 (1964). Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). The County does not dispute that there can be no negligent act absent

volition. *See County's Reply Br.* at 45-47; *see also Tapken's Answer. Br.* at 31-32, 45 (citing *Herrick v. Wash. Water Power Co.*, 75 Wash. 149, 162, 134 P. 934 (1913); RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (1965)). The County had the burden to present substantial evidence that Tapken exercised volition and, as a matter of law, it failed to satisfy that burden.

To be sure, the County presented evidence from which the jury could find that Tapken's upper body continued to the right when Malinak abruptly turned left without warning, "as hard as [he] could." RP 911. Malinak stated to the investigating officer that he thought Tapken must have leaned farther right, causing him to lose control of the motorcycle. RP 932-22, 1299, 1304-05. And the County's experts testified about the effects of an operator and passenger leaning in opposite directions. RP 1524-30, 1536, 1579-80. But none of that evidence spoke to whether Tapken exercised volition if and when she leaned farther right.

The County's experts assumed Tapken exercised volition. But when a person's movements are equally as explainable by physical forces as not, the exercise of volition cannot be presumed. *See Kuhlmann v. Rowald*, 549 S.W.2d 583, 584 (Mo. Ct. App. 1977). In *Kuhlmann*, the appellate court held it was error to submit contributory negligence to the jury absent evidence that the plaintiff pedestrian voluntarily entered the street before being struck by the defendant's car. *Id.* The only evidence explaining how she got there was that she was either pushed or slipped and fell, and "[n]either was a voluntary act." *Id.* Here, there was no evidence Tapken moved right voluntarily. Meanwhile, Tapken's expert, Steve Harbinson,

provided an unchallenged, science-based, and common-sense explanation of how, when an operator turns a motorcycle, inertia pushes the passenger's upper body in the opposite direction naturally and without volition on her part.¹ RP 1031. The County is correct that Mr. Harbinson's testimony is not conclusive. But to create a jury question in light of his testimony, the County had to present evidence that Tapken exercised volition if and when her upper body went to the right.

Unfortunately, Tapken's traumatic injuries left her with no memory of the accident or the events immediately preceding it. The law does not penalize Tapken for her lack of memory by affording the County a presumption. The County retained the burden of proof and thus the burden to present evidence to sustain its affirmative defense. Absent evidence of volition, it was at least equally likely that Tapken's movement was the natural consequence of inertia. *See* RP 1031. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). When a jury is faced with two propositions that are equally likely, the party with the burden of proof has failed to meet its

¹ Under Isaac Newton's first law of motion—the law of inertia—an object in motion tends to continue at a constant speed in a straight line. *See* Inertia, WIKIPEDIA, <https://en.wikipedia.org/w/index.php?title=Inertia&oldid=848352324> (permanent link). Inertia, addressed by Mr. Harbinson, explains why a passenger in a sharply turning vehicle feels the sensation of being pushed outwards, opposite the turn. *See* The Centripetal Force Requirement, THE PHYSICS CLASSROOM, <http://www.physicsclassroom.com/class/circles/Lesson-1/The-Centripetal-Force-Requirement> (last visited July 9, 2018).

burden. *Ruff v. Fruit Delivery Co.*, 22 Wn.2d 708, 720, 157 P.2d 730 (1945).² This is the fatal shortcoming of the County's affirmative defense.

The County attempts to sidestep the problem by asserting for the first time that the jury needed only to find that Tapken *omitted* to act—*i.e.*, “failed to follow [Malinak’s] lean”—and not necessarily that she “actively leaned farther away from Malinak.” *County’s Reply Br.* at 47. But this argument suffers from the same deficiency: lack of an evidentiary basis to determine whether Tapken’s leaning farther right was the result of voluntary action or inertia. To the extent the County intends to suggest that the jury could have found Tapken negligent simply for not leaning left, regardless of whether she leaned farther right, no evidence supported that this was a proximate cause of the accident. The County’s causation theory was that Tapken countered Malinak’s left turn by leaning farther right and that this caused Malinak to lose control of the motorcycle—not that she merely omitted to lean left. *See, e.g.*, RP 932-33, 953-54, 1299, 1304-05, 1524-30, 1536, 1579-80; *see also* RP 345-48 (opening statement), 1686-90, 1694-95 (closing argument).

Tapken cannot have been negligent in moving right unless she did it on purpose. Taking the evidence and reasonable inferences in the County’s favor, the evidence at most supported only a finding that Tapken’s body continued to the right. The evidence provided no basis to determine

² *See also Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981) (cited in *Tapken’s Answer Br.* at 46); *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004) (“If evidence of a fact or issue is equally balanced, then that fact or issue has not been established by a preponderance of the evidence.”).

whether she exercised volition, and thus provided no basis to find her negligent. The County's affirmative defense fails as a matter of law.

2. The County presented no evidence that Tapken had sufficient time to react.

Related to volition and perhaps more fundamental, Tapken could be negligent only if she had time to perceive and react to Malinak's reversal of direction. The issue of volition is not even reached unless there is evidence that Tapken had a reasonable opportunity for voluntary action. Because she had insufficient time as a matter of law, there was no evidentiary basis to submit her contributory negligence to the jury.

The County maintains Tapken was entitled to *no* perception-reaction time, asserting she was required to "mirror" Malinak's movements so they would "move in synch." *County's Reply Br.* at 48-59. This does not fill the evidentiary void because to "mirror" an act, one must know it is coming and simultaneously mimic. There can be no negligence for failing to "move in synch" with an unexpected act. *See Tapken's Answer. Br.* at 46-47 (citing *Liesey v. Wheeler*, 60 Wn.2d 209, 373 P.2d 130 (1962); *Kilde v. Sorwak*, 1 Wn. App. 742, 747-48, 463 P.2d 265 (1970)).³ The County cites no contrary authority.

³ *See also Haydon v. Bay City Fuel Co.*, 167 Wash. 212, 213-17, 9 P.2d 98 (1932) (reversing judgment on verdict for plaintiff and remanding for dismissal of negligence action where defendant driver had only "[f]ractions of seconds" to perceive and react to boy darting from behind mailbox); *Jellum v. Grays Harbor Fuel Co.*, 160 Wash. 585, 589-90, 295 P. 939 (1931) (affirming dismissal of affirmative defense of contributory negligence where the plaintiff had "but a fraction of a second within which to attempt to avoid the collision"); *Kuhlmann*, 549 S.W.2d at 584 (holding there can be no negligence absent an "opportunity to make a choice or to determine a course of action") (quoting *Stokes v. Carlson*, 362 Mo. 93, 240 S.W.2d 132, 136 (1951)).

The County's expert, Steven Garets, testified that a motorcycle passenger must "move with" the operator "almost like a dance." RP 1584. But the law requires a passenger to exercise *reasonable* care, not clairvoyance:

A passenger is not required to maintain the same degree of attention as is a driver. ... Nor is a passenger required to anticipate negligent acts on the part of the driver. ... If knowledge of peril comes too late to warn the driver and avoid the accident, failure to communicate cannot constitute contributory negligence.

Murray v. Amrine, 28 Wn. App. 650, 656-57, 626 P.2d 24 (1981) (citations omitted). Even assuming a motorcycle passenger has greater responsibility than an automobile passenger, that cannot justify holding a motorcycle passenger to a standard of superhuman ability to perceive and react to the unexpected. Nor does the County cite any precedent for doing so. Applying Mr. Garets' dance analogy, even the most experienced dancer cannot foresee her partner's sudden, unexpected, and unrehearsed moves. The law recognizes the limits of human ability in requiring *reasonable* care.

The County relies on this Court's reasoning that, "if Tapken had sufficient time to lean farther right, she may also have had sufficient time to lean to the left." *Slip. Op.* at 17-18. But that reasoning presumed the existence of evidence that leaning farther right was voluntary action, taken after sufficient perception-reaction time. Had there been such evidence, the jury could reasonably have inferred negligence. But there was no such evidence. The uncontradicted evidence (acknowledged by Mr. Garets) was that Tapken at most had a tiny fraction of a second—essentially no time at

all. RP 860, 1604-05. As a matter of law, that was not a reasonable time, and it was thus error to submit Tapken's negligence to the jury.⁴

B. The County's failure-to-preserve and invited-error arguments are meritless.

The County misconstrues the basis for this Court to review the submission of Tapken's contributory negligence to the jury. Tapken does not ask this Court once again to review the denial of summary judgment before the first trial. Nor does she challenge any ruling by the trial court on remand. Rather, she appeals "from the sufficiency of the evidence presented at trial." *Draszt v. Naccarato*, 146 Wn. App. 536, 541, 192 P.3d 921 (2008) (quoting *Caulfield v. Kitsap County*, 108 Wn. App. 242, 249 n.1, 29 P.3d 738 (2001)). And she asks this Court under RAP 2.5(c)(2) to review that issue under a different "opinion of the law" than set forth in its decision in the first appeal.

The County does not dispute this Court's authority under RAP 2.5(c)(2) to revisit its earlier decision. Contrary to the County's assertion, nothing in RAP 2.5(c)(2) requires Tapken to cite "new authorities or recent case law." *County's Reply Br.* at 42. The County argues the contributory-negligence issue was not preserved on remand and any error was invited. Both arguments are meritless.

Sufficiency of the evidence is reviewable even though Tapken did not move for judgment as a matter of law under CR 50(a). Such a motion

⁴ For the same reasons, had Malinak sued Tapken for his injuries, claiming she failed to "mirror" his unexpected left turn, his claim could not properly have survived summary judgment.

would have been futile in light of this Court’s decision in the first appeal, and our courts do not require a party to take futile actions to preserve issues for review. *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 804 n.6, 65 P.3d 16 (2003). Contrary to the County’s argument, *Kaplan* is not distinguishable because the denial of summary judgment there was based on a substantive issue of law. Although the ultimate issue here is sufficiency of the evidence, judgment as a matter of law was unavailable for a substantive legal reason: the law-of-the-case doctrine. On the County’s motion, the trial court ruled before trial that it was bound to enforce this Court’s decision as to Tapken’s contributory negligence. CP 655; RP (10/7/2016) 57; RP (12/12/2016) 90-92. The trial court correctly recognized that the law-of-the-case doctrine precluded it from entertaining—at any time—a sufficiency challenge based on the same evidence previously considered by this Court.

Although the trial court allowed that Tapken could renew her motion by seeking judgment as a matter of law at the close of the evidence, the court hastened to add—correctly—that it could consider such relief only if there were “something different” in the trial evidence as compared with the summary-judgment record. RP (12/12/2016) 92. The court was unequivocal:

My ruling was basically it’s already been ruled on. The Court of Appeals has already ruled on it. If something comes up, then you can renew that motion if there’s something different, but if you’re just going to stand up and argue the same thing that the Court’s already ruled on, no.

Id. The County does not dispute that there was nothing materially “different” in the trial evidence or that granting judgment as a matter of law based on the same evidence considered by this Court would have contravened this Court’s decision in the first appeal. *See* CP 98-99, 592. Under *Kaplan* and RAP 2.5(c)(2), Tapken was required to do nothing more to preserve the issue.

The County’s invited-error argument is meritless for a similar reason. The invited-error doctrine applies when a party induces the trial court to err. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Tapken did not induce or invite error by proposing a special-verdict form that included the issue of her negligence or by not objecting to the County’s proposed special-verdict form or summary-of-claims instruction for including that issue.⁵ *See* CP 2332, 2358, 2593, 2628. The trial court did not err; it was bound under this Court’s decision to allow the jury to decide whether Tapken was contributorily negligent and thus to reject any proposed verdict form that did not include the issue. Thus, not only did Tapken not induce error by ensuring that the jury would decide the issue of her negligence, she protected against error (and avoided the possibility of a third trial on liability in the event of reversal on appeal). Tapken’s cross-appeal is properly before this Court.

⁵ Because Malinak’s contributory negligence was at issue regardless of whether the issue of Tapken’s contributory negligence would also be submitted to the jury, Tapken did not invite error by not objecting to the general instructions on contributory negligence. *See* CP 2618-19.

C. This Court should vacate the finding that Tapken was contributorily negligent and remand for amendment of the judgment.

The County does not dispute that Tapken's remedy is to vacate the finding that she was contributorily negligent and remand with directions to amend the judgment to reflect the County and Malinak's joint and several liability. This is required under RCW 4.22.070(1)(b), under which defendants against whom judgment is entered are jointly and severally liable to a fault-free plaintiff. The County asks that, *in addition*, this Court remand the case for a new trial limited to the issue of reallocating the 10% of fault previously allocated to Tapken. That issue does not concern Tapken. The County raises no issue on appeal regarding the amount of damages, and hypothetical future contribution actions between the County and Malinak would not affect their joint and several liability to Tapken for a judgment on the entire verdict in her favor. *See* RCW 4.22.070(1)(b).

III. CONCLUSION

There was no material difference between the evidence on summary judgment and at trial. It provided no basis to find that Tapken exercised volition or had the opportunity to do so. This Court's analysis of the issue in its first decision was flawed. And as the judgment demonstrates, the erroneous submission of Tapken's contributory negligence to the jury was highly prejudicial to her. This Court should vacate the finding that Tapken was contributorily negligent and remand for amendment of the judgment to reflect the defendants' joint and several liability for the jury's entire verdict in her favor.

Respectfully submitted this 10th day of July, 2018.

FELICE LAW OFFICES, P.S.

CARNEY BADLEY SPELLMAN, P.S.

By



FDR:

Roger A. Felice,
WSBA No. 5125

By



Nicholas P. Scarpelli, Jr.,
WSBA No. 5810
Timothy J. Parker,
WSBA No. 8797
Jason W. Anderson,
WSBA No. 30512

Attorneys for Respondent & Cross-Appellant Madelynn M. Tapken

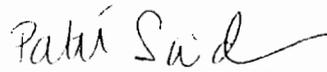
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email to the following:

Michael E. Tardif Gregory E. Jackson John R. Nicholson FREIMUND JACKSON & TARDIF, PLLC 711 Capitol Way S Ste 602 Olympia WA 98501-1293 miket@fjtlaw.com gregj@fjtlaw.com johnn@fjtlaw.com	Roger A. Felice Felice Law Offices, P.S. 505 W Riverside Ave., Suite 509 Spokane, WA 99201-0518 roger@felice-law.com
David Edward Michaud Michaud Law Firm, PLLC 11306 N Whitehouse St. Spokane, WA 99218-2693 davemeshow@msn.com	Lawrence W. Garvin Witherspoon, Brahcich, McPhee, PLLC 601 W Main Avenue, Suite 714 Lgarvin@workwith.com RClayton@workwith.com

DATED this 10th day of July, 2018.



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

July 10, 2018 - 10:43 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35473-3
Appellate Court Case Title: Madelynn M. Tapken v. Spokane County, et al
Superior Court Case Number: 13-2-01216-7

The following documents have been uploaded:

- 354733_Briefs_20180710104156D3982969_1200.pdf
This File Contains:
Briefs - Respondents/Cross Appellants
The Original File Name was Tapken Reply Brief on Cross-Appeal.PDF

A copy of the uploaded files will be sent to:

- davemeshow@msn.com
- gregj@fjtlaw.com
- johnn@fjtlaw.com
- lgarvin@workwith.com
- miket@fjtlaw.com
- rclayton@workwith.com
- roger@felice-law.com
- scarpelli@carneylaw.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com

Filing on Behalf of: Jason Wayne Anderson - Email: anderson@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600

Seattle, WA, 98104

Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20180710104156D3982969