

73569-1

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NO. 73569-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

VICTORY LONNQUIST, an individual,

Respondent,

vs.

**PATRICK M. KIBE, and "JANE DOE" KIBE, husband and wife, both individually
and on behalf of their marital community comprised thereof,**

Appellants.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Jean Rietschel, Judge**

REPLY BRIEF OF APPELLANTS

REED McCLURE

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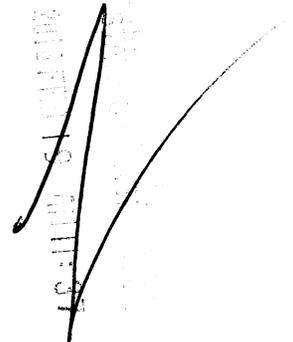


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I. INTRODUCTION

Plaintiff proposed an erroneous verdict form. The verdict form did not inform the jury that if it concluded Mr. Kibe was not negligent, the jury's job was done and it should sign the verdict. When the jury concluded Mr. Kibe was not negligent, plaintiff argued for a new trial contending the jury's conclusion about causation and negligence could not be reconciled. Plaintiff cannot benefit from an error she caused at trial regardless of whether the error was done intentionally or unintentionally. This Court should reverse and order that judgment be entered in favor of Mr. Kibe.

II. REPLY TO PLAINTIFF'S STATEMENT OF CASE

Plaintiff asserts Mr. Kibe has stated that all circumstances of the accident are "undisputed." (Resp. Br. at 2) Actually Mr. Kibe referenced a set of undisputed circumstances and a set of disputed circumstances. Mr. Kibe's opening brief lists two paragraphs of undisputed evidence followed by several paragraphs of disputed accident facts. (App. Br. at 2-5) It was the jury's role to decide how to resolve the disputed facts.

Plaintiff asserts the weight of credible evidence shows Mr. Kibe caused the accident. (Resp. Br. at 2) Questions of credibility have no bearing on appeal. Credibility determinations are solely for the trier of fact and are not reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60,

71, 794 P.2d 850 (1990). Moreover, the cause of the accident is not the issue. The jury found Mr. Kibe caused the accident. (CP 150) The only possible legal issue is whether causation is even germane in the absence of a finding of negligence.

Plaintiff identifies evidence from herself, Mr. Kibe, Trooper Orłowski, Richard Cook, and John Hunter which supported a conclusion that Mr. Kibe lost control of his car. (Resp. Br. at 2-4) The critical question was whether losing control of one's care is negligence. The jury resolved this question and concluded Mr. Kibe was not negligent. (CP 150)

III. ARGUMENT

A. THE JURY'S VERDICT IS CONSISTENT AND SUPPORTED BY EVIDENCE.

Judgment should be entered in favor of Mr. Kibe because the jury concluded he was not negligent. The jury's verdict is consistent and supported by the evidence, therefore, it was reversible error to grant a new trial.

The jury must have concluded that Mr. Kibe lost control of his vehicle due to weather conditions. The road was wet, slick, and slippery. (RP 34:8-10, 522:12-13) Plaintiff admitted that Mr. Kibe lost control and his vehicle spun. (RP 48, 50) Trooper Orłowski testified Mr. Kibe lost control. (RP 159) Richard Cook said Mr. Kibe lost control. (RP 527:2-7)

Even Mr. Kibe's expert, John Hunter testified the evidence supports a conclusion that Mr. Kibe could have lost control. (RP 641)

Plaintiff argues the verdict is irreconcilable because to find Mr. Kibe caused the accident, the jury must have concluded Mr. Kibe was negligent. Yet that is not how the jury answered the negligence question. As in *Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991), the jury's answers to questions 1 and 3 and the subparts in question no. 4 are surplusage.

Plaintiff attempts to equate instructions on the standards of negligence with evidence of negligence arguing duty, breach, and the resulting injury were "determined by the jury to have been caused by Mr. Kibe . . ." (Resp. Br. at 20-21) Instructions are not evidence. Instructions are certainly not jury findings. Here the jury specifically found based on the evidence presented and applying the instructions given that Mr. Kibe was not negligent.

Plaintiff argues the fact that Mr. Kibe lost control of his vehicle means that he was negligent. (Resp. Br. at 14) Plaintiff cites no legal authority for her argument. Citing *Horner v. Northern Pacific Beneficial Assoc. Hospitals*, 62 Wn.2d 351, 382 P.2d 518 (1963) and *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315 (1959), plaintiff contends she was entitled to an inference of negligence and that Mr. Kibe was required to present

“exculpatory evidence.” (Resp. Br. at 18-19) Plaintiff’s contention fails for two reasons. First, *Horner* and *Chase* involved *res ipsa loquitur*. In *Horner*, plaintiff suffered shoulder paralysis after abdominal surgery. The court concluded *res ipsa* applied. In *Chase v. Beard*, 55 Wn.2d 58 (1959)¹, the court determined *res ipsa* did not apply. Those courts’ discussions about *res ipsa* have no application here.

Second, plaintiff’s contention ignores the court’s jury instructions. She did not challenge any jury instructions and is bound by them under the law of the case doctrine. *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005). Nothing in the jury instructions created an inference of negligence. The instructions required plaintiff to prove her case.

Plaintiff contends *Gordon v. Deer Park Sch. Distr. No. 414*, 71 Wn.2d 119, 426 P.2d 824 (1967) is distinguishable because it did not involve jury instructions. (Resp. Br. at 19) The presence or absence of instructions in *Gordon* has no bearing. *Gordon* unquestionably establishes that negligence is not presumed. And *Gordon* also establishes that negligence is a jury question.

¹ *Overruled on other grounds by Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

Gordon involved a minor injured by a flying bat at a school's baseball game. The jury returned a defense verdict for the school district. Plaintiff moved for a new trial based on juror misconduct. The superior court granted a new trial but on the issue of damages only. The superior court determined that negligence had been established as a matter of law. The school district appealed challenging the order limiting the scope of the new trial. The Supreme Court reversed and remanded for trial on all issues.

In analyzing whether the superior court erred in deciding negligence as a matter of law, the Supreme Court recited Washington's well-established rules of law on negligence. Among those rules are:

Negligence is never presumed but must be established by a preponderance of the evidence by the one asserting it.

The fact that an accident occurred does not in and of itself establish negligence.

Whether one who is charged with negligence has exercised reasonable care is a question of fact for the jury.

71 Wn. 2d at 122 (citations omitted). These established rules apply here and require a judgment in favor of Mr. Kibe.

Plaintiff argues *Osborne v. Charbneau*, 148 Wash. 359, 268 P. 884 (1928) and *Rickert v. Geppert*, 64 Wn.2d 350, 391 P.2d 964 (1964) are distinguishable on their facts and the jury instructions involved. (Resp. Br. at 19-20) Each case does apply. Each case supports Mr. Kibe's

position. In *Osborne*, the Supreme Court held that the instructions were not so inconsistent to require reversal of a defense verdict. The *Osborne* court noted the instructions actually favored the plaintiff. Most notably for our case, *Osborne* established that negligence is not presumed merely because an automobile skids on wet pavement. 148 Wash. at 364-65.

In *Rickert*, the Supreme Court held stating:

[M]ere skidding of an automobile, alone, is not evidence of negligence” . . . is a correct statement of the law. . . . The fact that an automobile skids and an accident results does not demonstrate that the conduct of a defendant was such that he created an unreasonable risk of harm to others.

64 Wn. 2d at 355.

Plaintiff also suggests that there were sequential acts of negligence, not solely limited to a skidding car. (Resp. Br. at 20-21) She lists “crossing over into plaintiff’s lane,” “not driving with appropriate caution,” and “losing control” as additional negligent acts. To the extent these were the theories of negligence presented to the jury, the fact remains the jury rejected plaintiff’s theories when it concluded Mr. Kibe was not negligent. Mr. Kibe is entitled to judgment in his favor.

B. THE JURY’S VERDICT IS CONSISTENT WITH THE INSTRUCTIONS.

Plaintiff argues the jury did not understand or disregarded several instructions. In particular, plaintiff points to instructions 9, 11, and 12. (Resp. Br. at 11) Based on these instructions and the evidence presented,

the jury could have concluded that Mr. Kibe in fact lost control of his vehicle while nevertheless exercising ordinary and reasonable care under the conditions and circumstances.

A jury is presumed to follow all instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Plaintiff argues the presumption has been overcome here. (Resp. Br. at 12-13) She cites *Nichols v. Lackie*, 58 Wn. App. 904, 795 P.2d 722 (1990), *rev. denied*, 116 Wn.2d 1024 (1991) and *Tennant v. Roys*, 44 Wn. App. 305, 722 P.2d 848 (1986). *Nichols* does not apply here. There the jury was expressly instructed to award a category of special damages and did not do so. 58 Wn. App. at 907. Here the jury was not instructed that it was required to reach a certain decision. In *Tennant*, the Court of Appeals applied the general rule (not the exception). The *Tennant* Court held the jury was presumed to have followed the court's instruction that it disregard prejudicial comments during opening statements. 44 Wn. App. at 315-16. The jury's verdict here is consistent with the instructions and the evidence.

C. INVITED ERROR APPLIES TO PLAINTIFF, NOT TO MR. KIBE.

The invited error doctrine prevents a party from benefiting from an error she caused at trial regardless of whether the error was done intentionally or unintentionally. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

Plaintiff argues invited error applies to Mr. Kibe and thus urges this Court to reject Mr. Kibe's appeal. (Resp. Br. at 15-16) Plaintiff cites *State v. Pam*, 101 Wn. 2d 507, 680 P.2d 762 (1984)², *State v. Gaff*, 90 Wn. App. 834, 954 P.2d 943 (1998), and *Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wn. App. 706, 806 P.2d 787 (1991), for her invited error argument. These cases do not support her position. These cases involved situations where the appealing party had specifically asked for a ruling from the trial court that it then challenged on appeal.

In *Pam*, the State appealed an issue which it had specifically agreed to dismiss at trial. In *Gaff*, the defendant appealed a jury instruction which he and the State had specifically requested. Similarly, in *Nania*, the defendant challenged a special verdict form as inconsistent yet had specifically requested the superior court to modify the verdict form. Plaintiff's quotation from *Nania* omits the pertinent facts that the challenging party had requested a modification to the verdict form.

Here the superior court gave the special verdict form that plaintiff had requested. Plaintiff concedes that she proposed the special verdict

² *Overruled on other ground by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

form which was given. (Resp. Br. at 4-5; CP 92³) Plaintiff then challenged the verdict as inconsistent. Plaintiff asked for and obtained a new trial.

Plaintiff cites no case which holds that the lack of objection by Mr. Kibe equals invited error. Moreover, plaintiff fails to recognize that Mr. Kibe is not challenging the jury verdict as error. It was plaintiff who challenged the jury verdict. Mr. Kibe is not challenging the verdict or the special verdict form. Mr. Kibe is challenging the superior court's order granting a new trial. Invited error applies only to plaintiff.

Plaintiff also suggests that because Mr. Kibe's counsel has more experience in personal injury law than plaintiff's counsel, Mr. Kibe somehow took advantage of the situation. (Resp. Br. at 15, note 11) She argues Mr. Kibe's counsel "opted to 'lay in behind a log,' and seize the opportunity to complain [when] the verdict was not to his liking." *Id.* Again, this argument mischaracterizes what happened. Mr. Kibe agreed with the verdict. The jury concluded he was not negligent. It was plaintiff who did not like the verdict and availed herself of the alleged inconsistency in the verdict to get another chance to try the case.

³ Plaintiff cites to CP 92 for her proposed special verdict form. CP 92 is actually the first page of "Jury Questions to Witness."

The superior court erred in granting plaintiff a new trial based on an error which plaintiff had created. This Court should reverse and remand for entry of judgment in favor of Mr. Kibe.

D. MR. KIBE DID NOT WAIVE HIS CHALLENGE TO THE COURT'S ERRORS.

Plaintiff argues Mr. Kibe waived his right to review. (Resp. Br. at 16-18) *City of Bellevue v. Raum*, 171 Wn. App. 124, 286 P.3d 695 (2012), *rev. denied*, 176 Wn.2d 1024 (2013). In *Raum*, a firefighter filed a worker's compensation claim. The Board of Industrial Insurance Appeals awarded him benefits. The City appealed. At the superior court, the jury returned a verdict for the City. The firefighter appealed to the Court of Appeals which affirmed. The firefighter argued the special verdict form was reversible error. The City argued the firefighter waived his challenge by failing to provide a correct alternative verdict form.

The appellate court determined the firefighter had not waived the challenge because he objected to the special verdict form which sufficiently told the trial court the basis for his objection. The Court of Appeals [this Court] reviewed but rejected the firefighter's challenge to the special verdict form. *Raum* is not applicable here because Mr. Kibe is not challenging the special verdict form. He is challenging the superior court's order granting a new trial.

Plaintiff also cites RAP 2.5(a), *Trueax v. Ernst Home Center*, 124 Wn.2d 334, 878 P.2d 1208 (1994), *Nelson v. Mueller*, 85 Wn.2d 234, 533 P.2d 383 (1975), and *Roumel v. Fude*, 62 Wn.2d 397, 383 P.2d 283 (1963) as support for her contention that Mr. Kibe cannot challenge the special verdict on appeal because he did not object to the verdict form. Yet again, this contention ignores the issue on appeal. Mr. Kibe is not challenging the special verdict form. Mr. Kibe is not raising a new argument on appeal. Mr. Kibe is challenging the same thing he challenged at the superior court: the court's granting a new trial and failing to enter judgment on the verdict.

E. THE NEW TRIAL ORDER SHOULD BE REVERSED FOR FAILURE TO COMPLY WITH CR 59(f).

Reversal of the new trial order is mandatory based on binding Washington Supreme Court precedent. *Christy v. Davis*, 71 Wn.2d 81, 426 P.2d 493 (1967). The *Christy* case has not been overruled or limited. Plaintiff argues the superior court's order complies with CR 59(f) because the court's oral ruling gave an explanation. Reference to the oral ruling does not satisfy the CR 59(f) requirements. *Christy v. Davis* controls here and requires reversal for entry of judgment in favor of Mr. Kibe.

IV. CONCLUSION

Plaintiff invited any error in the special verdict form. She is legally barred from using her error for relief. The superior court's order on new trial does not contain the reasons required by CR 59(f). If this Court looks to the jury's verdict, this Court should also reverse and remand because the verdict is consistent and supported by substantial evidence. For these reasons, this Court should reverse and remand for entry of judgment in favor of Mr. Kibe.

Dated this 17th day of February 2016.

REED McCLURE

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