

73569-1

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NO. 73569-1-I

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

BRIEF OF APPELLANTS

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COURT OF APPEALS
DIVISION I

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I. NATURE OF CASE

This case involves a motor vehicle accident with disputed liability. The jury determined that defendant/appellant was not negligent. Yet, due to a defective special verdict form submitted by plaintiff, the jury answered the causation questions yes. The superior court granted plaintiff's motion for new trial on the grounds that the verdict was inconsistent.

This Court should reverse and remand for entry of judgment in favor of defendant/appellant for the following reasons: (1) Plaintiff invited any error in the jury verdict and is barred from challenging the verdict; (2) the superior court's order does not state grounds for a new trial per CR 59(f), and (3) the jury's verdict is consistent and supported by substantial evidence.

II. ASSIGNMENT OF ERRORS

1. The superior court erred in failing to enter judgment for defendant Mr. Kibe. (RP 801, 803)
2. The superior court erred in granting plaintiff's motion for new trial. (CP 220-21)
3. The superior court erred in denying Mr. Kibe's motion for reconsideration. (CP 254-55)

III. STATEMENT OF ISSUES

1. Should this Court reverse and remand for entry of judgment in favor of Mr. Kibe where plaintiff invited any error by submitting a defective verdict form?

2. Should this Court reverse and remand for entry of judgment in favor of Mr. Kibe where the superior court's order granting new trial lacks sufficient grounds per CR 59(f) to support the order?

3. Should this Court reverse and remand for entry of judgment in favor of Mr. Kibe where the jury's verdict is consistent and supported by substantial evidence?

IV. STATEMENT OF FACTS

Victory Lonnquist and Patrick Kibe were involved in a motor vehicle accident. Ms. Lonnquist sued Mr. Kibe alleging negligence. (CP 1-4) Mr. Kibe denied he was negligent. (CP 5-8) A jury trial began on April 6, 2015, and the jury reached its verdict on April 14, 2015. (CP 68-86)

The undisputed evidence established that the accident occurred the evening of September 6, 2010, on eastbound Highway 18 in Auburn, Washington. (RP 33, 34, 158, 331) The weather was rainy. (RP 34, 380, 449:1-4) The roadway was wet, slick, and very slippery. (RP 34:8-10, 522:12-13)

Plaintiff was driving a 2007 Honda CRV in the left lane (i.e., passing lane). RP 33, 47. Mr. Kibe was driving a Nissan in the right-hand (i.e., slow lane). RP 327:4-6, 331, 332. The right-hand front bumper of plaintiff's Honda (RP 116:25-117:3) hit the driver's side door of Mr. Kibe's Nissan. (RP 380:16-18) The accident occurred near a triangle-shaped gore point where a right-hand entrance lane merges onto the two lanes of Highway. (18. RP 35:12-20, 520:2-3) A motor home was parked in the gore point. (RP 47-48) After the accident, plaintiff and Mr. Kibe pulled their vehicles to the right. (RP 51:6-12, 146:22-147:4, 383:9-21) Mr. Kibe parked his vehicle on the right shoulder just east of the merging on-ramp. (RP 383:9-21; Ex. 39) Plaintiff parked her vehicle on the gore point in front of the motor home. (RP 146:22-147:4)

The remaining facts about the accident were disputed. Plaintiff testified that Mr. Kibe was speeding. (RP 47:15-16, 21-22)¹ She testified Mr. Kibe was six to eight car lengths in front of her. (RP 48) He slammed on his brakes near the location of the motor home. (RP 48) Mr. Kibe's vehicle lost control and began fishtailing. (RP 48) Plaintiff testified Mr. Kibe's vehicle was spinning and spun into her lane. (RP 50)

¹ Plaintiff testified at trial that she did not know what speed Mr. Kibe was traveling. She denied saying that he was travelling at 70-75 m.p.h. She was impeached by her deposition testimony where she said Mr. Kibe was travelling at 70-75 m.p.h. (RP 115:23-116:14)

Mr. Kibe testified he was traveling at 45 m.p.h. (RP 380) He was traveling lower than the 60 m.p.h. speed limit because the traffic in the right lane was driving that speed and because it was raining. (RP 380) As he was driving in the right-hand lane, his car was hit on the driver's side. (RP 381:19-24; Ex. 37) He denied that any part of his car was in the left-hand lane when plaintiff's vehicle hit him. (RP 382:3-5, 412:12-14) After his car was hit, it swung to the left and then towards the right. (RP 382:24-383:4)

Washington State Patrol Trooper Orłowski responded to the accident scene. (RP 152) Based on his interview of the drivers, Trooper Orłowski drew a diagram showing Mr. Kibe's vehicle turning into the path of plaintiff's vehicle. (RP 156-57; Ex. 1A) The trooper concluded Mr. Kibe lost control and crossed into plaintiff's lane. (RP 159)

Trooper Orłowski had a vague memory of the accident. He believed he followed the normal procedure of speaking to both drivers. (RP 152, 155-56) Trooper Orłowski determined that Mr. Kibe lost control and crossed over into plaintiff's lane of travel. (RP 159)

Trooper Orłowski believed he spoke with Mr. Kibe and used that information to prepare Exhibit 1A. (RP 157, 158) Mr. Kibe testified that he gave his paperwork to the trooper. (RP 387:2-12) Mr. Kibe was never asked to provide his version of the accident. (RP 388:4-6)

Richard Cook, an accident analyst expert, testified for plaintiff. (RP 516-17) Mr. Cook concluded that vehicle damage and the physics of how the vehicles moved are consistent with Trooper Orłowski's diagram. (RP 525:20-22) Mr. Cook opined that Mr. Kibe's Nissan lost stability and went to the left and hit plaintiff's Honda. (RP 527:2-7) He concluded plaintiff's Honda did not turn into Mr. Kibe's Nissan. (RP 528: 15-20, 546:21-547:8) Mr. Cook testified it was not possible to determine the speeds of the vehicles. (RP 532:20-24)

John Hunter, expert accident reconstructionist, testified for Mr. Kibe. (RP 628-33) Mr. Hunter agreed that it was not possible to determine the vehicles' speed at the time of the accident. (RP 658:5-7) Mr. Hunter opined that there was insufficient data to conclude which way the accident happened. (RP 649:18-20) Mr. Hunter opined that the accident could have happened either way: (1) Mr. Kibe's Nissan lost control into the path of plaintiff's Honda, or (2) plaintiff's Honda lost control and went into Mr. Kibe's Nissan. (RP 641)

A. PLAINTIFF'S PROPOSED VERDICT FORM.

During trial, Ms. Lonquist proposed a special verdict form which asked four questions. (CP 32-33)

1. Did defendant Kibe cause the collision with Plaintiff Lonquist's vehicle? Yes or No.
2. Was defendant Kibe negligent? Yes or No.

3. Did the actions of defendant Kibe proximately cause Plaintiff Lonquist's injuries? Yes or No.

If you answered "no" to Questions 1, 2, and 3, do not answer Question No. 4. Rather sign and return this form.

If you answered "yes" to Question 1, 2, and 3, please answer Question No. 4.

4. What are plaintiff Victory Lonquist's damages for the following?

Lost Past Medical expenses
Future Medical Expenses
Physical Injuries to date
Physical Future Injuries
Past Emotional Distress
Future Emotional Distress

(CP 32-33) This special verdict form was provided to the jury. (CP 150-51)

B. JURY INSTRUCTIONS.

The jury was given the following instructions on negligence.

Instruction No. 8 states:

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

(CP 162) Instruction No. 9 states:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

(CP 163)

Instruction No. 11 states: “It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing himself or others in danger and to exercise ordinary care to avoid a collision.” (CP

165) Instruction No. 12 states:

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. The driver shall control speed to avoid colliding with others who are complying with the law and using reasonable care.

The statute provides that a driver shall drive at an appropriate reduced speed when a special hazard exists with respect to other traffic and/or when a special hazard exists by reason of weather or highway conditions.

The maximum statutory speed limit at the place here involved was 60 miles per hour.

(CP 166) Instruction No. 13 states: “Every person using a public street or highway has the right to assume that other person thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.” (CP 167)

C. JURY DELIBERATION AND VERDICT.

During deliberation, the jury submitted an inquiry to the court. (CP 84, 173-74) The jury asked: “To consider question 4, is it required to have the same answer for questions 1, 2, and 3.” (*Id.*) The court conferred with counsel. (RP 784-88) Plaintiff’s counsel asked the court

to direct the jury to review the proximate cause instruction and Instruction No. 16 on how to complete the verdict form. (RP 784:13-785:1) Plaintiff's counsel believed "those are the only two areas that might have caused some confusion." (RP 784:17-18) Mr. Kibe's counsel also asked that the jury be directed to review Instruction No. 7. (RP 785:2-7)

The court determined the verdict form was sufficient. (RP 786:6-16) The trial court directed the jury: "Reread instruction 7, 10, the second page of instruction 16, and the verdict form." (CP 84, 174)

The jury completed the special verdict form. (CP 150-51) The jury concluded that Mr. Kibe was not negligent. (CP 150) Despite concluding Mr. Kibe was not negligent, the jury then concluded Mr. Kibe caused the accident and his actions were a proximate cause of Ms. Lonquist's injuries. (CP 150) Then the jury completed the damages section of the verdict form awarding \$8,765 in past medical expenses, \$4,030 in future medical expenses, and \$3,214 in past emotional distress. (CP 151) Zero was awarded for the other three categories of damage listed on the special verdict form. (CP 151) A copy of the Special Verdict Form is attached as Appendix A. (CP 150-51)

Before the jury arrived in the courtroom to announce its verdict, the jury alerted the bailiff to a concern about how the verdict had been completed. (RP 788:7-13) The judge explained to counsel:

The jury has expressed to the bailiff some concern about whether they have filled out the verdict correctly. If there is some obvious error in the way it's filled out, something that doesn't make sense, what I think I will do before we poll them is just excuse them and take that issue up with you in terms of how you'd like me to poll them.

(RP 788:7-13) When the jury announced its verdict, the court asked the jury to return to the jury room. (RP 789-90)

The judge discussed the matter with counsel, outside of the presence of the jury. (RP 790) The judge noted that the jury had answered "yes" to cause and proximate cause and "no" to negligence. (RP 790:4-7) Mr. Kibe's counsel submitted that because the jury found Mr. Kibe was not negligent, there could be no award of damages. (RP 790:8-13) At counsels' request, the court polled the jury. (RP 790-800) The polling revealed at least 10 jurors agreed on each question. (*Id.*)

Mr. Kibe's counsel asked the court to conform the verdict to reflect an award of zero damages because there was no finding of negligence. (RP 801:6-9) The court allowed plaintiff's counsel to prepare some briefing and ask for some relief. (RP 801-02)

D. PLAINTIFF'S MOTION FOR NEW TRIAL.

Plaintiff moved for a new trial arguing that the jury verdict was "inherently inconsistent" and could not "reasonably be interpreted one way or the other." (RP 804:11-14) Plaintiff argued for the jury to

conclude that Mr. Kibe caused the accident and injury, the jury must have concluded that Mr. Kibe breached a duty of care. (RP 806) And if the jury concluded there was a breach of duty, plaintiff argued, negligence is established. (RP 806)

Plaintiff argued that the jury found Mr. Kibe had caused the accident and “therefore there was no question as to whether or not did he breach a duty.” (806:8-9) Plaintiff continued that the breach of duty gives rise to negligence and the only way to resolve the dilemma was to order a new trial. (806:13-15)

Mr. Kibe opposed the motion. (RP 804-05) Mr. Kibe argued the verdict was consistent and the court should follow the strong presumption and allow the jury verdict to stand. (RP 804-05) Mr. Kibe also argued that plaintiff could not challenge the jury verdict because plaintiff was the one who proposed the verdict form. (RP 805) Plaintiff’s challenge was barred by waiver and/or invited error. (RP 805)

Mr. Kibe argued that “the question of can an accident happen, can a driver exercise due care in rainy conditions, cause an accident and proximately cause an injury without breaching its duty of care, is one that can be answered yes and is not inconsistent under the facts here.” (RP 810)

Mr. Kibe also argued that the jury could have rejected plaintiff's testimony that Mr. Kibe was speeding. (RP 809:18-20) An accident can happen in adverse weather conditions even with a driver exercising ordinary care. (RP 809:21-22) Plaintiff and Mr. Kibe could have hit a portion of standing water while going with the flow of traffic and the water caused them to lose control or spin. (RP 809:22-25)

Mr. Kibe asked for alternative relief that judgment be entered on the jury verdict in the amount of damages awarded by the jury. (RP 810:16-22)

The court acknowledged the verdict was not logically inconsistent but concluded the verdict was inconsistent under the facts of the case. (RP 807:22-25) The jury could have concluded that Mr. Kibe was not speeding. Yet, the court concluded that based on the testimony from the experts, if Mr. Kibe caused the accident, Mr. Kibe would have entered plaintiff's lane of travel. RP 807 With regard to the waiver and invited error issues, the court concluded the verdict form was not the basis that made the verdict inconsistent. (RP 808-09)

The court's order granting new trial states:

THE COURT FINDS that the jury's answers to the questions on the Special Verdict Form are irreconcilable with the Special Verdict Form itself and the Court's instructions to the jury;

THE COURT FURTHER FINDS that the jury's answers cannot be reconciled;

THE COURT FURTHER FINDS that the jury's verdict prevented the parties from having a fair trial, and that substantial justice has not been done under these circumstances.

(CP 220-21) Mr. Kibe's motion for reconsideration was denied. (CP 224-36; 254-55) Mr. Kibe timely appealed. (CP 257-62)

V. ARGUMENT

A. STANDARD OF REVIEW.

An order granting a new trial is reviewed for abuse of discretion unless the basis for the new trial order was an issue of law. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989). When the new trial order is based on a legal issue, the appellate court does not give deference to the superior court. *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 768, 818 P.2d 1337 (1991). Mr. Kibe submits the superior court's decision was based on two legal grounds: (a) no invited error and (b) allegedly inconsistent verdict. Therefore, this Court's review is de novo as a matter of law. As explained below, plaintiff was barred from seeking a new trial and the jury's verdict is consistent.

Assuming the standard of review is abuse of discretion, the superior court abused its discretion. The court abused its discretion by granting a new trial to plaintiff when plaintiff invited the error by submitting a defective special verdict form. The court abused its

discretion by concluding the jury's verdict was inconsistent on the facts. The court abused its discretion by failing to determine the jury's intent and by substituting its judgment for a verdict that is supported by substantial evidence. This Court should reverse and remand for entry of judgment in favor of Mr. Kibe.

B. THE NEW TRIAL ORDER WAS LEGAL ERROR BECAUSE PLAINTIFF WAS BARRED BY INVITED ERROR FROM CHALLENGING THE JURY'S VERDICT.

A court may not vacate a verdict for an error of law not involving a lack of substantial evidence if the party seeking the vacation failed to object or invited the error. *Sdorra v. Dickinson*, 80 Wn. App. 695, 701, 910 P.2d 1328 (1996), *citing*, *Cerjance v. Kehres*, 26 Wn. App. 436, 439, 613 P.2d 192 (1980). *City of Bellevue v. Raum*, 171 Wn. App. 124, 147-48, 286 P.3d 695 (2012), *rev. denied*, 176 Wn2d 1024 (2013). The verdict was supported by substantial evidence. Here plaintiff proposed the special verdict form. The special verdict form failed to follow the pattern verdict forms. Most importantly, it failed to inform the jury that once it decided Mr. Kibe was not negligent, the jury had finished its job. Plaintiff's confusing and defective verdict form was invited error.

The special verdict form was defective. It was the proverbial cart before the horse—doing things in the wrong order. “[T]o put the cart before the horse; to make a mistake by inverting facts or ideas logically

dependent.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 278 (2d ed. 1983) (*italics in original*).

The Washington pattern verdict forms place the question of negligence first. *See e.g.* WPI 45.21, WPI 45.24. The question of proximate cause is second. *Id.* The pattern verdict forms have one question about causation—proximate cause only. *Id.*

Here plaintiff’s proposed special verdict form added a question about cause---whether Mr. Kibe caused the collision. (CP 150) The question about cause was the first question. Negligence was the second question. Then a third question asked about proximate cause.

The pattern verdict forms include instructions to the jury that if the negligence question is answered no, the jury is to sign the verdict form. WPI 45.21. The pattern verdict forms also include instructions that if the proximate cause question is answered no, the verdict form is to be signed. *Id.*

Plaintiff’s proposed verdict form failed to include the explanatory instructions after each negligence and proximate cause question. (CP 150) Instead, the special verdict combined the questions. The jury was told that if it answered “no” to all three questions, the jury was not to answer question no. 4 regarding damages. The special verdict form did not provide the jury with the correct option that if it had answered “no” to

negligence, it should sign the verdict form and not answer any further questions.

The jury's question during deliberation exposed the error in plaintiff's special verdict form. The jury asked: "To consider question 4, is it required to have the same answer for questions 1, 2, and 3." (CP 84, 173-74) However, while the jury's question exposed the error in the verdict form, at no point during deliberations did the jury ever submit any question regarding any confusion as to the court's charge on the issue of negligence itself.

The 12 jurors properly deliberated and 11 of the 12 concluded that Mr. Kibe was not negligent. (RP 791-800) Yet, the fact that the jury went on, due to invited error by plaintiff's submitted special verdict form, to consider other questions of proximate cause and damages does not negate that fact that first and foremost they found beyond a preponderance of evidence that Mr. Kibe did not breach his duty of care that night. With such a finding of no negligence on Mr. Kibe's part, the other subsequent findings are moot and are not cause for a trial court's order for a new trial.

The superior court lacked the authority to grant plaintiff relief and vacate the jury's verdict based on plaintiff's invited error. This Court should reverse and remand for entry of judgment in favor of Mr. Kibe.

C. **JUDGMENT SHOULD BE ENTERED FOR MR. KIBE BECAUSE THE COURT’S NEW TRIAL ORDER DOES NOT COMPLY WITH CR 59(f).**

CR 59(f) states:

In all cases where the trial court grants a motion for a new trial, it **shall**, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court **shall give definite reasons of law and facts for its order.**

...

(Emphasis added.) CR 59(f) contains mandatory, not optional requirements. “Shall” is a mandatory provision. *Erection Co. v. Department of Labor & Industries*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

The superior court’s order fails to comply with the mandatory provisions of CR 59(f). The order does not state whether it is based on the record or on facts and circumstances outside the record. Assuming it can be inferred the order is based on the record, the order does not contain “definite reasons of law and facts for its order.”

The order lists three reasons for the new trial order although there are actually only two reasons. (CP 220-21) The first and second reasons are the same: that the jury’s answers are irreconcilable with the verdict form and instructions. (CP 220) The second reason is that the parties

were prevented from having a fair trial and substantial justice was not done. (CP 221)

When an order granting new trial does not include the reasons “of law and facts,” the order and judgment granting a new trial must be reversed for entry of judgment on the verdict. *Christy v. Davis*, 71 Wn.2d 81, 426 P.2d 493 (1967). Reversal is mandatory. The superior court’s order here does not provide reasons in law and fact for its order. As the Supreme Court held in *Christy*, this Court must reverse and remand for entry of judgment in favor of Mr. Kibe.

D. JUDGMENT SHOULD BE ENTERED FOR MR. KIBE BECAUSE THE JURY VERDICT IS CONSISTENT.

The jury concluded that Mr. Kibe was not negligent. In other words, he was exercising reasonable care under the circumstances. Had the jury been presented with a proper verdict form, the jury would have known that once it answered “no” to negligence, the jury verdict should have been signed and submitted. Instead, the jury believed it needed to answer the two questions about causation and it did so.

Plaintiff argued that there was conflicting evidence about the cause of the accident. (CP 175-76, 179)² Plaintiff pointed to the testimony of

² Plaintiff also argued she was entitled to a new trial because negligence can be inferred under the doctrine of *res ipsa loquitur*. (CP 179-80) *Res ipsa loquitur* was not

Mr. Hunter that if Mr. Kibe caused the accident, Mr. Kibe would be “at fault.” (CP 176) Mr. Hunter’s testimony about “fault” does not equate to an admission that Mr. Kibe was negligent. It is the jury’s exclusive role to decide negligence. CONST. art. 1, § 21; RCW 4.44.090; *Hawley v. Mellem*, 66 Wn.2d 765, 773, 405 P.2d 243 (1965). And to the extent Mr. Hunter’s testimony discussed “fault,” the jury was not deciding fault. The jury was deciding whether Mr. Kibe had failed to exercise ordinary care.

By determining that Mr. Kibe was not negligent, the jury concluded that he was exercising “the care a reasonably careful person would exercise under the same or similar circumstances.” (Instructions 8 and 9, 162-63) By determining that Mr. Kibe was not negligent, the jury also concluded Mr. Kibe was traveling at an appropriate speed. (Instruction 12, CP 166) The jury must also have concluded that Mr. Kibe lost control of his vehicle.

Negligence is never presumed; it must be established by a preponderance of the evidence by the plaintiff. *Gordon v. Deer Park Sch.*

previously raised in the trial, nor was the case submitted to the jury on that theory. Moreover, *res ipsa loquitur* does not apply because the elements are not met. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Due to the rainy, wet road conditions and the unexpected view of an RV seemingly blocking the roadway, the accident could have happened in spite of due care by both plaintiff and Mr. Kibe. The fact that Mr. Kibe was driving his vehicle does not establish he had exclusive control; water on the roadway and/or slippery conditions could have caused him to lose control of his vehicle through no fault of his own. Finally, there was evidence for the jury to conclude plaintiff was driving too fast, braked too hard, swerved into Mr. Kibe’s lane, or otherwise lost control of her vehicle. For these reasons, this Court should reject any arguments about inference of negligence and *res ipsa loquitur*.

Distr. No. 414, 71 Wn.2d 119, 122, 426 P.2d 824 (1967). Loss of control--skidding, spinning—is not negligence. Washington courts have long recognized that the mere skidding of an automobile is “not an occurrence of such uncommon or unusual character that alone, and unexplained, it can be said to furnish evidence of negligence in the operation of a car.” *Osborne v. Charbneau*, 148 Wash. 359, 364, 268 P. 884 (1928); *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964).

Defendant’s conduct can cause an event, yet defendant is not liable in negligence as a matter of law unless the jury also concludes the defendant’s conduct was negligent. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984) (essential elements of negligence are: duty, breach, resulting injury, and proximate cause). The question of whether a defendant breached a duty of care is a separate question from whether the breach was the proximate cause of plaintiff’s damages. *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991). “In a negligence action the threshold question is whether the defendant owes a duty of care to the injured plaintiff.” *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

Washington has a long-standing rule that jury verdicts are liberally construed. *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 544, 123 P. 1001 (1912). The court’s function is to determine the jury’s intent.

Bickelhaupt v. Inland Motor Freight, 191 Wash. 467, 469, 71 P.2d 403 (1937). A court must try to reconcile the answers to special interrogatories. *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995).

The Washington Supreme Court has explained:

In the construction of a verdict, the first object is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict, if consistent with legal principles, as will most nearly conform to the intent. The jury's intent is to be arrived at by regarding the verdict liberally, with the sole view of ascertaining the meaning of the jury

Wright v. Safeway Stores, 7 Wn.2d 341, 344, 109 P.2d 542 (1941), *citing*, *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. at 544. "Neither a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury." *Blue Chelan, Inc. v. Dept. of Labor & Industries*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984).

Here the jury instructions described the duty of care and breach of care: ordinary care (Instruction Nos. 8 and 11- CP 162, 165), the duty to drive at a reasonable and prudent speed for the conditions (Instruction NO. 12-CP 166), and the failure to exercise ordinary care (Instruction No. 9-CP 163). The jury applied these legal principles to the evidence and concluded Mr. Kibe was not negligent. From the evidence, the jury could conclude that although Mr. Kibe was exercising ordinary and reasonable

care, nevertheless, his car lost control and spun which caused the accident.

The verdict is consistent and reconcilable.

E. JUDGMENT SHOULD BE ENTERED FOR MR. KIBE BECAUSE THE JURY'S VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The jury's verdict is consistent and supported by substantial evidence. In assessing whether there is substantial evidence, the court views "the evidence in the record in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party." *Lian v Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992)). "Evidence is substantial when it is of sufficient quantity to 'convince an unprejudiced, thinking mind of the truth of the declared premise.'" 106 Wn. App. at 824 (quoting *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991)).

"Overturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence." *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). In evaluating a claim of inconsistent findings on a special verdict form, the court must reconcile the jury's answers and does not substitute its judgment for the jury's.

Estate of Stalkup v. Vancouver Clinic, Inc., 145 Wn. App. 572, 586, 187 P.3d 291 (2008).

If the answers on the verdict form reveal a clear contradiction, however, such that the court cannot determine how the jury resolved an ultimate issue, the court will remand for a new trial. *Stalkup*, 145 Wn. App. at 586. A jury verdict finding a defendant negligent, but also finding that the negligence did not proximately cause the plaintiff's injuries, "is not inconsistent if there is evidence in the record to support a finding of negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant's actions." *Stalkup*, 145 Wn. App. at 586 (citing *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983)).

A court may not willingly assume a jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. *Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for the court. The jury has exclusive province to determine credibility and the weight of evidence. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). The court is not to substitute its judgment for the jury. *Id.*

The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, “so long as there was evidence which, if believed, would support the verdict rendered.” *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

To find causation and no negligence, the jury must have concluded that Mr. Kibe lost control of his vehicle due to weather conditions. The evidence was undisputed that the road was wet, slick, and slippery. (RP 34:8-10, 522:12-13) Plaintiff testified Mr. Kibe lost control and his vehicle spun. (RP 48, 50) Trooper Orlowski testified Mr. Kibe lost control and went into plaintiff’s lane. (RP 159) Richard Cook said Mr. Kibe lost control and spun into plaintiff’s lane. (RP 527:2-7) Even John Hunter testified the evidence supports a conclusion that Mr. Kibe could have lost control and went into plaintiff’s lane. (RP 641) This evidence is of sufficient quantity to ‘convince an unprejudiced, thinking mind of the truth of the declared premise,’ therefore, there is substantial evidence to support the jury’s verdict. *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d at 486.

VI. 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 20th day of November, 2015.

REED McCLURE

By


Marilee C. Erickson WSBA #16144
Attorney for Appellants

FILED
KING COUNTY, WASHINGTON

APR 14 2015

SUPERIOR COURT CLERK
BY David Witten
DEPUTY

The Hon. Jean Rietschel
Trial date: April 6, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

VICTORY LONNQUIST, an individual,

Plaintiff,

v.

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

Defendants.

No. 13-2-31208-5 SEA

PROPOSED SPECIAL VERDICT FORM

We, the jury, give the following answers to the questions submitted by the Court:

1. Did defendant Kibe cause the collision with Plaintiff Lonnquist's vehicle?

Yes No

2. Was defendant Kibe negligent?

Yes No

3. Did the actions of Defendant Kibe proximately cause Plaintiff Lonnquist's injuries?

Yes No

If you answered "no" to Questions 1, 2, and 3, do not answer Question No. 4. Rather sign and return this form.

APPENDIX A

CP 150

If you answered "yes" to Question 1, 2, and 3, please answer Question 4.

4. What are plaintiff Victory Lonnquist's damages for the following?

Lost Past Medical expenses	\$ <u>8765</u>
Future Medical Expenses	\$ <u>4030</u>
Physical Injuries to date	\$ <u>0</u>
Physical Future Injuries	\$ <u>0</u>
Past Emotional Distress	\$ <u>3214</u>
Future Emotional Distress	\$ <u>0</u>

Dated this 14 day of April, 2015.

Keith Joh
Presiding Juror