Supreme Court No.: 91541-5

Court Of Appeals, Division II No.: 45934-5-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEANN I. TINNON,

Appellant/Petitioner,

vs.

WHITE RIVER SCHOOL DISTRICT,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Deann Tinnon asks the Supreme Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Ms. Tinnon seeks review of the Division Two of the Court of Appeals Order Denying Plaintiff's Motion to Modify the Commissioner's Ruling filed on March 12, 2015, pursuant to RAP 13.3(2)(e)[1]. *See* Appendix (App.) A. The commissioner's ruling was filed on December 17, 2014, granting Defendant's Motion on the Merits to Affirm the trial court's decision to instruct the jury on contributory negligence, deny Plaintiff's motion for a directed verdict on contributory negligence and deny Plaintiff's proposed jury instruction 15. *See* App. B. Plaintiff filed the Motion to Modify the commissioner's ruling on January 12, 2015, and it was denied by the court of appeals on March 12, 2015. *See* App. A.

C. ISSUES PRESENTED FOR REVIEW

This case presents a factual situation that logically requires a distinction from the medical malpractice based rule that an error in presenting contributory negligence is harmless if the jury returns a verdict

[1] A ruling by a commissioner or clerk of the Court of Appeals is not subject to review by the Supreme Court. The decision of the court of appeals on a motion to modify a ruling by the commissioner or clerk may be subject to review as provided in this title.

of no negligence on the defendant. In this case, Defendant was erroneously allowed to present a contributory negligence defense to the jury without substantial evidence to support such a theory. The Court of Appeals found this to be harmless error because the jury returned a verdict of no negligence on the defendant and it was assumed they did not reach the issue of plaintiff's contributory negligence.

This case is different than a typical contributory negligence error case because there is a complete absence of possible proximate cause other than the negligence of the defendant or the plaintiff. This is a case where, quite literally, the collision would not have occurred unless one of the two parties was negligent. There was no evidence presented by either side of any other possible source of proximate cause. Here, but for the negligence of a party, the collision could not have occurred under these facts. Therefore, a jury verdict of no negligence on defendant means that the jury **must have** considered the issue of plaintiff's negligence. Allowing the defendant to argue contributory negligence and instruct the jury on that theory without substantial evidence to support the theory should be reversible error.

The issues presented are:

(1) Did the Court of Appeals err in holding that any error in instructing the jury on contributory negligence was harmless when the jury returned a

verdict of no negligence on the defendant when either the defendant or the plaintiff must have been negligent?

(2) Did the Court of Appeals err in denying Plaintiff's proposed jury instruction 15 by dismissing it as a contributory negligence issue when the instruction is a separate issue on the duties of the parties?

D. STATEMENT OF THE CASE

This case arises out of a motor vehicle collision that occurred on the 14th day of May, 2008. CP 1-2. Deann Tinnon, Plaintiff, was driving southbound on A.P. Tubbs Road East, approaching 157th Street East in Buckley, Pierce County, Washington. CP 1-2. David Vawter, who was employed by White River School District (*hereinafter* White River), Defendant, was driving a school bus eastbound on 157th Street East and executed a left turn onto A.P. Tubbs Road East in front of Ms. Tinnon as she approached the intersection. CP 1-2. There was conflicting testimony as to whether or not Mr. Vawter could have, or should have, seen Ms. Tinnon prior to entering the intersection of 157th Street and A.P. Tubbs Road. Ms. Tinnon collided with the school bus sustaining damage to her vehicle and her person. *See generally*, RP III, IV.

Ms. Tinnon passed through sharp "S" curves that inherently limit speed prior to entering the final stretch of roadway prior to impact with the bus. RP III, p. 18, ll. 18-23; p. 16, ll. 16-20; and p. 18, ll. 18-23. Ms. Tinnon also testified to witnessing the school bus stop and then proceed

through the intersection well after she had rounded the corner, but she could not place the exact spot where she was when she realized the bus was not going to stop. RP III, p. 18, ll. 10-17.

> Q: But when the bus pulled out, do you know for sure that you were up around the corner? A: Yes. Q: And do you know for certain that you actually were able to see the bus pull up to the intersection and stop? A: Yes. Q: And you were able to observe the bus stop and then pull out in front of you, correct? A: Yes. Q: Is it then just where on that particular road you were, whether you were halfway or whatever, is that just where you were on the road when the bus pulled out and you can't be sure? A: No, I can't be positive. I know I was past the corner.

RP III, p. 20, ll. 19 to p. 21, l. 7.

> Q: So you slammed on the clutch and the brake? A: Yes.
> Q: Do you have a specific memory of that? A: Yes.

RP III, p. 21, l. 25 to p. 22, ll. 1-3.

> A: I believe the first thing I did was slam on my brake and the clutch. I reacted as fast as I could. Q: When you slammed on the brakes, did your car slow down at all before the car ran into the bus? A: I believe so, but there wasn't a whole lot of time.

RP III, p. 60, ll. 10-14.

Trial was held from January 16th to January 29th, 2014. *See generally*, RP. Defendant presented a contributory negligence defense during the trial and requested that the court instruct the jury on that theory. CP 60, 65. After the defense rested their case, Ms. Tinnon moved for a directed verdict on the issue of contributory fault and the trial court denied

the motion. RP VI, p. 4, l. 23 to p. 12, l. 20. The trial court also refused to give Plaintiff's proposed jury instruction 15 on the duties of favored and disfavored drivers. CP 31, RP VI, p. 13. The trial court then instructed the jury on the contributory negligence theory. CP 60, 65. The jury returned a verdict for White River on January 30, 2014. CP 84. Judgment on the verdict was entered on February 14, 2014. CP 88-89.

Ms. Tinnon timely filed a notice of appeal on February 25, 2014. CP 86. White River filed a Motion on the Merits to Affirm on September 4, 2014. Oral argument was heard on November 5th, 2014, and the commissioner's ruling was filed on December 17, 2014, granting the Motion to Affirm. *See* App. B. Plaintiff filed a motion to modify the commissioner's ruling on January 12, 2015, which the Court of Appeals denied on March 12, 2015. *See* App. A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The contributory negligence defense is one of the most important and contested parts of any tort trial. As Washington's tort law has developed over the years, transitioning from a scheme where contributory negligence acted as a bar to plaintiffs recovery to a state that has adopted a pure comparative negligence scheme, unresolved issues remain that need to be

resolved by this Court. The fact pattern presented in this case is one such issue. It is of substantial public interest that this Court resolve this issue to prevent absurd results occurring in cases where one of the two parties must have been negligent. This Court is the only avenue through which a rule can be developed to stop this injustice from occurring.

1. **When negligence must reside with one of the parties, it is prejudicial error to erroneously instruct the jury on contributory negligence even when a finding of no negligence on the defendant is made.**

The root issue here is whether, in a situation where negligence must reside with either the defendant or plaintiff, it is prejudicial error to erroneously instruct a jury on contributory negligence when the jury returns a verdict of no negligence on the defendant. In a situation where negligence must reside with one of two parties, a finding of no negligence on one party means that the jury **must** have considered the negligence of the other party. This is the same analysis that this Court reached in a case—discussing an intersection collision between a favored driver and disfavored driver—that is on point. *Nelson v. Blake*, 72 Wn.2d 652, 653, 434 P.2d 595 (1967). ("On this conflicting testimony, the trial court submitted the issue of the favored driver's contributory negligence to the jury; **and the jury, by its verdict for the defendant, of necessity must have found the favored driver contributorily negligent**.").

However, case law since the *Nelson* decision has developed in such a way as to tie the hands of the lower courts when ruling on this issue. This limitation has created the absurd result we have in this case, that an error concerning contributory negligence is considered harmless error, even though the jury must have considered the plaintiff's negligence in determining defendant's negligence. The Commissioner's Ruling dismissed *Nelson* in a footnote because it was decided in 1967, when contributory negligence was a complete bar to recovery. App. B at 9. However, the logical conclusion reached in *Nelson* remains unaltered by the change in the negligence scheme.

Contributory negligence was a complete bar to recovery in Washington until April 1, 1974, when Washington adopted a comparative fault scheme. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 633 n.1., 244 P.3d 924 (2010). In 1981, the comparative fault scheme was codified in RCW 4.22.005. Contributory negligence went from a complete bar to plaintiff's recovery to a mitigating factor that reduced any damages in proportion to the percentage of negligence attributable to the party recovering. RCW 4.22.005. The transition from a scheme where contributory negligence is a complete bar to recovery to a comparative negligence scheme **only affects the determination of plaintiff's recovery**. This change in the negligence scheme does not change the

logical conclusion reached in *Nelson* that when negligence must reside with one of the parties and the jury finds one of the parties free of negligence, they must have considered the negligence of the other party in their determination of fault. *See Nelson*, 72 Wn.2d at 653.

An error is reversible if it is prejudicial and prejudice is shown if the error presumably affected the outcome of the trial. *See Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 688 P.2d 571 (1983). In finding the error in this case to be harmless, the commissioner based her ruling on the oft-used legal construct described in *Bertsch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982), that errors concerning contributory negligence are harmless when:

> The instruction and special verdict form used clearly informed the jury that the issue of contributory negligence was not to be considered until an initial conclusion as to [defendant's] negligence had been made. Because the jury found no negligence on [defendant's] part, they presumably never reached the issue of [plaintiff's] contributory negligence.

Bertsch, 97 Wn.2d at 92. *Bertsch* and its companion case *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532, *review denied*, 117 Wn.2d 1026 (1991), also cited by the lower court, are medical malpractice cases. A simple walk through of these cases reveals why this legal construct works in fact patterns that support no negligence on the part of any party involved such

as medical malpractice cases where a "bad result" can occur even when no negligence is present.

In *Bertsch*, the Court looked at a medical malpractice claim on the issue of informed consent, so if the defendant was found not negligent, there was consent and there is no necessary contributory negligence on the part of the plaintiff. *Bertsch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982). In *Ford*, the Court looked at a medical malpractice question on the issue of the potential failure to perform a follow up x-ray after surgery, so the finding of no negligence was in relation to the necessity of the x-ray and did not necessitate a finding of contributory negligence on the part of the plaintiff. *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532 (1991).

Perhaps alluding to the possibility that the holdings in these medical malpractice cases should be applied only to similar factual situations this Court applied *Bertsch* in *Hizey v. Carpenter* with the preface that it was specifically a medical malpractice case.[2] *Hizey v. Carpenter*, 119 Wn.2d 251, 270, 830 P.2d 646 (1992) (emphasis added). The Court could have simply stated that the rule governs all contributory negligence situations but instead specifically chose to point out that the holding comes from medical malpractice roots.

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[2] "**in a medical malpractice case**, we declined to consider the sufficiency of evidence of contributory negligence because the jury had found the physician was not negligent and, therefore, presumably never reached the issue of [the plaintiff's] contributory negligence."

These cases, as is common in the medical malpractice realm, involve situations where "bad outcomes" are possible with no negligence by any party and, therefore, a finding of no negligence on defendant does not necessitate a finding of negligence on the plaintiff. However, these cases do not stand for the proposition that an error in instructing on contributory negligence is harmless when negligence **must** reside with either the defendant or the plaintiff and no other proximate cause. Therefore, these medical malpractice cases should not control the current case and do not prevent this Court from creating an exception to provide a logical outcome in fact patterns such as the case at hand.

The Court of Appeals commissioner also relied on *Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369, 372, 207 P.3d 1282 (2009), *aff'd by*, 171 Wn.2d 88, 249 P.3d 607 (2011). In *Veit,* the plaintiff appealed a jury verdict for the defendant in a collision between a freight train and a motor vehicle at a railroad crossing. *Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369. On appeal to this Court, the plaintiff argued that the Court of Appeals erred in holding that any error concerning contributory negligence was harmless error. *Veit*, 171 Wn.2d at 116. In addressing the plaintiff's arguments regarding comparative negligence, this Court stated:

> *Washington is a pure comparative negligence jurisdiction, in which a defendant can be held liable in negligence even where the plaintiff bears the majority of the fault. RCW 4.22.005. Thus, [plaintiff] cannot attribute the jury's negative finding as to [defendant's] negligence to its finding that [plaintiff] was a poor driver who was not in compliance with applicable traffic safety laws.*

Veit, 171 Wn.2d at 117.

The second sentence of the above paragraph does not logically follow the first **unless** the jury is also considering other proximate causes of negligence or the possibility that the event could occur through no negligent act by any party. If negligence must be apportioned between only two parties, and some negligence must have occurred, it is beyond the realm of reasonableness to conclude that the jury's decision making process did not include a consideration of both parties negligence.

The lower court also relied on the analysis of the special verdict form in *Veit* to reach its holding, however, *Veit* is distinguished from the case at hand because it too involves a possible proximate cause independent from either the defendant or plaintiff. Initially, Veit brought suit against BNSF, the City of Bellingham, and the marital community of Michael Burks, the BNSF engineer who was operating the train. *Id.* at 94. Before trial, the City of Bellingham settled with plaintiff, and the Court dismissed Veit's claims against Mr. Burks, leaving BNSF as the sole defendant remaining in the suit. *Id.* at 95.

During trial, expert testimony was presented that "the stop bar was located dangerously close to the railroad tracks, in violation of industry standards, which require the stop bar to be placed 15 feet away from the nearest tracks." *Id.* at 97. An employee for the City of Bellingham's public works department testified that "placing the stop bar 15 feet from the nearest tracks, per industry standards would have been problematic from a visibility standpoint." *Id.* This testimony established that the placement of the stop bar by the City's public works department may have been an intervening proximate cause of the collision separate from any negligence on the part of BNSF, or contributory negligence on the part of the plaintiff. This essentially created an "empty chair defense" that the jury could have used to determine that BNSF was not negligent, while also not reaching the issue of whether the plaintiff was contributorily negligent.

In *Veit,* as with the case at hand, the special verdict form explicitly instructed the jury not to address contributory negligence unless it found that the defendant had been negligent. *Veit,* 171 Wn.2d at 117. "Because juries are presumed to follow the law," the court assumed that the jury did not consider the plaintiff's duty of care in determining whether the defendant was negligent. *Veit*, 171 Wn.2d at 117. *Veit* illustrates a situation where, due to the possibility of an intervening proximate cause, the special verdict form rule may be appropriate because the jury could

have determined the defendant was not negligent without reaching the issue of the plaintiff's negligence. Applying this rule to the current case, however, creates the absurd result of finding the jury did not consider the issue of plaintiff's negligence when determining how to apportion negligence between the defendant and plaintiff, when one of the two parties must have been negligent.

Thus, the reasoning upon which the commissioner relies, that the special verdict form instructed the jury not address the issue of the plaintiff's contributory negligence unless they found the defendant had been negligent, while appropriate in the factual circumstances presented in *Veit*, does not satisfy the issue presented in the instant case. *See* App. B at 9. Also, the special verdict form itself does not support the defendant's suggestion that contributory negligence was not reached by the jury. The converse is true however, in that the special verdict form prevents the jury from noting the only possible finding they had to come to in order to find no negligence on behalf of the respondent in this case. That the jury found Plaintiff to be contributorily negligent. *See* CP 84.

A finding of no negligence on the defendant is not a universal bar to finding prejudicial error regarding contributory negligence. In fact this Court has previously held that factual circumstances dictate the appropriateness of contributory negligence errors when no negligence was

found against the defendant. *See Gregoire v City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (Finding that the instruction on contributory negligence to the jury was reversible error in cases regarding prison suicides regardless of a verdict of no negligence against the defendant). This Court also found an exception to the legal construct created to support the special verdict form in *Bordynoski v. Berger*, a case involving a collision between a young bicyclist plaintiff and an automobile driven by the defendent. *Bordynoski v. Berger*, 97 Wn.2d 335, 644 P.2d 1173 (1982). Based on the evidence presented, the trial court found the plaintiff to be contributorily negligent as a matter of law. *Bordynoski*, 97 Wn.2d at 337. The jury returned a finding of no negligence on the defendant on the first question of the special verdict form which directed them to not answer any further questions. *Id.* at 342. On appeal to this Court, defendant argued that "because the jury was instructed to answer the questions in the order given, they necessarily did not consider the issue of plaintiff's fault when answering the first question regarding defendant's negligence." *Id.* This Court **denied** defendant's argument stating that:

> *This argument ignores, however, the persuasive strength of the trial judge's instructions to the jury. The jury was told as a matter of law that plaintiff was contributorily negligent and that this was a proximate cause of the accident. This instruction was given prior to the time the jury answered the question on the special verdict form.*

> *Therefore, it is not logical to conclude that the directed verdict did not affect the jury's deliberation.*

Id. (emphasis added).

This Court has made exceptions to the rule that an error in presenting contributory negligence is harmless if the jury returns a verdict of no negligence on the defendant when logic requires. The specific factual circumstances of the instant case is a situation that logically calls for an exception. Here, negligence must reside with either the defendant or the plaintiff because the duties of the parties were clearly defined and there was no other proximate cause of the collision. It logically follows that a jury finding of no negligence on the defendant necessarily means that there was a finding of contributory negligence on the plaintiff. Therefore, any errors with instructing the jury on contributory negligence are not harmless error.

2. The Court of Appeals erred in denying Plaintiff's proposed jury instruction 15 by dismissing it as a contributory negligence issue when the instruction is a separate issue on the duties of the parties.

The commissioner's ruling and the court of appeal's Order Denying Plaintiff's Motion to Modify gave short shrift to Plaintiff's assignment of error regarding Plaintiff's proposed jury instruction 15. The commissioner dismissed the issue without directly referencing it at the end of her ruling; "[t]herefore, Tinnon's assignments of errors, which all relate

to the issue of contributory negligence, are harmless." *See* App. B at 10. The Court of Appeal's Order Denying Plaintiff's Motion to Modify the commissioner's ruling allotted one sentence to the issue, stating that it believed the trial court did not abuse its discretion in declining to give instruction 15. *See* App. A. These rulings fail to provide meaningful consideration of Plaintiff's argument that proposed jury instruction 15 was necessary to properly instruct the jury on the duties of the parties.

A trial judge's decision not to issue a jury instruction is reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). When the Washington Supreme Court reviews jury instructions, it looks to the jury instructions as a whole, with the primary purpose of allowing both parties to fairly state their case. *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613. 616-18, 707 P.2d 685 (1985)[3].

The jury in this case **did not** have the benefit of a full understanding of the relevant duties of the favored driver. The complete duties of the favored and disfavored drivers must be presented to the jury in order for the jury to make an accurate determination of a breach of those duties. *Poston v. Mathers*, 77 Wn.2d 329, 333-34, 462 P.2d 222 (1969). Because speed as contributory negligence in an auto accident places very specific duties on the driver, those duties must be defined

[3] (Finding that the trial court did not abuse its discretion because both parties were able to fairly state their theories of the case).

clearly for the jury and include reasonable reaction time. *See Id.* at 336[4];, 170 Wn. App. at 506.

> *The problem posed by the failure to instruct on respondent's duty is not difficult to describe. Neither negligence nor contributory negligence exists in the abstract. If the jury was not properly instructed and was unaware of the duty which respondent breached, it was unable to determine rationally if appellant's breach of his related duty contributed to the cause of the accident.*

Poston, 77 Wn.2d at 333-34.

In this case, the jury was not instructed on the reasonable point of notice, which is the precise point at which Ms. Tinnon had a duty to react to avoid the collision. "The point where a favored driver realizes a disfavored driver will not yield the right-of-way is the point of notice." *Bowers v. Marzano*, 170 Wn. App. 498, 506, 290 P.2d 134 (2012)[5]. "From the point of notice, the favored driver enjoys a reasonable reaction time to avoid a collision." *Id.* Until that critical point is reached, the duty rests on the disfavored driver to avoid the collision. *See Poston*, 77 Wn.2d at 335. Therefore, it logically flows that the defendant had a duty to avoid the collision up until Ms. Tinnon's reasonable point of notice, yet **the jury was never properly instructed on when the defendant's duty actually ceased**. The jury was not instructed on Ms. Tinnon's point of notice,

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[4] (Finding reversible error in an instruction on contributory negligence that does not include reasonable reaction time).

[5] This case was originally unpublished but a later motion to publish was granted. *Bowers*, 170 Wn. App. at 513.

therefore, the jury did not have enough knowledge of the duties of the respective parties to make a valid determination of defendant's potential negligence[6]. *See Bowers*, at 170 Wn. App. at 506. Ms. Tinnon proposed the following instruction (in relevant part):

> ***The favored driver is, however, entitled to reasonable reaction time after it becomes apparent, in the exercise of due care, that the disfavored driver will not yield the right of way.*** *It is not sufficient to attempt to prove comparative negligence on the part of the favored driver by means of split-second computations of time, speed and/or distance.*

CP 31, Plaintiff's Proposed Instruction 15 (emphasis added).

During colloquy regarding the jury instructions, counsel for Ms. Tinnon explained that the proposed instructions fully informed the jury of the duties of the respective parties and was cut off by the trial judge when attempting to explain reasonable reaction time.

> And that apparently informs the jury of the duties of the respective parties, and it allows me to argue my theory of the case.

RP VII, p. 12, ll. 12-14.

> And I would just like to note, Your Honor, the issues down below, the favored driver is entitled to reasonable reaction time --

RP VII, p. 13, ll. 8-10.

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[6] (To show proximate cause, a [party claiming negligence] must produce evidence from which the trier of fact can infer the favored driver's approximate point of notice). *Bowers,* at 506.

While some of the trial court's instructions did explain that any negligence of the plaintiff must be the proximate cause of the collision, the court did not instruct on the method of determining proximate cause that is specific to this type of contributory negligence claim. CP 62, 65-66. This left open to the jury that speed alone is contributory negligence. This was further aggravated when the trial court added a duty not to speed instruction without giving the counter balancing point of notice instruction. CP 72.

The jury instructions, considered as a whole, allowed the jury to find no negligence on behalf of the bus driver on possibly the issue of speed alone. The jury was not given all of the relevant duties of the favored driver, and thus, Ms. Tinnon could not effectively argue her theory of the case. Ms. Tinnon was therefore substantially prejudiced by this error.

Neither the commissioner nor the Court of Appeals undertook a substantial analysis of this issue. There is substantial public interest in having issues on appeal determined on their merits and with meaningful consideration. Therefore, the issue of whether it was error for the trial court to exclude Plaintiff's proposed jury instruction 15 should be determined by this Court pursuant to RAP 13.4(b)(4).

F. CONCLUSION

Logic requires that an exception be made in the factual situation presented to the rule that an error in presenting contributory negligence is harmless if the jury returns a verdict of no negligence on the defendant. Here, negligence must reside with one of the parties, therefore error in presenting contributory negligence prejudiced the plaintiff and was not harmless error. There is a substantial public interest in this Court resolving this issue to prevent absurd results occurring in cases where one of the two parties must have been negligent. Therefore the issue of whether it was prejudicial error for the trial court to allow the defendant to argue contributory negligence without substantial evidence should be determined by this court pursuant to RAP 13.4(b)(4).

Additionally, petitioner's argument regarding plaintiff's proposed jury instruction 15 is an argument of relevant duties of the parties, not simple contributory negligence. Neither the commissioner nor the Court of Appeals undertook a substantial analysis of this issue. There is substantial public interest in having issues on appeal resolved on their merits and with meaningful consideration. Therefore the issue of whether it was error for the trial court to exclude Plaintiff's proposed jury instruction 15 should be determined by this court pursuant to RAP 13.4(b)(4).

Dated this 8th day of April, 2015.

Respectfully submitted,

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APPENDIX

A. Court of Appeals of the State of Washington, Division Two, Order Denying Motion to Modify Commissioner's Ruling. Filed March 12, 2015.

B. Court of Appeals of the State of Washington, Division Two, Commissioner's Ruling to Grant Motion to Affirm. Filed December 17, 2015.

DECLARATION OF SERVICE

I, Marilyn Zimmerman, hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

That on April 8, 2015, I filed and served true and correct copies of the PETITION FOR REVIEW as follows:

Via legal messenger to:

H. Andrew Saller (copy)
Vandeberg Johnson Gandara
1201 Pacific Avenue, Suite 1900
Tacoma, Washington 98401

and via legal messenger to:

Court of Appeals, Div II (original and one copy, plus filing fee)
950 Broadway, Suite 300
Tacoma, Washington 98402

Forwarding to:
Supreme Court of the State of Washington Temple of Justice
415 12th Ave SW
Olympia, WA

DATED this 8th day of April, 2015, at Puyallup, Washington.

JACOBS & JACOBS

M. Zimmerman

Marilyn Zimmerman
Paralegal

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEANN L. TINNON,

Appellant,

v.

WHITE RIVER SCHOOL DISTRICT,

Respondent.

No. 45934-5-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated December 17, 2014, in the above-entitled matter. Following consideration, the court denies the motion. However, the court clarifies that we review for abuse of discretion the trial court's decision not to give instruction 15, and that the trial court did not abuse its discretion in declining to give instruction 15 because it allowed Appellant to fully argue about whether and when each party's duty arose. Accordingly, it is

SO ORDERED.

DATED this 12th day of March, 2015.

PANEL: Jj. Worswick, Maxa, Melnick

FOR THE COURT:

Worswick J

PRESIDING JUDGE

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEANN L. TINNON,

Appellant,

v.

WHITE RIVER SCHOOL DISTRICT,

Respondent.

No. 45934-5-II

RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Plaintiff Deann Tinnon appeals the trial court's February 14, 2014 Judgment on Verdict entered after a jury found that Defendant White River School District (White River) was not negligent in a motor vehicle collision involving Tinnon. She asserts that the trial court erred in: (1) denying her motion for a judgment as a matter of law and instructing the jury on the issue of contributory negligence; and (2) failing to give her proposed jury instruction regarding contributory negligence, reasonable reaction time, and point of reference in motor vehicle collisions. White River filed a motion on the merits to affirm the trial court's judgment under RAP 18.14,[1] arguing that any errors at trial regarding contributory negligence were harmless because the jury reached a verdict that White

[1] White River initially asked this court to dismiss Tinnon's appeal as frivolous under RAP 18.14 and award it attorney fees. On September 5, 2014, a commissioner of this court denied White River's motion to dismiss the appeal and ordered that its motion would be treated as a motion on the merits to affirm under RAP 18.14.

River was not negligent. Concluding that Tinnon's appeal is clearly controlled by settled law under RAP 18.14(e)(1), this court grants White River's motion on the merits to affirm.

FACTS

On May 14, 2008, Tinnon was driving southbound on A.P. Tubbs Road East in Buckley, Washington when she collided with a White River school bus turning left at the intersection of A.P. Tubbs Road and 157th Street East. Just before this intersection, there are sharp "S" curves on A.P. Tubbs Road. Report of Proceedings (RP) Jan. 21, 2014 at 16. Tinnon had come around these curves just before colliding with the school bus.

The bus driver, David Vawter, was on his usual route picking up school children on 157th Street. After he picked up the children, Vawter approached the intersection of 157th Street and A.P. Tubbs Road. He came to a complete stop at the intersection and pulled up to a point where he could see traffic from either direction. Because there is a blind curve to the left of this intersection, Vawter was always cautious when starting to make the turn onto A.P. Tubbs Road.

Vawter looked for traffic as far as he could see in both directions and, seeing no traffic approaching, began making a left turn. As Vawter was straightening out the school bus on A.P. Tubbs Road, he saw Tinnon's vehicle. Vawter attempted to accelerate the school bus to avoid a collision, but Tinnon's vehicle struck the bus just in front of the buses rear wheel.

Tinnon filed a complaint against White River on May 13, 2011, alleging that Vawter was negligent in failing to yield the right of way to her vehicle and had proximately caused the collision and her injuries. She also alleged that White River was liable for Vawter's

negligence under the doctrine of *respondeat superior*. White River denied that Vawter failed to yield the right of way to Tinnon's vehicle or that the proximate cause of the collision and Tinnon's injuries was the negligence of Vawter. As an affirmative defense, it alleged that Tinnon's injuries and damages, if any, were proximately caused or contributed to by Tinnon's own comparative fault.

During trial, Tinnon moved for a judgment as a matter of law on the issues of White River's negligence and her contributory negligence. She argued that White River was negligent because Vawter had failed to yield to oncoming traffic as required by statute. Regarding her contributory negligence, Tinnon argued that she was the favored driver and there was no evidence that "she was doing something that she certainly shouldn't have been doing," such as speeding. RP Jan. 28, 2014 at 5. She also argued that even if she was speeding, White River had not presented any evidence of when a reasonable person would know that the bus was not going to yield or what a reasonable reaction time would have been for the favored driver to stop.

In response, White River argued that a jury could reasonably conclude Vawter was not negligent based on the evidence that there were no other vehicles approaching the intersection when he began the left turn onto A.P. Tubbs Road. It also asserted that a jury could reasonably conclude that Vawter did not see Tinnon's vehicle when he began the turn because Tinnon had not yet rounded the blind corner. Regarding contributory negligence, White River argued that the jury had heard evidence about reaction time, velocity, and the distance of travel at various speeds, from which the jury could conclude that Tinnon was traveling too fast for the conditions and that her speed or failure to timely brake was a contributing factor to the collision.

In its oral ruling, the trial court noted that a driver's violation of a statute, such as failing to yield at an intersection, is not negligence *per se* but rather only evidence of negligence. The court stated that it was therefore a jury question as to whether Vawter had started from the intersection too early and pulled in front of Tinnon's vehicle or not. It also concluded that given the evidence regarding speed and distance, a jury could conclude that Tinnon was comparatively responsible for the collision. As such, it denied Tinnon's motion for a judgment as a matter of law.

Tinnon also proposed a jury instruction regarding contributory negligence and the duties of a favored driver. She asserted that a favored driver is entitled to a reasonable reaction time after realizing a disfavored driver will not yield the right of way, which went to the theory of her case. The trial court ruled that Tinnon's proposed instruction was a "highlight instruction" and that Tinnon could argue the theory of her case from other jury instructions. RP Jan. 29, 2014 at 11. As such, it denied her proposed jury instruction.

After the close of evidence, the trial court instructed the jury on the issues of negligence,[2] proximate causation, and contributory negligence. The jury also received specific instructions on a driver's duties. The trial court gave the jury a special verdict form that included six specific questions regarding the defendant's negligence, proximate causation, damages, the plaintiff's negligence, and the percentage of each parties' fault. Question 1 on the special verdict form asked: "Was the defendant negligent?" Clerk's

[2] The instructions provided that negligence was the failure to exercise ordinary care and that ordinary care meant the care a reasonably careful person would exercise under the same or similar circumstances. The jury also received an instruction that a violation of a statute was not necessarily negligence but could be considered as evidence in determining negligence.

Papers (CP) at 84 (boldface omitted). The directions provided that if the jury answered "no" to Question 1, it was not to answer the remaining questions. CP at 84.

On January 29, 2014, the jury returned a verdict that White River was not negligent. In accordance with the trial court's directions, the jury did not answer any further questions, including those pertaining to whether Tinnon was contributorily negligent. On February 14, 2014, the trial court entered a Judgment on Verdict in favor of White River. Tinnon appeals.

ANALYSIS

Tinnon argues that this court should reverse and remand the case for a new trial because the trial court erred in allowing White River to introduce the issue of contributory negligence to the jury without substantial evidence to support such theory. She asserts that there was a "mere scintilla" of evidence that she was speeding and that, even if she was speeding, there was not substantial evidence that this was a proximate cause of the collision. Br. of Appellant at 7.

In the alternative, Tinnon argues that, even if the trial court was correct in giving the jury a contributory negligence instruction, it should have included her proposed instruction regarding favored drivers. She asserts that "[b]ecause speed as contributory negligence in auto accident[s] places very specific duties on the driver, those duties must be defined clearly for the jury and include reasonable reaction time." Br. of Appellant at 13. Tinnon also argues that the trial court did not instruct the jury on how proximate causation should be determined in a contributory negligence claim, allowing the jury to consider her speed alone.

In response, White River argues that this court should affirm the trial court's judgment on a motion on the merits under RAP 18.14(e)(1), which provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law . . . .

Citing *Bertsch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982), and *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532, *review denied*, 117 Wn.2d 1026 (1991), White River argues that it is well settled law that any error regarding contributory negligence is harmless where the jury finds the defendant was not negligent and does not reach the issue of contributory negligence. White River asserts that because such scenario happened here, it is immaterial that the trial court instructed the jury on the issue of contributory negligence or failed to give Tinnon's proposed jury instruction.

In *Bertsch*, 97 Wn.2d 91-92, the plaintiff appealed a jury verdict for the defendant in a medical malpractice case and argued that the trial court erred in giving a contributory negligence instruction to the jury where there was no evidence from which the jury could reasonably determine that the plaintiff contributed to her own injuries. The Washington State Supreme Court held that even if the trial court erred in giving the contributory negligence instruction, such error was harmless because:

> The jury found no negligence on [defendant's] part and, therefore, never reached the issue of [plaintiff's] contributory negligence. The instruction and special verdict form used clearly informed the jury that the issue of contributory negligence was not to be considered until an initial conclusion as to [defendant's] negligence had been made. Because the jury found no negligence on [defendant's] part, they presumably never reached the issue of [plaintiff's] contributory negligence.

Bertsch, 97 Wn.2d 92.

Similarly, in *Ford v. Chaplin*, 61 Wn. App. at 901, the plaintiff appealed a jury verdict for the defendant in a medical malpractice case and argued that the trial court erred in giving a contributory negligence instruction. Division One of the Washington State Court of Appeals had "serious doubts concerning the sufficiency of the evidence to support a contributory negligence instruction." *Ford*, 61 Wn. App. at 901. Nevertheless, it held that any error by the trial court in giving the contributory negligence instruction was harmless because the jury found that the defendant was not negligent and never reached the issue of contributory negligence. *Ford*, 61 Wn. App. at 901. It stated:

> [T]he special verdict form set out a series of four questions for the jury to consider. The first question asked if the defendants were negligent. The verdict form clearly stated that if the answer was "no", the jury should not go on to the next three questions dealing with damages, negligence of the plaintiff, and percentage of contributory negligence. As in *Bertsch*, the jury here never needed to reach the issue of contributory negligence and hence any error would be harmless.

Ford, 61 Wn. App. at 901.

In the instant case, the special verdict form set forth six questions for the jury to consider. The first question asked whether White River was negligent. The form instructed the jury that if the answer to this question was "no," it was not to answer the remaining questions. The jury here answered "no" to the first question and never reached the latter question as to whether Tinnon was contributorily negligent. Thus, under the well settled law of *Bertsch* and *Ford*, Tinnon cannot show that she was prejudiced by the trial court's instructions on the issue of contributory negligence.

Tinnon argues that *Bertsch* and *Ford* are irrelevant because they involve medical malpractice, as opposed to a motor vehicle collision. She asserts that in a favored driver/disfavored driver case, someone is necessarily at fault and that "'the jury, by its

verdict for the defendant, of necessity must have found the favored driver contributorily negligent.'" Appellant's Resp. to Respondent's Mot. on Merits to Affirm at 3 (boldface omitted) (quoting *Nelson v. Blake*, 72 Wn.2d 652, 653, 434 P.2d 595 (1967)). Consequently, Tinnon argues that the special verdict form does not support White River's suggestion that the issue of contributory negligence was not considered by the jury.

Tinnon's argument that the jury must have reached the issue of contributory negligence because the jury found for White River fails, as this too is clearly controlled by settled law. In *Viet v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369, 372, 207 P.3d 1282 (2009), *aff'd by*, 171 Wn.2d 88, 249 P.3d 607 (2011), the plaintiff appealed a jury verdict for the defendant in a collision case between a freight train and a motor vehicle at a railroad crossing. Division One of the Washington State Court of Appeals declined to address the plaintiff's assignments of error concerning contributory negligence because the jury found for the defendant and did not reach the question of the plaintiff's negligence.[3] *Viet*, 150 Wn. App. at ¶ 69 n.10. On appeal to our Supreme Court, the plaintiff argued that the court of appeals erred in failing to reach the issue. *Viet*, 171 Wn.2d at 116.

In addressing the plaintiff's arguments regarding contributory negligence, our Supreme Court stated:

> Washington is a pure comparative negligence jurisdiction, in which a defendant can be held liable in negligence even where the plaintiff bears

[3] This court notes that Division One's opinion in *Viet* is a published in part decision. This court merely discusses the unpublished portion of the opinion to provide a factual context for our Supreme Court's decision and is not relying on Division One's unpublished portion of the opinion for precedential value.

> the majority of the fault. RCW 4.22.005.[4] Thus, [plaintiff] cannot attribute the jury's negative finding as to [defendant's] negligence to its finding that [plaintiff] was a poor driver who was not in compliance with applicable traffic safety laws.

Viet, 171 Wn.2d at 117. The court went on to state that the special form explicitly instructed the jury not to address contributory negligence unless it found that the defendant had been negligent. *Viet*, 171 Wn.2d at 117. "Because juries are presumed to follow the law," the court assumed that the jury did not consider the plaintiff's duty of care in determining whether the defendant was negligent. *Viet*, 171 Wn.2d at 117. Thus, it agreed with the court of appeals that any alleged trial error involving the plaintiff's duty of care was immaterial because the jury returned a negative finding on the defendant's negligence. *Viet*, 171 Wn.2d at 117. *See also Hizey v. Carpenter*, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992) (holding that error related solely to issue of damages was harmless where jury was instructed not to reach the issue if it found defendant was not negligent because "[t]he jury is presumed to follow the court's instructions").

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[4] RCW 4.22.005 (enacted by the legislature in 1981) provides:

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Tinnon's reliance on *Nelson v. Blake* is therefore misplaced because that case was decided in 1967, when any negligence by the plaintiff was a complete bar to recovery. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 633 n.1, 244 P.3d 924 (2010) ("Before April 1, 1974 contributory negligence was a complete bar to plaintiff's recovery in Washington if the damage suffered was considered partly the plaintiff's fault."). *Nelson* was also decided when a driver's violation of a statute was deemed negligence *per se*. *See Portland-Seattle Auto Freight v. Jones*, 15 Wn.2d 603, 607, 131 P.2d 736 (1942). In 1986, the legislature enacted RCW 5.40.050, which provides that a driver's breach of a duty imposed by statute, ordinance or administrative rule may be considered by the trier-of-fact as evidence of negligence but should not be considered negligence *per se*.

Here, the special verdict form instructed the jury not to reach the issue of Tinnon's contributory negligence if it found that White River was not negligent. Because the jury found White River was not negligent and it is presumed that the jury followed the instructions, this court assumes that the jury did not reach the issue of contributory negligence. Therefore, Tinnon's assignments of errors, which all relate to the issue of contributory negligence, are harmless.

CONLUSION

White River demonstrates that Tinnon's assignments of error are clearly controlled by settled law under RAP 18.14(a). Accordingly, it is hereby

ORDERED that White River's motion on the merits to affirm is granted.

DATED this 17th day of December, 2014.

Aurora R. Bearse
Court Commissioner

cc: G. Parker Reich
H. Andrew Saller, Jr.
Hon. Stanley J. Rumbaugh