

No. 45697 – 4 – II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**CYNTHIA BUTLER,**

**Appellant,**

**v.**

**RANDALL FROST,**

**Respondent.**

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**APPEAL FROM THE SUPERIOR COURT  
THE HONORABLE ROBERT LEWIS**

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**RESPONDENT'S BRIEF**

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## **I. INTRODUCTION**

This appeal arises from the jury verdict and subsequent trial court judgment resolving Appellant Cynthia Butler's personal injury lawsuit filed against Respondent Randall Frost. The personal injury action arose out of a disputed liability automobile accident that occurred on November 18, 2011 in Clark County, Washington. Jury trial in this case commenced on October 21, 2013 before the Honorable Robert A. Lewis in the Clark County Superior Court. After being presented with evidence over 3 and ½ days, the jury deliberated the cause and returned a verdict for Mr. Frost, answering "No" to the first question of the Special Verdict Form, which read "Was the defendant negligent on November 18, 2011." Due to the jury's response to question number 1 of the Special Verdict Form, concluding that Respondent Frost was not negligent on the date of the accident, the jury never reached the questions of Appellant Butler's damages or her contributory negligence.

Appellant's Appeal of the trial court's judgment seeks to impermissibly unwind the jury's deliberated decision, despite the substantial evidence supporting it.

## **II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. The giving of jury instruction No. 17 does not warrant vacating the jury's verdict and the trial court's judgment.

2. The trial court did not err in refusing to grant Appellant's motion for a new trial based on lack of evidence to justify the verdict because there was substantial evidence to support the jury's finding that Mr. Frost was not negligent.
3. The trial court did not err in refusing to grant Appellant's motion for a new trial based upon instructional error objected to at trial because no relevant objection was preserved, the disputed instruction was proper, and in any event, any alleged error was harmless as the jury never reached the question of Appellant's contributory negligence.

### **III. RESTATEMENT OF THE CASE**

After receiving an unfavorable jury verdict and subsequent adverse judgment in her personal injury action against Respondent, Appellant seeks to unwind the jury's decision in order to get another chance to try her case on the grounds that: (1) Jury Instruction No. 17 was improper; and (2) there was insufficient evidence to support the jury's verdict that Respondent was not negligent. Respondent Frost addresses those arguments in turn below, and for the following reasons, Appellant's appeal is without merit and the trial court's judgment based on the jury's verdict should not be disturbed.

From the very outset of this personal injury lawsuit, Respondent Frost's negligence has been contested. (See CP 6). At trial, Appellant

testified that she moved from the center lane to the left lane of I-205 southbound where Respondent had been traveling, allegedly 2-3 car lengths ahead of his vehicle (VRP, Vol. I, pg. 24:11 – pg. 26:6). She then testified that after she completed her lane change she started to slow down because she noticed brake lights ahead of her, causing her to believe “[t]hat something was up.” (VRP, Vol. I, pg. 31:24 – pg. 32:8). Appellant further described the method she used to slow was not to apply her brake, but simply release her foot from the gas without physically lifting her foot off the gas (VRP, Vol. I, pg. 161:19 – 162:20) and that she employed that slowing maneuver for up to 15 seconds (VRP, Vol. I, pg. 165:6 – 165:19), essentially coasting until the Respondent ran into the back of her vehicle.

By contrast, and in direct conflict with the Appellant’s version of events, at trial Respondent testified that:

“...At that point I saw Ms. Butler’s vehicle cut me off and it went right in front of me and I was very uncomfortable with the distance that were traveling – the distance in between the two of us.

At that point I – I believe I turned my head to look to see what was around me. I immediately started to slow. The next thing I know I saw lights – taillights in front of me – directly and – and then my airbags deployed and a poof of gas I assume from the airbags was all around me.”

(VRP, Vol. II, pg. 206:20 – 207:14).

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Respondent further testified that although he could not estimate the distance between the vehicles when the Appellant changed lanes, it was:

“... close enough that I was uncomfortable with the distance that was – the cushion – you know – I normally like to leave a certain amount of cushion between me and the car in front of me.

I was very uncomfortable with that which – which I guess triggered me slowing down at that time.”

(VRP, Vol. II, pg. 210:18 - 211:1).

Respondent also testified that as a result of Appellant’s cutting him off, he quickly looked to his left and then back to the Appellant’s vehicle and during that brief period the Appellant’s vehicle had not only gotten closer, but that “it was approaching me fast”. (VRP, Vol. II, pg. 211:2 – 212:6).

With regard to whether or not the Appellant applied her brakes after changing lanes, Respondent provided the following trial testimony:

Q: Do you think that the Plaintiff did brake?

A: I – yeah, I think she did brake.

Q: Why?

A: Well I – I just don’t see how I could have approached her as fast as I did. I was not accelerating. I was not accelerating so I don’t see how other than her braking I could have approached her that fast.

Q: In fact you were decelerating?

A: Yes.

(VRP, Vol. II, pg. 213:1 – 213:10).

Regarding whether or not Respondent saw brake lights, Respondent testified at trial that he was unable to testify for certain whether or not he saw brake lights prior to impact. Specifically, his testimony was:

Q: Do you recall ever seeing any brake lights as you sit here today?

A: I can't sit here today and say I specifically saw her brake lights. That I saw lights. They were bright and they were red.

Q: You understand you're under oath?

A: Yeah absolutely.

Q: And certainly you can't testify to something that you can't say – you understand that?

A: Absolutely.

(VRP, Vol. II, pg. 212:14 – 212:23) and:

Q: So you did brake when she moved over to the right?

A: Yes.

Q: Before you even noticed she was slowing down or anything?

A: It happened so fast. There was not time to tell you whether or not I saw brakes or if she – “

Q: You can't tell us that she signaled? You can't tell us that you saw brake lights?

A: I can't tell you for sure.

(VRP, Vol. II, pg. 248:21 – 249:12, quoting deposition transcript)

Regarding being cut off by the Appellant, Respondent testified at trial “Q: Is there any question in your mind that you were cut off that day?  
A: No question at all.” (VRP, Vol. II, pg. 222:3 – 222-5), and:

Q: Is there anything you think you could have done to avoid this impact?

A: I don’t think there was anything I could have done to avoid it, no.

Q: Why not?

A: The distance just was not – there was not enough distance or time.

(VRP, Vol. II, pg. 222:15 – 222:21)

This testimony was completely consistent with the Respondent’s prior testimony at his deposition as read into evidence at trial:

Q: When she merged in front of you how long did you follow her?

A: It was – there was no following. It was instantaneous.

Q: What was? Tell me.

A: The impact

Q: Tell me what happened.

A: She pulled in front of me, merged in front of me. I hit the rear of her car. The airbags deployed.

(VRP, Vol. II, pg. 246:3 – 246:6, quoting prior deposition)

At the conclusion of the evidence, the trial court instructed the jury on, among other things, negligence (Instruction No. 8, VRP, Vol. III, pg. 371:13 – 18), contributory negligence (Instructions No. 9 and 10, VRP, Vol. III, pg. 371:19 – 372:5), the following car doctrine (Instruction 16, VRP, Vol. III, pg. 373:2 – 18), the duties of a driver changing lanes (Instruction 17, VRP, Vol. III, pg. 373:19 – 374:5). Although Appellant’s counsel objected to the trial court’s giving of the Instruction 17, Appellant Counsel’s objection was limited to the second sentence of the instruction in general, not the alleged failure to define the instruction with regard to the phrase “appropriate signal” as she now argues should have been more clearly defined. (VRP, Vol. II, pgs. 332:22 – 334:8, See also VRP, Vol. II, pgs. 360:24 – 361:14.)

#### **IV. ARGUMENT IN RESPONSE TO APPELLANT’S ASSIGNMENTS OF ERROR**

1. The Giving of Jury Instruction No. 17 Does Not Warrant Vacating the Jury’s Verdict and the Trial Court’s Judgment

Appellant contends that the Court committed reversible error by giving Jury Instruction No. 17 to the jury. Instruction No. 17, provided:

“A statute provides that no person shall move right or left upon a roadway unless and until such movement can be made with reasonable safety. That statute also provides that no person shall suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any

vehicle immediately to the rear when there is opportunity to give such signal.” (Underlining added)

The language of the second sentence of the instruction is taken from RCW 46.61.305(3), which provides:

“No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.”

Appellant argues for the first time on appeal, that the trial court’s failure to provide a definition for the phrase “appropriate signal” in the second sentence of the instruction erroneously stated the law, was misleading, and was somehow contrary to the evidence presented at trial. For the following reasons, Appellant’s arguments fail.

a. Appellant Did Not Object to the Lack of Definition of the Term “Appropriate Signal.”

Appellant argues that Instruction 17 failed to inform the jury what an “appropriate signal” is and left the jury to speculate as to what an appropriate signal would be. Appellant contends that RCW 46.61.310(1) provides the necessary guidance for such a signal when it states that “[a]ny stop . . . signal when required herein shall be given either by means of the hand and arm or by signal lamps . . .” Appellant argues that Instruction

17, as given by the trial court, was improper because it did not define what an “appropriate signal” would be for Appellant’s compliance with the statute.

Although Appellant did raise an objection to Instruction 17 during trial, she did not object on the grounds upon which she now relies on appeal. CR 59(a)(8) provides for a new trial for “[e]rror in law occurring at the trial and objected to at the time by the party making the application.” In addition, CR 51(f) requires a party objecting to a jury instruction to “state distinctly the matter to which he objects and the grounds of his objection.” The purpose of the distinctly stated requirement is so that the objection will allow the trial court to remedy any potential error before instructing the jury, thus avoiding a retrial. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 134, 606 P.2d 1214 (1980); *See also; Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)(“The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.”). Indeed, instructions to which no exceptions are taken become the law of the case. *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744,769, 260P.2d 967 (2011). That rule applies even where the instruction is erroneous. Respondent disputes that the instruction as given was erroneous. However, even assuming *arguendo* that it was, it became the law of the case due to Appellant’s failure to state “distinctly” at trial court her objection so that the trial court could remedy any potential error.

Here, Appellant simply never apprised the trial court that she believed a definition of the phrase “appropriate signal” should be added to Instruction No. 17. Accordingly, it became the law of the case and she cannot now argue it in support of her appeal. *State v. Tamalini*, 134 Wn.2d 725, 736, 953 P.2d 450 (1998).

A jury verdict may not simply be vacated on the basis of a jury instruction given by the trial court to which neither party objected. Here, Appellant did not object to the insufficiency of the instruction in regard to the meaning of “appropriate signal” as she now argues on appeal. Accordingly, instruction 17 in this regard is unassailable at this stage.

b. Any Error Relating to Instruction No. 17 Was Harmless As It was Irrelevant to the Jury’s Verdict

Generally, prejudice is required for a trial court to grant a motion for a new trial. *Collings v. City First Mortg. Services, LLC*, 175 Wn. App. 589, 601, 308 P.3d 692 (2013); *see also Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969)(reversing order of new trial and stating the “existence of a mere possibility or remote possibility of prejudice is not enough”). Here, even assuming *arguendo* that the instruction was incorrect as given, Appellant shows no prejudice sufficient to vacate the trial court’s judgment.

At the conclusion of its deliberations, the jury made a single finding: Respondent was not negligent (CP 46B, See also VRP, Vol. III, pgs. 450:11 – 451:8). Instruction 17 had no relevance to the issue of

Respondent's negligence. In fact, it had no relevance to any conduct of Respondent Frost whatsoever. Where a person stops or suddenly decreases her vehicle's speed, the disputed instruction instructs the jury with regard to that person's (here, Appellant) duty to the driver of the vehicle to the immediate rear (here, Respondent). The answer to the question of whether the Appellant breached any statutory duty simply has no bearing upon whether Respondent was negligent.

In fact, Appellant does not even expressly state how she believes she was prejudiced by any alleged error in Instruction 17. Instead, she alludes to this issue by simply asserting that "[t]he instruction permitted the jury to find Respondent 0% negligent and Appellant 100% negligent because it emphasized a theory of events utterly lacking in facts." (Brief of Appellant, pg. 24). That statement, however, is a logical fallacy. As evidenced by the verdict entered by the jury, it made no finding regarding Appellant's negligence, and a determination that Respondent had no negligence leads no reasonable inference whatsoever regarding whether Appellant herself was negligent, much less lead to any inference by the jury that she was 100% negligent.

The simple fact is the jury made no determination in its verdict as to Appellant's alleged contributory negligence, instead the jury made a determination of Respondent's negligence only, and never got to the issue of the contributory negligence of the Appellant. Indeed, whether any evaluation of the Appellant's contributory negligence on the part of the

jury during its deliberations is purely speculative as the jury provided no determination of the issue of Appellant's negligence, nor would it have even been proper for it to have done so given its determination that the Respondent was not negligent. Pure speculation is not grounds for attempting to unwind a jury's determination of negligence in favor of the Respondent, just because it did not find the way Appellant wanted it to. *Spratt v. Davidson, supra*.

Furthermore, Appellant's argument impermissibly asks this Court to believe that the jury simply failed to follow another express instruction given to it by the trial court. The jury's special verdict form read: "QUESTION NO. 1: Was the defendant negligent? ANSWER: No." The verdict form went on to state: "If you answered "no" to Question 1, sign the verdict form." (CP 46B). In this case, the jury answered "no," and the presiding juror signed the form, and returned it as instructed. The question of Appellant's negligence does not appear on the verdict form until Question No. 4, which states: "Was the plaintiff negligent on November 18, 2011?" The answer to that question was left blank, in accordance with the court's instruction to the jury to sign the form if it answered "no" to the first question (VRP, Vol. III, pgs. 450:11 – 451:8).

The argument that the jurors might have considered Appellant's negligence to negate Respondent's negligence requires the Court improperly to believe that the jury failed to follow the court's instruction. A jury is presumed to follow the court's instructions. *Tincani v. Inland*

*Empire Zoological Soc'y*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994). Mere speculation that a jury did not follow the instructions given to it by the trial court does not support the grant of a new trial as Appellant urges. *Crane & Crane, Inc. v. C & D Electric, Inc.*, 37 Wn.App. 560, 570, 683 P.2d 1103 (1984).

The fact that the jury never reached the question of Appellant's negligence is evident from the verdict form and the presumption this Court must apply that the jury followed the trial court's instructions. Because the jury did not consider whether Appellant was negligent, it never applied the obligations described in Instruction 17, and hence, any error regarding its giving is harmless.

c. Appellant Incorrectly Asserts that Activation of Appellant's Brake Lights by Braking Meant That She Provided an Appropriate Signal.

Appellant incorrectly argues that the mere act of applying her brakes, and thus activating her brake lights, was sufficient to comply with the statutory requirement to give an "appropriate signal." She contends essentially that if the jurors had been informed of the full intent of the statute, they would have learned that the action of braking (which, was disputed at trial) would have complied with the statute. She further asserts With regard to an "appropriate signal", Appellant argues that "braking is in fact such an appropriate signal."

Appellant is mistaken. Merely braking is not an “appropriate signal” to a following car of suddenly decreasing speed. The “appropriate signal” of which the statute and instruction here speak is an “advance warning signal.” *James v. Niebuhr*, 63 Wn.2d 800, 801, 389 P.2d 287 (1964). In *James*, the Washington Supreme Court applied RCW 46.60.120(1) and (4), which contained language that was identical in all pertinent aspects to the language of the statutes that Appellant relies upon here, RCW 46.31.310(1) and RCW 46.61.305(3). The *James* court rejected the same position that Appellant asserts here, *i.e.*, there was no evidence that her brake lights were not functioning and (if she applied her brakes at all, which she denies) she complied with the statutory requirement to give an “appropriate signal” when she applied her brakes.

The court reversed the trial court, holding:

“This statute contemplates that the driver must do something more than merely apply his brakes in the act of stopping. It requires that the driver give some notice of his intention to stop where there is an opportunity to do so.”

*Id.* at 802 (citation omitted)(emphasis added). The court explained that in the case before it, the driver had the opportunity to “give a signal of her intention to stop, either by hand or by flashing the brake light in advance.”

*Id.* at 802 (emphasis added). In sum, tapping one’s brakes to flash the brake lights in advance of braking would suffice under the statute and the instruction. Hitting the brakes does not. Quite simply, Appellant’s

premise for her argument that Instruction 17 is erroneous on the law is itself erroneous.

d. The Giving of Instruction 17 Was Warranted Under the Evidence at Trial.

Finally, Appellant argues that there was no evidence that Appellant's vehicle "suddenly decreased" in speed, and therefore giving Instruction 17 was error for that reason as well. As discussed more fully below, there was substantial evidence presented at trial that Appellant's vehicle suddenly decreased in speed.

2. The trial court did not err in refusing to grant Appellant's motion for a new trial based on lack of evidence to justify the verdict because there was substantial evidence to support the jury's finding that Mr. Frost was not negligent

Under CR 59(a)(7), it is appropriate to grant a motion for a new trial if, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, the court can say as a matter of law that there is no substantial evidence to sustain the verdict for the nonmoving party or that the verdict is contrary to law. *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966); *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 426, 397 P.2d 857 (1964). This Court must "defer to the trier of fact on issues involving conflicting testimony, credibility of

the witnesses, and the persuasiveness of the evidence.” *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 260 P.3d 967 (2011).

Appellant argues that there was insufficient evidence to support the jury’s finding that Respondent Frost was not negligent, and therefore, the trial court should have simply vacated the jury’s considered verdict and granted her motion for new trial. In Washington, the jury determines if there was negligence, not the Appellant. Although it is true that the trial court may decide negligence as a question of law only under the following two, rare circumstances: (1) where “the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances,” and (2) “where the facts are undisputed and but one reasonable inference can be drawn from them.” *Baxter v. Greyhound Corp.*, *supra* at 426 (quoting *McQuillan v. Seattle*, 10 Wn. 464, 465, 38 P. 1119 (1895)). Under the facts of this case and the evidence presented to the jury at trial as discussed above, neither of those rare circumstances apply.

The trial court’s discretion does not “constitute a license for the trial court to weigh the evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict.” *Bunnell*, 68 Wn.2d at 775. In fact, when there is sufficient evidence to support the jury’s decision, it would have been an abuse of discretion for the trial court to have granted a new trial for lack of substantial evidence as the Appellant argues it should have. *Palmer v. Jensen*, 132 W.2d 193, 198, 937 P.2d 597 (1997).

Respondent testified at trial that he did not remember seeing brake lights prior to the collision and that he could not say for sure whether Respondent's brake lights were activated prior to the collision. This was wholly consistent with the testimony he provided in his prior deposition testimony. Respondent further testified at trial that after entering his lane from the left, Appellant's vehicle slowed so abruptly that Appellant must have applied her brakes. At trial he also testified that he applied his brakes upon the Appellant's arrival in his lane, that he thinks he looked to see if he could swerve into a different lane to avoid a collision, but that he did not have enough time and could not do anything to avoid impact.

At trial, and again in her brief, Appellant spends an inordinate amount of time attempting to impeach Respondent and attack his credibility, largely based on the fact that he used different words to describe the accident, and specifically, that he used the specific term "cut off" for the first time at trial. In reality, however, Respondent has denied that he was negligent for this accident from the very beginning and has described the accident consistently throughout the course of this litigation as an accident that occurred as a result of the Appellant's merging into his lane without providing him with enough opportunity to avoid impacting the rear of her automobile.

While it is true that Appellant presented evidence that conflicted with Respondent's testimony, it is the jury's role, not the trial court or the appellate court's role to resolve conflicting testimony, evaluate witness

credibility, and decide regarding the persuasiveness of evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *See also, State v. Walton*, 64 Wn.App 410, 415-416, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

Respondent disputes that there was any inconsistency in his testimony; however, even assuming *arguendo* that there was such inconsistency, that does not matter to the present appeal. Appellant's argument that the existence of conflicting descriptions of the accident somehow operates to make one of the competing versions insubstantial evidence is contrary to the law. "Even though there may be conflicting evidence on the record, [a reviewing court] will not disturb findings based on substantial evidence." *Henery v. Robinson*, 67 Wn. App. 277, 289, 834 P.2d 1091 (1992) *review denied*, 120 Wash.2d 1024, 844 P.2d 1018 (1993). Simply put, where there is conflicting evidence, the trial court must defer to the jury. *State v. Hernandez*, 85 Wn.App. 672, 672, 935 P.2d 623 (1997). In other words, if there is testimony that is substantial evidence supporting a finding of no negligence, as there was in the present matter, and to the extent there also is conflicting testimony, the matter remains the sole province of the jury, and not subject to the trial court's authority to order a new trial.

Appellant further argues that Respondent's testimony that Appellant must have braked is a conclusory statement or conclusion of fact, and such statements "do not raise questions of fact." Appellant is

incorrect. Respondent's trial testimony that Appellant slowed so abruptly that she must have braked is simply permissible lay opinion based on the witnesses' own perception. *See* ER 701.

Appellant also asserts that because Respondent could not testify that he did or did not see Appellant's brake lights before the collision, that that somehow means that the only manner by which Appellant's vehicle could have slowed was by Appellant taking her foot off the accelerator. That argument is a logical fallacy. The fact that Respondent did not *remember*, and could not testify whether he saw brake lights activated prior to the collision (again, the evidence viewed most favorably to Respondent) does not mean that they were not, in fact, or could not, in fact, have been activated. It only means that Respondent did not remember seeing them and could not testify whether they were activated or not. The only actually undisputed physical facts in this case are that Appellant's vehicle passed Respondent's, and thus was going faster than his at some point in time when she moved into his lane, and the damage to the vehicles was offset. Appellant does not explain how those physical facts conclusively establish that Respondent was not negligent, much less articulate how those undisputed physical should be employed to ignore the jury's finding that Respondent was not negligent.

In sum, as described above, when viewed in a light most favorable to the non-moving party, here Respondent, there was ample evidence, albeit disputed by the Appellant, from which one could reasonably infer

that Appellant's vehicle passed Respondent's vehicle on the left, changed lanes into Respondent's lane, cutting him off and then abruptly slowed. Respondent testified that he attempted to avoid the collision after being cut off, but was unable to do so, and collided with Appellant's vehicle. Despite Appellant's arguments to the contrary, the foregoing is substantial evidence that clearly supports a jury finding that Respondent was not negligent.

Appellant may certainly disagree with the jury's ultimate conclusion, or disagree with the weight the jury may have given to Respondent's testimony in light of the conflicting testimony of the Appellant or her witnesses, but the ultimate determination of the issue of Respondent's alleged negligence is for the jury's, not the Appellant, her witnesses, or even the trial court.

During trial the Appellant had the opportunity to prove her case in front of a jury, including the disputed issue of Respondent's negligence. After receiving all of the evidence presented, balancing the weight to the disputed evidence as instructed, and deliberating, the jury returned its verdict in favor of the Respondent. Simply because the Appellant is unhappy with that result, or believes that the jury should have weighed the conflicting evidence in her favor and returned a different verdict, does not mean the jury's verdict should be vacated and she be provided with another attempt to persuade another jury of her allegations against the Respondent.

3. The trial court did not err in refusing to grant Appellant's motion for a new trial based upon instructional error objected to at trial because no relevant objection was preserved, the disputed instruction was proper, and in any event, any alleged error was harmless as the jury never reached the question of Appellant's contributory negligence

For the very same reasons stated in response to Appellant's Assignment of Error number 1 above, the trial court did not err in refusing to grant Appellant's motion for a new trial based upon instructional error objected to at trial. Appellant incorporates his arguments in response to Appellant's assignment of Error number 1 here as his arguments in response to Appellant's assignment of Error number 3.

### **CONCLUSION**

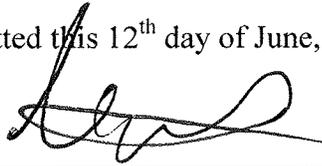
Appellant had the burden of proving Respondent negligent at trial. The jury determined that she failed to do so, finding that Respondent was not negligent. Viewed in a light most favorable to Respondent, there was substantial evidence to support that finding. Similarly, Appellant is unable to establish any error by the trial court that would justify ignoring the jury's verdict just so she can make another attempt at proving Respondent's negligence to another jury.

The parties to this case conducted discovery, the parties prepared for trial, the parties put on 4 days of evidence to a properly empanelled

jury, the jury deliberated that evidence, some of which was conflicting, and ultimately made its determination in the Respondent's favor that he was not negligent for the Appellants alleged damages. Appellant should not be allowed to unwind that jury determination simply because she does not like the jury's decision.

For the foregoing reasons, Respondent respectfully requests that this Court affirm the trial court's judgment.

Respectfully submitted this 12<sup>th</sup> day of June, 2014.



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Cliff J. Wilson, WSB No. 41204  
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COURT OF APPEALS DIVISION II  
FOR THE STATE OF WASHINGTON

CYNTHIA BUTLER,

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vs.

RANDALL FROST,

Defendant/Respondent.

Appellate Court No. 45697-4-II

DECLARATION OF SERVICE

I, Cliff J. Wilson, hereby declare under penalty of perjury under the laws of the State of Washington that on June 12, 2014, I caused to be filed via email with the Court of Appeals, Division II, the foregoing RESPONDENT'S BRIEF, and that a copy of the same was served on June 12, 2014 via electronic mail and messenger to the following:

Bruce Colven  
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Of Attorneys for Petitioner

SIGNED in Portland, Oregon on the 12th day of June, 2014.



Cliff J. Wilson

DECLARATION OF SERVICE — 1

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**June 12, 2014 - 3:56 PM**

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Case Name: Cynthia Butler v. Randall Frost

Court of Appeals Case Number: 45697-4

**Is this a Personal Restraint Petition?** Yes  No

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Statement of Arrangements

Motion: \_\_\_\_\_

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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**Comments:**

No Comments were entered.

Sender Name: Cliff Wilson - Email: [cwilson@smithfreed.com](mailto:cwilson@smithfreed.com)

A copy of this document has been emailed to the following addresses:

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