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

DEBBIE K. BALTAZAR, Appellant

v.

**DONALD PARADISE and "JANE DOE" PARADISE,
husband and wife, Respondents**

REPLY BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS.....i-ii

TABLE OF AUTHORITIESiii-iv

I. INTRODUCTION1

II. ARGUMENT2

 A. THERE IS NO COMPELLING REASON FOR THE COURT NOT TO USE ITS DISCRETION TO REACH THE MERITS OF THIS CASE2

 B. THE EMERGENCY DOCTRINE WAS UNWARRANTED AND PREJUDICIAL IN THIS CASE BECAUSE (1) ALL OF THE NEGLIGENCE CLAIMED OCCURRED PRIOR TO THE EMERGENCY SITUATION; (2) THE REACTION TO THE EMERGENCY WAS INSTANTANEOUS; AND (3) THE DEFENDANT CREATED THE EMERGENCY SITUATION6

 1. THERE IS NO ALLEGATION OF THE TYPE OF NEGLIGENCE THAT THE EMERGENCY DOCTRINE IS INTENDED TO ALLEVIATE6

 2. A MERE INSTANT OF TIME ALLOWING FOR ONE INSTINCTIVE REACTION IS *NOT* ENOUGH TO WARRANT THE USE OF THE EMERGENCY DOCTRINE8

 3. THE TRIAL COURT ERRED WHEN IT GAVE THE EMERGENCY DOCTRINE INSTRUCTION WHEN THE DEFENDANT CREATED THE PERILOUS SITUATION14

 4. PLAINTIFF WAS PREJUDICED BY THE IMPROPER GRANTING OF THE EMERGENCY DOCTRINE INSTRUCTION.....16

C. THE JURY INSTRUCTION ON THE ACT OF GOD
WAS A MISSTATEMENT OF THE LAW, AND
SHOULD BE PRESUMED TO BE PREJUDICIAL17

D. GUIDANCE TO THE LOWER COURT ON THE ISSUE
OF CONTRIBUTORY NEGLIGENCE IS
APPROPRIATE.....22

III. CONCLUSION.....25

TABLE OF AUTHORITIES

Table of Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 852, 281 P.3d 289 (2012)	22
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 721 P.2d 918 (1986)	14
<i>Boards of Regents of the Univ. of Wash. v. Frederick & Nelson</i> , 90 Wn.2d 82, 579 P.2d 346 (1980)	15
<i>Brown v. Spokane County Fire Prot. Dist. No. 1</i> , 100 Wn.2d 188, 688 P.2d 571 (1983).....	9,10,12,13
<i>Chunyk & Conley/Quad-C v. Bray</i> , 156 Wn. App. 246, 232 P.3d 564 (2010)	16,22
<i>Egede-Nissen v. Crystal Mountain, Inc.</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980)	23
<i>Fowles v. Sweeny</i> , 41 Wn.2d 182 (1952)	2
<i>Glenn v. Brown</i> , 28 Wn.App 86, 622 P.2d 1279 (1980)	14
<i>Hinkel v. Weyerhaeuser Co.</i> , 6 Wn. App. 548, 494 P.2d 1008 (1972)	7
<i>Kappelman v. Lutz</i> , 167 Wn.2d 1, 217 P.2d 286 (2009)	10,11,12,13
<i>Sandberg v. Spoelstra</i> , 46 Wn.2d 776, 285 P.2d 564 (1955)	7
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	3,4,5
<i>Tuttle v. Allstaet Ins. Co.</i> , 134 Wn.App 120, 138 P.3d 1107 (2006)	9
<i>Zook v. Baier</i> , 9 Wn. App. 708, 514 P.2d 923 (1973).....	9,12,14

Federal Cases:

<i>Ispat Inland, Inc., v. Am. Commer. Barge Line Co.</i> , 2002 U.S. Dist. LEXIS 26818 at *27, 2002 WL 32098290, at *8 (N.D. Inc. 2002) (unpublished opinion)	20
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<i>Skandia Ins. Co. v. Star Shipping AS</i> , 173 F. Supp. 2d 1228 (S.D. Ala. 2001)	21
<i>Uniroyal, Inc. v. Hood</i> . 588 F.2d 454 (1979)	21
<i>Wylor v. Holland Am. Line – United States, Inc.</i> , 348 F. Supp. 2d 1206 (2003)	17,20
Court Rules:	
RAP 1.2(a)	5
RAP 10.3	3
RAP 10.3(g)	3,4
Rules on Appeal 43, 34A Wn. (2d) 47	2
Other Authority:	
General Order 1998-2 In RE The Matter of Assignments of Error	4

I. INTRODUCTION

There is no compelling reason for this Court not to consider the merits of this case. None of the policy considerations established by the Supreme Court of Washington are forwarded by the Court refusing to reach the merits of this appeal. The nature and extent of the appeal is abundantly clear when reading Plaintiff's opening brief, the relevant issues are argued in the body of the brief, the Court has not been inconvenienced and the defendant has not been prevented or prejudiced from presenting his argument. Relying on a single case from 1952 that is based on rules no longer in effect in this State, the defendant's attempt to shut down this appeal on the basis of not specifically assigning error to the jury verdict in the assignments of error section of the opening brief is frivolous.

Defendant's response failed to provide any counter argument to Plaintiff's argument that the emergency doctrine instruction was improper because there was no allegation of the negligence of the type that the emergency doctrine is intended to alleviate. Defendant also erroneously compares the case at hand to a factually dissimilar case, when this case is factually similar to cases provided by the plaintiff that hold that a mere instant of time allowing for one instinctive reaction is not enough to warrant the use of the doctrine. The emergency doctrine instruction prejudiced the rights of the plaintiff, and is therefore prejudicial error.

Defendant is incorrect in his assertion that the jury went through the same thought process to determine whether the wave was a rogue wave that they would to determine whether it was an act of God. The factors are not the same, and therefore a rogue wave should not be considered “synonymous” with an act of God. The act of God jury instruction is therefore a misstatement of law and presumed to be prejudicial error.

Finally, Defendant provided no argument disputing Plaintiff’s request for the Court to provide guidance on the issue of contributory negligence should the case be remanded. Neither of the defendant’s contributory negligence theories were supported by substantial evidence, therefore, it was error for the trial court to allow the jury to be instructed on those theories.

II. ARGUMENT

A. THERE IS NO COMPELLING REASON FOR THE COURT NOT TO USE ITS DISCRETION TO REACH THE MERITS OF THIS CASE.

It is not 1952. The “Rules on Appeal” relied on by defendant do not govern appeals in the year 2015. *See*, Brief of Respondent at 2. Even if it was 1952, Rule on Appeal 43, which defendant relies on via reference to *Fowles v. Sweeny* 41 Wn.2d 182, 187 (1952), would not be the correct rule to apply. Rule on Appeal 43 applies to “appeals from all actions, at law or in equity, tried to the court **without a jury.**” Rules on Appeal 43, 34A

Wn. (2d) 47 (emphasis added). The present case was decided by a jury trial. More importantly, this appeal is governed by the Rules of Appellate Procedure (RAP). Defendant cites to RAP 10.3(g) arguing that an appellate court “will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” *See*, Brief of Respondent 6-7.

The effects of a technical violation of the RAP was addressed by the Supreme Court of Washington in *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The Court in *Olsen* held that the exclusionary effect of RAP 10.3 should be interpreted narrowly, and upheld the appellate court’s decision to reach the merits of the case. The Court ruled that “this statement must be read in context of a **complete failure** of the appellant to raise the issue **in any way at all** – neither in the assignments of error, in the argument portion of the brief, or in the requested relief.” *State v. Olson*, 126 Wn.2d at 320-21, (emphasis added). The Court provided clear policy considerations explaining that inconvenience to the Court and prejudice to the opposing party are what rule 10.3 is intended to prevent:

*The narrow rule makes perfect sense because in the situation where the issue is not raised at all, the court is **unable to properly consider the issue** prior to the hearing and is given **no information on which to decide the issue** following the hearing. More importantly, the other party is **unable to present argument on the issue or otherwise respond** and thereby potentially suffers great prejudice.*

State v. Olson, 126 Wn.2d at 321. This Court has also adopted General Order 1998-2 which supports the Supreme Court's policy reasoning in *Olsen*¹. Deciding whether an appellate court should exercise its discretion to consider cases and issues on their merits, the Court in *Olsen* held:

It is clear from the language of RAP 1.2(a), and the cases decided by this court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d at 323, (emphasis added). *Olsen* essentially put into words what was already the accepted practice of the Supreme Court of Washington in consistently applying this approach in favor of considering appeals on their merits².

¹ General Order 1998-2 states that "the judges of this Division of the Court of Appeals have determined to **waive the requirement in RAP 10.3(g)** that an appellant's brief must separately assign error to each challenged jury instruction, finding of fact, or conclusion of law. Henceforth, in Division Two, an appellant's or cross-appellant's brief may use a single assignment of error to identify more than one challenged jury instruction, finding of fact, or conclusion." General Order 1998-2 In RE The Matter of Assignments of Error (emphasis added).

² "In fact, **every case** in which we [The Supreme Court of Washington] have considered a technical noncompliance with the rules concerning appellate briefing or notice of appeal

Here, following the precedent set in *Olsen*, this Court may exercise its discretion to reach the merits of this appeal because none of the policy considerations listed in *Olsen* would be promoted by refusing to exercise such discretion. The nature and extent of the appeal is abundantly clear when reading Plaintiff's opening brief. Plaintiff is appealing the trial courts' giving of certain jury instructions in a personal injury trial which end in an erroneous defense jury verdict. *See generally*, Brief of Appellant. All relevant issues are argued in the body of the brief. Plaintiff specifically assigned errors to the particular jury instructions and included sections on how those instructions were prejudicial in causing the jury to find in favor of the defendant. Brief of Appellant at 21-22, 33-35. Plaintiff also clearly stated in the initial argument section and conclusion of the brief that she is seeking a new trial due to the prejudicial nature of these jury instructions. Brief of Appellant at 13-14, 43-44. Defendant has offered no reason in which the Court would be inconvenienced by a lack of citation to the jury verdict in the assignments of error section of the opening brief. Defendant did not, in any way, demonstrate any possible prejudice by a lack of such citation because no prejudice exists.

Further, the defendant cannot genuinely make any claim of inability to present an argument due to the missing citation to the jury

in light of RAP 1.2(a), **we have decided to reach the merits of the case or issue.**" *State v. Olson*, 126 Wn.2d at 322-323 (emphasis added).

verdict under the assignments of error. It should be no mystery to any party reading the opening brief, that the plaintiff is opposing the jury verdict for all of the grounds in which she clearly demonstrated she was prejudiced. The mere fact that Defendant self-identified and responded to each issue, including the jury verdict, shows his clear ability to present argument based entirely on the opening brief.

Defendant has presented no compelling reason for this Court not to exercise its discretion to consider the merits of the case. Therefore, the plaintiff respectfully requests that the Court exercise its discretion to reach the merits of issues related to the jury verdict.

B. THE EMERGENCY DOCTRINE WAS UNWARRANTED AND PREJUDICIAL IN THIS CASE BECAUSE (1) ALL OF THE NEGLIGENCE CLAIMED OCCURRED PRIOR TO THE EMERGENCY SITUATION; (2) THE REACTION TO THE EMERGENCY WAS INSTANTANEOUS; AND (3) THE DEFENDANT CREATED THE EMERGENCY SITUATION.

1. THERE IS NO ALLEGATION OF THE TYPE OF NEGLIGENCE THAT THE EMERGENCY DOCTRINE IS INTENDED TO ALLEVIATE.

In her opening brief, plaintiff argued that the trial court's giving of an emergency doctrine instruction was reversible error. Brief of Appellant at 15. One reason presented for why this was error was that the emergency doctrine was inapplicable to the case at hand because the plaintiff did not allege that the defendant acted negligently *after* being confronted by the wave. Brief of Appellant at 17. Plaintiff's theory of the case is that the

defendant was negligent in his actions leading up to, and creating the confrontation, with the perilous situation by failing to keep a proper lookout and travelling too fast for the conditions. See, Brief of Appellant at 17-18. The theory and issues in this case do not warrant the use of the emergency doctrine defense, and Defendant's brief provided no counter argument to this point.

As explained by this Court, "the [emergency] doctrine applies to the choice a party makes **after** he is confronted with sudden peril through no fault of his own." *Hinkel v. Weyerhaeuser Co.*, 6 Wn. App. 548, 494 P.2d 1008 (1972) (emphasis added). Analyzing and applying this aspect of the doctrine, and finding it to have been incorrectly applied, the Supreme Court of Washington stated: "[t]he benefit of the emergency doctrine rule is applicable only to conduct *after* a person has been placed in a position of peril. It is not here contended that any act of the defendant's driver *after* he was in a position of peril constituted negligence." *Sandberg v. Spoelstra*, 46 Wn.2d 776, 783, 285 P.2d 564 (1955) (emphasis in original).

In the case at hand, plaintiff did not argue that the defendant was negligent in how he reacted to the wave. Plaintiff consistently followed the line of argument that defendant was negligent in creating the confrontation with the perilous situation from opening statements:

MR. REICH (Attorney for plaintiff): Specifically a boat operator has a duty to keep a proper lookout to see where they're going and maintaining a safe speed so as to avoid oncoming peril

RP 38. Through to closing statements:

MR. REICH: Was the defendant negligent? If you read through the instructions, the answer is yes. He had a duty to keep a lookout and a duty to see what was there to be seen.

RP 941. There is no allegation of the negligence of the type that the emergency doctrine is intended to alleviate, defendant has provided no argument or authority to dispute this point, therefore the giving of an emergency doctrine instruction in this case was prejudicial error.

2. A MERE INSTANT OF TIME ALLOWING FOR ONE INSTINCTIVE REACTION IS NOT ENOUGH TO WARRANT THE USE OF THE EMERGENCY DOCTRINE.

In her opening brief, plaintiff also argued that the emergency doctrine was not applicable because the emergency doctrine requires that the person placed in the perilous position has at least two possible courses of action from which to choose. *See*, Brief of Appellant at 19-21. Plaintiff supported this argument by providing analogous cases wherein both the Court of Appeals Div. I and the Supreme Court of Washington refused to allow the use of the emergency doctrine because the incidents occurred too quickly for the defendant to have a choice between courses of actions. *See*, Brief of Appellant at 19-20. Plaintiff then cited the defendant

describing the incident as occurring “instantaneous[ly].” *See*, Brief of Appellant at 20; RP 820-821. In his response brief, Defendant admits that he described the incident as occurring “instantaneous[ly],” and then attempts to backtrack from that admission by arguing that, while in some respects the accident happened fast, it did not happen so fast that there was no time to react. *See*, Brief of Respondent at 20. This argument fails because it does not go to the heart of the issue which is that there must be a choice of options presented to the person in the emergency situation with enough time to pick a choice.

The emergency doctrine is only correctly applied in small window of time once the oncoming peril has been seen. There cannot have been so much time as to allow the actor to reflect on his decision. *See*, *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 132, 138 P.3d 1107 (2006). Nor can there be so little time as to allow for only a single instinctive reaction. This distinction is illustrated in *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P.2d 923 (1973), where the court found that, “there were not alternatives available **but only an instant of time** on a slippery road for **a single instinctive reaction**, an emergency doctrine was doubly improper.” *Zook*, 9 Wn. App. at 714. The Supreme Court of Washington followed this line of reasoning in *Brown v. Spokane Fire Prot. Dist. No. 1*, when it held:

Similarly, the sudden emergency presented to Mr. Holmes under these facts afforded him no alternative courses of action. He reacted instinctively by swerving to strike the fire engine a glancing blow rather than proceeding forward to strike the fire engine squarely. Since there were no alternative courses of action available to Mr. Holmes other than to strike the fire engine, the emergency doctrine was inapplicable.

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 198, 688 P.2d 571 (1983) (emphasis added). The case at hand is analogous to *Zook* and *Brown* in that the instantaneous nature of the incident gave the defendant no alternative courses of action other than a single instinctive reaction to pull back on the throttle, which is not enough to warrant the application of the emergency doctrine. RP 820.

Defendant attempts to analogize the case at hand to *Kappelman v. Lutz*, 167 Wn.2d 1, 217 P.3d 286 (2009), however the facts of that case are easily distinguished. *Kappelman* is a case where the emergency instruction was properly allowed because there was **not** instantaneous timing between the moment the defendant first saw the oncoming emergency, and the moment the collision occurred. Taking straight from the facts section of *Kappelman*: “**between three and four seconds elapsed** from the time Lutz first saw the deer until impact.” *Kappelman*, 167 Wn.2d at 4. (Emphasis added). Lutz, the defendant and operator of the motorcycle, had enough time to go through a fast decision making process in response to

the oncoming peril. He first saw the deer on the shoulder of the road, then as he realized the deer was going to enter the road, he swerved to the right side of his lane, away from the deer. *Id.* He also began to decelerate by a combination of light braking and downshifting. *Id.* Then the deer entered the roadway, crossed the oncoming lane of traffic, and entered Lutz's lane. *Id.* At 50 feet from impact, Lutz realized he was not going to be able to avoid hitting the deer and stood on the brake hard, causing the bike to skid and ultimately hit the deer. *Id.* These facts illustrate the choice requirement needed to properly apply the emergency doctrine and are far from the facts showing instantaneous reaction in this case.

The emergency doctrine instruction was proper in *Kappelman* because Lutz had just enough time to make a choice about how he wanted to react to the oncoming peril and the choices available to him had real impact on whether a collision would occur. The injured plaintiff passenger could then argue that Lutz was negligent in both the actions he took before he was aware of the deer, such as speeding and failing to see maintain a proper lookout, and also for his actions once he became aware of the deer. For example, the plaintiff could have argued that Lutz should have started braking much harder upon first seeing the deer appear on the shoulder of the road, instead of just moving over to the right side of his lane. Lutz was then able to correctly use the emergency doctrine to defend the actions he

took in the seconds of time *after* the onset of the peril³. *Kappleman* illustrates a factual situation that warrants an emergency doctrine instruction, and is entirely different than the factual situation presented in the case at hand.

Defendant was clear in his description of the amount time between when he first saw the oncoming wave and when the wave collided with the boat. Dr. Paradise's exact words were that, "**it was instantaneous**. That's about as much – **it wasn't one thousand one, one thousand two, one thousand three**. I'm saying this and it's instantaneous and I'm on the wave." RP 820-21. Unlike the motorcycle rider in *Kappelman* who had three or four seconds to react to the deer, Dr. Paradise had only an instant to make one instinctive reaction. He did not have a selection of choices by which he could react to the oncoming wave:

MS. MCGAUGHEY: Did you have any time to react in any way other than the warning you recall being shouted?

DR. PARADISE: Just taking the throttle and throttling it back to bring it back to neutral. But unfortunately, boats don't have brakes so we slammed through that.

RP 820. Dr. Paradise's reaction in this case mirrors the instinctive reactions described in both *Zook* and *Brown*. In the same way that the fire

³ As explained by the court in *Kappelman*, "a defendant who is suddenly confronted by an emergency through no fault of his own **and chooses a damaging course of action in order to avoid the emergency** is not liable for negligence although the particular act might constitute negligence had no emergency been present. *Kappelman v. Lutz*, 167 Wn.2d 1, 2, 217 P.3d 286 (2009) (emphasis added).

engine appeared in front of Mr. Holmes' vehicle in *Brown*, affording him no way to avoid the collision, the wave in the case at hand became instantaneously apparent to Mr. Paradise while he was piloting the boat. RP 820-21. During trial, Mr. Paradise explained that throttling down had no impact on how the boat hit the wave:

MS. MCGAUGHEY:...from your perspective did it – did that [throttling down] have any reduction in your speed when you actually made contact with the wave or was it just too fast?

DR. PARADISE: I think it was just too fast.

RP 821. Both Mr. Brown and Mr. Paradise made single instinctive reactions to the peril, Mr. Brown in swerving his car and Mr. Paradise in pulling back on the throttle, neither of which was enough of a choice to invoke the emergency doctrine.

Defendant further argues that even if the court finds that *Brown* governs, that an “apparent factual inconsistency between *Brown* and *Kappelman*,” requires the court follow *Kappelman* because it is the more recently decided case. Brief of Respondent at 24. This argument is completely baseless. There is no inconsistency between *Brown* and *Kappelman*. *Kappelman* is a fact pattern that supports the giving of an emergency doctrine and *Brown* is not. As already explained above, the

case at hand is factually analogous to *Brown*, therefore an emergency doctrine instruction was improper.

3. THE TRIAL COURT ERRED WHEN IT GAVE THE EMERGENCY DOCTRINE INSTRUCTION WHEN THE DEFENDANT CREATED THE PERILOUS SITUATION.

Plaintiff also argued in her opening brief that the emergency doctrine was inappropriate because it is not available to one who created the perilous situation. *See*, Brief of Appellant at 15-17. “The emergency doctrine is appropriate only when the trier of fact is presented with evidence from which it could be concluded that the emergency arose through no fault of the party seeking to invoke the doctrine.” *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P.2d 923 (1973). Defendant responded by asserting that there was substantial evidence to support the instruction based on the testimony of Mr. Paradise, Dennis Bunten, and the defense expert David Shoemaker. *See*, Brief of Respondent at 18. This evidence however does not satisfy the substantial evidence requirement.

“Prejudicial error occurs where the trial court instructs the jury on an issue that lacks substantial evidence to support it.” *Glenn v. Brown*, 28 Wn. App. 86, 89, 622 P.2d 1279 (1980). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). “The supporting facts on which to base an instruction must consist

of more than speculation and conjecture.” *Boards of Regents of the Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1980).

In his response brief, defendant relies on the testimony of Mr. Paradise, Dennis Bunten and David Shoemaker as substantial evidence to support the giving of the emergency doctrine instruction. Brief of Respondent at 16. However, Dennis Bunten’s testimony actually points towards Mr. Paradise’s negligence. When asked if the speed the boat was travelling that day was appropriate for going through waves of the size encountered, Mr. Bunten replied, “no...because it’s dangerous.” RP 343. Mr. Bunten also testified that he believed that a boater should keep a lookout for potential perils and expect that conditions will change from time to time. RP 348-49.

Defense expert David Shoemaker testified that he believed the wave encountered was a “rogue wave.” RP 563 However, when asked to describe his knowledge of the scientific literature describing how rogue waves are created, he answered, “I can find nothing, and would hope that someday someone would actually come up with a definition of how a rogue wave is created, what causes it. But I have not been able to determine that.” RP 553. Defendant’s premise that the accident occurred because of an act of God was based purely on speculation and conjecture and did not have substantial evidence to support it.

4. PLAINTIFF WAS PREJUDICED BY THE IMPROPER GRANTING OF THE EMERGENCY DOCTRINE INSTRUCTION.

In her opening brief, plaintiff also argued that the trial court's improper granting of the emergency doctrine prejudiced the plaintiff. *See*, Brief of Appellant at 21-22. Defendant's response did not contain an argument refuting that assertion⁴.

Plaintiff was prejudiced by the trial court's erroneous granting of the emergency doctrine instruction. "An error is prejudicial if it presumably affects the outcome of trial." *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 255, 232 P.3d 564 (2010). Here, the emergency doctrine instruction presumably affected the outcome of the trial because the emergency doctrine is a defense that directly relieves the defendant from liability, and the jury in this case returned a finding of no negligence. CP 1108. As with the jury instruction in *Chunyk*, which was found to be prejudicial, the "jury was invited to speculate about this issue, and the instructions allowed the jury to premise its verdict on [it]." *Chunyk*, 156 Wn. App. at 255. The jury then found the defendant to not be negligent. CP 1108.

The emergency doctrine was erroneously given for all of the preceding reasons, any one of which alone is enough to find that the

⁴ Defendant merely argued that prejudice must be shown without presenting any argument that prejudice has not, or could not be shown. *See*, Brief of Respondent.

instruction was given in error. Erroneously giving the emergency doctrine instruction prejudiced the plaintiff because, if accepted, the doctrine relieves the defendant of negligence and the jury returned a verdict finding no negligence. CP 1109. Therefore, the plaintiff respectfully requests that the Court reverse and remand this case for a new trial.

C. THE JURY INSTRUCTION ON THE ACT OF GOD WAS A MISSTATEMENT OF THE LAW, AND SHOULD BE PRESUMED TO BE PREJUDICIAL.

In her opening brief, Appellant argued that Jury Instruction 17 on the act of God defense is a misstatement of law, and is therefore presumed to be prejudicial. *See*, Brief of Appellant. The basis of Plaintiff's argument is that the first sentence of the instruction, which is taken directly from *Wyler v. Holland Am. Line – United States, Inc.*, 348 F. Supp. 2d 1206 (2003), states that “phrases such as “rogue waves” and “sneaker” are **synonymous** for “an act of God” and introduces this concept inside the standard factors for act of God without providing any guidance on how the two concepts are in fact dissimilar. CP 1102. Plaintiff argued that is an incorrect statement of law because rogue waves are not events that automatically satisfy the legal definition of an “act of God.” Plaintiff then presented a number of cases that discuss and illustrate the established factors for a jury to consider when determining whether an event constitutes an act of God. *See*, Brief of Appellant 24-27.

Defendant countered by arguing that instructing that a rogue or sneaker wave is synonymous with an act of God did not take away from the jury the requirement that they would have to conclude whether the wave encountered was even rogue in the first place, based on the expert testimony presented by both sides. *See*, Brief of Respondent 13. This argument completely misses the mark because it fails to recognize that the factors used by the experts to determine whether a wave is rogue or not are not the same factors established by case law to determine whether a natural occurrence is an act of God. *See*, Brief of Appellant 24-27; RP 228, RP 551-552. In his response, Defendant argues that the jury instruction does not run afoul of the specific characteristics associated with other acts of God. *See*, Brief of Respondent. However, a close inspection of the factors associated with rogue waves and acts of God show that there are notable differences that would prevent some rogue waves from being considered an act of God.

One of the differences is in the application of the “size” factor. Plaintiff’s and Defendant’s experts described rogue waves similarly. In determining whether a wave is a rogue wave, its size is compared relative to the other waves around it, and if it is a certain percentage larger than the surrounding seas is it considered a “rogue wave.” Plaintiff’s expert, Craig Sylvester, described a rogue wave as a “wave that is amongst other waves

that is somewhat unusual...that was **quite a bit larger than the other waves.**” RP 228 (emphasis added). Defendant’s expert, David Shoemaker, described a rogue wave as “being somewhat like 33 percent higher” and “**not typical of the sea state at the time** then in my opinion that’s a sneaker wave and/or a rogue wave.” RP 551-52. The U.S. Navy’s definition of rogue wave was also presented to the jury by the defendant during closing argument⁵. These definitions are all in accordance that a rogue wave is compared on a percentage basis relative to the surrounding sea state, however, there is no absolute size requirement. According to these definitions, a 1-inch wave on completely calm water would qualify as a rogue wave just as much as a 60-foot wave in rough ocean water would, because the 1-inch wave’s height is infinitely larger than the surrounding calm sea state. The jury instruction, stating that a “rogue wave is synonymous with an act of God,” would therefore establish the 1-inch wave as an act of God under this analysis. This is an absurd result.

Act of God jurisprudence **does not** look solely at the size or severity of the natural event relative to the surrounding environment, but also looks at the event’s absolute size or severity to determine whether it reaches “act of God” status. In fact, the first factor listed by the United States District Court for the Northern District of Indiana, Hammond

⁵ As defining a rogue wave as “something that is two to two-third or 33 percent higher than the countervailing area.” RP 952, lines 13-19.

Division is “the severity of the natural occurrence causing the damage.” *Ispat Inland, Inc. v. Am. Commer. Barge Line Co.*, 2002 U.S. Dist. LEXIS 26818 at *27, 2002 WL 32098290, at *8 (N.D. Ind. 2002) (unpublished opinion). The term severity is referred repeatedly in the act of God case law⁶. *Wylter* defines an act of God as “a natural phenomenon of such unanticipated **force** and **severity** as would fairly preclude charging the carrier with responsibility.” *Wylter*, 348 F. Supp. 2d at 1211. To ignore the size factor would result in absurd results such as 1-inch waves being considered acts of God.

Another difference in the application of the factors is in determining the foreseeability or unpredictability of the event. Both experts described rogue waves as unexpected relative to the prevailing sea state. Plaintiff’s expert, Craig Sylvester, described a rogue wave as unusual given the nearby waves⁷. Defense expert, David Shoemaker, described a rogue wave as “unpredictable⁸.” Act of God case law however holds that an “Act of God defense applies only to events in nature so extraordinary that the **history of climatic variations and other**

⁶ It was also included in the language of the second sentence of jury instruction 17 talking about acts of God. CP 1109.

⁷ “A wave that is amongst other waves that is somewhat unusual...I mean, if you’re operating in, you know, open ocean, you got waves around, a rogue wave would be something that was quite a bit larger than the other waves.” RP 228.

⁸ “It can happen at any time and typically without notice, suddenly develops, can happen in inclement weather and it can also happen on calm water.” RP 551-52.

conditions in the particular locality affords no reasonable warning of them.” *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1239 (S.D. Ala. 2001). (emphasis added). The United States Court of Appeals for the Fifth Circuit, found that “a catastrophe arising from the force of elements **which human intelligence cannot predict nor the ingenuity of man foretell** is an act of God.” *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 460 (1979).

Based on the experts’ characterizations of the unpredictable nature of rogue waves, a 3-foot wave could be considered unexpected relative to a calm surrounding sea state and, therefore, be considered unexpected under a rogue wave analysis. However, applying the act of God case law, it is beyond the realm of reasonableness to assert that the “history of climatic variations and other considerations” in the Puget Sound affords no “reasonable warning” of confronting a 3-foot wave. Nor that “human intelligence cannot predict nor the ingenuity of man foretell” that a boater may confront a 3 foot wave while out on the Puget Sound. Even on a calm day, there is the possibility of wake from a boat, an increase in wind gusts, or a sudden change of weather conditions causing a wave that size. A 3-foot wave arising in a relatively calm sea state may be considered unexpected under a rogue wave analysis, but a 3-foot wave on Puget Sound is not an event that is considered unexpected when applying act of

God case law. Thus, using the term “synonym” for a determination of a rogue wave and act of God is a misstatement of law and ultimately prejudicial to the plaintiff in this case.

In her opening brief, plaintiff argued that she was prejudiced by the Court granting jury instruction 17. *See*, Brief of Appellant at 33-35. Defendant responded that the instruction was not prejudicial error because it did not prejudice her “substantial rights.” However, here, when there is a misstatement of law, the reviewing Court must presume prejudice. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d at 860. Also, “an error is prejudicial if it presumably affects the outcome of trial.” *Chunyk & Conley/Quad-C*, 156 Wn. App. at 255. Also, defendant actively urged the incorrect statement of law on the jury during closing argument, establishing prejudice. *See*, *Anfinson*, 174 Wn.2d at 874-877; Brief of Appellant 40-41.

D. GUIDANCE TO THE LOWER COURT ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE IS APPROPRIATE.

In her opening brief, Plaintiff respectfully asked the Appellate Court to provide guidance on the issue of contributory negligence should the case be remanded. In support of her argument, Plaintiff provided examples of guidance given by the Supreme Court of Washington and the Court of Appeals Div. I. *See*, Brief of Appellant at 36-37. Plaintiff also provided support to her argument by clarifying that the primary function

of the Appellate Court is to provide guidance on legal issues. *Id.* In his response brief, Defendant provided one sentence countering the idea of the Court of Appeals providing guidance. *See*, Brief of Respondent at 9-10. The three cases cited after that sentence contain no discussion at all on the issue of whether guidance by an appellate court to a trial court is appropriate. This issue is essentially undisputed, guidance to the trial court on the issue of contributory negligence is appropriate.

Each party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Defendant asserted two theories of contributory negligence at trial; that the Plaintiff was contributorily negligent for riding in a boat when she had been diagnosed with early stages of osteoporosis, and that she wrapped a rope around her right wrist to help secure her to the boat and keep track of the line. In her opening brief, Plaintiff argued that there was no substantial evidence to support either theory of contributory negligence. Brief of Appellant 37-39. In his response brief, Defendant provided no argument disputing Plaintiff's assertion that there was not substantial evidence to support a theory of contributory negligence based on a diagnosis of early stages of osteoporosis. During trial, the defendant was unable to produce any evidence that Plaintiff had knowledge, or should have knowledge, at

the time of the incident, that she should not be on a boat. RP 657-58. Further, although alleged, the defendant was unable to produce any evidence that Ms. Baltazar had a duty to inform her employer of her medical diagnosis when the diagnosis does not require accommodation, and she had no reason to believe that the activity she was engaged in could increase her chance of injury. There was clearly no substantial evidence to support a contributory negligence argument based on a diagnosis of early stages of osteoporosis alone.

Defendant did provide a response to the issue of whether there was substantial evidence to support a theory of contributory negligence based on Plaintiff's wrapping a rope around her wrist. Defendant asserts that sitting in the bow of the boat was itself a negligent act, as was Plaintiff's not telling Defendant that she had wrapped the rope around her wrist. *See*, Brief of Respondent at 11. However, the defendant's own theory of the case – that it was an unavoidable or unforeseeable accident – precludes any argument that holding onto the rope was in any way a violation of the plaintiff's duty to exercise due care. *See*, Brief of Appellant at 40-41. Defendant was unable to provide any evidence that the act of holding the rope itself was negligent, therefore, there was no substantial evidence to support such a theory. Plaintiff respectfully requests that, on remand, the

trial court be directed to not allow contributory negligence instructions that are not based on substantial evidence.

III. CONCLUSION

This Court should exercise its discretion to hear this appeal on its merits because defendant has not provided any compelling reasons not to do so. The trial court abused its discretion in giving the emergency doctrine instruction because (1) Plaintiff did not claim negligence following the emergency event; (2) there was no alternative course of action available to the defendant; and (3) Plaintiff claimed that the defendant's negligence caused the emergency.

It was an error of law when the trial court gave a patchwork instruction on the "act of God" defense. This instruction prejudiced the plaintiff because (1) it conflated a natural phenomenon with an "act of God;" and (2) allowed the defendant to argue to the point of absurdity that a 3-foot wave should be considered in the same light as a 65-foot wave. Either error is enough for this case to be reversed and remanded for a new trial. Plaintiff respectfully requests that this Court reverse and remand for a new trial.

Finally, should this case be reversed and remanded for a new trial, Plaintiff respectfully requests guidance for the lower court on the issues of contributory negligence.

Respectfully submitted this 17th day of March, 2015.

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Attorneys for the Appellant

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 March 18, 2015, I filed and served true and correct copies of the REPLY BRIEF OF APPELLANT as follows:

Original and one copy via legal messenger to:

**Court of Appeals II
950 Broadway, Suite 300
Tacoma, WA 98402**

One copy via legal messenger to:

**Shellie McGaughey, Esq.
McGaughey Bridges Dunlap
3131 Western Ave, Suite 410
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COURT OF APPEALS
DIVISION II
2015 MAR 19 PM 1:19
STATE OF WASHINGTON
BY _____
DEPUTY

Dated this 18 day of March, 2015.



Marilyn Zimmerman
Paralegal, Jacobs & Jacobs