

**FILED**

SEP 09 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 330583**

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**In The Court Of Appeals  
The State Of Washington  
Division III**

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JOSEPH LETTRICK,

*Appellant/Plaintiff,*

v.

KRISTINA JOHNSON,

*Respondent/Defendant.*

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**APPELLANT'S REPLY BRIEF**

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## **ASSIGNMENTS OF ERROR**

### **Issues on Response**

Whether it is negligent to back a vehicle without looking backwards and looking in the direction one is driving.

Whether a jury may decide that a person who failed to see what was there to be seen, backing a vehicle without looking back, and colliding into another vehicle, can be free on any negligence.

Whether the rules of the road apply to a busy private parking lot of a large department store frequented by the public.

Whether drivers can act negligently and recklessly in a parking lot frequented by the public because “the rules of the road do not apply to private parking lots.” *Brief of Respondent*, p. 15.

Whether CR 32 requires a showing of due diligence for out of state deposition testimony to be admitted.

Whether a party may recover costs for records when they had previously been provided those records at no cost.

### **RE-STATEMENT AND CORRECTION OF FACTS**

To reiterate, this appeal arises from damages caused by a motor vehicle collision in which Respondent, Kristina Johnson, negligently and without looking back, backed her vehicle into Appellant, Joseph Lettrick’s,

vehicle. While it may be unclear where each vehicle was before and after the collision, what is clear is that Ms. Johnson's vehicle was still moving at the time she backed her vehicle into Mr. Lettrick's vehicle. Ms. Johnson backed out of her stall, continuing to back her vehicle, without continuing to look back, and she failed to see Mr. Lettrick's vehicle. CP 1486, 1488-89; VRP 325-26, 335. Ms. Johnson was not all the way out of her parking stall at the time of the collision. CP 1354-55, 1474-75; VRP 326. Ms. Johnson admitted at trial during direct examination that she was not completely out of her parking stall, and was not looking back when the collision occurred:

- Q. **You weren't completely out of your stall?**  
A. **I was not.**  
Q. **Do you think 50 percent of your vehicle was still within the stall?**  
A. **Yes.**  
...  
Q. **Were you looking back to the back of your vehicle when this accident happened?**  
A. **No.**

CP 1475-76; VRP 326-27 (emphasis added). Ms. Johnson further admitted that she was still backing, and that her vehicle was still moving, at the time of the collision:

- Q. **You were still moving at the time of this impact though?**  
A. **Yes.**  
...  
Q. **Was your foot on the gas at the time of impact?**

- A. **I would say, yes, most likely. I was backing out.**  
So, if not pushing on the gas, at least hovering over  
the gas like you do when you're backing out.

CP 1486, 1493; VRP 337, 344 (emphasis added). Ms. Johnson testified that she was still backing her vehicle without continuing to look back when she hit Mr. Lettrick's vehicle. CP 1474-76, 1486, 1488-89; VRP 325-27, 335.

Respondent incorrectly stated that "the jury unanimously found that Mrs. Johnson was not negligent." *Brief of Respondent*, p. 4. First, Respondent cannot rely on, and cite to, the jury verdict form to support his contention that the jury verdict was unanimous, because there is no indication of unanimity. *See* CP 1411-12. Second, the jury was polled in the presence of Ms. Johnson and her counsel after giving their verdict, during which two jurors found that Ms. Johnson was negligent. *See Transcript Final Day of Trial*, p. 76-78. Respondent's contention is simply incorrect, because in fact two jurors, juror 6 and juror 10, did not agree with the jury's verdict absolving Ms. Johnson of negligence. *See Transcript Final Day of Trial*, p. 76-78.

Respondent makes a big deal out of Respondent's statement during trial testimony "No. I still have my mirrors that I can see." There is a big difference between having mirrors and using them. Ms. Johnson's testimony on the other hand shows that she was looking forward at the time of impact

and not using her mirrors. In fact, she never saw Mr. Lettrick's vehicle until after she had pulled back into her stall, after the collision happened.

- Q. Okay. When was the first time you remember seeing Mr. Lettrick's car?
- A. When I got out of my car.
- Q. And by that point in time he was already pulled back into his stall?
- A. He was pulled back into a stall, yes.
- Q. And you're not sure what stall he came from because you didn't see him at any time before?
- A. I am not, nope.

VRP 335. In fact even after the impact when she was asked "Did you look into your side mirror or rear mirror after the cars hit?" she still did not remember using her mirrors even after the impact. VRP 348. She never saw the car she collided with, until after she got out of her vehicle.

#### **SUMMARY OF ARGUMENT**

Under the jury instructions given, a reasonable jury should have concluded that Ms. Johnson was negligent. The judge read the jury the following instructions dealing with negligence:

##### **Instruction No. 5**

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

##### **Instruction No. 6**

Every person has a duty to see what would be seen by a person exercising ordinary care.

Instruction No. 7

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

CP 1391-1393.

Ms. Johnson was negligent when she continued to back her vehicle without looking and when she failed to see the vehicle that she backed into. Throughout trial, Ms. Johnson affirmed that her vehicle was still moving back when she hit Mr. Lettrick's vehicle, and that she did not continue to look back as she backed her vehicle from her parking space. Reasonable people look in the direction their vehicle is traveling and see what there is to be seen.

Washington law allows juries to determine the degree of contributory fault by each party, and to assign a percentage of fault. See RCW 4.22.070. Washington does not bar a party from recovery for their own contributory fault. See RCW 4.22.005.

The Jury was also read as Instruction No. 8:

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

CP 1394. No one is alleging that this collision was an act of God or that this collision could have happened without negligence. So, in order to find Ms. Johnson to be fault free, the jury must have necessarily determined that Plaintiff was 100% at fault. Mr. Lettrick's argument is that no reasonable juror with knowledge of the evidence that was presented at trial could have completely absolved Ms. Johnson of *all* negligence.

#### **ARGUMENT**

**A. Mr. Lettrick Did Not Need to Move for Judgment As a Matter of Law During Trial, and It Was Unnecessary To Do So Until After The Jury Rendered Its Verdict**

Ms. Johnson is mistaken in her argument that Mr. Lettrick needed to move for judgment as a matter of law during trial. Ms. Johnson emphasizes a very small portion of court rule 50(a)(1), ignoring the context and the rest of the rule. A plain reading of the rule provides that a person may move for a motion for judgment as a matter of law if they have been fully heard, during trial, on an issue. See CR 50(a)(1). For convenience, the actual text of CR 50(a)(1) states:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found

for that party with respect to that issue, the court may grant a motion for judgment as a matter of law...

CR 50(a)(1) (emphasis added). Additionally, the rule provides that a court may grant a motion for judgment as a matter of law if there is not sufficient evidence for a jury “to find or have found for that party,” which implies that the issue may have already gone to the jury for them to decide. Ms. Johnson is mistaken in her assertion that a motion for JNOV may be made “only” before submission to the jury; while the rule does provide that it may be made before submission to the jury, nowhere does it say “only” before. See CR 50(a)-(b).

The Court Rules contemplate juries wrongly deciding issues based on insufficient evidence, and created a mechanism for courts to correctly decide those issues under CR 50, even after the jury has wrongly decided the issue. That is why CR 50(b) also provides that:

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

See CR 50(b) (emphasis added). The Court may not know if a jury would decide an issue wrongly, until after the jury has rendered its decision on the issue. Again, a court may grant a motion for judgment as a matter of

law if there is not sufficient evidence for a jury to “have found for that party,” even after a verdict has been rendered. See CR 50(a)(1), (b).

Mr. Lettrick’s contention is that the jury disregarded the evidence and the law in coming to its verdict. It is not necessary for Mr. Lettrick to object to jury misconduct before it has happened, and therefore Mr. Lettrick has still preserved his right to an appeal by bringing his Motions for JNOV and for a New Trial shortly after the jury’s verdict.

**B. The Evidence Shows That Ms. Johnson Was At Least Contributorily Negligent and At Fault**

In Washington State, the law provides that someone could be as much as 100% negligent, or as little as 0% negligent, and everywhere in between, but that total negligence must add up to 100%. *See* RCW 4.22.070; see also Godfrey v. State, 84 Wn.2d 959, 965, 530 P.2d 630 (1975). Additionally, a plaintiff is not barred from recovery simply because they were also at fault. See RCW 4.22.005; see also Godfrey v. State, 84 Wn.2d at 965. This makes it so that, even if Plaintiff is 90% at fault and negligent in causing a collision, and Defendant is only 10% at fault and negligent in causing the collision, Plaintiff is not barred from recovery, and is still entitled to recover 10% of their damages for

Defendant's 10% fault in causing the damages. See RCW 4.22.005; see also Godfrey v. State, 84 Wn.2d at 965.

In this case, the jury should have found, at the very least, some negligence on the part of Ms. Johnson in backing her vehicle up without looking back and without seeing what was there to be seen. The evidence simply does not support a finding that Plaintiff was solely at fault for this collision or that Defendant was fault free.

**1. The jury's verdict absolving Ms. Johnson of all negligence was contrary to the law and evidence in this case**

The Jury's verdict was contrary to the law and evidence in the case. The evidence shows that Ms. Johnson backed her vehicle into another vehicle, that her foot was still on the gas, that she was not looking backward, or looking in her mirrors, that she had already turned and was facing forward at the time of impact, and that defendant ran into something that was there to be seen. The Trial Court should have granted Mr. Lettrick's motion for judgment notwithstanding the verdict because it should have "conclude[d], as a matter of law, [that] there [was] no evidence or reasonable inference to support a verdict in favor of [the] nonmoving party." Thomas v. Wilfac, Inc., 65 Wn. App. 255, 259, 828 P.2d 597 (Div. 3 1992). The Trial Court should have granted Mr.

Lettrick's JNOV motion because it could have been said "as a matter of law, that there [was] no competent and substantial evidence upon which the verdict [could] rest." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001). If there was proof of negligence on Ms. Johnson's part, and the jury disregarded it, the Trial Court must grant Mr. Lettrick's motion for JNOV.

The jury should have attributed at least some fault to Ms. Johnson, given the evidence presented at trial. Ms. Johnson admitted to not continuing to look back as she backed out of her parking stall. Ms. Johnson admitted to not looking back when the collision occurred. Ms. Johnson also admitted that her vehicle was still moving backwards and that her foot was still on the gas pedal when the impact occurred and that she was not looking back at that time. She could not remember ever looking in the mirror, even after the collision occurred, and she admitted that she never saw a car that was there to be seen by a reasonable person. These were admissions by plaintiff of negligence, and a reasonable jury could have reached only one conclusion based on these admissions on the record—that there was at least some negligence on Ms. Johnson's part.

**2. The jury's verdict is not supported by substantial evidence, which strongly suggests that the jury disregarded the evidence in coming to its verdict**

The Trial Court should have overturned the jury's verdict and found that the Defendant was negligent based on the facts presented. Negligence is generally a question of fact for the jury, but it may also be decided as a matter of law by the Trial Court in certain instances. Thomas v. Wilfac, Inc., 65 Wn. App. at 261. If the jury verdict is not supported by substantial evidence, then a Trial Court may withdraw the issue from the jury or grant a judgment notwithstanding the verdict. Tusnadi v. Frodle, 8 Wn. App. 239, 242, 505 P.2d 165 (Div. 1 1973).

Ms. Johnson was negligent in backing out of her parking stall without continuing to look back, and for failing to see what was there to be seen. The jury should have found Ms. Johnson at least partially negligent. There was substantial evidence of negligence, and there was not substantial evidence of the absence of negligence on Ms. Johnson's part, and the jury verdict should not stand.

**3. The jury's verdict was contrary to law, and it creates bad precedent because it is bad policy to maintain that it is not**

**negligent for a driver to fail to look in the direction the vehicle is traveling**

The jury's verdict in this case is contrary to public policy. Public policy provides that people must act reasonably, and drive reasonably, to avoid risk to society. A reasonable person takes simple precautions whenever possible. In every case of a person backing a vehicle, it is reasonable for them to look in the direction their vehicle is traveling, in order for them to avoid hitting objects, cars, or people. This is especially the case in a busy parking lot where the risk of danger is high. A reasonable person would look back while backing their vehicle in a busy parking lot. The Jury in this case, in finding that Ms. Johnson was without fault, either must have found that this type of parking lot collision can occur with ZERO fault by anyone, or that the Plaintiff was 100% at fault. There was no or little evidence presented that Plaintiff was negligent in this case, so the only conclusion is that the Jury found that the collision was not anyone's fault. This is not consistent with the testimony or evidence in this case. It is not an imposition upon most people to ask that they watch where they are going while backing their vehicle, and it would no doubt avoid many collisions into objects, cars, and people. It is bad policy to allow a jury to hold that a person is not negligent or that no one

is negligent when they blindly back a vehicle, without looking in the direction they are going, and hit another car.

**4. Ms. Johnson's position essentially posits that a person may act negligently in a parking lot, supported by Ms. Johnson's tenuous argument that the rules of the road do not apply to parking lots**

While the legislature may not have expressly decided that the rules of the road apply to private parking lots, people must always act reasonably, and see what is there to be seen. A person can still act negligently in a private parking lot. Disobeying an established rule of the road is still evidence of negligence even if the disobedience happens in a large, publicly used parking lot. See RCW 5.40.050 (Provides in part, "A breach imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence..."). In fact, the Washington Attorney General was of the opinion that we should apply the rules of the road to parking lots frequented by the public. See 1963-64 Wash. Att'y Gen. Op. no. 25 (May 23, 1963). The rules of the road are meant to protect drivers and people on public roadways, but there is no reason not to protect drivers and people in parking lots, as well. It is good policy, and logical, to

require that drivers follow safety rules within parking lots where there is still risk of harm to people. Even if the rules of the road are truly inapplicable to parking lots, disregarding the rules of the road in a parking lot should still be considered evidence of negligence because they are meant to maintain public safety.

**C. The Court Rules Allowed Dr. Brian O’Grady’s Deposition Testimony to be Read at Trial, and the Court Should Have Allowed It, Per The Court Rules**

Dr. O’Grady’s deposition testimony should have been allowed at trial because the Court Rules provide that deposition testimony may be used at trial when the witness is not available and residing out of the county, over 20 miles from the trial. See CR 32(a). The court rules do not provide that a plaintiff must exercise due diligence in order to be able to use deposition testimony. See CR 32. The court rules further do not provide that the deposition transcript must be the original in order for it to be used. See CR 32. However, courts have clearly held that if a plaintiff is within the rules, they may choose to introduce deposition testimony, even if only as a “tactical prerogative.” See Bertsch v. Brewer, 97 Wn.2d 83, 89-90, 640 P.2d 711 (1982).

Mr. Lettrick was well within the rules when he sought to admit Dr. O'Grady's deposition testimony, and should have been allowed to do so. Mr. Lettrick did his due diligence to try to secure Dr. O'Grady's live testimony, even though he was not required to do so under the rules. However, he was unable to secure Dr. O'Grady's live testimony because Dr. O'Grady was living in Texas at the time, and was additionally going to be on vacation during the time of the trial. Mr. Lettrick was not required to have an original deposition transcript under the court rules in order to use Dr. O'Grady's deposition at trial, but to the extent an original was necessary, Ms. Johnson was in possession of the original. Mr. Lettrick tried to secure Dr. O'Grady's live testimony for trial, and when Dr. O'Grady was unavailable because he was living in Texas and was going to be on vacation during the time of trial, Mr. Lettrick was well within the court rules to use Dr. O'Grady's deposition testimony.

**D. Ms. Johnson Should Not Be Entitled to Costs for Duplicative Records Which had Already Been Previously Provided to Her**

Ms. Johnson should not be entitled to the costs for the entirety of the medical records she obtained because she is limited to *reasonable* expenses in obtaining medical records which are *admitted into evidence at trial*. See RCW 4.84.010(5). The Washington statute on costs allowed to

the prevailing party provides that they are entitled to the following expenses:

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

RCW 4.84.010(5) (emphasis added). The statute states that the party is only entitled to *reasonable* expenses. Additionally, the statute provides that parties may obtain costs for records *admitted into evidence at trial*, to the exclusion of being able to recover for those records not admitted into evidence.

Ms. Johnson should not be allowed reimbursement of costs for Mr. Lettrick's medical records, when she had previously been provided with copies of the medical records. CP 1437. Additionally, Ms. Johnson admits that the only Kadlec Medical Center records she admitted was Exhibit 144. See Brief of Respondent, p. 29. It is unreasonable and inequitable for Mr. Lettrick to have to pay to obtain records, then provide Ms. Johnson a copy, twice, and then have to pay for those same records a second time. Ms. Johnson unreasonably obtained the records for a third time, after Mr. Lettrick had already provided her copies of the records twice before. Aside from that, Ms. Johnson only admitted a very small portion of the

voluminous Kadlec Medical Center records obtained. Ms. Johnson cannot reasonably be entitled to costs for the entirety of the records, which had already been previously provided to her by Mr. Lettrick, and of which very few records were actually admitted at trial. Ms. Johnson is not entitled to costs for records because it was not reasonable for her to incur the cost for records she already had, and if it was reasonable for her to request the records, costs should be limited to records that were actually admitted at trial.

### **CONCLUSION**

Mr. Lettrick again requests that this court reverse the Trial Court and remand this case for trial for all of Mr. Lettrick's claims, and for a determination of the extent of Mr. Lettrick's damages, to include attorneys' fees and costs. The Trial Court could have granted Mr. Lettrick's Motion for Judgment Notwithstanding the Verdict and for a New Trial, under CR 50 and CR 59, after the jury disregarded the evidence and came back with a verdict absolving Ms. Johnson of all negligence. The jury's verdict was contrary to the facts and contrary to law, and the Trial Court should have granted Mr. Lettrick's motion for JNOV, or should have granted Mr. Lettrick a new trial. Additionally, this Court should reverse the Trial's Court's decision not allowing the

deposition testimony of Dr. Brian O'Grady at trial when it was well within the court rules. Finally, this Court should reverse the Trial Court's judgment awarding Defendant costs for the entirety of the medical records obtained, and limit recovery to costs for only the medical records admitted at trial, in accordance with state law.

Dated this 8 day of September, 2015.

Respectfully submitted,



Ned Stratton WSBA #42299

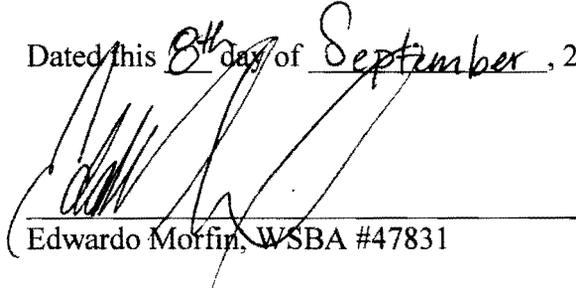
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CERTIFICATE OF SERVICE

I certify that on the 8<sup>th</sup> day of September, 2015, I caused a true and correct copy of RESPONSE TO BRIEF OF RESPONDENT to be served on the following in the manner indicated below:

Counsel for Respondents	via	<input type="checkbox"/> U.S. Mail
Ken Miller, WSBA #10946		<input type="checkbox"/> Hand Delivery
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1020 North Center Parkway, Suite B		<input type="checkbox"/> E-Mail
Kennewick, WA 99336		<input checked="" type="checkbox"/> Pronto Legal Messenger

Dated this 8<sup>th</sup> day of September, 2015.

  
\_\_\_\_\_  
Edwardo Moffin, WSBA #47831