No. 81253-5

ALEXANDER, J. (dissenting)—The lead opinion does not mention that the jury in this case never reached the questions of whether Edward Gregoire was contributorially negligent or assumed a risk of harm. In my view, it was unnecessary for the jury to do so because it found that the city of Oak Harbor's negligence was not a proximate cause of Mr. Gregoire's death. That being the case, even if we assume that the trial court's instructions on contributory negligence and assumption of risk were erroneous, their submission to the jury was harmless error.[1] *See* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 304 (1995/96) (erroneous instruction "[c]ured by the [j]ury's [v]erdict" is harmless); *see, e.g.*, *Miller v. Great N. Ry.*, 105 Wash. 349, 354, 177 P. 799 (1919) (erroneous contributory negligence instruction was harmless where jury's verdict ruled out any finding of negligence against defendant); *Faust v. Benton County Pub. Util. Dist. No. 1*, 13 Wn. App. 473, 477-78, 535 P.2d 854 (1975) (erroneous res ipsa loquitor instruction was harmless where jury found plaintiff was not contributorially negligent); *Okkerse v.*

[1]I, nevertheless, agree with Chief Justice Madsen's discussion of comparative negligence and her opinion that on remand the trial court should "be free to consider whether to instruct the jury on comparative fault." Concurrence/dissent at 13.

*Westgate Mobile Homes, Inc.*, 18 Wn. App. 45, 566 P.2d 944 (1977) (refusal to instruct on negligent misrepresentation was harmless where jury found defendant not liable for misrepresentation).

Tanya Gregoire's guardian ad litem and the estate of Edward Gregoire endeavor to get around this obvious problem by claiming that the jury instructions on contributory negligence and assumption of risk probably influenced the jury's decision on proximate cause. I fail to see how such a conclusion can be reached, particularly where, as here, the jury was properly instructed on proximate cause,[2] answered a special verdict question about proximate cause, and did not reach the special verdict question about contributory negligence.

Given these facts, one can only speculate as to what influenced the jury's determination that the city's negligence was not the proximate cause of Mr. Gregoire's death. We should not engage in such speculation. *See Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003) ("'The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict.'" (quoting *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632

[2]The proximate cause instruction initially given by the trial court was *Washington Pattern Jury Instructions: Civil* 15.01. Clerk's Papers (CP) at 43; 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (5th ed. 2005) (WPI). Upon receiving a request from the jury for a clearer definition of proximate cause, the trial court provided WPI 15.01.01 to the jury. CP at 55; 6 WPI 15.01.01, at 185. Our court did not grant review on the issue of whether the proximate cause instructions given by the trial court were erroneous. Supreme Court Order, *Gregoire v. City of Oak Harbor*, No. 81253-5 (Wash. Sept. 3, 2008) (granting review "only on the issue of whether the trial court erred in instructing the jury as to contributory negligence and assumption of risk"); Pet. for Review at 1.

(1988))). I would, therefore, affirm the Court of Appeals.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice Mary E. Fairhurst

Justice James M. Johnson