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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON--DIVISION I  
NO. 66706-8-I

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GERARD PLASSE, APPELLANT

v.

DUNG & JANE DOE MAO, RESPONDENTS

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APPELLANT'S REPLY BRIEF

William C. Budigan

WSBA #13443

Attorney for Appellant

2601 42nd Ave W

Seattle, Washington 98199

(206) 284-5305

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## B. ARGUMENT

This case is about erroneously rejected jury instructions.

Instructions have to do with driving rules of the road which were particularly relevant to the case and should have been allowed to provide legal standards as evidence of negligence for the jury.

In State v. Jarvis, 246 P.3d 1280 (2011), the court held that regarding appeals of rejected jury instructions, the standards of review are:

We review a trial court's refusal to give jury instructions for abuse of discretion. *State v. Buzzell*, 148 Wash.App. 592, 602, 200 P.3d 287 (2009). Jury instructions are improper if they do not permit the defendant to argue her theories of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. *State v. Vander Houwen*, 163 Wash.2d 25, 29, 177 P.3d 93 (2008). A defendant is entitled to have the jury instructed on her theory of the case when there is evidence to support the theory. *Buzzell*, 148 Wash.App. at 598, 200 P.3d 287 (quoting *State v. Hughes*, 106 Wash.2d 176, 191, 721 P.2d 902 (1986)). When determining whether the evidence was sufficient to support giving an instruction, we view the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wash.2d 448, 455-56, 6 P.3d 1150 (2000).

Under all of these bases, as supported by argument herein, Appellant's case should be remanded immediately, notwithstanding Respondent's broad statements of the law that judges have discretion in rejecting instructions (of course, so long as they do not abuse their discretion in the ways in the quotation above) and are under no obligation to instruct with

actual verbatim laws (of course, so long as the meat of re-worded law is instructed upon and relevant laws not excluded).

Respondent Conceded Assignments of Errors 2 & 4 from Appellant's Brief

In Respondent's Response Brief, Respondent did not address any of the assignment of error or arguments regarding Appellant's Brief Assignment of Errors 2 and 4 regarding:

Does a judge in a jury trial regarding negligence abuse his discretion in precluding the trier of fact from deciding the issue of proximate cause when there is sufficient factual evidence that a defendant's action, which is a violation of a statute, is at least one proximate causes of the accident? (Assignment of Error 2.)

Did the trial court error in interpreting and applying to the subject facts, case law allegedly excluding passengers who debus a bus and then enter an adjacent crosswalk in front of the bus from the protections of RCW 46.61.235(4), prohibiting a vehicle from passing a stopped vehicle at a crosswalk area of an intersection when a pedestrian is crossing there? Should the court clarify the subject language or dicta in Panitz, Jung or Rettig? (Assignment of Error 4.)

Therefore, these assignments of error are conceded and will not be readdressed here except that it is noted they are grounds for the trial

court's error in denying Appellant's motion for directed verdict and Appellant's motion for judgment as a matter of law and reconsideration motion regarding same.

Appellant has Complied with RAPs Regarding the Report of Proceedings

Appellant has complied with RAPs regarding the report of proceedings (RP), already had a motion herein about these RPs as limited to the jury instructions, and the record is adequate because the errors claimed surround the instructions and the court reporter claims that he transcribed every word regarding instructions throughout the trial.

It is important that Respondent does not factually dispute or contest any statement made and has not provided any contradictory RP. If this court believes that any particular additional portion of the lower court record is necessary for determination of any issue, appellant hereby requests additional time to procure the same, but again the focus of this appeal is on the denial of the proposed statutory rules of the road instructions and all the transcript regarding the court arguments and court rulings have been provided already.

Appellant has Complied with RAPs Regarding Identifying the Instructions for which there are Errors Claimed by Appellant

Addressing Respondent's Response Brief procedural and RAP arguments that Appellant has not complied with RAP 10.3(g) by providing

a separate assignment of error for each refused instruction and RAP 10.4(c) by providing the text of proposed instructions for the statutes in the proposed instructions quoted verbatim, first, Respondent himself in the Response Brief quoted Appellant’s proposed jury instructions, the CP numbers, the RCW citations, and the verbatim statutes/instructions. Nevertheless, these are below so that there is no confusion on the RAPs having been met.

First, individually assigned errors listed per proposed jury instruction with CP and RCW numbers:

*Assignments of Error*

- No. 1 The court erred in denying Appellant’s proposed jury instruction in CP 101, RCW 46.61.100(1) and (1)(a).....
- No. 2 The court erred in denying Appellant’s proposed jury instruction in CP 102, RCW 46.61.110(2).....
- No. 3 The court erred in denying Appellant’s proposed jury instruction in CP 103, RCW 46.61.120 .....
- No. 4 The court erred in denying Appellant’s proposed jury instruction in CP104, RCW 46.61.125(1)(b) .....
- No. 5 The court erred in denying Appellant’s proposed jury instruction in CP 100, RCW 46.61.140(1) .....
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- No. 12 The court erred in denying Appellant the realistic opportunity to argue his theory of the case that specific rules of the road were violated constituting negligence by rejecting Appellant’s proposed jury instructions .....
- No. 13 The court erred in denying Appellant’s motion for directed verdict and Appellant’s motion for judgment as a matter of law .....

Second, Appellant lists the text of every denied proposed instruction, the CP number and the RCW number:

In CP 101 Appellant requested the following instruction of verbatim RCW 46.61.100(1) and (1)(a), which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

- (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
- (b) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard.

In CP 102 Appellant requested the following instruction of verbatim RCW 46.61.110(2), which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions and special rules hereinafter stated:

(1) The driver of a vehicle overtaking other traffic proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken traffic.

(2) The driver of a vehicle approaching a pedestrian or bicycle that is on the roadway or on the right-hand shoulder or bicycle lane of the roadway shall pass to the left at a safe distance to clearly avoid coming into contact with the pedestrian or bicyclist, and shall not again drive to the right side of the roadway until safely clear of the overtaken pedestrian or bicyclist.

In CP 103 Appellant requested the following instruction of verbatim RCW 46.61.120, which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing other traffic proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the operation of any traffic approaching from the opposite direction or any traffic overtaken.

In CP 104 Appellant requested the following instruction of verbatim RCW 46.61.125(1)(b), which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

No vehicle shall be driven on the left side of the roadway under the following conditions:

(a) When approaching or upon the crest of a grade or a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event other traffic might approach from the opposite direction;

(b) When approaching within one hundred feet of or traversing any intersection or railroad grade crossing;

(c) When the view is obstructed upon approaching within one hundred feet of any bridge, viaduct or tunnel;

(d) When a bicycle or pedestrian is within view of the driver and is approaching from the opposite direction, or is present, in the roadway, shoulder, or bicycle lane within a distance unsafe to the bicyclist or pedestrian due to the width or condition of the roadway, shoulder, or bicycle lane.

[(c) and (d) should not have been included in the proposed instruction as not relevant to the facts of this case]

In CP 100 Appellant requested the following instruction of verbatim

RCW 46.61.140(1), which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

In CP 98 Appellant requested the following instruction of verbatim

RCW 46.61.235(1) and (4), which the court erroneously denied.

INSTRUCTION NO. \_\_\_\_\_

The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian to cross the roadway within an unmarked crosswalk when the pedestrian is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. "Half of the roadway" means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.

Whenever any vehicle is stopped at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

The Court's Instructions 6 And 9 Erroneously Improperly Require Verdict For Defendant When There Is Contributory Negligence And Confuse The Jury.

Appellant also assigns error to the court's Jury Instruction Number 9 (CP 70) and its verbatim text is:

INSTRUCTION NO 9 (CP 67)

The violation, if any, of a statute or ordinance is not necessarily negligence but may be considered by you as evidence of negligence on the part of the person committing the violation.

A statute provides that the driver of a vehicle shall yield the right of way, slowing down or stopping if necessary, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling or approaching so closely from the opposite half of the roadway as to be in danger. A statute also provides that no pedestrian shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle that is so close that it is impossible for the driver to stop.

The right of way described in this instruction, however, is not absolute by relative and the duty to exercise ordinary care to avoid collisions rests up both parties. The primary duty, however, rests upon the party not having the right of way.

Appellant also assigns error to the court's Jury Instruction Number 6 (CP 67) and its verbatim text is:

INSTRUCTION NO 6 (CP 67)

As to his claim of negligence, the plaintiff Gerard Plasse has the burden of proving each of the following propositions: First, that the defendant Dung Mao operated his vehicle in a negligent manner.

Second, that the defendant was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

As to the affirmative defense of contributory negligence, the defendant has the burden of proving both of the following propositions:

First, that plaintiff Gerard Plasse acted, or failed to act, in one of the ways claimed by the defendant and that in so acting or failing to act, he was negligent; and

Second, that this negligence was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the defendant as to this defense. On the other hand, if any of these propositions has not been proved, your verdict should be of the plaintiff as to this defense.

In the court's Instruction Number 9 in CP 67, the trial court used an incorrect and vague paragraph based on the WPI for this instruction about vehicles required to yield the right of way to pedestrians crossing in a crosswalk area instead of the proper, actual statutory language of RCW 46.61.235(1) and (4). The latter, noted above, in no uncertain terms requires the vehicle to actually stop at the crosswalk area and more importantly, remain stopped to allow the pedestrian to cross when in the half of the roadway of the vehicle. Here, it is undisputed that the Respondent's car did not stop and that in passing around the bus in the one lane road going in his direction, he had crossed over the center line of the two opposing-lane road and therefore was not only obligated to stop for an Appellant pedestrian in his legal half of the road, but was obligated to stop

for the pedestrian in the half of the road of the oncoming cars because he went into that lane as well. Of course, the judge's Instruction Number 9 incorrectly states the law in the statute and states that Respondent only had to slow down and that he only had to stop if necessary – i.e. that so long as he slowed down, he could be excused from stopping if it was not necessary to do so due to some fault of the pedestrian. This was objected to (RP 12/14/10 at 6) and the court erred in not changing its ruling, taking away a duty of driver to stop, affecting negligence. The statutory language should have been provided making it clear that Respondent had to stop and yield the right of way to the pedestrian. More confusing is that in the last paragraph of Instruction Number 9 (CP 70), the court instructed the jury that the right of way of a pedestrian is not guaranteed but that the driver has the primary duty, as the one not having the right of way, to exercise ordinary care to avoid collision with the pedestrian.

Unfortunately, the problem is that even though the jury is instructed about primary duty to avoid collision in Instruction Number 9, the instructions that the judge gave regarding the affirmative defense of contributory negligence of a pedestrian in Instruction Number 6 (CP 67) stated that if the jury found that the Appellant pedestrian was in part negligent and that this was “*a proximate cause*” of his own injuries, the jury was instructed that their verdict “should be for the defendant as to this defense.” This

tells a jury that when there is contributory negligence, their verdict should be for the Defendant. The problem is that it does not tell them what it means that a verdict for the Defendant amounts to. It should have been clear and say not that there is a verdict for the Defendant but that there is a finding that the jury then has to determine contributory negligence percentages because by definition, this “affirmative defense of contributory negligence” described in Instruction Number 6, means that the jury has to take the next steps of calculating the percentages of that contributory negligence. We as lawyers know this, but lay jurors instructed by a court in Instruction Number 6 that they have to give a verdict for the Defendant means just that to lay people – a verdict for the Defendant, just as they found here in answering the special verdict form stopping at the first question and giving a verdict for the Defendant without ever getting to any of the other portions of the special verdict form. The fact that seven instructions later in Instruction Number 13 (CP 75) the court discussed contributory negligence and that it needs to be calculated, did not clear up the confusion in Instruction Number 6 and the two never referred to the other and Instruction Number 6 is contrary to Instruction Number 13 in that it instructs the jury that if they find some contributory negligence by the Appellant, they had to give a verdict for the Defendant. What it really should have said is that they do not find a

verdict but then find contributory negligence and then are instructed to examine Instruction Number 13 instructions and follow the steps in the special verdict form. But, of course, they never got that far because the judge instructed them to give a verdict for the Defendant: end of story. When you compound this problem with the main problem that the judge did not instruct the jury on the law of the driver's duties coming into a crosswalk area in the five specific statutes spelling out negligence on the part of the driver when these statutes are violated, it is no wonder that the jury failed to find any negligence whatsoever on the part of the driver. There is absolutely no question here that the driver was negligent but that the real question for the jury was any negligence of the Plaintiff pedestrian and what is the percentage of contributory negligence. However, the jury was never given the proper instruction in the law to determine the driver's negligence and the case should be remanded for new trial and instructions.

The Court Failed To Properly Instruct The Jury On The Actual Laws Relevant To Drivers' Duties Entering A Crosswalk Area and Thereby Failed to Adequately Instruct the Jury on the Law and Prohibited Counsel from Arguing his Theory of Defendant's Negligence.

On the one hand, the judge gave the jury certain instructions which in part support negligence on the part of the driver here (Instruction Number 9 in CP 70 that the primary duty to avoid collisions rests on

drivers who must yield the right of way; Instruction Number 8 in CP 69 that the pedestrian had the right to assume that the driver would obey the rules of the road and could proceed on that assumption until they knew to the contrary) but on the other hand the court never gave the jury the law of the several rules of the road confirming the violations of which are negligence by the driver.

This court failed to instruct the jury on the specific rules of the road that this driver was required by the law to obey when driving into this crosswalk area occupied by the Appellant pedestrian.

The rules of the road requested in Appellant's proposed instructions of RCW laws would have instructed the jury about the specific protections we put into the law to save the lives of pedestrians and specifically not only made these violations of the law crimes, but also failures of the driver's duties of ordinary care and therefore a basis for negligence.

The law prohibits people from not driving on the right half of the roadway (denied Instruction in CP 101), passing vehicles traveling in the same direction, as this car and bus here, to avoid coming in contact with pedestrians (CP 102), crossing the left side of the center of the roadway and overtaking and passing traffic proceeding in the same direction, as in this car and bus here, without interfering with the operation of any others (CP 103), crossing left of center within 100 feet of any intersection (CP

104), crossing into an oncoming lane only if it could be done with safety (CP 100), and stopping and remaining stopped to allow a pedestrian to cross in a crosswalk area and never overtake or pass a stopped vehicle at a crosswalk area where pedestrians can cross, precisely our situation (CP 98).

The judge's comment to Appellant's attorney that he could just say that, of course, the driver should have been careful coming to an intersection, etc, and that that is enough of a basis for negligence to argue to the jury, and yet and in the same ruling state that he may not even refer to any elements of the relevant Rules of Road (just as the Respondent argues that counsel could somehow argue plaintiff's theories but not reference anything in any laws) really meant that counsel could only argue general theories that the driver should have been careful in the crosswalk area, but could not say anything more specifically. Counsel's hands were tied and mouth gagged. The court ordered counsel to not breathe a word about the specific duties of drivers. Going against an actual court order to not mention certain legal obligations, the violation of which would be evidence of negligence, has huge consequences in a jury trial regarding having to do the trial over and huge consequences for the order-defying attorney. For example, see

State v. Garrett, 124 Wn.2d 504, 881 P.2d 185 (1994) where defense counsel said that he would call it like he sees it to the jury and the court told him, "[n]o, you can't," whereupon Mr. Smith said to the court "[y]ou're not going to tell me what words I can use in talking to a jury." The consequences for the attorney were huge.

Wendt v. Department of Labor & Industries, 18W.APP674 (1977)

The Department argues, however, that the error did not prejudice Wendt because the court's other instructions (7, 9 and 10) permitted him to adequately present and argue his theory to the jury. *Nelson v. Mueller*, 85 Wash.2d 234, 533 P.2d 383 (1975). We disagree. Such general stock instructions might suffice were a less technical proposition involved. Here, however, a jury of lay persons might well consider the "lighting up" theory esoteric, to say the least. In such a case the law should be explicated by the judge in particular terms to insure that the jury grasps its subtleties. Finally, far from involving a mere fringe or subordinate issue, the requested instruction embodied the gist or substance of Wendt's claim. When such a key issue is involved, a correctly worded and particularized instruction should be given, and general instructions such as the court gave here will not suffice. *Kiemele v. Bryan*, 3 Wash.App. 449, 476 P.2d 141 (1970); *Lidel v. Kelly*, 52 Wash.2d 238, 324 P.2d 817 (1958); *DeKoning v. Williams*, 47 Wash.2d 139, 286.

Similarly here, the court should have instructed on specific, relevant technical laws about 100 feet before intersections and not passing or crossing over center lines in these particular circumstances and the court should not have prohibited plaintiff's counsel from even

mentioning the elements of these rules of the road and this will not suffice in our legal system. Similarly, allowing counsel to say everyone knows drivers should be slow near crosswalk areas is denying adequate presentation of theory arguments. A party is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the theory. State v. Ward, 135 Idaho 400, 17 P.3d 901 (2001).

In State v. Shumway, 137 Ariz. 585, 672 P.2d 929 (1983), the Defendant was speeding, but another driver failed to yield to oncoming traffic in making her left hand turn, allegedly caused the accident and she died at the scene. The court refused Defendant's requested instruction concerning the decedent's duty to yield the right of way in a left hand turn (certainly less complicated rule of the road one would think jurors already know versus all the numerous, dense laws about driver's duties in a crosswalk area and passing in an intersection area, 100 feet, center lines, etc here). The higher court reversed, holding:

The trial judge refused to give the defendant's requested instruction that

The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite

direction which is within the intersection or so close thereto as to constitute an immediate hazard.

*A party is entitled to an instruction on any theory of the case reasonably supported by the evidence. State v. Axley, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982); State v. Miller, 108 Ariz. 441, 445, 501 P.2d 383, 387 (1972).* The facts show that the decedent was in the middle of the intersection at the moment of impact, and that the defendant, who was not running a red light, had the right of way in that intersection...

*We believe, as did the Court of Appeals, that refusal of the defendant's instruction was erroneous. We acknowledge that the requested instruction was merely a verbatim repetition of the left turn statute.* It would have been better, and much clearer to the jury, if such an instruction had been combined with an instruction similar to RAJI, Negligence, 14. [ ed. comment: An instruction on negligence was given in our case of personal injury negligence] *Nevertheless, we believe that giving the "bare bones" of the left turn statute would have enabled the defendant to argue the effect of the decedent's actions on defendant's culpability. This was apparently his defense in the case, and the instruction should therefore have been given.*[bold and italics added]

Similarly in the subject case the complicated laws requested here verbatim were a basis of plaintiff's theory of the case and clearly relevant.

In Monastero v. Novak, 2008-Ohio-1947, No. 89656 (2008), Defendant sought an instruction on the open-and-obvious doctrine and the trial court declined. The higher court reversed stating:

The open-and-obvious doctrine provides that owners do not owe a duty to persons entering their premises regarding dangers that are open and obvious...

Where reasonable minds could differ as to whether a danger is open and obvious, however, the obviousness of the risk is an issue for the jury to determine.

Defendant testified that approximately six to eight inches of the car's bumper extended onto the sidewalk. Whether this extension was open and obvious, and indeed, whether extending six to eight inches onto the sidewalk constitutes parking a car on the sidewalk *in violation of R.C. 4511.68, are questions of fact for the jury.*

On these facts, there was a genuine issue, as previously noted by the trial court, on whether the condition was open and obvious, and the jury should have been so instructed. [bold and italics added]

Similarly here, where the Defendant's violation of several Rules of the Road were proximate causes of the injury to Plaintiff here are questions of fact for the jury and they should have been instructed as to these violated laws.

In Brown Distributing Co. of West Palm Beach v. Marcell, 30 Fla. L. Weekly D196, 890 So.2d 1227 (2005), Plaintiff challenged the trial court's refusal to give its proposed jury instructions on after-acquired evidence and the same actor inference. The higher court reversed:

“[I]t is axiomatic that each party is entitled to have the jury instructed upon [its] theory of the case.”... [Citations omitted]

We find the trial court erred by failing to give these proposed instructions. With respect to the after-acquired evidence instruction, we find the instruction to be a fair reading of the holding in *McKennon* and therefore ***appropriate as it accurately states the law and is necessary for the jury to properly resolve the issues of the case.*** [Citations omitted, bold and italics added.]

In Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358

(1999), the court held that relevant statutory elements should have been instructed to the jury:

In summary, we agree with the defendants, as did the court of appeals, that the circuit court erred in refusing to grant the defendants' motion to instruct the jury about defenses set forth in Wis. Stat. § 448.30, when evidence suggesting such defenses was presented.

Similarly, in the instant case statutory prohibitions against certain types of driving are relevant to proximate cause, foreseeability, negligence, and certainly contributory negligence and of course should be instructed to the jury as relevant considerations for the jury in determining Defendant's negligence. As in the State v. Shumway case discussed above, plaintiff here can assume and rely that the driver will obey all the rules of the road and plaintiff can proceed in the crosswalk area until presented with evidence of the

contrary, but the jury was not instructed in these rules of the road to aid them in their decision. In Maltos v. Texas Dept. of Protective and Regulatory Services, 937 S.W.2d 560 (1996), the court held: “The essential question the trial court must face in ruling on a requested instruction is whether the instruction will aid the jury in answering the questions and reaching a verdict.” Here, the applicable, relevant law was kept from the jury in their decision process and is error.

Of Course, Appellant was Prejudiced by the Court’s Prohibition of Providing the Jury the Applicable Law and the Court’s View of the Laws in the Instructions Erroneously Prejudiced the Court’s Decision Making on Motion for Directed Verdict and Motion for Judgment as a Matter of Law

It is axiomatic that if the jury is not given all of the relevant law there is prejudice to the requesting, losing party and the integrity of our whole legal system of jury trials is compromised. In Wood v. U.S. Bank, 160 Ohio App.3d 831, 828 N.E.2d 1072 (2005), plaintiff claimed that the trial court erred by rejecting instructions based on Ohio's codification of the Uniform Prudent Investor Act ("UPIA"). The higher court reversed stating:

*Generally, a party is entitled to the inclusion of its requested instruction if it is a correct statement of the law applicable to the facts of the case.* Jury instructions are proper if they correctly state the law as applied to the facts of the case and if “reasonable minds can properly reach the conclusion sought by the instructions.”

*Because of the trial court's erroneous instruction here [ added: in not instructing on the UPLA law], the jury was not given the proper legal standard.* The proper jury instruction would have simply quoted the appropriate statutory language.... Given the improper law to apply, the jury could have come only to the conclusion that it did... *But with the proper instructions, the jury may have gone the other way. Thus, we must order a new trial.*

[ bold and italics added]

If the trial court erroneously denies correct, non-argumentative jury instructions, we must reverse the judgment when “there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.” Soule v. General Motors Corp., 8 Cal.4th 548, (1994).

Respondent argues that there cannot be any prejudice to Appellant from the denial of these instructions because the laws in the instructions were not relevant to the crosswalk collision case and there were plenty of other points of evidence supporting Defendant’s negligence. First, this supports Appellant’s argument that the court should have granted directed verdict and motion for

judgment as a matter of law and second how can defendant say there would not have been a different verdict if the laws were instructed to the jury? There would be no impact if they came up with the same verdict after the laws were given, but to pre-judge the jury's thoughts after instruction in these clearly relevant laws was the prejudice done to appellant and the error of presumption by the judge that he knew better than the jury about determining negligence in taking this law away from the jury.

There is no question that the judge thought that the driver was negligent because he ruled it was proper to tell the jury :  
“When you come upon a bus, you shouldn't go across the centerline. You shouldn't go fast. You should creep forward at one mile per hour because of the possibility that this might happen.”  
(RP 12/15/10 at 22 line 8). To him, this was so clear and allowed to go to the jury's ears that he would not allow any of the specifics of the several laws the driver violated to go to the jury. Believing this negligence on the part of the driver, the judge thus just clearly erroneously failed to direct a verdict of negligence against defendant driver and should have gone on to considering contributory negligence of the pedestrian. But he would not go there because he had already made up his mind on that and refused

to look at these laws providing weight in calculating defendant driver's percentage of contributory negligence and rightly so-- that should have been left to the jury to weigh after given these requested laws by clear instruction. The judge erroneously denied these motions and caused the jury's uninformed verdict, in the dark about the actual law and only armed with part of the legal picture to consider.

The judge could not express a clear reason for keeping the law away from the jury other than that he would not allow the laws to be considered because he thought for centuries relevant driving laws are never presented to the jury and counsel cannot quote them (RP 12/15/10 at 20-21) and he felt they had nothing to do with a cause for the injurious contact (RP 12/14/10 at 15 line 6: "I don't see the causal connection between this infraction ...and the occurrence"; to the judge these driving laws were just like driving without a license -- a violation of the law, but seemingly not a proximate cause of the accident :Id. at 16 ); ***but that ignores that if defendant driver had been following the law he would not have passed the bus within 100 feet of the crosswalk area in the one direction lane and would have stopped at the crosswalk area and never done these acts if they could not be done safely to***

*pedestrians in the crosswalk area.* There is no question that the driver's negligence is clear in violating these relevant laws and the court should have directed verdict on negligence of defendant based on appellant's motion for directed verdict based on the same theories from the proposed instructions and evidence presented (including testimony and cross-examination, redirect, re-cross of the Defendant) at the resting of Plaintiff's case or at the motion for verdict after the trial (CP 109,CP110-131,decision CP134-135 and reconsideration CP 136-140 )and the only remaining question should have been about contributory negligence of the plaintiff. However, by denying these motions and saying he was leaving the case to the jury to decide, the judge actually decided it for them erroneously by failing to instruct them in the law.

#### Request for Attorney Fees and Costs

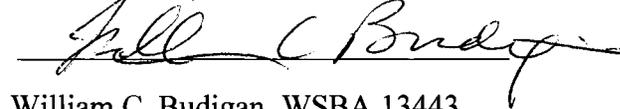
Appellant requests all reasonable attorney's fees and costs under all statutes, court rules, and case law applicable to this appeal or available through the court's equitable powers. In PA Life Ins. Co. v. Dept. of Emp. Sec., 97 Wash. 2<sup>nd</sup> 412 (1982) the court held that attorneys fees may be awarded on a recognized ground of equity. Here, the recognized is that it is unconscionable to leave for appellant to have gone through the full legal process and an entire trial and have to do it over again due to the courts

refusal to give instructions on clearly relevant statutes and the benefit brought to all litigants in jury trials regarding clarification of standards involving relevant laws requested as instructions. If the court does not award any of these, appellant requests that the attorney's fees and costs on appeal be reserved for determination of reasonableness by the trial court after any remand.

### C. CONCLUSION

Therefore, Appellant requests that the court remand this case for new trial, if it does not find negligence as a matter of law against the defendant and remand the case for determination of any contributory negligence and damages, and award attorney's fees and costs to Appellant on this appeal.

Dated this 23 day of November 2011



William C. Budigan, WSBA 13443

Attorney for Appellant