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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON--DIVISION I

NO. 66706-8-I

GERARD PLASSE, APPELLANT

vs.

DUNG & JANE DOE MAO, RESPONDENTS

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERRORS

Assignments of Error

1. The trial court erred in denying jury instructions on RCW 46.61.125(1)(b) and RCW 46.61.235(4), relevant statutory Rules of the Road in RCW 46.61 et seq. 5
2. Trial court erred in ruling that Defendant's actions in violation of the subject RCW 46.61 statutes were not a proximate cause of the accident and erred in not clarifying the relative duties and negligence of pedestrian and vehicles in instruction 9. 16
3. The trial court erred in failing to properly inform the trier of fact of the applicable subject law RCW 46.61 statutes as it applies to these facts and failed to permit plaintiff to argue its theory of the case of negligence based on acts in violation of the laws. 27

4. Trial Court erred 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.

30

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in denying jury instructions on RCW 46.61.125(1)(b) and RCW 46.61.235(4), relevant statutory Rules of the Road in RCW 46.61 et seq? (Assignment of Error 1.)
2. 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.)

3. Did the trial court erred in failing to properly inform the trier of fact of the applicable subject law RCW 46.61 statutes as it applies to these facts and failed to permit plaintiff to argue its theory of the case of negligence based on acts in violation of the laws?

(Assignment of Error 3.)

4. 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.)

B..Statement of the Case	1
C. Argument	5

1. The trial court erred in denying jury instructions on RCW 46.61.125(1)(b) and RCW 46.61.235(4), relevant statutory Rules of the Road in RCW 46.61 et seq. 5

Standard of Review 9

Relevance of the RCWs 9

2. Trial court erred in ruling that Defendant's actions in violation of the subject RCW 46.61 statutes were not a proximate cause of the accident and erred in not clarifying the relative duties and negligence of pedestrian and vehicles in instruction 9. 16

3. The trial court erred in failing to properly inform the trier of fact of the applicable subject law RCW 46.61 statutes as it applies to these facts and failed to permit plaintiff to argue its theory of the case of negligence based on acts in violation of the laws. 27

4. Trial Court erred 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.	30
<u>Request for Attorney Fees and Costs</u>	45
D. Conclusion	45

TABLE OF AUTHORITIES

Table of Cases

<u>Alexander v. County of Walla Walla</u> , 84 Wn.App. 687 (1997)	11
<u>Chen v. City of Seattle</u> , 153 Wn. App. 890 (Division I 2009)	22
<u>Cox v. Spangler</u> , 141 Wn.2d 431, 442, (Wash. 2000)	9
<u>Daley v. Stephens</u> , 64 Wn.2d 806, 394 P.2d 801 (1964),	31,32,40
<u>Estate of Templeton v. Daffern</u> , 98 Wash.App. 677, 682, (2000)	10,11
<u>Goucher v. J.R. Simplot Co.</u> , 104 Wn.2d 662 (1985)	24-26,30
<u>Hamblet v. Soderburg</u> , 189 Wash. 449 (1937)	34,35,39
<u>Hansen v. Washington Natural Gas</u> , 95 Wash.2d 773, 779 (1981)	25
<u>Hue v. Farmboy Spray Co.</u> , 127 Wash.2d 67, 92 (1995)	9
<u>Jung v. York</u> , 75 Wash.2d 195 (1969)	21,31,33-36,39
<u>Kim v. Budget Rent A Car Systems, Inc.</u> , 143 Wn.2d 190 (2001)	12

<u>Kness v. Truck Trailer Equip. Co.</u> , 81 Wash.2d 251, 258 (1972)	25-27,30
<u>Moratti v. Farmers Ins. Co. of WA</u> , 64477-7-I (WACA 7/2011)	28
<u>Panitz v. Orenge</u> , 10 Wn. App. 317 (1973)	30-33,36,39,40
<u>Rettig v. Coca-Cola Bottling Co.</u> , 22 Wash.2d 572 (1945)	17,18,31-39
<u>State v. Buzzell</u> , 148 Wash.App. 592, 598 (2009)	16,29
<u>State v. Rodriguez Ramos</u> , 171 Wn.2d 46 (2011)	12
<u>State v. Wanrow</u> , 88 Wash.2d 221 (1977)	9
<u>U.S. v. Carroll Towing</u> , 159 F.2d 169, (2d Cir. 1947)	42
<u>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</u> , 122 Wash.2d 299, 339(1993)	16,29

Statutes

RCW 4.22.005	27
RCW 5.40.050	10

RCW 46.61	1,5,6,27
RCW 46.61.100(1)	6
RCW 46.61.100(1)(a)	6
RCW 46.61.110(2)	6
RCW 46.61.140(1)	7
RCW 46.61.125(1)(b)	7,44
RCW 46.61.235 (1)	8, 44
RCW 46.61.235(4)	8,30,31,34,35,44
RCW 46.61.522(1)(a)	12
RCW 46.61.600	24,25
Rem.Rev.Stat. Vol. 7A, § 6360—99	34

Other Authorities

RESTATEMENT (SECOND) OF TORTS § 286 (1965)	10
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B. STATEMENT OF THE CASE

This appeal is about jury instructions rejected by the trial court. Therefore, the jury was not instructed on the law in these instructions. The instructions concerned Rules of the Road RCW 46.61 et seq. laws involving precisely our fact pattern of a pedestrian in a crosswalk area being hit by a car violating several of the Rules of the Road specifically for this situation. The facts are simple and not in dispute. Appellant was injured when hit by Respondent's car. It is undisputed that Appellant had debused from a bus at a bus stop right at a crosswalk area intersection and that Appellant was in the crosswalk area and crossing in front of the bus when he was hit by Respondent's car traveling in the same direction as the bus in only a two lane road with traffic allowed to go in two opposing directions (RP 12/15/10 14 line 10-16: the court stated the parties could tell the jury: "in this case the instruction defines a crosswalk as existing in a situation such as this. And I don't expect Mr. Vidlak [driver's attorney] to disagree with me when I tell you that this was a crosswalk that Mr. Plasse was in."); the trial court also added a phrase to the crosswalk instruction 10 making it clear that the area "in front of where the bus was stopped" was a crosswalk area even if unmarked, RP 12/15/10 13 line 10-18; defense counsel agreed to leave instruction 10 as instructing the jury about pedestrians favored in a marked or unmarked crosswalk areas under

our facts, RP 12/14/10 7 line 21 through 8 line 4; driver's counsel stated that there really was not a question here that there was a crosswalk area here, stating: "I really don't care if it is a marked or unmarked crosswalk." RP 12/14/10 12 line 24). It is undisputed that Respondent testified he passed around the bus from behind within 100 feet of the crosswalk area and crossed over into the oncoming traffic lane to pass the bus and was accelerating up an incline when coming into the crosswalk area to pass the bus.

At trial, Appellant requested jury instructions in October 2010, months before the actual trial (after continuance), again before the trial and during trial (CP 81-94 and 95-108) involving relevant rules of the road RCW statutes prohibiting certain driving actions by vehicles passing another vehicle in a crosswalk area and crossing over the centerline into the oncoming lane (RCWs and instructions quoted below) (RP 12/14/10 at 14 lines 4-13: the court noted all of the various RCWs requested in the jury instructions and stated that Plaintiff's counsel had "made the record with your written submissions, I think, of the jury instructions"). The trial judge rejected these instructions over strenuous argument and objection of Appellant's counsel (RP 12/14/10 at 14 line 12 through 17 line 11 and RP 12/15/10 14 line 17 to 16 line 4; RP 12/15/10 19 line 4 through 23 line 15). The trial court ruled that passing a vehicle was not an issue in the case

as he saw it (RP 12/14/10 at 14 line 17), he did not see “the causal connection between this infraction... and the occurrence.” (RP 12/14/10 15 line 6-8)[the judge was confused regarding the undisputed testimony of the driver that he had crossed the centerline into the oncoming traffic lane before the crosswalk area, but even conceding this infraction, the judge still felt that it was not causally connected to the occurrence, forgetting the other infractions and especially of not passing within 100 feet of the intersection, without which, if the driver had complied with the law, the accident would not have happened -- the point of the requested instruction](RP 12/15/10 14 line 17 to 16 line 4)(See also RP 12/15/10 at 16 line 13 – 17, where the court ruled that “crossing the centerline here bears no direct relevance to the harm that resulted in this case”). After the latter infraction of passing within 100 feet of a crosswalk area was pointed out to the judge, the judge reasoned that violating another driving related law such as driving without a license would not be a proximate cause of this accident (RP 12/14/10 at 16 line 2), but the point is that the driver here did not just drive without his drivers license which may not automatically lead to accidents and injury, but he drove illegally proceeding into a crosswalk area, violating specific laws enacted by the legislature precisely to prevent harm to pedestrians in the crosswalk. Counsel argued this and the clear causal connection to the injury here in a crosswalk where people

get on and off buses at the crosswalk area and need to be protected. (RP 12/14/10 at 16 line 14 through 17 line 11). The trial court also ruled against the statute instruction because of his reading that people debusing from a bus are not protected under the relevant statutes because of cases exempting buses where passengers have debused and are crossing in front of the bus in a crosswalk area (RP 12/15/10 16 line 22 through 18 line 13). Counsel argued that the cases relied upon by the court are inapplicable dicta and do not support that position and the court is misapplying the case law and there is no distinction in the written statutes regarding exemptions for buses or pedestrians in a crosswalk coming from a bus (RP 12/15/10 17 line 8 -18). The court rejected all of appellant's Rules of the Road instruction requests (RP 12/15/10 19 line 4 through 23 line 15), but ruled that the jury could be told other inexact things that are not in the Rules of the Road and were actually contrary to what is required by the law, but are made up arguments about duties of care and ordinary negligence:

You are free to say to the jurors, Look, you are drivers. You know what is safe and reasonable prudence and what isn't. When you come upon a bus, you shouldn't go across the center-line. 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 22 line 8-14).

While plaintiff was pleased to have this instruction from the court to counsel, it was not a court instructing a jury on the responsibilities of drivers coming upon a crosswalk area, crossing centerlines, going fast, leading to the possibility that this accident might happen.

The jury came back with a finding of no negligence whatsoever by Respondent and therefore did not even get to any contributory negligence by Appellant under the special verdict form (CP 78-80). Thus, the jury did not find Appellant contributorily negligent in any way. Appellant moved for a directed verdict (CP 109) and this was denied and Appellant sought reconsideration of this decision (CP 136-140) and that was denied (CP 134-135). Appeal followed timely.

C. ARGUMENT

This case is about erroneously rejected jury instructions. The 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.

1. The trial court erred in denying jury instructions on relevant statutory Rules of the Road in RCW 46.61 et seq.

The court denied Appellant's request for jury instructions on several Rules of the Road in RCW 46.61 et seq described below (hereinafter referred to as "the subject RCWs" or as "RCWs") and requested in Plaintiff's Proposed Instructions To The Jury with and without Citations (CP 81-94 and 95-108), originally months before the actual trial because it was continued and also just prior to the trial and provided on the first day of trial, also available with CD version for the court, which the court did not want to take and did not use. The relevant portions of the RCWs were quoted verbatim except that the RCW numbers and titles were removed and replaced with the standard instruction language "A statute provides..." and are as follows:

46.61.100(1) and (1)(a) (Keep right except when passing, etc(1) 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),

46.61.110(2) (Overtaking on the left. 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:

(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.)

46.61.120, (**Limitations on overtaking on the left** 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.)

46.61.125(1)(b), (Further limitations on driving to left of center of roadway (1) No vehicle shall be driven on the left side of the roadway under the following conditions:(b) When approaching within one hundred feet of or traversing any intersection or railroad grade crossing)

46.61.140(1), (Driving on roadways laned for traffic 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 (1) 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.)

46.61.235(1) & (4) (Crosswalks. (1) The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. For purposes of this section "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. (4) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian or bicycle to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

The Court improperly withheld from jury instructions, several relevant RCWs Rules of the Road to be considered by the trier of fact as evidence of the statutory standard of care. Appellant seeks reversal of trial court improper refusal to give the jury instructions.

Standard of Review

The review of jury instructions are:

guided by the familiar principle jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." Hue v. Farmboy Spray Co., 127 Wash.2d 67, 92 (1995). On appeal, jury instructions are reviewed de novo. State v. Wanrow, 88 Wash.2d 221 (1977).

Cox v. Spangler, 141 Wn.2d 431, 442 (Wash. 2000)

Thus, proposed jury instructions are reviewed de novo to determine the relevance of the omitted instructions to the proposing party's theory in the case.

Relevance of the RCWs

While the trial court found the requested rules of the road to be irrelevant to the case at hand, even the court acknowledged and indeed instructed the jury in the first sentence of jury instruction number 9 that the violation of a statute may be considered by the jury "*as evidence of negligence on the part of the person committing the violation.*" Here, the judge refused to give the jury this evidence of negligence by refusing to instruct on these relevant laws and it is no wonder that the jury could not find negligence.

A statute is relevant as evidence of the standard of care in determining negligence where the statute (1) protects a class of people that includes the person whose interest was invaded; (2) protects the particular interest invaded; (3) protects that interest against the kind of harm that resulted; and (4) protects that interest against the particular hazard that caused the harm. Estate of Templeton v. Daffern, 98 Wash.App. 677, 682 (2000) (citing RESTATEMENT (SECOND) OF TORTS § 286 (1965)).

In 1986, the legislature enacted RCW 5.40.050, generally eliminating per se negligence. That statute provides:

“A breach of a duty 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;”

Templeton continues on to explain that statutory negligence under RCW 5.40.050 remains highly relevant:

RCW 5.40.050 did not change the Restatement's four-part test for determining whether a statutory duty applies in a negligence case --RCW 5.40.050 *assumes* the existence of a statutory duty, as well as a breach of that duty--but it did change the *legal effect* of breaching a statutory duty that has been determined to apply. By stating that the breach of a statutory duty is not negligence, but only *evidence* of negligence,^[29] it provided, essentially, that a

plaintiff must always show the existence and breach of the common law duty of reasonable care, even though the plaintiff can show the existence and breach of an applicable statutory duty as evidence of--i.e., as a factor indicating--a breach of the common law duty. Concomitantly, it abrogated the pre-1986 idea that a plaintiff could recover by showing *either* the applicability and breach of a statutory duty, *or* the existence and breach of the common law duty of reasonable care. In short, it made the breach of an applicable statutory duty admissible but not sufficient to prove negligence, and in that way abolished the doctrine of "negligence per se."

Templeton at 683

Thus, the change that abolished negligence per se did NOT make statutory standards of negligence irrelevant, and statutes are relevant as evidence if the statute meets the four part test described above.

First, the statute must protect a class of people that includes the person whose interest was invaded. It has long been held that the Rules of the Road are intended to protect a class that always includes pedestrians using the roadways. "Statutes or municipal ordinances prescribing the rules of traffic establish rules of conduct which must be obeyed. They are standards for testing negligence and contributory negligence" Stanley v. Allen, 27 Wn.2d 770, 783, 180 P.2d 90 (Wash. 1947). [see also: "To protect the users of highways from intoxicated drivers" Alexander v. County of Walla Walla, 84 Wn.App. 687 (1997), discussing RCW

46.61.505; “The vehicular assault statute penalized driving in a reckless manner that caused “substantial bodily harm *to another*. ” State v. Rodriguez Ramos, 171 Wn.2d 46 (2011), discussing RCW 46.61.522(1)(a); “[i]t appears to me that the statute is designed for the protection of the owner and for the protection of others in the path of the vehicle if it should be put in motion by reason of having been insecurely parked.” Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190 (2001), discussing RCW 46.61.600]. Appellant was a pedestrian in a crosswalk area crossing the road when Appellant was struck by Respondent. Appellant is clearly of a class the Rules of the Road were designed to protect.

Second, the statute must protect the particular interest invaded. In this case Appellant’s interest of personal safety was invaded when the respondent struck Appellant with his car. The Rules of the Road are designed to protect pedestrians from bodily harm from vehicles. Therefore, the interest invaded is one the Rules of the Road are designed to protect.

Third, the statute must be designed to prevent the type of *harm* caused to the protected interest. The Rules of the Road are designed to protect the pedestrian’s interest of personal safety. The Rules of the Road protects this interest from the harm of being struck by vehicles who share

the roadways. We all know that cars traveling at city speeds of 20-35 mph can do great damage to individuals. The Rules of the Road regarding a vehicle's duty when coming into a crosswalk area are specifically designed to reduce the risk of coming in contact with pedestrians in crosswalk areas. There is no question that they were designed keeping in mind modern speeds, stopping distances, sight lines, ect, and the subject RCWs are specifically designed to prohibit cars from passing a vehicle within 100 feet of a crosswalk area, driving left of center to pass a vehicle in a two lane, opposite direction situation precisely because, as the trial judge ruled,

You are free to say to the jurors, Look, you are drivers. You know what is safe and reasonable prudence and what isn't. When you come upon a bus, you shouldn't go across the center-line. 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 pg 22)

Unfortunately, the trial judge knows that there are actual statutory rules of the road on these topics, and they are very specific about what a driver can and cannot do under the very detailed, designed restrictions on drivers. The trial judge is ignoring the specific limitations on vehicles that the legislature went out of its way to put in the statutes with specific detail

to prevent harm to those on the road and particularly pedestrians who might come in contact with vehicles and therefore put significant, specific obligations upon vehicles when coming upon a crosswalk area. Particularly one passing a vehicle or crossing a center line when coming into a crosswalk area.

Here, Appellant was struck in a crosswalk area by a respondent while driving his vehicle. Respondent's negligence caused Appellant personal injury, the exact harm the Rules of the Road are designed to protect against. Therefore, an interest the Rules of the Road, designed to protect was harmed in a manner the RCWs are designed to prevent.

Finally, the statute must protect that interest against the particular *hazard* that caused the harm. Vehicles are a dangerous hazard to pedestrians on roadways. The Rules of the Road protect pedestrians from the hazard of being hit by vehicles. In this case, Appellant was a pedestrian in the crosswalk area, the Appellant was allowed legally to cross the street in a crosswalk area in front of a legally parked bus he debused from, and Respondent passed around the bus and struck Appellant, causing personal injury. Therefore, the hazard of the vehicle driven is the hazard that caused the bodily harm to the Appellant.

Appellant is of a class the Rules of the Road are designed to protect. The interest involved (bodily safety of pedestrians) is the interest the statute is designed to protect. The Rules of the Road are designed to prevent harm to pedestrians using roadways, harm which was inflicted upon Appellant. Finally, the hazard which actually occurred in Appellant's case (vehicle impact) is a hazard which the Rules of the Road are designed to prevent. Therefore, the RCWs omitted from jury instructions were relevant to the Appellant's theory of negligence as evidence of the duty of care this driver owed to this pedestrian in the crosswalk area as he passed the bus so close to the crosswalk area and accelerated and passing around a debusing bus at a bus stop sign right at the crosswalk area where there is absolutely no question that people coming to and from the bus would likely cross because it was at the intersection and not in the middle of the block, three quarters of the way up the block, or down by the other end of the block. We all know that metro often places bus stops at convenient locations for passengers coming from and going away to places will have a minimal walk to a crosswalk intersection nearby for their convenience, and thus all drivers are aware that bus stops are places where pedestrians are present and are to be protected and drivers must be on the lookout for them. The subject RCWs require this and a failure to act in compliance with the RCWs is clearly evidence of negligence which should have been

determined by the trier of fact after proper instruction on the actual statutes involved.

2. Trial court erred in ruling that Defendant's actions in violation of the subject RCWs statutes were not a proximate cause of the accident and erred in not clarifying the relative duties and negligence of pedestrian and vehicles in instruction 9 :

On appeal, refusal of a trial judge to give a jury instruction is reviewed on an abuse of discretion standard. State v. Buzzell, 148 Wash.App. 592, 598 (2009). Case law has held that “a defendant is entitled to have the jury instructed on her theory of the case when there is evidence to support the theory”. Buzzell, *supra* 598. In addition, when reviewing the admissibility of a statute as evidence of negligence in a case, the “evidence must be viewed in the light most favorable to the party requesting the instruction”. Buzzell *supra* at 602. Finally, a court “would **necessarily abuse its discretion** if it based its ruling on an erroneous view of the law.” Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 339 (1993).

Appellant was entitled to use the relevant subject RCWs proposed instructions as necessary to prove his theory of breach of the statutory negligence standard which appears in those statutes. The trial court judge

abused his discretion by failing to allow the jury to decide whether respondent's violation of the RCWs was a proximate cause of Appellant's injury and whether the statutes are evidence of the duty of care.

A party is typically entitled to allow the finder of fact to decide the question of proximate cause:

We have decided that usually the question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court. Schofield v. Northern Pacific Railway Co., 4 Wash.2d 512, 104 P.2d 324 (Wash. 1950); Ross v. Johnson, Wash., 22 Wn.2d 275, 155 P.2d 486 (Wash. 1945).

Mathers v. Stephens, 22 Wn.2d 364, 370 156 P.2d 227 (Wash. 1945)

In Rettig v. Coca-Cola Bottling Co., 22 Wn.2d 572, 156 P.2d 914 (Wash. 1945), the court ruled that a similar situation was a question for the trier of fact and not the judge;

Although the facts bearing on the negligence of the driver of the truck were not in dispute the trial court was unable to say that reasonable minds could not differ as to the conclusion to be drawn from them and correctly held it was

for the jury to find and conclude whether in the exercise of reasonable and ordinary care under the circumstances the driver of the truck should have stopped it Before passing the bus and what he should reasonably have anticipated or foreseen as to the probability of passengers alighting from the bus and coming around the front of it and crossing the road. *The court could not decide these questions as a matter of law because reasonable minds could well differ as to what the driver of the truck should have anticipated and done under the circumstances.* [italics added]

Rettig, *supra* at 578

Even if the trial judge thought that the plaintiff was contributorily negligent and therefore, for some reason, not entitled to an instruction on the Rules of the Road regarding the *driver's* duties, plaintiff's negligence is still a jury question to be considered after an instruction in the applicable law of the driver's duties. As the court in Geri v. Bender, 25 Wn.2d 50, 55, 168 P.2d 144 (Wash. 1946) held, "*the question of contributory negligence also falls within the province of the jury*," as does the question of proximate cause." Thus, even if the judge thought that Appellant is somehow responsible because he was crossing in the crosswalk area and only shortly could be seen by the accelerating passing driver coming around the bus and therefore the driver's violation of the law should somehow be excused because Appellant could only be observed by the driver for a short period of time, this was still a jury

question, and he should not have taken this away from the jury. As the court in Overlander v. Johnson, 11 Wn.App. 331, 523 P.2d 434 (Wash.App. Div. 2 1974) held:

On the other hand, when the jury must determine as a fact, because of the inordinately brief exposure of the pedestrian, whether or not the pedestrian was seen or could have been seen in time so as to permit the otherwise reasonably prudent driver to yield the right of way, then the driver is entitled to have the jury instructed that Before the statutory duty arises he must either be aware of the presence of the pedestrian or, exercising reasonable care, he should have become aware of the pedestrian's presence in the crosswalk.

Overlander, *supra* at 335

Appellant also claims error in the court's jury instruction number 9 by its explanation that a driver must yield the right of way to a pedestrian in a crosswalk area, which would be a clear basis for the finding of negligence on the part of the driver and then in the very next sentence state that there was another statutes that provides that a pedestrian cannot suddenly leave a curb or "other place of safety" and even walk into the path of a vehicle so close as to make it impossible for a driver to stop. First, the instruction is very unclear on the jury's duty to first examine the negligence of the driver in failing to yield the right of way to the plaintiff here in the crosswalk area well before the driver comes upon the scene and

then only after this finding determine whether or not the pedestrian was contributorily negligent. The wording of instruction number 9 gives the jury no guidance on the primacy of the two statutes presented to them and a process under our law for determining negligence and then perhaps an excuse, affirmative defense, or contributory negligence of the other party under a system that allows for gradation of those “excuses” by apportioning percentages of negligence/liability among the parties. The instruction number 9 does not give the jury any guidance what-so-ever and does not even begin to explain how the jury is to undertake this analysis. It appears that the second statute could be interpreted by the jury to totally absolve the driver of any negligence in failing to yield the right of way, but this is clearly not the law and the second statute has many vague, undefined terms making its application by the jury uninstructed: suddenly is not defined and it is contradicted by the later terms of the sentence that seems to say that a pedestrian loses the protections of the right of way law requiring drivers to yield even if the pedestrian “walks” or “otherwise” moves into the path of a vehicle, the latter phrase is also ridiculous because a pedestrian moving through a crosswalk area is not moving into a path of a vehicle, but instead is defined by the same instruction as a vehicle moving into an area of safety for a pedestrian and that vehicle must yield the right of way and as between the two there is no question

that cars on the roadway even at lowest posted speeds of say 20 miles per hour for a school zone are so much more sudden and faster than pedestrians and clearly most people would say that the vehicle from outside the crosswalk area is moving into the crosswalk area and not the opposite that a pedestrian is moving into a vehicles roadway path when the pedestrian is crossing that path in a crosswalk area. In this particular case, the plaintiff never stepped on the curb after getting off the bus, but stepped down onto the crosswalk area and therefore he could not have suddenly left a curb, but the next phrase in the second statute about leaving “a place of safety” is also vague, undefined, and extremely confusing and many cases that might come up regarding pedestrians crossing in a crosswalk area. Everyone would concede that being in the crosswalk area is a “place of safety” generally because of the first statute mentioned that requires cars to yield the right of way and stop so they cannot touch you or put you in danger, but no one disputes here that the Appellant stayed in the crosswalk area and did not leave it at any time and therefore the second statute should not apply because he never left the curb or the crosswalk area place of safety. The Jung, supra court ruled that anywhere in the road is not a place of safety for a pedestrian and therefore a pedestrian does not lose his protection requiring cars to yield to him when he is properly in the road. Appellant’s counsel asked for this clarification on this phrase for the

instruction and the judge refused. This was error because even the court cases disagree on interpretations on this instruction sentence about the second statute and it is obviously of little or no guidance to the jury. This was pointed out to the court in seeking changes to instruction number 9 shifting the burden to pedestrians to be on the lookout and no longer truly having the right of way in a crosswalk area. (RP 12/14/10 8 line 9 through 9 line 20; and RP 12/15/10 11 line 23 through 12 line 13, but the court ruled that it would “stick with the statutory language on this subject using the reference to place of safety.” RP 12/15/10 12 line 14) The court stated that it would take it under advisement and look at a prior case he handled. (RP 12/14/10 9 line 21) The next day plaintiff’s counsel cited Chen v. City of Seattle, 153 Wn. App. 890 (Division I 2009), as a post-tort reform act case placing pedestrians in crosswalks above vehicles, requiring the latter to yield, and can assume that they will do so. (RP 12/15/10 7 line 9 through 9 line 6) The trial court rejected that position, stating “so I don’t think it is worth taking more time to argue the question of whether or not the law places some duty upon the pedestrian in an unmarked crosswalk to exercise reasonable care for there own safety. I intend to retain that language in the Court’s instructions and to deny each of the requested instructions that would eliminate that duty.” RP 12/15/10 10 line 19-25. The court simply refused to clarify the numerous problems with the actual

instruction pitting the two statutes against each other without any guidance to the jury as to how to apply the law of who really has to yield to the other between the pedestrian and the car. This was error. Furthermore, in the final sentence of instruction number 9, the court confusingly states that both the pedestrian and the driver have to avoid collisions, but that the primary duty to do so rests upon the party not having the right of way. However, significantly, the instruction never explains when you have parties each in the situation described in each of the two statutes which party has the “right of way.” The right of way of the pedestrian seems to be taken away by the second statute, but the jury is not told this and they are left to guess the law.

As discussed further herein, the driver clearly should have become aware of the likelihood of pedestrians present in the crosswalk area because the bus was stopped for loading on and off, and had its flashers flashing, and the bus stop was right at the corner – all things indicating to any reasonable person that pedestrians were likely afoot, and greater caution needed to be taken than simply driving in non-crosswalk areas.

For the court to hold as a matter of law that the respondent driver’s negligence in driving on the wrong side of the road and passing coming into an intersection crosswalk area was not a proximate cause of the

accident, is contrary to much of the case law of this state, as set forth in

Everest v. Riecken, 26 Wn.2d 542, 174 P.2d 762 (Wash. 1946):

Taken in the *light most favorable to appellants*, the direct and circumstantial evidence summarized above establishes James Riecken's primary negligence in that a proximate cause of the collision was the presence of his automobile on the wrong side of the road, which was not shown to be without fault.

Everest, supra at 546

In Goucher v. J.R. Simplot Co., 104 Wn.2d 662 (1985), a negligence case, the Washington State Supreme Court found that the trial court's refusal to give a jury instruction on RCW 49.17.010 (Washington Industrial Safety Health Act "WISHA", regulations involving ladders and platforms used by workers; it was rejected by the trial court and the court used other regulations to instruct the jury, and the plaintiff objected; on appeal, the court held that the trial court erred in denying WISHA's applicability and set aside the jury verdict and remanded for a new trial). In Goucher, the trial court ruled that WISHA regulations did not apply to the case, and therefore denied instructions on them. This was reversible error because the statute was relevant to determining the duty of care under the statutory negligence analysis. The Defense argued that failure to

follow RCW 49.17.010 could not be said to be the proximate cause of the accident. The Supreme Court rejected this argument, ruling:

....Negligence per se, however, only establishes a defendant's duty and breach thereof; the question of whether the breach is a proximate cause of the plaintiff's injury, unless it is so clear as to be established as a matter of law, remains an issue to be determined by the trier of facts. Hansen v. Washington Natural Gas, 95 Wash.2d 773, 779 (1981); Kness v. Truck Trailer Equip. Co., 81 Wash.2d 251, 258 (1972). Here we cannot say as a matter of law that Simplot's failure to comply with the applicable WISHA regulations was a proximate cause of the plaintiff's injuries. That remains a question for the jury.

Goucher, *supra* at 676

Similarly, in our case, *even if* we give the trial judge all the benefit of saying he is right that violation of the subject RCWs here do not, as a matter of law, find negligence here, there is absolutely no question that when the evidence of the facts and the violations of the states are taken in the light most favorable to the Appellate proposing the instructions, one would necessarily have to find that the facts create a question of proximate cause for the trier of fact to determine, and not the judge in this jury trial, to determine. However, Appellants of course, do not concede that the judge could ever have found that the statutes do not apply as a matter of law given the facts of this case, and instead argue that the facts at trial

clearly support a directed verdict on negligence due to the actions of the respondent when he violated the subject RCWs and ran into Appellant.

If anything, the facts here support a finding as a matter of law in favor of Appellant and not the burdened driver Respondent. Minimally this was a question for the jury and the judge made the decision for the jury, and refused to instruct them in the law necessary for a fair and just determination.

Absent a showing that no reasonable person could find a violation of the law was a proximate cause of the injury, the question of proximate cause must be submitted to the jury. The injury, proximate caused by the Respondent's failure to exercise the level of care set forth in RCWs is a question for the jury if not found in Appellant's favor as a matter of law. Therefore, the statute and the issue of proximate cause should have been submitted to the jury at trial through the instructions. The similarities between Goucher and our case are readily apparent, and show that the trial court in our case abused his discretion in not admitting the subject RCWs.

Similarly, in Kness the court ruled:

Accordingly, where there exists prima facie a discernible causal connection between the violation of a statute or lawful regulation and an injury, and if the Restatement tests for relevance are met, the jury

is properly advised that the violation amounts to negligence per se. [*editor's note: Appellant acknowledges that per se negligence no longer applies*] Proximate cause then becomes an issue of fact *to be* resolved by the trier of the facts unless it is so apparent that the court can rule as a matter of law that reasonable minds could not reasonably differ as to the proximate cause.”

Kness, supra at 258

In our case, the trial judge abused his discretion by making a decision of fact whether respondent’s failure to conform to the standard in the subject RCWs is a proximate cause of the injury to Appellant. Even if Appellant’s actions are found also be a proximate cause of the accident, the driver’s defense of contributory negligence by the Appellant pedestrian is not a complete defense against the driver’s own negligence (because a plaintiff’s comparative negligence as a complete bar to recovery was eliminated under the Tort Reform Act of 1981, RCW 4.22.005). Therefore, each party’s contributory negligence is in question and is not decidable as a matter of law for Respondent, but is a factual question for the trier of fact—here the jury and not the trial judge.

3. The trial court erred in failing to properly inform the trier of fact of the applicable subject law RCW 46.61 statutes as it applies to these facts and failed to permit plaintiff to argue its theory of the case of negligence based on acts in violation of the laws

Trial court's failure to include the proposed instruction misstated, by omission, a misleading and erroneous presentation of the law to the jury that mislead the jury by failing to inform the jury of relevant applicable law.

Jury instructions must accurately state the law, permit each side to argue its theory of the case and not be misleading and, when read as a whole, properly inform the trier of fact of the applicable law" Moratti v. Farmers Ins. Co. of Washington, 64477-7-I (WACA). The court's use of the word "must" denotes a requirement of the trial court. The trial court must fully inform the jury of the applicable law necessary for each party to argue their theory of the law.

Subject RCWs were relevant. Thus, failure to include the relevant statutes fails to inform the jury of the applicable law necessary to prove Appellant's theory in the case. In addition, this misleads the jury, as they are not fully informed of the omitted laws, because they are unaware of a link between the relevant and long standing theory of statutory negligence in the omitted laws and whatever they think is reasonable driving standards that they are left using to decide the case.

Here, the trial judge stated:

You are free to say to the jurors, Look, you are drivers. You know what is safe and reasonable prudence and what isn't. When you come upon a bus, you shouldn't go across the center-line. 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 pg 22

Even the judge misstated the statutes and included "rules" which appear nowhere in the RCWs and he left out the numerous subject RCWs involved. Juries cannot be expected to know every Rule of the Road, nor can they be expected to know the precise wording of every rule. Jurors, in a case such as this, need to know more of the specifics of crosswalk area law, not being able to pass a vehicle within 100 feet, not go over the center line, etc and enough details to understand that law completely and why we have these laws in place to prevent negligence by drivers and to protect life.

Appellant was entitled to inclusion of the subject RCWs as jury instructions. The trial court abused its discretion under Buzzell and Fisons by excluding relevant law, necessary to prove the theory of recovery in the case. Any question regarding proximate cause of the statute to the facts in the case is required to be submitted to the jury, along with the subject

RCWs under Goucher and Kness. Omission of the relevant jury instruction is also an abuse of discretion under Moratt, as failure to include misstates the law by omission and misleads and misinforms the jury by not providing them the full relevant law to consider.

4. Trial Court erred 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.

RCW 46.1.235(4) provides:

“Whenever any vehicle is stopped at a marked crosswalk or 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.”

Trial judge ruled that Appellant did not get this instruction because a Washington State Division II Court of Appeals case says it does not apply to passengers debusing a bus and crossing in front of the bus at a crosswalk area intersection, citing Panitz v. Orange, 10 Wn. App. 317

(1973). Trial court erred in interpreting and applying this prior case Panitz involved a plaintiff who debused a bus at a crosswalk and then walked in front of the bus at the crosswalk and was struck by Orengo after stepping out from in front of the bus. Panitz held, using incorrect case law analysis, that RCW 46.1.235(4) did not apply in its case and that the statute applies to every person except for passengers getting off a bus:

The applicability of this subsection has been discussed in Rettig and Jung v. York, 75 Wash.2d 195 (1969), and it does not apply to the instant fact pattern--thus, it was correctly refused by the trial court.

The last cited cases hold that RCW 46.1.235(4) is not intended for the protection of passengers discharged from a bus who are not deemed to be pedestrians, even though they proceed across the street in front of a vehicle, but rather for the protection of persons for whom the vehicle [*editorial comment: bus*] has stopped to permit their safe passage over a crosswalk.

Panitz *supra* at 321.

Daley v. Stephens, 64 Wn.2d 806, 394 P.2d 801 (Wash. 1964), which did not involve a bus, but involved a pedestrian over an unmarked crosswalk, overturned the type of dangerous reading of Rettig which Panitz relied upon, the Supreme Court of Washington stated:

[Rettig] appears to be inconsistent with these cases, and in so far as the language contained in the Rettig opinion appears to *engraft conditions on the rule of the road* giving the right of way to a pedestrian crossing a roadway within a crosswalk, we hold such statement of the law inapplicable to an uncontrolled and unmarked crosswalk case.

Daley, supra at 809

Thus, the Rules of the Road DO NOT place conditions on a pedestrian crossing in a marked or unmarked crosswalk before the protections of the subject RCWs arise. Panitz's reading of Rettig was inconsistent with well established lines of cases in which pedestrians are protected inside crosswalks

Panitz creates an unsupported and dangerous distinction between bus drivers discussed by requiring analysis as to the intent of the stopped vehicles operator, thereby removing all protections of RCW 46.1.235(4) from persons who debus a bus and then cross a roadway at a cross walk where the bus driver had no intent to allow the passengers to debus and then cross within the crosswalk.

Panitz interpreted prior law as creating a limited exception to the statute for only buses and for only buses letting passengers debus and

erroneously relied on *dicta* in Jung, Panitz supra at 412 and on Rettig, which was not a pedestrian crossing in a crosswalk in front of a bus case. We discuss both of these below.

Jung did **NOT** rule that RCW 46.1.235(4), requiring cars to stop for pedestrians in crosswalks in front of parked vehicles, does not apply to pedestrians coming off of buses but only pointed out parenthetically that pedestrians must ascertain the way is clear before proceeding—not that passing cars have any lesser legal obligation. Jung did not hold that ***all*** persons discharged from a bus were not protected pedestrians if they then crossed in a crosswalk in front of a bus, but it has been interpreted as impliedly holding this in ***dicta*** having nothing to do with its facts and contrary to the language in the case. In Jung, a mother and her two children were hit by defendant’s vehicle while crossing in a crosswalk, after passing in front of a stopped **car**: not a stopped bus, as Jung *did not involve a bus at all*. The Jung court found that the statute applied and found in favor of the pedestrians. The facts did not have anything to do with debusing a bus or crossing at a crosswalk in front of a bus:

We are aware of cases in which we have held that a pedestrian passing in front of a parked bus must ascertain that the way is clear before proceeding in the path of approaching traffic. *Rettig v. Coca-Cola Bottling Co.*, 22 Wash.2d 572, (1945), and

Hamblet v. Soderburg, 189 Wash. 449, (1937), are cases of this kind. In those cases, the bus had not stopped to allow pedestrians to pass, but rather to discharge and take on passengers; and in *Rettig v. Coca-Cola Bottling Co.*, *supra*, this court expressly held that the statute (then Rem.Rev.Stat. Vol. 7A, § 6360--99, now RCW 46.61.235(4)), which is substantially the same as section 21.20.440 of the Traffic Code of the City of Seattle, did not apply.

Jung, *supra* at 199

The Jung court did not mention Rettig and Hamblet for any part of its reasoning after the above passage. The cases were only cited parenthetically and were not a basis for its decision in its case, having nothing to do with buses.

After the above passage, the Jung court returned to the facts and analysis, having nothing to do with the bus case, and instead ruled that pedestrians crossing in front of a parked vehicle are protected by the burdens on passing vehicles. The court ruled:

The presence of the stopped vehicle ***was notice to vehicles behind it*** that a pedestrian was in the crosswalk.

...There being no evidence of circumstances in this case which would have alerted the plaintiff to the fact that an approaching vehicle was going to fail to yield the right of way in time for her to avoid the accident, the trial court correctly held that ***she was entitled as a matter of law to assume that the right of way would be yielded and had no***

duty to stop and look before proceeding into the second lane of traffic.

Jung at 199

The Jung court upheld the trial court in favor of the plaintiff, finding that RCW 46.61.235(4) actually applied to its facts and a pedestrian is entitled as a matter of law to assume she had the right of way, with no duty to even look for passing cars while in a crosswalk because she was in a crosswalk and was walking in front of a parked car at the crosswalk area which is notice to passing cars.

Jung relied on Hamblet v. Soderburg, 189 Wash. 449 (1937) and this also is incorrect. Hamblet did not even quote our statute here (RCW 46.1.235(4)), but instead ruled on other grounds that the pedestrian was barred from recovery. Hamblet involved a woman waiting for a bus who never boarded or debused a bus. When a bus stopped, the woman changed her mind and walked in front of the bus within a crosswalk without exercising reasonable care to look around. As she emerged from in front of the bus, defendant swerved around the bus and struck the woman. Hamblet did not discuss any statute about crossing in front of parked vehicles at a crosswalk or any other statute in making its decision that the woman was negligent (later cases emphasized that such a pedestrian has no burden to look around and is protected in the crosswalk, see Jung) and

that the complete defense of comparative negligence for the defendant driver existed in its case.

Jung (and in turn, Panitz) also relied on Rettig, where a bus was headed southbound when it pulled over “at a driveway” (Rettig, supra at 574) and “*somewhat to the south of and beyond the crosswalk when it stopped*” (Rettig, supra at 577). Note that Rettig is not a case about a pedestrian crossing at a crosswalk or a person debusing at a normal bus stop, but simply at a driveway and not stopped before a crosswalk and the pedestrian was not in a crosswalk. However, this case has been cited by all the subsequent cases as making an exception to the subject statute for people debusing buses not at a bus stop. In Rettig A boy debused the bus and ran diagonally away from, and in front of, the bus in a southbound direction away from the crosswalk when a truck hit him. The court emphasized that the bus did not stop at a crosswalk, stopping south of the crosswalk for some unknown reason, but for the purpose to let passengers debus.

The instant trial court and some later cases misread this distinction and argue that Rettig stands for protection of the RCW for all pedestrians crossing in front of any type of vehicle stopped before a crosswalk *except* for bus passengers who get off a bus *and* the bus driver must have the

intent to stop solely to allow them to cross in front of the bus and NOT the intent to just allow them to debus. This is wrong. Rettig is not trying to make a distinction between these type of bus passengers or different bus drivers with different intentions, but Rettig really means is that if you are coming off a bus which is stopped in front of a crosswalk, you can cross in front of the bus in the crosswalk and you are protected by RCW 46.1.235(4) and cars must stop for you. Rettig has nothing to do with the intent of the driver to only let you debus or let you cross in front of him, or not cross in front of him.

No one would be able to figure out the intentions of a driver as to what he wants you to do after you leave the bus, unless he actually expressed those intentions, so no later cases could ever look to a distinction in the bus driver's intentions without proof of those intentions and this is simply an irrational and illogical standard to determine whether or not people debusing a bus are going to be protected or without any protection when they enter a crosswalk in front of a bus. To say that only those who debus a bus where the bus driver had the intention to allow the pedestrian to cross in front of the bus would be protected by the statute is an unworkable standard and clearly unconstitutional and discriminatory without any justifiable basis for protecting those passengers who come off

a bus because a bus driver let them off at a crosswalk and those passengers let off at a crosswalk and with the intent of the bus driver to allow them to cross there. Both are passengers debusing and both want to cross at the crosswalk. One is protected because of the intent of the driver to allow them to cross, and one is NOT protected because the driver did not have that intent.

The statute does not make any exception whatsoever for buses or debusing people. The statute does not provide any guidance whatsoever to determine the intent of a parked vehicle regarding whether or not it is parked there to permit people in front of it or parked there to debus people but not let them cross in front of it if they legally can. This is a made up distinction that the courts have made subplanting themselves for the legislature which made no such distinction. Courts that think there is some distinction in protection for these pedestrians in the crosswalk are reading far too much into the prior precedents that never made this distinction and are improperly protecting one class of pedestrians in a crosswalk in front of a bus versus another class.

The Rettig court very clearly reasoned that under the facts of that case the bus did not stop before the crosswalk but in fact had actually traveled southbound south of the crosswalk and therefore the bus could

not possibly have stopped to allow the debusing boy to cross in a crosswalk, but instead had decided to randomly stop there to let people off. The court reasoned that the bus had not stopped to yield for the boy to cross in front of it because the bus did not even stop before the crosswalk for the boy to use it. The court clearly found on the facts that the boy was not in the crosswalk and therefore lost all privileges and protections of a pedestrian in a crosswalk. The court went on to hold that the driver of the truck, approaching from the rear of the bus thus was not obligated to stop for a pedestrian in the crosswalk, but should only have been obligated to take all reasonable steps to avoid hitting the boy once he should have seen him.

Rettig's holding has nothing to do with buses in particular, or any type of particular vehicle. Rettig has to do with whether or nor someone crossing the street is protected in the crosswalk area. Rettig did not narrow itself only to buses stopped to debus passengers. Jung did not even deal with buses and passengers and intentions (see above). Hamblet did not deal with the subject statute and the woman involved did not debus a bus. Panitz incorrectly relied on, and misinterpreted Jung and Rettig as creating an incorrect distinction between debusing bus passengers not being pedestrians for the purposes of the subject statute and those debusing bus

passengers where the driver also had an intent for them to cross in front of the bus. Panitz's reasoning was overturned in Daley, supra.

The burden of keeping pedestrians safe in crosswalks has long been a staple of statutory protections, placing the burden of safety on the drivers of vehicles. Wood v. Copeland Lumber Co., 32 Wn.2d 490, 497, 202 P.2d 453 (Wash. 1949) is one such case, noting. "If the conceded right of way [for pedestrians] means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings." Viewing case law in the manner set forth in Panitz is wrong, and contrary to a well established line of cases protecting pedestrians in crosswalks areas, and putting the burden of protecting pedestrians in those areas, on drivers.

There should be no real distinction as far as protections against other drivers between someone debusing and walking away from a bus in front of the bus and someone else walking away from the bus in the other direction. At a corner going any one of four directions, which is what almost always occurs at a crosswalk area at an intersection, one can walk from that corner in at least two crosswalk areas at the intersection if it is

the most common four corner intersection. One crossing in the crosswalk area in front of the bus has at least a one in four chance of crossing in the crosswalk in front of the bus. This percentage of chance that the person will cross in front of the bus remains the same regarding each pedestrian, but the more people coming off the bus the higher the number of people multiplied by the percentage of chance results in a higher number of potential people crossing in front of the bus – if only one gets off of the bus, there may be only a 1 in 4 chance that the person may cross in front of the bus, but if 10 people get off the bus, all 10 of them could be crossing in front of the bus. Then you also have to consider that pedestrians will be coming towards the bus to board the bus at the stop by the intersection corner and these pedestrians also have chances of crossing in front of the bus and this is multiplied by the numbers of potential people coming to board the bus.

When you do the math, it is clear why the legislature makes cars not pass other vehicles and to slow down and if necessary stop when coming into an intersection area because these drivers need to be careful of all of the potential pedestrians coming and going in crosswalk areas in general and particularly when the bus authority places a bus stop for debusing and loading of people rushing to and from buses. The trial judge

here recognized this and said that there is some unspecified ordinary care that drivers must take around buses (RP 12/15/10 22 line 8), but he refused to instruct the jury in the law the legislature spelled out particularly to prevent this type of injury and that he would not allow me to mention these laws to the jury and said I would have to take it up with the Court of Appeals. (RP 12/15/10 23 line 10)

In the famous case U.S. v. Carroll Towing, 159 F.2d 169, (2d Cir. 1947), Judge Learned Hand set forth a three variable equation that has been often used in determining the standard of care owed by a defendant to a plaintiff:

the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL.

Carroll Towing, *supra* at 173

Thus, a duty is owed to a plaintiff where $B < PL$, i.e the probability of harm and the degree of potential injury outweigh the burden of creating adequate precautions.

Here, the chances or likelihood of harm are high when a car passes around and/or does not slow or come to a complete stop at a crosswalk where a bus pulls over. Crosswalks are THE designated locations where a pedestrian MUST cross a roadway. Crossing at any other location in a roadway is a violation of the law, requiring the pedestrian to cross in crosswalks. As a result, crosswalks are at all times the most likely place a pedestrian will be. Buses in particular constantly stop to allow passengers to board and debus at regular intervals, often near or directly in front of crosswalks, creating a known condition where drivers of other automobiles become aware the likely presence of a pedestrian in the crosswalk. Thus, where a vehicle swerves around a bus and through a crosswalk, the likelihood of harm is incredibly high -- heightened beyond even where a crosswalk exists independent of a bus.

The degree of potential harm is always high where collisions involve automobiles and pedestrians. The weight, speed, and force involved in a vehicle collision with a pedestrian are extreme, which can easily cause serious injury and fatality. Even the lightest of automobiles on the road are extremely dangerous when colliding with pedestrians due to the speeds at which they travel and the relative ease with which a body can be injured. Cars can easily weigh in excess of 2000 lbs (1 ton). When something of that size is traveling, even at very slow speeds, the vehicle

can cause severe injury to pedestrians. The degree of potential harm increases exponentially the faster a vehicle is moving. As a result, the degree of potential harm is almost always very high when a car (or any automobile) is involved in a collision with a pedestrian.

The burden of creating adequate precautions, by comparison to the above stated degree of harm and likelihood of harm, is low and are set forth in the subject RCWs, Rules of the Road. The subject RCWs require that a vehicle only pass into the left lane to overtake or pass traffic unless the lane is clear (46.61.120), not cross the center line within 100 feet of a crosswalk (46.61.125(1)(b)), require that a car not pass a vehicle stopped to allow pedestrians to cross in a crosswalk (RCW 46.61.235 (1) & (4)). These burdens outline several steps which may be used to ensure the safety of pedestrians in a crosswalk. The burdens of slowing down, not passing other vehicles stopped at a crosswalk, and making sure the crosswalk is empty by slowing down and increasing observation of the area, are very small in comparison to the likelihood and degree of harm involved, necessitating only that the vehicle slow down.

Thus, under the Learned Hand negligence equation, the subject RCWs are appropriate burdens placed on drivers of vehicles. The trial

judge should have presented these duties, contained in the subject RCWSs, to the jury.

Request for Attorney Fees and Costs

Appellant requests all reasonable attorneys fees and costs under all statutes, court rules, and case law applicable to this appeal or available through the court's equitable powers. If the court does not award any of these, appellant requests that the attorneys fees and costs on appeal be reserved for determination of reasonableness by the trial court after any remand.

D. 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.

Dated this 18 day of August 2011.

Respectfully submitted,



WILLIAM C. BUDIGAN

WSBA #13443

Attorney for Gerard Plasse

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THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

Gerard Plasse,)
) No. 66706-8-I
)
Appellant,)
) CERTIFICATE OF SERVICE
) OF APPELLANT'S BRIEF
V.)
)
Dung Mao et al,)
)
Respondent.)
)
)

CERTIFICATE OF SERVICE

I certify that on the 18th day of August, 2011, I caused a true and correct copy of Appellant's Brief to be served on the following in the manner indicated below:

Clerk of the Court (X) U.S. Mail
(Original and 1 copy)
() Hand Delivery

Address:

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Name: Marilee Ericson () Hand Delivery
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