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NO. 66706-8-1

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

GERARD PLASSE,

Appellant,

vs.

DUNG MAO and JANE DOE MAO, husband and wife and their marital
community and JOHN and Jane Does 1 through 50 inclusive,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable William L. Downing, Judge

BRIEF OF RESPONDENTS

REED McCLURE

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TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. RESPONDENT’S STATEMENT OF ISSUES	1
III. STATEMENT OF THE CASE.....	1
A. STATEMENT OF RELEVANT FACTS	1
B. STATEMENT OF PROCEDURE.....	2
IV. ARGUMENT.....	3
A. THE RECORD IN THE BRIEF OF APPELLANT IS SO DEFICIENT THIS COURT SHOULD DECLINE TO REVIEW THE APPEAL	3
1. The Appellate Record Is Inadequate to Review Plaintiff’s Assigned Errors	3
2. The Brief of Appellant Fails to Comply with the Rules of Appellate Procedure.....	5
B. THE JURY INSTRUCTIONS WERE CORRECT, A PROPER EXERCISE OF THE SUPERIOR COURT’S DISCRETION, AND ALLOWED THE PLAINTIFF TO PRESENT HIS THEORY TO THE JURY	6
1. The Standards of Review.....	6
2. Instruction No. 9 Correctly Stated the Applicable Law and Was Properly Given by the Court.....	7
3. Declining To Give Proposed Instructions Was Not an Abuse of Discretion	9
4. Plaintiff Could Argue His Theory of the Case	16
C. THERE IS NO BASIS FOR AN AWARD OF ATTORNEY FEES TO APPELLANT PURSUANT TO RAP 18.1	17
V. CONCLUSION	17

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>A.C. ex rel. Cooper v. Bellingham School District</i> , 125 Wn. App. 511, 105 P.3d 400 (2004).....	7
<i>Boeing Co. v. Key</i> , 101 Wn. App. 629, 5 P.3d 16 (2000), <i>rev. denied</i> , 142 Wn.2d 1017 (2001)	6, 9
<i>Hue v. Farmboy Spray Co.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	6
<i>Hurlbert v. Gordon</i> , 64 Wn. App. 386, 824 P.2d 1238, <i>rev. denied</i> , 119 Wn.2d 1015 (1992).....	5
<i>Kastanis v. Educational Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993)	16
<i>Keller v. City of Spokane</i> , 104 Wn. App. 545, 17 P.3d 661 (2001), <i>aff'd</i> , 146 Wn.2d 237 (2002)	6
<i>Nelson v. Schubert</i> , 98 Wn. App. 754, 994 P.2d 225 (2000).....	4
<i>Pannell v. Food Services of America</i> , 61 Wn. App. 418, 810 P.2d 952, 815 P.2d 812 (1991), <i>rev. denied</i> , 118 Wn.2d 1008 (1992).....	7
<i>Public Utility Dist. No. 1 v. Kottsick</i> , 86 Wn.2d 388, 545 P.2d 1 (1976).....	17
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	16
<i>State v. Hall</i> , 104 Wn. App. 56, 14 P.3d 884 (2000), <i>rev. denied</i> , 143 Wn.2d 1023 (2001).....	7
<i>State ex rel. Campbell v. Cook</i> , 86 Wn. App. 761, 938 P.2d 345, <i>rev. denied</i> , 133 Wn.2d 1019 (1997)	4
<i>State ex rel. Taylor v. Reay</i> , 61 Wn. App. 141, 810 P.2d 512, <i>rev. denied</i> , 117 Wn.2d 1012 (1991).....	16
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	7, 16

Statutes

RCW 5.40.0508
RCW 46.61.100(1).....10
RCW 46.61.100(1)(a)10
RCW 46.61.110(2).....11
RCW 46.61.12012
RCW 46.61.125(1)(b).....13
RCW 46.61.140(1).....14
RCW 46.61.235(1).....8, 14, 15
RCW 46.61.235(2).....8, 9
RCW 46.61.235(4).....14, 15

Rules and Regulations

RAP 9.2(b).....4
RAP 10.3(a)(4).....5
RAP 10.3(a)(5).....5
RAP 10.3(g).....5, 6, 9
RAP 10.4(c)5, 7, 10
RAP 10.4(f).....5
RAP 18.117
RAP 18.9.....17

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I. NATURE OF THE CASE

This case involves an accident between a pedestrian who had got out of a bus and a motorist. The pedestrian ran directly into the path of a motorist who was unable to avoid hitting him. The pedestrian sued the motorist. A jury returned a verdict for the motorist.

II. RESPONDENT'S STATEMENT OF ISSUES

A. Should this Court reject appellant's appeal and issues on appeal because appellant has failed to provide a record necessary for appellate review?

B. Did the superior court properly exercise its discretion in giving Instruction No. 9 where the instruction correctly states the law and allowed appellant to argue his theory of the case to the jury?

C. Did the superior properly exercise its discretion in refusing to give appellant's proposed jury instructions where the court's instructions to the jury correctly stated the law, were supported by the evidence, and permitted appellant to argue his theory of the case to the jury?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

On May 5, 2006, pedestrian plaintiff/appellant Gerard Plasse ran directly into the path of motorist defendant/respondent Dung Mao's

vehicle from a hidden position in front of a bus. Mr. Mao was unable to avoid a collision with him. (CP 7-8)

B. STATEMENT OF PROCEDURE.

On May 4, 2009, plaintiff sued Mr. Mao as well as several John and Jane Does. (CP 1-6) Mr. Mao answered the complaint and denied negligence. (CP 7-9) The case proceeded to a jury trial from December 13 - 15, 2010. (CP 142)

The jury found for Mr. Mao. (CP 78-80) On December 17, 2010, plaintiff filed a motion for entry of directed verdict. (CP 109) On December 22, 2010, plaintiff filed a "Memorandum in Support of Motion for Judgment of Negligence Against Defendant as a Matter of Law". (CP 110-31) Mr. Mao filed a response stating that there was sufficient evidence at the jury trial to support the finding that the plaintiff was negligent and the defendant was not negligent, and that it would be inappropriate for the court to invade the province of the jury and usurp its authority by changing the jury's decision. (CP 132-33) The court ruled on January 4, 2011:

[B]oth at the close of the plaintiff's case and at the close of all evidence, counsel for plaintiff request a directed verdict in plaintiff's favor. The request has now been put forth as a post-trial motion. It was the Court's view previously – and remains the Court's view now – that a jury question was presented as to whether or not the defendant was negligent.

That question was submitted to a properly instructed jury of 12 and they have answered it in the negative.

Accordingly, the plaintiff's motion for a directed verdict is DENIED.

(CP 134-35) Plaintiff's "Motion [for] Reconsideration of Denial of Motion for Judgment as a Matter of Law" was denied. (CP 136-40, 142) Judgment was entered for the defense. (CP 141-43) Plaintiff appealed. (CP 144-47)

IV. ARGUMENT

A. **THE RECORD IN THE BRIEF OF APPELLANT IS SO DEFICIENT THIS COURT SHOULD DECLINE TO REVIEW THE APPEAL.**

The record in the Brief of Appellant is so deficient this Court should decline to review the appeal.

1. **The Appellate Record Is Inadequate to Review Plaintiff's Assigned Errors.**

The brief makes statements of fact and refers to trial testimony that is not included in the record on appeal. (Brief of Appellant 1, 2, 3, 6, 21, 23, 25, 26)

Plaintiff does not assign error to entry of the judgment or denial of his post-trial motions/motion for reconsideration. Although he argued in those motions that the verdict was not supported by the evidence, the assignments of error in his appellate brief pertain mostly to the jury instructions.

This was a three-day jury trial. (CP 142) Plaintiff has only provided a small extract of the trial transcript on Dec. 14 and 15, 2010, where the court and counsel discussed the jury instructions. (12/14/10 RP 1-20; 12/15/10 RP 1-24)

RAP 9.2(b) provides:

A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. . . . If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding. If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given and the court's ruling on the objections.

As the appellant, plaintiff had the burden of presenting an adequate record and must bear the consequences – *i.e.* – rejection of his challenge – where, as here, the record is inadequate. *Nelson v. Schubert*, 98 Wn. App. 754, 764, 994 P.2d 225 (2000), citing *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 768-69, 938 P.2d 345, *rev. denied*, 133 Wn.2d 1019 (1997) “court need not consider alleged error if complete record is not provided.” 98 Wn. App. at 764 n.23.

Plaintiff has not provided sufficient context of his alleged errors in the record for review. This Court should refuse to review plaintiff's alleged errors.

2. The Brief of Appellant Fails to Comply with the Rules of Appellate Procedure.

The Brief of Appellant fails to comply with RAP 10.3(g) by not providing a separate assignment of error for each refused jury instruction and not identifying them by number. The proposed jury instructions are not numbered in the clerk's papers but the brief does not even identify them by clerk's papers page number or document page number. The brief does comply with RAP 10.4(c) by providing the text of the statutes but does not identify which proposed jury instructions they pertain to and does not provide the text of the proposed instructions.

The brief fails to comply with RAP 10.4(c) by not providing the text of the excepted given jury instruction No. 9.

The brief fails to comply with RAP 10.3(a)(5) which requires references to the record for each factual statement. At pages 1, 2, 3, 6, 21, 23, 25, and 26 of the brief there are statements of fact without relevant references to the record. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *rev. denied*, 119 Wn.2d 1015 (1992). "A reference to the record should designate the page and part of the record." RAP 10.4(f).

Plaintiff has failed to properly assign error on appeal. RAP 10.3(a)(4) and (g) require specific assignments of error. Plaintiff has not assigned a separate assignment of error for each refused jury instruction

and does not identify them by number. “A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number.” RAP 10.3(g).

This Court should decline to consider plaintiff’s argument on appeal due to the insufficient record.

B. THE JURY INSTRUCTIONS WERE CORRECT, A PROPER EXERCISE OF THE SUPERIOR COURT’S DISCRETION, AND ALLOWED THE PLAINTIFF TO PRESENT HIS THEORY TO THE JURY.

The jury instructions were correct, a proper exercise of the superior court’s discretion, and allowed the plaintiff to present his theory to the jury.

1. The Standards of Review.

Alleged errors of law in jury instructions are reviewed de novo. *Keller v. City of Spokane*, 104 Wn. App. 545, 551, 17 P.3d 661 (2001), *aff’d*, 146 Wn.2d 237 (2002). “Whether to give a particular jury instruction is within the trial court’s discretion.” *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000), *rev. denied*, 142 Wn.2d 1017 (2001). Jury instructions are proper when they allow the parties to argue their theories of the case, do not mislead the jury, and properly provide the applicable law. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

The refusal to give an instruction is reviewable only for abuse of discretion. *A.C. ex rel. Cooper v. Bellingham School District*, 125 Wn. App. 511, 516, 105 P.3d 400 (2004); *State v. Hall*, 104 Wn. App. 56, 60, 14 P.3d 884 (2000), *rev. denied*, 143 Wn.2d 1023 (2001). “The absence of a specific instruction on a matter at issue is not error if the instructions given clearly inform the jury of the applicable law regarding that issue and permit each party to argue his theory of the case.” *Pannell v. Food Services of America*, 61 Wn. App. 418, 437, 810 P.2d 952, 815 P.2d 812 (1991), *rev. denied*, 118 Wn.2d 1008 (1992).

Instructional error does not require a new trial unless it was prejudicial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996). Error is prejudicial if it affects the outcome of the trial. *Id.* at 499.

2. Instruction No. 9 Correctly Stated the Applicable Law and Was Properly Given by the Court.

Plaintiff assigns error to the court giving Instruction No. 9. (Brief of Appellant 19-23) He fails to comply with RAP 10.4(c) by not providing the text of the instruction in his brief

Instruction No. 9 stated (CP 70):

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 but relative and the duty to exercise ordinary care to avoid collisions rests upon both parties. The primary duty, however, rests upon the party not having the right of way.

Plaintiff claims the trial court should have added language to clarify the relative duties and negligence of pedestrian and driver in the instruction. This instruction pertains to the following statutes.

RCW 5.40.050:

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

RCW 46.61.235(1):

(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.

RCW 46.61.235(2):

(2) No pedestrian or bicycle shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop.

The court's instructions no. 8, 9, and 10 more than adequately apprised the jury of the law. (CP 69-71). Jury instruction No. 9 accurately states the law. Appellant was able to argue his case to the jury.

Plaintiff has failed to provide this Court with any citation to authority or non-conclusory legal argument to show that the trial court abused its discretion in giving the instruction. Even if giving the instruction was somehow erroneous, erroneous instructions do not require reversal unless prejudice is shown. *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000), *rev. denied*, 142 Wn.2d 1017 (2001). Plaintiff has not shown how the giving of the instruction prejudiced him.

The trial court was within its discretion in giving this jury instruction.

3. Declining To Give Proposed Instructions Was Not an Abuse of Discretion.

Plaintiff claims the trial court's refusal to give his proposed standard of care and statutorily-based instructions (rules of the road) requires a new trial.

Plaintiff has failed to comply with RAP 10.3(g) by not assigning a separate assignment of error for each refused jury instruction and not

identifying them by number. The proposed jury instructions are not numbered in the clerk's papers but the brief does not even identify them by clerk's papers page number or document page number. The brief does comply with RAP 10.4(c) by providing the text of the statutes but does not identify which proposed jury instructions they pertain to and does not provide the text of the proposed instructions.

Plaintiff's relevant proposed instructions are provided verbatim.

Proposed instruction CP 87, 101:

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.

This proposed instruction pertains to RCW 46.61.100(1) and

(1)(a), which provide:

(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;

....

Proposed instruction CP 90, 102:

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.

This proposed instruction pertains to RCW 46.61.110(2), which provides:

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.

....

Proposed instruction CP 91, 103:

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.

This proposed instruction pertains to RCW 46.61.120, which provides:

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 authorized by the provisions of RCW 46.61.100 through 46.61.160 and 46.61.212 and 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 every event the overtaking vehicle must return to an authorized lane of travel as soon as practicable and in the event the passing movement involves the use of a lane authorized for vehicles approaching from the opposite direction, before coming within two hundred feet of any approaching traffic.

Proposed instruction CP 92, 104:

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.

This proposed instruction pertains to RCW 46.61.125(1)(b), which provides:

(1) 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;

....

Proposed instruction CP 86, 100:

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.

This proposed instruction pertains to RCW 46.61.140(1), which provides:

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.

....

Proposed instruction CP 83, 98:

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.

This proposed instruction pertains to RCW 46.61.235(1) and (4), which provides:

(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.

....

Appellant has failed to demonstrate that these instructions are supported by the evidence in the case. Appellant has also failed to show that the trial court abused its discretion in refusing to give the proposed instructions. The trial court and counsel engaged in extensive discussion about the jury instructions. (12/14/10 RP 6-18; 12/15/10 RP 6-23). The trial court thoroughly explained the reasons for rejecting the proposed instructions. (12/14/10 RP 14-15; 12/15/10 RP 9-10, 16-18). The court properly exercised its discretion.

Even if the refusal to give the proposed instructions were error (which it was not), the refusal did not affect the outcome of trial. The refusal to give the instructions had no effect on the trial's outcome. The trial court did not abuse its discretion in refusing to give plaintiff's proposed instructions.

4. Plaintiff Could Argue His Theory of the Case.

Plaintiff claims that without his proposed instructions, he was unable to argue his theory of the case.

The trial court was within its discretion not to give the proposed instructions. A refusal to give an instruction is reviewable only for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). A trial court also has considerable discretion as to the wording and number of instructions. *State ex rel. Taylor v. Reay*, 61 Wn. App. 141, 146, 810 P.2d 512, *rev. denied*, 117 Wn.2d 1012 (1991). “Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury on the applicable law.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997).

“While it is proper for the court to instruct the jury in the language of a statute, *it is not required to do so.*” *Reay*, 61 Wn. App. at 147 (emphasis added); *accord Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 497, 859 P.2d 26, 865 P.2d 507 (1993). As in *Reay*, the trial court here did not abuse its considerable discretion in refusing to give the proposed instructions.

Under the instructions given, plaintiff was able to argue his theory of the case. The instructions given were sufficient.

C. THERE IS NO BASIS FOR AN AWARD OF ATTORNEY FEES TO APPELLANT PURSUANT TO RAP 18.1.

Appellant requests an award of attorney fees on appeal. The attorney fees request is not supported by law, as there is no contract, applicable statute, or recognized ground in equity serving as the basis for such an award. *Public Utility Dist. No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). Consequently there is no basis for an award of fees to plaintiff pursuant to RAP 18.1.

Because there was no basis to award attorney fees below, there is no basis to award attorney fees to plaintiff on appeal or after any remand. Moreover, if any fees are awarded on appeal, this Court should award fees to respondent under RAP 18.9 for having to respond to appellant's frivolous appeal and deficient record and appellant's brief.

V. CONCLUSION

This Court should decline to address appellant's appeal and affirm the superior court's judgment and order because appellant has failed to provide the record necessary for appellate review. If this Court addresses the appeal, the Court should affirm because the superior court properly exercised its discretion in determining which jury instructions to give. There was no error. The superior court's rulings and the judgment on jury verdict should be affirmed.

DATED this 21st day of October, 2011.

REED McCLURE

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