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NO.249816

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

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AMBER L. KAPPELMAN,

Plaintiff/Appellant

v.

THEODORE J. LUTZ,

Defendant/Respondent

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**REPLY BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

	Page
PLAINTIFF KAPPELMA N'S REPLY TO DEFENDANT LUTZ'S STATEMENT OF THE CASE .....	1
PLAINTIFF KAPPELMA N'S REPLY TO DEFENDANT LUTZ'S ARGUMENT .....	3
1.    Reply to Argument No. 1: The Trial Court Erred In Refusing to Permit Evidence of Mr. Lutz's Violations ..	3
A.    Standard of Review .....	3
B.    Argument .....	7
2.    Reply to Argument No. 2: The Trial Court Erred in Giving the Emergency Instruction .....	16
A.    Standard of Review .....	16
B.    Argument .....	17
3.    Reply to Argument No. 3: Ms. Kappelman Was Entitled to Inform the Jury Who Took Her Statement .....	22
4.    Reply to Argument No. 4: Ms. Kappelman Should Have Been Allowed to Discuss the Motorcycle's Acceleration Capability .....	24
CONCLUSION.....	24

## TABLE OF AUTHORITIES

### Cases

	Page
<u>Bell v. Wheeler</u> , 14 Wn. App 4, 6, 538 P.2d 857 (1975) .....	17
<u>Bennett v. McCready</u> , 57 Wn.2d 317, 356 P.2d 712 (1960) .....	21
<u>Billington v. Schaal</u> , 42 Wn. 2d. 878, 259 P.2d 634 (1953) .....	13
<u>Bohnsack v. Kirkham</u> , 72 Wn. 2d 183, 432 P.2d 554 (1967) .....	12
<u>Brown v. Spokane City Fire Protection District No. 1</u> , 100 Wn.2d 188, 668 P.2d 571 (1983) .....	19
<u>Fleming v. City of Seattle</u> , 45 Wn.2d 477, 275 P.2d 904 (1954) .....	13
<u>Haynes v. Moore</u> , 14 Wn. App. 668, 45 P.2d 28 (1975) .....	16
<u>Himango v. Prime Time Broadcasting</u> , 37 Wn. App. 259, 680 P.2d 432 (1984) .....	5
<u>Holz v. Burlington Northern Railroad Co.</u> , 58 Wn. App. 704, 794 P.2d 1304 (1990) .....	8, 9, 14
<u>Kysar v. Lambert</u> , 76 Wn.App. 470, 887 P.2d 431 (1995) .....	22
<u>Mills v. Park</u> , 67 Wn.2d 717, 409 P.2d 646 (1966) .....	11, 19

	<b>Page</b>
<u>Radford v. City of Hoquiam</u> , 54 Wn. App. 351, 773 P.2d 861 (1989) .....	4, 10
<u>Reynolds v. Donoho</u> , 39 Wn.2d 451, 236 2d 552 (1951) .....	12
<u>Ryan v. Westgard</u> , 12 Wn. App. 500, 530 P.2d 687 (1975) .....	13
<u>Sandberg v. Spoelstra</u> , 46 Wn. 2d 776, 285 P.2d 564 (1955) .....	18, 19
<u>Safeco Insurance Co. v. JMG Restaurants, Inc.</u> , 37 Wn. App. 1, 680 P.2d 409 (1984) .....	4
<u>Schneider v. Strifert</u> , 77 Wn. App. 58, 888 P.2d 1244 (1995) .....	10
<u>State v. Cameron</u> , 100 Wn.2d 520, 674 P.2d 650 (1983) .....	14
<u>State v. Coe</u> , 101 Wn. 2d 772, 684 P.2d 668 (1984) .....	4
<u>State v. Cronin</u> , 142 Wn. 2d 568, 14 P.3d 752 (2000) .....	14
<u>State v. Gould</u> , 58 Wn. App. 175, 791 P.2d 569 (1990) .....	14
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991) .....	5, 22

	<b>Page</b>
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003) .....	3
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998) .....	16
<u>Switzer v. Sherwood</u> , 80 Wash. 19, 141 P. 181 (1914) .....	10
<u>T.S. v. Boy Scouts of Am.</u> , 157 Wn.2d 416, 138 P.3d 1053 (2006) .....	3
<u>Tuttle v. Allstate Ins. Co.</u> , 134 Wn. App. 120, 138 P.3d 1107 (2006) .....	16, 18, 19
<u>White v. Peters</u> , 52 Wn.2d 824, 329 P.2d 471 (1958) .....	9
<u>Yurkovich v. Rose</u> , 68 Wn. App. 643, 847 P. 2d 925, <u>rev. den.</u> , 121 Wn.2d 1029, 856 P.2d 382 (1993) .....	11
<u>Zook v. Baier</u> , 9 Wn. App. 708, 514 P2d 923 (1973) .....	18

#### Statutes

	<b>Page</b>
RCW 5.40.050 .....	4, 7, 8, 10, 11, 12, 13, 25
RCW 46.20.515 .....	4, 12

## Rules and Regulations

	<b>Page</b>
ER 103 .....	5, 22
ER 401 .....	7
ER 403 .....	13, 14, 15, 16

**TABLE OF SUPPLEMENTAL APPENDIX**

Special Verdict Form ..... Supp. App. 1

**PLAINTIFF KAPPELMAAN'S REPLY TO DEFENDANT  
LUTZ'S STATEMENT OF THE CASE**

At page 8 of his responsive brief (hereinafter, "Resp. Br."), Mr. Lutz states that he "estimates" the motorcycle went down 180-200 feet from the deer, and he rolled further down the pavement. He said this in response to questions from his own counsel, and his "estimate" contradicted his deposition testimony that he was thrown off the motorcycle after striking the deer and slid about 180 feet from the deer. RP 214, 227-228.<sup>1</sup>

At Resp. Br., 9-10, Mr. Lutz's counsel paraphrases Mr. Stearns' answers to questions on cross-examination after counsel asked Mr. Stearns to change the assumptions the expert used to form his opinion, and argues that **if** Mr. Lutz was only 200 feet from the deer,<sup>2</sup> Mr. Lutz could not quite have stopped before reaching the point where the deer was. Mr. Stearns' actual opinion given on direct was that Mr. Lutz could have come to a

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<sup>1</sup> Mr. Lutz's trial testimony also contradicted established physical evidence, namely the evidence Trooper Cashatt referred to in his report that the motorcycle went down 40 feet after striking the deer. RP 158, Stearns testified that the motorcycle could **not** have stayed up more than 50 feet after striking the deer. RP 202.

<sup>2</sup> Ms. Kappelmaan testified they were 250-300 feet away from the deer when she saw it, and she saw it **after** Mr. Lutz. Mr. Stearns estimated that since "3-4" seconds elapsed between the time Mr. Lutz saw the deer and hit it, Mr. Lutz was even **further** from the deer than Ms. Kappelmaan estimated.

complete stop before hitting the deer if he had been going the speed limit. See, Plaintiff's Opening Brief, pp. 9-11.<sup>3</sup> At the very least, if Mr. Lutz had been traveling at the speed limit, and had begun braking when he saw the deer, he would have been able to steer around the deer and avoid the accident, or the damage done at the point of impact would have been much less devastating. RP 263-265.

Ms. Kappelman's counsel and Mr. Lutz's counsel agree on one thing.

At Resp. Br. page 11, counsel for Mr. Lutz states:

"Mr. Stearns agreed that it is difficult to do emergency braking while carrying a passenger."<sup>4</sup>

Mr. Lutz agreed. RP 212. Mr. Lutz was not experienced enough to carry a passenger and brake safely to a stop before reaching the deer. That is why the state prohibited him from carrying a passenger until he demonstrated the

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<sup>3</sup> Mr. Lutz's counsel did not explain in his responsive brief (or in the trial court) why he failed to call his own expert. Presumably, if Mr. Lutz could have found an expert to testify that he was not traveling at 80-90 mph when he saw the deer, or that he could not have stopped if going the speed limit, he would have done so.

<sup>4</sup> Ms. Kappelman does not agree that Mr. Lutz had no option other than "emergency braking". Assuming, *arguendo*, that Mr. Lutz had to do "emergency braking," it was only because he waited until the last 40 feet when he realized he could not get around the deer, and only because he was speeding in the first place.

requisite collision avoidance skills to get a full motorcycle endorsement.<sup>5</sup>

Finally, in a footnote, Mr. Lutz quibbles with Ms. Kappelman's statement in her opening brief that after he stomped on the brake, he lost control and went into a skid. See, footnote 2, p. 11. **By definition**, once Mr. Lutz went into a "skid," he lost control. RP 196, 204.

**PLAINTIFF KAPPELMAN'S REPLY TO DEFENDANT  
LUTZ'S ARGUMENT**

1. **Reply re: Assignment No. 1: The Trial Court  
Erred In Refusing to Permit Evidence of Mr.  
Lutz's Violations**

A. **Standard of Review**

Ms. Kappelman correctly stated the standard of review for exclusion of evidence based on application of wrong legal standards. While admission of evidence is generally a matter of discretion, that discretion is abused where its exercise is "manifestly unreasonable or based upon untenable grounds or reasons." "Untenable reasons" exist if the trial court's decision was reached by applying the wrong legal standard. *T.S. v. Boy Scouts of America*, 157 Wn. 2d 416, 423-424, 138 P. 3d 1053 (2006); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The same standard applies to the trial court's ruling

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<sup>5</sup> Mr. Lutz admitted that he was afraid to brake with a passenger because he feared he would go into a skid and lose control. RP 203-204.

under ER 403 because, as explained below, it was based on the incorrect legal ruling that evidence of Mr. Lutz's statutory violations was not evidence of negligence.<sup>6</sup>

Mr. Lutz contends at p. 21 of his brief that Ms. Kappelman did not make any offer of proof that "would make Mr. Lutz's lack of motorcycle endorsement relevant." Relevance is a question of law for the court; no "offer" is required. The motorcycle statutes themselves establish their relevance; and specifically RCW 46.20.515, among others, requires that the driver pass a test demonstrating skills and maneuvers (such as emergency braking and turning). The Washington legislature has mandated that evidence of a statutory violation be admissible. RCW 5.40.050. In any event,

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<sup>6</sup> Mr. Lutz asserts that there is an abuse of discretion when 'no reasonable person would take the view adopted by the trial court,' and cites certain cases at Resp. Br. 12. These cases are inapposite because the trial court in these cases applied the correct legal standard to evidence. See, *State v. Coe*, 101 Wn. 2d 772, 684 P.2d 668 (1984) (identification evidence in rape case); *Radford v. City of Hoquiam*, 54 Wn. App. 351, 773 P.2d 861 (1989) (the trial court had discretion to admit photographs of other trash transfer stations other than the one at issue); *Safeco Insurance Co. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 680 P.2d 409 (1984) (exclusion of evidence of other fires in a dispute over fire damage insurance coverage). *State v. Coe* explains that discretion is accorded to the trial judge in such matters because he is in a superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions. *State v. Coe*, 101 Wn. 2d at 782, 684 P.2d at 674. Here, the trial court applied the wrong **legal standard**. The trial court is in no better position than this court to evaluate the law.

Ms. Kappelman presented evidence from, *inter alia*, her expert, Mr. Stearns, which showed the significance of Mr. Lutz's inexperience. RP 266-272. ER 103(a)(2) only requires that "the substance of the evidence [be] made known to the court or [be] apparent from the context within which questions were asked." It is the duty of a party offering evidence only:

to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling . . . .

*State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220, 1225 (1991) (offer sufficient where colloquy among counsel and court revealed substance of evidence and the theory under which it was offered). No offer is required to challenge the exclusion of evidence if the subject of the excluded evidence is apparent from the record. *Id.* at 539; See, *Himango v. Prime Time Broadcasting*, 37 Wn. App. 259, 263, 680 P.2d 432 (1984) (no formal offer necessary when issue fully argued in motion *in limine*).

At Resp. Br. 21 & 24, Mr. Lutz contends that Ms. Kappelman did not make any "offer of proof" to show that the "accident would have been less likely to happen" if Mr. Lutz had not have been carrying a passenger, or driving in the dark. Ms. Kappelman had **no** obligation to make the "offer of proof" urged by Mr. Lutz. ER 103(a)(2) requires only that the substance of

the evidence be made known to the court. Nor did Ms. Kappelman need to prove that the accident would be less likely to happen without Ms. Kappelman as a passenger. **It was for the jury to decide causation**, not for the trial judge on a motion *in limine*.

Nevertheless, Ms. Kappelman made offers that Mr. Lutz's lack of experience (and a full endorsement which can only be had after experience and testing) could lead to the disaster in this case. Ms. Kappelman stated in detail in her memorandum in response to Mr. Lutz's motion *in limine* what the evidence would be ("... plaintiff's expert will testify . . .," CP 20), stated it again in her memorandum in support of motion for reconsideration of the trial court's ruling on the motion (CP 24), again in argument on the motion *in limine* on September 20, 2005, Transcript of Hearing on Motion *in Limine*, September 20, 2005 (hereinafter, "RP MTN") 10-12, and finally in argument the morning of trial on plaintiff's motion for reconsideration. RP 14-15.<sup>7</sup> Mr. Stearns testified that Mr. Lutz's lack of experience made a significant difference in his ability to control the motorcycle. RP 216-221. Mr. Lutz was, in essence, over-driving his ability. RP 228. Mr. Stearns testified to the deleterious effects of a passenger on an inexperienced driver's ability to

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<sup>7</sup> Indeed, counsel for Mr. Lutz acknowledged at the hearing in September he knew exactly what the testimony would be. RP 7.

control the motorcycle and to safely brake. RP 269-271. Even Mr. Lutz admitted that he had a harder time braking and controlling the motorcycle with Ms. Kappelman on it. RP 212.

#### B. **Argument**

The trial court excluded Mr. Lutz's admission that he drove in violation of his restricted endorsement by carrying a passenger and driving after dark, the citation itself, his guilty plea, and any reference to the statute he violated, ruling erroneously that the evidence was not relevant under ER 401. RP 15, Transcript of hearing on motion *in limine* on September 20, 2005 (hereinafter, "RP MTN"). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action of the action more probable than it would be without the evidence." ER 401. Mr. Lutz's failure to pass state-mandated competency tests and obtain his full endorsement was highly relevant, and was compelling evidence of negligence under RCW 5.40.050.

The trial court's ruling was prejudicial error. Evidence of a statutory violation is not only admissible, but, as explained at p. 20 of Ms. Kappelman's Opening Brief, it may also form the basis for a directed verdict for a plaintiff. RCW 5.40.050, in relevant part, 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 ...** (emphasis added).

It is beyond reasonable dispute that Mr. Lutz's failure to demonstrate he had the requisite skills to enjoy the privilege of a full motorcycle endorsement was relevant and probative. Mr. Lutz relied on *Holz v. Burlington Northern Railroad Co.*, 58 Wn. App. 704, 794 P.2d 1304 (1990) to urge the trial court to exclude the evidence. In *Holz*, plaintiff lacked a motorcycle endorsement and the tortfeasor-defendant railroad sought to introduce that evidence **against plaintiff**, the injured party. The *Holz* court correctly excluded that evidence.<sup>8</sup>

The trial court below apparently believed *Holz* established a general rule that the absence of a motorcycle endorsement is not admissible. RP MTN 15. But what *Holz* actually says is that a statutory violation is admissible as evidence of negligence under RCW 5.40.050 if the violation causes injury to a member of the protected class. Motorcycle licensing statutes are not intended to protect railroads that leave railcars parked at night

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<sup>8</sup> The railroad was not a member of any class the statute was meant to protect. Here, a member of the class protected by the statute (a passenger, Ms. Kappelman) sought to introduce evidence that Mr. Lutz did not have the required motorcycle endorsement. See, Ms. Kappelman's Op. Br., 18 -19.

across intersections from damage to those railcars caused by unsuspecting motorists. In *Holz*, defendant railroad did not contend plaintiff was actually negligent or caused the injury. Instead, the railroad argued only that plaintiff Holz should not have been out driving at the hour the accident occurred.<sup>9</sup> The *Holz* court held that the statutory violation played no role in the collision. Here, Mr. Lutz's failure to demonstrate collision avoidance skills, among other things, was directly responsible for Ms. Kappelman's injuries, as Ms. Kappelman's expert, Mr. Stearns, testified. RP 266-270, 278.

The *Holz* court cited *White v. Peters*, 52 Wn.2d 824, 329 P.2d 471 (1958). In that case, plaintiff was a leg-amputee and had a license restriction requiring him to use a hand-throttle mounted on his steering column. The trial court ruled that his failure to comply with this license restriction was

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<sup>9</sup> In other words, the railroad was making a cause-in-fact argument; that is, if plaintiff Holz had not been riding his motorcycle at night in violation of his license restriction, he would not have run into the tank cars. The court of appeals in *Holz* held that, in order to introduce the violation into evidence, the railroad would have to show that plaintiff Holz's illegal driving made the accident **more likely** to occur than legal riding. *Holz*, 58 Wn. App at 702. The railroad could not prove that plaintiff *Holz* was less likely to injure himself if he had a permit than if he did not (indeed, the railroad made no claim that plaintiff *Holz* was actually negligent). In this case, Mr. Lutz would have been much less likely to injure Ms. Kappelman if he had taken a course in collision avoidance skills and passed the state mandated test. Mr. Stearns testified, and Mr. Lutz agreed, that Ms. Kappelman's extra weight made it much harder to brake safely. RP 204, 206, 212, 293.

contributory negligence as a matter of law.<sup>10</sup> Mr. Lutz contends that *White v. Peters* is distinguishable because plaintiff's license imposed physical restrictions (which Mr. Lutz apparently agrees are admissible), not legal restrictions (which Mr. Lutz apparently believes are not admissible). Resp.Br. 25-26. Mr. Lutz's distinction fails. The question is: Is the restriction at issue intended to protect the injured party, in this case, Ms. Kappelman?<sup>11</sup>

*Radford v. Hoquiam*, 54 Wn.App. 351, 773 P.2d 861 (1981) illustrates how admissibility of a statutory violation depends on whether the party offering the evidence is a member of the protected class. There, the

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<sup>10</sup> Today, it would only be evidence of negligence, after the legislature enacted RCW 5.40.050 in 1986.

<sup>11</sup> Mr. Lutz seems to suggest motorcycle license cases are exempt from RCW 5.40.050, but he is wrong. He cites *Switzer v. Sherwood*, 80 Wash. 19, 141 P. 181 (1914). Resp. Br., p. 20. In *Switzer*, the trial court refused to admit evidence because the violation was of the 'revenue portion' of the statute. *Switzer v. Sherwood*, 80 Wash. at 23. Significantly, the court acknowledged that a licensing violation would be admissible if plaintiff had "violated some part of the **regulative** part of the statute and his injury resulted therefrom . . ." (emphasis added). *Switzer*, at 23. Under the correct view of Washington law, by analogy, evidence that a restaurant owner failed to pay the required fee and get a business license would not be relevant to a claim for personal injury arising from a kitchen fire, but failure to comply with city safety fire codes would be. Thus, in *Schneider v. Strifert*, 77 Wn. App. 58, 888 P.2d 1244 (1995), the defendant's dog allegedly injured a motorcyclist. His violation of a city ordinance forbidding dogs to be at large was admissible because a purpose of the ordinance was to protect motorists. *Schneider*, at 61-62.

question was whether a city was negligent for failing to have guard rails on the precipice of a dumping platform at a trash transfer station. Plaintiff, a member of the general public, sought to invoke WISHA regulations requiring placement of guardrails across a precipice.<sup>12</sup> The trial court refused to allow plaintiff to introduce the regulations and argue negligence based thereon because WISHA's regulations are intended to protect workers, not the general public, and plaintiff was therefore not in the class of persons the legislature intended to protect. The appellate court agreed. *Radford*, at 356-358.

In *Yurkovich v. Rose*, 68 Wn. App. 643, 649–653, 847 P. 2d 925, rev. den., 121 Wn.2d 1029, 856 P.2d 382 (1993), a schoolgirl's estate sued a bus driver and his employer after the girl was killed by a vehicle after she exited a schoolbus. The bus driver violated applicable Washington statutes and regulations in discharging the schoolgirl from the bus. On appeal, the appellate court affirmed.

Mr. Lutz cites *Mills v. Park*, 67 Wn.2d 717, 409 P.2d 646 (1966), and argues that there must be a nexus between Holz's lack of motorcycle endorsement and "the likelihood of the accident." Resp. Br., 22. First, Mr.

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<sup>12</sup> *Radford v. Hoquiam* involved a statutory violation as negligence *per se* rather than evidence of negligence because the case was filed before the effective date of RCW 5.40.050.

Lutz undeniably violated RCW 46.20.510. The legislature decreed that it is unsafe to drive at night and with a passenger until one demonstrates required collision-avoidance skills. Second, from the testimony of Mr. Stearns and Mr. Lutz himself, discussed elsewhere, the conclusion is inescapable that both Mr. Lutz's carrying a passenger and his handling of the motorcycle contributed significantly to the accident. Under RCW 5.40.050, Ms. Kappelman was entitled to introduce this evidence.

Even *Holz*, which Mr. Lutz relies on heavily, is simply an application of the general rule that such evidence is admissible if the party offering the evidence is a member of the class the statute is meant to protect. *See, e.g., Bohnsack v. Kirkham*, 72 Wn. 2d 183, 190, 432 P.2d 554, 559 (1967) (violation of statute requiring that a driver making a left turn must yield to oncoming traffic is negligence *per se* under pre-1986 law).

Mr. Lutz cites *Reynolds v. Donoho*, 39 Wn.2d 451, 456, 236 2d 552 (1951), Resp. Br., 26, for the proposition that evidence of his citation and fine is inadmissible. *Reynolds* does not so hold. Rather, the case holds that evidence of bail **forfeiture** on a traffic citation is not admissible. But, Ms. Kappelman did not seek to introduce such evidence. Mr. Lutz also fails to disclose *Reynolds*' holding on a matter that is at issue here – specifically, that

a guilty plea to a traffic citation is admissible. *Reynolds*, at 455.

Mr. Lutz also cites *Billington v. Schaal*, 42 Wn. 2d. 878, 882-884, 259 P.2d 634, 637-638 (1953). Resp. Br., p. 26. There, the trial court excluded evidence of a traffic citation because the citation was based on the **opinion** of an investigating officer. *Billington* explicitly recognized that a **guilty plea** is admissible as an admission against interest. *Billington*, at 882.

The Washington rule is that a guilty plea is admissible. *Fleming v. City of Seattle*, 45 Wn.2d 477, 487-488, 275 P.2d 904 (1954) (confirming that the Washington rule is that a conviction based on a guilty plea is admissible in subsequent civil action); *Ryan v. Westgard*, 12 Wn. App.500, 510-511, 530 P.2d 687 (1975) (guilty plea to traffic offense is admissible in later civil case, citing *Billington* and *Reynolds*).<sup>13</sup>

Mr. Lutz states that his motion *in limine* was also based on ER 403 (Resp. Br., 12-13, 15), pursuant to which evidence can be excluded if it would "unfairly prejudice the jury against the defendant, confuse the issues,

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<sup>13</sup> Further, even absent these cases, the 1986 statute, RCW 5.40.050, renders relevant and admissible evidence of statutory violations. Mr. Lutz's guilty plea to the citation was admissible as a party admission to show the statutory violations.

[or] ...mislead the jury."<sup>14</sup> For exclusion under ER 403, there must be “unfair prejudice” and it must **substantially** outweigh the probative value of the evidence.

‘[U]nfair prejudice’ is that which is more likely to arouse an emotional response than a rational decision by the jury.” *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). Within its context, “unfair prejudice” means an undue tendency to suggest a decision on an improper basis--commonly an emotional one. *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

*State v. Cronin*, 142 Wn. 2d 568, 583, 14 P.3d 752 (2000). Neither in Mr. Lutz’s Memorandum in Support nor at the hearing on the motion *in limine* did Mr. Lutz’s counsel ever explain why admission of the evidence would constitute “unfair” prejudice. And, the trial court in its ruling never explained why admission would be “unfair” either. At the hearing on Mr. Lutz’s

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<sup>14</sup> Mr. Lutz even cites *Holz v. Burlington Northern Railroad Company, supra*, for the proposition that his lack of a full motorcycle endorsement would be unfairly prejudicial under ER 403. Resp. Br., 18. However, Mr. Lutz’s counsel has again turned the logic of the *Holz* decision on its head. Specifically, the court of appeals in *Holz* was concerned that plaintiff Holz’ lack of endorsement might cause the jury to “feel his family and personal administrator were less worthy of compensation than if he were a fully licensed rider, i.e., a law abiding citizen.” *Holz*, 58 Wn. App. at 708. The court also held that plaintiff’s lack of endorsement did not cause the accident; obviously, the railroad did. In the instant case, Mr. Lutz’s failure to demonstrate the requisite experience and collision-avoidance skills to obtain his full endorsement was directly responsible for Ms. Kappelman’s injuries. Ms. Kappelman, like plaintiff Holz, was not responsible for her injuries.

motion, the trial court said:

To admit that ... into evidence that he also did not have a motorcycle endorsement I believe, first of all, is highly prejudicial and **we all know that juries often make decision based on things like that and that's not what a jury should be making a decision on in this case.** (emphasis added) RP MTN 15.

The trial court's statement quoted above is, with all due respect, unexplained and inexplicable. The trial judge did not say the evidence was highly emotive, emotional, or unfair. Why should a jury not consider a defendant's violation of law in making its decision, particularly where the violation results in serious injury to a person (a passenger, in this case) the law is intended to protect? The trial court concluded, without explanation, that the evidence was "highly prejudicial"<sup>15</sup> because the trial judge apparently believed it was evidence a jury "should not" base its decision upon, even though the trial judge acknowledged that a defendant's lack of on-road inexperience with motorcycles (which is precisely why Mr. Lutz did not have a full endorsement) was relevant and admissible. The trial court did not perform the balancing called for by ER 403 because, in his mistaken view, any use by the jury of this evidence would be "prejudicial." It is axiomatic,

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<sup>15</sup> *Nota Bene*: The trial court did not say the evidence was *unfairly* prejudicial, only it is "highly" prejudicial. RP MTN 15.

however, that evidence which tends to prove the defendant was negligent is “prejudicial.” That is not the question, nor is it the test of ER 403. The question is whether the evidence is **unfairly** prejudicial. Ms. Kappelman was seriously injured because Mr. Lutz broke the law. The evidence of that violation was not unfairly prejudicial.

2. **Reply to Argument No. 2: The Trial Court Erred in Giving the Emergency Instruction**

A. **Standard of Review**

Ms. Kappelman correctly stated the standard of review. “A trial court's decision to give an instruction based upon a ruling of law is reviewed *de novo*.” *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). And, “[W]e review *de novo* a trial court's decision to give an instruction based on a ruling of law . . . Here the question is one of law: **Whether the emergency doctrine applies to these facts.** *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006) (emphasis added). The giving of an instruction that is not supported by substantial evidence is **prejudicial error** as a matter of law. *Haynes v. Moore*, 14 Wn. App. 668, 672, 45 P.2d 28 (1975).

The trial court failed to perform its gatekeeper function to determine if Mr. Lutz presented substantial evidence on each element of the emergency

doctrine, which Mr. Lutz admits he had to do before the instruction could be given. Resp.Br., 40. Had the trial court done so, and had it further considered Mr. Lutz's statutory violations, it would not have given the instruction.

### B. Argument

Mr. Lutz argues that the trial court properly gave the emergency instruction because all three "elements" of an emergency were present. Resp. Br., 29. Mr. Lutz was the proponent of the instruction, and had to convince the court that the instruction should be given. *Bell v. Wheeler*, 14 Wn. App. 4, 6, 538 P2d 857 (1975). As a preliminary matter, Ms. Kappelman suggests there was no real emergency. First, Mr. Lutz was not confronted with a sudden and unexpected emergency, even though counsel asserts he was. Resp. Br., 32. Mr. Lutz admitted he had 3-4 seconds and 200 feet to react.<sup>16</sup> RP 210, 220-221. This was not a situation where Mr. Lutz had to make a "split second decision" because a child jumped out 50 feet in front of him. Three to four seconds gave Mr. Lutz sufficient time to brake or take evasive maneuvers, assuming he was not speeding. Mr. Stearns testified that with 3-4 seconds, Mr. Lutz could have stopped before hitting the deer even if he had

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<sup>17</sup> Ms. Kappelman saw the deer well after Mr. Lutz (by the time she saw the deer, it was already in the roadway; Mr. Lutz saw it while it was on the hill opposite the road) said she saw the deer 2-3 seconds before impact. RP 72.

been speeding at 65 mph (which suggests Mr. Lutz was traveling at well over 65 mph). RP 273-278. Nor was the appearance of a deer unexpected. Mr. Lutz knew deer frequently came out at night in this area. RP 192.

Second, there is no evidence that Mr. Lutz did not have time to make a decision. Aside from counsel's unsupported assertions, Resp. Br. 39, there is no evidence in the record that Mr. Lutz made, or had to make, an immediate or instinctive choice. A true emergency prevents the actor from reflecting upon which choice to make, *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P2d 923 (1973), and forces the actor to make an immediate or instinctive choice. *Tuttle v. Allstate, supra*, at 131. In this case, Mr. Lutz did reflect, coasted, decided not to significantly brake until he was 40 feet from the deer, and decided instead to go around the deer.<sup>17</sup> He had time to downshift **twice**. RP 221. When he was only 40 feet from the deer, he belatedly decided to brake when he realized he could not beat the deer. RP 222.

Third, for the emergency doctrine to apply, Mr. Lutz had to demonstrate that he did not, in whole or **in part**, cause or contribute to the emergency. *Sandberg v. Spoelstra*, 46 Wn. 2d 776, 782-783, 285 P.2d 564

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<sup>17</sup> There was no traffic in the on-coming lane (RP 195) and Mr. Lutz could have steered left, not right, but Mr. Lutz apparently thought he could beat the deer to the right side of the road. RP193-195.

(1955). Since he could not do so, the instruction should not have been given. “An emergency doctrine instruction is appropriate only when the trier of fact is presented with evidence from which it can conclude that the emergency arose through **no fault of the party seeking to invoke the doctrine**” (emphasis added). *Tuttle*, at 131, citing *Brown v. Spokane City Fire Protection District No. 1*, 100 Wn.2d 188, 197, 668 P.2d 571, 577 (1983) and *Mills v. Park*, 67 Wn. 2d 717, 409 P.2d 646 (1966). “The benefit of the emergency rule is applicable only to conduct **after** a person has been placed in a position of peril.” *Sandberg*, at 783. In this case, Mr. Lutz and Ms. Kappelman were only in peril 40 feet from the deer because Mr. Lutz had not applied his brakes earlier.

Mr. Lutz acknowledges that the party requesting the instruction (i.e., Mr. Lutz) is not entitled to the instruction unless there is **substantial** evidence that the requesting party’s negligence was **not** a cause, **in whole or in part**, of the emergency. Counsel’s assertions notwithstanding, Mr. Lutz did not produce substantial evidence that his conduct was **not** a cause, at least in part. Ms. Kappelman produced substantial evidence that it was.

Initially, Mr. Lutz suggests that the appropriate inquiry is whether his negligence in whole or in part caused the **emergency**. Rsp.Br., 30. Later,

however, Mr. Lutz argues that his speed did not cause the “accident.” Resp. Br., 39, 43. This court should not be misled by counsel’s verbal “sleight of hand.” The correct inquiry is whether Mr. Lutz’s speeding and statutory violations caused the **emergency**.<sup>18</sup>

Mr. Lutz admits he was speeding when he saw the deer. RP 204. He told Trooper Cashatt he was still speeding when he hit the deer. RP 170. If he had been traveling at or under the speed limit, Mr. Lutz could have either stopped before hitting the deer or in all probability avoided the deer. RP 257-263, 270-278. Indeed, Mr. Lutz even suggested that if he had been going the speed limit, the deer might have traveled all the way to the other side of the road and been out of Mr. Lutz’s way by the time Mr. Lutz got to the place where the deer was. RP 205. Mr. Lutz admits violating statutory requirements of motorcycle-permittees in two important respects: he was operating his motorcycle on the road during “an hour of darkness” and with a passenger. Certainly Mr. Lutz’s excessive speed<sup>19</sup> and the presence of a passenger, Ms.

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<sup>18</sup> The jury never even reached the question of causation in this case because the jury held, most likely because of the emergency instruction, that Mr. Lutz was not negligent. See, Special Verdict, CP 64-67, Supp. App. 1-2.

<sup>19</sup> Contrary to the argument of Mr. Lutz’s counsel (Resp. Br., 39-47), Mr. Lutz would have had time to stop, or could have avoided the accident, if he had not been speeding, as Mr. Stearns clearly stated. Mr. Lutz’s counsel’s speculative assertions to the contrary are based solely on changing Mr.

Kappelman, contributed to the emergency (if there was one), although Mr. Lutz's speeding and decision to beat the deer to the right side of the road and not to brake until he was 40 feet from the deer also contributed significantly.

Mr. Lutz contends there was substantial evidence that he behaved reasonably **after** the alleged emergency arose (i.e., in braking within the last 40 feet). Resp. Br., 35. While Ms. Kappelman does not agree that Mr. Lutz performed well, this was an "emergency" that Mr. Lutz caused. Mr. Lutz cannot deny established physical facts. Lutz cannot deny established physical facts. In *Bennett v. McCready*, 57 Wn.2d 317, 319, 356 P.2d 712 (1960), the supreme court stated: "It is a well-established rule that when 'physical facts are uncontroverted and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ.'" The established physical facts show that Mr. Lutz did not significantly brake until he was 40 feet from the deer.<sup>20</sup> RP 272. Mr. Lutz

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Stearns's fundamental assumptions (such as reaction times).

<sup>20</sup> Ms. Kappelman testified that she felt no braking as Mr. Lutz approached the right side of the road. RP 72. A party is not entitled to a jury instruction that is contrary to uncontroverted physical facts. *Bennett v. McCready*, 57 Wn.2d 317, 319, 356 P.2d 712, 713 (1960).

cites this as evidence that he behaved reasonably, but it shows the opposite.<sup>21</sup>

**3. Reply to Argument No. 3: Ms. Kappelman Was Entitled to Inform the Jury Who Took Her Statement**

Mr. Lutz apparently concedes the merits of this assignment because he argues only that Ms. Kappelman failed to preserve the error by making an offer of proof, citing *Kysar v. Lambert*, 76 Wn.App. 470, 490 - 491, 887 P.2d 431 (1995). Resp. Br., 49. In *Kysar*, the proponent of the evidence made no offer of proof whatsoever.

Mr. Lutz's argument is easily disposed of. To preserve an argument on exclusion of evidence, ER 103(a)(2) only requires that "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." See, Standard of Review in Assignment of Error No. 1, *supra*. *State v. Ray*, *supra*, at 540. When Mr.

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<sup>21</sup> Mr. Lutz contends that Ms. Kappelman offered argument, but no evidence, that he performed poorly in the "emergency." Mr. Lutz is incorrect. First, Ms. Kappelman offered the testimony of her expert, Mr. Stearns, that Mr. Lutz should have applied the brakes more forcefully and sooner to avoid the accident, but Mr. Lutz objected to that evidence. RP 266-267. Ms. Kappelman believes there was no emergency or, if there was one, Mr. Lutz caused the emergency. Second, Ms. Kappelman testified that Mr. Lutz did not brake as he approached the deer. RP 72. Third, Mr. Lutz admitted he did not apply the brakes in full until he was 40 feet from the deer. RP 202-204. Mr. Stearns also confirmed there was no physical evidence of braking, RP 271-272, and that Mr. Lutz was over-driving his ability. RP 278-279.

Lutz's counsel began to inquire about the statement she made to the adjuster, Ms. Kappelman objected and explained at sidebar that Ms. Kappelman had made the statement to Mr. Lutz's insurance adjuster, and that if Mr. Lutz's counsel intended to inquire, then the door would be "open," and Ms. Kappelman should be entitled to inquire regarding the circumstances of the statement, including who solicited it. Although the trial court informed both counsel that sidebar discussions were recorded by a microphone, and it was not necessary to make an offer or objection on the record outside the jury's presence, the microphone apparently did not pick up the court's comments all the time. See, RP. 62, 305, 316. In any event, in open court shortly thereafter, Ms. Kappelman's counsel stated that counsel for Mr. Lutz had "opened the door," and requested leave of court for Ms. Kappelman to identify to whom the statement was made, if not as an "insurance adjuster," then at least as Mr. Lutz's "agent." RP 134-136. That was an offer.

The point is: no reasonable person would ask Ms. Kappelman after an accident if she "blamed" Mr. Lutz. No one wants to "blame" a friend. A family member might ask her who was at "fault," but not who was to "blame." An insurance adjuster, however, would not ask Ms. Kappelman who was "at fault" because Ms. Kappelman (or any other injured party) might well

answer such a question by indicating that the insured was at fault.

4. **Reply to Argument No. 4: Ms. Kappelman Should Have Been Allowed to Discuss the Motorcycle's Acceleration Capability**

As with Assignment No. 3, Mr. Lutz only argues that Ms. Kappelman failed to make an offer of proof, relying on the same authority. In reply, Ms. Kappelman relies on the authorities cited above, in the argument on assignment no. 3. The issue of the motorcycle's acceleration capability surfaced the morning before trial in Mr. Lutz's third motions *in limine*. In the motions *in limine*, Mr. Lutz's counsel described the evidence he did not want introduced, including "acceleration capabilities" of the motorcycle. See, third motions *in limine*, CP 104. The proposed evidence of acceleration was further discussed at argument the morning of trial. RP 49-50. Ms. Kappelman's counsel stated that: "the jury needs to know that they accelerate very fast . . ." RP 50. Mr. Lutz's counsel responded that the acceleration capabilities of the motorcycle were not relevant, RP 50-51, after which the trial judge cut off counsel and said ". . . I've heard enough." RP 51.

**CONCLUSION**

When cars first began to appear on the highway, one did not need a driver's license. Then, one needed a license, but didn't have to pass a test

to get one; one merely paid a fee and registered. Now, one has to take a test, and some states require driver's education, at least for minor drivers. Presently, with millions of cars on the road, people realize cars are dangerous, and one must have adequate training to drive safely, or one will endanger the public and oneself. Mr. Lutz has relied upon cases decided as long ago as 1914. See authorities cited on page 20 of the responsive brief, including those in the ALR 2<sup>nd</sup> Annotation. Presently, the legislature has indicated clearly that safety on the highways is paramount. RCW 5.40.050, a 1986 statute, compels courts in these cases to admit evidence of statutory violations such as Mr. Lutz's violation of RCW Chapter 46.

Would the estate of a deceased man killed today in a plane crash be able to introduce evidence at his wrongful death trial that the pilot who was flying the plane was doing so in violation of a restricted student pilot's license forbidding him from carrying passengers? It is unthinkable that such evidence would not come in today. Similarly, the evidence of Mr. Lutz's restrictions should have been admitted in the trial of this case.

Dated this 5th day of January, 2007.

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Gordon T. Carey, Jr., WSBA No. 6340  
Attorney for Plaintiff-Appellant Amber  
Kappelman [Strain]

SUPPLEMENTAL APPENDIX

**FILED**  
DEC 23 2005  
Saundra Olson, Clerk  
KLICKITAT COUNTY

SUPERIOR COURT OF WASHINGTON FOR KLICKITAT COUNTY

AMBER L. KAPPELMAN, )  
 )  
 Plaintiff, ) No. 03 2 00163 1  
 )  
 vs. ) SPECIAL VERDICT FORM  
 )  
 THEODORE J. LUTZ, )  
 )  
 Defendant. )

We, the jury, answer the questions submitted by the Court as follows:

QUESTION 1: Was the defendant Theodore J. Lutz negligent?

ANSWER: NO (Write "yes" or "no")

*(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

QUESTION 2: Was the defendant's negligence a proximate cause of injury to the plaintiff?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

*(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)*

QUESTION 3 (A) What do you find to be the amount of the plaintiff's economic damages?

ANSWER \_\_\_\_\_

QUESTION 3 (B) What do you find to be the amount of the plaintiff's noneconomic damages?

ANSWER \_\_\_\_\_

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

DATE: 12/23/05 Presiding Juror: \_\_\_\_\_



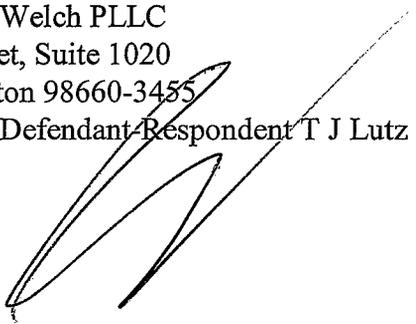
**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on January 5, 2007, I filed the original and two (2) copies of the foregoing **REPLY BRIEF**, by sending them via regular mail, enclosed in a sealed envelope and addressed to:

Administrator Division III  
Washington State Court of Appeals  
P O Box 2159  
Spokane, Washington 99210

I further certify that on January 5, 2007, I served two (2) copies of the foregoing **REPLY BRIEF**, by sending them via regular mail, enclosed in a sealed envelope and addressed to:

Jackson Welch  
Duggan Schlotfelt & Welch PLLC  
900 Washington Street, Suite 1020  
Vancouver, Washington 98660-3455  
Attorneys for Defendant-Respondent T J Lutz



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Attorney for Plaintiff-Appellant Amber  
Kappelman