

80996-8

NO. 249816

**COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

AMBER KAPPELMAN, Appellant,

vs.

THEODORE J. LUTZ, Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE.....	1
ASSIGNMENT OF ERROR 1: EXCLUSION OF EVIDENCE RELATED TO MOTORCYCLE PERMIT RESTRICTIONS AND CITATION.....	11
(a) Standard of Review	12
(b) Argument.....	13
ASSIGNMENT OF ERROR 2: EMERGENCY JURY INSTRUCTION27	
(a) Standard of Review	27
(b) Argument.....	28
ASSIGNMENT OF ERROR 3: EXCLUSION OF EVIDENCE REGARDING INSURANCE ADJUSTER	47
(a) Standard of Review	47
(b) Argument.....	48
ASSIGNMENT OF ERROR 4: EXCLUSION OF EVIDENCE OF MOTORCYCLE’S ACCELERATION CAPABILITY	49
(a) Standard of Review	49
(b) Argument.....	50
CONCLUSION.....	50

TABLE OF AUTHORITIES

Table of Cases

	<u>Page</u>
Bell v. Wheeler, 14 Wn. App. 4 (1975).....	30, 34, 39
Bennett v. McCready, 57 Wn.2d 317 (1960).....	40
Billington v. Schaal, 42 Wn.2d 878 (1953)	26
Brown v. Spokane Fire Protection District No. 1, 100 Wn.2d 188, (1983)	30, 41
Channel v. Mills, 77 Wn. App. 268 (1995)	24, 44
Crescent Harbor Water Company, Inc. v. Lyseng, 51 Wn. App. 337 (1988)	12, 48, 49
Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127 (1980).....	39
Grobe v. Valley Garbage Service, Inc., 87 Wn.2d 217 (1976).....	44
Haynes v. Moore, 14 Wn. App. 668 (1975).....	29, 30, 33, 39
Holz v. Burlington Northern Railroad Company, 58 Wn. App. 704 (1990)	12, 16, 17, 18, 19, 21, 22
Kilde v. Sorwak, 1 Wn. App. 742 (1970).....	44
Kysar v. Lambert, 76 Wn. App. 470 (1995)	49, 50
Mills v. Park, 67 Wn.2d 717 (1966)	20, 22, 29
Radford v. City of Hoquiam, 54 Wn. App. 351 (1989).....	12, 27
Reynolds v. Donoho, 39 Wn.2d 451 (1951)	26
Safeco Insurance Company of America v. JMG Restaurants, Inc., 37 Wn. App. 1 (1984).....	12
Sandburg v. Spoelstra, 46 Wn.2d 776 (1955).....	40

State ex rel. Carroll v. Junker, 79 Wn.2d 12 (1971)	12
State v. Berlin, 133 Wn.2d 541 (1997)	27
State v. Coe, 101 Wn.2d 772 (1984).....	12
State v. Lucky, 128 Wn.2d 727 (1996).....	27, 28
State v. Walker, 136 Wn.2d 767 (1998)	27, 28
Switzer v. Sherwood, 80 Wash. 19 (1914)	20
Theonnes v. Hazen, 37 Wn. App. 644 (1984)	44
Tobias v. Rainwater, 71 Wn.2d 845 (1967).....	42, 43
Tuttle v. Allstate Insurance Company, 134 Wn. App. 120 (2006)	27, 28, 29, 35, 41
White v. Greyhound Corp., 46 Wn.2d 260 (1955)	44
White v. Peters, 52 Wn.2d 824 (1958).....	25
Zenith Transport v. Bellingham National Bank, 64 Wn.2d 967 (1964) ...	46

Statutes

	<u>Page</u>
RCW 46.04.200	13
RCW 46.20.500	16
RCW 46.20.510	1, 13

Court Rules

	<u>Page</u>
ER 103(a)(2)	49, 50
ER 401	13, 18
ER 403	13, 18

Other Authorities

	<u>Page</u>
Annot., Lack of Proper Automobile Registration or Operator's License as Evidence of Operator's Negligence, 29 A.L.R.2d 963 (1953, later case serv., 1981 & supp. 1989).....	22
WPI 12.02	28

STATEMENT OF THE CASE

On June 19, 2000 Amber Kappelman was a passenger on a motorcycle operated by Theodore Lutz northbound on State Route 141 north of Hussum, Washington. (RP 59, 187, 188-189, 213)

A deer came down a hill to the left of the roadway ahead and entered the roadway, moving from left to right. (RP 211-212, 213) The motorcycle struck the deer, ejecting Ms. Kappelman. (RP 196-197)

Ms. Kappelman sued Mr. Lutz for personal injuries, alleging that he negligently operated the motorcycle. (CP 1)

Mr. Lutz filed two Motions in Limine which were heard and ruled upon several months before trial. His First Motion in Limine (CP 7) moved for exclusion of evidence that he operated the motorcycle in violation of conditions of his motorcycle instruction permit, and that he was cited for doing so. The permit had been issued under RCW 46.20.510, and authorized Mr. Lutz to operate the motorcycle upon public highways, but not during "hours of darkness", and not while carrying a passenger. Mr. Lutz stipulated for purposes of the Motion that he was in violation of these restrictions at the time of the accident. (CP 10-11) The parties filed legal Memoranda supporting and opposing the Motion (CP 10; CP 18), and the trial court heard argument on the Motion and entered

its Order granting the Motion. (Report of Proceedings – Motions in Limine, hereinafter: “RP-MTN”, 1-17) (CP 16) The Court ruled that the proposed evidence was “highly prejudicial,” and was without relevance. (RP-MTN 15; RP 10-11)

Ms. Kappelman testified that she and a friend were visiting the home of an acquaintance on the date of the accident, and that Ms. Kappelman accepted the suggestion of her friend that she go for a motorcycle ride with Mr. Lutz. (RP 60-61) Ms. Kappelman had never been on a motorcycle before. (RP 110, 113)

Ms. Kappelman testified that after leaving the town of Hussum Mr. Lutz accelerated and then let up on the accelerator after she yelled at him to slow down. (RP 72) At that point she looked up and saw a deer in the left lane ahead, moving slowly to the right. (RP 72) She testified that it appeared to her that Mr. Lutz was trying to beat the deer to the right side of the road, to go around the deer. (RP 72) Impact with the deer occurred approximately two to three seconds later, ejecting Ms. Kappelman from the motorcycle. (RP 72)

Ms. Kappelman described the lighting conditions as dusk, and testified that she saw the deer clearly when she looked up at the road ahead. (RP 73)¹

Ms. Kappelman testified that she had estimated in her deposition that the deer was approximately 75 feet away when she first saw it. (RP 75) At trial she provided an estimate of 250 to 300 feet, after returning to the accident location and taking measurements. (RP 75, 79)

Upon impact with the deer, she flew off the motorcycle and slid down the roadway. (RP 79-80)

When she saw Mr. Lutz hopping toward her following the accident (due to an ankle injury), he was approximately 50 feet further north from her position. (RP 121-122) She had seen him still riding the upright motorcycle after she had been ejected, and she did not know how much further north he remained on the motorcycle. (RP128)

Ms. Kappelman told her doctor that she had been a passenger on a motorcycle and that they were going 50 to 55 miles per hour and hit a deer; she testified that she was referring to the impact speed. (RP 129) She also told the same doctor that they had been going 90 miles per hour and had slowed down to 70 before hitting the deer. (RP 129-130)

¹ Ms. Kappelman's Brief in this Court incorrectly states that it was *dark*, rather than *dusk*, and that Ms. Kappelman saw the deer "in the headlight". (Br. App. 2, 5) The record

Randall Cashatt, a trooper with the Washington State Patrol, responded to the scene of the accident. (RP 149) He looked for evidence related to the collision on the roadway including skid marks, paint marks, divots, and related evidence. (RP 153-154) He found a 41 foot 6 inch long skid mark made by the motorcycle immediately prior to impact with the deer. (RP 154, 156) He located the final rest position of the motorcycle 369 feet from the deer carcass. (RP 158)

Over objection Trooper Cashatt was permitted to testify that he noted in his report that the motorcycle had slid approximately 330 feet without riders. (RP 158) He identified an approximate area where the motorcycle could have gone down to the pavement after impact with the deer. (RP 160) He vaguely recalled looking for marks on the roadway to indicate where the motorcycle first went down on the pavement after hitting the deer. (RP 162-163) When shown Ex 5C, a photograph of the north end of the skid mark and the area beyond it, he did not see any evidence of paint transfer on the pavement. (RP 163-164) Trooper Cashatt testified that there would have been some indication on the roadway that the motorcycle went down to the pavement, and that he would have used that as a reference for his measurements. (RP 165) He

refutes these mis-characterizations. (RP 73, 128, 192-193, 210-211)

characterized this accident as a typical collision that he handled during his patrol duties, and not one of the more serious nature which called for a more detailed investigation. (RP 173-174, 176)

Mr. Lutz told Trooper Cashatt that he accelerated out of the town of Hussum at approximately 65 miles per hour. He said that he saw the deer but was unable to avoid contact with it, and that he may have been traveling 60 miles per hour when he hit the deer. (RP 169-170)

Mr. Lutz was called to testify as a witness by Ms. Kappelman. He was 21 years of age at the time of the accident. (RP 185) He purchased the involved motorcycle and took possession of it approximately three months before the accident date. (RP 185) It was the first street motorcycle he had owned. (RP 186) He had ridden off road dirt bikes for four or five years. (RP 210)

He had graduated from high school in 1998 in White Salmon, Washington, and at the time of trial was working as a journeyman electrician. (RP 209-210)

He testified that he operated the motorcycle northbound on State Route 141 through the town of Hussum at 45 miles per hour. (RP 188-189) After leaving Hussum, he accelerated past the 55 mile per hour speed limit on the open highway. (RP 189) After traveling roughly a

quarter of a mile he saw the deer on a hillside to the left of the highway. (RP 190) It was dusk, but visibility was clear for at least 300 or 400 feet. (RP 192-193) He estimated that the deer was approximately 200 feet away when he first saw it. (RP 210) He saw the deer come out of some trees and move down the hill toward the highway "at a pretty good rate of speed". (RP 210-211) He estimated that it took only about a second for the deer to reach the left side of the roadway. (RP 211, 220) Mr. Lutz estimated that the motorcycle's speed at that time was between 60 and 65 miles per hour. (RP 211) He responded to seeing the deer moving toward the highway by letting off the accelerator and beginning to apply his brakes and moving toward the right side of the highway. (RP 212) He believes that he downshifted one or two gears, and he applied the brakes as hard as he could while still maintaining control over the motorcycle. (RP 212) He did not apply the brakes full force when he saw the deer because he did not feel he needed to, but also because he was concerned about putting the motorcycle into a skid and laying it down on the pavement if he did so. (RP 212-214) He was able to maintain control of the motorcycle all the way up to the point of collision with the deer. (RP 213)

As he approached the deer, it was moving from left to right, across the southbound lane, and approaching his northbound lane of travel. (RP 213) He was concerned about steering left into the southbound lane, which the deer was crossing, so he steered toward the right side of his northbound lane. (RP 212-214) As the deer continued moving into his path, he eventually realized that he was not going to be able to avoid contact with it, and he applied the brakes hard, causing the tires to skid roughly 50 feet immediately before impact. (RP 196) The front of the motorcycle in the area of the headlights hit the deer in the head and killed it. (RP 196, 214-215)

Mr. Lutz estimated the entire span of time between his first seeing the deer and it's reaching the right side of the road (the northbound lane, in which the motorcycle was traveling) at approximately three seconds. (RP 221) Ms. Kappelman estimated that impact occurred two or three seconds after she saw the deer crossing the southbound lane. (RP 72)

Mr. Lutz was questioned by Ms. Kappelman's attorney about his decision not to apply his brakes with more force when he first saw the deer rapidly approaching the road. (RP 221-222) He agreed that he could have done so, but chose not to. (RP 221-222)

Mr. Lutz was also asked by Ms. Kappelman's attorney whether he was trying to "beat the deer" to the right side of the road by steering to the right. (RP 193) He responded that he was trying to avoid impacting the deer, but was not racing the deer to the right side of the road. (RP 193)

Ms. Kappelman was ejected from the motorcycle upon impact, but Mr. Lutz remained on the motorcycle for some distance after impact. (RP 215) The motorcycle then went into what he described as a "death wobble", with the handlebars going back and forth. (RP 215) He eventually lost control of the motorcycle and it went down and he hit the ground and rolled three or four times. (RP 215) He estimated that the motorcycle went down to the pavement after traveling approximately 180 to 200 feet, or roughly half the distance between the rest position of the deer and of the motorcycle. (RP 216) When he stopped rolling, he was closer to the motorcycle's rest position than to that of the deer. (RP 216)

Mr. Lutz testified that the motorcycle had not slid down the road without riders 330 feet as Trooper Cashatt had concluded, because he had been riding the upright motorcycle for a portion of that distance, as he described. (RP 216) Mr. Lutz testified that he told Trooper Cashatt that he was traveling at approximately 60 to 65 miles per hour, but not that he specified a speed at the time of the impact with the deer. (RP 208-209)

He acknowledged that he does not know his speed at the time of impact.
(RP 209)

Robert Stearns, an accident reconstruction consultant, testified on behalf of Ms. Kappelman. He reviewed the available documentation to arrive at an opinion on the speed of the motorcycle and possible accident avoidance factors. (RP 238) He testified to his opinion that the motorcycle was traveling in the vicinity of 70 to 77 miles per hour prior to the braking which was shown by physical evidence. (RP 245-246) After considering testimony that the roadway had been repaved between the accident date and the date of Mr. Stearns' inspection, he reduced his speed estimate to 69 to 76 miles per hour. (RP 285) He described this estimate as conservative, and testified that the actual speed may have been higher but cannot be accurately calculated because of unknown energy loss factors which cannot be quantified. (RP 285-286)

Mr. Stearns reviewed Mr. Lutz's deposition testimony estimating that the deer was approximately 200 feet away when he first saw it, and calculated that if he had been going at the 55 mile per hour speed limit at that point he would have needed 224 feet to safely bring the motorcycle to a stop. (RP 255-256, 258) If he used the most appropriate co-efficient of friction (drag factor) of .70 due to the 2003 repaving, Mr. Stearns

calculated that the motorcycle still would have been traveling approximately 23 miles per hour when it reached the point of impact with the deer if its initial speed had been at the speed limit of 55 miles per hour when the deer was 200 feet away and Mr. Lutz reacted to seeing it. (RP 294-295) This calculation was made using a perception reaction time of 1.0 seconds, which Mr. Stearns believed was appropriate. (RP 295) If Mr. Stearns used a perception-reaction time of 1.5 seconds, which he agreed would not be unreasonable, the motorcycle would have been traveling approximately 36.9 miles per hour at the point of impact. (RP 297, 300)

In making his speed calculations of 69 miles per hour to 76 miles per hour, Mr. Stearns depended to some degree upon Trooper Cashatt's conclusion that the motorcycle had slid without riders 330 feet. (RP 286-287)

If Mr. Stearns assumed that the motorcycle traveled approximately half of the 330 feet on its rolling tires rather than sliding on its side, then his pre-braking speed estimate would be 58 to 59 miles per hour rather than 69 to 76 miles per hour if the deer first appeared approximately 200 feet away as Mr. Lutz testified. (RP 250-251)

If he assumed that the deer was first visible approximately 300 feet away, based on the testimony of Ms. Kappelman, Mr. Stearns calculated that Mr. Lutz could have brought the motorcycle to a stop prior to reaching the point of impact if his initial speed had been between 50 miles per hour and 65 miles per hour. (RP 262-263)

Mr. Stearns testified that when Mr. Lutz realized he was in trouble, he employed his brakes as much as he could while also decelerating by way of shifting down, and that he ended up locking his rear wheel but managed to keep sufficient pressure on the front brake as well that his bike pretty well went in a straight line prior to impact. (RP 289-290)² Mr. Stearns agreed that it is more difficult to do emergency braking while carrying a passenger. (RP 293) He agreed that gradual braking allows a better opportunity to keep control of the vehicle than does emergency braking. (RP 293)

The jury answered the Special Verdict Form by indicating that Mr. Lutz was not negligent. (CP 64)

ASSIGNMENT OF ERROR 1: EXCLUSION OF EVIDENCE

RELATED TO MOTORCYCLE PERMIT RESTRICTIONS AND

CITATION

² Ms. Kappelman incorrectly states that Mr. Lutz "lost control and went into a skid". (Br. App. 5-6) The record does not support this statement.

(a) Standard of Review

Rulings under Evidence Rule 401 on the relevance of offered evidence are within the sound discretion of the Trial Court, and will be reversed only upon a showing of manifest abuse of discretion. *Crescent Harbor Water Company, Inc. v. Lyseng*, 51 Wn. App. 337, 344 (1988). The same is true of a Trial Court's rulings under Evidence Rule 403 that any possible probative value of offered evidence is substantially outweighed by the danger of unfair prejudice which would result from its admission. *State v. Coe*, 101 Wn.2d 772, 782 (1984); *Safeco Insurance Company of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 5 (1984). Reasonable minds often differ as to how to strike the balance between probative value and unfair prejudice, and the trial judge in general is in a better position to weigh the competing considerations. *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 708 (1990).

A manifest abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons". *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971). Stated otherwise, a manifest abuse of discretion occurs only when no reasonable person would take the view adopted by the Trial Court. *Radford v. City of Hoquiam*, 54 Wn. App. 351, 354 (1989).

(b) Argument

Mr. Lutz moved in limine prior to trial to exclude evidence that he was operating his motorcycle beyond the parameters permitted by his motorcycle permit which had been issued to him under RCW 46.20.510. (CP 7) The Motion was based on the evidence being both irrelevant under ER 401 and unfairly prejudicial under ER 403. (CP 7, 10) Mr. Lutz admitted for purposes of the Motion that he was carrying a passenger and operating the motorcycle during statutory “hours of darkness”, neither of which was allowed under his motorcycle permit. (CP 10-11) (“Hours of darkness” are defined for the motor vehicle code by RCW 46.04.200 as “the hours from one-half hour after sunset to one-half hour before sunrise...”) Mr. Lutz conceded that the accident occurred approximately fifty minutes after sunset. (CP 11)

The Trial Court considered legal Memoranda filed on behalf of Mr. Lutz and on behalf of Ms. Kappelman, heard the arguments of counsel, issued an oral ruling on the Motion and entered a written Order Granting the Motion on September 20, 2005. (RP MTN 14-17; CP 16) The Court reviewed the allegations of negligence in the Complaint, the respective positions of the parties as reflected in their Memoranda of Law, and applicable Washington case law, and ruled that evidence that Mr. Lutz

was operating the motorcycle beyond the restrictions of his permit was irrelevant to the issues of negligence and proximate cause to be litigated in the trial. (RP MTN 14-17) In addition, the Court held that any arguable relevance of this evidence was substantially outweighed by its danger of unfair prejudice. (RP MTN 15)

Far from abusing its discretion, the Trial Court carefully considered its decision on the Motion in Limine, followed controlling Washington case law in reaching that decision, and carefully explained its rationale in reaching its rulings. In finding the evidence irrelevant, the Court explained:

“The issue, of course, is whether or not it’s relevant... that Mr. Lutz did not have a motorcycle endorsement, that he was just operating under an instructional permit and had violated the instructional permit. The general rule as set forth in *Holtz* [sic] is that... the fact that somebody is not licensed... in this case not a licensed motorcycle driver, is irrelevant. There are some situations where violation of a statute can be admissible as negligence. It’s not negligence per se but it can be admissible as negligence. In this case, however, I can’t find that the fact that Mr. Lutz was operating without a valid endorsement is really relevant to how he operated the motorcycle.

The real issue in this case is was he... was he negligent? Was he speeding? Was he not keeping a proper lookout? Did he lose control of the motorcycle because of his negligence? Did that cause the injury? ... Mr. Lutz could have been fully qualified as a motorcycle operator and still be negligent. The fact that he wasn’t fully qualified under

state law as a motorcycle operator doesn't mean that he was or wasn't negligent.

. . .

So I am holding that it is irrelevant in this case for evidence to be introduced that Mr. Lutz was operating without a motorcycle endorsement under an instructional permit and that he was violating an instructional permit and any evidence to that affect, including evidence of the Citation, will not be allowed at trial.” (RP MTN 15-16)

Likewise, the Trial Court considered the danger of unfair prejudice from the excluded evidence, and ruled that any possible relevance of it was substantially outweighed by that prejudice:

“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.” (RP MTN 15)

Significantly, the Court distinguished between the irrelevant and prejudicial evidence about the licensing status of Mr. Lutz, and relevant evidence which Ms. Kappelman wished to offer about the limited amount of prior experience Mr. Lutz had had operating motorcycles on public roads. In a brief colloquy with Ms. Kappelman's counsel after the oral ruling on the Motion in Limine, the Trial Court told counsel that evidence on the amount of such experience would be admitted. (RP MTN 16) Ms. Kappelman brought out on examination of Mr. Lutz that he had purchased

the motorcycle only about three months before the accident date, and that it was the first street motorcycle he had owned. (RP 185-187) In addition, Ms. Kappelman elicited testimony from her accident reconstruction expert on the significance of Mr. Lutz's relative lack of prior experience operating street motorcycles. (RP 268-271)

The Trial Court properly employed the controlling Washington case authority in considering and ruling on the Motion in Limine. The same issues were addressed in *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704 (1990). Sixteen year old Jody Holz was operating a motorcycle without a motorcycle endorsement or motorcyclist's instruction permit. He had only a driver's instruction permit, authorizing him to operate an automobile, but only with supervision, and not at night. Because he had neither a driver's license nor a motorcycle endorsement issued pursuant to RCW 46.20.500, Jody was in violation of the motorcycle licensing statute when he rode his motorcycle without supervision and at night on the date of his accident. He rode his motorcycle over a railroad crossing, failing to see a black railroad tank car straddling the crossing in the dark, collided with the tank car, and suffered fatal injuries. His parents and Estate moved in limine before trial to exclude any reference to the fact that he was not licensed to

ride a motorcycle and was violating state law by driving at night and without supervision. The Court granted the Motion over the railroad's objection, and the ruling was reviewed on appeal from a verdict in the plaintiff's favor.

The Court of Appeals began its analysis in *Holz* by rejecting a simple cause-in-fact approach offered by the defendant railroad. The railroad simply argued that Jody Holz did not have a motorcycle endorsement, and was therefore prohibited from riding unsupervised or at night; if he had not violated that restriction, the accident would not have happened, presumably because he would not have been out riding his motorcycle that night. *Holz* at page 708. The Court noted that such an approach contradicts well established case law, in this state and beyond, making driver license status irrelevant in motor vehicle liability cases.

The Court observed as follows:

“This argument misses the point. In all cases upholding the general rule that unlicensed status is irrelevant, the same argument could be made: the accident victim was not licensed to drive; persons without a driver's license may not drive; if the accident victim had obeyed this restriction, there would have been no injury.” *Holz* at page 709.

The Court of Appeals recognized that the proper analysis asks whether a difference in the **licensing status**, according to the evidence presented, would have made any difference in whether the accident would

have occurred. It is the illegality represented by the licensing status whose relevance is being judged. The Court stated the issue succinctly as follows:

“Burlington Northern ignores the crucial question: Would a person with a motorcycle endorsement, enabling that person to ride unsupervised and at night, have been any better off, *i.e.*, any less likely to have suffered the same fate? Riding a motorcycle without supervision at night is not illegal; the Legislature has declared only that doing so without a motorcycle endorsement is. [Statutory citation omitted] To show a causal connection between **this illegality** and an accident, one must show that the accident was more likely to result **from it** than from the legal behavior of riding unsupervised at night *with* a motorcycle endorsement.

If a rider with a motorcycle endorsement would have suffered the same fate, evidence that Jody Holz lacked an endorsement would be irrelevant. *See* ER 401. Moreover, it would carry with it “the danger of unfair prejudice, confusion of the issues, or misleading the jury,” ER 403, because the jury might 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. Like character evidence generally, evidence of other bad or illegal acts tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.” *Holz* at pages 707-708. [Italics original; bold face supplied]

Applying the law as developed by the Court of Appeals in *Holz* to the issue now before this Court, one can see that the trial judge properly

analyzed and ruled upon the issue. Judge Reynolds identified the issue as “whether or not it’s relevant that... the fact... is it relevant that Mr. Lutz did not have a motorcycle endorsement, that he was just operating under an instructional permit and had violated the instructional permit.” (RP MTN 15)

It is the fact of the lack of a proper endorsement, as in the *Holz* case, which must be shown by the proponent of that evidence to have a probative nexus with the occurring of the accident. As the Holz Court stated: “Therefore, Burlington Northern’s argument fails to prove a causal connection between the accident and the alleged negligence of riding unsupervised at night **without a motorcycle endorsement.**” [Bold face supplied] *Holz* at page 709.

It is not the fact that Mr. Lutz was carrying the plaintiff as a passenger, nor the fact that the accident occurred approximately 50 minutes after sunset, that were excluded when the Court granted the Motion in Limine. It was the fact that he was doing so without a full motorcycle endorsement representing a granting by the State of Washington of licensing permission to do these acts. It is this lack of licensing permission from the State that the Trial Court properly ruled had no relevance to the negligence issues to be tried before the jury.

As noted above, the Holz Court recognized the generally accepted and widespread rule rendering such lack of licensing permission in driving to be irrelevant and inadmissible. At page 708 of its opinion, the Court cited an annotation from A.L.R.2d on that subject, and the Court also cited *Mills v. Park*, 67 Wn.2d 717 (1966) and *Switzer v. Sherwood*, 80 Wash. 19 (1914). In *Mills* the Supreme Court held irrelevant and inadmissible the fact that the 18 year old defendant driver did not have a valid driver's license when he rear-ended the plaintiff's vehicle. The Mills Court observed: "We find nothing in the record to show a causal relation between the defendant's failure to have a valid driver's license and his asserted acts of negligence." *Mills* at page 721. In *Switzer*, the Supreme Court rejected a defense of contributory negligence based on the plaintiff's lack of a motorcycle endorsement when he was struck on his motorcycle by a negligent defendant driver. The Court noted: "The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the state and been in possession of the statutory license." *Switzer* at page 23.

The Holz Court noted that the railroad had failed to offer any evidence which would supply the necessary relevance nexus between Jody Holz's lack of a motorcycle endorsement and his allegedly negligent

operating of his motorcycle. *Holz* at page 710. In its footnote 5, the Holz Court even considered the possibility that the railroad might be entitled to a permissible inference that a holder of a full motorcycle endorsement would probably possess greater experience and knowledge in the operation of a motorcycle than a person without the endorsement. However, the Court quickly dismissed this possible inference as a basis to admit evidence of the lack of the endorsement, holding that any possible inferential probative value would be slight in comparison to proof of what actually happened at the time of the accident, and also would often be outweighed by the unfair prejudice naturally resulting from the jury hearing that the motorcyclist was breaking the law. Interestingly, the Holz Court characterized evidence of the licensing violation as evidence which “on its face, appears to be significant, but upon reflection, is not.” (*Holz*, footnote 5, at page 710)

Ms. Kappelman did not make any offer of proof to the Trial Court of evidence which would make Mr. Lutz’s lack of a motorcycle endorsement relevant to the issues in the case. Also, she did not offer evidence that the accident would have been less likely to happen if Mr. Lutz had not been carrying a passenger, or had not been operating the motorcycle during statutory “hours of darkness”.

The same absence of evidence linking the licensing status to the likelihood of the accident occurring was noted by the Court in *Holz* at page 709: “Here, there is no evidence or argument as to how or why a person with a motorcycle endorsement (who as a minor would have had to pass a motorcycle safety education course) would have been any less likely to suffer the same fate as Jody Holz. Therefore, Burlington Northern’s argument fails to prove a causal connection between the accident and the alleged negligence of riding unsupervised at night without a motorcycle endorsement.”

A similar lack of nexus evidence was noted in *Mills v. Park*, 67 Wn.2d 717, 720-721 (1966).

The lack of evidence linking the licensing violations in all of these cases to the subject accident is not surprising. It supports the general rule making such evidence inadmissible, because it is almost never probative of any issue in the case (*Annot., Lack of Proper Automobile Registration or Operator’s License as Evidence of Operator’s Negligence*, 29 A.L.R.2d 963 (1953, later case serv., 1981 & supp. 1989), and, as discussed in *Holz*, it is virtually always highly prejudicial. *Holz* at page 708.

Ms. Kappelman offers argument, but did not offer evidence, that Mr. Lutz’s lack of a full motorcycle endorsement was relevant in three

ways: because he was operating the motorcycle during statutory “hours of darkness”, because he was carrying a passenger, and because a more experienced operator in possession of an unrestricted endorsement would have reacted to the appearance of the deer differently and would have avoided the collision. (Br. App. 23-24) She does not even argue that the lack of endorsement was relevant to the speed or lookout negligence allegations.

The Trial Court was logically and legally correct in ruling against all three of these arguments. Operating the motorcycle during the statutory hours of darkness had nothing to do with the accident happening. Mr. Lutz saw the deer as it emerged from trees on a hill above the roadway; he had no difficulty seeing it, and the ambient lighting played no role. (RP 192-193; 211) He saw the deer from a distance of about 200 feet. (RP 210) It was dusk, but visibility was clear for at least 300 to 400 feet. (RP 192-193) Likewise, Ms. Kappelman saw the deer clearly from a distance she estimated to be 250 to 300 feet; she described the lighting conditions as “dusk”. (RP 72-74; 79; 128) No evidence in the record makes operation of the motorcycle during statutory “hours of darkness” relevant to the accident.

While the fact that Mr. Lutz was carrying a passenger on his motorcycle undeniably brought the plaintiff to the location of the accident and therefore could be considered a literal cause-in-fact, this does not make the endorsement violation relevant anymore than the pure cause-in-fact relation between Jody Holz riding his motorcycle at night and being at the railroad crossing made his lack of an unrestricted endorsement legally relevant. Circumstances which do no more than bring the parties to the same location at the same time constitute a remote cause, not a proximate cause. *Channel v. Mills*, 77 Wn. App. 268, 277 (1995). Ms. Kappelman presented no evidence, nor made any offer of proof, that the presence of the passenger on the motorcycle made the difference between the collision with the deer happening and not happening, either under Mr. Lutz's account of the deer appearing 200 feet away when he was traveling 60 to 65 miles per hour, or under Ms. Kappelman's account that the deer appeared 250 to 300 feet away when the motorcycle was traveling 80 to 90 miles per hour. Without such evidence or offer of proof, the Trial Court acted within its discretion in holding that the act of carrying the passenger was not legally relevant as a proximate cause of the accident.

In her Brief Ms. Kappelman provides extensive quotations from the statutes governing issuance of motorcycle endorsements. (Br. App.

17) She argues that Mr. Lutz would have received additional training and testing on emergency braking and turning if he had taken the test for the full motorcycle endorsement, and argues therefore that Mr. Lutz lacked sufficient collision avoidance skills to avoid this accident, and that he “performed poorly in avoiding the subject accident”. (Br. App. 24) The latter assertion, however, is unsupported by any evidence in the record; there is only innuendo implied by plaintiff’s counsel’s interrogation of Mr. Lutz. (RP 221-223) Careful review of all of the testimony of plaintiff’s accident reconstruction expert will disclose no opinion testimony to the effect that Mr. Lutz “performed poorly in avoiding the subject accident”. In fact, Mr. Stearns testified that the motorcycle braking skid mark indicated that the operator properly employed both front and rear brakes, did not do a dangerous panic braking sometimes seen, and kept the motorcycle moving in a straight line (and, by inference, under control) right up to the point of impact. (RP 248-249; 289-290)

Ms. Kappelman relies upon *White v. Peters*, 52 Wn.2d 824 (1958), which is readily distinguishable. The Supreme Court upheld the Trial Court’s action in instructing the jury that White’s operation of his car without a special hand throttle required under his driver’s license constituted negligence. He had lost his right leg and wore an artificial

limb, and the evidence raised an issue as to whether he could react to traffic conditions at the time of the accident as quickly with his artificial leg as he could with hand controls. Unlike the restrictions on Mr. Lutz's motorcycle permit, the restrictions on Mr. White's driver's license related directly to his physical ability to control the vehicle. Analogous restrictions would include a corrective lens requirement relevant to a driver's vision without his glasses.

The Trial Court also ruled inadmissible the fact that Mr. Lutz had received a traffic citation related to his licensing status, and had paid the fine for the citation. (CP 16) This was also a proper ruling under controlling Washington precedent. *Billington v. Schaal*, 42 Wn.2d 878, 882-884 (1953); *Reynolds v. Donoho*, 39 Wn.2d 451, 456 (1951).

The Trial Court's rulings on the defendant's First Motion in Limine followed controlling precedent. In addition, the Court carefully weighed any possible probative value of Mr. Lutz's licensing status against the danger of unfair prejudice against Mr. Lutz which it would present, and held that any possible probative value was substantially outweighed by that danger. This weighing process was the responsibility of the Trial Court, in the sound exercise of its discretion. By no stretch of the imagination can it fairly be said that the Trial Court committed a

manifest abuse of its discretion in weighing those competing considerations, such that “no reasonable person would take the view adopted by the trial court”. *Radford v. City of Hoquiam*, 54 Wn. App. 351, 354 (1989). The Trial Court’s rulings granting the defendant’s First Motion in Limine should therefore be affirmed.

ASSIGNMENT OF ERROR 2: EMERGENCY JURY

INSTRUCTION

(a) Standard of Review

Ms. Kappelman suggests that the Trial Court’s decision to give the emergency jury instruction was based upon a ruling of law, and that the proper standard of review in this Court is therefore *de novo*. (Br. App. 26) She cites *State v. Walker*, 136 Wn.2d 767, 771-772 (1998) and *State v. Lucky*, 128 Wn.2d 727, 731 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544 (1997). However, both cases also hold that a trial court’s decision on requested jury instructions, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion. Ms. Kappelman also cites *Tuttle v. Allstate Insurance Company*, 134 Wn. App. 120, 131 (2006), in which the Court of Appeals held that it was reviewing a question of law because the issue was whether there was a complete

absence of substantial evidence in the record to support one or more of the required elements of the emergency doctrine.

As discussed in the argument section below, there was substantial evidence in the record before the Trial Court from which the jury could find that each element of the emergency doctrine existed, thereby entitling Mr. Lutz to the benefit of the emergency instruction. The Trial Court's ruling allowing the instruction was therefore not based on a ruling of law, but rather on the Trial Court's assessment of the facts in the case. The proper standard of review in this Court is therefore abuse of discretion, and the Trial Court's action in giving the instruction should not be disturbed except upon a clear showing of abuse of discretion. Cf. *State v. Walker*, 136 Wn.2d 767, 777 (1998); *State v. Lucky*, 128 Wn.2d 727, 731 (1996). This is the standard generally applied for review of a trial court's decision on whether to give a particular jury instruction. *Tuttle v. Allstate Insurance Company*, 134 Wn. App. 120, 131 (2006).

(b) Argument

Mr. Lutz requested the Court to instruct the jury with WPI 12.02, the duty of one confronted by an emergency, and the Court gave that instruction as its Instruction No. 14. The instruction reads as follows:

“A person who is suddenly confronted by an emergency through no negligence of his or her own and who is

compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.”

A party is entitled to the emergency instruction if substantial evidence has been admitted which would support the jury finding each of the following required elements: (1) The party is confronted by a sudden emergency, placing him in a position of peril (*Mills v. Park*, 67 Wn.2d 717, 719-720 (1966)); (2) The emergency required the party to make an immediate or instinctive choice between alternative courses of action without time for reflecting on the choices, and the party did so (*Tuttle v. Allstate Insurance Company*, 134 Wn. App. 120, 131-132 (2006)); (3) The emergency was not caused wholly or in part by the negligence of the party (*Haynes v. Moore*, 14 Wn. App. 668, 669 (1975)).

The effect of the doctrine is to excuse an unfortunate human choice of action that would be subject to criticism as negligent were it not that the party was suddenly faced with a situation which gave him no time to reflect upon which choice was the best. *Haynes v. Moore*, 14 Wn. App. 668, 669 (1975).

The Court is required to give the emergency instruction where requested if the record contains substantial evidence from which the fact-finder could find facts sufficient to support each required element of the

doctrine. *Bell v. Wheeler*, 14 Wn. App. 4, 6 (1975); *Haynes v. Moore*, 14 Wn. App. 668, 671 (1975); *Brown v. Spokane Fire Protection District No. 1*, 100 Wn.2d 188, 197 (1983). Existence in the record of evidence contrary to that relied upon by the party offering the instruction does not justify refusal of the instruction. This is true even if the evidence relied upon by the party opposing the instruction appears to the Trial Court, or to a reviewing court, to be more persuasive than the evidence relied upon by the party offering the instruction. *Haynes v. Moore*, 14 Wn. App. 668, 670-671 (1975). The Trial Court is justified in rejecting the instruction only where it can rule as a matter of law that there is an absence of any substantial evidence supporting one or more of the required elements. *Bell v. Wheeler*, 14 Wn. App. 4, 8 (1975).

As discussed in more detail below, Ms. Kappelman ignores the jury's prerogative under the evidence in this record to make the findings as to whether or not Mr. Lutz was negligent, and if so, whether his negligence was or was not one of the causes of the emergency. (Br. App. 27-29) She argues as if these matters were not disputed by substantial evidence, or were ruled upon in her favor as a matter of law. Neither assumption is correct.

Mr. Lutz presented substantial evidence from which the jury could make each of the findings required for application of the emergency doctrine.

Instruction 14 told the jury that Mr. Lutz was only entitled to the benefit of the Instruction if they found its foundation elements satisfied from the evidence.

The first element is confrontation by a sudden emergency, placing the person in peril. Mr. Lutz testified that a deer emerged from the trees on a hillside adjacent to the highway and approximately 200 feet ahead on his left. (RP 210-211) The deer was “coming down the hill to cross the road at a pretty good rate of speed”, and Mr. Lutz estimated that it took only about a second for the deer to reach the left side of the roadway. (RP 211, 220) Mr. Lutz estimated that the motorcycle speed at that time was 60 to 65 miles per hour (which would have been closing the distance to the deer at the rate of approximately 90 feet per second). (RP 211) As the motorcycle approached the deer’s location, the deer bounded down the hill and began to cross the road, first entering the southbound lane and then moving toward the northbound lane in which the motorcycle was traveling. (RP 212-213)

Ms. Kappelman's accident reconstruction expert, Robert Stearns, testified that a motorcycle operator in Mr. Lutz's position would require approximately one full second to perceive and react to the hazard, i.e. approximately one second would have passed before he could have implemented any responsive action. (RP 257) During that approximately one second, the operator must see the unexpected event, process through his mind that it does present a hazard, decide how to react, and implement the reaction decision. (RP 297-298) During this one second before any avoidance strategy could be started, simple calculation tells us that the motorcycle would travel 88.0 feet at 60 miles per hour, and 80.6 feet even at the speed limit of 55 miles per hour.

Mr. Lutz estimated that the entire span of time between his first seeing the deer and its reaching the right side of the road (the northbound lane, occupied by the motorcycle) was approximately three seconds. (RP 221) Ms. Kappelman estimated that impact with the deer occurred two or three seconds after she saw it crossing the southbound lane. (RP 72)

This testimony provides substantial evidence from which the jury could reasonably conclude that Mr. Lutz was suddenly confronted with an unexpected emergency which placed him and his passenger in peril, satisfying the first requirement of the emergency doctrine.

Contrary evidence offered in Ms. Kappelman's testimony that the deer appeared when the motorcycle was farther away than estimated by Mr. Lutz (RP 79) would not justify refusal of the emergency instruction. Likewise, contrary opinion testimony from Mr. Stearns that the motorcycle was further away than estimated by Mr. Lutz, which Mr. Stearns calculated using time estimates provided by Mr. Lutz (RP 272-275), would not justify refusal of the instruction.

In *Haynes v. Moore*, 14 Wn. App. 668, 670-671 (1975), the Court of Appeals upheld application of the emergency instruction based upon the plaintiff's testimony that the defendant's stalled car on a bridge at night ahead of the plaintiff displayed no taillights, despite contrary evidence offered by the defendant that the taillights were displayed and that other motorists successfully avoided rear-ending the defendant's vehicle. Holding that the plaintiff's testimony was sufficient to take the emergency issue to the jury, the Court noted at page 671: "Since there was substantial evidence presented on all elements of the emergency doctrine, albeit some vigorously contested, **the question of whether an emergency existed... was for the jury**, and plaintiff was entitled to a proper instruction." (Bold face supplied) The Court noted on page 670 that the plaintiff's evidence on that issue may not have been as convincing as that of the defendant, but

the Court recognized that it was not the job of either the trial court or the Court of Appeals to weigh the persuasiveness of that evidence, but rather that the plaintiff's testimony alone would have supported a jury finding of an emergency.

Similarly, in *Bell v. Wheeler*, 14 Wn. App. 4, 6 (1975), the Court upheld the giving of the emergency instruction, finding that the plaintiff's testimony alone provided substantial evidence that the plaintiff had been confronted by a sudden emergency. Plaintiff was operating a motorcycle on a curve, and testified that as he rounded the curve the defendant's bus was over the centerline and partially in the plaintiff's lane of travel. The Court noted that this testimony was sharply disputed by the defendant's witnesses, but held at page 6: "However, plaintiff's evidence, even if not as persuasive as that presented by defendant, was substantial evidence and was sufficient to warrant an instruction on the doctrine of sudden emergency."

The second element of the emergency doctrine is that appearance of the sudden emergency situation required the party requesting the instruction to react with an immediate or instinctive choice between alternative responses, and without time to reflect upon and consider his

decision. *Tuttle v. Allstate Insurance Company*, 134 Wn. App. 120, 131-132 (2006).

Mr. Lutz was required to make such an immediate choice between two alternative courses of action, and he did so. Ms. Kappelman's counsel on examination of Mr. Lutz questioned his decision-making, implying that he had reacted negligently to the emergency.

Mr. Lutz testified that when he saw the deer coming toward the road he let off on the accelerator of the motorcycle and started applying his brakes. (RP 212) He may have also downshifted, and he started applying his brakes as hard as he could while still keeping the motorcycle under control. (RP 212) He did not hit his brakes full force at that point. (RP 212)

On examination of Mr. Lutz, and again during examination of Robert Stearns, Ms. Kappelman's counsel raised questions about Mr. Lutz's conduct in braking in the manner he did, implying to the jury that he was negligent in doing so. The following exchange occurs on page 221-222 of the Report of Proceedings:

Carey: But you didn't apply the brakes hard when you first saw the deer?

Lutz: That is correct.

Carey: Okay. Now if the deer was coming down a hill quickly, and into the road, why didn't you apply the brakes harder, sooner?

Lutz: Because I wanted to avoid having an accident before I even came upon the deer.

Carey: I think in your testimony, you indicated that you did not apply the brakes ... apply the brakes hard until the last minute, correct? Until the last ... the last forty feet, correct? [Objection and ruling omitted]

Carey: Didn't apply full force until about forty feet from the deer?

Lutz: Yeah.

Carey: It's true you could have applied the brakes harder at the beginning, couldn't you?

Lutz: I applied the brakes as hard as I felt needed to be to keep the bike under control at that point in time.

Again, on page 223:

Carey: And that's when you started skidding is when you actually applied the brakes hard?

Lutz: Yes.

Carey: So you really didn't apply the brakes hard until you were about at the deer?

Lutz: What's applying the brakes hard? I mean ...

Carey: Where are the skids?

Lutz: ... that was right before I hit the deer.

Carey: Okay.

Lutz: In that general area.

Carey: Alright. And up until that time, you had been decelerating, downshifting, braking slightly in or ... and trying to go to the right on the road, correct?

Lutz: Braking as hard as I possibly could to keep the bike under control. Correct.

Carey: As hard as you thought you could?

Lutz: Yes.

Carey: And that was definitely not full braking?

Lutz: No.

Mr. Lutz explained his choice not to brake full force when he initially saw the deer. He testified that braking too hard would cause the motorcycle to go into a skid and lay down on the pavement before even reaching the deer, which he wanted to avoid happening. (RP 213)

Ms. Kappelman's counsel later emphasized a perceived need to begin braking immediately after the one second perception reaction time, obtaining agreement from Mr. Stearns that doing so is important. (RP 278) Plaintiff's contention that Mr. Lutz was negligent for not braking harder sooner after the emergency arose is repeated in her Brief in this Court. (Br. App. 6, 10-11)

At the same time Mr. Lutz made the choice to decelerate without applying his brakes full force, he also made a choice to steer the motorcycle toward the right side of the roadway, rather than trying to steer to the left behind the approaching deer. He testified that when he spotted the deer he started trying to go toward the right side of the road to avoid contact with the deer because it was moving toward him in the southbound lane to his left. (RP 212) He made an immediate decision not to steer toward the left because of a concern that he might collide with the deer, which was approaching from that direction. (RP 212, 213-214)

Likewise, Mr. Stearns interpreted the path of the motorcycle's skid mark as indicating "a choice" to steer toward the right side of the northbound lane. (RP 271)

Plaintiff's counsel suggested in questioning Mr. Lutz that Lutz had been trying to "beat the deer by going around the right side", a clear suggestion of negligence or recklessness. (RP 193) Consistent with this line of attack on Mr. Lutz's reaction to the deer, Ms. Kappelman testified that she thought Mr. Lutz was trying to "go by [the deer] or beat it in the right lane..." (RP 72) These suggestions are repeated in Ms. Kappelman's Brief in this Court. (Br. App. 5, 6)

Under the analyses in *Bell v. Wheeler* and *Haynes v. Moore* (supra), Mr. Lutz's testimony provides substantial evidence that he made two immediate and instinctive choices between alternative courses of action: decelerating and braking gradually rather than initially braking hard and risking losing control of the motorcycle, and steering toward the right side of the road to try to avoid the deer rather than steering to the left to attempt to go around behind the deer. This testimony satisfies the second requirement of the emergency doctrine, the making of an immediate or instinctive choice between two possible responses to the peril presented by the emergency condition.

The third element required by the emergency doctrine is that the peril to the driver presented by the emergency not be caused wholly or in part by the driver's own negligent conduct. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 136 (1980).

Ms. Kappelman argues that Mr. Lutz's speed was one of the proximate causes of the accident, and that he therefore is not entitled to the benefit of the emergency instruction. (Br. App. 27-29) However, Mr. Lutz presented substantial evidence to the contrary, which Ms. Kappelman ignores.

In support of her argument Ms. Kappelman cites cases in which the party requesting the emergency instruction failed to present substantial evidence from which the fact-finder could find that that party's negligence was not one of the causes of the emergency, or failed to present substantial evidence on other essential elements necessary to the emergency instruction. These cases do not support her argument. In *Bennett v. McCready*, 57 Wn.2d 317, 319 (1960) the Supreme Court held that the instruction had been improperly given because the uncontroverted physical evidence in the record disproved the claim of sudden emergency argued by the party who had received the benefit of the instruction. Significantly, the Supreme Court distinguished situations such as that of Ms. Kappelman and Mr. Lutz, in which the record does contain substantial evidence from which the jury could properly find the elements necessary to application of the instruction:

The instruction would have been proper if the jury had had the privilege of believing the respondent's version of the facts; but, since we find to the contrary, the emergency doctrine was not available to the respondent, and it was error for the Court to give the instruction. (*Bennett v. McCready* at pages 319-320)

Similarly, in *Sandburg v. Spoelstra*, 46 Wn.2d 776, 782-784 (1955), the Supreme Court affirmed the Trial Court's refusal to apply the emergency doctrine in a trial to the Court in which the Court found from

the evidence that negligence of the party urging the doctrine had been a cause of the emergency. The Supreme Court was not faced with a jury trial with substantial evidence presented on both sides of that issue; rather, the Court was reviewing the record of a trial to the Court in which the Trial Court had made the factual findings which precluded application of the emergency doctrine.

In *Brown v. Spokane County Fire Protection District No. 1*, 100 Wn.2d 188, 197-198 (1983), also cited by Ms. Kappelman, the Supreme Court upheld refusal of the emergency instruction to the jury because the record was lacking in substantial evidence of an essential element for the emergency doctrine, i.e. a sudden emergency presenting the driver with alternative courses of action. Significantly for our case, the Supreme Court distinguished a situation such as ours, in which a jury is given substantial evidence from which they may properly find all of the essential elements of the doctrine to be established:

Further, an emergency doctrine instruction is appropriate only when the trier of fact is presented with evidence from which it could be concluded that the emergency arose through no fault of the party seeking to invoke the doctrine. (Citation omitted) (*Brown v. Spokane County Fire Protection District No. 1*, page 197)

Tuttle v. Allstate Insurance Company, 134 Wn. App. 120, 130-131 (2006) is another case in which the emergency instruction was found

inappropriate because the record contained no substantial evidence from which the jury could have concluded that the party requesting the instruction had been presented with a sudden emergency which required him to make an instinctive choice between alternative courses of action. The Court of Appeals noted at page 131 that if such evidence had been present in the record, it would have been appropriate to give the instruction, even if that evidence was disputed: “Further, if the evidence is conflicting as to whether the doctrine applies, the Court should give the instruction.”

Ms. Kappelman argues that the emergency instruction should not have been given “because Mr. Lutz by his own admission was negligent.” (Br. App. 29) This reference is apparently related to the acknowledgement by Mr. Lutz that he was traveling 65 miles per hour where the posted speed limit was 55 miles per hour. (Br. App. 29, footnote 3)

Ms. Kappelman’s argument ignores the proximate cause portion of the third element of the emergency doctrine when she suggests that his admission that he was over the speed limit is enough to preclude the emergency instruction. Relevant case law is to the contrary. In *Tobias v. Rainwater*, 71 Wn.2d 845, 858-859 (1967), a supplemental emergency

instruction was disapproved by the Supreme Court because it instructed the jury not to invoke the emergency doctrine if it found that the party requesting the instruction was negligent or "committing a wrong". The Court explained that this instruction omitted the requirement that the negligence or wrong must be found by the jury to have been one of the causes of the emergency in order to disqualify the party from the benefit of the emergency instruction:

Although the first sentence of the instruction is a correct statement of the law, the second sentence, beginning with the words, "In other words," which is seemingly explanatory of the first sentence, omits any requirement that the emergency be *brought about* by the "negligence" or "wrong" being committed by the one seeking to benefit from the application of the doctrine. It is conceivable that the jury might have concluded, under the instruction, that, if appellant was exceeding the speed limit, and hence "committing a wrong," he was not entitled to the benefit of the doctrine in connection with his acts after being confronted by the respondent's vehicle. (*Tobias v. Rainwater* at page 859) (Italics original)

Mr. Lutz presented evidence from which the jury could reasonably conclude that his speed did not proximately cause the accident, even if he was negligent. He testified that the deer first became visible to him when it came out of the trees on a slope next to the road, and about 200 feet ahead of his position. (RP 210-211) The jury was entitled to accept this testimony.

Speed in excess of a posted speed limit is not a proximate cause of an accident where the evidence shows that the driver would not have had sufficient time to avoid the collision even if he had been driving at a lawful speed. *White v. Greyhound Corp.*, 46 Wn.2d 260, 264 (1955); *Grobe v. Valley Garbage Service, Inc.*, 87 Wn.2d 217, 220 (1976); *Theonnes v. Hazen*, 37 Wn. App. 644, 646 (1984); *Kilde v. Sorwak*, 1 Wn. App. 742, 746 (1970).

The driver's speed is judged when he reaches the "point of notice", i.e. the distance from the point of impact when he first noticed, or should have noticed, the potential hazard ahead. *Channel v. Mills*, 77 Wn. App. 268, 278-279 (1995). He is then accorded the benefit of a reasonable perception-reaction time, and his speed is deemed not to be a proximate cause of the accident if he would have had insufficient time and distance remaining to avoid reaching the point of impact by braking, swerving, or taking other available evasive action. *Id.*³

Mr. Lutz presented testimony on cross-examination of accident reconstruction expert Robert Stearns that there was insufficient available time and distance within which Lutz could have safely stopped the

³ *Channel v. Mills*, at pages 273-279, also recognized that a driver's speed in excess of the posted limit is not a legal cause of an accident, and therefore not a proximate cause, merely because it brought the two involved vehicles to the same location at the same moment (the "mere location" rule).

motorcycle prior to reaching the point of impact with the deer, even if he had been traveling at the 55 mile per hour speed limit when the deer appeared. (RP 294) Using the most appropriate drag factor, and accurate information about the most recent paving of the highway, Mr. Stearns agreed that the motorcycle would still have been traveling approximately 23 miles per hour when it reached the point of impact with the deer if the motorcycle had been going at the 55 mile per hour speed limit when the deer appeared and Mr. Lutz reacted to seeing it. (RP 294-295) This was calculated using Mr. Stearns' 1.0 second perception reaction time. Mr. Stearns also agreed that it would not be unreasonable to allocate a longer perception reaction time of 1.5 seconds to Mr. Lutz, which would result in his calculating that the motorcycle would still be going 36.9 miles per hour when it reached the point of impact, again beginning at the speed limit of 55 miles per hour. (RP 297, 300)

The jury was entitled to credit Mr. Lutz's description of his efforts to avoid contact with the deer as reasonable, and the jury was entitled to accept the testimony of Mr. Stearns that Mr. Lutz's reasonable efforts to avoid the deer would have been unsuccessful, even if he had been traveling at the lawful speed limit of 55 miles per hour. This is substantial evidence which supports the element of the emergency doctrine that the

emergency not be proximately caused wholly or in part by negligence of the party requesting the instruction.

An example of the importance of consideration of proximate cause in analysis of this element of the emergency doctrine is found in *Zenith Transport v. Bellingham National Bank*, 64 Wn.2d 967 (1964). Mr. Kemp was speeding and driving under the influence of intoxicants. He was driving on a straight stretch of rural road on a dark night with no available illumination. He failed to notice that Mr. Gorino's oncoming vehicle was being driven partially over the centerline in Mr. Kemp's lane of travel. A three vehicle collision resulted, involving a Zenith truck. Zenith sued the administrator of Kemp's estate and Mr. Gorino. Kemp's counsel unsuccessfully requested an emergency instruction at trial, based upon the argument that at whatever point a reasonably prudent and cautious driver in Kemp's position would have recognized that Gorino was over the centerline, that driver (such as Kemp) would have been presented with an emergency situation justifying the instruction. The Trial Court denied Kemp's executor the benefit of the emergency instruction because the Court found evidence that Kemp had been negligent due to speed and intoxication.

The Supreme Court reversed and remanded for a new trial, holding that neither Kemp's intoxication nor his speed would be a proximate cause of the resulting collision so long as he remained on his own side of the road, and at least until a reasonable person in his position would have seen that Gorino was over the centerline and reacted to that emergency. The Supreme Court held that Kemp's executors were entitled to have the jury instructed on the emergency doctrine, to aid them in deciding whether Kemp bore any fault for the accident.

Likewise, Mr. Lutz's admitted speed of 60 to 65 miles per hour is not necessarily a proximate cause of the accident in which he and Ms. Kappelman were involved. The evidence presented a jury question on that issue. Therefore, it was for the jury, and not the Trial Court, to decide whether the emergency was caused or contributed to by any negligence on the part of Lutz. They were permitted to do so under the Court's Instruction No. 14.

The Trial Court did not err in giving the emergency instruction.

ASSIGNMENT OF ERROR 3: EXCLUSION OF EVIDENCE

REGARDING INSURANCE ADJUSTER

(a) Standard of Review

The standard of review is manifest abuse of the Trial Court's discretion in governing the admission of evidence. *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wn. App. 337, 344 (1988).

(b) Argument

Ms. Kappelman assigns error to the Trial Court's ruling "allowing evidence of a prior statement by Ms. Kappelman without allowing her to explain that the statement was solicited by and made to Mr. Lutz's insurance adjuster". (Br. App. 30) However, Ms. Kappelman made no objection to the questions on her cross-examination regarding the statement. (RP 124-125) She also admitted making the statement (RP 125), so the statement was not in dispute.

Ms. Kappelman argues to this Court that the Trial Court refused to allow her to explain that the statement was given to Mr. Lutz's insurance adjuster while Ms. Kappelman was still suffering from the effects of the accident (Br. App. 31) and in pain and heavily medicated. (Br. App. 14) She argues that she was denied the opportunity to explain "the circumstances of the statement". (Br. App. 34)

The Court's actual ruling was that because Ms. Kappelman did not dispute having made the statement asked about on cross-examination, the fact that the statement was made to a representative of the defendant, an

insurance adjuster, was irrelevant and would be unfairly prejudicial and violate the rule against evidence of liability insurance being admitted. (RP 135-136)

With the exception of the insurance-related evidence, the Court allowed Ms. Kappelman to explain the circumstances of giving the statement. (RP 140) She did not offer any testimony, either before the jury or in an offer of proof, that the statement was given “while she was still suffering from the effects of the accident” (Br. App. 31) or “when she was in pain and heavily medicated.” (Br. App. 14)

The ruling was well within the discretion of the Trial Court, and Ms. Kappelman was not unfairly deprived of the opportunity to talk about the circumstances of her making the acknowledged statements. The issue now raised was not properly preserved by an offer of proof. ER 103(a)(2); *Kysar v. Lambert*, 76 Wn. App. 470, 490-491 (1995).

**ASSIGNMENT OF ERROR 4: EXCLUSION OF EVIDENCE OF
MOTORCYCLE’S ACCELERATION CAPABILITY**

(a) Standard of Review

The standard of review is manifest abuse of the Trial Court’s discretion in governing the admission of evidence. *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wn. App. 337, 344 (1988).

(b) Argument

Plaintiff failed to preserve this issue by making an offer of proof as to what her alleged evidence would be. Without such an offer of proof, this Court has not been given the opportunity to review the Trial Court's discretionary ruling or to assess whether any error in that ruling is prejudicial, so review is not warranted. *Kysar v. Lambert*, 76 Wn. App. 470, 490-491 (1995). Evidence Rule 103(a)(2) requires an offer of proof of evidence excluded at trial, to enable the reviewing court to make those judgments.

In addition, despite the Court's ruling, Ms. Kappelman did elicit from Mr. Stearns the description that Mr. Lutz's Yamaha 600 motorcycle is "a rather low-slung machine that's designed for high performance...".
(RP 268)

CONCLUSION

For the reasons discussed herein, the Judgment should be affirmed.

DATED this 3rd day of November, 2006.



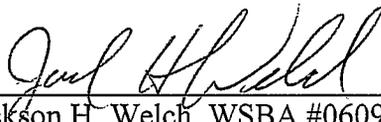
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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 2006, I served a copy of **BRIEF OF RESPONDENT** upon the attorney for Appellant by depositing in the United States Post Office, Vancouver, Washington, a full, true and correct copy thereof, with postage thereon prepaid, to the address set forth below:

Gordon T. Carey, Jr.
Attorney at Law
721 S.W. Oak Street, Second Floor
Portland, OR 97205

DUGGAN, SCHLOTFELDT & WELCH, PLLC



Jackson H. Welch, WSBA #06094
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