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No. 80996-8

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**AMBER L. KAPPELMAN,**

**Petitioner,**

**vs.**

**THEODORE J. LUTZ,**

**Respondent.**

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**SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT KAPPELMAN**

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Gordon T. Carey, Jr.  
Gordon T. Carey, Jr., P.C.  
721 SW Oak Street, Suite 200  
Portland, OR 97205  
Telephone: (503) 222-1415  
Facsimile: (503) 222-1923  
Attorney for Petitioner-Appellant

Jackson H. Welch, WSB No.  
Duggan Schlorfeldt & Welch PPLC  
900 Washington Street, Suite 1020  
Vancouver, Washington 98666-0570  
Telephone: (360) 699-1201  
Fax: (360) 693-2911  
Attorney for Defendant-Respondent

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## I. SUMMARY OF ARGUMENT

**Assignment No. 1:** Under RCW 5.40.050, Kappelman could introduce evidence of defendant's motorcycle permit terms and violations, and she could also admit them to establish a standard of care beyond ordinary care under *Restatement (Second) of Torts*, § 286 (1965), and violation of that standard. The trial court's ruling violated RCW 5.40.050's directive of admissibility, and was based on an erroneous finding of lack of relevance and a flawed balancing of probativity versus prejudice. The majority of the court of appeals affirmed the trial court, relying on a misreading of *Holz v. Burlington Northern Railroad Co.*, *infra*, which conflicts with this court's decision in *White v. Peters*, *infra*.

**Assignment No. 2:**<sup>1</sup> The trial court erred in giving the emergency instruction because the undisputed evidence was that defendant's negligence at least partly caused the emergency, a conclusion that will be strengthened if plaintiff prevails here on Assignment No. 1. The court of appeals affirmed, stating that defendant "showed" that the emergency caused the accident. The appellate court's focus was flawed. The question is whether defendant's negligence wholly or partly caused the emergency.

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<sup>1</sup> In her petition for review, Kappelman urges review by this court of the trial court's instructing the jury on the emergency doctrine, and the court of appeals' affirmance of the trial court. See, Kappelman's Petition for Review, pp. 16 - 19. By inadvertence, counsel failed to specify the emergency instruction was one of the issues presented for review. See, Petition for Review, p. 1. Counsel apologizes for any confusion.

## II. ASSIGNMENTS OF ERROR

Plaintiff refers to the first two assignments in her amended opening brief to the court of appeals (“Plaintiff. Am. Op. Br.”), p. 1.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Plaintiff refers to the “issues” stated in Pl. Am. Op. Br., p. 2.

Plaintiff offers as supplemental issues:

### **Assignment of Error No. 1: (Motorcycle Permit Violations)**

1. Is evidence that a motorcycle operator violated his motorcycle endorsement restrictions under RCW 46.20.510(2) by operating during an ‘hour of darkness’ and by carrying a passenger admissible under RCW 5.40.050 to show negligence?

2. If the answer to no.1 is yes, may such evidence include his guilty pleas to citations for violating the statute and admission to those pleas?

3. Does a trial court have discretion to exclude evidence that defendant violated the law because the evidence is prejudicial?

4. May RCW 46.20.510(2) form the basis of a standard of care beyond ordinary care under *Restatement (Second) of Torts, § 286 (1965)*?

### **Assignment of Error No. 2: (Emergency Instruction)**

5. May a trial court give the ‘emergency instruction’ of WPI 12.02 without first determining that defendant’s negligence did not, wholly or

partially, cause the emergency?

6. May the trial court give the emergency instruction when there is undisputed evidence that defendant's negligence wholly or partly caused the emergency if the instruction contains a "disclaimer" that only a person who is confronted by an emergency "through no negligence of his or her own" is entitled to the benefit of the instruction?

#### IV. STATEMENT OF THE CASE<sup>2</sup>

Plaintiff Amber Kappelman was injured while riding on the back of a motorcycle driven by defendant Lutz when Lutz struck a deer near Husum, Washington on the evening of June 19, 2000. Lutz was admittedly speeding and was operating the motorcycle in violation of his operator's permit by operating at night and by carrying a passenger (namely, Ms. Kappelman).

Lutz had just bought his first street motorcycle, a new Yamaha 600, a high-speed, high-performance motorcycle. RP 185: 13 - 186: 24; 268: 20 -25. He had a 90-day instructional permit under RCW 46.20.510. Traffic Citation and Traffic Report, attached to Def.'s First Motion *in Limine*, CP 7 - 9, and Appendices ("App.") to Pl. Am. Op. Br. and hereto, RP 187: 1 - 4. His permit forbade him to carry a passenger or operate a motorcycle during

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<sup>2</sup>For a more complete statement, see Pl. Am. Op. Br., pp. 3 - 12.

“hours of darkness.” RCW 46.20.510(2)<sup>3</sup> Traffic Citation and Traffic Report, attached to Def.’s First Motion *in Limine*, 7 - 9, App. to Pl. Am. Op. Br. and hereto. Before he could qualify for a full motorcycle endorsement, Lutz had to pass a skills test that emphasized accident avoidance skills.<sup>4</sup>

On the evening of June 19, 2000, Kappelman and a friend stopped by the house of another friend near Husum. RP 59: 15 - 25. Lutz was also visiting there, and he offered Kappelman a ride on his new motorcycle. RP 187: 5 - 15. Kappelman had never ridden on a motorcycle before and she was not suitably attired. RP 61: 13 - 62: 10. With Kappelman as a passenger, Lutz accelerated rapidly north out of Husum. Kappelman yelled at Lutz to “slow down.” RP 72: 3 - 16. Ms. Kappelman then looked up and saw a deer, illuminated by the motorcycle’s headlight, about 250 - 300 feet ahead, and slowly walking from left to right across the road. RP 72: 3 - 16; 73: 10 - 21; 79: 5 - 9. Lutz initially did not brake - he decelerated and downshifted one

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<sup>3</sup>The “hours of darkness” are from one-half hour after sunset to one-half hour before sunrise. RCW 46.04.200. See, App. at p. 9.

<sup>4</sup>RCW chapter 46.20 provides for the motorcycle endorsement program. Its purpose is to assure that motorcyclists have the skills needed for safe on-street operation. RCW 46.20.515; RCW 46.81A.001. A person must first pass a test designed to “emphasize maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision.” to get a full motorcycle endorsement. RCW 46.20.515. Because one who only has an instructional permit is still learning to operate a motorcycle on the roadway and has not yet passed the required test under RCW 46. 20.515, such person may not carry passengers or drive during an hour of darkness. RCW 46.20.510(2).

or two gears. RP 195: 16 - 19; 212: 13 - 19.<sup>5</sup> He steered to the right of the road to try to avoid the deer. RP 126: 18 - 127: 12; 194: 1 - 5; 212: 7 - 19. Lutz appeared to be trying to beat the deer to the right shoulder of the road. RP 126: 21 - 22; 193: 13 - 22; 212: 7 - 19. He 'stood on' his brakes about 55 feet from the deer, and started to skid. RP: 196: 11 - 20. The motorcycle hit the deer in the head and Kappelman flew off the motorcycle and slid 200 feet. RP 72: 14 - 16; 80: 1 - 2; 80: 25 - 81: 7; RP 214: 21 - 215: 10.

Kappelman estimated Mr. Lutz's speed before deceleration at 80 to 90 miles per hour ("mph"), and 70 mph at impact. RP 72: 19 - 73: 6; 80: 3-6. Lutz admitted that he exceeded the posted speed limit of 55 mph, RP 72: 6 - 8; 204: 16 - 18, accelerating to 65 mph, and estimated he was going 60 mph on impact with the deer. RP 169: 5 - 8; 170: 4-9; 204: 16 - 18. The accident occurred 50 minutes after sunset, within the statutory "hours of darkness." Hearing on Def.'s First Motion *in Limine*, RP 2; RCW 46.04.200.

Kappelman called an expert reconstructionist, Mr. Robert Stearns, who testified that if Lutz had been traveling at the posted speed limit, he could have completely stopped the motorcycle before hitting the deer, or at least slowed enough to easily steer around the deer. Pl. Am. Op. Br, pp. 8 - 10; Plaintiff's Reply Brief to the Court of Appeals, pp. 1 -2; RP 257: 25 -

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<sup>5</sup> Kappelman never felt Lutz brake significantly. RP 73: 7 - 9. Lutz testified he avoided braking "hard enough" to go into a skid. RP 204: 7 - 11, not as hard as he could have without the weight of a passenger. RP 206: 1 - 10.

263: 16; 265: 9 - 19. Stearns also explained that it is more difficult to do emergency braking while carrying a passenger or with limited experience. RP: 269: 15 - 271: 10.<sup>6</sup> Lutz admitted this. RP 206: 1 - 4; 212: 15 - 19. Lutz also admitted that he was afraid to brake with a passenger and lose control. RP 204: 9 - 11. He agreed that if he had been going more slowly, it would have been easier to brake and keep control, even with a passenger. RP 206: 5 - 10. Lutz himself did not opine on whether he could have stopped had he been doing the posted speed limit, and he put on no expert reconstructionist testimony, presumably because he could not find a favorable expert opinion.

The trial judge *in limine* excluded evidence of Mr. Lutz's motorcycle instructional permit violations, i.e., that he was forbidden to carry a passenger or operate a motorcycle during an hour of darkness, that he violated those bans and that he pled guilty to a citation for violating those bans. Order granting Def.'s First Motion *in Limine*, CP 16 - 17. In charging the jury, at Lutz's request and over Kappelman's objection, the trial judge also gave the emergency instruction. RP 367: 24 - 368: 3. The trial court failed preliminarily to determine whether Mr. Lutz's negligence wholly or partly caused the alleged emergency, relying instead on the 'disclaimer' in the instruction that Mr. Lutz was only entitled to the benefit of instruction if his

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<sup>6</sup>For a more detailed account of Mr. Stearns's testimony, see Pl. Am. Op. Br, pp. 8-11.

negligence did not cause the emergency.

## V. ARGUMENT

### A. The Trial Court Erred in Excluding Evidence of Lutz's Instructional Permit Violations

#### 1. Standard of Review

The court of appeals should have reviewed the trial court's *in limine* evidentiary ruling by evaluating whether the trial court clearly had untenable grounds for the exercise of his discretionary acts. Discretion is abused if untenable, and untenable if reached without applying the proper legal standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.2d 1053 (2006). It is a question of law whether the trial court applied the wrong standard, which the court reviews *de novo*. *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). At least on the facts of this case, the trial court had little, if any, discretion to exclude evidence of Lutz's statutory violations of his motorcycle permit.

#### 2. Argument

##### (a) The Trial Court Wrongly Excluded Evidence Of Lutz's Motorcycle Permit Violations

RCW 5.40.050<sup>7</sup> expressly entitled Kappelman to show that Lutz at the time of the accident was in violation of his 90-day instructional endorsement under RCW 46.20.510 (2) by carrying a passenger and by operating during

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<sup>7</sup>RCW 5.40.050 directs that evidence of breach of a statutory duty is evidence of negligence. Plaintiff's Pl. Am. Op. Br, p. 18.

a statutory 'hour of darkness', including Lutz's guilty plea to a citation for these violations.<sup>8</sup> It was error for the trial judge to exclude this evidence.

Beyond admissibility under RCW 5.40.050, Kappelman showed that, pursuant to *Restatement (Second) of Torts, § 286 (1965)*,<sup>9</sup> RCW 46.20.510(2) established a standard of care beyond ordinary care. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004) (*Restatement (Second) of Torts, § 286 (1965)* has been Washington law for over 30 years); *Kappelman v. Lutz*, 141 Wn. App. 580, 594 - 595, 170 P.3d 1189 (2007) (Dissent); Pl. Am. Op. Br, pp. 18 - 20. The trial judge denied Kappelman the right to use the permit and permit violations evidence to establish a standard of care beyond ordinary care and that Lutz violated this standard.<sup>10</sup>

The trial court's ruling was not only wrong, but it dangerously flouted a legislative directive. The legislature decided a jury may consider a breach

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<sup>8</sup>Kappelman asserted this both in opposing defendant's *in limine* motion and later in seeking reconsideration of the trial court's ruling. CP 18 - 23, 24 - 29; RP 10: 8 -19; 11: 10 - 20; 360: 19 - 23.

<sup>9</sup>*Restatement (Second) of Torts, § 286 (1965)* is set forth in the Appendix at p. 12. Its requirements are that the statute's purposes, exclusively or in part, must be: (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted.

<sup>10</sup>Inconsistently, the trial judge gave an instruction under RCW 5.40.050 that exceeding the posted speed limit was evidence of negligence. RP 366: 7 - 9; 367: 14 - 17. Yet Kappelman's motion for reconsideration seeking application of RCW 5.40.050 to Lutz's permit violations was denied. See Memorandum in Support of Motion for Reconsideration, CP 24 - 29.

of statutory duty as evidence of negligence. RCW 5.40.050. It did **not** say this directive was at the discretion of the trial judge. But the appellate court's affirmance approved the trial judge's discretionary overriding of a legislative command.<sup>11</sup> Respect for legislative powers requires this court to reverse the trial court's exercise of discretion and the appellate court's affirmance.

Oddly, the trial judge admitted that Lutz's inexperience was relevant, but ruled that a statute restricting an inexperienced permittee from operating in darkness or with a passenger was not! He said:

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.

And he also said:

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.

Hearing on Def.'s First Motion *in Limine*, RP 15 - 16. As the dissenting court of

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<sup>11</sup> This is not a case where the matter addressed by the statute, a permittee's limited experience, is ruled to be irrelevant. RP 9: 20 -21.

appeals judge wrote:

[E]vidence of the statutory violation was not only relevant but necessary to provide the jury a context in which to evaluate Mr. Lutz's inexperience. Given that the central purpose of the motorcycle endorsement program is to assure that motorcycle operators possess the necessary skills for safe on-street driving, a motorcycle endorsement bears directly on the experience of the operator.

*Kappelman v. Lutz*, 141 Wn. App. at 593 (Dissent).

Under the trial judge's reasoning, a jury should not be permitted to consider an airline pilot's lack of licensure, or that the pilot exceeded his license limits (e.g., lack of instrument rating), in a plane crash case because lack of licensure would not necessarily establish negligence, and admission of that evidence would "unfairly" prejudice the jury.

The trial judge, after excluding the evidence on relevance grounds, then ruled that the evidence would unfairly prejudice defendant. Even if the trial judge could consider prejudice, he did not use a proper balancing test to see if the risk of **unfair** prejudice substantially outweighed the evidence's probative value under ER 403:

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 decisions based on things like that and that's not what a jury should be making a decision on in this case ...** 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.

(Emphasis added) Hearing on Def.'s First Motion *in Limine*, RP 15. The "prejudice" he foresaw was that the jury might find the evidence relevant, as the legislature contemplated. ER 403 allows exclusion when the potential for **unfair** prejudice

substantially outweighs the relevance of the evidence.<sup>12</sup> The trial judge overstepped his authority when he excluded the evidence because of **fair** prejudice when the legislature has expressly determined such evidence to be admissible, and it was error for the appellate court to affirm the exclusion.

The trial judge ignored the legislature's directive in RCW 5.40.050 and this court's adoption of *Restatement (Second) of Torts*, § 286 (1965) decades ago. He decided that the jurors should not consider the statutory violations because he believed they would be persuaded by such evidence, and he considered that somehow improper. But that was not his decision to make. The legislature directed that a jury should consider such evidence. It is telling that the "prejudice" the trial judge feared was that the jury would probably agree with the legislature and find the licensure violation evidence relevant!<sup>13</sup> The majority of the appellate court approved this judicial overstepping of authority.

The proffered evidence was not only relevant to whether Lutz was negligent

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<sup>12</sup> 'Unfairly prejudicial evidence' is evidence that suggests an improper basis for decision. *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). The motorcycle endorsement restriction violations suggested a proper basis for decision. Even if there was substantial prejudice to such evidence (a conclusion that Kappelman strongly disagrees with), where there is both substantial prejudice and substantial probative value, the evidence should be admitted. *United States v. Krenzelok*, 874 F.2d 480, 482-483 (7<sup>th</sup> Cir. 1989) (applying F.R. Evid. 403, on which ER 403 is based).

<sup>13</sup> ER 403 protects against "unfair prejudice" substantially outweighing probativity, not from the fair prejudice of probative evidence. Here the trial judge found prejudice from the prospect that the jury would properly find the permit evidence relevant.

at common law, but also it helped to establish a standard of care beyond ordinary negligence under *Restatement (Second) of Torts*, § 286 (1965).<sup>14</sup> Evidence of Lutz's violation of a standard of care beyond ordinary negligence would have bolstered plaintiff's claims. The trial court's ruling denied her right to do so.

It is revealing that the trial court never considered the effects of RCW 5.40.050 and *Restatement (Second) of Torts*, § 286 (1965). Without considering RCW 5.40.050's mandate on relevance, the trial judge could not decide if relevance was substantially outweighed by unfair prejudice, or if a standard of care beyond common law negligence applied under *Restatement (Second) of Torts*, § 286 (1965).

**(b) The Courts Below Misread *Holz v Burlington Northern Railroad Co.* To Support Excluding Evidence of Lutz's Motorcycle Permit Violations**

The appellate court misread *Holz v. Burlington Northern Railroad Co.*, 58 Wn. App. 704, 794 P.2d 1304 (1990), and ignored this court's holding in *White v. Peters*, 52 Wn.2d 824, 329 P.2d 471 (1958) and the mandate of *Restatement (Second) of Torts*, § 286 (1965).

The appellate court read *Holz* as authority for upholding exclusion of the motorcycle endorsement evidence, but a careful reading of *Holz* shows that it was based on a lack of causation and is not authority for general exclusion. *Holz* was a wrongful death case arising when an unlicensed motorcyclist died after colliding at night with defendant's unlit (and not visible) tank car, which was parked straddling

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<sup>14</sup>There is no dispute that Kappelman showed that Lutz's statutory violations met the *Restatement (Second) of Torts*, § 286 test. *Kappelman v. Lutz*, 141 Wn. App. at 594 (Dissent); Pl. Am. Op. Br., pp. 20 - 22.

a road Division II upheld the exclusion of the motorcyclist's lack of a motorcycle endorsement. *Holz* is not authority for exclusion of the endorsement evidence in this case because:

1. *Holz* was decided on the narrow ground that “no reasonable jury could find a causal link between the statutory violation and the accident.” *Kappelman v. Lutz*, 141 Wn. App. at 595 (Dissent). There was evidence of causation in this case, including un rebutted expert testimony. Even the court of appeals majority admitted that Lutz made judgment errors - the very thing that training before licensure addresses.<sup>15</sup>

2. In *Holz*, the defendant railroad did not even argue that the decedent's lack of licensure made a difference. See *Kappelman v. Lutz*, 141 Wn. App. at 596 (Dissent). In contrast, Kappelman did, e.g., her expert testified that either carrying a passenger or lack of training increases the likelihood of an accident. RP 269:15 - 271:10; *Kappelman v. Lutz*, 141 Wn. App. at 596 (Dissent). This comports with the

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<sup>15</sup> The trial court did not find that Lutz's illegal operation of the motorcycle was *not* a cause of the accident. Yet, as discussed above at p. 12, the trial court failed to consider RCW 5.40.050 and the *Restatement (Second) of Torts*, § 286 (1965) when he excluded the evidence as irrelevant under ER 403. If Lutz had struck a bystander on the right side of the road while going around the deer, the trial court apparently would have excluded evidence that he was violating his permit in an action by the bystander. Perhaps if a boulder had dropped from a cliff and fortuitously struck Lutz and Kappelman, the trial judge's exclusion might be understandable in an action by Kappelman because the permit restrictions were not designed to protect passengers from falling boulders. But, the permit restrictions were designed to protect passengers like Kappelman and pedestrians such as a bystander in an action from the hazard posed by an inexperienced motorcyclist. See, *Restatement (Second) of Torts*, § 286(d).

legislature's directive that training in "emergency braking" and other accident avoidance skills is required to qualify for an unrestricted motorcycle endorsement, and with it license to carry a passenger and operate during an 'hour of darkness.' RCW 46.04.200.

3. In *Holz*, unlike here, the evidence was not offered by a member of the class protected by the statute, a criterium under *Restatement (Second) of Torts, § 286 (1965)*. *Kappelman v. Lutz*, 141 Wn. App. at 594 (Dissent).

*White v. Peters*, 52 Wn. 2d 824, 329 P.2d 471 (1958) is on point. There, this court ruled that a jury could find that a leg amputee's failure to comply with a license restriction requiring that his car be fitted with a column-mounted braking device contributed to the accident. This court ruled that it was for the jury to decide whether the plaintiff-amputee's license noncompliance contributed to the accident. *White v. Peters*, 52 Wn.2d at 828. This evidence of causation made it factually distinguishable from, but legally consistent with, Division II's decision in *Holz*. As the dissenting judge below said:

Contrary to the reasoning of the majority, the test under *Holz* [*v. Burlington Northern Railroad Co.*, 58 Wn. App. 704, 794 P.2d 1304 (1990)] is not whether a party "could still have been negligent even without the endorsement," (majority at 7) but whether the lack of an endorsement provided evidence of negligence making the accident more or less likely. *Holz*, 58 Wn. App. at 710- 11.

*Kappelman v. Lutz*, 141 Wn. App. at 596 (Dissent). The *Holz* court recognized the general rule that proximate causation is for the jury to decide when there is evidence of it. *Holz*, 58 Wn. App. at 709-10 (recognizing jury question in *White* because "the

evidence supported an inference that the plaintiff's violation of the restriction was a proximate cause of the accident.""). Here, both the trial court and the majority of the court of appeals erred by adopting a rule of exclusion without regard to causation.

## **B. The Trial Court Erred in Giving the Emergency Instruction**

### **1. Standard of Review**

Plaintiff agrees with the court of appeals that the standard of review is *de novo*. It stated that the trial judge determined that the 'emergency doctrine' applied on these facts. *Kappelman v. Lutz*, 141 Wn. App. at 588. Plaintiff disputes that the trial judge made this required preliminary determination. Instead, he relied on the 'disclaimer' in the instruction (that it only applies to one not in an emergency because of his own negligence), and let the jury decide. The question is whether the 'emergency doctrine' was appropriate on these facts. The trial judge's failure to do his preliminary determination helps explain how he went wrong.

### **2. Argument**

The court of appeals incorrectly framed the issue of whether the 'emergency doctrine' applied to the facts before the trial court. While it acknowledged that "there was evidence that Mr. Lutz caused the emergency by his negligence" (including his admitted speeding), it accepted Lutz's statement that "the emergency, not negligence, caused the accident." *Kappelman v. Lutz*, 141 Wn. App. at 589. This missed the mark - even if the emergency caused the **accident**, Lutz cannot be

relieved of liability if his negligence wholly or partly caused the **emergency**.<sup>16</sup> The appellate court's decision relieves defendants of liability whenever there is an emergency, even if caused by the defendant.<sup>17</sup>

As noted, a basis of the appellate decision was that the **emergency** caused the **accident**. In so doing, the court effectively ruled that it does not matter whether **defendant's negligence** contributed to the **emergency**. Not even the trial judge went this far. Despite wrongly excluding evidence of Lutz's motorcycle permit violations and failing to do a preliminary determination of whether Lutz's negligence contributed to the emergency, the trial judge instructed the jury that Lutz could only invoke the emergency doctrine if the emergency did not arise from his negligence. RP 367: 24 - 368: 3. He thus determined, correctly, that it was material if Lutz's negligence contributed to the emergency.

Aside from Lutz's statutory violations (speed, carrying a passenger, operating during an hour of darkness), he was negligent at common law by operating a motorcycle at dusk, with a passenger and without accident avoidance skills. This

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<sup>16</sup> Demonstrating confusion on this point, the court of appeals admitted this rule in the paragraph immediately before it relieved Lutz of liability on the basis that the emergency caused the accident. *Kappelman v. Lutz*, 141 Wn. App. at 589.

<sup>17</sup> The majority opinion below proves too much. In every 'emergency' case, the emergency causes the accident. If not, the 'emergency' would not be material. Thus, the majority's formulation would excuse negligence whenever there is an emergency. Further, since "the idea of emergency inheres in nearly all automobile accidents", *Curtis v. Blacklaw*, 66 Wn.2d 484, 492, 403 P.2d 358 (1965), the court's ruling has great potential for mischief.

court has said:

[W]e have declared it the rule that an automobile driver is bound to know the operational limitations of his equipment. [Citation omitted]

*Curtis v. Blacklaw*, 66 Wn.2d at 490 (negligent for driver to be unfamiliar with use of emergency brake pedal and only to know its approximate location). Such negligence precludes the giving of the emergency instruction. *Id* at 493. Lutz's admitted inexperience in operating street bikes (especially in an emergency) made it negligent for him even to be on the road at that hour with a passenger, and barred the giving of the emergency instruction.

The trial court erred by giving the emergency instruction based on WPI 12.02 (RP 367: 24 - 368:3) without first holding Lutz to his burden to show that his negligence did not wholly or partially cause the emergency. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 197 - 198, 668 P.2d 571 (1983) (affirming trial court's refusal to give emergency instruction); *Mills v Park*, 67 Wn.2d 717, 719 - 720, 409 P.2d 646 (1966) (error to give emergency instruction where proponent failed to adduce evidence of an emergency); *Sandberg v. Spoelstra*, 46 Wn.2d 776, 783, 285 P.2d 564 (1955) ("the rule can only apply if it has first been determined that there existed a real peril and that the negligence of the party seeking to invoke it was not a contributing cause."). Lutz failed to prove that his negligence did not at least contribute to the **emergency**. The un rebutted evidence of Lutz's negligence, including his admissions, indicated that he was speeding, that he violated his motorcycle permit in two ways (by carrying a passenger and operating during a

'hour of darkness'), and that he lacked motorcycle accident avoidance skills. Mr. Stearns testified that if Lutz had been doing the speed limit, he could have avoided the accident and, in any event, accident avoidance skills would have improved his chances of avoiding the accident.<sup>18</sup> The trial judge failed to do the required preliminary inquiry; it was not enough to rely on the instruction's disclaimer.

Lutz may argue that this case is controlled by authorities that the emergency instruction is rightly given when there is a conflict in the evidence. However, reliance on these authorities is misplaced because there was no conflict for **each** of the following reasons: (1) Lutz admitted exceeding the posted speed limit and did not rebut Stearns' testimony that if Lutz had obeyed the speed limit, he could have avoided the deer; (2) Lutz admitted he was afraid to brake with a passenger and delayed braking, and did not rebut Stearns' testimony that he could have avoided the deer with more experience and without a passenger; and (3) Lutz cannot rebut (indeed, he admitted) the permit violations (the subject of Assignment No. 1). Lutz may also rely, as he did in the court of appeals, on the false logic that because the emergency caused the accident, the emergency instruction should be given. This court should reject the argument. See, p. 16 and fn. 16 above.

As alluded to in the preceding paragraph, the outcome of Assignment of Error No. 1 affects this Assignment. The trial court's *in limine* ruling excluded conclusive

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<sup>18</sup> While Lutz's opinion on his stopping ability may be questionable, plaintiff's attorney nevertheless asked his opinion, but Lutz attorney's objection to this question was sustained. RP 206: 1 - 10.

evidence that Lutz contributed to the emergency. If this court rules for Kappelman on Assignment of Error No. 1, the trial court should not give the emergency instruction because Lutz cannot show his negligence did not wholly or partially cause the emergency. The undisputed evidence is that there would have been no emergency if Lutz had stayed within the posted speed limit, or if he had not had not violated his permit by carrying Kappelman as a passenger and operating during an hour of darkness. As the dissent below pointed out:

[T]he giving of the emergency instruction based on WPI 12.02 . . . compounded the court's error in not allowing Ms. Kappelman to present evidence of Mr. Lutz's statutory violation . . . Here, the jury heard only half of the story, as Mr. Lutz was allowed to advance his emergency theory but Ms. Kappelman was not allowed to offer opposing evidence of the statutory violation.<sup>19</sup>

*Kappelman v. Lutz*, 141 Wn. App. at 596 n. 5 (Dissent). In the words of the dissent, "the jury heard only half of the story." *Id.*

This court should bar the emergency instruction on retrial, or at least instruct the trial court that it must make a preliminary determination whether Lutz's negligence wholly or partially caused the emergency.<sup>20</sup>

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<sup>19</sup>In language omitted from this quote, the Dissent commented that not giving the emergency instruction was not error "of itself." *Kappelman v. Lutz*, 141 Wn. App. at 596 n. 5 (Dissent) - Kappelman disagrees - Lutz admitted exceeding the posted speed limit just before the accident, and he failed to meet his burden to show that this and his other negligence did not wholly or partly cause the emergency. Thus, it was error to give the emergency instruction even without evidence of permit violations.

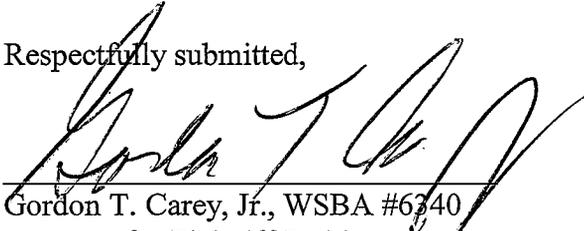
<sup>20</sup>This court can proscribe jury instruction on retrial. *Bartlett v. Hantover*, 84 Wn.2d 426, 431 - 432, 526 P.2d 1217 (1974); *Enyeart v. Borgeson*, 60 Wn.2d 494, 498, 374 P.2d 543 (1962).

## VII. CONCLUSION

The trial court judgment and the court of appeals decision should be vacated and the case remanded to the trial court for retrial, with instructions that evidence of defendant's violations of his motorcycle permit, including his guilty plea to a citation for such violations, is admissible as evidence of negligence, that those two permit requirements establish in this case a standard of care beyond ordinary negligence, and that the emergency instruction cannot be given.

DATED this 3rd day of October, 2008.

Respectfully submitted,



Gordon T. Carey, Jr., WSBA #6340  
Attorney for Plaintiff-Petitioner

## APPENDIX

CITATION

INFRACTION  TRAFFIC  NON-TRAFFIC I137880

IN THE  DISTRICT  MUNICIPAL COURT OF WEST WASHINGTON  
 STATE OF WASHINGTON PLAINTIFF VS. NAMED DEFENDANT  
 COUNTY OF Klickitat  
 CITY/TOWN OF  
 L.E.A. CRIF: WAWSP 5/8 00 COURT CRIF: WA 1920-71

State of Washington  
 County of Klickitat

The undersigned duly authorized clerk of the West District Court for Klickitat County, does hereby certify that the document upon which this stamp is imprinted is a true and correct copy of the original document, and the whole of it, as such original document is on file with the aforesaid Court.

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO. WA 12X T J 215 JB STATE WA EXPIRES 103 ID NO. (SSN/CV) \_\_\_\_\_

NAME: LAST LUTZ FIRST THEODORE MIDDLE JOHN

ADDRESS 72 RATTLE SNAKE RD / BOX 177 CITY HUSUM STATE WA ZIP CODE 98623 EMPLOYER \_\_\_\_\_

IF NEW ADDRESS  PASSENGER

I witness whereof, I have set my hand this 24th day of June, 2004  
Julius Gross  
 Clerk

RACE W M SEX M DATE OF BIRTH 4-2-79 HEIGHT 100 WEIGHT 190 EYES Blue HAIR Brown RESIDENTIAL PHONE NO. \_\_\_\_\_

VIOLATION DATE MONTH 10 DAY 19 YEAR 00 TIME 2:45 24 HOUR \_\_\_\_\_

ON OR ABOUT 10:19:00 TIME \_\_\_\_\_

LOCATION SR 141 NB 9.2 M.P. \_\_\_\_\_

COUNTY OF CLICKITAT

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO. TEMP STATE WA EXPIRES \_\_\_\_\_ VEH. YR. 99 MAKE Pontiac MODEL Wildcat STYLE \_\_\_\_\_

TRAILER #1 LICENSE NO. \_\_\_\_\_ STATE \_\_\_\_\_ EXPIRES \_\_\_\_\_ TR. YR. \_\_\_\_\_ TRAILER #2 LICENSE NO. \_\_\_\_\_ STATE \_\_\_\_\_ EXPIRES \_\_\_\_\_ TR. YR. \_\_\_\_\_

OWNER/COMPANY IF OTHER THAN DRIVER Same ADDRESS \_\_\_\_\_ CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP CODE \_\_\_\_\_

ACCIDENT NO. NR R 0 F \_\_\_\_\_ COMMERCIAL  YES  NO HAZARD  YES  NO EXEMPT  FARM  FIRE  OTHER

VEHICLE  NO PLACARD  NO VEHICLE  YES  NO

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING INFRACTIONS

1. VIOLATION/STATUTE CODE RCW 46.20.055 / 510 VEHICLE SPEED 150 IN A \_\_\_\_\_ ZONE \_\_\_\_\_

VIOLATION OF MIC PERMIT

SMD  PACE  AIRCRAFT

2. VIOLATION/STATUTE CODE \_\_\_\_\_

3. VIOLATION/STATUTE CODE \_\_\_\_\_

PENALTY U.S. FUNDS \$ 119-

RELATED # \_\_\_\_\_ DATE ISSUED 10-20-00

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), I PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

COLLISION

DEFENDANT'S SIGNATURE X Julius Gross OFFICER [Signature] 431

INF	RESPONSE	DISPOSITION	PENALTY	SUSPENDED	SUB-TOTAL	FNDG/JDGT DATE
1	C NC	C NC D P S	\$		\$ 119-	11/6/06
2	C NC	C NC D P S	\$		\$	ABSTRACT MLR TO OLYMPIA 1/10
3	C NC	C NC D P S	\$		\$	
TOTAL COSTS					\$ 119-	

WASHINGTON STATE PATROL TRAFFIC REPORT



STATE OF WASHINGTON  
POLICE TRAFFIC  
COLLISION REPORT



REPORT NO. 0946527

03

INTERSTATE <input type="checkbox"/>	CITY STREET <input type="checkbox"/>	FAIR RESERVED <input type="checkbox"/>
STATE ROUTE <input checked="" type="checkbox"/>	OTHER <input type="checkbox"/>	STOLEN VEHICLE <input type="checkbox"/>
COUNTY RD <input type="checkbox"/>	PRIVATE WAY <input type="checkbox"/>	W/ST & TRUCK <input type="checkbox"/>

01 OBJECT DEER

DATE OF COLLISION: 06 19 2000 TIME (2400): 2145.20 MILES: 7.57 N  E  IN  S  W  OF X 1435

ON (PRIMARY TRAFFIC WAY) INTERSECTION  NON-INTERSECTION   
STATE ROUTE 141 BLOCK NO.  MILE POST 56 9.20

DISTANCE 3.6 MILES  N  E  OF (REFERENCE OR CROSS STREET) HUSUM ROAD

UNIT 01 DAMAGE THRESHOLD MET  5094933042

LAST NAME: LUTZ  
FIRST NAME: THEODORE  
STREET: 77 RATTLESNAKE RD POB 177  
CITY: HUSUM STATE: WA ZIP: 98623

DRIVER'S LICENSE #: LUTZ TJ215JB STATE: WA SEX: M D.O.B.: 04 02 1979  
ON DUTY  STATUS: AIRBAG 1 RESTR: EJECT 2 HELMET USE: 1 INJURY CLASS: 5 NATURE OF INJURY: ANKLE/ABBRASSION

LICENSE PLATE #: TEMP STATE: WA VIN: JYARJ04E5YA006324

TRAILER PLATE # STATE TRAILER PLATE # STATE  
VEHICLE YEAR: 1999 MAKE: JAMA MODEL: 6000L MC STYLE: MC TOWED BY: N/A

REGISTERED OWNER INFO: LIABILITY INSURANCE IN EFFECT  INSURANCE CO. & POLICY #: STATE FARM 116968-02147  
VEHICLE LEGALLY STATIONED  CITATION #: E 1378805 CHARGE: PERMIT VIOLATION

UNIT 02 MOTOR VEHICLE  PEDAL CYCLE  PEDESTRIAN  PROPERTY OWNED  DAMAGE THRESHOLD MET  PHONE:

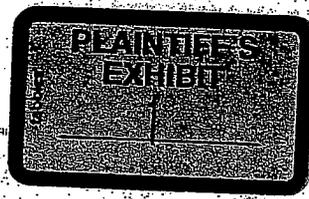
LAST NAME: FIRST NAME: STREET: CITY: STATE: ZIP: DRIVER'S LICENSE #: STATE: SEX: D.O.B.: MMDDYY

ON DUTY  STATUS: AIRBAG: RESTR: EJECT: HELMET USE: INJURY CLASS: NATURE OF INJURY:

LICENSE PLATE #: TRAILER PLATE #: STATE TRAILER PLATE #: STATE  
VEHICLE YEAR: MAKE: MODEL: STYLE: TOWED BY: VEHICLE NO. 2

REGISTERED OWNER INFO: LIABILITY INSURANCE IN EFFECT  INSURANCE CO. & POLICY #: CITATION #: CHARGE:

VEHICLE LEGALLY STATIONED  CITATION #: OFFICER'S NAME (PRINT): ROBERT D. CASHATT BADGE NO.: 431 AGENCY: WSP



0946527



1581972

CORRECTION

REPORT NO. 0946527

CASE #

ADDITIONAL PERSONS INVOLVED (PASSENGERS AND/OR WITNESSES ONLY)

NAME (LAST, FIRST, MIDDLE INITIAL) **KAPPELMAN AMBER L**

ADDRESS & PHONE # **22 SPRINKLE LN. WHITE SALMON WA. 98672 509 493 1937**

PASSENGER  WITNESS  UNIT # **01** SEAT POS. **1Z** AIRBAG **1** RESTR. **1** EJECT **2** HELMET USE **1** INJURY CLASS **5**

SEX **F** D.O.B. **10 11 1981**

NAME (LAST, FIRST, MIDDLE INITIAL)

ADDRESS & PHONE #

PASSENGER  WITNESS  UNIT #

SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS

NAME (LAST, FIRST, MIDDLE INITIAL)

ADDRESS & PHONE #

PASSENGER  WITNESS  UNIT #

SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS

NAME (LAST, FIRST, MIDDLE INITIAL)

ADDRESS & PHONE #

PASSENGER  WITNESS  UNIT #

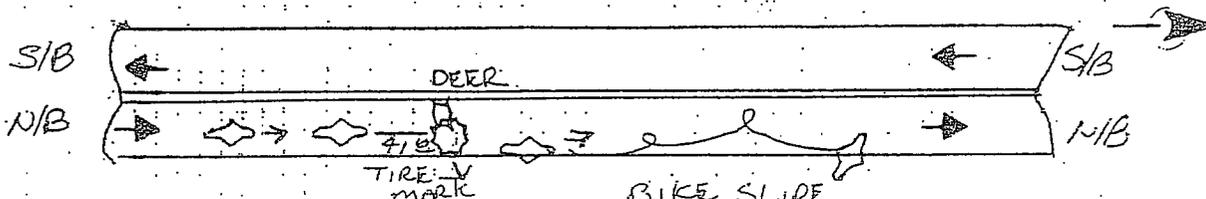
SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS

SEVERE/EXTENSIVE  
FRACTURES

DIAGRAM

SR 141 MP 9.2

INDICATE NORTH  
BY ARROW



BIKE SLIDE  
APPROX. W/D RIDERS  
330'  
APPROX. 369' ANIMAL REST TO M/C REST.

NARRATIVE

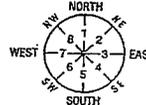
THE M/C WAS TRAVELING NIB SR 141 FROM HUSLUM WA. THE M/C WAS ~~RIDING~~ <sup>RIDING</sup> W/ TWO RIDERS. THE DRIVER SAID HE ACCELERATED OUT OF HUSLUM AT APPROX. 60 MPH. HE SAW A DEER CROSSING THE ROAD AND BEGAN TO SWAY THE BIKE DOWN. THE DRIVER SAID HE WAS UNABLE TO AVOID CONTACT W/ THE DEER. UPON CONTACT W/ THE DEER BOTH RIDERS WERE SEPARATED FROM THE M/C. THE DRIVER SAID HE MAY HAVE BEEN COORPH WHEN HE HIT THE DEER.

I CERTIFY (DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT (RCW 9A.72.025)

INVESTIGATING OFFICER'S SIGNATURE *[Signature]* UNIT OR DIST. DET **518** DATED **6-20-00** PLACE SIGNED **Klickitat Co.**

APPROVED BY *[Signature]* DATE **7-2-00**

BADGE / OS ID # **431** OFFICER **WAWSPG50E** TIME POLICE PROCESSED **2205** TIME POLICE ARRIVED **2221**

<b>ROADWAY SURFACE CONDITION</b> 1 Dry 2 Wet 3 Snow / Slush 4 Ice 5 Sand / Mud / Dirt 6 Oil 7 Standing Water 8 Other* 9 Unknown		<b>CONTRIBUTING CIRCUMSTANCES - DRIVERS, PEDALCYCLISTS OR PEDESTRIANS (NO MORE THAN THREE PER UNIT)</b> 1 Under Influence of Alcohol 2 Under Influence of Drugs 3 Exceeding Stated Speed Limit 4 Exceeding Reas. Safe Speed 5 Did Not Grant R/W to Vehicle 6 Improper Passing 7 Following Too Closely 8 Over Center Line 9 Failing to Signal 10 Improper Turn 11 Disregard Stop and Go Signal 12 Disregard Stop Sign / Flashing Red 13 Disregard Yield Sign / Flashing Yellow 14 Apparently Asleep 15 Improper Parking Location 16 Operating Defective Equipment 17 Other* (Last in Narrative) 18 None 19 Improper Signal 20 Improper U Turn 21 Light Violation: No Lights / Fall to Dim 22 Did Not Grant R/W to Pedestrian / Pedalcyclist 23 Inattention 24 Improper Backing 25 Disregard Flagger / Officer 26 Apparently Ill 27 Apparently Fatigued 28 Had Taken Medication 29 On Wrong Side of Road 30 Hitchhiking 31 Failure to Use Xwalk	
<b>WEATHER</b> 1 Clear / Partly Cloudy 2 Overcast 3 Raining 4 Snowing 5 Fog / Smog / Smoke 6 Steel / Hail / Freezing Rain 7 Severe Crosswind 8 Blowing Sand / Dirt / Snow 9 Other* 0 Unknown		<b>VEHICLE ACTIONS (NO MORE THAN THREE PER VEHICLE)</b> 1 Going Straight Ahead 2 Overtaking and Passing 3 Making Right Turn 4 Making Left Turn 5 Making U-Turn 6 Slowing 7 Stopped for Traffic 8 Stopped at Signal or Stop Sign 9 Stopped in Roadway 10 Starting in Traffic Lane 11 Starting From Parked Position 12 Merging (Entering Traffic) 13 Legally Parked, Occupied 14 Legally Parked, Unoccupied 15 Backing 16 Going Wrong Way on Divided Hwy 17 Going Wrong Way on Ramp 18 Going Wrong Way on One-Way Street or Road 19 Other* 20 Changing Lanes 21 Illegally Parked, Occupied 22 Illegally Parked, Unoccupied	
<b>LIGHT CONDITIONS</b> 1 Daylight 2 Dawn 3 Dusk 4 Dark - Street Lights On 5 Dark - Street Lights Off 6 Dark - No Street Lights 7 Other* 9 Unknown		<b>WORK ZONE (CONSTRUCTION, MAINTENANCE, UTILITY)</b> 1 Workers Present 2 Workers Not Present 3 Traffic Backup From Work Zone	
<b>LOCATION CHARACTER (ONLY IF APPLICABLE)</b> 1 Parking Lot 2 Bridge / Overpass 3 Underpass / Tunnel 4 Rest Area / Turn Out 5 Shopping Mall / Plaza 6 Park & Ride Lot 7 Ferry Dock 8 School Zone 9 Playground Zone 0 RR-Crossing		<b>ROADWAY CHARACTER</b> 1 Straight & Level 2 Straight & Grade 3 Straight at Hillcrest 4 Straight in Sag 5 Curve & Level 6 Curve & Grade 7 Curve at Hillcrest 8 Curve in Sag 9 Unknown	
<b>HAZARDOUS MATERIALS (IDENTIFY IN NARRATIVE)</b> 1 Hazmat Transported - Not Released 2 Hazmat Transported - Released		<b>VEHICLE CONDITION (NO MORE THAN THREE PER VEHICLE)</b> 1 Defective Brakes 2 Defective Headlights 3 Defective Rear Lights 4 Tires Worn or Smooth 5 Tires Punctured or Blown 6 Lost a Wheel 7 Defective Steering Mechanism 8 Power Failure 9 Headlights Glaring 10 Other Lights / Reflectors Insufficient 11 Other Defects* 12 No Defects 13 Motorcycle - Lights Off 14 Equipped with Studded Tires 15 Motorcycle Windshield Installed 16 Truck / Trailer Safety Inspection	
<b>TRAFFIC CONTROL</b> 1 Signals 2 Stop Sign 3 Yield Sign 4 Flashing Red 5 Flashing Amber 6 RR Signal 7 Officer / Flagger 8 Other Traffic Control* 9 No Traffic Control 0 Unknown		<b>POSTED SPEED</b> MILES PER HOUR FOR EACH VEHICLE INVOLVED	
<b>TYPE OF ROADWAY</b> 1 One Way 2 Two Way - Undivided 3 Two Way - Divided, with Barrier 4 Two Way - Divided, no Barrier 5 Reversible Road 6 Interchange Ramp 7 Alley 8 Center Two-Way Left Turn Lane 9 Driveway 0 Unknown		<b>DIRECTION OF MOVEMENT (INDICATE BY NUMBER THE "FROM" AND "TO" MOVEMENT)</b>  9 Vehicle Stopped 0 Vehicle Backing	
<b>ROADWAY SURFACE TYPE</b> 1 Concrete 2 Blacktop 3 Brick or Wood Block 4 Gravel 5 Dirt 6 Other* 9 Unknown		<b>SOBRIETY</b> 1 HBD - Ability Impaired 2 HBD - Ability Not Impaired 3 HBD - Sobriety Unknown 4 Had Not Been Drinking 9 Unknown	
<b>VEHICLE CLASSIFICATION (ONLY IF APPLICABLE)</b> 1 Trailer w/GVWR of 10,001 lbs or more, if GVWR of combined vehicle(s) is 25,001 lbs or more. 2 Single vehicle w/GVWR of 26,001 lbs or more, or any school bus, regardless of size. 3 Single vehicle of 26,000 lbs or less, designed to carry 16 passengers or more; or any vehicle regardless of size which requires a HAZ-MAT placard.		<b>ALCOHOL TEST</b> 97 Test Given - Results Pending OR: List Actual Test 98 Test Given - No Results Results in 100ths 99 Test Refused	
<b>PEDESTRIAN / PEDALCYCLIST WAS USING:</b> 1 Sidewalk 2 Walkway 3 Shoulder 4 Marked X-Walk 5 Unmarked X Walk 6 Other* 7 Designated Bike Route 8 Roadway		<b>DRE ASSESSMENT (NO MORE THAN 2 PER UNIT)</b> 1 CNS - Depressants 2 CNS - Stimulants 3 Hallucinogens 4 PCP 5 Narcotic Analgesics 6 Inhalants 7 Carinabits 8 Drug Combinations 9 Drug Impaired, Type Not Determined 0 Not Drug Impaired	
<b>PEDESTRIAN / PEDALCYCLIST CLOTHING VISIBILITY</b> 1 Dark 2 Light 3 Mixed 4 Retro-Reflective 5 Other Reflective Apparel* 6 Shoes, Patches		<b>SEQUENCE OF EVENTS (UP TO FOUR PER VEHICLE)</b> 1 Collision Involving Motor Vehicle in Transport 2 Collision Involving Fixed Object 3 Collision Involving Other Object 4 Collision Involving Parked Vehicle 5 Collision Involving Pedestrian 6 Collision Involving Pedalcyclist 7 Collision Involving Animal 8 Collision Involving Train 9 Ran off the Road 10 Jackknife 11 Overturn (Rollover) 12 Downhill Runaway 13 Cargo Loss or Shift 14 Explosion or Fire 15 Separation of Units 16 Other*	
<b>PEDESTRIAN ACTION (ONE PER UNIT)</b> 1 Xing at Intersection with Signal 2 Xing at Intersection Against Signal 3 Xing at Intersection - No Signal 4 Xing at Intersection - Diagonally 5 From Behind Parked Vehicle 6 Xing - Non Intersection - No X Walk 7 Xing - Non Intersection - In X Walk 8 Walk'g in Roadway with Traffic 9 Walk'g in Rdwy Opposite Traffic 10 Walk'g on Rdwy Shldr with Traffic 11 Walking on Roadway Shoulder Opposite Traffic 12 Standing or Working in Roadway 13 Pushing or Working on Vehicle 14 Playing in Roadway 15 Lying in Roadway 16 Not in Roadway 17 All Other Actions* 18 Fell or Pushed into Path of Vehicle 19 At Intersection Not Using Crosswalk		<b>STATE OF WASHINGTON</b> <b>POLICE TRAFFIC COLLISION REPORT OVERLAY</b> 3000-345-359 Revised (1/97) ① UNIT #1      ② UNIT #2 *DESCRIBE IN THE NARRATIVE	
<b>PEDALCYCLIST ACTION (ONE PER UNIT)</b> 43 Xing diagonally 44 Riding with Traffic 45 Riding Against Traffic 46 Fell or Pushed into Path of Vehicle 47 Cyclist Turned Into Path of Vehicle - Same Direction 48 Cyclist Turned Into Path of Vehicle - Opposite Direction 49 All Other Actions* 50 Xing or Entering Trafficway			

**INSTRUCTIONS:**

This Police Traffic Collision Report is designed to use computer technology to read and record your printed responses. To ensure accuracy, please follow these instructions when completing the report.

When the information requested is not available or not applicable, leave that portion of the report blank.

Print in block capital letters using a black ball-point pen with a medium tip, do not use a pencil or felt-tip pen. Please follow the examples below:

**A B C D E F G H I J K L M N O P Q R S T U V W X Y Z 1 2 3 4 5 6 7 8 9 0**

Items requiring a box to be marked should be filled in as follows:

Note: sevens and zeros should not be crossed.



RIGHT



WRONG

When the information requested is not available or not applicable, leave that portion of the form blank. Enter the pre-printed REPORT NO. found at the top right of Part A, on all subsequent pages. Include the REPORT NO. if you are providing exchange of information to individuals involved.

If applicable to your jurisdiction, enter the Case # on all pages.

Use the Unit #1 section of Part A to capture information on motor vehicle drivers or pedalcyclists.

Use the Unit #2 section of Part A to capture information on motor vehicle drivers, pedalcyclists, pedestrians or property owners.

Use the applicable Status codes to further describe pedestrians or pedalcyclists involved.

Use the Additional Persons Involved section of Part B to capture information on vehicle passengers or witnesses only.

Use the Supplemental Police Traffic Collision Report to capture information on additional units.

WHEN TO USE THE COMMERCIAL MOTOR CARRIER PORTION OF THE REPORT  
(See Supplemental Police Traffic Collision Report).

Answers to questions below determine use.

Did this collision involve -

	Yes	No
1 A truck with at least 2 axes and 6 tires?	_____	_____
2 A bus with seats for 16 or more people, including driver?	_____	_____
3 Any vehicle requiring a hazardous material placard?	_____	_____

STOP - If response to all above questions is "No", do not complete the Commercial Motor Carrier portion of report.

4 A fatal injury?	_____	_____
5 An injured person who was transported for immediate medical attention?	_____	_____
6 A vehicle which was towed because of disabling damage?	_____	_____
7 A vehicle requiring intervening assistance before proceeding under its own power? (e.g., towed from ditch, etc.)	_____	_____

Note: If response to question 6 or 7 is "Yes", mark the "Any Vehicle Towed?" box on the Commercial Motor Carrier portion of report.

STOP - If response to the last four items is "No", do not complete the Commercial Motor Carrier portion of report.

USE THE FOLLOWING CODES ON THE COMMERCIAL MOTOR CARRIER PORTION OF THE REPORT.		
<b>VEHICLE TYPE</b>	<b>CARGO BODY TYPE</b>	<b>NAME SOURCE (CARRIER)</b>
1 Bus	1 Bus	1 Side of Vehicle
2 Single-unit Truck; 2 axle, 6 tires	2 Veh/Enclosed Box	2 Shipping-Papers
3 Single-unit Truck; 3 or more axles	3 Cargo Tank	3 Driver
4 Truck/Trailer	4 Flatbed	4 Log Book
5 Truck Tractor (Bob-tail)	5 Dump	
6 Tractor/Semi-Trailer	6 Concrete Mixer	
7 Tractor/Doubles	7 Auto Transporter	
8 Tractor/Triples	8 Garbage/Refuse	
9 Other/Cannot Classify	9 Other	

USE THE FOLLOWING CODES FOR STATUS, SEAT POSITION, AIRBAG, RESTRAINT SYSTEMS, EJECTION, HELMET USE AND INJURY CLASS															
<b>STATUS OF PEDESTRIAN/ PEDALCYCLIST</b>	<b>SEAT POSITION</b>	<b>AIRBAG</b>	<b>RESTRAINT SYSTEMS</b>	<b>EJECTION</b>	<b>HELMET USE FOR MOTORCYCLISTS, PEDALCYCLISTS, SKATERS OR SKATEBOARDERS</b>	<b>INJURY CLASS</b>									
1 Bicyclist	<table border="1"> <tr><td>7</td><td>4</td><td>1</td></tr> <tr><td>8</td><td>5</td><td>2</td></tr> <tr><td>9</td><td>6</td><td>3</td></tr> </table>	7	4	1	8	5	2	9	6	3	1 Not Airbag Equipped	1 No Restraints Used	1 Not Ejected	1 Helmet Used	1 No Injury
7	4	1													
8	5	2													
9	6	3													
2 Tricyclist		2 Airbag Equipped	2 Lap Belt Used	2 Totally Ejected	2 Helmet Not Used	2 Dead at Scene									
3 Person on Foot		3 Not Activated	3 Shoulder Belt Used	3 Partially Ejected	3 Other	3 Dead on Arrival									
4 Roller Skater/ Skateboarder		4 Airbag Equipped	4 Lap & Shoulder Belt Used	4 Unknown		4 Died at Hospital									
5 Non-Motorized Wheelchair	10 Other Position	5 Activated	5 Child Infant Seat Used			5 Disabling Injury									
6 Motorized Wheelchair	11 Position Unknown	9 Unknown	6 Child Convertible Seat Used			6 Non-Disabling (Evident Injury)									
7 Flagger	12 Motorcycle		7 Child Built-In Seat Used			7 Possible Injury									
8 Roadway Worker	13 Outside of Vehicle		8 Child Booster Seat Used												
9 Emergency Response Personnel			9 Unknown												
0 Other															

\* DESCRIBE IN THE NARRATIVE.

SELECTED STATUTES

**RCW 5.40.050**

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, sterilization of needles and instruments used in tattooing or electrology as required under RCW 70.54.350, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

**RCW 46.20.510**

(1) **Motorcycle instruction permit.** A person holding a valid driver's license who wishes to learn to ride a motorcycle may apply for a motorcycle instruction permit. The department may issue a motorcycle instruction permit after the applicant has successfully passed all parts of the motorcycle examination other than the driving test. The director shall collect a fee of fifteen dollars for the motorcycle instruction permit or renewal, and deposit the fee in the motorcycle safety education account of the highway safety fund.

(2) **Effect of motorcycle instruction permit.** A person holding a motorcycle instruction permit may drive a motorcycle upon the public highways if the person has immediate possession of the permit and a valid driver's license. An individual with a motorcyclist's instruction permit may not carry passengers and may not operate a motorcycle during the hours of darkness.

(3) **Term of motorcycle instruction permit.** A motorcycle instruction permit is valid for ninety days from the date of issue.

(a) The department may issue one additional ninety-day permit.

(b) The department may issue a third motorcycle instruction permit if it finds after an investigation that the permittee is diligently seeking to improve driving proficiency.

**RCW 46.20.515**

The motorcycle endorsement examination must emphasize maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision. The examination for a two-wheeled motorcycle endorsement and the

examination for a three-wheeled motorcycle endorsement must be separate and distinct examinations emphasizing the skills and maneuvers necessary to operate each type of motorcycle. The department may waive all or part of the examination for persons who satisfactorily complete the voluntary motorcycle operator training and education program authorized under RCW 46.20.520 or who satisfactorily complete a private motorcycle skills education course that has been certified by the department under RCW 46.81A.020

**RCW 46.04.200**

"Hours of darkness" means the hours from one-half hour after sunset to one-half hour before sunrise, and any other time when persons or objects may not be clearly discernible at a distance of five hundred feet.

**RCW 46.81A.001**

It is the purpose of this chapter to provide the motorcycle riders of the state with an affordable motorcycle skills education program in order to promote motorcycle safety awareness.

SECTION 286, RESTATEMENT (SECOND) TORTS

*Restatement (Second) of Torts, § 286 (1965)*

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part:

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

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**CERTIFICATE OF FILING AND SERVICE**

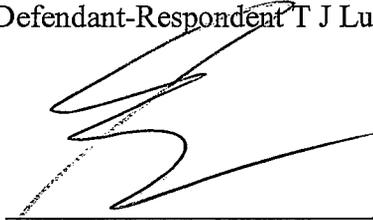
2008 OCT -6 P 2:19  
BY RONALD R. CARPENTER  
CLERK

I hereby certify that on October 3, 2008, I filed the original and one (1) copy of the foregoing **SUPPLEMENTAL BRIEF**, ~~by sending them~~ via U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, and addressed to:

Washington State Supreme Court  
415 12th Avenue SW  
PO Box 40929  
Olympia, Washington 98504-0929

I further certify that on October 3, 2008, I served one (1) copy of the foregoing **SUPPLEMENTAL BRIEF**, by sending it via U.S. 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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Gordon T. Carey, Jr., OSB No. 77133  
Attorney for Plaintiff-Petitioner Amber  
Kappelman