

No. _____

(COA NO. 61137-2-I)

SUPREME COURT OF THE STATE OF WASHINGTON

CARMEN ROLLINS and WILHELM HENDERSHOTT,

Respondents,

v.

KING COUNTY METRO TRANSIT,

Petitioner,

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

King County Metro Transit, Petitioner here and Appellant below, respectfully asks this Court to accept review of the Court of Appeals' decision set forth in Section II.

II. COURT OF APPEALS' DECISION

Under RAP 13.4(b), King County Metro Transit seeks review of the decision of the Washington State Court of Appeals, Division I, in *Rollins & Hendershott v. King County Metro Transit*, No. 61137-2-I, slip op. (Wash. Jan. 20, 2009). The decision was filed on January 20, 2009. The opinion is attached as Appendix A and is cited as "Slip Op."

III. ISSUES PRESENTED FOR REVIEW

This Court's opinion in Tegman v. Accident and Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003) requires the trier of fact to segregate damages caused by intentional conduct from damages caused by alleged negligence. This requirement was disregarded by the trial court when the court failed to give defendant's proposed jury instruction and verdict form directing the jury to segregate damages resulting from an assault as plaintiffs attempted to exit a Metro Transit bus at their intended stop. The trial court and Court of Appeals departed from this standard. The trial court and Court of Appeals further failed to follow this Court's decisions that comparative fault is a question of fact for the

jury when the evidence created a factual issue to be resolved. If accepted, this case would raise the following issues:

1. Does Tegman require jury instructions and a verdict form sufficient to allow the jury to segregate damages from intentional conduct of unidentified assailants from alleged negligence of a named defendant?

2. Viewing all the evidence in the light most favorable to King County, could the jury have found that the plaintiffs failed to exercise ordinary care for their own personal safety based on their admitted observations of potential dangerousness of the other passengers on the bus?

This case is appropriate for review under RAP 13.4(b)(1), (b)(2) and (b)(4). The Court of Appeals' decision conflicts with the decision of the Supreme Court in Tegman, *supra*. In concluding that the jury did not need to first determine the total damages and then the percentage caused by the intentional conduct of the individuals who actually assaulted the plaintiffs, the Court of Appeals fundamentally altered the threshold for determining damages in tort cases arising from situations involving criminal acts. Review is appropriate under RAP 13.4(b)(1).

The Court of Appeals' decision also directly conflicts with the Court of Appeals' decision in Jane Doe v. Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007) in which a different panel of Division I held that

damages do need to be segregated in cases such as this one, even if the intentional tortfeasor is not a party to the action. This case is, therefore, appropriate for review under RAP 13.4(b)(2).

This is also an issue of substantial public importance and one that is likely to recur to the detriment of both plaintiffs and defendants in future tort litigation. As such, review under RAP 13.4(b)(4) is needed.

IV. STATEMENT OF THE CASE

Shortly after midnight on Saturday, May 22, 2005, Wil Hendershott and his then girlfriend Carmen Rollins, along with Karensa Umipeg, boarded a Metro bus, coach 1832 on Route 7. RP (11/27/07) 52-54, 81-82, 118-121, 153-154. They were riding from downtown Seattle through the Rainier Valley to Ms. Rollins' parent's home in the Columbia City neighborhood. RP (11/27/07) 51-52, 81-83. The Metro bus was operated by Mr. Jacob Fryar, who had been driving this route regularly in the preceding months. RP (11/29/07) 432-433. The 60 foot, articulated bus was nearly empty when they boarded. They sat near the rear of the bus, just in front of the rear exit doors. RP (11/27/07) 54-55, 253-254; (11/29/07) 349, 439-440. Ms. Rollins and Mr. Hendershott sat next to one another on the passenger side of the bus while Ms. Umipeg sat in an adjoining seat across the aisle. RP (11/27/07) 54, 121-123. The ride from downtown Seattle to Rainier Valley was uneventful until the bus

approached the bus zone near the Rainier Community Center at the intersection of Rainier Avenue South and Alaska Way. RP (11/27/07) 55; (11/29/07) 436; (12/3/07) 13. The bus stop was just over one mile from where the three intended to get off the bus. RP (11/27/07) 172-173.

According to Hendershott and Rollins, a group of 30 to 50 young people, ranging in ages from 7 to 22, boarded the bus at this stop. RP (11/27/07) 56-57; (12/3/07) 15-17. Rollins testified she could see the large group of teenagers outside the bus before they boarded. RP (11/29/07) 351. She described them as "rambunctious," "violent" and "scary" to her before they had even boarded the bus. RP (11/29/07) 351-352. Hendershott stated they were "rowdy and chaotic," and "looked evil". RP (11/27/07) 126-127. Hendershott was "immediately concerned for his [my] safety" when the teenagers boarded the bus. RP (11/27/07) 129. Despite their concerns, neither Hendershott nor Rollins moved from their rear seats toward the front of the bus, near the driver. RP (11/27/07) 256.

According to Ms. Rollins, as one of the boys was boarding, he touched her leg with his finger, saying "Hey". RP (11/29/07) 353-354; 397-398. She interpreted the remark to have sexual connotations. RP (11/29/07) 397-398, 416-418. She did not report the touching or inappropriate remark to the bus driver. Hendershott felt "uncomfortable"

at the point the boy walked by and touched Ms. Rollins' leg with his finger. RP (11/27/07) 254. He did not report the incident to the driver nor did they get off the bus at this point, although they were just over a mile from her parent's home. RP (11/27/07) 257; (11/29/07) 353-354. There were six bus zones/stops between the stop at Alaska and Rainier and Graham and Rainier but Hendershott and Rollins did not attempt to disembark from the bus before then. RP (11/29/07) 460-461. Rollins had a cell phone in her backpack but did not use it to call for help at any time. RP (11/29/07) 360.

Once the bus left the bus stop, Ms. Rollins stated that another boy made inappropriate sexual remarks toward her and that a fight broke out between some of the boys behind them. RP (11/29/07) 358,360-361. Hendershott never alerted the bus driver that there was a fight going on or that Ms. Rollins had been verbally harassed. RP (11/28/07) 268. Rollins acknowledged that she did not do anything to alert the driver that a fight was going on behind them. RP (11/29/07) 6-9.

Bus drivers like Mr. Fryar rely on passengers to report to them disturbances on board the bus. RP (12/4/07) 60, 81-82. As the bus proceeded southbound on Rainier Avenue South through the intersection at Orcas, Mr. Fryar heard someone shout, "Fight". RP (12/3/07) 21-23. Fryar could not actually see any altercation when he looked in his rear

view mirrors but nonetheless pushed the PRTT (Priority Request to Talk) button on his console to relay the information to the Metro control center coordinator. RP (11/29/07) 444-446, 456; (12/3/07) 22-23. He also looked for the first available place to pull the bus over safely so he could open all the bus doors to ensure that no one would be trapped inside if an assault was occurring. RP (12/3/07) 23.

Mr. Fryar pulled over near the Graham Street bus zone, which incidentally was where the trio intended to get off. RP (12/3/07) 23. According to Hendershott, as they were getting ready to get off the bus, one of the teenagers verbally insulted Rollins and he took umbrage at the remark. RP (11/27/07) 65-66; 98-99,132,213-214. He was unexpectedly punched in the face and according to their various descriptions, within 20 seconds, he and Rollins were pushed or dragged off the bus after it stopped and physically assaulted. RP (11/27/07) 136; (11/28/07) 270-272. Hendershott testified that the majority of the physical injuries he sustained occurred after he was off the bus. RP (11/28/07) 273-274.

Police arrived at the scene shortly after the assaults but the assailants had fled. RP (12/4/07) 9-11. They spoke with Hendershott and he and Rollins were taken by ambulance to Harborview Medical Center where they were seen and released. RP (11/29/07) 405,410. Rollins stated her physical injuries resolved in one week while Hendershott

estimated his physical injuries resolved within 4-5 weeks. RP (11/27/07) 233-236; (11/29/07) 371-373. Within one week of the incident, both Hendershott and Rollins had returned to riding Metro buses. RP (11/28/07) 276; (11/29/07) 386-389.

On November 26, 2007 a jury trial began in King County Superior Court before the Honorable William L. Downing.

On December 5, 2008, the parties took formal exceptions to the Court's jury instructions, including Metro's exceptions to the Court's refusal to include Metro's proposed instructions on contributory negligence, the burden of proof on segregation of damages and the Special Verdict form allowing the jury to segregate out the damages arising from negligence by Metro from the intentional acts of the assailants. RP (12/5/07)12-18. With the issue of plaintiffs' comparative fault precluded and the issue of segregation of damages from intentional conduct analysis by the jury excluded from the verdict form and improperly inserted only into the damages instruction with a *sole* proximate cause requirement, King County Metro was unable to argue its theory of this case. Instead, King County Metro was held entirely responsible for plaintiffs' damages without the opportunity to fairly weigh the bus driver's allegedly negligent conduct against that of the plaintiffs.

The trial concluded on December 6, 2007 with a verdict in favor of Rollins and Hendershott and a timely appeal followed. CP 140-141, 167-168.

The Court of Appeals acknowledged that Metro "raised issues relating to segregation and allocation of damages" but the court then proceeded to focus on the issue of allocation of fault not segregation of damages. Slip Op., at 5, 5-12. The Court of Appeals further recognized that Metro had set forth the correct standard for the submission of the issue of contributory negligence to the jury. Slip Op., at 12-13. Unfortunately, the Court of Appeals ignored the fact that the trial court's record is silent in its rationale for rejecting the issue of contributory negligence.

Metro now petitions for review.

V. ARGUMENT

1. **The Court of Appeals' Decision Conflicts With This Court's Decision In Tegman.**

The Court of Appeals concluded that "Tegman is about joint and several liability." Slip Op. at 8. What the Court of Appeals overlooked is that Tegman also holds "... where the damages result from both intentional acts and omissions and "fault," i.e. negligence, recklessness, and conduct subjecting the actor to strict liability, the **damages** resulting from the

intentional acts and omissions **must be segregated** from damages that are fault-based." Id. at 117 (emphasis added). The trial court's jury instructions on segregation of damages (CP 155) and jury verdict form (CP 140-141), which the Court of Appeals approved, failed to provide the jury with the opportunity to do that, as Tegman requires. Under the Court of Appeals' decision, a negligent tortfeasor, like Metro can be held liable for damages caused by others' intentional acts, as long as those intentional acts were also "proximately caused by" Metro's negligence. This is simply inconsistent with the letter and spirit of Tegman. As the Tegman court noted, "the full recovery for all damages may not be claimed against a negligent defendant for all negligent and intentional acts," is a reflection of the legislative scheme set out in the Tort Reform Act "to provide some relief to negligent defendants whose conduct is not as egregious as the intentional tortfeasor, nor the cause of the intentionally based damages". Id. at 119. Under Tegman, a fact finder must be instructed to segregate those damages proximately caused by the intentional conduct (whether the intentional tortfeasor is a party to the case or not - See- R.K v. the Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 2006 WL 2506413(W.D. Wash. 2006), affirmed, Fleming v. Church of Later Day Saints, , 2008 U.S. App. LEXIS 9139 (9th Cir.2008). The Court of Appeals' analysis ignores the fact that the trial court's Verdict

form made no provision whatsoever for the segregation of intentionally caused harm from the negligent. The trial court's Verdict Form did not even contain the word "intentional." The Verdict Form did not capture whether the jury actually segregated some unknown portion of the damages to the assailants in this incident. The Court of Appeals essentially adopted the position outlined in the dissent in Tegman and the "allocation of fault" analysis in Welch v. Southland Corp., 134 Wn.2d 629, 952 P.2d 162 (1998). This analysis ignores the majority opinion of the Supreme Court's "segregation of damages" analysis in Tegman. The question before the trial court and the Court of Appeals was not whether a negligent defendant can apportion fault to an intentional tortfeasor, but rather the distinct issue of segregation of damages. The Court of Appeals erred in failing to make that distinction, and therefore, this Court should accept review.

2. The Court of Appeals' Decision Directly Conflicts With Another Decision of the Court of Appeals, Jane Doe v. L.D.S., 141 Wn.App. 407, 167 P.3d 1193, (2007).

In Jane Doe v. Latter-Day Saints, 141 Wn. App.407, 167 P.3d 1193 (2007), the Court of Appeals (Div.1) applied Tegman and determined that the defendant does not have the burden of proving segregation of damages in an action involving negligent and intentional act claims. The Court's

decision in the instant case directly conflicts with its decision in Doe v. LDS warranting review by the State Supreme Court.

In Doe v. LDS the plaintiffs, two sisters, brought negligence and intentional infliction of emotional distress claims against the Jesus Christ of Latter Day Saints (LDS Church) after they were sexually assaulted by their stepfather, a church leader. They also sought damages against him for intentional infliction of emotional distress. The Court of Appeals reversed the jury verdict in plaintiffs' favor, in part, because the trial court instructed the jury that the defendant LDS Church bore the burden of segregating the damages for negligence from damages for intentional torts. Relying on Tegman and R.K. v. Corp. of President of Church of Jesus Christ of Latter Day Saints No.4-2338RSM (W.D. August 28, 2006)¹, the court set out the statutory basis supporting the need to segregate damages arising from negligence from damages from intentional acts and the accompanying burden of proof:

As a threshold matter, fault based damages must be segregated. The Supreme Court articulated the principle that,

[u]nder comparative fault principles, [*46] the *trier of fact* must allocate fault between a negligent plaintiff and a negligent defendant. *RCW4.22.005*. Similarly,

¹ CP 80-83; Appendix A to Brief of Appellant in Court of Appeals.

under *RCW 4.22.070(1)*, where the damages result from both intentional acts and omissions and "fault," i.e., negligence, recklessness, and conduct subjecting the actor to strict liability, the damages resulting from the intentional acts and omissions must be segregated from damages that are fault-based.

Tegman, Inc., 150 Wn.2d at 117(emphasis added). Despite the dissent's concern that requiring segregation by the factfinder would be baffling, the Tegman majority stated,

Segregating fault-based damages from those caused by intentional acts or omissions should pose no great difficulty because similar allocations are already part of the statutory scheme. When this State's legislature rejected the absolute bar of contributory negligence to recovery by negligent plaintiffs and adopted comparative negligence principles, Laws of 1973, 1st Ex. Sess., ch. 138, §1, the "premise that wrongs were inherently indivisible or that responsibility could not rationally be apportioned among multiple parties fell into disfavor."

Tegman, 150 Wn.2d at 116 (quoting Gregory C. Sisk, *The Constitutional [*47] Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986*, 13. U. Puget Sound L. Rev. 433, 437 (1990).

The next question is who has the burden to prove the segregation of damages. Federal District Court Judge Ricardo Martinez rejected an argument similar to Osborne's that a defendant must bear the

