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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 SAMER KAZAN, et al.,

11 Plaintiffs,

12 v.

13 WALTER KENNEDY and ANNE  
KENNEDY,

14 Defendants.  
15

CASE NO. C15-1251-BJR

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
STRIKING MOTION REGARDING  
SPOILIATION OF EVIDENCE

16  
17 **I. INTRODUCTION**

18 Plaintiffs Samer, Reine, Samir and Catherine Kazan bring this action against Defendant  
19 Walter Kennedy, alleging causes of action for negligence and loss of consortium arising out of  
20 injuries that occurred when a bus driven by Defendant Walter Kennedy struck Plaintiff Samer  
21 Kazan. Plaintiffs have brought two motions before the Court: (1) a motion for partial summary  
22 judgment finding that Defendant was negligent as a matter of law and dismissing any  
23 contributory negligence defense, and (2) a motion for sanctions due to spoliation of evidence  
24 arising out of the loss of Defendant's cell phone prior to their examining it. Defendants oppose

1 the motions. Having reviewed the parties' briefs along with all relevant materials, and finding  
2 that oral argument will not be helpful in further clarifying the issues, the Court GRANTS partial  
3 summary judgment in Plaintiffs' favor on the issue of Defendant's negligence and Defendant's  
4 theory of Plaintiff's contributory negligence. In light of this ruling, the Court STRIKES  
5 Plaintiffs' request for sanctions due to spoliation of evidence as moot.

## 6 II. FACTUAL BACKGROUND

7 The record consists of deposition testimony given by the following people: Plaintiff  
8 Samer Kazan; Defendant Walter Kennedy; witness James Thompson, who was walking behind  
9 Plaintiff prior to his being struck; witness Claire Sutherland, who was seated her in car at the  
10 intersection in which the accident occurred; and witness Stephanie Hughes, who was standing  
11 diagonally across the street from the scene of the accident. This record, from which the Court  
12 must draw all reasonable inferences in favor of the nonmoving party (*Anderson v. Liberty Lobby,*  
13 *Inc.* 477 U.S. 242, 55 (1986)), consists of the following material facts:

14 On the afternoon of July 23, 2015, Plaintiff Samer Kazan, an Amazon employee, was  
15 walking south on Westlake Avenue in Seattle from one building in which he worked to another.  
16 Decl. of Cochran, Exh. 1 ("Kazan Depo") at 122:24-123:10, 178:9-10. Defendant Walter  
17 Kennedy (d/b/a Oncore Coach Leasing) was driving his bus north on Westlake Avenue.  
18 According to Plaintiff, the traffic light at the intersection of Westlake Avenue and Thomas  
19 Street showed a white "Walk" signal. Plaintiff testified that he entered the crosswalk and was  
20 struck by the bus driven by Defendant, who was turning left from Westlake onto Thomas. *Id.* at  
21 131:10-11, 132: 9-10, 134:18-20.

22 Witness Thompson was walking southbound behind Plaintiff on the west side of  
23 Westlake Avenue when both reached the intersection of Westlake and Thomas. Decl. of

1 Cochran, Exh. 2 (“Thompson Depo”) at 47:6-10, 59:5-13, 67:23-25. According to witness  
2 Thompson, when he reached the intersection of the two streets Plaintiff was in front of him.  
3 Thompson’s testimony is that the pedestrian indicator was a white “Walk” signal when both men  
4 entered the crosswalk. *Id.* at 43:14, 44:7-10, 46:1-5, 47:18-19. Thompson stepped briefly into  
5 the crosswalk, but saw Defendant commencing a left turn from Westlake onto Thomas and  
6 retreated back onto the sidewalk. *Id.* at 75:11-21. Thompson testified that he saw the bus  
7 contact Plaintiff, push him sideways and to the west down Thomas Street for “a couple feet”  
8 before Plaintiff fell down and went under the bus. *Id.* at 70:11-15, 70:22-71:13, 77:14-21.  
9 According to Thompson, he yelled at Defendant to stop; once the bus halted he directed it to  
10 back up, which it did, uncovering the injured Plaintiff. *Id.* at 78:12-13 and 21-23, 80:10-11,  
11 80:23-81:2.

12         Witness Sutherland was parked on the northwest corner of Westlake and Thomas, seated  
13 behind the wheel with the rear of her vehicle protruding slightly into the crosswalk, facing west.  
14 According to Sutherland, there was not enough space between her car and the car parked in front  
15 of her for someone to walk through. Decl. of Cochran, Exh. 4 (“Sutherland Depo”) at 94:19-21.  
16 She testified that she was waiting for a valet to come and get her car and noticed Plaintiff  
17 coming towards her, facing in her direction. She remembers seeing his face and torso turned  
18 towards her, moving quickly. *Id.* at 53:3-7. She did not see him cross in front of her car prior to  
19 this; when she saw him, he was parallel to the front left tire of her car (*Id.* at 54:24-55:4), outside  
20 of the crosswalk. *Id.* at 94:22-95:13. According to Sutherland, she saw the bus “in the middle of  
21 the road... very close to the man who got hit” (*Id.* at 57:10-12) and, believing that the bus was  
22 going to hit Plaintiff, she turned her head away and called 911. *Id.* at 58:23-59:5.

1 Witness Hughes was standing on the southeast corner of the intersection of Westlake and  
2 Thomas (diagonally from where Plaintiff entered the street), waiting for the signal to change so  
3 she could cross Westlake. Decl. of Patterson, Ex. B (“Hughes Depo”), 15:6-10. According to  
4 Hughes, she saw the bus on the street in front of her turning left from Westlake onto Thomas. *Id.*  
5 at 15:16-18, 16:20-17:2. She testified that she heard “a noise, like someone kind of like in  
6 agony.” *Id.* at 17:15-16. Hughes said that, based on where the bus was when she heard the  
7 “noise,” she believes that the accident occurred outside of the crosswalk. She admits, however,  
8 that she never actually saw Plaintiff get struck by the bus. *Id.* at 23:6-25.

9 According to Defendant, he saw neither Plaintiff nor Thompson as he was making the  
10 left turn from Westlake onto Thomas. Decl. of Cochran, Ex. 5 (“Kennedy Depo”) at 34:5-11,  
11 38:12-16, 86:20-87:1. He testified that no one was in the crosswalk when he commenced his  
12 turn from Westlake to Thomas. *Id.* at 87:1-4, 93:15-20. He did not apply the brakes of the bus  
13 until after he heard the sound of the bus connecting with Plaintiff’s body (a sound he described  
14 as a “tap”). *Id.* at 88:7. Asked for an explanation of how Plaintiff came to be in front of his bus,  
15 he answered “I don’t know how he got out where he was.” *Id.* at 93:24-25.

### 16 III. LEGAL STANDARD

17 Summary judgment is proper “if the movant shows that there is no genuine issue as to  
18 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
19 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue  
20 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding a summary  
21 judgment motion, the court must view the evidence in the light most favorable to the non-moving  
22 party and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S.  
23 242, 55 (1986).

1 The moving party is only required to assert that the party with the burden of proof cannot  
2 carry that burden, and “that there is an absence of evidence to support the nonmoving party’s  
3 case.” *Celotex*, 477 U.S. at 325. On those issues where he bears the burden of proof, Defendant  
4 must present actual evidence to successfully oppose the motion and may not rest on allegations,  
5 speculations or opinion. *Anderson*, 477 U.S. at 248.

#### 6 IV. CONTRIBUTORY NEGLIGENCE AND NEGLIGENCE

7 Plaintiffs seek summary judgment (1) dismissing Defendant’s affirmative defense of  
8 contributory negligence and comparative fault, and (2) finding that Defendant was negligent as a  
9 matter of law.

##### 10 A. Plaintiff was not contributorily negligent

11 A person’s contributory negligence is determined based on an inquiry regarding “whether  
12 or not he exercised that reasonable care for his own safety which a reasonable man would have  
13 used under the existing facts and circumstances, and, if not, was his conduct a legally  
14 contributing cause of his injury.” *Huston v. Church of God*, 46 Wn.App. 740, 747, *rev. denied*,  
15 108 Wn.2d 1018 (1987).

16 According to Defendant, Plaintiff was contributorily negligent. Defendant attempts to  
17 create disputed issues of material fact around the question of (1) whether or not Plaintiff was in  
18 the crosswalk when he was struck, (2) whether he entered the intersection when the crosswalk  
19 signal read “Walk,” and (3) whether he was “jogging” or walking across the street. It is an  
20 unsuccessful effort.

21 Defendant, in his opposition, relies on the testimony of two witnesses to assert that  
22 Plaintiff was out of the crosswalk when struck by Defendant’s bus: Sutherland, who reported  
23 seeing Plaintiff outside of the crosswalk with his face and torso turned toward her, parallel with

1 her left front tire; and Hughes, who reported hearing “a noise, like someone kind of like in  
2 agony” at a time when she saw the front of the bus beyond the crosswalk area. What is most  
3 noteworthy about both accounts is that neither of these witnesses saw Plaintiff enter the street or  
4 observed the actual collision.

5 Both Thompson and Plaintiff are unequivocal in their testimony that Plaintiff was  
6 walking in a southerly direction along the west side of Westlake, that he entered the intersection  
7 within the crosswalk and that the pedestrian traffic signal was a white “Walk” indicator at that  
8 time. Defendant’s attempts to cast doubt on the reliability and credibility of both witnesses are  
9 unavailing.

10 Defendant alludes to Plaintiff’s “spotty” memory of the incident, but the transcript  
11 excerpts he cites (*see* Response at 14) all concern Plaintiff’s memory of events after he was  
12 struck by the bus, moments where Plaintiff understandably reports that the details are “fuzzy.”  
13 Kazan Depo at 9:3. Regarding whether he entered the intersection inside the crosswalk and  
14 whether the pedestrian traffic indicator was white when he entered the crosswalk, he testified  
15 that he is “one hundred percent sure.” *Id.* at 134:12-20.<sup>1</sup>

16 Plaintiff’s testimony is corroborated by the only other eyewitness who observed the  
17 collision, a witness who was directly behind Plaintiff and reports unequivocally that Plaintiff  
18 proceeded across the street in the crosswalk with a white “Walk” signal. The Court is  
19 unpersuaded by the aspersions cast by Defendant on Thompson’s credibility. The fact that his  
20 testimony regarding Plaintiff’s pace changed from “jogging” to “walking quickly” is not

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22 <sup>1</sup> The Court also rejects Defendant’s attack on Plaintiff’s credibility based on allegedly inaccurate  
23 testimony that he was dragged 20 or 30 feet by the bus. The sources that Defendant cites for that testimony are  
24 medical reports prepared by doctors who examined Plaintiff (*see* Decl. of Patterson, Exs. G and H). There is no  
evidence in those records that Plaintiff provided this information, nor any rationale provided as to why the Court  
should overlook the inherently suspect hearsay nature of the document.

1 relevant; as discussed below, whether Plaintiff was jogging or walking quickly does not affect  
2 the liability determination under the facts before the Court and is not a sufficiently significant  
3 difference to discredit the remainder of Thompson’s testimony.

4 Similarly, the alleged discrepancy between Thompson’s testimony that, at the point he  
5 saw Defendant’s bus, stopped and returned to the curb, he was “close enough to touch  
6 [Plaintiff],” “between 3 and 4 feet” away and his testimony that, when the collision occurred,  
7 Plaintiff was “well past the halfway point of the crosswalk” (based on a hand-drawn “X” on a  
8 photograph of the intersection; *see* Decl. of Cochran, Ex. 24), is *de minimis* for two reasons.

9 First, Defendant ignores another sketch of the accident scene that Thompson created on  
10 the day of the event (*see id.*, Ex. 23) where he places Plaintiff’s body at a point much closer to  
11 the northwest corner of the intersection and more congruent with the photograph produced by  
12 Defendant showing the location of the bus after it had backed up. Decl. of Patterson, Ex. I.  
13 Second, assuming that Plaintiff was moving rather rapidly (either “jogging” or “walking  
14 quickly”) at the point where he left the curb and Thompson briefly entered the intersection, saw  
15 the bus and retreated, it would only have been a matter of seconds before Plaintiff would have  
16 been 10-12 feet away from Thompson. There is no discrepancy or lack of credibility arising  
17 from these disparate pieces of evidence.

18 Finally, Defendant suggests that, as Thompson and Plaintiff (who did not know each  
19 other) are both employees of Amazon, there may be a possibility of “bias towards his coworker.”  
20 Response at 15. The Court rejects the suggestion that two strangers who work for a mega-  
21 corporation employing tens of thousands of individuals might, based on their common employer  
22 alone, be favorably disposed towards each other sufficiently to fabricate or exaggerate testimony  
23 and Defendant presents nothing more to support this theory than his speculation. In the final

1 analysis, the only testimony that establishes the facts critical to assessing liability in this incident  
2 – the direction in which Plaintiff was walking, the point at which he entered the street and the  
3 status of the pedestrian traffic signal – comes from Plaintiff and Thompson.

4       Regarding the witnesses proffered by Defendant in support of his version of the events,  
5 Sutherland herself acknowledges she did not see Plaintiff enter the street, and the direction in  
6 which he was facing when she initially saw him (face and torso towards her, moving in a  
7 completely different direction than he started out) logically supports only one conclusion: that  
8 she first saw Plaintiff after his initial contact with Defendant’s bus, which contact propelled him  
9 in the opposite direction from which he was originally moving.<sup>2</sup> This conclusion is corroborated  
10 by Thompson’s testimony that Plaintiff’s initial contact with Defendant’s bus pushed him  
11 sideways and west (i.e., toward where Sutherland was parked) for “a couple of feet” before  
12 Plaintiff went under the bus. Thompson Depo. at 70:11-15, 70:22-70:13, 77:14-21. Contrary to  
13 Defendant’s argument, the Court does not find Sutherland’s testimony at odds with Plaintiff’s or  
14 Thompson’s; she simply saw the portion of the accident which occurred *after* Plaintiff was first  
15 struck. Nor does the Court believe Sutherland is reporting what she saw inaccurately, only that  
16 her testimony does not establish what Defendant purports it to establish.

17       Regarding Hughes’ testimony, the Court again points out the key fact that this witness  
18 never saw Plaintiff enter the street or witnessed him being struck by the bus. She saw a bus  
19 turning and then (when the front of the bus was beyond the crosswalk) heard a sound that she  
20 described as “a noise, like someone kind of like in agony.” Defendant would like the Court to

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22       <sup>2</sup> The Court likewise discounts the opinion of Defendant’s expert Wells, first for its reliance on the  
23 assumption that Sutherland’s testimony indicates that Plaintiff was first struck by Defendant’s bus outside the  
24 crosswalk and second for its conclusion that Kazan first came into contact with the bus 15 feet west of the  
crosswalk; a calculation that is totally at odds with Sutherland’s testimony (that Plaintiff was parallel with her left  
front tire that was, at most, 8-10 feet west of the crosswalk). *See* Decl. of Wells, ¶¶ 7, 9-10, 14.



1 conclude from that testimony that this was the point at which the bus first struck Plaintiff, but  
2 there is nothing else in the evidence that logically supports that conclusion. No one else reports  
3 hearing Plaintiff cry out when he was struck; the only loud noises the evidence shows are  
4 Thompson’s yells to Defendant to stop his bus after he had struck Plaintiff. And even if the  
5 Court (viewing the evidence in the light most favorable to Defendant) were to assume that the  
6 cries were Plaintiff’s, that fact establishes no genuine issue about where he was located when he  
7 was first struck by the bus, a fact to which Hughes cannot attest.

8 Defendant presents one other piece of evidence purportedly from Hughes, an audio  
9 recording contained in a video from a police “dash cam” in which a woman can be heard to say  
10 that the crosswalk pedestrian light was “counting down” when she heard the cry. Decl. of  
11 Patterson, Ex. J. Plaintiff has moved to strike this evidence as hearsay and the Court will grant  
12 that motion – the audio recording (unquestionably an out of court statement submitted for the  
13 truth of the matter asserted) was presented without a foundational declaration or other  
14 evidentiary support and it will be stricken.<sup>3</sup>

15 Defendant also attempts to assert that he himself made statements that establish a genuine  
16 issue of material fact in this matter; namely, Hughes’ testimony that, at the time of the accident,  
17 Defendant made a statement to the effect of “He just came out of nowhere.” Hughes Depo at  
18 25:10-12, 26:22-27:1. Hearsay problems aside, since this statement (to the extent it suggests  
19 that Defendant actually saw Plaintiff before his bus struck him) contradicts Defendant’s own  
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21  
22 <sup>3</sup> Even if it the Court were to admit it (and assume that Hughes was the speaker), the statement does not  
23 establish the proposition that Defendant seeks to propound. Because Hughes did not see Plaintiff enter the  
24 intersection, she cannot testify as to what the state of the pedestrian traffic indicator was at that point in time, which  
would be the critical juncture for proving that Plaintiff attempted to cross the street in a negligent or reckless  
fashion. Additionally, Hughes has testified that she does not remember whether she made this statement. Hughes  
Depo at 30:5-7, 23-25; 45:9-13.

1 sworn testimony that he saw neither Plaintiff nor Thompson, it will not suffice to create a  
2 disputed issue of material fact.

3 The Court is aware that summary judgment case law requires that the facts be viewed in  
4 the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242,  
5 55 (1986). However, the Court is not required to abandon common sense or logic in the process;  
6 is, in fact, only required to draw “justifiable” inferences in Defendant’s favor. The facts as  
7 adduced by Defendant do not justifiably lead to the conclusion he wishes this Court to draw, nor  
8 do they create genuine issues of material fact concerning the undisputed items of evidence that  
9 have been presented; namely, that the only two percipient witnesses to the prelude and onset of  
10 this accident establish that Plaintiff entered the crosswalk with the white “Walk” signal and was  
11 struck therein by Defendant’s bus.

12 With that factual underpinning, the Court turns to the question of Defendant’s affirmative  
13 defense of contributory negligence.

14 Although the law does not permit a pedestrian to walk “suddenly” into a crosswalk so  
15 that an approaching vehicle cannot stop, RCW 46.61.235(2), Washington courts have  
16 long recognized that a pedestrian in a crosswalk “may assume that the driver of a vehicle  
17 will recognize the pedestrian's right of way.” *Knight v. Pang*, 32 Wn.2d 217, 232, 201  
18 P.2d 198 (1948);

19 *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 906, 223 P.3d 1230, 1238-39 (2009).

20 Having found that the facts establish Plaintiff was within the crosswalk and entered on a  
21 white “Walk” signal, the Court will not analyze further Defendant’s contributory negligence  
22 arguments based on an assumption that Plaintiff was outside the crosswalk when first struck by  
23 Defendant’s bus. However, Defendant also argues for a contributory negligence defense that  
24 survives even if Plaintiff was within the crosswalk.

1 First, Defendant cites to municipal and state regulations prohibiting a pedestrian from  
2 stepping into the path of a vehicle if it is impossible for the vehicle to stop in time to avoid  
3 hitting that person. SMC 11.40.060, RCW 46.61.236. There is no evidence this was the case.  
4 Defendant’s own testimony is that he was driving “[a]round five miles per hour.” Kennedy  
5 Depo. at 156:2. Had he not failed to see Plaintiff in the crosswalk, it would have been possible  
6 for him to stop in time to avoid hitting Plaintiff as the bus proceeded across the two southbound  
7 lanes of Westlake to complete its left turn.

8 Defendant also cites a jury instruction approved in a 1970 Washington case in which the  
9 jury was instructed concerning the duty of a pedestrian: “One is charged with the duty of seeing  
10 that which he would have seen had he been exercising ordinary care.” The Washington Court of  
11 Appeals held that such an instruction was “proper and sufficient.” *Cakowski v. Oleson*, 1 Wn.  
12 App. 780, 783 (1970). Defendant argues that Washington law imposes a duty upon pedestrians  
13 like Plaintiff to maintain vigilance about oncoming vehicular traffic even if they are in a  
14 crosswalk.

15 Plaintiff asserts – and the Court agrees -- that the tension between a pedestrian’s  
16 crosswalk right-of-way and this apparent duty to be on the lookout for errant drivers was  
17 resolved by the Washington State Supreme Court in 1969. Citing an even earlier state court  
18 opinion, the Washington Supreme Court held that “[i]f the conceded right of way means  
19 anything at all, it puts the necessity of continuous observation and avoidance of injury upon the  
20 driver of the automobile when approaching a crossing...” *Jung v. York*, 75 Wn.2d 195, 198  
21 (1969)(quoting *Johnson v. Johnson*, 85 Wash. 18, 25-26 (1915)).

22  
23 The *Jung* court’s finding regarding that plaintiff applies equally here:

1 A pedestrian cannot at one and the same time have a right to assume that the right of way  
2 will be yielded and a duty to look to make sure that it is. In the absence of circumstances  
3 which would alert the pedestrian rightfully in the crosswalk to the fact that an  
approaching vehicle is not going to yield, negligence cannot be predicated on his failure  
to look and see the vehicle in time to avoid the accident.

4 *Id.* The Washington Court of Appeals ruling in *Cakowski* loses its precedential value in the  
5 face of this holding. As another Court of Appeals decision observed, “[*Cakowski*]’s  
6 persuasiveness is mooted by the mandated application of *Jung v. York...*” *Johnson v. Strutzel*, 14  
7 Wn.App. 620, 622 (1975).

8 Similarly, whether Plaintiff was “jogging” or “walking quickly” is of no import if he was  
9 rightfully within the crosswalk and proceeding with a “Walk” signal. Pedestrians may run across  
10 the street if they do so within a designated crosswalk when they have the right of way.

11 Based on the foregoing analysis, the Court will GRANT Plaintiff’s motion for summary  
12 judgment dismissing Defendant’s affirmative defense of contributory negligence.

13 **B. Defendant Walter Kennedy was negligent**

14 “The elements of negligence are duty, breach, causation, and injury.” *Hartley v. State*,  
15 103 Wn.2d 768, 777 (1985). “It is the duty of a driver approaching a crossing to maintain a  
16 continuous observation in order to avoid injuring a pedestrian...” *Burnham v. Nehren*,  
17 7 Wn.App. 860, 865 (1972). The Washington State Supreme Court has spoken on the duty of a  
18 driver in Defendant’s position:

19 1. The driver shall yield the right-of-way, slowing or stopping, if necessary, to a  
20 pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half  
21 of the roadway upon which the vehicle is traveling or approaching so closely from the  
opposite half of the roadway as to be in danger. [*citations omitted*]

22 2. It is the duty of a driver approaching a crossing to maintain a continuous observation in  
23 order to avoid injuring a pedestrian and failure on the part of a driver to yield the right-of-  
24 way to a pedestrian constitutes negligence per se if the pedestrian was seen or should  
have been seen by the driver. *Oberlander v. Cox*, [75 Wn.2d 189 (1969)]; *Ross v.*  
*Johnson*, 22 Wn.2d 275, 155 P.2d 486 (1945).

1 3. A driver is negligent as a matter of law if he fails to yield the right-of-way to a  
2 pedestrian in a crosswalk in the absence of evidence of unusual circumstances. *Daley v.*  
*Stephens*, 64 Wn.2d 806, 394 P.2d 801 (1964).

3 *Burnham v. Nehren*, 7 Wn. App. 860, 865 (1972). The only “evidence of unusual  
4 circumstances” in this case is Defendant’s failure to see either Plaintiff or Thompson in the  
5 crosswalk, a singularity that does not inure to his benefit.

6 Plaintiffs introduce, as further evidence of Defendant’s negligence, the records of  
7 Defendant’s cell phone that indicate phone activity at or near the time of the accident. Defendant  
8 denies being on his phone at the time of the accident. Kennedy Depo at 157:15-158:8.  
9 Defendant submits a document purporting to be an online “chat” with a Verizon phone  
10 representative who represents that a cell phone record indicating phone activity at a certain time  
11 does not mean that the cell phone owner was actually speaking on the phone; i.e., it may simply  
12 indicate an incoming call that the cell phone owner did not answer. Decl. of Patterson, Ex. F.

13 Plaintiffs move to strike the document as hearsay. Defendant even concedes that the  
14 report of the online conversation is hearsay, but argues nevertheless that his opposing  
15 interpretation of the cell phone records creates a genuine issue of material fact. Response at 16  
16 fn. 10. The Court will strike the evidence as hearsay. But the Court further finds the parties’  
17 submissions inconclusive as to whether or not Defendant was using his cell phone at the time of  
18 the accident and therefore will not find that the records proffered by Plaintiff constitute further  
19 evidence of Defendant’s negligence.

20 Nevertheless, the Court is compelled to find there is no genuine issue of material fact  
21 regarding Plaintiff’s presence in a crosswalk that he entered with a white “Walk” signal, to find  
22 the existence of a duty on Defendant’s part to yield the right of way under such circumstances  
23 and to find, as a matter of law, that Plaintiffs are entitled to a summary judgment of negligence

1 on the part of Defendant in proximately causing injury to Plaintiff with his bus while in that  
2 crosswalk.

3 **V. SPOILIATION OF EVIDENCE**

4 The gravamen of this motion is relatively straightforward: based on a review of  
5 Defendant's cell phone records, Plaintiffs developed a suspicion he may have been on his cell  
6 phone at the time of the accident. On that basis, they requested that Defendant produce his cell  
7 phone for inspection (Dkt. No. 75, Ex. 18), to which Defendant responded that he had lost the  
8 phone on a fishing trip weeks before when it fell of a boat into a river. Decl. of Cochran at Ex. 9.

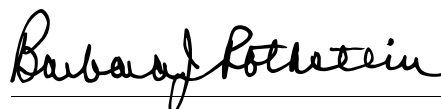
9 Plaintiffs seek sanctions against Defendant for spoliation of evidence. In light of the fact  
10 that the Court is awarding summary judgment to Plaintiff on the issue of Defendant's negligence,  
11 Plaintiff's motion for spoliation of evidence is moot and the motion is STRICKEN.

12 **VI. CONCLUSION**

13 Defendant has failed to establish a genuine issue of material fact regarding Plaintiffs'  
14 proof that Plaintiff entered a crosswalk with a white "Walk" signal and was in the crosswalk at  
15 the time he was struck by Defendant's bus, undisputed facts that entitle Plaintiffs to a finding as  
16 a matter of law that Defendant was negligent and Plaintiff was not contributorily negligent. In  
17 light of this ruling, Plaintiffs' request for sanctions due to spoliation of evidence resulting from  
18 the loss of Defendant's cell phone is moot; that motion will be stricken.

19 The clerk is ordered to provide copies of this order to all counsel.

20 Dated this 18th day of October, 2016.

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Barbara Jacobs Rothstein  
24 U.S. District Court Judge