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No. 62770-8-I

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

STEVEN HERNANDEZ and CLEONA HERNANDEZ,  
husband and wife,

Respondents/Cross-Appellants

v.

TIMOFEY FEDORCHENKO and JANE DOE FEDORCHENKO,  
husband and wife and the marital community thereof,

Appellants/Cross-Respondents

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STATE OF WASHINGTON  
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**REPLY BRIEF AND RESPONSE TO CROSS-APPEAL**

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## TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	iii
I. Preliminary Statement.....	1
II. Restatement of Facts on Cross-Appeal.....	2
III. Restatement of Issue on Cross-Appeal.....	3
IV. Argument on Cross-Appeal.....	3
A. This court does not review an appeal of a denial of summary judgment on a factual issue later tried to a verdict.....	3
B. Even if the court considers the cross appeal, it has been mooted by the verdict reached without a presumption of negligence.....	5
C. The trial record supports the verdict’s finding of third-party fault.....	6
V. Argument in Reply on Fedorchenko’s Appeal.....	8
A. Fedorchenko’s inability to produce Dr. Billington for deposition on short notice cannot amount to “willful violation of a court order” justifying Billington’s exclusion.....	8
B. A judicial statement qualifies as a comment on the evidence if it merely implies the judge’s opinion on a factual question entrusted to the jury, and the court’s statement that Fedorchenko was “negligent in this collision” is just such a statement.....	12
C. Hernandez failed to show that negligence by Fedorchenko was anything but a fact question that should have been left entirely to the jury, not determined on summary judgment.....	14

D. Fedorchenko was entitled to an instruction based on the lane-change statute when there was substantial evidence of an improper lane change.....	15
E. Neither Washington nor foreign law supports the exclusion of Warmenhoven’s lay testimony about the facts of the accident .....	16
VI. Conclusion .....	19

## TABLE OF AUTHORITIES

<i>Accetta v. Provencal</i> , 962 A.2d 26 (R.I. Jan. 12, 2009).....	18
<i>Adcox v. Children’s Orthopedic Hosp. and Medical Center</i> 123 Wn.2d 15, 864 P.2d 921 (1993).....	4, 5
<i>Brenman v. Demello</i> , 191 N.J. 18, 921 A.2d 1110 (N.J. 2007).....	18
<i>Brothers v. Public School Employees of Washington</i> , 88 Wn. App. 398, 945 P.2d 208 (1997).....	4
<i>DiCosola v. Bowman</i> , 342 Ill. App.3d 530, 794 N.E.2d 875, 276 Ill. Dec. 625 (2003).....	17
<i>Doherty v. Municipality of Metropolitan Seattle</i> , 83 Wn. App. 464, 921 P.2d 1098 (1996).....	17
<i>Eskin v. Carden</i> , 842 A.2d 1222 (Del. 2004).....	17
<i>In re Estate of Foster</i> , 55 Wn. App. 545, 779 P.2d 272 (1989).....	8, 10
<i>Johnson v. Rothstein</i> , 52 Wn. App. 303, 759 P.2d 471 (1988).....	4
<i>Lundberg v. All-Pure Chemical Co.</i> , 55 Wn. App. 181, 777 P.2d 15, review denied, 113 Wn.2d 1030 (1989).....	16
<i>Marron v. Stromstad</i> , 123 P.3d 992 (Alaska 2005).....	18
<i>Mason v. Lynch</i> , 388 Md. 37, 878 A.2d 588 (Md. 2005).....	18
<i>Murray v. Mossman</i> , 52 Wn.2d 885, 329 P.2d 1089 (1958).....	18
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	14

<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	6
<i>Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union</i> 44, 103 Wn.2d 800, 699 P.2d 217 (1985).....	3
<i>State v. Hansen</i> , 46 Wn. App. 292, 730 P.2d 706 (1986) .....	14
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	13, 14
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	16
<b>Statutes</b>	
RCW 5.40.050 .....	15
<b>Court Rules</b>	
CR 26(b).....	10
ER 702 .....	18

## **I. Preliminary Statement**

The jury determined that Warmenhoven was negligent – it was she, after all, who collided with Hernandez because she was not looking. On his cross-appeal Hernandez asks that this court overturn that jury determination because he claims that the trial court improperly denied him summary judgment on the issue. But this court has repeatedly said that it will not review a denial of summary judgment on a factual issue tried to a jury.

In similar fashion Hernandez's response to Fedorchenko's appeal ignores the critical facts and law. So he claims that Billington was properly excluded because Fedorchenko willfully violated a court order – even though no such violation took place. He claims that the trial court did not comment on the evidence – even though its verdict form, fairly read, contains just such a comment. He claims that Fedorchenko was not entitled to a jury instruction based on the lane-change statute – even though substantial evidence supported it. And he claims that Fedorchenko was required to provide expert testimony as a condition of admission of lay testimony about the facts of the accident – even though neither Washington nor foreign law imposes such a requirement.

Hernandez had a full and fair opportunity to show that Warmenhoven was not negligent. By contrast, Fedorchenko was denied a

fair opportunity to contest Hernandez's medical damages, was denied proper jury instructions and was denied the opportunity to present evidence controverting Hernandez's claims.

## II. Restatement of Facts on Cross-Appeal

Before trial Hernandez brought a motion for partial summary judgment seeking dismissal of affirmative defenses, including the third-party-fault defense that Warmenhoven's negligence caused the accident.<sup>1</sup> Fedorchenko responded with supporting testimony showing that Warmenhoven was negligent.<sup>2</sup> The judge denied Hernandez's motion as to third-party fault, ruling that presumptions or factual inferences existed that required trial.<sup>3</sup> Hernandez did not seek an interlocutory appeal of the order, and the issue of third-party fault went to the jury. From the evidence presented at trial the jury found Warmenhoven negligent, assigning to her 25 percent of the fault.<sup>4</sup> In his brief Hernandez assigns

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<sup>1</sup> CP 39-50.

<sup>2</sup> CP 53-77.

<sup>3</sup> CP 87-88 (Order); CP 91-92 (Amended Order).

<sup>4</sup> CP 763-64.

error to the order denying partial summary judgment before trial.<sup>5</sup> But he has not made his Notice of Cross-Appeal part of the record in this court.

### **III. Restatement of Issue on Cross-Appeal**

This court reviews a denial of summary judgment on a factual issue later tried based on the trial record. The trial record showed that Warmenhoven had stopped in the right lane, but then pulled into the left lane without – as she admitted – looking properly, and collided with Hernandez. Did substantial evidence support the jury’s finding Warmenhoven negligent?

### **IV. Argument on Cross-Appeal**

**A. This court does not review an appeal of a denial of summary judgment on a factual issue later tried to a verdict.**

It is well-established law that an order denying a motion for summary judgment is not a final appealable order.<sup>6</sup> When a trial court denies summary judgment due to factual disputes, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of

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<sup>5</sup> Brief of Respondents and Cross-Appellants at 1.

<sup>6</sup> *Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44*, 103 Wn.2d 800, 801-802, 699 P.2d 217 (1985).

summary judgment.<sup>7</sup> In other words, “a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact.”<sup>8</sup>

Hernandez cannot now overturn the jury’s verdict by contesting the denial of his partial summary-judgment motion before trial. In *Johnson*, the court of appeals explained the reason for this rule. Rather than preventing final judgment or discontinuing the action, a trial court’s decision denying summary judgment ensures resolution of the parties’ disputes by a trier of fact.<sup>9</sup> It would be unfair to permit a losing party to require the appellate court to undo a verdict based on a fair hearing of all the evidence, with a ruling based on a less complete record in an earlier interlocutory motion.<sup>10</sup> That reason applies here. This court should therefore refuse to consider the cross-appeal.<sup>11</sup>

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<sup>7</sup> *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993).

<sup>8</sup> *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988).

<sup>9</sup> 52 Wn. App. at 306.

<sup>10</sup> *Id.* at 306-307.

<sup>11</sup> See *Brothers v. Public School Employees of Washington*, 88 Wn. App. 398, 945 P.2d 208 (1997) (refusing to review the summary-judgment denial because the issue was tried).

**B. Even if the court considers the cross appeal, it has been mooted by the verdict reached without a presumption of negligence.**

This cross-appeal on the fault issue could only be considered--if at all--based upon the sufficiency of the complete record at trial.<sup>12</sup> The record at trial shows, however, that the issue is moot. Hernandez argues that the trial court wrongly denied his motion by relying on a presumption of negligence by a following driver.<sup>13</sup> But at trial, the court gave the following jury instruction:

Where Wendy Warmenhoven changed lanes and was confronted with unusual or unexpected conditions, there is no presumption of negligence and it is for you to determine whether in the exercise of ordinary care she should have anticipated Timofey Fedorchenko's conduct or in some other way failed to exercise ordinary care.<sup>14</sup>

While at the time of the motion the trial court apparently thought that a presumption might apply, at trial the court decided to instruct the jury not to apply any presumption of negligence. The court did not give any instruction to apply a "following car" presumption of negligence.

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<sup>12</sup> See *Adcox*, 123 Wn.2d at 35 n.9 (reviewing full trial record, although party had assigned error to denial of partial summary-judgment motion and relied only on the motion record).

<sup>13</sup> Brief of Respondents and Cross-Appellants at 21.

<sup>14</sup> CP 754 (Court's Instruction no. 6).

Hernandez's complaint about the basis for denial of his motion is moot, because the jury did not use a presumption to reach its verdict.

**C. The trial record supports the verdict's finding of third-party fault.**

Negligence is a question of fact for the jury, which is not usually susceptible to summary judgment.<sup>15</sup> On the motion for partial summary judgment, the court was presented with very limited evidence, including brief excerpts of Warmenhoven's deposition testimony.<sup>16</sup> But the jury verdict was based on a trial record concerning third-party negligence much more complete than the summary-judgment order.

The evidence at trial renders moot Hernandez's complaints about the shortcomings of evidence on summary judgment. His own expert's testimony covered reasonable reaction times – an issue that Hernandez points out was not covered in the summary-judgment motion papers.<sup>17</sup> At trial the jury was not required to “speculate” about Warmenhoven's negligence. The jurors heard Warmenhoven testify in person about the accident, and had the opportunity to judge her credibility.<sup>18</sup> They also

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<sup>15</sup> *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

<sup>16</sup> CP 60-77.

<sup>17</sup> Brief of Respondents and Cross Appellants Hernandez at 21-22.

<sup>18</sup> RP (10/16/08 PM) 68-82.

heard expert testimony under direct examination and cross examination from Paul Olson, a former police officer and accident-reconstruction specialist, who discussed Warmenhoven's conduct and reactions during the accident as well as her deposition testimony.<sup>19</sup>

This record contained sufficient evidence on negligence by Warmenhoven to support both the verdict and the previous denial of Hernandez's motion as to her fault. She testified that she had come to a complete stop in the far right line, but was impatient, so she looked behind her on the left and moved into the left lane.<sup>20</sup> She hit the back of Hernandez's car, which was stopped in the left lane.<sup>21</sup> She said that "when I looked, I must not have looked very well."<sup>22</sup> That evidence amply supports the jury's determination. Hernandez's cross-appeal should therefore be denied.

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<sup>19</sup> RP (10/14/08) 26-27, 36-44, 48-55, 61-70.

<sup>20</sup> RP (10/16/08 PM) 71-72.

<sup>21</sup> RP (10/16/08 PM) 72, 76-77, 78.

<sup>22</sup> RP (10/16/08 PM) 76.

## V. Argument in Reply on Fedorchenko's Appeal

### A. Fedorchenko's inability to produce Dr. Billington for deposition on short notice cannot amount to "willful violation of a court order" justifying Billington's exclusion.

To justify the "extreme sanction" of Billington's exclusion, Hernandez must show "intentional non-disclosure, willful violation of a court order, or other unconscionable conduct."<sup>23</sup> Hernandez concedes that Billington was properly disclosed,<sup>24</sup> and does not dispute that he had Billington's detailed 25-page report four years before trial.<sup>25</sup> The record also shows that Hernandez never sent a Notice of Deposition or any kind of compulsory process for Billington's deposition. Rather, the only request for Billington's deposition came buried in a letter to Fedorchenko addressing many other topics, only ten days before the discovery cutoff.<sup>26</sup>

Foreseeing that the requested deposition would be difficult to achieve before the discovery cutoff, Fedorchenko sought either a trial postponement or an extension of the discovery cutoff.<sup>27</sup> Hernandez

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<sup>23</sup> *In re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1989).

<sup>24</sup> Brief of Respondent at 8; *See* CP 31, 37, 942, 963.

<sup>25</sup> CP 345-369, 79; 942, 967-991.

<sup>26</sup> CP 904, 910, 930.

<sup>27</sup> CP 895-897, 857-894.

opposed both. The trial court ruled that Billington would be excluded unless he could be produced for deposition within eight calendar days (i.e., by September 12).<sup>28</sup> Billington's schedule did not permit a deposition on such short notice but did permit a deposition on September 18, 22, 24 and 25, 2008, as Fedorchenko advised the court in his motion for reconsideration.<sup>29</sup> The court nevertheless refused to allow Billington to testify<sup>30</sup> and refused to allow Dr. Massey to be cross-examined about Billington's report, even though that report was part of Massey's medical records for Hernandez.<sup>31</sup>

According to Hernandez, Fedorchenko's inability to produce Billington on short notice qualifies as a "willful violation of a court order" justifying his exclusion.<sup>32</sup> If Hernandez is correct, he has laid out the blueprint for a new level of litigation gamesmanship: wait until the last minute to seek discovery of an opposing expert, and then when the expert cannot be produced on short notice (as one would expect when dealing

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<sup>28</sup> CP 901, 80, 1050, 932.

<sup>29</sup> CP 79-80.

<sup>30</sup> CP 78-80, 948.

<sup>31</sup> CP 123; RP (10/9/08) 13.

<sup>32</sup> Brief of Respondent at 5-6.

with busy professionals), have the witness excluded. A neat trick, perhaps, but not one this court should endorse.

In evaluating this issue, this court should consider how Fedorchenko could have responded – within the rules – to Hernandez’s letter request. Fedorchenko could have taken the position that Hernandez had not given five days’ written notice of deposition to Dr. Billington as required by CR 26(b) and that because he had not done so and had not properly noted the deposition before the discovery cutoff, Hernandez was not entitled to depose Billington.

Rather than taking that “hardball” approach, Fedorchenko tried to cooperate with Hernandez to obtain the requested discovery, only to be punished for that cooperation. But under no circumstances can Fedorchenko’s inability to produce Billington on short notice because of scheduling conflicts be fairly characterized as a “willful violation of a court order” or as “unjustified or unexplained resistance to discovery” justifying the exclusion of the witness. And because those are the only bases on which Hernandez seeks to justify Billington’s exclusion, the justification fails and the trial court’s exclusion of Billington was an abuse of discretion.<sup>33</sup>

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<sup>33</sup> E.g. *Estate of Foster*, 55 Wn. App. at 548.

But Hernandez appears to also claim that Fedorchenko waived the issue because Fedorchenko did not contest exclusion when the trial court excluded Billington in ruling on a motion in limine one week before trial.<sup>34</sup> Hernandez misstates the record. The court excluded Billington before the motion in limine.<sup>35</sup> Hernandez's motion in limine concerned whether, because of that exclusion, Fedorchenko could examine plaintiff's physician, Dr. Massey, about Billington's report found in Massey's file.<sup>36</sup> Fedorchenko argued that he could but the trial court disagreed.<sup>37</sup> Hernandez does not explain how these facts amount to a waiver.

Hernandez also implies that allowing Billington's testimony would have been unfair because Hernandez would have only a little time to find a treating physician to rebut Billington.<sup>38</sup> This argument is difficult to understand for two reasons. First, the fault for the delay in deposing Billington lay solely with Hernandez. He could have deposed Billington at any time in the four years after he had received Billington's 25-page

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<sup>34</sup> Brief of Respondent at 8-9.

<sup>35</sup> CP 96-97.

<sup>36</sup> CP 96-97.

<sup>37</sup> CP 118; 123.

<sup>38</sup> Brief of Respondent at 5-6.

report, and could have readily identified a rebuttal witness after review of the report. Second, he already had Dr. Massey and Dr. Shoup, Hernandez's treating physicians, as witnesses.<sup>39</sup> He does not explain why they could not rebut Billington.

**B. A judicial statement qualifies as a comment on the evidence if it merely implies the judge's opinion on a factual question entrusted to the jury, and the court's statement that Fedorchenko was "negligent in this collision" is just such a statement.**

Plaintiffs' response fails to meet Fedorchenko's argument. According to Hernandez, the statement in the jury instruction that Fedorchenko was "negligent in this collision" does not express the trial judge's view about causation, and taken together the instructions created no confusion.<sup>40</sup> These arguments have no merit.

Fedorchenko recognizes – as he did in his opening brief – that the instructions stated that the jury was to determine causation.<sup>41</sup> But the question here is whether the verdict form and the jury instructions conflict. And they do. The instructions state that the court had determined that Fedorchenko was negligent but that the jury was to determine causation.<sup>42</sup>

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<sup>39</sup> RP (10/15/08) 6 ff. CP 179; RP (10/16/09) 60, 63.

<sup>40</sup> Brief of Respondent at 11.

<sup>41</sup> Brief of Appellant at 22-23, citing CP 751.

<sup>42</sup> CP 751.

But the statement in the verdict form that the court had determined that Fedorchenko was “negligent in this collision” tied Fedorchenko’s unidentified negligence to the collision.<sup>43</sup> A statement qualifies as a comment on the evidence if the court’s opinion on a factual issue entrusted to the jury is merely implied.<sup>44</sup> At a minimum, the court’s statement implies that Fedorchenko’s negligence caused the collision. And that implication is particularly powerful when the court’s instruction does not define exactly what Fedorchenko’s negligence was. Without knowing what Fedorchenko’s negligence was, the jury was left with the strong impression that whatever Fedorchenko had done, was, in the judge’s view, causally related to the collision.

This powerful suggestion is not overcome by the reading of the jury instructions as a whole. The test for the jury instructions is not whether judges or lawyers, after painstaking study, can reconcile the conflict between the instructions and the verdict form, but rather it is sufficient to show an improper comment on the evidence if the court’s attitude toward the *merits* of the case or the court’s evaluation relative to a

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<sup>43</sup> CP 763.

<sup>44</sup> *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

*disputed issue* is inferable from the statement.<sup>45</sup> It is sufficient if the court's attitude is merely implied to the jury.<sup>46</sup> Nor is it an answer to say that the instructions say that the judge does not intend to comment on the evidence.<sup>47</sup> That boilerplate instruction cannot grant a free pass to make comments on the evidence in the instructions.

**C. Hernandez failed to show that negligence by Fedorchenko was anything but a fact question that should have been left entirely to the jury, not determined on summary judgment.**

Here, Fedorchenko stopped in a lane of traffic in such a way that both following cars had time to stop safely. The question on summary judgment was whether he was negligent as a matter of law. The trial court erred in so ruling because the traffic violation was not decisive on the issue of negligence.

Hernandez concedes that negligence is normally a question of fact for the jury unless no reasonable minds could differ.<sup>48</sup> As the opening

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<sup>45</sup> *State v. Hansen*, 46 Wn. App. 292, 299, 730 P.2d 706 (1986), *affirmed as modified*, 737 P.2d 670 (1987) (but finding no error where the court's comment went to a peripheral and unimportant issue – not to the merits or a disputed issue).

<sup>46</sup> *State v. Jackman*, 156 Wn.2d at 743-44.

<sup>47</sup> Brief of Respondent at 12; CP 748.

<sup>48</sup> Brief of Respondents at 9; *see Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008) (whether a defendant has met the applicable duty is a question for the jury, unless reasonable minds could not differ).

brief pointed out, under current law a violation of a minor traffic law is not negligence per se, it is merely evidence of negligence.<sup>49</sup> To support his response Hernandez relies first on an argumentative statement that here, reasonable minds cannot differ. Second, he relies on *Wells v. City of Vancouver*, which did not involve summary judgment – the issue of negligence went to the jury.<sup>50</sup> Moreover *Wells* was decided at a time when violation of a statute was negligence per se.<sup>51</sup> That case is based on outdated law and does not support a finding of summary judgment on negligence under current law. Hernandez does not cite any cases under the modern law granting summary judgment on negligence in a similar traffic case. Nor should Hernandez’s opinion be given weight. Negligence was a disputed fact that should have been decided entirely by the jury.

**D. Fedorchenko was entitled to an instruction based on the lane-change statute when there was substantial evidence of an improper lane change.**

According to Warmenhoven, she pulled from a stopped position in the right-hand lane into the left lane where she immediately bumped into

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<sup>49</sup> RCW 5.40.050; Brief of Appellants at 26.

<sup>50</sup> 77 Wn.2d 800, 802, 467 P.2d 292 (1970).

<sup>51</sup> *Wells*, 77 Wn.2d at 804 (holding that evidence warranted jury instructions on theory that city was guilty of negligence per se).

Hernandez.<sup>52</sup> Hernandez claims, however, that Warmenhoven was in the left lane long before the collision. This claim is based on his accident reconstructionist's theorizing at odds with Warmenhoven's testimony.<sup>53</sup> But even if the accident reconstructionist's testimony was proper, Warmenhoven's testimony of what occurred is substantial evidence of her improper lane change. Because there was substantial evidence of an improper lane change, Fedorchenko was entitled to an instruction based on the lane-change statute.<sup>54</sup>

**E. Neither Washington nor foreign law supports the exclusion of Warmenhoven's lay testimony about the facts of the accident.**

The trial court excluded any testimony by Ms. Warmenhoven describing her impact with Hernandez's vehicle as a bump or any evidence about the lack of damage to the vehicles. Hernandez seeks to justify this exclusion based on the lack of "usual expert engineering or bio-mechanical testimony" linking that fact to the injury.

Lay witnesses may generally testify to facts that they observed and felt. Washington case law does not require expert testimony as a

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<sup>52</sup> RP (10/16/08) 71-72, 76-77, 78.

<sup>53</sup> RP (10/14/08) 36-40.

<sup>54</sup> *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996); *Lundberg v. All-Pure Chemical Co.*, 55 Wn. App. 181, 187, 777 P.2d 15, review denied, 113 Wn.2d 1030 (1989).

condition of admissibility of that lay testimony. Certainly *Doherty*, upon which Hernandez relies, imposes no such requirement. Rather that case merely describes an affidavit from a bio-mechanical engineer – evidence that was appropriately stricken.<sup>55</sup>

Nor are the out-of-jurisdiction cases cited by Hernandez either helpful on the question or representative of the majority position. The Illinois case, *DiCosola v. Bowman*, holds that there is no rule in Illinois that photographs showing minimal damage are *automatically* relevant and admissible on the nature and extent of injuries – thus the trial court did not err in excluding this evidence as irrelevant.<sup>56</sup> *DiCosola* relied on the *Davis* decision out of Delaware—also cited in the Response—but a few years later, the Delaware Supreme Court expressly narrowed and limited *Davis* to its facts.<sup>57</sup>

Other states, including Alaska, have declined to follow the holding in *Davis* requiring expert testimony to accompany lay evidence showing

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<sup>55</sup> *Doherty v Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 467-468, 921 P.2d 1098 (1996).

<sup>56</sup> *DiCosola v. Bowman*, 342 Ill.App.3d 530, 794 N.E.2d 875, 878-79, 276 Ill. Dec. 625 (2003).

<sup>57</sup> 794 N.E.2d at 881; *See Eskin v. Carden*, 842 A.2d 1222, 1233 (Del. 2004) (“*Davis* should not be construed broadly to require expert testimony in every case in order for jurors to be permitted to view photographs of vehicles involved in an accident”).

slight damage to the vehicles in an accident.<sup>58</sup> For example, the New Jersey Supreme Court in *Brenman v. Demello* reversed an appellate court decision that had followed *Davis*.<sup>59</sup> The court held that the relationship between force of impact and the existence or extent of resulting injury does not require expert testimony under ER 702, although experts may be presented to address the weight, rather than the admissibility, of evidence such as impact photographs.<sup>60</sup> *Davis*, moreover, is contrary to Washington law expressed in *Murray v. Mossman*, that such evidence is admissible in an auto accident case for the limited purpose of showing force and direction of impact.<sup>61</sup>

The trial court erred in excluding Warmenhoven's observations about the accident.

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<sup>58</sup> See *Marron v. Stromstad*, 123 P.3d 992, 1009 (Alaska 2005) (declining to follow *Davis*); see *Accetta v. Provencal*, 962 A.2d 56, 61-62 (R.I. 2009) (rejecting *Davis* and noting that other jurisdictions have declined to follow its holding, citing cases); see also *Brenman v. Demello*, 191 N.J. 18, 921 A.2d 1110 (N.J. 2007); *Mason v. Lynch*, 388 Md. 37, 878 A.2d 588 (Md. 2005).

<sup>59</sup> *Brenman v. Demello*, 191 N.J. 18, 921 A.2d 1110 (N.J. 2007).

<sup>60</sup> *Brenman*, 921 A.2d at 1120-21.

<sup>61</sup> *Murray v. Mossman*, 52 Wn.2d 885, 887-88, 329 P.2d 1089 (1958).

## VI. Conclusion

The trial court's denial of Hernandez's summary-judgment motion on Warmenhoven's negligence presents no issue for this court to review because the issue was presented to and decided by the jury at trial and substantial evidence supports the jury's finding. This court should dismiss the cross-appeal.

By contrast, the trial court's elimination of Fedorchenko's defenses by excluding Billington's medical evidence, by commenting on the evidence in the jury-verdict form, by refusing to instruct on the lane-change statute, and by refusing Warmenhoven's testimony about her observations of the accident, affected the trial outcome by leaving Hernandez's claims essentially uncontested. Those errors require reversal, an award of a new trial, and an award of costs on appeal.

Dated: September 28, 2009



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Appellants

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DECLARATION OF SERVICE

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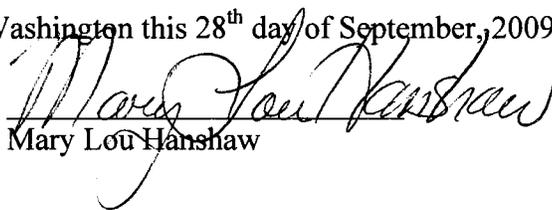
I declare under penalty of perjury under the laws of the United States of America that I served via U.S. Mail Reply Brief and Response to Cross-Appeal and this Declaration of Service on the following counsel of record:

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Mary Lou Hanshaw