

NO. 63232-9

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

2009 SEP 10 AM 10:33
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

ROBERT OSBORN,

Appellant,

v.

LARRY D. GREENE and JANE DOE GREENE; and STATE OF
WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

**BRIEF OF RESPONDENT STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS**

ROBERT M. MCKENNA
Attorney General

RICHARD A. FRASER, III
WSBA NO. 37577
MATT DAHEIM
WSBA NO. 30555
Assistant Attorneys General
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle Washington 98104-3188
(206) 464-7352

ORIGINAL

TABLE OF CONTENTS

- I. INTRODUCTION AND SUMMARY1
- II. STATEMENT OF THE CASE AND PROCEEDINGS BELOW.....3
 - A. Statement Of Relevant Facts.....3
 - B. The Expert Tangle.....4
 - C. Osborn’s Appeal Finds Fault With Several Of The Courts Instructions And One Ruling On Admission Of Testimony7
 - 1. Non Party At Fault Instruction7
 - 2. Following Driver Instruction.....8
 - 3. Emergency Doctrine Limiting Instruction.....9
 - 4. Testimony Of Timothy Moebes9
- III. ARGUMENT11
 - A. Osborn Has Misapplied The Standards Of Review Applicable To The Jury Instructions He Has Challenged11
 - B. The Court Did Not Abuse Its Discretion In Giving The Non-Party At Fault Instruction14
 - 1. The Appropriate Standard of Review For The Non-Party Instruction Is Abuse of Discretion14
 - 2. Substantial Evidence Supported Giving The Non-Party Instruction16
 - 3. Osborn Inaccurately Characterizes The Statute And Jurisprudence In Attempting To Create An Issue Of Law17

4.	The Jury Verdict Rendered Any Error Harmless	19
C.	The Court Did Not Abuse Its Discretion In Giving The Following Driver Instruction	20
1.	Osborn Failed to Preserve His Argument On The Following Driver Instruction For Review By This Court.....	20
2.	But, If This Court Were To Review Osborn’s Claim, The Appropriate Standard of Review For The Trial Court’s Decision To Use Following Driver Instruction Is Abuse Of Discretion.....	23
3.	Substantial Evidence Supported The Following Driver Instruction	23
4.	The Following Driver Instruction Is Applicable When A Driver Collides With A Vehicle As The Result Of Following Another Vehicle Too Closely	24
D.	The Trial Court Did Not Abuse Its Discretion In Refusing To Give A Limiting Instruction On The Emergency Doctrine.....	26
1.	The Appropriate Standard of Review For A Limiting Instruction On The Emergency Instruction Is Abuse Of Discretion	26
2.	Osborn Failed To Properly Propose Any Limiting Instruction.....	27
3.	A Limiting Instruction Was Neither Necessary Nor Appropriate.....	29
E.	The Court Did Not Abuse Its Discretion In Admitting Expert Testimony.....	30
1.	Moebes Based His Opinions On Eyewitness Testimony, Not Speculation, And Did Not Violate The Motion In Limine	30

2. Osborn Failed To Object To The Testimony And
Thus Waived Any Objection34

F. Osborn Was Not Prejudiced By Any of the Trial Court
Errors He Alleges and, Consequently, the Jury’s Verdict
Must Be Affirmed37

IV. CONCLUSION38

TABLE OF AUTHORITIES

Cases

<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	16, 21
<i>Caruso v. Local 690</i> , 33 Wn. App. 201, 653 P.2d 638 (1982).....	27, 28
<i>Cooper v. Bellingham School District</i> , 125 Wn. App. 511, 105 P.3d 400 (2005).....	37
<i>Greenwalt v. Lane</i> , 4 Wn. App. 894, 484 P.2d 939 (1971), <i>review denied</i> 79 Wn.2d 1008	25, 26
<i>Heggelund v. Norby</i> , 48 Wn.2d 259, 292 P.2d 1057 (1956).....	28
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	23
<i>Kirk v. WSU</i> , 109 Wn.2d 448, 746 P.2d 285 (1987).....	13
<i>Mina v. Boise Cascade Corp.</i> , 37 Wn. App. 445, 681 P.2d 880 (1984).....	16
<i>Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.</i> , 83 Wn. App. 432, 922 P.2d 126 (1996).....	20, 30
<i>Seth v. Department of Labor and Industries</i> , 21 Wn.2d 691, 152 P.2d 976 (1944).....	36
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984).....	12, 16, 21
<i>State v. McGraw</i> , 127 Wn.2d 281, 898 P.2d 838 (1995).....	18

<i>State v. Sullivan</i> , 69 Wn. App. 167, 847 P.2d 953 (1993).....	36, 37
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	38
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	13, 27
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	16
<i>Svehaug v. Donoghue</i> , 5 Wn. App. 817, 490 P.2d 1345 (1971).....	25
<i>Szupkay v. Cozzetti</i> , 37 Wn. App. 30, 678 P.2d 358 (1984).....	25
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183(1959).....	12, 16
<i>Todd v. Harr, Inc.</i> , 69 Wn.2d 166, 417 P.3d 945 (1966).....	28, 29
<i>Tuttle v. Allstate Ins. Co.</i> , 134 Wn. App. 120, 130 P.3d 1107 (2006).....	19

Statutes

Laws of 2003, ch. 337 § 1, p. 1917.....	18
RCW 5.40.050	19
RCW 46.61.645	14, 18
RCW 46.61.645(1).....	17, 19
RCW 46.61.655	14

Rules

CR 51 28

RAP 2.4(b) 37

RAP 2.5(a) 23, 38

SCLCR 51(b) 28

I. INTRODUCTION AND SUMMARY

This appeal arises from a jury verdict culminating five days of trial testimony and arguments by counsel in a case in which the plaintiff, Robert Osborn, crashed his dump truck and trailer into two stopped cars on I-5 in Everett, Washington. Those cars were stopped to allow debris to be removed from the roadway; their drivers/owners were sued by Mr. Osborn herein. The Snohomish County jury returned a valid verdict finding that neither the two named defendants (Washington State Department of Corrections and Larry Greene) nor a possible non-party at fault was negligent.

The inescapable conclusion from this verdict is that the Mr. Osborn was responsible for his own accident and injuries. Mr. Osborn appeals that verdict and seeks a new trial, essentially on the premise that, in order to rule as it did, the jury must have been confused. He further claims that jury confusion must have arisen from trial court error involving four rulings: two errors for giving jury instructions on “non-party at fault” and “following driver,” one error for refusing to give a limiting instruction on the “emergency doctrine,” and one error for admitting expert testimony. These errors, claims Mr. Osborn, must have so confused the jury that it found none of the potential defendants at fault.

This confusion argument is interesting because Mr. Osborn now claims that not only was the DOC employee negligent, but that Mr. Greene was negligent as well. However, in closing argument, his counsel instructed the jury to find no negligence on the part of Mr. Greene (or the potential non-party, who was the source of the roadway debris). In describing Mr. Greene's actions in stopping his vehicle on the freeway to permit the DOC employee to remove the debris blocking the roadway, Mr. Osborn's counsel twice told the jury, "I don't think he [Mr. Greene] did anything wrong" and instructed them, "I think we can put a zero by his fault." RP at 542, 552. The jury obliged him, and ruled that neither Mr. Greene nor the non-party had been negligent. However, it also ruled that the DOC employee's actions (which were assisted by Mr. Greene's admittedly non-negligent stop) were likewise not negligent, confounding Mr. Osborn and resulting in this appeal.

The trial court did not err in its rulings or instructions. The jury accepted the evidence and applied the law, then returned an entirely consistent and valid verdict. The only confusion is on Mr. Osborn's part. His claims of error should be denied, and the jury's verdict affirmed.

II. STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Statement Of Relevant Facts

This accident occurred on northbound Interstate 5 in Everett, Washington, at approximately 9:30 a.m. on the morning of April 12, 2004, when Robert Osborn crashed his dump truck and trailer into two vehicles which were stopped on and alongside the roadway as the result of debris blocking one lane. RP at 77. Prior to the collision, Michael Mathern, an employee of the State of Washington Department of Corrections, had been driving in the far right lane of northbound Interstate 5 when he noticed traffic ahead of him quickly veering left to avoid the debris in the roadway. RP at 78-79. Fearing that the debris posed a real threat of causing a serious accident, and based upon his own previous experience as a deputy sheriff and patrolman in other jurisdictions and his vision of the Department of Corrections' mission statement "to improve community safety," Mr. Mathern decided to remove the debris. RP at 123, 127-28, 143-45. He slowed and pulled off of the roadway, stopping his car adjacent to the beam guardrail, and waited for a break in the traffic. RP at 83-84, 92. Shortly thereafter, Larry Greene observed the same debris in the roadway and slowed to avoid it, then saw Mr. Mathern and stopped his vehicle in the right hand lane to permit Mr. Mathern to remove the debris.

RP at 165. The debris consisted of a detached tire tread or carcass approximately 12 feet long and 10 inches high, lying on its edge across most of the right lane. RP at 129-30. Both Mr. Mathern and Mr. Greene described the debris as making the lane impassable. RP at 129, 169-70.

Appellant Robert Osborn approached the location driving a large dump truck and trailer combination. RP at 349-50. Mr. Osborn testified that he had been following a box van, and that when the box van changed lanes and opened up his view, he saw the Greene vehicle stopped in the road ahead, but was unable to stop. RP at 317, 319-21. Mr. Mathern testified that he first saw the Osborn vehicle approaching at a distance of between 300 and 400 feet, with no intervening traffic. RP at 98-100, 138-39. Mr. Osborn failed to stop and collided with both the Greene and Mathern vehicles, suffering a wrist injury in the impact. RP at 321.

Mr. Osborn filed suit on July 7, 2005, alleging negligence on the part of Michael Mathern, individually and as an employee of the State Department of Corrections, and Larry Greene. CP at 209-13. Mr. Mathern was dismissed as an individual defendant just prior to trial, leaving as defendants only DOC and Mr. Greene.

B. The Expert Tangle

In the course of discovery, Robert Osborn gave sworn deposition testimony that he first saw the Greene vehicle stopped in the lane ahead of

him at a distance of 350-400 feet, and that he applied his brakes as “[s]oon as I saw it.” RP at 36, 274 [Osborn Dep., CP at ** pp. 109-110]. Mr. Osborn further explained that he had been following a box van that obscured his vision ahead until it changed lanes, opening up his view of the Greene vehicle. CP at 317-19. Mr. Osborn also testified that there were two additional vehicles in front of the box truck which changed lanes at essentially the same moment. CP at 317-19.

Mr. Osborn’s initial expert analysis performed by Charles Lewis involved a computer simulation in which Mr. Lewis disregarded the sworn testimony of Mr. Osborn that he was 350 to 400 feet away when he saw the Greene vehicle. Instead, Mr. Lewis substituted his own distance opinion and created a computer simulation showing that Mr. Osborn was much closer to the Greene vehicle when it became visible to him. On motion before Judge Richard J. Thorpe on December 23, 2008, Mr. Lewis’ opinion and computer simulation were excluded from trial; at the request of Osborn’s counsel, Judge Thorpe agreed to note in his order that it was “without prejudice to the Trial Court’s admission [of] other simulation in conformance with the testimony of Mr. Osborn and

Mr. Mathern (300-400 ft. away when box van cleared.)” CP at **; RP at 23-39.¹

All parties filed general motions in limine to exclude untimely disclosed evidence and speculative expert testimony, and those motions were granted. RP at 2-3, 10. Despite failing to disclose any additional simulation or conclusions until the morning of trial, and over the objections of defendants, Mr. Lewis was permitted to testify to new opinions to excuse Mr. Osborn’s failure to stop. RP at 236-43, 265-66, 269-70

At trial, defense expert testimony established that Mr. Osborn should have been able to stop his vehicle completely within 305 feet if he was travelling at the claimed 55 m.p.h. RP at 417. Plaintiff’s expert Lewis agreed with the 305 feet of total stopping distance, absent any other action before braking.² RP at 277.

With the benefit of all of the testimony and evidence, and the arguments of counsel, the Snohomish County jury found that neither DOC employee Mathern nor Mr. Greene had acted negligently. RP at 597-98. Furthermore, the jury also ruled that a potential non-party at fault, the

¹ Judge Thorpe’s order has been designated in the Supplemental Designation of Clerk’s papers. DOC’s brief will be re-submitted with the correct clerk’s paper reference once the Index has been received from the Snohomish County Clerk.

² Mr. Lewis posited that Mr. Osborn took several actions before braking that delayed his reaction time.

person(s) responsible for failing to remove the tire tread debris in the highway as required by State statute, was also not negligent. RP at 597-98. Absent fault on the part of any named or potential defendant, the only rational conclusion is that jury believed Mr. Osborn was responsible for his own accident.

C. Osborn's Appeal Finds Fault With Several Of The Courts Instructions And One Ruling On Admission Of Testimony

Mr. Osborn has now appealed that jury verdict, arguing that the finding of no negligence on the part of all potential defendants means the jury must have been confused, and seeks a new trial based upon four allegations of error:

1. Non Party At Fault Instruction

The trial court gave an instruction to the jury regarding a potential "non-party at fault" based upon the fact that debris was left lying on the highway and was not immediately removed as required by RCW 46.61.645 or 46.61.655.³ CP at 39, 45.⁴ Following closing arguments of counsel in which Osborn's counsel instructed the jury to find no fault on the part of a non-party, the jury complied; its verdict included a finding of no negligence on the part of the alleged non-party at fault. RP at 597-98. The court did not err in giving the instruction because

³ Both statutes are included in the appendix.

⁴ Court's Instructions Nos. 13 and 19 are included in the appendix.

substantial evidence supported it, and the jury demonstrated no confusion on this issue.

2. Following Driver Instruction

Osborn has also excepted to the court giving the “following driver” instruction. CP at 38.⁵ Mr. Osborn argues that because the Greene vehicle was stopped, the instruction was inappropriate. However, substantial evidence supported giving the instruction. Mr. Osborn testified that he was following a box van that obscured his vision such that he was unable to stop when that box van changed lanes and he first saw Mr. Greene stopped in front of him. Stoppages of traffic on Interstate 5 in Everett on a weekday morning are reasonably foreseeable traffic conditions as anticipated by the instruction; a following driver has a duty to keep such distance from the vehicle ahead that he is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions. Mr. Osborn’s own testimony, standing alone, created the following driver scenario. His own testimony was sufficient to establish that he failed to keep such distance behind the vehicle ahead of him that he could safely stop when confronted with a reasonably foreseeable traffic condition. Accordingly, the instruction was properly given, and jury demonstrated no confusion on this issue.

⁵ Court’s Instruction No. 12 is included in the appendix.

3. Emergency Doctrine Limiting Instruction

Mr. Osborn claims error by the trial court for its refusal to further encumber the “emergency doctrine” instruction with additional limiting language, suggesting that it permitted parties other than Mr. Osborn to claim the benefit of the sudden emergency doctrine. In fact, Mr. Osborn’s counsel explained in closing argument that only Mr. Osborn got the benefit of the emergency doctrine. RP at 589. No emergency doctrine arguments were made on behalf of the defendants, and counsel for DOC emphasized that Mr. Mathern’s decision to stop and remove the tire tread was the result of a cost benefit decision, albeit quickly performed, that public safety was better served by his removal of the debris rather than to leave it for a certain accident. RP at 575-76. The jury determined that Mr. Mathern’s decision, under the circumstances, was not negligent, but not based upon the emergency doctrine, which was not argued for either Mr. Mathern or Mr. Greene. There could was no confusion on this issue.

4. Testimony Of Timothy Moebes

Mr. Osborn complains that the court should not have allowed testimony of Timothy Moebes because of assumptions he made in the performance of his analysis. However, those assumptions did not factor into his ultimate analysis, and only served to corroborate Osborn’s factual testimony. Mr. Moebes accepted the sworn testimony of Mr. Osborn that

Mr. Osborn was 350 to 400 feet from the Greene vehicle when he first saw it, and made assumptions to determine whether Mr. Osborn's unsupported description of three vehicles in front of him was consistent with that testimony. RP at 408-10. Those assumptions simply involved lengths of the vehicles, following distances for those vehicles, and simple addition to confirm, as his analysis did, that Osborn's testimony that he could see the Greene vehicle from the distance 350 to 400 feet was plausible. RP at 407, 412-13. The assumptions Mr. Moebes used to validate Osborn's sworn testimony played no further part in his analysis, which in separate calculations confirmed that Mr. Osborn should have been able to stop his dump truck and trailer within 305 feet of observing the Greene vehicle. RP at 417. Those assumptions of which Osborn complains were merely a part of Moebes' effort to validate Osborn's factual testimony, and did not affect his ultimate conclusion that Osborn should have been able to stop his truck and trailer within the distance from which he observed the Greene vehicle. Appellant's brief also mischaracterizes those assumptions to argue that a one second following distance was "reasonable;" Mr. Moebes actually said was that one second gap on I-5 was a reasonable assumption, but less than ideal spacing. RP at 411. The trial court properly exercised its discretion in admitting Mr. Moebes' expert testimony, and Mr. Osborn made no objection at trial.

III. ARGUMENT

A. Osborn Has Misapplied The Standards Of Review Applicable To The Jury Instructions He Has Challenged

In his discussion of the standard of review applicable to jury instructions, Mr. Osborn is generally accurate in his description of the applicable law:

Generally, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447,453, 105 P.3d 378 (2005). However, jury instructions may sometimes be reviewed under an abuse of discretion standard. The standard for review of jury instructions depends on whether the assignment of error is based upon a matter of law or of fact. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *Id* Conversely, a trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id*.

Br. Appellant at 12-13.

But Mr. Osborn errs when he *applies* this general discussion of the standard of review to the instructions he has challenged in this case. He has challenged the giving of those instructions, not on the law contained therein, but upon the application of the instructions to the facts of this case. His initial, crucial error is in failing to note that DOC prevailed in

this case after a five day jury trial, and, consequently that this court, in examining disputed factual issues, and in determining whether substantial evidence⁶ supported offering particular instructions, this court must view all evidence in favor of DOC, the prevailing party.⁷ CP at 9-10. The posture of this case significantly affects the analysis this court applies to the various instructions that have been challenged. In instances where the trial court has resolved a dispute of fact in order to instruct the jury on a particular issue, an appellate court must uphold the instructions the trial court has given if the evidence upon which those instructions is based is competent and legally introduced. *See generally, Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 573, 343 P.2d 183(1959); *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984) (“Even where the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings.”).

The two instructions challenged by Mr. Osborn were based upon the resolution of factual disputes by the trial court. They must, therefore,

⁶ Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). If the standard is satisfied, an appellate court will not substitute its judgment for that of the trial court.

⁷ In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). In evaluating the persuasiveness of the evidence and the credibility of witnesses, an appellate court must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994)

according to his own description of the standard of review applicable to the appeal of jury instructions (Br. Appellant at 12-13), be reviewed under the abuse of discretion standard. Osborn errs in assuming his jury instruction arguments warrant de novo review.

If review of the trial court's refusal to give a limiting instruction on the emergency doctrine is afforded, it must be guided by the nature of the dispute, that is, the factual application of the emergency doctrine to the parties, not an error of law in the instructions themselves. The abuse of discretion standard should be applied. "A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." *State v. Walker*, 136 Wn.2d 767, 779, 966 P.2d 883 (1998) [upholding the trial court's refusal to give an instruction where, "the trial court's decision clearly rested upon the application of the proper legal standard to the specific facts of the case." *Id.*] The trial court's refusal to give a limiting instruction on the application of the emergency doctrine to the specific facts of this case should be reviewed only for abuse of discretion.

Relying upon *Kirk v. WSU*, 109 Wn.2d 448, 459, 746 P.2d 285 (1987), Mr. Osborn accurately argues that the abuse of discretion standard is appropriate in reviewing decisions regarding the admission or exclusion of expert testimony. Br. Appellant at 13.

Thus, as Mr. Osborn's own discussion of the standard of review demonstrates, de novo review is not appropriate for any one of the errors he has alleged.

B. The Court Did Not Abuse Its Discretion In Giving The Non-Party At Fault Instruction

1. The Appropriate Standard of Review For The Non-Party Instruction Is Abuse of Discretion⁸

Mr. Osborn argues that the trial court's decision to use the "non-party at fault instruction" was a ruling of law that may be reviewed by this court de novo. Br. Appellant at 14. He is incorrect.

Under RCW 46.61.645 (and RCW 46.61.655)⁹, a driver has a duty to immediately remove debris. The trial court in this case reviewed the evidence presented by DOC and Greene establishing that no attempt was made by any individual to remove the debris during the extensive events that took place after Mr. Osborn's accident. The discussion of the "non-party at fault" instruction was factual, not legal.¹⁰ RP at 495-96. The trial

⁸ As discussed in detail below, the trial court's use of this instruction was harmless error because the jury attributed no fault to the non-party. It is discussed here because Mr. Osborn's error in interpreting the standard of review applicable to the instructions he has challenged is illustrative of the overall error of the brief. The non-party instruction is included in the Appendix.

⁹ Copies of the statutes referred to in DOC's brief are included in the statutory appendix.

¹⁰ THE COURT: Do you think it's really accurate to say there is zero evidence?

MR. BEARB: Absolutely, Your Honor.

THE COURT: Well, consider this. The trooper indicated he responded within minutes. Your client indicated that he was on the

court viewed the decision to use the non-party instruction entirely as a question of fact. RP at 495-96. So did Osborn's counsel, who argued that there was "zero" factual evidence to support use of the instruction. RP at 495. All parties agreed that the question before them was whether there were sufficient admitted facts to support use of the instruction. RP at 495-96.

If this court were to assess the trial court's decision to use this instruction, it would be required to do so under the abuse of discretion

scene for at least 20 minutes. So there a little window there. If the trooper responded within minutes and the DOT said that they coordinate with the State Patrol, so even if their response time was hung up because of 10 auto accidents going out at the same time, they still would have been able to coordinate with the State Patrol by radio.

I think that Mr. Daheim is right. He indicated that he had no radio contact with regard to the debris. So the duty is one that immediate -- if the person was out there trying to do something, they didn't do it immediately. They didn't do it within 20 minutes. Pretty much from what I saw on the testimony, I doubt very seriously if anybody called immediately, it wouldn't have been heard by the State Patrol, at least heard by the State Patrol.

I mean, at this point, it is already a problem, if they had just dropped it and it popped off and he pulled off the next exit and made the call. That is at least minutes. My hunch is it is longer than that.

MR. BEARB: I didn't understand.

THE COURT: Emergency vehicles come, they are sitting on the scene, your client is sitting on the tongue, he gets into the emergency vehicle, he gets into an ambulance, and he said he was there at least 20 minutes. I say probably longer than that. The duty is immediate. That's not immediate.

I'm not quite sure what Mr. Watkins was talking about, but it is superseding intervening something --

MR. SPENCER: We will deal with that. Counsel knows we are going through these. What I did want to indicate, with those rulings, we now agree that this instruction, 20.01, Greene's proposed No. 11 is okay. The other language is acceptable given the ruling.

THE COURT: Okay. It is coming in. That was the 13th one we considered.

standard. Thus, it would weigh the evidence in the light most favorable to DOC, give great deference to the trial court's determination, and use the substantial evidence test in making its review. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). There are no circumstances under which this court would conduct de novo review of the trial court's decision to include the "non-party" instruction. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d at 573; *State v. Black*, 100 Wn.2d at 802. The non-party instruction allowed the defendants to argue an aspect of their case (RP at 573-74), but did not interfere with Mr. Osborn's ability to argue his case, specifically that all fault should be attributed to DOC (as Mr. Mathern's employer). RP at 539-43.

2. Substantial Evidence Supported Giving The Non-Party Instruction

An instruction is proper if there is substantial evidence upon which it can be predicated. *See Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 681 P.2d 880 (1984). Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Here, the uncontested evidence shows that the tire tread was left on the freeway and the owner did not remove it during the considerable period which elapsed between the time Mr. Mathern stopped

and the conclusion of the accident investigation. RP at 79 and 231. By statute, the owner of the tire tread had a responsibility to “immediately remove” it from the freeway. RCW 46.61.645(1). No one returned to remove the debris. RP at 495-96. No one contacted DOT to request that the debris be removed. RP at 495-96. No one contacted WSP to request that the debris be removed. RP at 495-96. The failure to immediately remove the debris constitutes a violation of RCW 46.61.645(1) by the tread owner, and as such is evidence of that person’s negligence.

On the basis of this substantial evidence, the trial court determined that this instruction should be used. RP at 495-96. The non-party driver had a statutory duty and substantial evidence demonstrated that he had failed to fulfill it. RP at 495-96. Thus, there was substantial evidence to support a theory of negligence against the non-party, and that issue was properly presented to the jury.

3. Osborn Inaccurately Characterizes The Statute And Jurisprudence In Attempting To Create An Issue Of Law

RCW 46.61.645(1) embodies an absolute duty to immediately remove debris, with no mention of intent or knowledge.¹¹ Mr. Osborn attempts to introduce additional language into the statutory duty by

¹¹ “Any person who drops, or permits to be dropped or thrown, upon any highway any material shall immediately remove the same or cause it to be removed.” RCW 46.61.645(1).

requiring the owner of the debris to have left the debris on the roadway intentionally. Br. Appellant at 13-18. Mr. Osborn himself recites the holdings which implore the court to assume the legislature means exactly what it says and to not construe unambiguous language. Br. Appellant at 17, citing *State v. McGraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). Yet, by asking this court to read a scienter requirement into the statute, Mr. Osborn asks the court to do what he says it cannot: read what is not there. Furthermore, reading such language into the statute is not consistent with the legislative intent of the statute. In enacting the current RCW 46.61.645, the legislature found:

...that the littering of potentially dangerous products poses a greater danger to the public safety than other classes of litter.... As such, the legislature finds that a higher penalty should be imposed on those who improperly dispose of potentially dangerous products, such as is imposed on those who improperly dispose of tobacco products.

See Laws of 2003, ch. 337 § 1, p. 1917.

At no point, either in statute intent or express language, does the legislature require that there be an intent element to this statute. Rather, the focus is on eliminating the hazard to protect the public. If Mr. Osborn's reading of the statute is correct, a citizen transporting an unsecured load of debris has no motivation to either secure the load or ensure no part of the load falls off the vehicle while in transport. If

challenged, that driver could simply say that he did not know the debris had fallen off the vehicle. Therefore, there is a greater potential for debris to be left on the roadway and a greater risk of danger to the public. Clearly, that is not what the legislature intended. By eliminating the “I did not know defense,” the driver in the example above would be more inclined to initially secure the load and actively work to prevent debris from being deposited on the roadway.

Mr. Osborn also argues that the decision by Division II in *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 130 P.3d 1107 (2006), conclusively determines that leaving tire debris in the roadway is not negligence. Br. Appellant at 14-15. However, *Tuttle* is not helpful in that it did not address the duty created under RCW 46.61.645(1) when depositing debris on the freeway. The *Tuttle* court was focused on a contractual issue involving underinsured motorist coverage, and did not address the relevant issue here: the duty to remove debris once it is deposited on the roadway. Since RCW 46.61.645(1) creates a clear duty to remove such debris, the failure to do so is a violation of the statute. That violation constitutes substantial evidence of negligence. RCW 5.40.050.

4. The Jury Verdict Rendered Any Error Harmless

Lost in Mr. Osborn’s argument is the jury’s decision to assign no negligence to the non-party or the two named defendants. CP at 21. Since

the jury found no negligence on the part of the non-party, it was as if the non-party was not on the verdict form and the non-party instruction had not been given. The jury thus eliminated the non-party issue.

The giving of an instruction is harmless error if the outcome of the case would not have been different if the instruction had been not given. *See Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.*, 83 Wn. App. 432, 922 P.2d 126 (1996). Here, since the jury essentially eliminated the non-party from the verdict form, it cannot be shown that the outcome of the case would have been any different had the non-party initially been excluded from the verdict form. The outcome would have been the same; the jury could not have found negligence on the part of the non-party. Therefore, giving the non-party instruction and inclusion of the non-party on the verdict form was, at most, harmless error.

C. The Court Did Not Abuse Its Discretion In Giving The Following Driver Instruction

1. Osborn Failed to Preserve His Argument On The Following Driver Instruction For Review By This Court¹²

Mr. Osborn argues that the trial court erred as a matter of law because substantial evidence did not support the trial court's decision to include the following driver instruction. Once again he errs in assuming

¹² This challenged instruction is also included in the Appendix.

he is entitled to de novo review and errs in applying the substantial evidence standard. As the prevailing party, DOC is entitled to have the evidence supporting use of this instruction viewed in the light most favorable to DOC. *Bland v. Mentor*, 63 Wn.2d at 155; *State v. Black*, 100 Wn.2d at 802. In practice, this means that the trial court's determination that the instruction was supported by Mr. Osborn's testimony that he was following a box truck shortly before the accident and that he saw the Greene's and Mathern's stopped vehicles only after the box truck moved into the left lane is entitled to deference by this court. RP at 485.

The factual argument for using the "following driver" instruction—which was key to defendants' theory of the case—was made by Mr. Greene's counsel:

MR. SPENCER: Your Honor, the issue – the case cited by counsel doesn't apply. The issue with the following too close has nothing to do with the Greene vehicle. We understand that Mr. Osborn was not following the Greene vehicle. So that's not the purpose of this instruction. Mr. Osborn was following a panel truck or van, however it's been described.

The testimony from Mr. Moebes is that given due regard for traffic speeds, conditions, and your inability to see around that vehicle is the reason this accident occurred. If you had left yourself a sufficient safe margin given the circumstances, he should have been able to stop in the distance that was available.

The conclusion from that is that he was following too close so that when these vehicles got out of his way, he didn't have sufficient time then to react to this "emergent situation." That's the theory of the defendants and that has always been our theory. That is why this instruction is appropriate.

RP at 481-85. At no time during the trial did Osborn argue there was insufficient evidence to support use of the "following driver" instruction. Rather, his primary concern, as his closing argument makes clear, was factual—he feared that the jury would apply the "following driver" instruction to the Greene and Mathern vehicles:

Now, I want you to go to the -- there is a following driver instruction. I'm not sure. Oh, it's No. 12. Now, I need you to read this pretty closely because I don't want you to be confused. When one vehicle is following another, in the second paragraph, when one vehicle is following another vehicle, that means when Mr. Osborn is following the box van, when it says vehicle that he is following, it's the box van. So we have the slow lane. Here is the shoulder. We've got Mr. Osborn following the box van. It is saying is that distance too close? There is no evidence that it's ever too close. This is what this statute has to do with. It says it may be considered evidence of negligence if the following vehicle collides with the vehicle ahead. That didn't happen in this case. Don't be confused. It's not the Greene car or the Mathern car this has reference to. Read it. You will find this.

RP at 548-49.

Thus, the argument which Mr. Osborn makes here—that the trial court's decision to use the pattern following driving instruction was not supported by substantial evidence—was not made at trial and has not been

preserved for review by this court. RAP 2.5(a); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (“An issue, theory or argument not presented at trial will not be considered on appeal.”)

2. But, If This Court Were To Review Osborn’s Claim, The Appropriate Standard of Review For The Trial Court’s Decision To Use Following Driver Instruction Is Abuse Of Discretion

Assuming for the purposes of argument that Osborn’s objection at trial was sufficient to preserve his objection, there is no evidence that Osborn’s concern at trial was warranted, that is, there is no evidence that the jury erred in its application of the instruction. When the facts of this case are considered in the light most favorable to DOC, the evidence supporting the trial court’s decision to give this instruction was substantial. Mr. Osborn cannot establish that the trial court erred as a matter of law. If this court determines this issue has been preserved for appellate review, abuse of discretion is the proper standard of review for this jury instruction.

3. Substantial Evidence Supported The Following Driver Instruction

Mr. Osborn argues that the trial court erred, as a matter of law, by giving the “following driver” instruction. Br. Appellant at 19-20. However, the following driver scenario was an issue of fact introduced by Mr. Osborn, and only Mr. Osborn. He introduced it as an issue of fact

when he defended his failure to stop by claiming that he was following a box van that obscured his vision until it changed lanes, and he was then unable to stop. Mr. Osborn's counsel emphasized to the jury in closing argument that Mr. Osborn was following the box van:

We've got Mr. Osborn following the box van. It is saying that distance too close? There is no evidence that it's ever too close. This is what this statute has to do with. It says it may be considered evidence of negligence if the following vehicle collides with the vehicle ahead. That didn't happen in this case. Don't be confused. It's not the Greene car or the Mathern car this has reference to.

RP at 549.

Mr. Osborn now argues that the following driver instruction is inapplicable to a car stopped in the highway ahead. This misses the point. The argument has not been made that Mr. Osborn was following Mr. Greene too closely; Mr. Osborn himself said that he was following a box van which obscured his vision until it changed lanes, and he was then unable to avoid the traffic which was stopped in the lane ahead of him. Quite simply, he was following that box van too closely to react to a reasonably foreseeable traffic condition ahead.

4. The Following Driver Instruction Is Applicable When A Driver Collides With A Vehicle As The Result Of Following Another Vehicle Too Closely

Mr. Osborn argues two cases for the proposition that the following driver instruction is not appropriate in a situation in which a following

driver strikes a stationary vehicle, both of which suggest that the driver was never truly “following” the stopped vehicle. Br. Appellant at 19. However, both of those cases, *Szupkay v. Cozzetti*, 37 Wn. App. 30, 678 P.2d 358 (1984) and *Svehaug v. Donoghue*, 5 Wn. App. 817, 490 P.2d 1345 (1971), involved collisions between a moving vehicle and a stopped vehicle with no intervening traffic. RP at 481-83. That is not the case here. Mr. Osborn testified that he was following a box van which obscured his vision and that when it cleared, he collided with the stopped vehicle in the lane ahead of him. The *Svehaug* decision is instructive on this scenario,

However, the following driver is not necessarily excused even in the event of an emergency, for it is his duty to keep such distance from the car ahead and maintain such observation of that car that he can make such emergency stop as may be required by reasonably foreseeable traffic conditions.

5 Wn. App. At 818. Mr. Osborn failed to stop for a reasonably foreseeable traffic condition on I-5 in Everett: automobiles stopped ahead of him.

The facts as claimed by Mr. Osborn are virtually identical to those found in *Greenwalt v. Lane*, 4 Wn. App. 894, 484 P.2d 939 (1971), *review denied* 79 Wn.2d 1008, in which the at fault driver claimed to have been following a van truck, and when he changed lanes to pass the van truck,

thus clearing his vision, he collided with the plaintiff's previously unseen, slow moving vehicle which was making a left turn at an intersection ahead. Given that scenario, the *Greenwalt* Court approved the giving of the instruction:

Having determined there was evidence from which the jury could find defendants' car was following the van truck at the time plaintiffs' driver started his turn, it was not error to give an instruction on the duty of the driver of a following car.

4 Wn. App. at 899.

This scenario is exactly the same as claimed by Mr. Osborn: he testified he was following a box van and when it cleared his vision he hit a stopped vehicle in the lane ahead of him. There was adequate evidence, from Mr. Osborn himself, from which the jury could find that Mr. Osborn was following the box van, and the jury was entitled to be instructed about the duties of a driver of a following vehicle in this circumstance.

D. The Trial Court Did Not Abuse Its Discretion In Refusing To Give A Limiting Instruction On The Emergency Doctrine

1. The Appropriate Standard of Review For A Limiting Instruction¹³ Is Abuse Of Discretion

¹³ The emergency instruction that was used by the court is included in the Appendix as is the supplemental instruction defining "emergency" denied by the court. CP at 38, 62. No limiting instruction is included in the Appendix because none was proposed.

Mr. Osborn argues that the trial court erred as a matter of law in failing to give a limiting instruction to the jury regarding the emergency doctrine. In the present case, as is discussed in detail below, Mr. Osborn failed to offer a limiting instruction and, consequently, is not entitled to review under either a de novo or an abuse of discretion standard. *See Caruso v. Local 690*, 33 Wn. App. 201, 653 P.2d 638 (1982); RP at 527. However, if review of the trial court's refusal to give a limiting instruction is afforded, it must be measured by the abuse of discretion standard because the issue involves the trial court's decision on the factual application of the emergency doctrine to the parties, not an error of law in the instructions themselves. *State v. Walker*, 136 Wn.2d at 771-72.

2. Osborn Failed To Properly Propose Any Limiting Instruction

Mr. Osborn assigns error in the trial court's failure to give a limiting instruction to the jury regarding the "emergency doctrine" instruction. Br. Appellant at 3. He asserts that the court should have instructed the jury that the emergency doctrine was not applicable to respondent DOC. *Id.* at 20-22. However, Mr. Osborn failed to provide a limiting instruction in writing and failed to except to the instruction given. More importantly, Osborn specifically presented his limiting language to the jury during closing argument and the respondent did not argue that it

was entitled to the benefit of the emergency doctrine instruction. RP at 589.

Jury instructions must be proposed in writing. *See Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.3d 945 (1966); CR 51; SCLCR 51(b). The failure to give an oral instruction is not error. *See Todd*, 69 Wn.2d 166; *Heggelund v. Norby*, 48 Wn.2d 259, 292 P.2d 1057 (1956). Furthermore, the failure to except to a court's decision on an instruction precludes consideration of the issue on appeal. *See Caruso v. Local 690, supra*.

Here Osborn proposed two written instructions regarding the emergency doctrine. CP at 76 and 62. Neither written instruction limited the use of the instruction to Osborn only. Rather, moments before closing argument, Mr. Osborn's counsel orally requested that the instruction be limited to Mr. Osborn only. RP at 527. That oral request came while arguing whether a proposed supplemental emergency doctrine instruction should be given. *Id.* The trial court properly declined to give the supplemental instruction, and when excepting to the court's instructions, Osborn did not make any mention of the limiting instruction. Thus, Osborn did not except to the Court's refusal to give a limiting instruction. More importantly, since Osborn failed to provide the limiting instruction in writing, he was not entitled to the instruction. *See Todd*, 69 Wn.2d 166.

3. A Limiting Instruction Was Neither Necessary Nor Appropriate

Even if Osborn had properly preserved the limiting instruction issue for appeal, the instruction was not necessary. The failure to give an instruction is harmless error if the outcome of the case would not have been different if the instruction had been given. *See Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.*, 83 Wn. App. 432, 922 P.2d 126 (1996). Counsel for DOC did not invoke the use of the emergency doctrine. RP at 566-87. In fact, counsel for DOC only used the word "emergency" three times in closing argument and each was in reference to why the "emergency" confronted by Osborn was reasonably foreseeable. RP at 579 and 587. Counsel for DOC emphasized that Mr. Mathern's decision to stop and remove the tire tread was the result of a cost benefit decision, albeit quickly performed, that public safety was better served by his removal of the debris rather than to leave it for a certain accident. RP at 575-76. More importantly, counsel for Mr. Osborn specifically limited the use of the emergency doctrine in his closing argument:

...well, Mr. Mathern and Mr. Greene don't get the benefit of the emergency instruction. Only one person in this case gets the benefit of that, and that is Mr. Osborn.

RP at 589.

Therefore, the DOC did not invoke the use of the doctrine as feared by Osborn and Osborn specifically argued the limitation to the jury. Thus, a limiting instruction was not needed and there is no evidence to show that the outcome of the case would have changed had the limiting instruction been given.

E. The Court Did Not Abuse Its Discretion In Admitting Expert Testimony

Osborn's final assignment of error is based upon the admission of expert testimony, which all parties agree is reviewable only for abuse of discretion. Mr. Osborn claims that the trial court abused its discretion by failing to exclude testimony of expert Timothy Moebes, which Mr. Osborn erroneously argues was based upon speculation in violation of motions in limine. Mr. Osborn is simply wrong about the testimony, and he failed to preserve any challenge by failing to timely object.

1. Moebes Based His Opinions On Eyewitness Testimony, Not Speculation, And Did Not Violate The Motion In Limine

Mr. Moebes testified that he performed a two-part analysis, first attempting to corroborate the eye-witness testimony that Mr. Osborn was 350-400 feet away from the Greene when he first saw the stopped vehicle, then separately calculating the total stopping distance for Mr. Osborn's vehicle. RP at 408-10. His conclusions and opinions were based upon

factual comparison of the eyewitness testimony and his mathematical calculations of stopping distance. RP at 412-13.

In describing the first part of his analysis, Mr. Moebes testified as follows:

We had a couple comparisons of the gap that Mr. Osborn had in front of him. Mr. Mathern was indicating 300-400 feet or even 500. Mr. Osborn was indicating 350 to 400. That was one additional fact I didn't mention. He indicated that after those three vehicles had split off of his lane, he saw the Greene vehicle, and he estimated it was about 350 to 400 feet away.

I wanted to see if there was any way I could reinforce that estimate, have a greater confidence in that estimate, so I looked at the typical spacing of vehicles to see approximately how far Mr. Osborn would be away if the stated testimony was accurate...

It would be only as good as the assumptions I made, but it would give me kind of an ordered magnitude number that would be kind of an independent assessment of how far away Mr. Osborn was at the time he could see Mr. Greene.

RP at 408-10.

Making assumptions about the spacing of the three vehicles which Mr. Osborn testified he was following, and the size of those vehicles (there being no testimony about either value except Mr. Osborn's deposition testimony that he was 75-100 feet behind the box van, which was accepted by Mr. Moebes, RP at 407), then adding up those distances,

Mr. Moebes felt that he had some corroboration of the distance estimates testified to by Mr. Osborn and Mr. Mathern:

So when you add this up, you get four times 81, which is 324 feet, plus 60 feet, and that is 384 feet, which makes me think that the estimates of 300 to 400 feet, 350 to 400 feet might have some merit. It reinforces that estimate. People aren't always best at estimating distance. So this kind of gives me some reassurance the numbers might not be off by a factor of 10 or something.

RP at 412-13.

Mr. Moebes testified that, having thus confirmed the eye-witnesses estimates of the distance at which Mr. Osborn first saw the Greene vehicle with this portion of his analysis, he used the witness estimates and went on to the second part of his analysis. Here, he determined the distance a truck like that driven by Mr. Osborn would need to stop from 55 miles per hour. RP at 413. He calculated a total stopping distance of 305 feet. RP at 417. His ultimate conclusion, based upon the deposition testimony and his analysis, was as follows:

So it's probably less than that. I have tried to err on the long side. You know, 85 percent of drivers would be able to respond to 300 feet. So if it is 300 to 400 feet or 350 to 400 feet of available distance, the vehicle ought to have been stopped.

RP at 417.

Mr. Moebes was asked to address Mr. Osborn's trial testimony which changed his deposition testimony to lengthen the distance at which

he was following the box van. He confirmed that it would only increase Mr. Osborn's available stopping distance, and would not change his analysis or conclusions. RP at 418-19.

I concluded basically two things. One is that if we really accept the testimony on its face value, he ought to have been able to stop. Really, I guess, the key conclusion is that no matter what the circumstance, Mr. Osborn did not leave himself adequate distance to be able to bring his vehicle to rest given his response and his level of attentiveness in this circumstance. He did not leave enough room and he drove into stopped traffic on a highway.

RP at 419-20.

Clearly, Mr. Moebes testimony was based upon two critical items, the factual testimony regarding the stopping distance available to Mr. Osborn and the total stopping distance required for the vehicle Mr. Osborn was driving. His opinions were based upon the facts in evidence and his scientific analysis. The limited assumptions Mr. Moebes made in the first part of his analysis simply helped corroborate the accuracy of the witness' testimony, and were not the bases for his opinions and conclusions. The Trial Court clearly understood that his testimony did not violate any motion in limine, and did not err in permitting that testimony to go to the jury.

2. Osborn Failed To Object To The Testimony And Thus Waived Any Objection

Mr. Osborn's counsel made no objection to any of the testimony which he now complains was based upon speculative assumptions by Mr. Moebes delivered in violation of a motion in limine. In fact, far from feeling prejudiced by the fact that the jury heard that testimony, Mr. Osborn's counsel conducted a lengthy cross examination, repeatedly questioning and emphasizing the assumptions that he now criticizes and argues should not have been presented to the jury. The generally worded motions in limine were not directed to this testimony, and until the need for an appeal issue arose, Mr. Osborn never considered that testimony improper.

Washington courts have made it abundantly clear that objections to the admission of testimony not be considered on appeal if no timely objection was made in the trial court.

We have held in many cases that an objection to the admission of testimony will not be considered by this court on appeal if it is not timely made in the trial court. [citations omitted] The reason for the rule is that the party offering the evidence should be given an opportunity to obviate the objection or waive the testimony if he is unwilling to take the risk of error, and so that the trial court may be given an opportunity to consider the question sought to be raised and rule on it before the case is submitted to the jury.

Seth v. Department of Labor and Industries, 21 Wn.2d 691,693, 152 P.2d 976 (1944).

The obligation to object and give the trial court the opportunity to address the issue is not obviated by the prior granting of a motion in limine; orders in limine are not self-executing. Divisions 1 and 2 have taken identical stands on this issue. In *State v. Sullivan*, 69 Wn. App. 167, 847 P.2d 953 (1993), the Court instructed as follows:

The issue here is whether the State violated the order in limine, and if so, what remedy is called for. The issue of the violation, and of what remedy should be applied, was not brought to the trial court's attention by the original motion in limine. When granting an order in limine to exclude evidence, the trial court considers whether the contested evidence should be admitted. However, it generally does not consider whether erroneous admission of the contested evidence will be prejudicial or harmless, or what remedy should be applied to rectify the erroneous admission of the evidence. These matters are considered when a violation is called to the trial court's attention. The trial court has no duty to remedy a violation *sua sponte*.

It is appropriate then that, where the evidence has been admitted notwithstanding the trial court's prior exclusionary ruling, the complaining party be required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

We, therefore, hold that in the absence of any unusual circumstances that makes it impossible to avoid the prejudicial impact of evidence that had previously been

ruled inadmissible, the complaining party at the time must make a proper objection in order to preserve the issue for appeal. By Sullivan's failure to object, he has waived review of the trial court's action or lack thereof on the violation of the order in limine.

69 Wn. App. At 171-73 (emphasis added).

Similarly, Division I recently ruled in *Cooper v. Bellingham School District*, 125 Wn. App. 511, 105 P.3d 400 (2005):

In a situation where a party prevails on a motion in limine and thereafter suspects a violation of that ruling, the party has a duty to bring the violation to the attention of the court and allow the court to decide what remedy, if any, to direct.

125 Wn. App. At 525. Then, citing the potential for abuse identified by the *Sullivan* court, this Division went on to rule,

Second, A.C.'s failure to object to the quoted language is precisely the situation contemplated in *Sullivan* and illustrates the point of the rule. The failure to object deprived the court of the opportunity to take corrective action at the time of the improper remark. We will not sanction a failure to make a timely objection under these circumstances for it would encourage the type of abuse that the court envisioned in that case. In short, the failure to object to the clear violation of the order in limine is fatal to the claim she now makes on appeal.

125 Wn. App. at 526 (emphasis added).

Mr. Osborn was obligated to object if he felt the expert testimony violated the order in limine, and his failure to do so waived his right to review of that issue. RAP 2.4(b).

F. Osborn Was Not Prejudiced By Any of the Trial Court Errors He Alleges and, Consequently, the Jury's Verdict Must Be Affirmed

Mr. Osborn argues that where a jury instruction errs as a matter of law, prejudice is presumed. But none of the instructions for which he has requested review contains an error of law. Insofar as Mr. Osborn is entitled to review of the “non-party at fault” instruction, the “following driver” instruction and the admission of expert testimony, he is entitled to review under the abuse of discretion standard. Under that standard, he is incapable of demonstrating either abuse of the Trial Court’s discretion or that he was prejudiced.¹⁴ He has no basis for requesting review of a limiting instruction on the emergency doctrine, since the instruction was never proposed, and he waived review of the admission of expert testimony by failing to preserve the issue through objection. RAP 2.5(a); *Herberg v. Swartz*, 89 Wn.2d at 925.

The jury instructions in this case properly informed the jury of the applicable law, were not misleading, and permitted each party to argue its theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Mr. Osborn was fully able to argue his case. RP at 534-54;

¹⁴ The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion. *See generally, State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 492 P.2d 775 (1971).

587-93. The trial court's instructions were not prejudicial and should be affirmed by this court.

IV. CONCLUSION

DOC respectfully requests that this court affirm the jury's verdict in this case.

RESPECTFULLY SUBMITTED this 9 day of September, 2009.

ROBERT M. MCKENNA
Attorney General



RICHARD A. FRASER, III, WSBA #31577
MATT DAHEIM, WSBA #30555
Assistant Attorneys General
Attorneys for Respondent State of Washington
Department of Corrections

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Brief of Respondent State of Washington Department of Corrections were filed by First Class U.S. Mail at the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And that one copy was served by First Class U.S. Mail on counsel for Appellant Osborn and counsel for Respondent Greene at the following addresses:

MICHAEL WATKINS
TIMOTHY BEARB
JOEL HANSON
LAW OFFICES OF
MICHAEL T WATKINS
1100 DEXTER AVE N
SEATTLE WA 98109-
3598

WILLIAM SPENCER
MURRAY DUNHAM &
MURRAY
PO BOX 9844
SEATTLE WA 98109-0844

DATED this 9th day of September, 2009 at Seattle,
Washington.


MICHELLE TEMPLE

JURY INSTRUCTIONS APPENDIX

No. 12

A statute provides that a driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the street or highway.

When one vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the driver of the following vehicle. It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, in the absence of an emergency. The driver of the following vehicle is not necessarily excused even in the event of an emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions.

No. 13

A statute provides that any person who drops any material upon any highway shall immediately remove the same or cause it to be removed.

No. 19

1. Plaintiff claims that Michael Mathern, an employee of the State of Washington, Department of Corrections, was negligent in parking his vehicle on the shoulder of the freeway and attempting to remove tire debris from the freeway. Plaintiff claims that Defendant Larry Green was negligent in stopping his vehicle on the freeway.

Plaintiff claims that Defendants' conduct was the proximate cause of injuries and damage to Plaintiff. Defendants deny these claims.

2. In addition, Defendants claim as an affirmative defense that Plaintiff was contributorily negligent in following too close and failing to keep a proper look out. Defendants claim that Plaintiff's conduct was a proximate cause of Plaintiff's own injuries and damage. Plaintiff denies these claims.

3. In addition, Defendants claim that a non-party entity was negligent in leaving tire debris on the freeway and that such conduct was a proximate cause of Plaintiff's injuries and damage. Plaintiff denies these claims.

4. Defendants further deny the nature and extent of the claimed injuries and damage to Plaintiff.

INSTRUCTION NO. __

An emergency requires a person to make an immediate or instinctive choice between alternative courses of action without time for reflection.

Kappelman v. Lutz, 141 Wn. App. 580 (2007)

PLAINTIFF'S REQUESTED INSTRUCTION NO. 30

STATUTORY APPENDIX

RCW 5.40.050

Breach of duty -- Evidence of negligence -- Negligence per se.

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.

[2001 c 194 § 5; 1986 c 305 § 901.]

NOTES:

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

RCW 46.61.645

Throwing materials on highway prohibited -- Removal.

(1) Any person who drops, or permits to be dropped or thrown, upon any highway any material shall immediately remove the same or cause it to be removed.

(2) Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle.

[2003 c 337 § 5; 1965 ex.s. c 155 § 77.]

NOTES:

Rules of court: Monetary penalty schedule -- IRLJ 6.2.

Findings -- 2003 c 337: See note following RCW 70.93.060.

Lighted material, disposal of: RCW 76.04.455.

Littering: Chapter 70.93 RCW.

RCW 46.61.655

Dropping load, other materials -- Covering.

(1) No vehicle shall be driven or moved on any public highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction.

(2) No person may operate on any public highway any vehicle with any load unless the load and such covering as required thereon by subsection (3) of this section is securely fastened to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway.

(3) Any vehicle operating on a paved public highway with a load of dirt, sand, or gravel susceptible to being dropped, spilled, leaked, or otherwise escaping therefrom shall be covered so as to prevent spillage. Covering of such loads is not required if six inches of freeboard is maintained within the bed.

(4)(a) Any person operating a vehicle from which any glass or objects have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon such public highway shall immediately cause the public highway to be cleaned of all such glass or objects and shall pay any costs therefor.

(b) Any vehicle with deposits of mud, rocks, or other debris on the vehicle's body, fenders, frame, undercarriage, wheels, or tires shall be cleaned of such material before the operation of the vehicle on a paved public highway.

(5) The state patrol may make necessary rules to carry into effect the provisions of this section, applying such provisions to specific conditions and loads and prescribing means, methods, and practices to effectuate such provisions.

(6) Nothing in this section may be construed to prohibit a public maintenance vehicle from dropping sand on a highway to enhance traction, or sprinkling water or other substances to clean or maintain a highway.

(7)(a)(i) A person is guilty of failure to secure a load in the first degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section and causes substantial bodily harm to another.

(ii) Failure to secure a load in the first degree is a gross misdemeanor.

(b)(i) A person is guilty of failure to secure a load in the second degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1) or (2) of this section and causes damage to property of another.

(ii) Failure to secure a load in the second degree is a misdemeanor.

(c) A person who fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section is guilty of an infraction if such failure does not amount to a violation of (a) or (b) of this subsection.

NOTES:

Rules of court: Monetary penalty schedule -- IRI J 6.2.

Severability -- 1990 c 250: See note following RCW 46.16.301.

Severability -- 1971 ex.s. c 307: See RCW 70.93.900.

Littering: Chapter 70.93 RCW.

Transporting waste to landfills: RCW 70.93.097.