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NO. 66334-8-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KOTI HU,

Respondent,

vs.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of  
the STATE OF WASHINGTON,

Appellant,

vs.

INTRASTATE PAINTING CORPORATION, a Washington corporation; and  
MICHAEL F. SAVO,

Defendants.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Steven C. Gonzalez, Judge

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REPLY BRIEF OF APPELLANT

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## I. ARGUMENT

### A. THERE WAS NO EVIDENCE OF PROXIMATE CAUSE.

WSDOT is entitled to judgment as a matter of law because there is no substantial evidence the collision was caused by defective or inadequate on-ramp design. Proof of proximate cause “must be upon evidence, not speculation or conjecture, nor may it be by inference piled upon inference.” *Wilson v. Northern Pac. Ry. Co.*, 44 Wn.2d 122, 130, 265 P.2d 815 (1954). Even if plaintiff showed WSDOT’s negligence “might have”, “could have”, or “possibly did” cause his injuries, more was required. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001); *Xieng v. Peoples Nat’l Bank*, 63 Wn. App. 572, 582, 821 P.2d 520 (1991), *aff’d*, 120 Wn.2d 512, 844 P.2d 389 (1993).

Plaintiff’s own expert admitted the truck driver, respondent Savo, would have had time to stop had he been paying attention. (RP 965) Further, the parties agree Savo did not see what he had to see to avoid the accident. The question is *why*. Respondents offer only speculation.

In contrast, WSDOT is the only party that produced eyewitnesses who actually saw what Savo was doing before the accident—Mr. and Mrs. Wetsch saw him looking to his left and not paying attention to plaintiff’s car in front of him. (RP 1262-63, 1298) As will be discussed, neither Savo’s nor Mr. Wetsch’s testimony, read in context, was to the contrary.

**1. Savo Was Speculating.**

Savo failed to appear at trial. (RP 76-77) Respondents point to his deposition where he purported to blame not seeing plaintiff's car on the overpass shadow. Savo was speculating. A verdict based on speculation cannot stand. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

Savo testified he wondered how the accident had happened and could not recall seeing plaintiff's car *before* it went into the shadow:

Q. Do you recall whether there were any cars in front of you as you headed toward the intersection where the signal was before you made the right-hand turn onto the onramp?

A. I recall backtracking from the accident, *wondering how it was that I hit him, . . . saying to myself I don't remember seeing a car anywhere when I turned that right-hand turn off of 70<sup>th</sup> heading south, going onto that onramp.*

Q. So you don't recall any traffic in front of you during the whole sequence?

A. I don't. Right, correct.

(CP 4053-54) No one claims Savo's failure to see plaintiff's car before it stopped was WSDOT's fault.

Savo then testified—again—about wondering how the accident had happened (CP 4062):

Q. After the accident, did you ever go back to the scene with the purpose of trying to figure out what happened?

- A. . . . I do remember coming back onto that, looking and wondering, just, you know—
- Q. So if you're on your regular driving, if you came upon that, you would think back and wonder what happened?
- A. I mean, I remember driving on the onramp and just kind of looking around, **wondering just how that could have happened**. I just, you know, **at the end of the day, looking back on it, just how did all those circumstances come about to this outcome?** You know, I remember many times driving on 405 and looking away from that area, and trying not to think.

It was only at the very end of the deposition that Savo testified:

I would just say that I'm shocked that I hit him, and if you walk that back—I'm shocked I didn't see him, I'm shocked I didn't see the sign, whatever all those things are, ***I can blame that on the sun being in the windshield, you know, there's a million things. I still cannot ever come to a conclusion in my mind how I did not see his car. And I blame a lot of it on the sun, and just the glare, his car being hidden under the shadow, his gray car. But I consider myself a pretty good driver, I don't get in wrecks, you know, and—and it just—it just blows me away that I hit him, I didn't see him.***

(CP 4068-69) (emphases added). No reasonable person reading this testimony could believe Savo had any idea why the accident occurred. He was just guessing. Guessing cannot support a verdict.

Even if Savo had not been speculating, a jury may not speculate on two proximate cause theories, under one of which defendant would be liable and under the other would be absolved. *Sanchez v. Haddix*, 95

Wn.2d 593, 599, 627 P.2d 1312 (1981). The logical corollary is that where plaintiff has the burden to prove certain facts, but “his testimony, or that of his witnesses, on the question is so contradictory as to present to the jury no basis for a finding except a mere conjecture”, a verdict cannot stand. *Musleva v. Patton Clay Mfg. Co.*, 338 Pa. 249, 12 A.2d 554, 557 (1940); *Lemak v. City of Pittsburgh*, 147 Pa. Super. 62, 23 A.2d 354, 356 (1941); *accord Goater v. Klotz*, 279 Pa. 392, 124 A. 83, 84 (1924).

Here, plaintiff had the burden of proving proximate cause. Savo’s testimony as to whether he knew why the accident had occurred was so contradictory the jury could only speculate. The verdict cannot stand. *See Nelson v. Columbia Clinic, Inc.*, 1 Wn.2d 558, 562, 96 P.2d 575 (1939).

Moreover, Savo’s claim he failed to see plaintiff’s car because of the shadow and testimony by the trooper and experts that the shadow could reduce visibility, are speculative as contrary to physical facts. When a verdict is contrary to physical facts, it cannot stand. *See Hartnett v. Standard Furniture Co.*, 162 Wash. 655, 656, 299 P. 408 (1931).

The day of the accident was very sunny. Plaintiff’s car in the shadow would have nonetheless been silhouetted against the sunlight on I-405 past the overpass. As a result, as visibility expert James Harris testified, his car would have been highly visible. (CP 4054; RP 1565,1568)

In fact, photos of a car like plaintiff's parked at the stop line when the sun was in a position similar to at the time of the accident verify Mr. Harris' testimony. These photos were taken from a truck like Savo's with a camera mounted at eye level facing straight ahead. (Exs. 275, 284; RP 1490-95, 1497-98, 1520-22, 1525-26, 1531-35, 1539-42) As Exs. 275 and 284 show, the shadow would have obscured *details* of plaintiff's car (*e.g.*, color, trim, license plate). But the car's *shape and bulk* would have been at least as, if not more, visible than had there been no shadow. The exhibits show the car could be seen even *before* Savo came out of the curve. Savo did not see plaintiff's car because he was not looking.

Savo/Intrastate, but not plaintiff, also claims glare prevented Savo from seeing plaintiff's car. But WSDOT cannot be liable for glare, even had there been glare for a northbound driver such as Savo.

**2. Mr. Wetsch Testified He and Savo Were Both Accelerating.**

Ignoring that *Mrs.* Wetsch testified Savo had been looking left over his shoulder (RP 1298), respondents claim *Mr.* Wetsch's testimony raised a factual issue whether Savo was looking ahead or left as he came down the on-ramp. Taking Mr. Wetsch's testimony in context makes clear he was simply saying Savo was accelerating just as he was (RP 1279-80):

Q. . . . I think you said you were traveling between 40 or 50 miles an hour in the diamond lane when it

occurred to you that this truck was going to have trouble stopping.

- .....
- A. Correct.
- Q. Does that refresh your recollection as to how fast you thought you were going at that time?
- A. . . . . I was accelerating to go onto the freeway, so yeah, that would have been very accurate.
- Q. So at the point that you're describing what you were doing, you were looking ahead and you were accelerating to merge with freeway traffic?
- A. That's correct.
- Q. And was it your impression that the driver of the white pickup truck was doing the same thing?
- A. He was.
- Q. And was it true that at that point in time, you were going roughly the same speed as the driver of the pickup?
- A. Yes.

This testimony was consistent with Mr. Wetsch's earlier testimony

(RP 1263):

- A. Well, I would have expected him [Savo] to brake or move over into the other lane. But again he was not looking. He was not looking forward. He was looking off to his left, toward the freeway. And so again, as I said, the expectation was this is not going to be good.
- Q. How about speed-wise, was he maintaining speed with you fully away?
- A. . . . I know we were coming down the on-ramp, and obviously I was accelerating and he was staying ahead of me, so obviously he must have been accelerating also.

“‘[E]vidence cannot be taken out of context in a way that makes it seem to support a verdict when it in fact never did.’” *Service Corp. Int’l v. Guerra*, 348 S.W.3d 221 (Tex. 2011); *see also State v. Grove*, 82 N.M. 679, 486 P.2d 615, 617 (1971). Mr. Wetsch’s testimony never supported plaintiff’s case.

### **3. Respondents’ Other Arguments Are Meritless.**

With no favorable competent evidence of what Savo was doing, respondents try to manufacture proximate cause from their experts’ testimony. Respondents argue that since Savo did not see the signs or plaintiff’s car, and their experts testified the signs and the stop line’s placement did not comply with MUTCD, proximate cause was shown.

Respondents confuse breach of duty with proximate cause. *See White v. Greyhound Corp.*, 46 Wn.2d 260, 263, 280 P.2d 670 (1955); *Rogers v. Retrum*, 170 Ariz. 399, 825 P.2d 20, 22 (1991) (breach and cause often confused), *rev. denied* (1992). “Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury.” *White*, 46 Wn.2d at 263.

*Tarulis v. Prassas*, 236 Ill. App.3d 56, 603 N.E.2d 13 (1992), *app. denied*, 149 Ill.2d 661, 612 N.E.2d 524 (1993), provides a good comparison. There the negligent driver hit a wheel stop in a parking lot, losing control of her car. Plaintiff’s expert testified the wheel stop lacked

visibility and should have been painted with contrasting stripes to make it more visible. The jury found the parking lot owner liable.

The Illinois appellate court reversed, holding the parking lot owner was entitled to a directed verdict. The court explained:

Although here, [the driver] testified that she struck the median, Tarulis . . . depends . . . on the further inference that she did not see it because it was not readily visible. . . . ***[W]e find th[is] inference[] “merely speculative.”***

. . . .***[T]he possibility that the wheel stop’s poor visibility caused [the driver] to hit it is insufficient to establish a causal relationship*** between the [parking lot owners’] alleged negligence and Tarulis’s injuries.

. . . . Thus, even if we assume that the [parking lot owners] breached their duty to Tarulis to exercise reasonable care to keep the parking lot in a reasonably safe condition, and even though it is possible that [the driver] hit the wheel stop because of the [parking lot owners’] breach of duty, ***this possibility is not enough to establish proximate cause.***

603 N.E.2d at 18, 19 (emphasis added). In other words, that the driver struck the wheel stop and that plaintiff’s expert testified it was not very visible and should have been painted to make it more visible were insufficient. Just because there is a breach of duty —*i.e.*, negligence— does not mean the breach was the proximate cause of the accident.

Respondents say because there was a collision and their experts said plaintiff’s car and the signs/signals were not readily visible, that was why Savo did not perceive them. But that is analogous to the inference *Tarulis* rejected. Indeed, this case is even stronger for WSDOT than

*Tarulis* was for the lot owner. Unlike here, *Tarulis* had **no evidence** the driver was not looking where she was supposed to be looking.

Savo/Intrastate does not even mention *Tarulis*. Plaintiff argues it is inapposite, claiming inferring proximate cause here is not speculative. But as discussed *supra*, Savo's testimony about the shadow and why he failed to perceive the signs was speculative. Absent evidence or a reasonable inference therefrom that Savo was looking straight ahead, respondents' experts' causation testimony has no value. *Prentice Pkg. & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940). Hence, the verdict is based on speculation as to proximate cause.

Respondents' other causation arguments are meritless. For example, the claim the ramp-metered ahead sign on the curve was hard to see is contrary to physical facts. As Exs. 264-67 show, the sign was placed so a driver looking ahead could see it straight on **before** entering the curve. These photos were taken with a camera at eye height and pointing ahead in a vehicle similar to Savo's. (RP 1497-98, 1525-26, 1531-35)

In any event, there was no evidence whatsoever why Savo did not notice either ramp-metered ahead sign with the flashing beacon on top. Plaintiff's highway design expert admitted (RP 858, 978)—

People ordinarily will see [the sign and the flashing beacon on top of it]. It isn't something that happens all the time.

Savo did tell the trooper he was looking at the mainline, preparing to merge. But both Wetsches testified he was looking left to do so. I-405 could be seen between the trees on the left. (RP 1243, 1259-60, 1262-63, 1292-93, 1298) Savo testified that once he had made his second 90 degree turn (*i.e.*, the curve), he could “look off”, it was then he noticed traffic had built up, and the collision occurred “not too far after noticing the traffic.” (CP 4054) As Mr. Wetsch testified, Savo “was not looking forward. He was looking *off* to his left, toward the freeway.” (RP 1263) (emphasis added).

Nonetheless, plaintiff implies that in preparing to merge, Savo was looking straight ahead at traffic on I-405 *past* the overpass. (Brief of Respondent 16) Substantial evidence exists only if there is ““a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question.”” *Blinka v. Washington St. Bar Ass’n*, 109 Wn. App. 575, 582, 36 P.3d 1094 (2001), *rev. denied*, 146 Wn.2d 1021 (2002). A rational, fair-minded person would not believe that in preparing to merge, Savo, while coming down the on-ramp, was looking straight ahead past the overpass to see traffic already well past him. In such circumstances, a driver seeking to merge looks toward traffic *next to or behind* him. In fact, Mr. Wetsch testified:

. . . I could see the driver, and *the driver was looking at the freeway. I would describe it as the way you enter on a regular ramp, you're looking to see where you can merge into traffic, and his attention was not ahead. He was looking to the side.*

(RP 1262) (emphasis added). Savo must have been looking left. That Mr. Wetsch had been looking ahead signifies nothing, because, unlike Savo, the Wetsches were in the far right lane. (RP 1269, 1294)

Accordingly, that the lights were on the other side of the overpass means nothing, since Savo was not looking ahead, as he would have had to do to see them. Mr. Wetsch, who was looking ahead, saw the red light despite knowing it did not apply to the HOV lane. (RP 1259)

Plaintiff also contends the stop bar and the stop on red sign should have been farther up the on-ramp to avoid the overpass shadow. But since Savo was not looking straight ahead, he would not have seen them even then. Further, plaintiff's car was stopped at the stop bar, thereby obscuring it. Anyone looking straight ahead would have seen the car.

That there were no "signal ahead" signs is irrelevant. Since Savo did not notice the signs that were there, there is no reason to think he would have noticed yet another sign.

Contrary to plaintiff's arguments, the trooper did not rule out *all* inattention, and there was evidence Savo was inattentive. The trooper ruled out Savo's using a cell phone, reading, and writing. He did not rule

out the possibility Savo was simply not looking straight ahead. The Wetsches both testified Savo was looking to his left and did not see plaintiff's car. (RP 1240, 1259-60, 1262-63, 1298) That is inattention.

That Savo failed to perceive the signs/signals despite his familiarity with metered ramps does not show causation. The issue is *why* he did not perceive them. He did not have to testify about the intricacies of highway design. He could have testified he was looking straight ahead but still did not perceive the signs/signals. But no one testified he was looking straight ahead. The only people who testified which way he was looking both said he was looking left. (RP 1262-63, 1298)

Plaintiff also claims Mr. Wetsch's testimony was irrelevant, arguing what one or even the average driver sees is immaterial. Plaintiff further claims Mrs. Wetsch's testimony was irrelevant as there is no "ordinary passenger standard". Under plaintiff's theory—raised for the first time on appeal, no eyewitnesses to an accident other than those involved could testify. The Wetsches' testimony tended to make the existence of consequential facts more or less probable than it would have been without their testimony and thus was admissible. ER 401-02.

Respondents also claim Mr. Wetsch did not see all the signs and was confused about the facts. That he may not have seen all the signs says nothing, since he saw one. Safety engineers design for redundancy. *See,*

*e.g.*, *5 Star, Inc. v. Ford Motor Co.*, \_\_\_ S.E.2d \_\_\_ (S. C. App. 2011) (2011 WL 3568546, at \*3). Thus, there were two ramp metered ahead signs<sup>1</sup> with blinking beacons if a driver did not see one of the signals or cars at the stop bar.

In any case, Mr. Wetsch did not testify he did not see all the signs. He merely testified he *did not recall* seeing a second ramp metered ahead when flashing sign. (RP 1271, 1272) Given that he had seen one, his inability to recall whether he had seen a second one says nothing.

That Mr. Wetsch may have been confused as to certain collateral details—for example, from which direction Savo entered the on-ramp—is meaningless. *Cf. Amend v. Bell*, 89 Wn.2d 124, 128, 570 P.2d 138 (1977) (credibility issues on collateral issues do not prevent summary judgment). In any event, respondents do not claim Mrs. Wetsch was confused. She also testified Savo was looking to his left over his shoulder. (RP 1298)

Citing *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), plaintiff claims WSDOT's duty to design safe highways extends beyond protecting average drivers and that WSDOT must design to prevent accidents. *Keller* does not say WSDOT has a duty to design

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<sup>1</sup> Plaintiff claims there were three. (Brief of Respondents 18) But the third sign, as page 12 of plaintiff's brief admits, was across the intersection for north-facing traffic. It was not designed to be seen and could not be seen by south-facing drivers, like Savo and the Wetsches, before they turned onto the on-ramp to head north. (CP 4053; RP 696-98)

highways to protect all types of motorist negligence. In any event, duty is not at issue in this aspect of the appeal.

Respondents' attempt to distinguish *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941), must fail. In *Johanson*, plaintiff's theory was that an outdated yellow line confused the driver. Because there was no evidence the driver had seen the yellow line, the court ruled the "**only** reasonable inference" was that he was not relying on it. *Id.* at 122 (emphasis added). The court affirmed judgment as a matter of law for the defendant County.

Here, as in *Johanson*, there was no evidence Savo was looking straight ahead. As in *Johanson*, the **only** reasonable inference is that as a result, he did not see plaintiff's car or the signs/signals.

Respondents' other cited cases are not persuasive. In *Sketo v. Olympic Ferries*, 436 F.2d 1107 (9<sup>th</sup> Cir. 1970), the victim, a hemophiliac, knew the seriousness of his condition and that he had to avoid trauma. Unlike here, there was no evidence of inattentiveness. In *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964), the facts on which the experts based their opinion had been proved. Here, the experts **assumed** Savo had been looking ahead, which was never proved.

In *Unger v. Cauchon*, 118 Wn. App. 165, 73 P.3d 1005 (2003), the issue was not visibility, but mud and debris on the road that had caused the

accident. In *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988), and *Radosevich v. County Comm'rs*, 3 Wn. App. 602, 476 P.2d 705 (1970), the drivers knew of, or saw, the roadway feature at issue, so *why* they did not see it was not at issue. Proximate cause was not at issue in *Breivo v. City of Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976), *Ulve v. City of Raymond*, 51 Wn.2d 241, 317 P.2d 908 (1957), or *Cornejo v. State*, 57 Wn. App. 314, 788 P.2d 554 (1990).

Finally, at the very least, it is just as possible the accident occurred because Savo was looking left as it is that WSDOT's negligence caused him not to see what he should have seen. The jury may not speculate between the two possibilities. See *Prentice*, 5 Wn.2d at 164; *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *rev. denied*, 171 Wn.2d 1004 (2011). WSDOT is entitled to judgment as a matter of law.

**B. THE "CURATIVE" INSTRUCTION DID NOT CURE, IT HARMED.**

Respondents do not challenge the exclusion of evidence of prior accidents at the on-ramp at issue. All parties agree WSDOT's counsel's remarks to the jury about the lack of such evidence were improper and—since *no one* wanted a mistrial—a curative instruction was required. The trial court did not find WSDOT's counsel in bad faith; no one suggested otherwise. (RP 2093, 2117, 2119-24)

The issue, therefore, is whether the curative instruction given was proper, as opposed to WSDOT's proposed curative instruction. (CP 6167; RP 2128-29) Because the trial court told the jury that counsel's remarks were not only improper, but inaccurate, a new trial is required.

Article IV, section 16, of the Washington Constitution declares:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

While new trial denials are usually reviewed for abuse of discretion, whether the trial court here commented on the evidence is a question of law reviewed *de novo*. *State Department of Corrections v. Fluor Daniel, Inc.*, 130 Wn. App. 629, 631, 126 P.3d 52 (2005), *aff'd*, 160 Wn.2d 786, 161 P.3d 372 (2007); *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 489-90, 713 P.2d 113 (1986); K. Tegland, 4 WASHINGTON PRACTICE *Rules Practice* at 491 (5<sup>th</sup> ed. 2006).

Savo/Intrastate (but not plaintiff) argues WSDOT agreed to the curative instruction and did not object *when* it was given. Savo/Intrastate also claims WSDOT invited error because its counsel "agreed to *a* curative instruction". (Joint Brief 42) (emphasis added). Both contentions are meritless. First, agreeing that *a* curative instruction should be given does not invite error where, as here, counsel proposed *a* curative

instruction and, as will be discussed *infra*, objected to **the** curative instruction actually given.

Second, WSDOT could not have objected when the instruction was given, because exceptions to instructions are not made in front of the jury. CR 51(f).

Third, the trial court knew what WSDOT's objection was. *See Falk v. Keene*, 113 Wn.2d 645, 782 P.2d 974 (1989). The trial court knew because WSDOT did object<sup>2</sup>, outside the jury's presence:

Mr. Cooley: The curative instruction that the plaintiff has proposed goes beyond the pale, however, and strays dangerously into **a comment on the evidence by the Court**, labeling WSDOT and its counsel . . . that this was a knowing violation. . . .

. . . .

***It's a scarlet L for liar being put on my head if the Court goes ahead and gives that.*** So we think our curative instruction is the proper one to give at this stage . . . .

. . . .

. . . With that addition [specifically telling the jury that there had been accidents on the on-ramp], it goes beyond curative instruction, and ***it has now injected evidence into the case***, and it's going to be a problem.

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<sup>2</sup> Consequently, Savo/Intrastate's claim that WSDOT "now claims it can raise the issue under RAP 2.5(a)(3)" is puzzling. (Joint Brief 40) In any event, the constitutional error was manifest as it had practical and identifiable consequences—telling the jury about excluded evidence the jury had asked about and impugning counsel's integrity and credibility. *See State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999).

The Court: Otherwise I have to say your statement was inaccurate. Would you prefer that approach?

Mr. Cooley: Yes, I would prefer that approach than your statement that there have been collisions. ***I think the proper remedy is to—there has been no—you should disregard the statements of counsel.***

(RP 2121, 2122, 2127) (emphasis added).

Savo/Intrastate quotes only part of Mr. Cooley’s remarks, making it seem as if WSDOT acquiesced in the court’s instruction. (Joint Brief 18, 40) But since the trial court rejected WSDOT’s proposed instruction, choosing the less objectionable of the two objectionable instructions the court offered did not invite error. *See State v. Vander Houwen*, 163 Wn.2d 25, 98-99, 177 P.3d 93 (2008) (no invited error where appellant proposed challenged instruction after trial court rejected his earlier proposed instruction); *accord Messenger v. Frye*, 176 Wash. 291, 28 P.2d 1023 (1934); *cf. State v. Pirtle*, 127 Wn.2d 628, 656 n.3, 904 P.2d 245 (1995) (no invited error where appellant appealed from instruction part added by trial court), *cert. denied*, 518 U.S. 1026 (1996).

Jury instruction exceptions ensure the trial court is informed of the points of law and reasons why an instruction may be erroneous. *Favors v. Matzke*, 53 Wn. App. 789, 798, 770 P.2d 686, *rev. denied*, 113 Wn.2d 1033 (1989); *see Zwink v. Burlington Northern, Inc.*, 13 Wn. App. 560, 568, 536 P.2d 13 (1975). The trial court here was not only informed

WSDOT believed the instruction would comment on the evidence, the trial court initially believed it would. Before reinserting “inaccurate” into the instruction, the trial court said, “I took out the word inaccurate because then I feel like I’m potentially commenting and saying the opposite is true, and I don’t want to be commenting on the evidence either.” (RP 2125-26)

Finally, even had WSDOT not objected, whether there was a comment on the evidence can be raised for the first time on appeal. *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

Citing *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990), Savo/Intrastate claims one who proposes an instruction cannot complain it was given on appeal. But WSDOT’s proposed instruction was not given.

Unlike Savo/Intrastate, plaintiff claims WSDOT invited error by making the improper comments in the first place and gambling on the verdict by not requesting a mistrial. The invited error doctrine would have precluded a mistrial had WSDOT requested one, so the gambling argument is meritless. *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44, *rev. denied*, 97 Wn.2d 1018 (1982). The error here is in the “curative” instruction, which WSDOT did not propose and to which it objected. WSDOT should not be penalized for a mistake everyone agreed an appropriate instruction could rectify.

*Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 82 P.3d 1223 (2004), does not apply. There, repeated discovery violations led the trial court to limit defendant's answers to certain questions at trial to "don't know". When defendant gave different answers, the trial court read the "don't know" answers to the jury. As *Esteb* recognized, the defendant's violation of the previous court order left the trial court with "little choice." *Id.* at 771. But here the trial court had some choice in the curative instruction's wording, and there was no order dictating how it should read.

Plaintiff's attempt to distinguish *State v. Martin*, 77 Conn. App. 818, 827 A.2d 1 (2003), must fail. As here, defense counsel there told the jury an untruth in closing. As here, the trial court gave a curative instruction that told the truth. *Martin* reversed and remanded for new trial:

We generally accord deference to a court's efforts to eliminate prejudice through a curative instruction. . . . ***The court, however, did not simply identify defense counsel's improper comment and instruct the jury to disregard the comment.***

*Id.* at 827, 827 A.2d at 8 (emphasis added). WSDOT's proposed curative instruction would have done just what *Martin* said a curative instruction should do—identified the improper remark and advised the jury "to disregard his reference to a lack of accidents at this location." (CP 6167)

Further, contrary to plaintiff's claim, WSDOT's proposed instruction would not have told the jury "there haven't been any collisions.

but you are not supposed to know that.” (Brief of Respondent 28) Rather, it would have said, “The *presence* or absence of prior accidents at the onramp is an issue that is outside of the evidence in this case, and you are not to concern yourself with it.” (CP 6167) (emphasis added) Unlike the court’s instruction, this was a neutral statement whether there had been prior accidents: it did not tell the jury one way or the other.

By calling WSDOT’s counsel’s remarks inaccurate, the trial judge essentially told the jury about excluded evidence—accidents at the onramp—and that WSDOT’s counsel had lied to them.

Respondents claim there was no comment on the evidence, as the instruction said nothing about the judge’s personal opinion of the evidence or the merits of the case. Savo/Intraste claims there can be no comment on the evidence if the remark is about a fact undisputed or not in issue.

But, as explained in WSDOT’s opening brief, a trial judge who tells the jury about excluded evidence charges the jury with respect to matters of fact or otherwise comments on the evidence under art. IV, section 16. *State v. Ratliff*, 121 Wn. App. 642, 90 P.3d 79 (2004); see *Patten v. Town of Auburn*, 41 Wash. 644, 84 P. 594 (1906). A trial court also violates art. IV., section 16, when it rebukes counsel in a way that would clearly tend to put counsel in an unfavorable light before the jury. *Kluge v. Northern Pac. Ry. Co.*, 167 Wash. 294, 9 P.2d 74 (1932).

Both happened here. Yet respondents have not even mentioned *Ratliff*, *Kluge*, or *Patten*, let alone tried to explain why they do not apply. That the instruction's telling the jury that counsel's remarks were "inaccurate" is true does not mean there was no comment on the evidence.

*Hansen v. Wightman*, 14 Wn. App. 78, 538 P.2d 1238 (1975), is inapposite. The court there commented on irrelevant evidence. Here, the evidence was arguably relevant<sup>3</sup> but inadmissible under 23 U.S.C. § 409. Respondents' other cited cases<sup>4</sup> are inapposite because none involved comments about inadmissible evidence or the credibility of counsel.

Plaintiff claims the instruction did not imply counsel had lied, only that he had erred due to the federal privilege. But the jury was told counsel's remarks had been "improper" and "inaccurate". Using "inaccurate" with "improper" told the jury not only had counsel erred due to the federal privilege, but he had lied. WSDOT's neutral proposed instruction would have solved this problem. (CP 6167)

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<sup>3</sup> Evidence of prior accidents would be relevant only to the extent, if any, the accidents occurred under the same or substantially similar circumstances. *Toftoy v. Ocean Shores Props., Inc.*, 71 Wn.2d 833, 835, 431 P.2d 212 (1967). The record here does not reveal whether any or how many met this requirement.

<sup>4</sup> *State v. Gamble*, 168 Wn.2d 161, 225 P.3d 973 (2010); *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000); *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988); *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009); *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 210 P.3d 337 (2009).

Savo/Intrastate claims the instruction “stated nothing about the actual accident history at the onramp.” (Joint Brief 39) Similarly, plaintiff claims instructing that counsel’s argument was inaccurate is different than expressly advising the jury of excluded evidence.

But both respondents argue they would have been prejudiced had the court left the jury with the impression “there had been no accidents at the onramp”, and that “[a]nything short of ‘inaccurate’ would have legitimized the false and prejudicial sting of WSDOT’s remarks.” (Joint Brief 17; Brief of Respondent 28) Respondents cannot have it both ways.

Citing *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992), plaintiff claims a curative instruction addressed to closing argument cannot be a comment on the evidence. But by telling the jury counsel’s remarks on the on-ramp’s accident history were “inaccurate”, the trial court was telling the jury about inadmissible evidence.

*Hizey* is inapposite anyway. The remarks there were directed at issues of law, not fact. By its terms, art. IV, section 16, is directed only to questions of fact. Further, the *Hizey* remarks were not in a jury instruction.

Plaintiff also argues the trial judge could not comment on evidence never admitted. But that is what happened in *Ratliff*, 121 Wn. App. 642—the trial court’s telling the jury about excluded evidence was a comment on the evidence.

*State v. Pockert*, 53 Wn. App. 491, 768 P.2d 504 (1989) does not compel a different result. There the evidence upon which the judge remarked had been admitted.

Savo/Intrastate (but not plaintiff) claims that a state agency like WSDOT has no constitutional rights and thus cannot rely on WASH. CONST. art. IV, § 16. Wrong, for several reasons.

First, the State has constitutional rights. In *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964), the Washington Supreme Court ruled that a statute that gave a contractor the right to sue the State without any statute of limitations violated the privileges and immunities and equal protection clauses of the state and federal constitutions.

Second, although *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988), rejected defendant state agency's comment on the evidence argument, the court **did not** hold the state agency had no art. IV, § 16 rights. See *Allbin v. City of Seattle*, 130 Wash. 342, 345, 227 P. 322 (1924); *Hewitt v. City of Seattle*, 62 Wash. 377, 113 P. 1084 (1911).

Third, RCW 4.92.020's waiver of the State's sovereign immunity places it on "equal footing with private parties defendant." *Hunter v. North Mason High School*, 85 Wn.2d 810, 818, 539 P.2d 845 (1975). In waiving sovereign immunity, the State could not have intended to forego

basic constitutional protections enjoyed by other litigants. If a trial court could comment on the evidence at will to disadvantage the State when it or one of its agencies or subdivisions is a party, why would the State have ever waived its sovereign immunity?

Fourth, the jury was instructed the law did not permit the trial court to comment on the evidence in any way. (CP 4982) Respondents did not except to this instruction. It is therefore the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

The only authority Savo/Intrastate cites, *City of Mountlake Terrace v. Wilson*, 15 Wn. App. 392, 549 P.2d 497 (1976), does not apply here. That case involved the due process clause. The court reasoned that since the due process clause is intended to protect people from the government, it did not protect the state itself or its political subdivisions.

The due process clause is in the federal Bill of Rights and article I of the State Constitution. Article I, the “Declaration of Rights”, is quite similar to the Bill of Rights. The federal Bill of Rights and the state Declaration of Rights largely protect individuals from the government.

In contrast, the constitutional prohibition against comments on the evidence is in article IV of the State Constitution. Article IV establishes and governs the judiciary. Nothing in Article IV suggests the State is to be treated differently than any other litigant vis-à-vis article IV, § 16.

Fifth, the purpose of prohibiting judicial comments on the evidence is to prohibit a judge from influencing the jury's determination of what the testimony proves or fails to prove. *State v. Baxter*, 134 Wn. App. 587, 592, 141 P.3d 92 (2006). When the State is a litigant because it waived its sovereign immunity, it should receive the same protection.

Even if the curative instruction were not an unconstitutional comment on the evidence, it deprived WSDOT of a fair trial by advising the jury of excluded evidence, *see Symes v. Teagle*, 67 Wn.2d 867, 871, 410 P.2d 594 (1966), and impugning the integrity and credibility of WSDOT's trial counsel, *State v. Phillips*, 59 Wash. 252, 259, 109 P. 1047 (1910); *see State v. Whalon*, 1 Wn. App. 785, 799, 464 P.2d 730, *rev. denied*, 78 Wn.2d 992 (1970). As discussed in WSDOT's opening brief—

A lawyer's character and reputation for fairness, candor, and honorable dealing are as much a part of his professional worth as is his reputation for ability and learning. For the court to impeach it before the jury is to weaken in a measure the client's cause.

*Perry v. Perry*, 144 N.C. 328, 57 S.E. 1 (1907). Respondents have not even bothered to try to explain why these authorities do not apply here.

Finally, prejudice is presumed when there is a comment on the evidence, unless the record affirmatively shows no prejudice could have resulted. *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945,

*rev. denied*, 122 Wn.2d 1019 (1993). Respondents have not shown the record affirmatively shows no prejudice could have resulted.

Plaintiff notes the jury was instructed. “Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either *during trial* or *in giving these instructions*, you must disregard it entirely.” (CP 4982) (emphases added). But the comment on the evidence here was not made during trial or in “these instructions.” It was made well *after* trial and the court’s instructions to the jury—in fact, a day later. (RP 2037, 2128-29)

Even if WSDOT had to show prejudice, it has done so. The trial court did not permit jury questions about prior accidents at the on-ramp. (CP 3217, 3218, 4686) But when the court gave its “curative” instruction—telling the jury the remark about no accidents at the on-ramp had been “inaccurate”—it answered the jury’s questions. Thus, the trial court charged the jury “with respect to matters of fact” within the meaning of art. IV, section 16, placing its imprimatur on the inaccuracy as well as the impropriety of the remarks, thereby commenting on the evidence.

In addition, the aspersions cast upon defense counsel’s credibility and integrity by the “curative” instruction were inherently prejudicial.

**C. THE JURY SHOULD HAVE DECIDED COMPARATIVE FAULT.**

Only plaintiff has responded to WSDOT’s comparative fault issue.

### 1. The Flying Amplifier.

The amplifier to plaintiff's car stereo system had been screwed into the car's rear interior. After the accident, it was found lodged between the two front seats, nestled against the inner top corner of the driver's seat. (CP 1061, 1209, 1217-18)

The investigating trooper concluded the amplifier had "travel[ed] over the top right of Hu's seat" and "struck Hu in the head breaking his neck." WSDOT's material science/metallurgical engineering expert found impact marks on the amplifier and testified that "on a more probable than not basis", "once the speaker system catastrophically failed, the leading face of the audio amplifier struck a round and smooth object more probably than not the back of Mr. Hu's head, violently forcing it forward during the event." WSDOT's biomechanical/accident reconstructionist testified the amplifier likely hit the seatbacks, causing it to significantly decelerate. (CP 1133-34, 1211, 1240, 1376)

RCW 46.37.680(1) required plaintiff to securely attach his stereo components to his vehicle. Although WSDOT did not cite RESTATEMENT (SECOND) OF TORTS § 286 (1965) in the trial court, the Restatement is merely legal *authority* supporting its arguments below that RCW 46.37.680 applies. WSDOT was not required to raise the Restatement below. *See State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App.

869, 872 n.1, 751 P.2d 329, *rev. denied*, 111 Wn.2d 1013 (1988). *Lipscomb v. Farmers Ins. Co.*, 142 Wn. App. 20, 174 P.3d 1182 (2007), is inapposite as it involved a party who raised a new legal *theory* for the first time on appeal.

Plaintiff claims the Legislature could not have imposed the “absurd” duty to install a car stereo system that would withstand a 50 mph impact that demolishes the area where the system is installed. In addition, plaintiff claims the Legislature did not intend the statute to apply to professional installers. If plaintiff’s claims were true, the Legislature would have said so. Instead, RCW 46.37.680(1) provides:

All vehicle sound system components, including any supplemental speaker systems or components, must be *securely* attached to the vehicle regardless of where the components are located, so that the components cannot become dislodged or loose during operation of the vehicle.

(Emphasis added.) Plaintiff would read the statute as if it said:

All vehicle sound system components, including any supplemental speaker systems or components, **except those installed with the participation of a professional installer,** must be ~~securely~~ attached to the vehicle ~~regardless of where the components are located~~, so that the components cannot become dislodged or loose during operation of the vehicle, **except for collisions at 50 mph or more that demolish the area where the components are located.**

(Boldfaced underscored language and strike-through added.)

RCW 46.37.680(1), the Courtney Amisson law, was enacted after Amisson died by being struck by an unsecured speaker that flew through the air when her vehicle was involved in a collision. (CP 611, 616, 1464, 1465-66) Because that speaker was unattached, plaintiff claims the Legislature intended the statute to apply only to unattached stereo components, so he was not part of the class within the statute's protection.

But the Legislature said components must be "*securely* attached", not just attached (emphasis added). By ignoring "securely", plaintiff ignores the following well-established rules of statutory construction:

Another well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." "[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute." "[W]e may not delete language from an unambiguous statute: 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'"

*State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (citations omitted). Under plaintiff's theory, components could be attached with thread or twine. RCW 46.37.680 would be meaningless.

In fact, the legislative history notes, "Bolting speakers in a vehicle is a very simple, inexpensive process." This method is similar to what defense expert Kent proposed: using plywood, nuts, bolts, washers, and

construction adhesive to provide a “cheap and easily available system” that would meet the statute’s requirements. (CP 1414, 1462)

Moreover, it is not “absurd” to require securely attaching stereo components so they do not come loose when the area around them is destroyed. Plaintiff presented no evidence a secure yet inexpensive attachment was impossible. Defense expert Kent explained a proper system would have withstood the instant crash. (CP 1415)

Plaintiff claims the Legislature did not intend to impose new industry standards in automotive safety, which he argues is governed by federal law. (Brief of Respondent 35) What federal law? Under plaintiff’s theory, RCW 46.37.510, requiring seatbelts, would be invalid.

Plaintiff also claims there is no common law duty, again arguing that any such duty would be absurd. As discussed *supra*, the duty is not absurd. A reasonable person would know that if stereo components are not securely attached, they could become projectiles in a collision.

Reasonable persons would know the materials plaintiff used—particle board and screws—would not be a secure attachment in a collision. The average person knows particle board is not as sturdy as plywood and that nuts and bolts are far stronger than screws.

Plaintiff also claims there was no evidence the amplifier flew through the air and hit him. But the amplifier had been screwed into the

rear interior of the vehicle. After the crash, it was found nestled between the two front seats, resting against the inside corner of the driver's seat. (CP 1217-18) There would be *no reason* for anyone to place it there, and no one is claiming that occurred. Plaintiff offers no explanation how it could have gotten there except by coming loose and flying through the car.

Claiming no evidence of head injury, plaintiff contends there was no evidence the amplifier hit him. But WSDOT's biomechanical expert testified an injury like plaintiff's could occur without external injury. (CP 1375) Plaintiff argues this evidence should be disregarded as the expert was not a medical doctor. But a biomechanics expert's testimony is sufficient to create a genuine issue of material fact on causation. *See Grandeau v. South Colonie Central School Dist.*, 63 A.D.3d 1484, 1485-86, 881 N.Y.S.2d 549 (2009); *Ruffin ex rel. Sanders v. Boler*, 384 Ill. App.3d 7, 890 N.E.2d 1174, *app. denied*, 229 Ill.2d 695, 900 N.E.2d 1126 (2008). That plaintiff's expert disagreed created a fact issue for the jury.

*Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 183 P.3d 1118 (2008), does not compel a different result. There salmonella poisoning allegedly caused a type of arthritis. *Fabrique* said, "Expert medical testimony is necessary to establish causation where the nature of the injury involves '*obscure* medical factors which are beyond an ordinary lay person's knowledge". *Id.* at 685 (emphasis added). Whether

salmonella poisoning causes arthritis is obscure. In contrast, the average person would know a cervical spinal cord injury could cause paralysis.

All facts submitted and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Vazquez v. Hawthorne*, 145 Wn.2d 103, 106, 33 P.3d 735 (2001). Reasonable people looking at the facts in the light most favorable to WSDOT could reach more than one conclusion. *See id.* Summary judgment was inappropriate.

## **2. The Jury Should Have Decided the Brake Lights Issue.**

Plaintiff does not dispute there was testimony his brake lights were “almost nonexistent.” (RP 988) Instead, he argues the testimony was not intended to raise issues about his own fault.<sup>5</sup> Plaintiff cites no legal authority a witness’ intent governs how his testimony can be used.

Because WSDOT’s witness, Mrs. Wetsch, testified she saw plaintiff’s brake lights, plaintiff implies WSDOT is somehow bound by her testimony. Wrong. Her testimony merely creates an issue of fact for the jury. *See Revier v. Revier*, 48 Wn.2d 231, 234, 292 P.2d 861 (1956).

Plaintiff testified his brake lights were working. But contrary to what his brief represents, he qualified that testimony (RP 601-02):

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<sup>5</sup> Presumably the sentence in plaintiff’s brief at page 43 that the witness “did not do so to create an issue about WSDOT’s negligence” meant to refer to “plaintiff’s negligence.”

Q. To your knowledge there wasn't any defect in the brightness of the bulbs or how they shined out the back and alerted motorists; correct?

A. Uhm, the only thing I would say about—not about the light bulbs, but about the light covers, were that, because it was a 1973—yeah, it was a 1973, I believe they were originally—(inaudible) what you call those, the plastic that surrounds the bulb—uhm, you know. they were worn, but I'm not sure I would say that—I can't remember the phrase you used, but I'm not sure that would have affected the brightness to—I never (inaudible) in car, so.

In short, plaintiff was unsure whether the worn plastic affected the brake lights' brightness.

That WSDOT's expert opined the brake lights were working because their filaments were deformed says nothing as to how bright or visible they were. Plaintiff does not dispute RCW 46.37.200(1) requires that brake lights be visible for not less than 300 feet to the rear.

Plaintiff also claims Savo testified "he did not notice the lights."

(Brief of Respondent 44) What Savo really said was (CP 4062):

A. . . . At the time of—what I recollect that when I saw his vehicle, I do not think that his brake lights were on.

Q. . . . So it is your belief, based on your recollection, that when you saw Koti's vehicle, the brake lights were not illuminated; is that correct?

A. Correct.

At the very least, a jury should have decided whether the brake lights were not on or not adequately visible. A new trial is required.

**D. A NO DUTY TO UPGRADE INSTRUCTION WAS REQUIRED.**

**1. The Trial Court’s Flip-Flop Requires a New Trial.**

The trial court said it would give a no duty to upgrade instruction due to Dr. Parsonson’s “signal ahead sign” testimony. It changed its mind after the witness was excused. WSDOT would have been satisfied if its originally proposed instruction, that instruction minus its second sentence, or the trial court’s suggested instruction had been given. (RP 2023-27) None was.

Plaintiff—who agreed a no duty to upgrade instruction should be given (RP 1910)—does not claim the trial court’s suggested instruction referring to signs was error. Instead, he argues WSDOT did not formally proffer it. His cited cases, *City of Bellevue v. Kravik*, 69 Wn. App. 735, 850 P.2d 559 (1993), and *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245, *rev. denied*, 169 Wn.2d 1027 (2010), however, do not require a formal proffer of the trial court’s *own* proposed language.

Indeed, unlike plaintiff, Savo/Intrastate admits WSDOT “ask[ed] the Court to instruct the jury that ‘the State’s duty does not require it to update road signs to present day standards.’ RP 2024-25, 2027.” (Joint Brief 45) This was the trial court’s proposed language. Plaintiff’s argument has no merit.

Plaintiff also argues no one suggested WSDOT had a duty to update signs and no reasonable juror would have inferred it had such a duty. But once evidence of such signs at other on-ramps was admitted, the jury would have wondered why such signs were not at the on-ramp in question. A no duty to upgrade instruction would have told the jury WSDOT was under no legal obligation to upgrade older signage systems.

Savo/Intrastate argues there was no evidence *when* the signs seen by Dr. Parsonson had been installed. But WSDOT's counsel told the trial court, "These are older designs, and they would violate the duty to upgrade to present day standards." (RP 1905-06) Counsel making an offer of proof "may state orally . . . what the witness is expected to say." 5 K. Tegland, WASHINGTON PRACTICE *Evidence* § 103.19, at 89 (5<sup>th</sup> ed. 2007).

Further, once the trial court declined to give a no duty to upgrade instruction, the evidence would have been irrelevant. WSDOT's not submitting evidence at the close of Savo/Intrastate's case is immaterial, as the trial court had already announced its change of mind and WSDOT had made its offer of proof (RP 1905-06. 2030, 2035)

That Dr. Parsonson testified such signs were required under the 1988 and 2003 MUTCD standards did not preclude giving one of the proposed instructions. The doctor admitted the 1988 MUTCD did not specifically say signal ahead signs were required at metered ramps. (RP

1986) The ramp here was first metered in the 1990's, before the 2003 MUTCD went into effect. (RP 671-72) With a no duty to upgrade instruction, it was for the jury to decide whether WSDOT had been negligent, since MUTCD standards in effect then did not expressly require such signs.

Citing *Smith v. Seibly*, 72 Wn.2d 16, 431 P.2d 719 (1967), plaintiff claims WSDOT failed to offer proof how Dr. Parsonson would have testified had it been known there would be no no duty to upgrade instruction. But since Dr. Parsonson's evidence was new and had never been subject to discovery, and the trial court had assured counsel it would give the instruction, WSDOT's counsel could not reasonably be expected to have been able to make such an offer. (RP 1911)

*Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967), does not apply. There the trial judge orally ruled one way, but changed that ruling in formal findings and conclusions. Hence, there was no contention that counsel detrimentally relied on the trial court's original representation. Here, "the problem is *the way the court changed the rules*"—after the witness had testified. *State v. Brady*, 116 Wn. App. 143, 148-49, 64 P.3d 1258 (2003) (emphasis added), *rev. denied*, 150 Wn.2d 1035 (2004).

Plaintiff fails, and Savo/Intrastate does not even try, to distinguish *Brady* or *In re Shue*, 63 N.C. App. 76, 303 S.E.2d 636 (1983), *aff'd as*

*modified on other grounds*, 311 N.C. 586, 319 S.E.2d 567 (1984). That the trial court changed its mind *after* the witness testified was *more* prejudicial than if the court had changed its mind *during* his testimony, because WSDOT's counsel had relied on the anticipated instruction to frame his cross-examination. The trial court's change of mind "fundamentally affected the evidence". (Brief of Respondent 49)

## **2. The Evidence Was Inadmissible in Any Event.**

In any case, the "signal ahead" sign evidence was inadmissible. It was not true impeachment because plaintiff was not trying to impeach Mr. Rickman with his own prior inconsistent statement. Instead, plaintiff was trying to *rebut* Mr. Rickman's testimony with Mr. Parsonson's testimony. This is rebuttal, not true impeachment. *See State v. Hubbard*, 103 Wn.2d 570, 576, 693 P.2d 718 (1985).

Hence, the evidence had to be independently competent and admissible for a purpose other than attacking the witness's credibility. *Jacqueline's Wash., Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972). Respondents claim it was material to their improper signage theory. But defense counsel learned of Dr. Parsonson's new evidence only that day and had no chance to depose him. Plaintiff's counsel responded, "We don't have to disclose . . . our impeachment material" and "we didn't have to disclose it, cuz it's impeachment." (RP

1905-07). The evidence was called impeachment because it was not disclosed in discovery. Under these circumstances, it was inadmissible.

**E. ATTORNEY FEES/EXPENSES ON APPEAL ARE UNAVAILABLE.**

Citing RAP 18.1(b), Savo/Intrastate seeks attorney fees and expenses on appeal. Attorney fees and expenses are not permitted absent contract, statute or recognized ground of equity. *Fraser v. Edmonds Comm. College*, 136 Wn. App. 51, 55, 147 P.3d 631 (2006). There is no such contract, statute, or ground of equity here. RAP 18.1(b) does not alone authorize an award. *Bill of Rights Legal Found. v. Evergreen St. College*, 44 Wn. App. 690, 697, 723 P.2d 483 (1986). Thus, even were Savo/Intrastate to prevail, attorney fees/expenses would not be awardable.

**II. CONCLUSION**

The party who caused plaintiff's tragic accident was Savo. Because the evidence was undisputed he was the proximate cause of the accident and WSDOT was not, WSDOT is entitled to judgment as a matter of law.

In any event, WSDOT was deprived of a fair trial when the trial court told the jury its counsel's admittedly improper remarks during closing were "inaccurate", declined to let the jury decide comparative fault, and refused to give a no duty to upgrade instruction after assuring counsel that it would. At the very least, WSDOT is entitled to a new trial.

DATED this 3<sup>rd</sup> day of November, 2011.

REED McCLURE

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