

NO. 45697-4-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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CYNTHIA BUTLER,

Appellant,

v.

RANDALL FROST,

Respondent,

---

APPEAL FROM THE SUPERIOR COURT

---

HONORABLE ROBERT A. LEWIS

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BRIEF OF APPELLANT

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### ASSIGNMENTS OF ERROR

1. The trial court erred in giving instruction 17 because the instruction was a misstatement of the law, was misleading and was not supported by the evidence.
2. The trial court erred in failing to grant Appellant's motion for new trial based on lack of evidence to justify the verdict.
3. The trial court erred in failing to grant Appellant's motion for new trial based upon instructional error objected to at trial.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Instruction 17 presumptively prejudicial or misleading? Was the instruction as given a correct and/or complete statement of the law?
2. What is the appropriate standard of review as to a trial court's decision to give an instruction a matter of law, allowing de novo review, or a matter of fact, requiring a showing of abuse of discretion?
3. Was there evidence to support the jury's verdict that Respondent was not negligent?

### STATEMENT OF THE CASE

This appeal arises from the trial of a personal injury case involving a motor vehicle crash. The trial began on Monday, October 21, 2013.

Presentation of the evidence was concluded on Thursday October 24<sup>th</sup>, and the case went to the jury the same day. The jury returned a verdict in favor of Respondent Randall Frost just before 5 pm the same day.

The facts of the crash were as follows: Between 5:15 pm and 5:30 pm on November 18, 2011, Appellant Cindy Butler was driving a 2007 Honda Pilot in the middle of three lanes on southbound Interstate 205. (Verbatim Report of Proceedings, hereinafter “VRP,” pgs. 15, l. 2-5, and pgs. 16, l. 6-10; see also, pg. 33, l. 17-24) Respondent Randall Frost was driving in the right-hand (or “slow”) lane of the same freeway. (VRP, pg. 206, l. 4-9) As it happened, Appellant was driving to her job as a cardiovascular intensive care unit (ICU) nurse at Peace Health Southwest Washington Hospital in Vancouver, Washington. (VRP, pg. 2, l. 9-18). She had begun her trip from home and had left in time to arrive at the hospital by 5:55 p.m. for her shift that began at 6:30 p.m. (VRP, pg. 13, l. 14 – 19, pg. 15, l. 2-5) Respondent was driving home to Camas, Washington from his job as a mail carrier with the US Postal Service. (VRP, pg. 203, l. 14 – pg. 204, l. 9) The crash occurred at approximately 5:24 p.m. (VRP, pg. 33, l. 17-24)

Both parties described the conditions as dark and rainy weather and Appellant described traffic as moderate-to-heavy. (VRP, pg. 15, l. 12-18 and pg. 204, l. 12-17)

Appellant first noticed Respondent's vehicle slightly south of the I-205/State Route 500 Interchange, as she was proceeding south on I-205. (VRP, pg. 17, l. 17-22) What first caught her eye was Respondent's erratic manner of driving, which Appellant described as "slowing down, speeding up, slowing down, speeding up." (VRP, pg. 23, l. 20-23)

Respondent testified he did not see Appellant's car until it merged in front of him. (VRP, pg. 236, l. 13-19) From the time he drove his vehicle from SR 500 onto southbound I-205 until the crash happened, Respondent testified his vehicle never left the right-hand or slow lane of I-205. (VRP, pg. 206, l. 4-14)

Appellant testified that her route to work was to take the Mill Plain exit off of I-205. (VRP, pg. 17, l. 24 – pg. 18, l.1) She estimated she began making her lane change from the center lane to the right-hand lane approximately  $\frac{3}{4}$  of a mile from the Mill Plain exit. (VRP, pg. 22, l. 21- pg. 23, l. 4; see also, pg. 18, l. 12-22)

Respondent's manner of driving gave Appellant enough concern that Appellant decided to pass him and get into the right-hand lane. (VRP, pg. 24, l. 5-14) At the time she began her pass she described her speed with "the flow of traffic" and less than the posted speed limit. (VRP, pg. 158, l. 24 – pg. 159, l. 11) Before making the pass, Appellant looked at the right-hand lane in front of Respondent to see if there were any cars that

would make passing into the lane unsafe; she saw nothing in front of his car and said there was enough room in front of his car to make a safe pass. (VRP, pg. 25, l. 16-24) Respondent testified he did not remember how much room there was between his car and the next car in front of him in the right hand lane before he saw Appellant's car. (VRP, pg. 240, l.7-13)

Appellant described the manner of her lane change as follows:

I put on my blinker, I look over my right shoulder, I accelerate and then I merge into the right hand lane.

(Pg. 24, l. 17-19; see also pg. 26, l. 11 – pg. 27, l. 11, and pg. 160, l. 12-14)

Appellant testified there was no problem with her lane change:

Q: Was there any problem making the lane change?

A: No.

Q: Did you hear any horns honk – honking?

A: No.

Q: Anything of that nature?

A: No.

Q: Did you think anything was unusual about the pass you made?

A: No.

Q: All right. So you get into the right hand lane. At any time in making that lane change did you ever put on your brakes?

A: No.

(VRP, pg. 31, l. 10-23)

Appellant further testified that at no time between passing Respondent, accelerating to make the lane change, changing lanes and the collision occurring did she apply her brakes, and had no reason to do so. (VRP, pg. 34, l. 13-21)

Appellant testified after she passed Respondent she got two-to-three car lengths in front of his vehicle and then “made my merge.” (VRP, pg. 26, l. 4-6; see also, pg. 160, l. 12-15)

After entering the right-hand lane, Appellant noticed brake lights on vehicles ahead of her in all three lanes of southbound I-205, at or near the Ninth Street overpass. (VRP, pg. 31, l. pg. 32, l. 12) She testified the distance from where she had completed her pass to the Ninth Street overpass was slightly less than ½ mile in front of her. (VRP, pg. 32, l. 13-22) In response, Appellant released her foot from the accelerator. (VRP, pg. 33, l. 17-20) Appellant estimated she released her foot from the accelerator 10-15 seconds after she entered the right hand lane. (VRP, pg. 34, l. 22 – pg. 35, l. 7) After she released her foot, she saw headlights in her rearview mirror getting brighter, and Respondent’s car struck the rear of hers. (VRP, pg. 34, l. 7-12)

Respondent gave several different versions of what took place. His first version was in his response to Appellant's Interrogatories; Respondent's response was given in October 2012. (VRP, pg. 223, l. 14-18) That version was as follows:

Judge: Okay. Now I'm going to read to you an instruction. It says:

You will now be given evidence in the form of answers to written Interrogatories. Interrogatories are questions asked in writing by one party and directed to another party. The answers to Interrogatories are given in writing, under oath, before trial.

The answers to Interrogatories will be read aloud to you. Insofar as possible give them the same consideration that you would give to answers of a witness testifying from the witness stand.

Go ahead counsel.

BC: Thank you. The Interrogatories reads – and this is an Interrogatory goes to Mr. Frost.

*If you contend that Plaintiff's injuries are caused or contributed to by the Plaintiff's own negligence, then set forth any and all facts supporting that claim. Answer: Prior to the collision giving rise to this lawsuit, Plaintiff changed lanes in front of Defendant's vehicle and then abruptly slowed. While attempting to change lanes to go around the Plaintiff's vehicle Defendant was unable to avoid colliding with the left rear of Plaintiff's vehicle.*

(VRP, pg. 196, l. 10 – pg. 197, l. 9)

Respondent's second version of events was in his deposition, taken on December 16, 2012. (VRP, pg. 223, l. 2-4) In that version he stated the following:

Q: I want you to tell us anywhere in your oral response to questions, your deposition or in responding to written questions that you said you were cut off.

A: Okay. On page 17, line number 10. The question was:

*When did you first see the car? Answer: When she merged in front of me.*

(VRP, pg. 236, l. 9-16)

Respondent testified further at his deposition that a car merging into his lane at the location where Respondent's did would not surprise him at all. (VRP, pg. 237, l. 3 – 22, and pg. 238, l. 8-12)

Respondent's third version of events was his trial testimony. In that version he said the following:

. . . I saw Ms. Butler's vehicle cut me off and it went right in front of me and I was very uncomfortable with the distance that we were traveling – the distance in between the two of us.

At that point I – I believe I turned my head to look to see what was around me. I immediately started to slow. The next thing I know I saw lights – taillights in front of me – directly and – and then my airbags deployed and a poof of gas I assume from the airbags was all around me.

(VRP, pg. 207, l. 5-14)

Respondent agreed that he had not stated under oath in his interrogatory response that he had been cut off. (VRP, pg. 234, l. 11- pg. 235, l. 4) He also testified there was nothing to have prevented him from using the phrase “cut off” in his deposition to describe Appellant’s manner of changing lanes, instead of the word “merged.” (VRP, pg. 236, l. 9 – pg. 238, l. 15) He further agreed he had waited until testifying in front of the jury to claim that Appellant had cut him off. (VRP, pg. 235, l. 10-13) He further acknowledged that since the lawsuit with Respondent had begun, nothing before the day of his trial testimony had prevented him from using the words “Ms. Butler cut [him] off.” (VRP, pg. 242, l. 10-13)

In none of his versions did Respondent say he had seen Appellant’s brake lights activated before the crash. In his second version, Respondent stated he did not see brake lights until *after* he crashed into the rear of Appellant’s vehicle. (VRP, pg. 231, l. 3-12) At trial, Respondent acknowledged that on at least seven different occasions during his deposition he testified he had not seen or did not recall seeing Appellant’s brake lights come on prior to the crash. (VRP, pg. 229, l. 16 – pg. 232, l. 12) Despite his prior testimony, Respondent testified for the first time at trial that he believed Appellant must have applied her brakes prior to the crash, even though he continued to acknowledge he never saw brake lights

prior to impact. (VRP, pg. 229, l. 11 – 13 and pg. 232, l. 13-21 and pg. 229, l. 14-15)

Respondent never alleged nor testified that Appellant's brake lights were not working the night of the crash.

At trial, Respondent testified that he was aware of cars passing him on the left, but that he didn't "specifically fixate" on Appellant's until she "was in his lane." (VRP, pg. 241, l. 6-9) He testified he did not know which lane she came from when she passed him. (VRP, pg. 241, l. 15-18)

Finally, Respondent acknowledged at trial that he had stated under oath in his interrogatory response that after Appellant had merged into his lane, he attempted to change lanes to go around her. (VRP, pg. 243, l. 16-18) He further acknowledged that five times during his deposition testimony – which he also acknowledged was under oath – he had denied having attempted a lane change. (VRP, pg. 243, l. 19 – pg. 245, l. 7)

Larry Tompkins, a forensic engineer, testified on behalf of Appellant. Mr. Tompkins testified there was a 45% - 50% "overlap" between the damage to the rear of Appellant's vehicle and the front of Respondent's. (VRP, pg. 278, l. 9-18) He described the damage to Appellant's vehicle as being to the rear, from approximately the center to the driver's side, and the damage to Respondent's being from the center front to the passenger side. *Id.* Given his review of the post-crash

photographs, the property damage estimates and the pre-trial depositions of the parties, he estimated that at the moment of impact there was a 15 mile per hour difference in speed between the two vehicles, meaning that Respondent's vehicle was traveling 15 mph faster than Appellant's at impact. (VRP, pg. 299, l. 16-19)

Mr. Tompkins was asked to give the basis of his opinions based on the pre-trial discovery materials he had reviewed, as well as another opinion based upon the new information provided by Respondent's trial testimony. His first opinion, arrived at prior to trial, was premised on the parties' testimony that there had been no braking by either car until just before impact. (VRP, pg. 290, l. 2-14) He did different calculations after hearing Respondent's trial testimony, which Mr. Tompkins testified contained the following new information: That Respondent was traveling at 55 mph prior to Appellant's lane change, that he reacted immediately when Appellant's vehicle entered his lane and that Respondent was braking at the moment of impact. (VRP, pg. 276, l. 24 – pg. 277, l. 14) Under either version of events, Mr. Tompkins testified that the cause of the crash was Respondent's inattention. (VRP, pg. 310, l. 8 – pg. 313, l. 1)

Mr. Tompkins also testified that he had test-driven the same year make and model Honda Pilot that Appellant drove the night of the crash to test the car's deceleration properties. As a general proposition, he testified

it takes “a pretty long time to lose speed” from sixty to forty miles an hour if a driver only takes his foot off the gas. (VRP, pg. 307, l. 9-12) He later testified that based upon the characteristics of Appellant’s car, that time period would be approximately 13 – 18 seconds. (VRP, pg. 308, l. 8-20)

Mr. Tompkins earlier testified that the height of Appellant’s vehicle was higher than that of Respondent’s. (VRP, pg. 323, l. 5-8) He also testified that from Respondent’s vantage point, Appellant’s brake lights would have been directly at eye-level once Appellant’s car was in front of his. (VRP, pg. 325, l. 11 – pg. 328, l. 11) In Mr. Tompkins’ opinion, Appellant’s brake lights were readily in view of Mr. Frost. (VRP, pg. 328, l. 8-11)

In response to a juror’s question, Mr. Tompkins testified regarding the relative positions at impact of the rear bumper of Appellant’s car and the front bumper of Respondent’s. (VRP, pg. 349, l. 15 – pg. 350, l. 8) Mr. Tompkins testified that the initial impact between the cars was bumper to bumper, followed by some “under-ride follow through” that caused damage to one of the headlights on Respondent’s car. (VRP, pg. 349, l. 24 – pg. 350, l. 8) His opinion was supported by his assessment of the damage to the vehicles, which included the fact the rear driver’s-side quarter panel of Appellant’s car was “mashed” or moved forward, indicating a direct hit to the rear of Appellant’s vehicle, followed by under-

riding by Respondent's car. (VRP, pg. 352, l. 21 – pg. 353, l. 16; see also, VRP, pg. 355, l. 5 – pg. 356, l. 13)

Another question asked of Mr. Tompkins was whether the rear of Appellant's vehicle rose up at impact. (VRP, pg. 350, l. 9-10) In response to follow-up questions from Appellant, Mr. Tompkins testified there was no indication "anywhere" that the rear of Appellant's vehicle rose up in "any way" in the ten seconds before the crash. (VRP, pg. 356, l. 17-22)

At the end of the second day of trial, but before the close of evidence, the trial court reviewed its initial proposed jury instructions with the attorneys. (VRP, pg. 266, l. 13 – pg. 270, l. 21) The trial court informed the attorneys he did not think the evidence warranted the proposed defense instructions of unavoidable accident or emergency. (VRP, pg. 269, l. 4 – pg. 270, l. 21) Ultimately, the Court informed the parties it would not give either instruction, and the defense did not object to the removal of either instruction. (VRP, 337, 1.23 – pg. 338, 1.9)

On the third day of trial, Respondent offered an additional instruction, No. 17. (VRP, pg. 331, l. 14-15; see also, VRP, pg. 271, l. 4) When asked by the Court, Appellant responded that she objected to the portion of the instruction that read as follows:

That statute also provides that no person shall suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any vehicle

immediately to the rear when there is opportunity to give such signal.

(VRP, pg. 332, l. 23 – pg. 333 l.2; See also, VRP, pg. 333, l. 3-8)

The Court explained its reasoning for giving the instruction, using an example of a vehicle going up a hill, the driver taking his foot off the accelerator, thereby causing a sudden decrease of speed. (VRP, pg. 333, l. 9-22)

Later, Appellant asked Mr. Tompkins – her final witness – whether he had driven the area of I-205 where the crash had occurred and if the area of the accident was flat. Mr. Tompkins testified that he had driven the area, and that it is flat. (VRP, pg. 357, l. 17-24)

Following the noon recess, Appellant renewed her objection to the portion of instruction 17 cited at VRP, pg. 332, l. 23 – pg. 333 l.2. (See, VRP, pg. 360, l. 25 – pg. 361, l. 14) Appellant referred the Court to Mr. Tompkins' testimony regarding the lack of any grade in the area of the crash. (VRP, pg. 361, l. 9-14) The Court stated it noted the objection. (VRP, pg. 362, l. 1)

The Court read its instructions to the jury; included in the instructions was the portion of Instruction 17 to which Appellant had twice objected. (VRP, pg. 373, l. 22 – pg. 374, l. 1; CP 46A)

Following the jury instructions and closing argument, the jury deliberated. The jury returned a verdict that found Respondent was not negligent. (VRP, pg. 450, l. 19-22. See also CP 46B)

On October 31, 2013 Appellant filed a motion for new trial, pursuant to CR 59(a)(7) and (a)(8). (See CP 50) Pursuant to local rule, the motion was heard without oral argument. (See Clark County Local Rule 59b) On November 15, 2013, the Court issued a ruling denying Appellant's motion. (See CP 55)

Judgment was entered on November 22, 2013. This appeal was filed on December 12, 2013.

### ARGUMENT

I. The Trial Court Erred In Giving Instruction 17 Because the Instruction Was Incomplete, Misstated The Law and Was Misleading.

Appellant submits that Instruction 17 as given misstated the law, or in the alternative, was misleading.

An appellate court reviews jury instructions de novo. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn.App. 475, 488-89, 302 P.3d 500 (2013), citing *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 791 (2000). Parties are entitled to jury instructions that accurately state the law. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 420, 58 P.3d 292 (2002), review

*denied*, 149 Wn.2d 1034, 75 P.3d 968 (2003). Jury instructions are sufficient when they allow counsel to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). On appeal, errors of law in jury instructions are reviewed *de novo*. *Hue v. Farmboy Spray Co., Inc.* 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A clear misstatement of the law in a jury instruction is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

The trial court's statement of the law as contained in Instruction 17 was a clear misstatement of the law. Instruction 17 given to the jury read in its entirety as follows:

A statute provides that no person shall move right upon a roadway unless and until such movement can be made with reasonable safety. The statute also provides that no person shall suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

Instruction 17 was offered by Respondent on the last day of trial. The instruction appears to have been derived from an amalgam of RCW 46.61.305(1) and (3). Those sections read as follows (the portions of the statutes included in the instruction are underlined):

No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

(Emphasis added) RCW 46.61.305(1).

No person shall stop or suddenly decrease the speed of a vehicle without giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to such signal.

(Emphasis added) RCW 46.61.305(3).

The two preceding sections of the statute proscribe two different types of actions: Section (1) prohibits moving left or right unless or until the move can be made with reasonable safety, and without giving an appropriate signal. Section (3) prohibits sudden decreases in speed without giving an appropriate signal to the driver of any vehicle immediately to the rear.

RCW 46.61.305(1) expressly states that a "move right" shall not be made without reasonable safety *nor* without giving an appropriate signal in the manner hereinafter provided. (Italics added). Instruction 17 as given only informed the jury that the statute prohibits the first "prong," namely that the move right shall not be made without reasonable safety. (see first sentence of Instruction 17)

Appellant had no objection to the giving of that portion of the instruction, nor raises one in this appeal. Omitting the second "prong" (not moving right without giving an appropriate signal) was correct and consistent with the uncontroverted evidence that Appellant in fact complied with the statute by turning on her right-hand turn signal prior to moving right.

This section addresses a leading car's driver's duty when driving in the same lane of traffic as the trailing driver. Under the facts of this case, that means after Appellant entered the right hand lane of southbound I-205.

The second sentence of Instruction 17 informed the jury that a statute provided that no person "shall suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver immediately to the rear when there is opportunity to give such signal."

Section (3) and Instruction 17 expressly state that the driver in Appellant's position must give "an appropriate signal" prior to "suddenly decreas[ing]" the speed of her vehicle. The instruction *did not inform the jury what an appropriate signal is*. However, RCW 46.61.310 does:

- (1) Any stop . . . when required herein shall be given either means of the hand and arm or by signal lamps . . .

In *Kinney v. Bissel*<sup>1</sup>, the Supreme Court upheld an instruction which stated that a signal for a stop or a sudden decrease in speed may be given by signal lamp. According to the Court, that instruction correctly interpreted the predecessor statute to RCW 46.61.310.

Respondent's proposed instruction contained none of the language in RCW 46.61.310. Neither did Instruction 17 given by the Court.

The uncontroverted testimony at trial was that Appellant's lights were on at all relevant times on November 18, 2011, including up to and at the moment of impact. Likewise, the evidence was uncontroverted that her tail lights and brake lights (i.e., "signal lamps") were functioning and operable at all relevant times. Assuming for the sake of discussion there had been evidence Appellant braked prior to the crash, the only conclusion to be drawn from the evidence is that she signaled -- via her brake lights -- her "sudden" decrease in speed.

As given, the instruction left the jury free to speculate what an "appropriate signal" is. The instruction gave no indication what an "appropriate signal" is under the statute, when braking is in fact such an appropriate signal. *Kinney, supra*. Instead, it left the jury free to ascribe any number of actions Ms. Butler had to perform in order to comply with

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<sup>1</sup>55 Wn.2d 660, 663, 349 P.2d 599 (1960), *overruled on other grounds, Danley v. Cooper*, 62 Wash.2d 179, 182, 381 P.2d 747 (1963).

the statute. Those conceivable actions were limited only by the jurors' imaginations, and only invited speculation, particularly given that the uncontested testimony of both Appellant and Respondent that Appellant's brake lights were working the night of the crash. The omission of what constituted an appropriate signal simply invited the jury to conclude Appellant had not used one, contrary to the express provisions of RCW 46.61.310.

Instruction 17 as given informed the jury that a statute required a leading driver to give an appropriate signal when her vehicle suddenly decreased in speed. Respondent gave at least three different versions of events of the facts of the crash. Prior to trial, he declared under penalty of perjury that Appellant changed lanes and then slowed abruptly. At his deposition he testified on at least five occasions that either Appellant did not apply her brakes prior to impact, or that he didn't see or didn't recall seeing brake lights prior to impact; he also testified he did not see brake lights until after the crash. At trial he testified again that he did not see brake lights but assumed Appellant "must have" applied her brakes. In none of these versions did Respondent offer any affirmative evidence Appellant applied her brakes prior to the crash.

Appellant testified she did not use her brakes prior to impact.

Larry Tompkins testified that when he test drove the same make and model Honda Pilot as that driven by Appellant on November 18, 2011, the vehicle took 18.2 seconds to slow from 60 mph to 40 mph. He further testified that the deceleration rate of the Pilot he test drove was within a range of deceleration rates that covered virtually all passenger vehicles on the road in the United States. That range was approximately 13-18 seconds. Mr. Tompkins further testified there was no evidence that the rear of Appellant's car rose up at any time — consistent with braking that would cause a sudden decrease in speed — in the 10 seconds before the crash. (VRP, pg. 356, 1.17-22)

There was *no* evidence — let alone substantial evidence — presented at trial to support a verdict based on Appellant's "sudden decrease" in speed. In fact, the evidence was to the contrary. Respondent's "best" evidence was his parsed trial testimony that Appellant "must have" applied her brakes, but that is merely a conclusion. As noted above, conclusions of fact or conclusory statements do not create issues of fact. Conclusory statements unsupported by evidence do not create issues of fact. *See, e.g., Strong v. Terrell*, 147 Wn.App. 376, 384, 195 P.3d 977 (2008).

Larry Tompkins' testimony was that Appellant's vehicle took over 13-18 seconds to slow from 60 miles per hour to 40 miles per hour; he

also testified it would take less time to decelerate to 40 mph when the road was wet. (VRP, 309, 1.15-17). Because there was no evidence that Appellant braked prior to impact, deceleration was the only means by which her vehicle slowed between the time it passed and overtook Respondent's until the impact occurred. Under no definition could Appellant's decrease in speed be considered "sudden".

The undisputed facts were that Appellant's vehicle did not suddenly decrease in speed by her letting off the gas pedal. Furthermore, the uncontroverted and non-speculative facts were that Appellant did not apply her brakes until *after* Respondent slammed into the back of her car. Instructing the jury regarding a statute that requires a driver in Appellant's position to signal appropriately when *suddenly* decreasing speed was misleading and contrary to the evidence. The instruction placed undue emphasis on a theory not supported or simply not given at trial. There was no evidence that Appellant's vehicle "suddenly decreased" in speed, and therefore giving Instruction 17 was error for that reason as well.

Instruction 17 clearly misstated the law in at least three ways. First, it failed to give the jury any guidance as to what constituted an "appropriate signal", when both RCW 46.61.310 and *Kinney* expressly provide such guidance. Second, it failed to inform the jury that by applying her brakes and activating her signal lamps, Appellant complied

with the statute; the instruction invited the jury to speculate that even by applying her brakes and activating her signal lamps, Appellant violated the statute. Third, it invited speculation that a driver in Appellant's position might have to do more than what is required by RCW 46.61.310, such as pump her brakes, activate her hazard lights, or the use of hand or arm signals.

An instruction that is a clear misstatement of the law is presumptively prejudicial. *Anfinson v. FedEx Ground Package System*, 174 Wn.2d 851, 866, 281 P.3d 289 (2012). The central issue of Appellant's alleged comparative negligence was presented by way of an instruction that clearly misstated the law. *Id.*, at 872 (citation omitted). As a result, Instruction 17 was presumptively prejudicial.

As noted above, a misleading jury instruction must also be prejudicial. *Anfinson v. FedEx Ground Package System, supra*. Unlike a clear misstatement of the law, prejudice is not presumed. *Id.* (citations omitted).

Washington cases do not appear to define what makes a jury instruction misleading. Appellant submits that some guidance is provided in the language concerning whether verdict forms are misleading. Special verdict forms are reviewed under the same standard as jury instructions. *Capers v. The Bon Marche*, 91 Wn.App. 138, 142, 955 P.2d 822 (Div. I)

(1998).<sup>2</sup> The special verdict must adequately present the contested issues to the jury in an unclouded, fair manner. *Capers*, at 142. (*citations omitted*).

Appellant contends that Instruction 17 did not present the contested issue of the parties' respective negligence in an unclouded, fair manner. To the contrary, the instruction provided a very specific but erroneous pathway for the jury to follow to reach a result unsupported by both the law and the evidence. The instruction did not tell the jury that activation of Appellant's brake lights complied with the statute. The instruction provided no guidance as to what constituted an "appropriate signal", which was particularly significant given the crash happened at night. Because the pertinent language of RCW 46.61.310 was not included in the instruction, it left to the jury's collective speculation and imagination what Appellant would have had to do to comply with RCW 46.61.305.

There was no evidence to suggest that Appellant's decrease in speed was caused by braking. By the same token, there was no evidence that Appellant's decrease in speed was sudden, regardless which of

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<sup>2</sup> That standard is that instructions are sufficient if, when considered in their entirety, they: (1) permit each party to argue his theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Capers*, 91 Wn.App. at 142.

Respondent's versions the jury believed. Accordingly, the instruction was misleading and prejudicial because it presented the contested issues to the jury in a clouded, unfair manner. *Capers, supra*, at 142. The instruction permitted the jury to find Respondent 0% negligent and Appellant 100% because it emphasized a theory of events utterly lacking in facts.

The instruction was misleading on multiple levels because it was incomplete, misstated the law, failed to inform the jury that Appellant had in fact complied with the statute and promoted a defense version of events unsupported by the evidence. Each of those reasons alone was prejudicial. Taken together, they constituted obvious and overwhelming prejudice.

The Supreme Court has held that incorporating the provisions of (present-day) RCW 46.61.305(1) and RCW 46.61.310 into an instruction that informs a jury that a signal to suddenly slow or stop may be given by signal lamp "correctly interprets the statute". *Kinney v. Bissel, supra*; see also, *Anderson v. Beagle*, 71 Wn.2d 641, 645, 430 P.2d 539 (1967); *Felder v. City of Tacoma*, 68 Wn.2d 726, 732-33, 415 P.2d 496 (1966), and *Western Packing v. Visser*, 11 Wn.App 149, 158-59, 521 P.2d 939 (1974) (cases in which instructions given or proposed contained provisions of both present-day RCW 46.61.305 and .310). Given the absence of any evidence that Appellant used her brakes at all prior to the crash, it was

especially erroneous not to instruct the jury on the entire meaning and intent of the statutes.

The omission of the pertinent provision of RCW 46.61.310 provided the jury an unwarranted avenue to find Respondent not negligent, because the omission allowed the jury to find that either (a) Appellant's use of her brakes was not an appropriate signal or (b) that her "unsignaled" decrease in speed via deceleration violated the statute. For those reasons, the instruction was prejudicially misleading. Instruction 17 misled the jury, and improperly informed the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004).

II. The Trial Court's Decision to Give Instruction 17 was Erroneous.

Appellant submits that the trial court's decision to give Instruction 17 was erroneous.

A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wash.2d 1, 6, 217 P.3d 286 (2009); *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). In *Kappelman*, the Supreme Court affirmed the holdings of the Court of Appeals, which specifically included the holding that the defendant had been entitled to the emergency instruction. See, *Kappelman v. Lutz*, 141

Wn.App. 580, 170 P.3d 1189 (2007) and *Kappelman v. Lutz*, 167 Wn.2d 1, 217 P.3d 286 (2009). However, the Court of Appeals said the following regarding the standard of review regarding a trial court's decision to give an instruction:

Generally, we review a court's decision to give an instruction for an abuse of discretion. *Tuttle v. Allstate Insurance Co.*, 134 Wn.App. 120 at 131, 138 P.3d 1107 (2006). But we will review a court's decision to give an instruction based upon a ruling of law de novo. *Id.* Whether the emergency doctrine applies to these facts, thus warranting the giving of the instruction, is a question of law. *Id.*

*Kappelman*, 141 Wn.App. at 588.

In its opinion in *Kappelman*, the Supreme Court did not expressly address the discrepancy in the *de novo* review outlined by the Court of Appeals and the abuse of discretion standard it applied in the same case on the same issue. Given that the Supreme Court affirmed the Court of Appeals on the issue without specifically addressing the discrepancy, it is confusing as to what the appropriate standard actually is.<sup>3</sup> The confusion is compounded by the language used by each court: the Court of Appeals appears to hold that the de novo standard applies generally as to trial courts' decisions to give instructions, and the Supreme Court's analysis

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<sup>3</sup> Appellant is mindful that in its opinion, the Supreme Court stated that it saw the standard of review as being an abuse of discretion, but did so in a cursory fashion and without addressing the Court of Appeals' analysis.

appears to be focused on the standard to be applied to the emergency instruction specifically.

According to the Court in *Walker*, in determining whether a party has produced sufficient evidence to warrant an instruction, the trial court must apply a mixed subjective and objective analysis. 136 Wn.2d at 772. However, in *Kappelman*, the Court held that – as to the decision to give the emergency instruction – the trial court:

(M)ust merely decide whether the record contains the kinds of facts to which the [emergency] doctrine applies. Therefore, we review the trial court’s decision to give an emergency instruction for abuse of discretion.

*Kappelman*, 167 Wn.2d at 6.

Given the Supreme Court’s holding in *Kappelman*, this Court’s review would appear to center upon a determination of whether the record in this case “contains the kinds of facts to which the [statutory framework of RCW 46.61.305 and .310] applies.” Appellant submits that an apt analysis of whether that is indeed the case here would be to compare the facts before the trial court in *Kappelman* with those in the case at bar.

In *Kappelman*, the defendant Lutz took his friend Amber Kappelman (at the time known as Amber Strain) for a motorcycle ride at dusk on a state road in unincorporated Klickitat County. Kappelman was

injured when Lutz hit a deer. The Court described the crash and the moments leading up to it as follows:

The motorcycle was traveling over the 55 mile per hour speed limit when Lutz saw a deer off to his left, coming down toward the road. In less than a second, the deer reached the shoulder of the road. Lutz realized the deer was going to enter the road and swerved to the right of his lane, away from the deer. He also began to decelerate by a combination of light braking and downshifting. The deer entered the roadway, crossed the oncoming lane of traffic, and entered Lutz's lane. At 50 feet from impact, Lutz realized he was not going to be able to avoid hitting the deer and stood on the brakes hard, causing the bike to skid. The motorcycle hit the deer. Between three and four seconds elapsed from the time Lutz first saw the deer until impact.

*Kappelman*, 167 Wn.2d at 4 (footnote omitted).

The Court noted that Lutz knew there were deer in the area and that they come out at dusk, but that he still was surprised to see a deer the evening of the crash. *Kappelman*, 167 Wn.2d at 4, fn 3.

Both the Supreme Court and the Court of Appeals stated it was not Lutz's fault the deer appeared by the side of the road, or that it ran onto the road. See, *Kappelman*, 167 Wn.2d at 10, and *Kappelman*, 141 Wn.App at 589. Because the emergency was not brought upon Mr. Lutz in whole or in part by his own negligence, and because the parties' testimony conflicted as to whether the emergency or his negligence caused the crash,

the trial court was correct in giving the instruction. *Kappelman*, 141 Wn.App. at 588-89.

In comparing the facts presented in the case at bar with those in *Kappelman*, it is first worth pointing out a specific finding the trial court here made on the record — namely, that this particular set of facts did not constitute an emergency situation, and therefore an emergency instruction was not warranted. Accordingly, Respondent was not placed in a position of peril, was not placed in such a position through no fault of his own and was not suddenly faced with a situation which gave him no time to reflect which choice was best. See, e.g., *Tuttle v. Allstate Ins. Co.*, 134 Wn.App. 120, 131, 138 P.3d 1107 (2006).

The record contains the following facts with respect to Instruction 17: Appellant’s car overtook Respondent’s while the two vehicles were in their respective lanes. Appellant’s car was going faster than Respondent’s to accomplish that pass. (VRP, pg. 228, l. 13-21) Appellant was fully aware of Respondent’s presence and manner of driving, which included speeding up and slowing down, for a considerable distance prior to overtaking his car. Respondent’s first awareness of Appellant’s car was when it merged in front of him. (VRP, pg. 236, l. 9-16; see also VRP, pg. 242, l. 7-9) It was common and not surprising “at all” to Respondent that cars would be merging into his lane at the location Appellant did the night

of the crash. (VRP, pg. 237, l. 5 pg. 238, l. 7) Such a lane change was something Respondent would actually anticipate at the location of crash. (VRP, pg. 238, l. 13-15)

Respondent did not recall seeing Appellant's car when it overtook his. (VRP, 239, l. 24 – pg. 240, l. 5) He did not know what lane of traffic Appellant was in when her car overtook him. (VRP, pg. 241, l. 15-18) He did not remember the amount of distance between his car and the car ahead of him before he saw Appellant's car. (VRP, pg. 240, l. 7-13) He did not know "distance-wise" how far Appellant's car was in front of him when he hit his brakes, or when he first attempted to brake. (VRP, pg. 240, l. 14-23)

In his interrogatory response, Respondent said that after Appellant changed lanes in front of him and abruptly slowed, he attempted to pass Appellant on the left. (VRP, 196, l. 12 – pg. 197, l. 9) Respondent acknowledged that response was given under oath. (VRP, pg. 243, l. 16 – 18; see also, VRP, pg. 245, l. 8-12 and VRP, pg. 242, l. 19 – pg. 243, l. 6) By Respondent's own testimony, he had the time to see Appellant when she merged in front of him, and then make the decision to accelerate around her in an attempt to pass her.

In his deposition, Respondent stated on at least four occasions that at no time did he attempt to pass Appellant on the left. (VRP, pg. 243, l.

21 – pg. 245, l. 3) Respondent acknowledged that on each of those four occasions he was under oath. (VRP, pg. 245, l. 4-7)

In his deposition, Respondent testified on seven occasions that he did not see or did not recall seeing Appellant's brake lights before the crash occurred. (VRP, pg. 229, l. 16 – pg. 232, l. 12) The first time he saw brake lights on Appellant's car was after the crash occurred. (VRP, pg. 231, l. 3 – 12; see also, VRP, pg. 231, l. 15 – pg. 232, l. 12) At trial, Respondent also testified that he did not see appellant's brake lights prior to the crash, though he did say for the first time that he believed she did. (VRP, pg. 229, l. 11-15; see also, VRP, pg. 233, l. 9-13)

Finally, Respondent admitted that he did not know if Appellant signaled her lane change. (VRP, pg. 230, l. 19-24)

In short, there was no evidence before the jury to suggest that Appellant did anything to “suddenly decrease” her speed prior to the collision. See, Instruction 17. The testimony from Appellant's expert was that Appellant's vehicle did not suddenly decrease speed when a driver removed his or her foot from the accelerator. Both Appellant's and Respondent's testimony was that there was no evidence that Appellant braked at all prior to impact; Respondent's testimony confirmed that Appellant's brake lights were operable the evening of the crash. (See VRP, pg. 231, l. 3-12; after the collision, “all [Respondent] saw was brake

. . .”)(See also VRP, pg. 314, 1.15-19) Appellant testified she passed and changed lanes prior to the crash with no problem. Respondent acknowledged that in order to pass him, Appellant had to be driving faster than him. He further testified that he first saw her vehicle when it merged in front of him, but never said that in the process of merging she reduced her speed, either with or without the use of her brakes. His testimony was that she made her lane change and then abruptly slowed, but according to his clear and sworn interrogatory response, that was after Appellant was in his lane of travel. Respondent never testified he had a problem seeing the rear of Appellant’s car or her taillights in the process of merging or after she merged, but he never saw her brake lights until after he drove his vehicle into the rear of hers. The uncontroverted testimony was that Appellant’s brake lights were at Respondent’s eye level, and were “readily” there to be seen. (VRP, pg. 328, 1.8-11)

The physical facts before the jury regarding Appellant’s sudden decrease in speed were uncontroverted, and overcame Respondent’s vague and conclusory testimony to the contrary. See, e.g., *Bohnsack v. Kirkham*, 72 Wn.2d 183, 190, 432 P.2d 554 (1967). Assuming the standard of review before this Court is abuse of discretion, the facts in the record must be the kinds of facts to which Instruction 17 would apply. *Kappelman*, 167 Wn.2d at 9. There was no evidence that Appellant suddenly

decreased her speed; in fact, the evidence was that the collision occurred because Respondent was not paying attention and/or because he *increased* his speed, consistent with his manner of driving Appellant saw before the collision. Accordingly, it was an abuse of the trial court's discretion to have given Instruction 17.

If the standard of review is *de novo*, Instruction 17 was clearly erroneous. "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson v. FedEx Ground Package System, Inc.* 174 Wn.2d 851, 860, 281 P.2d 289 (2012), *quoting*, *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. *Id.*, *citing*, *Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 323-25, 119 P.3d 825 (2005).

Instruction 17 was not supported by the evidence, misleading for the reasons given earlier, and when in read as part of the instructions as a whole improperly informed the jury of the applicable law. It provided the jury a way to relieve Respondent of liability because of Appellant's alleged failure to comply with RCW 46.61.305 and .310. Because the facts showed that her vehicle could not suddenly decrease in speed by Appellant removing her foot off the accelerator, the instruction was

unsupported by the facts and therefore was misleading. Because there was no evidence for the jury to find that Appellant applied her brakes prior to impact, it was unsupported by the evidence and therefore misleading.

III. The Trial Court's Decision to Give Instruction 17 was Erroneous Because there was Not Substantial Evidence to Support the Giving of the Instruction.

Appellant submits the trial court erred in giving Instruction 17 because there was not substantial evidence to support it.

The standard of review for a challenge to the sufficiency of evidence supporting the giving of an instruction is abuse of discretion. *Herring v. DSHS*, 81 Wn.App. 1, 22, 914 P.2d 67 (1996); *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

If a party's case theory lacks substantial evidence, a trial court must not instruct the jury on it. *Fergen v. Sestero*, 174 Wn.App. 393, 397 298 P.3d 782 (2013) (citations omitted). Evidence supporting a party's case theory must "rise above speculation and conjecture" to be substantial. *Id.*, quoting *Bd. of Regents of Univ. of Washington v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978). Evidence is substantial if a "sufficient quantum [exists] to persuade a fair-minded person of the truth

of the declared premise.” *Id.*, quoting, *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621(1978).

Here, Respondent testified that the impact happened “instantaneous – within seconds” after Appellant merged in front of him. (VRP, pg. 246, l. 17-22) That was testimony read from Respondent’s deposition, which he acknowledged was under oath. In his interrogatory response, he swore under oath that he had the opportunity to see Appellant’s car merge in front of him, comprehend that such a maneuver had taken place, make a decision to go around Appellant, and then attempt to execute the maneuver.

At trial, also testifying under oath, Respondent said for the first time that Appellant “cut [him] off.” (VRP, pg. 207, l. 5-8; see also VRP, pg. 234, l. 21-24) Appellant acknowledged he waited until testifying in front of the jury to claim for the first time Appellant had cut him off. (VRP, pg. 235, pg. 10-13) He further acknowledged in his deposition he had no problems expressing himself. (VRP, pg. 233, l. 14 – pg. 234, l. 5) He further testified under oath at trial there was nothing preventing him from using the term “cut off” when asked at his deposition when he first saw Appellant’s car, instead of the sworn response he gave at that time, which was “[w]hen [Appellant merged in front of [him]].” (VRP, pg. 236, l. 9 – pg. 237, l. 1)

At trial while under oath, Respondent testified that when he first saw Respondent's vehicle he began braking. (VRP, pg. 211, l. 2-4) This was in contrast to the sworn statement he gave in his interrogatory response, where he said he tried to go around Appellant's vehicle and never mentioned the use of his brakes. Respondent acknowledged at trial he testified multiple times at his deposition in direct contrast with his interrogatory answer with respect to his attempt to go around Appellant before the crash. And despite his claim at trial that Appellant "must have" applied her brakes before the crash, Appellant also acknowledged under oath that he testified to the contrary multiple times at his deposition.

When asked about his manner of driving prior to the crash, Respondent testified that "he did not know" if he was driving "faster and then slower or remaining at a constant speed." VRP, pg. 239, l. 18-22; see also, pg. 208, l. 8-11.

It was an abuse of the trial court's discretion to give Instruction 17 because there was not a "sufficient quantum [of evidence] to persuade a fair-minded person of the truth" of Respondent's claim that Appellant suddenly decrease her speed. See, *Holland, supra*. At best, Respondent's testimony rises to, but not above, the level of conjecture and speculation. See, *Bd. of Regents, supra*. This is true even without taking into account Respondent's acknowledged contradictory sworn statements on the crucial

issues of Appellant's manner of driving, her lane change, Respondent's responses to the lane change, whether Appellant braked before impact and whether Respondent attempted to go around her.

There was no factual dispute that any alleged "sudden decrease" in Appellant's speed was accomplished by Appellant removing her foot from the accelerator. Appellant's testimony was the decrease was gradual, as was Larry Tompkins', and Respondent offered no evidence that a sudden decrease could be caused simply by Appellant removing her foot from the accelerator. That means any sudden decrease in speed could only have been accomplished by Appellant's use of her brakes, and the defense presented nothing on that issue other than conjecture and speculation. Accordingly, the trial court abused its discretion in giving the instruction.

IV. The Trial Court Erred in not Granting Appellant's Motion For a New Trial.

Appellant submits the trial court erred in denying her motion for new trial. The motion was based upon the insufficiency of the evidence and the giving of Instruction 17.

A court may grant a motion for a new trial when important rights of the moving party are materially affected because substantial justice has not been done. CR 59(a). When the trial court's basis for denying a new trial is based upon questions of fact, the ruling will not be disturbed absent

a manifest abuse of discretion. When an order is based on questions of law, the standard of review is de novo and not abuse of discretion. *Ramey v. Knorr*, 130 Wn.App. 672, 686, 124 P.3d 314 (2005) (*citations and footnotes omitted*).

Appellant's first basis for a new trial was brought pursuant to CR 59(a)(7), namely that there was "no evidence or reasonable inference from the evidence to justify the verdict . . . or that is contrary to law."

The standard of review of the trial court's denial of a motion for new trial under CR 59(a)(7) is similar to the standard of review if a denial of a motion for judgment as a matter of law: The reviewing court views the evidence in the record "in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party." *Lian v. Stalick*, 106 Wn.App. 811, 824, 25 P.3d 467 (2001), *quoting, Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

Appellant incorporates by reference her citations to the record and arguments contained in Section II and II, pps. 25-37, with the following supplement:

Respondent's response to the interrogatory that was read to the jury is substantive evidence. See, e.g., *Esborg v. Bailey Drug Company*, 61 Wn.2d 347, 349, 378 P.2d 298 (1963) (a party intending to use an

interrogatory answer as substantive evidence should ask that the answer be formally received into evidence). (See also, WPI 6.10 and VRP, pg. 196, l. 10 – pg. 197, l. 9) His statements given under oath at his deposition are substantive evidence. CR 32(a)(2). See also, *Young v. Liddington*, 50 Wn.2d 78, 80, 309 P.2d 761 (1957). This includes using Respondent's deposition testimony as substantive evidence at trial. See *Young, Id.* That evidence established that Respondent did not brake in response to seeing Appellant's vehicle in front of him; that Respondent attempted to go around Appellant's vehicle in response to seeing her in front of him; the reasonable inference to be drawn from Respondent's attempt to go around Appellant is that he was closing in on her vehicle prior to his attempt to go around her.

Furthermore, all of Respondent's versions of events established that Appellant did not use her brakes prior to the crash, which establishes that Appellant's decrease in speed was accomplished by her removing her foot from the accelerator and gradually decreasing her speed, consistent with her testimony and that of Larry Tompkins. The undisputed evidence was that Appellant's taillights were operable the night of the crash and visible to Respondent. The undisputed evidence was also that Appellant's car had to have been going faster than Respondent's to have passed him. There was no evidence that Appellant slowed at all in the process of

getting alongside Respondent, completely overtaking him and moving into the right-hand lane. It was undisputed that at all times in that process Appellant's vehicle was there to be seen by Respondent, but that he did not see it until it "merged in front of him". Appellant's testimony that she used her right-hand turn signal before moving into the right-hand lane was uncontroverted. Likewise, Appellant's testimony that Respondent was speeding up and slowing down prior to her making the lane change was uncontroverted.

In short there was ample testimony and evidence in the record to establish that Respondent was negligent. The evidence most favorable to Respondent is that Appellant cut him off and the impact occurred "instantaneous – within seconds" of her merging in front of him. At best, those statements are vague, conclusory, and internally inconsistent (an event cannot occur both "instantaneously" and "within seconds"). Furthermore, at best, the evidence establishes some percentage of fault on Appellant's part. However, even when viewed in the light most favorable to Respondent, the evidence in the record also established his negligence.

Accordingly, there was no evidence or reasonable inference to be drawn therefrom to justify the jury's verdict that Respondent was not negligent. The trial court's decision not to grant Appellant's motion for new trial was an abuse of discretion.

Appellant's second ground for a new trial was brought under CR 59(a)(8). A motion for new trial may be granted under CR 59(a)(8) if an error of law occurred at trial and "was objected to at the time by the party making the application." CR 59(a)(8). Because the motion for new trial was based on a question of law, the standard of review is de novo. *Ramey v. Knorr*, 130 Wn.App. 672, 686, 124 P.3d 314 (2005).

Appellant's argument, and the applicable standard for review, are identical to that presented in Sections I-III, pps. 13-37, *supra*. Appellant incorporates those portions of the record and argument presented in that section, and adds the following:

The record is clear that Appellant on two separate occasions objected to the portion of Instruction 17 at issue here. Accordingly, the requirement of objecting on the record was satisfied. The remaining question is whether the issue regarding the instruction was one of law or fact.

Appellant submits that the trial court's decision to give only the part of the instruction that contained language contained in RCW 46.61.305, and not RCW 46.61.310, was an issue of law. See, *Kinney v. Bissel, supra*, (the two sections read together is an accurate statement of the law).

Because the instruction as read to the jury was a clear misstatement of the law, prejudice is presumed, and therefore the trial court erred in failing to grant Appellant's motion for new trial. Even if the instruction was only misleading, prejudice was established because there was no evidence in the record that Appellant slowed suddenly, and the instruction unfairly focused the jury on an issue that was unsupported in the record. On that basis as well, the trial court erred in failing to grant Appellant's motion for new trial.

#### CONCLUSION

The trial court erred in giving Instruction 17. The instruction as given did not inform the jury what an appropriate signal was, and therefore was presumptively prejudicial. The instructional was also prejudicially misleading because there was no evidence that Appellant used her brakes prior to the collision, or that her vehicle had suddenly slowed prior to Respondent colliding with the rear of her car. The trial court also abused its discretion in giving the instruction because there was not substantial evidence Appellant had not used an appropriate signal, or had slowed suddenly.

The trial court erred in failing to grant Appellant's motion for new trial. There was both insufficient evidence to support the jury's verdict that Respondent was not negligent, and sufficient evidence – including

Respondent's prior testimony and interrogatory response – that he was in fact negligent. Furthermore, the trial court's decision to give Instruction 17 was an error of law to which Appellant objected at the time of trial.

For these reasons, Appellant asks this Court to reverse the trial court's order denying a new trial, remand the case to the trial court, and order that the case be set for a new trial.

DATED this 1<sup>st</sup> day of April, 2014.



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BRUCE COLVEN, WSB #18708  
Of Attorneys for Appellant

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY *[Signature]*  
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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

CYNTHIA BUTLER,

Plaintiff/Appellant,

v.

RANDALL FROST,

Defendant/Respondent.

Appellate Court No. 45697-4-II

DECLARATION OF SERVICE

I, Bruce Colven, hereby certify under penalty of perjury under the laws of the State of Washington that on April 1, 2014, I caused to be filed with the Court of Appeals, Division II, via Federal Express Overnight Delivery, postage prepaid and deposited in Vancouver, Washington, United States of America the original of the following document:

- 1. Brief of Appellant;

and copies of the same were served via first class postage prepaid and deposited in Vancouver, Washington, United States of America on April 1, 2014, upon the following:

Cliff Wilson  
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