

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

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CYNTHIA BUTLER,

vs.

RANDALL FROST,

Petitioner,

Respondent,

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE ROBERT LEWIS

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APPELLANT'S REPLY BRIEF

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I. Appellant Adequately Preserved the Objection to Instruction 17.

Respondent argues that Appellant did not object to the lack of definition of the term “appropriate signal” included in Instruction 17. The following colloquy took place when the court first proposed giving the instruction:

Court: So I just - as you asked from the Plaintiff first of all, do you have any objection to giving of the 20 instructions?

BC: Your Honor I do object to the second sentence of the first paragraph which reads: *“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.”*

My concern with that is that the jury may think that this means that in a night time driving situation that when somebody takes their foot off the accelerator or – you know – decreases their speed – they have to somehow notify the driver behind. So that’s my concern with that second sentence.

Judge: Well that’s what the statute say and I think that there are situations where it might be that you have to give some sort of signal of that.

For example, there really wasn’t any testimony about the roadway here – whether it was level or whether they were going up a hill or not. And so if a person takes their foot

off the ga – off the gas in a position where that would cause a sudden decrease of speed

In other words you're going up a hill like this at sixty miles an hour and all of a sudden you take your foot off the gas and so now the vehicle is going to slow down quickly, then the law seems to indicate that you're required to give some sort of signal that that's occurred.

So – I think that the instruction is appropriate and I will give it with the changes that I've made and it's up to the parties to argue whether it fits the facts and – because there's two sets – there are two I instructions that deal with statutes providing for something, this one and the other one I mentioned.

(VRP 332, l. 18 – 334, l. 3)

Following the completion of Larry Tompkins' testimony, Appellant addressed the instruction again, in light of the court's previous comments and Mr. Tompkins' testimony:

Judge: Thank you. Please be seated. All right counsel. Are we ready for the jury then?

BC: Almost Judge. A couple of things I wanted to discuss. One I want to renew my objection to that portion of instruction number seventeen that I objected to earlier which reads:

*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 and there's opportunity to give such signal."*

I raise it now because I asked Mr. Tompkins a question about was the road flat in that area – I think it was clear from the exhibits anyway. But I – again I do think this over-stresses – this bring an issue that's – given the facts of this case inapplicable. So I'd just renew that.

(VRP pps. 360, l.22 – 361, l. 14)

CR 51(f) requires a party objecting to a jury instruction to “state distinctly the matter to which he objects and the grounds of his objection.” This objection allows the trial court to remedy error before instructing the jury, avoiding the need for a retrial. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 134, 606 P.2d 1214 (1980). “The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983). So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review. *Washburn v. City of Federal Way*, 172 Wn.2d 732, 747, 310 P.3d 1275 (2013).

Appellant's initial objection was addressed to the specific issue of how a driver in front of another vehicle at night would “appropriately signal” the trailing driver that her foot was going to, or had come off the

accelerator. The trial court's response included a hypothetical that involved a "sudden decrease in speed" caused not by the lead vehicle braking, but one caused by the vehicle encountering an incline. Regardless of the manner of the decrease in speed (i.e., deceleration, incline or braking), it was clear that Respondent conveyed and the Court understood that the essence of the objection was "appropriate signal."

Appellant distinctly stated the matter in Instruction 17 to which she objected, as well as the grounds. The grounds were specific enough that the court formulated a hypothetical to explain why it believed the portion of the approved instruction was appropriate. The court's comments "manifested an understanding" of Appellant's position. See, *Washburn*, *supra*, 172 Wn.2d at 748. Respondent's argument that Appellant raised the issue for the first time on appeal is unsupported by the record.

It is ironic that Respondent argues that Appellant failed to adequately inform the Court of the objection, given that Respondent failed to provide the full and accurate statement of the law. See Appellant's Opening Brief, pps. 17-18, and *Kinney v. Bissel*, 55 Wn.2d 660, 663, 349 P.2d 599 (1960) (*reversed on other grounds*). Respondent was the party who presented the incomplete instruction on the morning of the last day of trial. Furthermore, Respondent claims in his response that throughout the entirety of the litigation, he always asserted — in one fashion or another

— that Respondent “cut him off”. Yet Respondent waited until the trial of the case was nearly over before presenting an incomplete statement of the law.

II. The Error Relating to Instruction 17 was Harmful.

Respondent claims the error in instruction 17 was harmless because the instruction addressed Appellant’s negligence, and the single question answered by the jury only addressed Appellant’s negligence.

There were two parties to the crash in this case. Appellant’s complaint alleged the fault of no one other than Respondent. Respondent’s answer alleged the fault of no one other than Appellant. The evidence presented on the issue of liability implicated no one other than the parties. The trial court made a specific finding that no emergency contributed to the crash (VRP pps. 267, l. 4-16; 268, l. 10 – 21), and the defense conceded the point the following day. (VRP pps. 337, l. 22 – 338 l. 9) The instructions directed the jury to allocate fault of both parties. The jury’s finding that Respondent was not negligent is the equivalent of the jury allocating 0% fault to him and 100% to Appellant.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both *the nature of the conduct of the parties to the action* and the extent of the causal relation between such conduct and the damages.

RCW 4.22.015 (emphasis added).

Based upon the testimony and evidence presented at trial, the pleadings of the parties and the arguments, the only explanation for the jury's negative response to the question it answered is that it found Appellant was 100% at fault for the crash. To surmise otherwise assumes the jury ignored the evidence and failed to follow the law.

The defense argues that the erroneous Instruction 17 was "not relevant". To the contrary, the instruction expressly informed the jury that a driver (Appellant, in this instance) was negligent when she didn't signal appropriately a sudden decrease in speed. *Omitted* incorrectly from the instruction was that the activation of brake lights satisfied the signaling driver's statutory duty. Because the instruction was incomplete, the jury did not know that Appellant complied with the statute through activation of her brake lights. As given, the instruction left the jury with the unmistakable — but incorrect — impression that Appellant *failed to engage in behavior required by statute*, thereby providing a ready means to find her entirely at fault for the crash.

The instruction was harmful also because it unduly emphasized a theory of the crash unsupported by the evidence. See Appellant's Opening Brief, section III, Pages 34-37. The instruction allowed Respondent to advance to the jury a claim unsupported by the law *and* the facts. That the instruction was erroneous and incomplete is clear. The harm caused by the

instruction was further magnified because of the lack of substantial evidence supporting it. See, e.g., *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999).

III. The Facts of this Case are Inapposite to those in *James v. Niebuhr*.

Respondent relies upon *James v. Niebuhr*, 63 Wn.2d 800, 389 P.2d 287 (1964), for the proposition that use of brake lights is an inadequate signal of an intention to suddenly stop. The reliance is unhelpful for several reasons.

Despite the undisputed evidence that Appellant's brake lights worked the night of the crash, Respondent argues he didn't see them before the crash occurred. (VRP pps. 231, l. 3 – 232, l. 12) Respondent testified he never saw Appellant's brake lights until after the crash. (VRP p. 231, l. 3-7) Respondent could neither assert nor deny that Appellant "appropriately signaled" *in any fashion* prior to the collision occurring. Accordingly, even if *James* stands for the authority Respondent claims, it is unavailing to him because he cannot say if she signaled or not.

The facts in *James* are unique and explain the rationale for the Supreme Court's holding. It is important to contrast those with the facts in this case. The accident occurred during daylight hours. *James, supra*, 63 Wn.2d at 800. The trailing driver had been behind the lead driver for six miles leading up to the collision. The lead car stopped suddenly – as

opposed to slowing – on an arterial highway. The trailing driver testified he was looking ahead but saw no hand signal and that the lead driver stopped suddenly without any prior signal with the brake lights. There does not appear to have been any dispute between the parties that the lead driver’s stop was in fact sudden; in other words, the issue appeared to be whether the stop had been signaled. Based upon the language of the opinion, it appears the instruction to the jury included the pertinent sections of both (present-day) RCW 46.61.305(3) and .310. Finally, the Supreme Court interpreted the meaning of the statute in light of the facts in front of it, namely that the lead vehicle *stopped* suddenly. The Court did not interpret the statute in a case with a theory as postulated by Respondent at trial.

The crash in the case at bar occurred at night, rendering useless the use of hand signals, and therefore the applicability of that portion of the statute. Very much unlike the trailing driver in James, Respondent was not aware of Appellant’s presence until she was in the right lane, despite that uncontroverted evidence that she gradually passed him in the middle lane, and that she signaled her lane change (VRP p. 236, l. 13-19; VRP pps. 240 l. 24 – pg. 24, l. 18; and VRP pps. 25, l. 16 – pg. 27, l. 11) Third, there was no factual evidence that Appellant slowed suddenly or abruptly prior to the crash. (VRP p. 31, l. 20-23; VRP pps. 31, l. 24 – pg. 32, l. 15; and

VRP p. 33, l. 15 – 20; see also, VRP 307, l. 1 – 308, l. 7) Fourth, the action of a vehicle changing lanes at the location Appellant did was one Respondent anticipated and was not surprised by. (VRP pps. 237 l. 5 – 238, l. 15) Fifth, the trial court here gave an incomplete instruction of the law.

The *James*' court's conclusion was simply that the lead driver was going to stop in an unusual and unexpected location<sup>1</sup> and there was substantial evidence in the record to suggest that she failed to signal that action; under those facts, the instruction was proper. However, neither the facts in *James* nor the Court's holding suggests the blanket conclusion Respondent claims that a lead driver must<sup>2</sup> – “pre-signal” an intention to slow down. This is evident from the Court's language in *James* upon which Respondent relies:

The statute contemplates that the driver must do something than merely apply his brakes in the *act of stopping*. It requires that the driver give some notice of his *intention to stop* where there is an opportunity to do so.

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<sup>1</sup> There was “no reason for [the lead driver] to assume that [the trailing driver] would know that [the lead driver] intended to stop.” *James*, 63 Wn.2d at 802.

<sup>2</sup> Respondent's Reply brief, section IV, l.c., pg. 13-15.

“ . . . the [lead] driver had the opportunity to ‘give a signal of her intention to stop, either by hand or by flashing the brake light in advance.’”

(See Respondent’s Brief, p. 14 — emphasis and underline added)

Respondent’s argument is that the *James* court rejected the argument advanced here by Appellant. That is simply not true. The *James* court held that the facts supported a statutory violation of the statute based upon the lead driver’s failure to signal an intention to stop in advance of *stopping*. Nowhere does the opinion state that a lead driver must signal an intent to slow by – as Respondent posits – “tapping one’s brakes to flash the brake lights in advance of braking . . .”. (Respondent’s Brief, g. 14)

Here, there was no evidence here that Appellant – unlike the lead driver in *James* – intended to stop or in fact did. Furthermore, there was no evidence Appellant either (a) slowed suddenly or intended to do so, or (b) applied her brakes in a manner to cause her vehicle to slow suddenly. Neither the circumstances immediately before the crash in *James*, or the facts adduced regarding the lead driver’s actions remotely resemble the facts of the case at bar. Accordingly, Respondent’s blanket assertion that the Supreme Court rejected the argument advanced here by Appellant is incorrect, because the *facts and evidence* presented here were completely different, and did not support the giving of the instruction.

RCW 46.61.305(3) requires that “a driver must signal the vehicles behind him when he suddenly decreases speed.” *Ryan v. Westgard*, 12 Wn.App. 500, 509, 530 P.2d 687 (1975). The statute simply says a driver must give trailing drivers some kind of signal that her speed is decreasing *suddenly*. A driver who suddenly decreases his speed by braking but whose brake lights are inoperable would violate the statute. A driver in the same predicament but who used hand signals to indicate a sudden speed decrease would not, at least not during daylight hours. A driver who does nothing to signal a sudden decrease in speed would violate the statute<sup>3</sup>. A driver who signals a sudden decrease in speed by activating her brake lights complies with the statute. RCW 46.61.310. The plain meaning of the statute is that the lead driver must give a visual signal of the intent to decrease speed. Activating operable brake lights by depressing the brake pedal complies with the statute. There is no statutory requirement for a lead driver to “pre-signal” a signal to suddenly decrease speed, and the *James* court’s holding did not say that.

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<sup>3</sup>The lead driver in *Ryan* is an example, even though his speed decrease was not “sudden”: While driving at night in the middle lane of I-5, his speed dropped from 60 to approximately 10 miles per hour due to insufficient fuel. The trailing driver’s view of the decrease was blocked by an intermediate vehicle which suddenly changed lanes, revealing to the trailing driver for the first time a vehicle traveling at a dangerously low speed with no signal by the driver to trailing drivers (such as emergency flashers) that he was doing so.

As noted above, it is not entirely clear from the *James* opinion if the jury instruction in that case included the portion of RCW 46.61.310 not included in this case. What *is* known is that the two statutes read together comprise a correct statement of the law, and that the correct statement of the law was not given here. *Kinney, surpa.*

IV. There was not Substantial Evidence to Establish the Complete Absence of Respondent's Negligence.

Respondent writes that Appellant spent an “inordinate” amount of time attempting to impeach Respondent and attack his credibility. (Respondent’s Reply Brief, p. 17) Respondent misses the point. It is not possible for a reviewing court to determine if there was substantial evidence to support a jury’s finding without knowing all the relevant testimony and evidence presented to the trier of fact. There is no question that Respondent told varying versions of what happened, and that some of those versions were sufficient to establish his negligence. But the point of showing all of his versions was not to impeach his credibility. The varying and conflicting stories told by Respondent is required to show that no combined or cobbled-together set of facts show either (a) Respondent’s absence of negligence, or (b) Appellant’s complete and 100% fault. In other words, even in the light most favorable to him, no factual version of events presented to the jury supported the jury’s verdict that Respondent

was fault-free. For that reason, the judgment should be reversed and a new trial granted.

Respondent's Reply points to the absence of facts to support the verdict. Respondent did not see, and/or could not remember seeing Appellant's brake lights activated prior to the collision. Respondent's Brief, page 17. Coupled with Appellant's testimony that she never touched her brakes from the moment she began overtaking Respondent until after the impact occurred, there were no facts in the record to support that she suddenly slowed. The evidence on this point was uncontroverted by any affirmative defense testimony.

*Testimony must have more than a speculative value before it can be regarded as of testimonial sufficiency to establish a material fact . . . The evidence of negligence must be affirmative and there can be no presumption that the lights were not burning . . .*

*Poland v. City of Seattle*, 200 Wash. 208, 214-15, 93 P.2d 379 (1939) (citation omitted).

Appellant submits that evidence of an event occurring or a condition existing (such as her brake lights being operable) is not contradicted by a witness's testimony that he does not remember the event or condition. The same notion applies to the testimony of a witness who claims to have not observed an event or condition, particularly when the event or condition was there to be seen. At a minimum there must be

more than a scintilla of evidence to create an issue of fact. See, e.g., *Poland, supra*, at 216 (citation omitted) (“we have adopted the fair and reasonable rule of requiring substantial evidence, not merely a scintilla of evidence, to satisfy the requirement of a preponderance of the evidence.”). Without the affirmative and substantial evidence necessary to create a factual issue, it was error for Instruction 17 to be given. And the fact there was not substantial evidence to support the jury’s conclusion that Respondent was not negligent, it was error for the trial court to deny Appellant’s motion for new trial on that basis.

The foregoing is especially true given that the evidence in question was that of a physical fact, namely that Appellant’s brake lights were operational and working on the night of and at the time of the crash. Where the physical facts are uncontroverted, and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts. See, e.g., *Mouso v. Bellingham & No. Ry. Co.*, 106 Wn. 299, 303, 179 P. 848 (1919). The undisputed physical fact here was that on the night of the crash, Appellant’s brake lights signaled when she applied her brakes. Even Respondent testified the brake lights came on after the impact<sup>4</sup>. The fact this establishes is that Appellant did not

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<sup>4</sup>It is worth noting that as of the time of the crash, this also means Respondent had the physical capability to see Appellant’s brake lights if he was looking and/or paying attention.

“suddenly slow” any time before the crash, at least not via application of her brakes. Furthermore, the uncontroverted evidence was that Appellant’s vehicle could not and did not “suddenly slow” by simply removing her foot from the accelerator. (VRP p. 31, l. 20-23; pps. 31, l. 24 – 32, l. 15, and pps. 33, l. 15 – 20; see also, VRP pps. 307, l. 1 – 308, l. 7) The grade of the freeway was flat, so Appellant’s vehicle did not slow suddenly due to a sudden incline. (VRP pg. 361, l. 9-14)

These physical facts do more than merely cast doubt on Respondent’s credibility. See, e.g., *Bunnell v. Barr*, 68 Wash.2d 771, 775, 415 P.2d 640 (1966) (citation omitted) (in order for the rule to apply, the physical facts in evidence must go further than to simply cast doubt upon the credibility of a witness or party). Rather, they (a) completely corroborate and are consistent with the testimony of the parties, and (b) explain why Respondent did not see or did not remember seeing Appellant’s brake lights prior to the impact, because they never came on prior to impact. Not only were those physical facts undisputed, they were consistent with each other and, when taken together, “manifestly irreconcilable” with Respondent’s oral testimony. *Id.*

There is one further circumstantial physical fact Respondent cannot account for with respect to a sudden decrease in speed caused by appellant braking: Because the brake lights were operational, they would

have been lit for several seconds to accomplish the sudden decrease in speed Respondent claims. Coupled with the established fact that Respondent did not see brake lights, this adds further corroboration and consistency that any decrease in speed by Appellant's vehicle was not caused by braking. And because the undisputed facts were that her vehicle did not slow suddenly via deceleration on a flat road, there was no evidence that she slowed suddenly at all.

The consistency of the testimony and evidence, in conjunction with the physical facts, points to the quite plausible and common explanation for what appeared to Respondent to be a sudden slowing of Appellant's vehicle's speed: He was not paying attention and failed to see what was there to be seen. In short, the established and undisputed physical facts were such as to irresistibly lead reasonable minds to but one conclusion. *Bunnell, supra*, at 68 Wn.2d at 775-76. That conclusion was that Respondent was negligent.

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V. Conclusion.

As stated in the conclusion to her Opening Brief, 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.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of July, 2014.



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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

CYNTHIA BUTLER,

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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 July 15<sup>th</sup>, 2014, I caused to be filed with the Court of Appeals, Division II, via Certified Mail; Return Receipt Requested, first class postage prepaid, and deposited in Vancouver, Washington, United States of America the original of the following document:

- 1. Appellant's Reply Brief;

and copies of the same were served via first class postage prepaid and deposited in Vancouver, Washington, United States of America on July 15, 2014, upon the following:

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SIGNED in Vancouver, Washington on July 15, 2014.

Bruce Colven