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NO. 87915-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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NANETTE & ARNOR AURDAL,

Respondents,

v.

UNITED TELEPHONE COMPANY OF THE NORTHWEST, d/b/a  
SPRINT, an Oregon corporation doing business in the State of  
Washington, JOHN BURNSTON and JANE DOE BURNSTON,  
husband and wife, and the marital community composed thereof,

Petitioners,

and

PHILIP B. HUNTINGFORD and "JANE DOE" HUNTINGFORD,  
husband and wife, and the marital community composed thereof,  
CHARLES R. HUNTINGFORD and "JANE DOE"  
HUNTINGFORD, husband and wife, and the marital community  
composed thereof, GLEN J. HUNTINGFORD and "JANE DOE"  
HUNTINGFORD, husband and wife, and the marital community  
composed thereof, as individuals and as a partnership doing  
business as OUT R WAY FARM,

Defendants.

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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 ORIGINAL

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## INTRODUCTION

It is undisputed that John Burnston hit and ran. On a dark night, he killed a large black mare, leaving her dead body in the road – an obvious hazard for other drivers. He did not stop. He drove off, returning 15 minutes (or more) later.

It is undisputed that Nanette Aurdal was seriously injured when her SUV collided with the black mare. Her SUV was totaled. She has chronic pain, requiring a pain pump to manage her daily activities. She cannot have children.

It is undisputed that the jury heard, without objection, the following evidence (and more) of Burnston's negligence:

- ◆ “[S]tate law mandates” that Burnston stop. RP 220-21.
- ◆ “[T]he law is . . . specific that you are to stop, identify yourself, render aid, etc.” RP 236;
- ◆ Sprint’s policies required Burnston to “Stop at once,” and to “Take steps to prevent further accidents,” such as setting out “warning devices” in his Sprint truck. RP 42, 108; Ex 26; and
- ◆ Burnston violated Sprint guidelines. RP 42-43, 45.

The dispute is whether the trial court properly gave a jury instruction that is plainly consistent with this evidence, and if not, whether the error was harmless. The answer to both is “yes.” Burnston’s preservation issue is equally unpersuasive. This Court should affirm.

## SUPPLEMENTAL STATEMENT OF THE CASE

- A. Sprint employee John Burnston hit a horse with his Sprint truck and drove off, leaving the dead mare in the center of the lane.**

Around 5:00 p.m. on December 14, 2001, Philip Huntingfords' horse escaped when a wind storm damaged her pen. RP 530, 538, 541, 1033. The night was dark, and the black mare began making her way toward Center Road, an unlit road in rural Chimacum Washington. RP 98, 541, 1093-95, 1183-84.

As Hungtingford pursued the horse, Sprint employee John Burnston drove southbound in a Sprint utility truck on Center Road, returning from a repair job. RP 541, 1093-94. The horse jumped onto the lane just past a curve. RP 1095. Out of the darkness, Burnston saw the black mare and tried to swerve. RP 1095.

Burnston hit the horse, killing her and damaging his Sprint truck. RP 174-75, 1095-96. Although he knew he hit the horse, and although he thought she might be alive, he kept on driving. RP 1012, 1096, 1100, 1107-08.

- B. Nanette Aurdal hit the dead horse, totaling her SUV and suffering permanent disabling pain.**

Shortly after Burnston hit and ran, Nanette Aurdal approached the scene driving her Ford Explorer SUV at about 45

mph – under the speed limit. RP 108-09, 177-78, 565, 568. She did not see the dead horse until it was too late. RP 177-78, 565.

Aurdal struck the horse, launching her Explorer into the air for several feet. RP 177-78, 185-86, 566. The Explorer's undercarriage crashed down on the pavement, sending sparks flying. *Id.* The impacts threw Aurdal about – her chest slammed the steering wheel, her hip struck the console, and her head or her hand broke the rearview mirror. RP 566, 593-94, 607, 609. Aurdal regained control and stopped on the side of the road. RP 566, 610-11. Her SUV was totaled. RP 957.

Aurdal now suffers persistent and chronic neck, back and hip pain. RP 574, 579. When more conservative treatments failed, a doctor implanted a pain pump in Aurdal's abdomen, which delivers pain medication directly to her spine through a catheter. RP 283, 288, 576, 630. Aurdal cannot work and cannot perform her regular daily activities and hobbies. RP 587-89, 632-33, 635-36. Due to her disabling pain and the lifestyle it causes, Aurdal cannot have children. RP 589-90.

**C. Although Sprint's policies required Burnston to stop and remain at the scene, he fled, later lying about having done so.**

When Burnston hit and ran, he had been employed by Sprint for nearly 27 years. RP 1092-93. He had been trained to immediately stop and remain at the scene of any accident he was involved in. RP 36-37, 42, 56, 1114-15. As a reminder of Sprint's policies, the "IN CASE OF ACCIDENT" card located in Burnston's Sprint truck told him to stop and "[t]ake steps to prevent further accidents," including taking steps to warn others:

1. Stop at once.
2. Take steps to prevent further accidents – park safely, set out warning devices.

RP 36-37, 47-48, 1169; Ex 26.

Burnston admitted that his Sprint truck was equipped with a strobe light, reflective safety cones, and flares. RP 1100. But he did not "[s]top at once," and did not "set out [the] warning devices" located in his truck, taking no steps whatsoever "to prevent further accidents." Ex 26. Burnston fled. RP 1096.

Burnston returned to the scene 15 minutes or more later. RP 173-75, 177, 182-84, 197-98, 202-03. He lied, claiming that he was the first to arrive after Aurdal struck the dead horse, but at least one other person was already there. RP 178, 202-03, 1104.

He lied again, telling his supervisors and Sprint's insurance company that Aurdal collided with the horse while he "was pulled over and going to put up flares." Ex 119; Ex 29; RP 43-45, 1223-25. He later admitted this lie. RP 1097-98, 1113-14.

**D. Evidence of Burnston's negligence included, among other testimony, the state law mandate that he stop and remain at the scene.**

The Aurdals sued the Huntingfords, Sprint, and Burnston for negligence. CP 1-6. The jury heard copious evidence that Burnston was negligent, including – without objection:

- ◆ Expert testimony that "state law mandates" that Burnston stop after he hit the horse. RP 220-21;
- ◆ Expert testimony that Burnston had to stop as quickly (and safely) as possible and as near to the scene as possible. RP 239;
- ◆ Expert testimony that "the law is . . . specific that you are to stop, identify yourself, render aid, etc." RP 236;
- ◆ Testimony that Sprint's policies required Burnston to "[s]top at once," and to "[t]ake steps to prevent further accidents," such as setting out "warning devices" located in the Sprint vehicle. RP 42, 108; Ex 26; and
- ◆ Testimony from a Sprint safety-procedures trainer that Burnston failed to follow company guidelines. RP 34-35, 42-43, 45.

The trial court instructed the jury that a driver involved in a collision damaging property must immediately stop and remain at the scene:

A statute provides that:

The driver of any vehicle involved in an accident resulting in damage to other property shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident; every such stop shall be made without obstructing traffic more than is necessary.

CP 142 (Instruction 18, based on former RCW 46.52.020); RP 1288. The trial court also instructed the jury regarding negligence and the standard of ordinary care. CP 132 (Instruction 8), 134 (Instructions 10), and 135 (Instruction 11). Sprint agrees that “general negligence principles” and its own safety policies require drivers involved in an accident to stop. RP 42, 1232; Ex 26. Sprint’s only objection at trial, and the only one raised in its Petition for Review, is that former RCW 46.52.020, upon which Instruction 18 is based, did not “apply to an accident with an animal.” RP 1231-32, 1267; Pet. 5.

#### **SUPPLEMENTAL ARGUMENT**

**A. Instruction 18 was proper, but any error is harmless in any event.**

**1. The appellate court did not address whether Instruction 18 was proper and Sprint did not seek review of this issue.**

Sprint repeatedly states that the appellate court “acknowledged” that former RCW 46.52.020 does not apply. Pet.

2, 4-5, 7. But the majority did not address the statute (or whether Instruction 18 was proper), holding instead that Sprint failed to preserve its only persuasive argument on this point:

Before us, counsel argues persuasively that the hit-and-run statute does not apply because it imposes no duty to stop and stay to *prevent further accidents*. But counsel did not make the same critically important legal point to the trial court. Rather, counsel simply argued at trial that the statute did not apply, providing no legal explanation or distinct grounds for Burnston's objection. We hold that Burnston failed to preserve the issue for appeal. RAP 2.5(a).

Majority at 5 (emphasis original).<sup>1</sup> There is no holding that former RCW 46.52.020 does not apply. *Id.* The holding is that "Burnston failed to preserve the issue for appeal." *Id.*

Sprint's Petition did not ask this Court to determine whether former RCW 46.52.020 applied or whether Instruction 18 was proper. Petition at 1-2. The issue is not before this Court.

**2. Nonetheless, this Court should affirm on the ground that Instruction 18 was proper.**

Giving Instruction 18 was proper, where former RCW 46.52.020(2) plainly applied. Former RCW 46.52.020(1) governed accidents in which a person was injured or killed so is inapplicable here. But former RCW 46.52.020(2) required a driver involved in

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<sup>1</sup> This new argument is not persuasive – all road regulations are intended to prevent accidents. *Supra*, Argument § B. And former RCW 46.52.020(2) applied to all "other property" without limitation. *Id.* at § A.2.

an accident damaging "other property" to immediately stop and remain at the accident scene. The only limitation on "other property" is that it is something other than "a vehicle which is driven or attended by any person":

The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property shall immediately stop such vehicle at the scene or such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every stop shall be made without obstructing traffic more than is necessary.

Former RCW 46.52.020(2). In other words, a driver who damages "other property" must stop and remain.

The horse was plainly "other property," and neither Sprint nor the Dissent claim otherwise. *Sohol v. Clark*, 78 Wn.2d 813, 820, 479 P.2d 925 (1971) (a horse is personal property); *Wall-A-Hee v. N. Pac. Ry. Co.*, 180 Wash. 656, 41 P.2d 786 (1935) (same). Thus, former RCW 46.52.020(2) plainly applied – Burnston was "involved in an accident resulting only in . . . damage to other property," so he had to "immediately stop . . . and . . . remain at, the scene of such accident."

At trial, Sprint's sole argument that former RCW 46.52.020(2) was inapplicable was that it did not "apply to an

accident with an animal," where former RCW 46.52.020(3) requires the driver damaging "other property" to "give his or her name, address, insurance company . . . and vehicle license number," etc. Pet. 4-5, 7; RP 1231-32, 1267. In other words, Sprint claims that since "[t]here was no person at the scene of Burnston's accident to whom Burnston could have provided the information . . . required by [former] RCW 46.52.020(3)," Burnston could hit and run. Pet. 6.

Burnston breached his duty to stop and remain at the scene, so his subsequent duties are irrelevant. But in any event, Sprint's interpretation of former RCW 46.52.020(2) would produce absurd results – namely, that a driver can negligently hit and damage someone else's property, but lawfully flee the scene, so long as no one is around. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) ("the court 'will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.' A reading that produces absurd results must be avoided because 'it will not be presumed that the legislature intended absurd results'" (internal citations omitted)).

If Sprint is right, then a driver could, for example, sideswipe a row of parked cars, run head-on into a house, or even smash into a propane tank, and flee the scene, taking no responsibility for the

property damage – and potential hazards created – if there was “no person at the scene” to witness his wrongdoing. Pet. 6. But the former statute’s obvious objective is to discourage drivers from damaging property and running without taking responsibility.

And Sprint’s proposed interpretation suffers from additional defects – a driver who hits and runs may have no idea whether he injured a person he should be assisting, or whether there is someone present at the scene with whom he should be exchanging information. Sprint’s reading invites drivers to hit and run, claiming that no one was around, without ever bothering to stop and find out.

Burnston did not know whether the horse was being led by her owner, whom he might have injured. He did not know that Huntingford was just minutes away. He did not know these things because he ran without stopping and finding out.

The Dissent creates an ambiguity in the former statute where none exists, stating that it is unclear whether the statute is intended to apply to “the nonstationary property of a person not present at the scene.” Dissent at 8 n.1. Former RCW 46.52.020(2) makes no distinction between stationary and “nonstationary” property. It applies to all “other property,” which by the statute’s plain language includes any property other than “a vehicle which is

driven or attended by any person.” Former RCW 46.52.020(2). Again, Sprint never argued that the horse was not “other property.”

Nor is the distinction the Dissent proposes reasonable. The legislative history the Dissent unnecessarily resorts to plainly reveals that a negligent driver cannot hit a house and flee, without attempting to find the owner, or at least notify him by leaving a note. Dissent at 8 n.1. But as the Dissent would have it, a negligent driver could hit a man’s dog – “nonstationary property” – and flee, leaving it to die in the street. That cannot be the law.

**3. Or this Court should affirm the appellate court’s correct holding that giving Instruction 18 was a harmless error, if error at all.**

Instruction 18 is consistent with considerable testimony, admitted at trial without objection, about a statutory “mandate” to stop. And contrary to the Dissent’s statement that “Aurdal made little effort to establish the Burnston’s failure to stop constituted a breach of the standard of ordinary care,” the jury heard ample evidence that Burnston simply had to stop, independent of the “state law mandate[.]” Dissent at 12 and 12 n.3. This Court should affirm the majority’s correct conclusion that any error was harmless.

When an instruction is erroneous, the appellate courts will reverse only if the error is prejudicial; *i.e.*, “presumably affects the

outcome of trial.” Majority at 6; *Herring v. Dep’t of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996). If the appellate court determines that an instruction is erroneous, then it “presume[s] prejudice subject to a comprehensive record review.” Majority at 6 (citing *Blaney v. Int’l Ass’n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 212, 87 P.3d 757 (2004)). In other words, the appellate court reviews the record to determine whether the presumption of prejudice is rebutted.

Sprint’s principal argument in its Petition for Review is that the appellate court failed to presume prejudice. Pet. at 9. But the majority acknowledged that “[w]hen considering an erroneous jury instruction, we presume prejudice subject to a comprehensive record review.” Majority at 6. Assuming arguendo that Instruction 18 was erroneous, the majority presumed prejudice and engaged in a “comprehensive record review,” which rebutted the presumption. Majority at 5-7 (citing *Blaney*, 151 Wn.2d at 212).

The majority correctly found no prejudice. Any error was harmless where Instruction 18 was merely cumulative of the overwhelming evidence that Burnston had a duty to immediately stop and stay at the scene. *Miller v. Arctic Alaska Fisheries, Corp.*, 133 Wn.2d 250, 261-62, 944 P.2d 1005 (1997); *see also*

Dennis J. Sweeney, *An Analysis of Harmless Error In Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 319 (1995-96). Without any objection, Aurdal's accident reconstruction expert, Ed Wells, testified about the specific requirements of former RCW 46.52.020(2). Wells first testified that "state law mandates" that Burnston stop and stay:

Q. . . I believe you testified that Mr. Burnston should have stopped once he hit the horse?

A. I'm certain I said that.

Q. Okay. And why should he have stopped?

A. Well, for one thing, state law mandates it, and, second, he should have stopped to protect the scene and keep others from potential harm.

RP 220-21. The "state law mandate[]" Wells referred to was of course former RCW 46.52.020 – Wells later explained in specific detail former RCW 46.52.020's "mandate" that a driver involved in an accident must "immediately stop":

Q. You talked about a duty to stop under the law. That's not an absolute duty in terms of where to stop or how quickly to stop or where to park?

A. Well, the law is not specific about the details that you have described. It's only specific that you are to stop, identify yourself, render aid, etc.

Q. Yeah. And in fact, it says to stop as soon as practicable, doesn't it? Words to that effect?

A. I believe that's the wording.

RP 236. Nothing contradicted this testimony that "the law" imposed a "duty to stop" and identify, render aid, etc. *Id.*

The jury also heard other "mandates" that Burnston stop and stay. Contrary to the Dissent's claim that Aurdal was not focused on Burnston's breach of the common-law duty to stop and stay, Sprint readily admitted that Aurdal could rely on "general negligence principals." RP 1232. Wells testified – again without objection – that Burnston simply had to stop. When asked "why" Burnston had to stop, Wells enumerated two reasons: first, the "state law mandate[]"; and "second, he should have stopped to protect the scene and keep others from potential harm." RP 220-21. And Wells also testified that "the first thing to be done would be to stop as safely and quickly as possible, as near to the incident as [Burnston] could have gotten stopped." RP 239.

The jury also heard that Burnston violated Sprint's policies, listed on the "IN CASE OF ACCIDENT" card in Burnston's Sprint vehicle, requiring him to "[s]top at once," and to "[t]ake steps to prevent further accidents," such as setting out "warning devices" located in the Sprint vehicle. RP 42-43, 108; Ex 26. The Sprint

employee who trained Burnston testified that Burnston breached company guidelines. RP 34-35, 42-43, 45.

The jury also heard that Burnston repeatedly lied about the incident. RP 43-45. He claimed that he was the first to arrive after Aurdal's accident, but was not. RP 178, 202-03, 1104. He falsified his accident report, claiming that Aurdal hit the horse while he was "stopped, putting out flares," but later admitting that he did not even stop, much less take preventative measures. RP 45, 1096. Aurdal repeatedly characterized Burnston's false statements as "a lie" and as "far from the truth," without objection. RP 43-45.

The Dissent dismisses Burnston's repeated lies, stating that the appellate court cannot assess whether the jury gave credence to Burnston's testimony. Dissent at 12. While it may be true that a court of review cannot know whether a jury "disregard[s] testimony consisting of contrasting statements," there were no "contrasting statements." *Compare id. with* RP 43-45, 1096. Burnston admitted his lies and conceded that he hit and ran. RP 43-45, 1096, 1114.

The Dissent also argues that Sprint's policies unequivocally requiring Burnston to stop, stay, and take steps to prevent further accidents, are a "private industry standard," which are not conclusive evidence of negligence. Dissent at 12. That argument

was quite literally never raised at trial or on appeal. It was not before the appellate court and is not before this Court.

But again, the Sprint employee who trained Burnston testified – without objection – that Burnston violated Sprint's policies. RP 34-35, 42, 56. The jury most certainly could – and did – conclude from this (and other) testimony that Burnston was negligent. CP 157-59, 291-94.

With such overwhelming evidence of Burnston's negligence, any error in giving Instruction 18 was harmless under this Court's decision in *Blaney, supra*. There, the trial court instructed the jury to calculate Blaney's future wage loss "from today until the time Ms. Blaney may reasonably be expected to retire." 151 Wn.2d at 210. This Court held that the instruction erroneously usurped the jury's discretion to determine how long Blaney would continue working. *Id.* at 210-11. But the error was harmless, where Blaney presented evidence that she would work until retirement, and her employer only speculated otherwise. *Id.* at 211-12.

Any error here is similarly harmless. The jury was told in myriad ways that Burnston simply had to stop and stay. Whether by state law mandate, by company policy, or by common sense

and ordinary care, the result is the same: stop and stay. Instructing the jury consistent with this evidence is harmless, if error at all.

**B. The appellate court's decision that Sprint failed to preserve an objection to Instruction 18 is plainly correct, where Sprint never raised the objection in the trial court.**

Sprint, like the Dissent, claims that the majority requires too much under CR 51(f). Dissent at 9. But if Sprint is right, then *any* objection to a jury instruction is sufficient to preserve *every* objection to a jury instruction. That is not the law.

CR 51(f) requires a party opposing a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection . . . ." Put another way, the "[p]ertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." Majority at 5 (citing *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (citation omitted in *Walker*); Dissent at 10 (citing *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)). The purpose of this rule is to permit the trial court to correct erroneous instructions and avoid the expense of a new trial. Majority at 5.

The "grounds of [Sprint's] objection" at trial was that former RCW 46.52.020 does not apply to an accident with an animal. CR 51(f); RP 1230-32, 1267. This simply did not "apprise the trial

judge of the nature and substance" of the completely different objection Sprint raised for the first time on appeal – that the former statute is not intended to prevent further accidents. *Id.*; Majority at 5. These are two entirely different objections.

It is quite plain "what . . . the majority would require" – that the opponent of a jury instruction actually state "the grounds of his objection." Dissent at 9; CR 51(f). This is akin to an evidentiary objection. A party objecting that evidence is irrelevant under ER 401 & 402, does not preserve an objection that it is inadmissible on some other ground, such as unfair prejudice under ER 403. **State v. Guloy**, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). The same is true here.

**Crossen**, upon which Sprint and the Dissent exclusively rely, is plainly inapposite. Pet. at 7-8; Dissent at 10-11. There, counsel took exception to the trial court's refusal to give several instructions, citing the statute upon which the proposed instructions were based. **Crossen**, 100 Wn.2d at 357-58. The appellate court held that the objection was not preserved, where counsel neglected to explain why the instructions were necessary. 100 Wn.2d at 357, 359. This Court reversed, holding that "the failure to give a rationale [does not] *necessarily* preclude[] appellate review, [where]

it was apparent . . . that the trial judge understood the basis of counsel's objection." *Id.* at 359 (emphasis in original).

Relying on *Crossen*, the Dissent points to "extensive debate" over Instructions 18, concludes that the trial court "understood the nature of the objection" and questions "what more the majority would require of trial counsel . . . to satisfy CR 51(f)." Dissent at 9 (emphasis in original). In the "debate" the Dissent refers to, Sprint does not even suggest that the former statute is not intended to prevent further accidents. RP 1230-32; 1267. The trial court plainly understood, and correctly rejected Sprint's argument that the former statute does not apply to accidents with an animal. RP 1268. Again, horses are "other property." *Supra*, Argument § A(2).

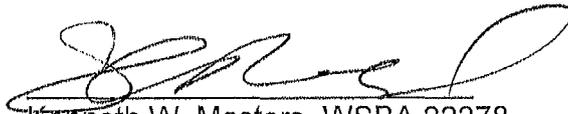
The trial court was never given the opportunity to understand Sprint's argument that the former statute is not intended to prevent further accidents, where Sprint never raised it. RP 1230-32, 1267. Sprint is wrong in any event – prevention is a "constant purpose" of all road regulations. *Lyle v. Fiorito*, 187 Wash. 537, 544, 60 P.2d 709 (1936) ("The constant purpose of laws and rules regulating the use of roads is to prevent accidents").

## CONCLUSION

The trial court properly instructed the jury consistent with overwhelming evidence of Burnston's negligence. If any error occurred, it was harmless. And Burnston plainly failed to preserve its objection in any event, raising a ground on appeal that it never once mentioned in the trial court. This Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **RESPONDENTS' SUPPLEMENTAL BRIEF** postage prepaid, via U.S. mail on the 8th day of March 2013, to the following counsel of record at the following addresses:

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## OFFICE RECEPTIONIST, CLERK

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**To:** Cheryl Fox  
**Subject:** RE: 87915-0 Aurdal v. United Telephone Co. of the NW - Respondent's Supplemental Brief

Rec'd 3-8-13

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**From:** Cheryl Fox [<mailto:cheryl@appeal-law.com>]  
**Sent:** Friday, March 08, 2013 4:20 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
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### RESPONDENT'S SUPPLEMENTAL BRIEF

Case: *Aurdal v. United Telephone Co. of the NW.*  
Case No.: 87915-0  
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Thank you!

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