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NO. 72267-1-I

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

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
a foreign insurance company,

Appellant,

vs.

PHYLLIS GLOVER-SHAW AND JOHN DOE GLOVER-SHAW,
wife and husband and their marital community; et al.,

Respondents.

AMENDED BRIEF OF APPELLANT
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

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I. INTRODUCTION

This appeal is from a declaratory judgment action filed by appellant State Farm Mutual Automobile Insurance Company (“State Farm”). In its complaint, State Farm asked for a ruling that multiple collisions at the intersection of Broadway and Everett Avenue on April 1, 2011 constituted one “accident” for purposes of the liability coverage in the relevant State Farm auto policy.

The Superior Court should have ruled on summary judgment that there was one accident because there has never been a dispute that the multiple impacts occurred in a short amount of time (four to five seconds) and distance (about 160 feet), and that defendant Suzanna Suljic’s out-of-control driving was the cause of the collisions. Under Washington law, these are the three factual criteria that must be met to support a legal conclusion that one accident occurred. There was no genuine issue of material fact that each were met in this case. The Court improperly denied State Farm’s summary judgment motion.

At trial, the Superior Court erred by not instructing the jury about the meaning of “control” in conformance with *Pemco Mut. Ins. Co. v. Utterback*,¹ which defined “regaining control” as “regain[ing] a full

¹ 91 Wn. App. 764, 766, 960 P.2d 453 (1998).

measure of control over either the car’s injury inflicting potential or the situation in general.”² State Farm objected that the instruction on control was contrary to *Utterback* and it invited the jury to speculate as to the meaning of control. The Court acknowledged the key language from *Utterback*, and even stated that it “gets to the issue of control”³ and that the control issue in *Utterback* was “really the crux of what’s at issue here.”⁴ But the Court called the definition of control in *Utterback* “awfully cumbersome language” and refused to instruct the jury as to what “control” meant in the context of this case. Counsel for respondents took advantage and argued in closing statements that if Ms. Suljic was “swerving” or “weaving in and out of traffic,” this meant she was controlling the vehicle because—although undisputedly drunk, panicking, and colliding at high speed with multiple vehicles—she was exercising some amount of “driver input.”

The Superior Court also erred by failing to ask the jury the three questions relevant to the “how many accidents?” issue:

² Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 3-5 (*quoting Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764, 772, 960 P.2d 453 (1998)).

³ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 5-6.

⁴ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 7-10 (emphasis added).

- Did the collisions from start to finish take less than five seconds (i.e., did they occur quickly)?
- Did the collisions occur over approximately 160 feet (i.e., over a short distance)?
- Did Ms. Suljic’s out-of-control driving cause the collisions?

The Court instead submitted verdict form questions that essentially asked if the collisions occurred in a “chain reaction” sequence. State Farm repeatedly objected because it never argued that this was a classic chain reaction accident and Washington law does not require that there be a chain reaction collision for there to be one accident.

After the jury answered “no” to the three questions on the special verdict form, the Court refused to even rule on whether there were one or more accidents. As explained below, the issue cannot be tried in the underlying third-party liability case⁵ or another declaratory judgment action. The Court orchestrated a pointless trial that left the key issue “twisting slowly in the wind.”⁶

State Farm asks the Court of Appeals to hold that there was one accident as a matter of law. Alternatively, State Farm requests a new

⁵ That case is styled *Terry Kennedy, et al. v. Suljic* and was brought by respondents Terry Kennedy, Matthew Thayer, and Lindsey Price. It is still pending in Snohomish County Superior Court under cause No. 11-2-10314-3.

⁶ Verbatim Report of Proceedings 7/28/2014 p. 8, l. 24 – p. 9, l. 1.

trial and an order that the Superior Court submit correct instructions and special verdict form questions.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

No. 1: The trial court erred in denying State Farm's motion for summary judgment.

No. 2: The trial court erred by giving jury instruction number six.

No. 3: The trial court erred by submitting its special verdict form questions.

No. 4: The trial court erred by rejecting State Farm's proposed special verdict form questions.

No. 5: The trial court erred by denying State Farm's motion for a new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1: Taking the evidence in the light most favorable to respondents, is there a genuine issue of material fact as to whether more than one accident occurred? (Assignment of Error no. 1)

No. 2: Should the Court have instructed the jury about the meaning of "maintain control" and "regain control" in accordance with Utterback? (Assignment of Error no. 2)

No. 2: Did leaving “control” undefined in jury instruction number 6 “mislead” the jury or “cloud[] the jury’s vantage point of the contested issues”?⁷ (Assignment of Error no. 2)

Nos. 2-4: “When read as a whole,”⁸ did instruction number six’s undefined use of “control,” combined with misleading closing statements from respondents and irrelevant special verdict form questions, “undermine[] the efficacy of the jury instructions as a whole”?⁹ (Assignment of Error nos. 2-4)

Nos. 3 & 4: Did the Court’s special verdict form questions ask about the factors relevant to whether one or more accident occurred? (Assignment of Error nos. 3 and 4)

Nos. 3 & 4: Did the Court’s special verdict form questions “adequately present the contested issues to the jury in an unclouded, fair manner”?¹⁰ (Assignment of Error nos. 3 and 4)

⁷ *Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 143, 955 P.2d 822, 825 (1998).

⁸ *Capers*, 91 Wn. App. at 145.

⁹ *Capers*, 91 Wn. App. at 145.

¹⁰ *Capers*, 91 Wn. App. at 142 (citations omitted).

Nos. 3-5: Did the special verdict form questions proposed by State Farm ask about the factors relevant to whether one or more accidents occurred? (Assignment of Error nos. 3-5)

Nos. 2-5: Should the Court have granted a new trial with correct jury instructions and special verdict form questions? (Assignment of Error nos. 2-5)

III. STATEMENT OF CASE

A. THE ACCIDENT

The accident from which this matter arises occurred on April 1, 2011, at approximately 9:34 p.m. on Broadway near where it intersects with Everett Avenue.¹¹ Ms. Suljic was driving a 2000 Lincoln Navigator SUV southbound toward Everett Avenue with two passengers in the vehicle. The Lincoln Navigator was insured by State Farm.¹² Ms. Suljic was intoxicated when she caused the collisions and her blood alcohol concentration was .091.¹³

¹¹ Before all of these collisions, Ms. Suljic also collided with two parked, unoccupied vehicles on Broadway, over three blocks north of the collisions that occurred around Broadway and Everett Avenue. *See* CP 488 (Police Report No. E0989839: “Prior to the collisions detailed above, unit 01 had struck two parked and unoccupied vehicles in the 2300 block of Broadway.”). These collisions with parked vehicles are not at issue in this case and the owners of the parked vehicles are not parties to this case.

¹² CP 550.

¹³ CP 521-524.

As she approached the intersection of Everett Avenue, Ms. Suljic's Navigator crossed the center line and entered the northbound lanes of Broadway, striking a northbound 2001 Cadillac Seville being driven by George Maxfield. Ms. Suljic then hit the rear end of a 2005 Ford Mustang, being driven by defendant Terry Kennedy that was stopped in the southbound left turn collector lane. The impact pushed the Mustang into the rear end of a 2006 Volkswagen Passat, being driven by defendant Matthew Thayer (defendant Jason Harder was his passenger). The impact pushed the Passat into the middle of the intersection. After it struck the rear end of the Passat, the Mustang rotated counter-clockwise and struck the front driver's side of a 2000 Dodge Ram 1500 pickup truck, driven by defendant Jason Tastad, which was in the southbound, inside lane of Broadway approaching Everett Avenue.

Ms. Suljic continued southbound into the intersection of Everett Avenue, against a red light, and again encroached into the northbound lanes. Here the Navigator collided head-on with a 2009 Mitsubishi Lancer, which was being driven northbound through the intersection by defendant Lynsey Price. That impact caused the Navigator to rotate clockwise, and the rear of the Navigator struck the passenger side of

Ms. Price's Lancer. As a result of the impacts, Ms. Price's Lancer hit a 1998 Buick Century behind her that was being driven by defendant Amber Conner.¹⁴ Ms. Suljic's vehicle then came to a rest about 160 feet from the spot of the initial impact.¹⁵ In sworn statements, witnesses described the collisions as chaotic and rapid:

- Community Transit bus driver Donald Lords described a "fast moving southbound SUV vehicle. It sounded as if swerved to avoid someone and the[n] collided with a northbound car. I estimate his speed at 50-60 mph."¹⁶
- Driver Jason Tastad said the accident "happened too fast to tell."¹⁷
- Eyewitness Michael Christopher "saw a Jeep weaving in and out of traffic, hitting cars, and then he ran a red light and hit 3 more cars."¹⁸
- Eyewitness Michael Grove, who saw the accident from his parked vehicle, "saw a light colored SUV type car speeding through the intersection when it hit a red Mustang. It hit the Mustang so hard that the SUV [indecipherable] airborne hitting a few more cars."¹⁹

¹⁴ The foregoing description of the collisions is based on the police narratives found at CP 253-280, 360-363, 482-494, and 520-548.

¹⁵ CP 608-613 (Tim Moebes Declaration ¶¶ 4-11).

¹⁶ CP 273.

¹⁷ CP 274.

¹⁸ CP 492.

¹⁹ CP 494.

Ms. Suljic's blood alcohol concentration was .091.²⁰ Police officers described her as "gesticulating wildly" on the ground after the accident and thought at first she was having a seizure.²¹ One officer reported that after the accident Ms. Suljic "defecated on herself"²²

In addition to being intoxicated, Ms. Suljic was panicking while the collisions occurred. She complained to investigating officers (albeit mistakenly) that the brakes on the Navigator were not working, but subsequent investigation did not reveal any mechanical problems with the brakes.²³ One of her passengers, defendant Christopher Shaw, told police "that he was sleeping [in the back seat] but awoke to Suljic (who was driving) screaming that the brakes were out."²⁴ Her other passenger, defendant Brittany Dixon-Taylor, told an officer that "she smelled

²⁰ CP 521-524 (Wakefield Declaration ¶ 2 and Exhibit 1, Officer Stamey's Reports).

²¹ CP 278.

²² CP 279.

²³ CP 544 (Police Report No. E098939, p. 7 of 12, which records that Ms. Suljic told the police that "the brakes on the vehicle she was driving were not functioning at the time of the collision." She told Officer T. Katzer that "she attempted to brake but was unable to due to the defective brakes.").

²⁴ CP 546-548 (Wakefield Declaration ¶ 6 and Exhibit 5, Officer Katzer follow up report, p. 1 of 3).

‘burning’ as Suljic shouted that the brakes were not working.”²⁵ The forgoing facts about the accident are undisputed.

Mechanical engineer Tim Moebes, an expert on automotive accident reconstruction,²⁶ investigated the collisions by studying photographs of the accident scene, photographs of the vehicles in daylight after the accident, and the 169-page police report.²⁷ He opined in a declaration that all of the collisions occurred in about four to five seconds and that Ms. Suljic’s vehicle traveled about 160 feet (around 53 yards) from the first to the last collision.²⁸

B. THE STATE FARM INSURANCE POLICY

Defendant Phyllis Glover-Shaw is the named insured on State Farm policy No. 552 86 22C04 0413A, which insured the Lincoln Navigator that Ms. Suljic was driving when she caused the collisions. The liability coverage insuring agreement states:

1. ***We*** will pay:
 - a. damages an ***Insured*** becomes legally liable to pay because of:

²⁵ *Id.*

²⁶ CP 608-613 (Moebes Declaration ¶ 2 and Exhibit 1, Moebes CV).

²⁷ *Id.* (Moebes Declaration ¶ 3).

²⁸ *Id.* (Moebes Declaration ¶¶ 4-11).

(1) ***bodily injury*** to others; and

(2) damage to property

caused by AN ACCIDENT that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy;²⁹

The policy does not define the term “accident” and this declaratory judgment action was brought by State Farm to obtain a judicial determination that one “accident” occurred at the intersection of Broadway and Everett Avenue on April 1, 2011.

C. STATE FARM’S COMPLAINT FOR DECLARATORY RELIEF

State Farm filed a complaint for declaratory relief requesting that the Court issue a declaration pursuant to RCW 7.24.020 and CR 57 that the collisions constitute one “accident” under the policy. Respondents Terry Kennedy, Matthew Thayer, and Vicki Thayer answered the complaint. Respondent Price served State Farm with an answer and counterclaim for declaratory relief but did not file it with the correct cause number until after trial was over.³⁰ The other named defendants did not answer State Farm’s complaint or otherwise participate in the case.

²⁹ CP 556 (Policy Form 9813B at p. 6 (italics and bold in original but “an accident” capitalized for emphasis)).

³⁰ Verbatim Report of Proceedings 7/28/2014 p. 5, ll. 15-23.

D. THE SUMMARY JUDGMENT MOTION

State Farm moved for a summary judgment ruling that the collisions constituted one accident under the policy. State Farm presented the foregoing statement of facts about the collisions³¹ and supported its motion with a declaration from Mr. Moebes.³² Respondents Kennedy, Matthew Thayer, Vicki Thayer, and Price opposed the motion. The Honorable Millie M. Judge denied State Farm’s motion because “material issues of fact are present.”³³ Judge Judge did not identify what the material issues of fact were.

E. ORDER DENYING CONSOLIDATION

Respondents Price, Kennedy, Matthew Thayer, and Vicki Thayer moved to consolidate the declaratory judgment action with the underlying tort case. Judge Bowden denied the motion.³⁴

F. THE TRIAL: JURY INSTRUCTIONS

Judge Bowden presided over the jury trial. State Farm proposed the following jury instruction:

³¹ CP 616-618.

³² CP 608-613. State Farm also supported its motion with the “Declaration of Scott Wakefield in Support of State Farm’s Motion for Partial Summary Judgment.” CP 517-607.

³³ CP 454.

³⁴ CP 394-397.

The plaintiff State Farm has the burden of proving that: (1) all the collisions that occurred at or near the intersection of Broadway Avenue and Everett Avenue in Everett, Washington on April 1, 2011 occurred in a short time span (several seconds); (2) at a confined location (at or near the intersection of Broadway Avenue and Everett Avenue); and, (3) that the negligent driving of Suzanna Suljic was a proximate cause of the collisions.³⁵

Instead of using State Farm's proposed instructions, the Court adopted the following jury instruction:

The term "proximate cause" means a cause which in a direct sequence, unbroken by any superseding cause, produces the event complained of and without which such event would not have happened. There may be more than one proximate cause of an event.

The parties agree that Suzanna Suljic was at fault for the injuries and damages that resulted to defendants, and others, on April 1, 2011 in Everett, Washington. The parties also agree that Ms. Suljic maintained or regained control of the vehicle she was driving after she collided with a number of parked vehicles north of the intersection of Broadway and Everett Avenue.

The parties disagree on the question of proximate causation for the events that occurred at the intersection of Broadway and Everett Avenue. Plaintiff alleges that Ms. Suljic was unable to maintain or regain control over the vehicle she was driving after impacting the vehicle driven by George Maxfield and hence there was but a single proximate cause of all of the impacts or collisions that occurred after that collision with the Maxfield vehicle. The plaintiff has the burden of proof on that issue.

³⁵ CP 210.

*If Ms. Suljic maintained or regained control over the vehicle she was driving after the impact with the vehicle driven by George Maxfield, then there may have been a separate proximate cause for one or more of the subsequent impacts or collisions, even though no one other than Ms. Suljic may have been at fault.*³⁶

State Farm objected to this instruction because (among other reasons) the last paragraph invited the jury to speculate about what “control” meant in these types of cases:

MR. WAKEFIELD: . . . [W]hat I do object to and object to strenuously is the last paragraph which, to me, that just is—again, I don’t believe that’s a correct statement of the law, with all due respect to the Court. *I don’t think that the case law says that if you regain control a fraction of a second that now there’s a different—now there’s a different proximate cause. I just don’t think that that is what Rhode [sic], Utterback, and Greengo say.*

* * *

. . . [W]hen somebody is drunk and weaving down Broadway at 50 to 60 miles an hour and screaming that my brakes don’t work and probably stomping on the brake pedal and what she thinks is this brake pedal and is probably the accelerator, I mean, *it really invites the jury to completely speculate maybe she instantaneously, oh, now I’m in control. It was a millisecond. And now that’s a different proximate cause.*³⁷

³⁶ CP 171 (emphasis added).

³⁷ Verbatim Report of Proceedings 6/11/2014 p. 102, l. 24 – p. 103, l. 7 and p. 106, ll. 13-22 (emphasis added). For similar argument from State Farm, *see also* Verbatim Report of Proceedings 6/9/2014 p. 54, l. 20 – p. 57, l. 21 *and* Verbatim Report of Proceedings 6/10/2014 p. 9, l. 2 – p. 12, l. 18.

The Court acknowledged that in *Utterback*, the Court of Appeals adopted a specific interpretation of “control” as “regain[ing] a full measure of control over either the car’s injury inflicting potential or the situation in general.”³⁸ The Court called this “awfully cumbersome language” but acknowledged that “it still gets to the issue of control.”³⁹ The Court even acknowledged that *Utterback* was on point:

And the [*Utterback* court] decided, I think, as a matter of law, that under what was presented on appeal, this woman [the tortfeasor in *Utterback*] had never regained effective control over the vehicle. *That’s really the crux of what’s at issue here.*⁴⁰

Despite State Farm’s objections and arguments, the Court left “control” undefined in the jury instruction.⁴¹

G. THE TRIAL: SPECIAL VERDICT FORM

State Farm proposed a verdict form with three questions about time, distance, and causation:

QUESTION NO. 1: Did the collisions at the intersection of Broadway Avenue and Everett Avenue on April 1, 2011—starting with Suzanna Suljic’s vehicle colliding with the vehicle driven by George Maxfield and ending

³⁸ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 3-5 (*quoting Utterback*, 91 Wn. App. at 772).

³⁹ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 5-6.

⁴⁰ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 7-10 (emphasis added).

⁴¹ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 10-15.

with the Suljic vehicle colliding with the vehicle being driven by Lynsey Price—take less than five seconds?

Answer: Yes _____ No _____

QUESTION NO. 2: Did the collisions at the intersection of Broadway Avenue and Everett Avenue on April 1, 2011, between the vehicle Suzanna Suljic was driving and the other vehicles, take place over a distance of approximately 160 feet?

Answer: Yes _____ No _____

QUESTION NO. 3: Was Suzanne Suljic’s negligence a proximate cause of the collisions at the intersection of Broadway Avenue and Everett Avenue on April 1, 2011?

Answer: Yes _____ No _____⁴²

The Court rejected these proposed questions in favor of its own special verdict form that essentially asked whether the collisions occurred in a chain reaction (i.e., did the first impact cause all the subsequent impacts):

QUESTION 1: Has the plaintiff met its burden of proof that the initial impact of the vehicle driven by Suzanna Suljic and the vehicle driven by George Maxfield was the sole proximate cause of the subsequent collision with the vehicle driven by Terry Kennedy?

Answer: Yes _____ No _____

QUESTION 2: Has the plaintiff met its burden of proof that the initial impact of the vehicle driven by Suzanna Suljic and the vehicle driven by George Maxfield was the sole proximate cause of the subsequent collision between

⁴² CP 217.

the vehicle driven by Amber Connor and the vehicle driven by Lynsey Price?

Answer: Yes _____ No _____

QUESTION 3: Has the plaintiff met its burden of proof that the initial impact of the vehicle driven by Suzanna Suljic and the vehicle driven by George Maxfield was the sole proximate cause of the subsequent collision between the vehicle driven by Amber Connor and the vehicle driven by Lynsey Price?

Answer: Yes _____ No _____⁴³

State Farm argued that these questions did not allow it to argue its theory of the case because they:

ma[de] it sound like unless the Navigator basically ricocheted off of the Maxfield vehicle and went directly into the Kennedy vehicle, that there's no proximate cause. And that's not a correct statement of the case law from *Utterback* and *Rhode* [sic].

* * *

And the way the questions are now phrased in the special verdict form, I'm effectively precluded from arguing my theory of the case which is her intoxication was the cause of this, not necessarily that she bounced off the Maxfield vehicle and into the Kennedy vehicle.⁴⁴

State Farm requested that the Court add a verdict form question that asked if Ms. Suljic was out-of-control during the time she caused the collisions:

⁴³ CP 161.

⁴⁴ Verbatim Report of Proceedings 6/11/2014 p. 5, l. 11 – p. 6, l. 6.

QUESTION NO. 1: Has the plaintiff [State Farm] met its burden of proof that Suzanna Suljic was not in control of the vehicle she was driving from the time it struck the vehicle being driven by George Maxfield until the time it struck the vehicle being driven by Lynsey Price?

Answer: Yes _____ No _____⁴⁵

Appellant suggested that this question at least be added to the three questions that the Court was already going to ask the jury in the special verdict form:

MR. WAKEFIELD: . . . if you don't want to give this instruction alone, I think it should at least be added at question number three on the special verdict form before question number four about the Lynsey Price and Amber Connor. It seems to me that if we don't have that, I don't get to argue my theory of the case. I have to get up and basically say this was basically a billiard ball, and that's not the case law, Your Honor.⁴⁶

The Court refused to add State Farm's proposed question about control even though it acknowledged that the jury's answer to the question would have resolved the issue of the number of accidents:

I'm going to not give the alternate [proposed by State Farm]. . . . *Obviously if the jury answered yes to the proposed question, it would likely resolve the question before the Court in the plaintiff's favor, but I think we can still get there through parsing out these questions to the jury as I've drafted.*⁴⁷

⁴⁵ CP 176.

⁴⁶ Verbatim Report of Proceedings 6/11/2014 p. 5, ll. 7-14.

⁴⁷ Verbatim Report of Proceedings 6/11/2014 p. 7, ll. 11-17 (emphasis added).

H. THE TRIAL: EVIDENCE PRESENTED

The only live testimony presented at trial was from State Farm's expert accident reconstruction engineer Mr. Moebes. Just as in his declaration in support of summary judgment, Mr. Moebes testified about his qualifications; that he investigated the collisions by studying photographs of the accident scene, photographs of the vehicles in daylight after the accident, and the 169-page police report; that all of the collisions occurred in about four to five seconds; and that Ms. Suljic's vehicle traveled about 160 feet (around 53 yards) from the first to the last collision.⁴⁸

The police report was admitted into evidence in its entirety without objection. It included evidence that after the accident Ms. Suljic complained to investigating officers (albeit mistakenly) that the brakes on the Navigator were not working.⁴⁹ It included defendant Christopher Shaw's statement under oath to the police "that he was sleeping [in the back seat] but awoke to Suljic (who was driving) screaming that the

⁴⁸ Verbatim Report of Proceedings 6/10/2014 pp. 40-62; *compare to* CP 608-613 (Tim Moebes Declaration).

⁴⁹ CP 544 (Police Report No. E098939, p. 7 of 12, which reports that Ms. Suljic told the police that "the brakes on the vehicle she was driving were not functioning at the time of the collision." She told Officer T. Katzer that "she attempted to brake but was unable to due to the defective brakes.").

brakes were out.”⁵⁰ And it included the sworn statement from Ms. Suljic’s other passenger, defendant Brittany Dixon-Taylor, “she smelled ‘burning’ as Suljic shouted that the brakes were not working.”⁵¹ It included sworn statements from eyewitnesses quoted above.⁵²

I. THE TRIAL: CLOSING ARGUMENT

At closing argument, State Farm had to argue that the facts supported a “yes” answer to the three questions on the special verdict form. Appellant attempted to do so,⁵³ but the special verdict form questions did not ask about control, time, or distance. And the jury instructions did not define “control” as it was defined in *Utterback*. Time, distance, and control (as defined in *Utterback*) were central to State Farm’s theory of the case, as presented in its summary judgment motion⁵⁴ and trial brief.⁵⁵

⁵⁰ CP 546 (Wakefield Declaration ¶ 6 and Exhibit 5, Officer Katzer follow up report, p. 1 of 3).

⁵¹ *Id.*

⁵² See CP 273 (Donald Lords), CP 274 (Jason Tastad), CP 492 (Michael Christopher), and CP 494 (Michael Grove).

⁵³ Verbatim Report of Proceedings 6/11/2014 p. 59, l. 4 – p. 61, l. 18.

⁵⁴ CP 614-624 (“State Farm’s Motion for Partial Summary Judgment for Declaratory Relief”) and CP 468-473 (“State Farm’s Reply in Support of Its Motion for Partial Summary Judgment for Declaratory Relief”).

⁵⁵ CP 225-235 (*see pp.* 230-234 in particular).

In its closing argument, counsel for respondent Price argued that because Ms. Price told police that “[s]he saw the [Navigator] headed straight for her . . . while it may not convince you that she’s in control, it’s highly suggestive that . . . she is.”⁵⁶ Similarly, counsel for respondents Thayer and Kennedy argued in closing that while Ms. Suljic was drunkenly operating the vehicle improperly—swerving, speeding off, and weaving in and out of traffic—she was still “controlling” it:

Well, you know, that’s bad driving. She was drunk, [] she’s not controlling her vehicle properly, *but she is controlling it.*

* * *

When you look at the witness statements, there are certain adjective phrases in there that I believe will show you that Ms. Suljic was in control of her vehicle.

* * *

[Eyewitness] Jamie Holman. *The truck sped off.*

* * *

[Eyewitness] Paul McLean. He saw a silver truck swerving back and forth down the street. *Swerving . I think that shows that she was in control.*

Michael Christopher. I saw a Jeep *weaving in and out of traffic* hitting cars and then ran a red light.

* * *

*All words, statements of control.*⁵⁷

⁵⁶ Verbatim Report of Proceedings 6/11/2014 p. 69, ll. 14-23.

⁵⁷ Verbatim Report of Proceedings 6/11/2014 p. 91, l. 6 – p. 92, l. 2 (emphasis added). Counsel for respondent Price made the same argument to Judge Bowden that “If Ms.

As explained below, these arguments contradicted *Utterback*, which defined control as “regain[ing] a *full measure* of control over either the car’s *injury-inflicting potential* or *the situation in general*,”⁵⁸ but the Court had refused to incorporate that definition into its jury instructions.⁵⁹ Counsel for State Farm argued in rebuttal that colliding with vehicles and entering the wrong lane of traffic was not evidence of “control”:

. . . Mr. Alexander said, well, after she hit the Mustang, she’s in control. Even though we all know after she hit the Mustang she was traveling southbound in the northbound lanes of Broadway. Now, how many of you are going to, you know, leave the courtroom tonight and go up Broadway, if you’re going northbound on Broadway, say, you know what, I’m in control, but it’s kind of boring to go this way. Let’s just go over into the—you know—the southbound lanes for a few blocks and see what happens. It was—quite frankly, [it] was silly.

* * *

But clearly when the Suljic vehicle came—struck the Maxfield vehicle and then hit—why would she regain control and say now I’m going to hit the back of the

Suljic is continuing to accelerate and put input into the car and steer, even though she may not have complete control, she’s now doing things that create another proximate cause.” Verbatim Report of Proceedings 6/10/2014 p. 9, ll. 2-9. State Farm pointed out that this was a “completely incorrect statement of the law.” *Id.*

⁵⁸ *Utterback*, 91 Wn. App. at 772 (emphasis added).

⁵⁹ Verbatim Report of Proceedings 6/11/2014 pp. 103-104.

Mustang at least 40 miles an hour? Why would—what makes sense about that? I’m in control of my vehicle. I’m headed toward a Mustang’s rear tail bumper at 40 miles an hour, and I’m in control of my vehicle? There is something that is just patently ludicrous about that whole concept.⁶⁰

State Farm could not point to language in the jury instructions that supported its interpretation of “control.”

J. THE TRIAL: JURY VERDICT

The jury answered “no” to the three questions on the special verdict form.

K. LINDSEY PRICE FILES HER COUNTERCLAIM FOR DECLARATORY RELIEF

After the jury returned its verdict, respondent Price filed her counterclaim for declaratory relief with the correct cause number.⁶¹

L. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After trial the Court invited the parties to submit findings of fact and conclusions of law, which the parties did.⁶² At the hearing on these submissions, the Court said, “I am choosing not to enter findings of fact

⁶⁰ Verbatim Report of Proceedings 6/11/2014 p. 97, l. 19 – p. 98, l. 4 and p. 99, l. 22 – p. 100, l. 4.

⁶¹ Verbatim Report of Proceedings 7/28/2014 p. 5, ll. 15-23.

⁶² See CP 143-152 (“Plaintiff State Farm’s Brief in Support of Its Proposed Findings of Fact and Conclusions of Law”).

or conclusions of law based on this jury's verdict."⁶³ The Court entered its written "Order on Post-Trial Motions to Enter Findings of Fact and Conclusions of Law," which rejected the parties' proposed findings of fact and conclusions of law.⁶⁴

In the Order on Post-Trial Motions, the Court explained that "[a]pplying case law, the court formulated questions for the special verdict form that would allow the jury to make findings of fact that would permit the court to make a finding as a matter of law regarding how many accidents occurred."⁶⁵ The Court determined that the jury's answers to the three questions on the special verdict form meant that State Farm "failed to meet its burden of proof that no separate proximate causes existed as to each of the impacts."⁶⁶ Therefore, "the court will not enter a declaratory judgment that the collisions caused by Suzanna Suljic constituted one accident for purposes of insurance coverage"⁶⁷

The Court also ruled that "the failure of plaintiff to sustain its burden of proof as to causation does not mean that defendants have met

⁶³ Verbatim Report of Proceedings 7/3/2014 p. 16, ll. 18-22.

⁶⁴ CP 9-13.

⁶⁵ CP 12.

⁶⁶ CP 12.

⁶⁷ CP 12.

their burden of proof on counterclaims that were never filed alleging more than one accident.”⁶⁸ The Court then stated that the jury in the underlying tort case may decide that respondents could meet their burden of proving more than one accident occurred,⁶⁹ even though the Court had already ruled that declaratory judgment questions (i.e., insurance coverage issues) could not be consolidated into the underlying tort case.⁷⁰

M. STATE FARM’S MOTION FOR NEW TRIAL

State Farm moved for a new trial⁷¹ and the Court heard oral argument on the motion on July 28, 2014. State Farm explained that because the Court refused to rule on how many accidents occurred but already ruled that this issue could not be consolidated into the underlying tort case, a new trial was needed to resolve the “how-many-accidents” issue. Even respondent Price argued that the Court’s refusal to resolve the issue rendered the trial pointless, but the Court said that was acceptable:

⁶⁸ CP 12.

⁶⁹ CP 12 (“At trial on defendant’s claim for damages [i.e., the underlying tort case against Ms. Suljic], the burden will be on those defendants [here, respondents] to establish separate proximate causation for the collisions which they assert constituted separate accidents, which, in turn, may implicate separate insured losses.”).

⁷⁰ CP 394-397 (Order Denying Defendants’ Motion to Consolidate).

⁷¹ CP 88-98.

MR. ALEXANDER [counsel for respondent Price]: . . .
*we have got to turn this trial into something that was
meaningful, and I don't think the Court can leave us
twisting in the wind, and that's what I –*

THE COURT: *Twisting slowly in the wind, and I think
the Court can do that . . .*⁷²

State Farm suggested that a new trial with correct jury instructions and verdict form questions (and one in which the Court had discretion to allow respondent Price's counterclaims to be tried) was the best solution:

MR. WAKEFIELD: . . . We know each other, we disagree on things obviously, but it seems to me that what really the Court ought to do here for the parties, for the lawyers is let's try this case again, and let's get it right this time.

I think that is the appropriate, proper and rational solution to this, and I think that you have discretion, even though it would be against my wishes, and certainly against the wishes of my client to let these guys have another bite at the apple, but if we're going to redo the case and I get to reargue this whole issue of what jury instructions are appropriate, I think the Court gets equitable discretion to allow them to litigate the obviously raised counterclaim that was not presented at trial.⁷³

The Court denied State Farm's motion for new trial.⁷⁴

⁷² Verbatim Report of Proceedings 7/28/2014 p. 8, l. 24 – p. 9, l. 3 (emphasis added).

⁷³ Verbatim Report of Proceedings 7/28/2014 p. 10, ll. 1-24.

⁷⁴ Verbatim Report of Proceedings 7/28/2014 p. 12, ll. 10-13.

N. FINAL JUDGMENT AND APPEAL

The Court's Final Judgment "incorporat[ed] its 'Order on Post-Trial Motions to Enter Findings of Fact and Conclusions of Law'" and its oral rulings on July 28, 2014 because "[t]hese rulings were the Court's final determination of the rights of the parties in this action."⁷⁵ State Farm appealed.

IV. SUMMARY OF ARGUMENT

The Court should have ruled on summary judgment that there was one accident. There never should have been a trial. But if there had to be a trial, it should have included correct jury instructions about what constitutes "control" of a vehicle in accordance with *Utterback*. The Court should have submitted verdict form questions to the jury about the time, distance, and causation of the multiple collisions, as proposed by State Farm. It should have asked the jury about whether Ms. Suljic regained control of the Navigator after striking the Maxfield vehicle, as proposed by State Farm. Because the Superior Court refused to do these things, the trial result was meaningless. Once the Court realized that the jury's answers to the verdict form questions left the key issue "twisting slowly in the wind," it should have granted a new trial.

⁷⁵ CP 661-662.

On appeal, State Farm requests a ruling that, as a matter of law, the multiple collisions at the intersection constituted one accident. Taking the evidence in the light most favorable to respondents, there is *no evidence* that Ms. Suljic “regained a full measure of control over either the [Navigator’s] injury-inflicting potential or the situation in general.”⁷⁶ Alternatively, State Farm requests that the Court remand for a new trial with an order that the Superior Court issue correct jury instructions and verdict form questions about time, distance, causation, and control.

V. ARGUMENT

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Appellate courts “review summary judgment rulings de novo, engaging in the same inquiry into the evidence and issues called to the attention of the trial court.”⁷⁷

B. THE TERM “ACCIDENT” IS NOT AMBIGUOUS

Courts interpret insurance policies as a matter of law, and have held that the term “accident” is not ambiguous: “[T]he words ‘accident’

⁷⁶ *Utterback*, 91 Wn. App. at 770 (quoting *Welter v. Singer*, 126 Wis.2d 242, 376 N.W.2d 84 (Ct.App. 1985)).

⁷⁷ *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

and ‘occurrence’ are words of common usage and, in and of themselves, are not ambiguous.”⁷⁸

C. UNDER WASHINGTON LAW, THERE WAS ONE ACCIDENT

*Greengo v. Public Employees Mut. Ins. Co.*⁷⁹ is the seminal Washington case on whether multiple collisions constitute a single “accident”⁸⁰ or multiple “accidents” under an auto insurance policy. In *Greengo*, the Supreme Court explained that Washington follows the “cause theory” which turns on whether there were multiple proximate causes, not whether there were multiple injuries or claims:

We have previously considered situations involving two or more collisions to determine whether there were two or more “accidents” for insurance purposes. Where there were two collisions, we look to see if each has its own proximate cause. If so then there are two accidents. As an Illinois court explained, “A majority of foreign courts have concluded that the number of occurrences is determined by referring to the cause or causes of the damage (the ‘cause’ theory), as opposed to the number of individual claims or injuries (the ‘effect’ theory).” *Illinois Nat’l Ins. Co. v. Szczepkowitz*, 185 Ill.App.3d 1091, 542 N.E.2d 90, 92, 134 Ill. Dec. 90 (1989). Washington follows the cause theory.⁸¹

⁷⁸ *Utterback*, 91 Wn. App. at 767 (footnotes omitted) (quoting *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 473, 303 P.2d 659 (1956)).

⁷⁹ 135 Wn.2d 799, 804, 959 P.2d 657 (1998).

⁸⁰ The relevant cases are about either “accidents” or “occurrences,” but for purposes of this case they are the same thing.

⁸¹ *Greengo*, 135 Wn.2d at 813-814 (footnote omitted).

*Utterback*⁸² helpfully illustrates the “cause theory.” The accident in *Utterback* took place in a parking lot. The negligent driver struck a pedestrian, plaintiff James Utterback, backed up, and then struck him again. Mr. Utterback’s wife, an eyewitness, testified that the time between the impacts was short, the negligent vehicle was continually in motion, and she was unable to do anything for her husband before the second impact. The negligent driver testified that her car first lurched forward when her foot slipped off the brake and hit the accelerator. She did not remember putting the car into reverse, but her vehicle did go backwards and then forwards to hit Mr. Utterback a second time. She remembered that her foot got stuck under the gas pedal and she was not able to extricate it “until it was all over.”⁸³

The Superior Court ruled on summary judgment that there was one accident. The Court of Appeals affirmed, holding that it was a single accident under the insurance policy because the negligent driver never regained control of her vehicle. Striking Mr. Utterback a second time was the result of the driver being “flustered” by her initial loss of

⁸² 91 Wn. App. 764, 766, 960 P.2d 453 (1998).

⁸³ *Id.*, 91 Wn. App. at 766.

control.⁸⁴ “The *interdependent nature of the two impacts* and their *continuity and proximity in time and location* all require the conclusion that *just one accident occurred.*”⁸⁵ As to whether the driver regained control, the Court of Appeals held that she did not because she “never regained a full measure of control over either the car’s injury-inflicting potential or the situation in general.”⁸⁶

Just like the driver in *Utterback*, Ms. Suljic caused only one accident. Ms. Suljic never regained “a full measure of control over” the Navigator’s “injury-inflicting potential or the situation in general” during the time that she caused all of the collisions. She was intoxicated and panicked; she was in much worse condition than the driver in *Utterback*, who was merely “flustered.” Just like in *Utterback*, the collisions occurred in a short amount of time and in the same general location. Respondents never presented evidence to the contrary.

Another Washington case, *Truck Ins. Exch. v. Rohde*⁸⁷ (discussed with approval by the *Greengo* court), also supports the legal conclusion

⁸⁴ *Id.*, 91 Wn. App. at 772.

⁸⁵ *Id.*, 91 Wn. App. at 772 (emphasis added).

⁸⁶ *Utterback*, 91 Wn. App. at 770.

⁸⁷ 49 Wn.2d 465, 303 P.2d 659 (1956).

that Ms. Suljic caused only one accident. The negligent driver, Roy Rohde, was driving on a state highway and three motorcycles were approaching from the opposite direction in echelon formation. The motorcycles were about 75 feet apart from each other. This made for a total distance of 150 feet, which is very close to the approximately 160 feet travelled by Ms. Suljic when she caused all of the collisions.⁸⁸

Mr. Rohde drove across the center line, hit the first motorcycle, and then spiraled into the second and third motorcycles. Mr. Rohde's "vehicle went out of control, either before or simultaneously with the first collision, and . . . it remained out of control until it came to rest after the third collision."⁸⁹ The Superior Court concluded that there were three separate accidents, but the Supreme Court disagreed and held that there was one accident because all three collisions had "one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."⁹⁰ In the instant case, all of the injuries and damage were the result of one proximate, uninterrupted, and continuing cause: Ms. Suljic's intoxicated, panicked, out-of-control driving.

⁸⁸ CP 608-610 (Moebes Declaration ¶¶ 6, 8).

⁸⁹ *Rohde*, 49 Wn.2d at 471-472.

⁹⁰ *Rohde*, 49 Wn.2d at 472.

An out-of-state case, *Banner v. Raisin Valley, Inc.*,⁹¹ also supports a summary judgment ruling that Ms. Suljic caused one accident. In *Banner*, the negligent driver, Phillips, lost control of his vehicle immediately before or during the initial collision with another vehicle and remained out-of-control during the subsequent collisions with three other vehicles. The vehicles he collided with were separated by an average of about two car lengths. The court concluded *on summary judgment* that there was one accident because of “the *distance* between the cars in the eastbound lane prior to the first collision, the *rapid* succession of the collisions, the statement of Phillips that he could not see any oncoming cars, but only a tunnel of debris, and *the absence of any evidence showing that Phillips ever regained control of his vehicle after the first collision.*”⁹² Ms. Suljic also never regained control of her vehicle once the collisions began, and respondents never provided any evidence to the contrary.

Cases where a court holds that there are two accidents are rare. And in those cases the negligent driver always regains control of the

⁹¹ 31 F.Supp.2d 591, 591-592 (N.D. Ohio 1998), attached as Exhibit 7 to the Wakefield Declaration.

⁹² *Id.*, 31 F.Supp.2d at 594 (emphasis added).

vehicle or there is a significant gap in time or space between the collisions. For example, in *Liberty Mut. Ins. Co. v. Rawls*,⁹³ “[t]he only reasonable inference” was that the negligent driver “had control of his vehicle after the initial collision.” Similarly, in *American Family Mut. Ins. Co. v. Wilkins*,⁹⁴ the collisions were separated by a significant gap in time (one minute) and space (one half of a mile). The negligent driver in *Wilkins* also regained control of his vehicle after the first collision. There was no evidence that Ms. Suljic regained control of her vehicle—as “control” is defined in *Utterback*—after the first collision with the Maxfield vehicle.

D. RESPONDENTS PRESENTED NO EVIDENCE OF MULTIPLE ACCIDENTS

Respondents opposed summary judgment but presented no evidence for the Court to consider in a light most favorable to them. To avoid summary judgment, respondents were required to rebut State Farm’s contentions with specific facts:

A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party

⁹³ 404 F.2d 880, 881 (5th Cir. 1968).

⁹⁴ 285 Kan. 1054, 1068, 179 P.3d 1104 (Kan. 2008).

submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.⁹⁵

Respondents relied solely on argumentative assertions and speculation to defeat summary judgment.

Respondent Price repeatedly stated in her opposition brief that Ms. Suljic "continued volitionally driving forward" after each collision.⁹⁶ Likewise, respondents Thayer and Kennedy asserted that Ms. Suljic "maintained control of her vehicle until such time as it became non-operational."⁹⁷ Respondents cited no evidence to support these statements, which are contrary to *Utterback* even if they had evidentiary support. Respondent Price quoted three witness statements, but they just describe the Lincoln Navigator "speeding" and "weaving" through traffic.⁹⁸ Under *Utterback*, this was not evidence that Ms. Suljic "regained a *full measure* of control over either the car's injury-inflicting potential or the situation in general."⁹⁹

⁹⁵ *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986), citing *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 587 P.2d 191 (1978).

⁹⁶ CP 496 (Price opposition p. 2, l. 21; p. 3, l. 13; and *passim*).

⁹⁷ CP 511 (Kennedy et al. opposition p. 4, ll. 16-17).

⁹⁸ CP 465 (Price opposition, p. 9) and CP 490 and 492 (witness statements).

⁹⁹ *Utterback*, 91 Wn. App. at 770 (emphasis added).

All of the evidence submitted to the Superior Court showed that during the collisions Ms. Suljic was intoxicated, which respondents admitted,¹⁰⁰ and panicking about her brakes not working, which respondents were not able to deny. Her two passengers told police that Ms. Suljic was screaming about the brakes not working and Ms. Suljic herself told police that she thought the brakes were not working.¹⁰¹ None of this was disputed. It does not matter that the brakes were, in fact, functioning—what matters is that Ms. Suljic was panicked, intoxicated, and driving out-of-control, just as driver in *Utterback* was flustered.¹⁰² The vehicle in *Utterback* was working fine—the at-fault driver was not. The same was true of Ms. Suljic, only more so.

Respondents made generic criticisms of Mr. Moebes' declaration: it was not definite enough (even though it was given on a “more probable than not basis”), Mr. Moebes used the word “probably,” he only reviewed the (voluminous) police report, he signed his declaration in Arizona.¹⁰³ But respondents provided no evidence to contradict Mr.

¹⁰⁰ CP 514 (Kennedy et al. opposition p. 7, ll. 7-9) and CP 497 (Price opposition p. 3, ll. 6-7).

¹⁰¹ CP 546-548 (Wakefield Declaration ¶ 6 and Exhibit 5, Officer Katzer follow up report, p. 1 of 3).

¹⁰² 91 Wn. App. at 766.

¹⁰³ CP 514-515 (Kennedy et al. opposition pp. 7-8).

Moebes' opinions, even though counsel for respondents had been litigating the underlying liability case since December 2011¹⁰⁴ and by the time of the summary judgment hearing, should have obtained any deposition testimony, witness declarations, or expert opinions that cast doubt on Mr. Moebes' conclusions. None existed then, none existed at trial, and none exist now.

There is no dispute that Mr. Moebes is a professional engineer qualified to reconstruct motor vehicle collisions. He has done so for two decades throughout the Pacific Northwest and nationally.¹⁰⁵ Mr. Moebes stated, on a more-probable-than-not basis, that the Navigator caused all of the collisions in four to five seconds while traveling approximately 53 yards. This is within the time and distance parameters that Washington appellate courts have found "one accident" occurred as a matter of law.¹⁰⁶ Respondents presented no evidence that the collisions occurred over a longer distance or time period.

As often happens, respondents survived summary judgment because of bluster and the general reluctance of a Superior Court to grant

¹⁰⁴ CP 509 (Kennedy et al. opposition p. 2, ll. 19-21).

¹⁰⁵ CP 612-613 (Moebes Declaration, Exhibit 1, Moebes CV).

¹⁰⁶ See *Rohde*, 49 Wn.2d at 303 (around 150 feet total distance travelled by the vehicle that caused the collisions).

summary judgment if the pleadings are thick enough. But *Utterback* and *Rohde* were summary judgment decisions, and so was the out-of-state case, *Banner*. The Superior Court denied State Farm’s motion for summary judgment because “material issues of fact are present”¹⁰⁷ but did not specify what “material facts” those were. The only reasonable inference from the evidence submitted for summary judgment (and at trial) was that this multi-collision accident was quick, compressed, and had one cause: Ms. Suljic’s panicked, drunk, and out-of-control driving. There was no evidence to the contrary presented at the summary judgment hearing. The Court of Appeals should reverse the Superior Court’s order denying summary judgment and hold as a matter of law that there was one accident.

E. APPELLATE COURTS REVIEW JURY INSTRUCTIONS DE NOVO

Washington appellate courts review jury instructions de novo:

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” Claimed errors of law in jury instructions are reviewed de novo, and an instruction

¹⁰⁷ CP 454.

containing an erroneous statement of the applicable law is reversible error where it causes prejudice.¹⁰⁸

“We review jury instructions de novo, asking first whether an instruction is erroneous, and second whether the error prejudiced a party.”¹⁰⁹ Even if the jury instructions are technically legally correct, they are insufficient if they “cloud” the jury’s view of the contested issues:

Notwithstanding the legal sufficiency of the instructions, we must find these instructions insufficient if they are misleading or if the special verdict form clouds the jury’s vantage point of the contested issues.¹¹⁰

F. THE COURT SHOULD HAVE INSTRUCTED THE JURY ABOUT “CONTROL” IN CONFORMANCE WITH *UTTERBACK*

Under *Utterback*, regaining control means “regain[ing] a full measure of control over either the car’s injury inflicting potential or the situation in general.”¹¹¹ Jury instruction number six was erroneous because it failed to define “control” in conformance with *Utterback*:

If Ms. Suljic maintained or regained control over the vehicle she was driving after the impact with the vehicle driven by George Maxfield, then there may have been a separate proximate cause for one or more of the

¹⁰⁸ *Ezell v. Hutson*, 105 Wn. App. 485, 488, 20 P.3d 975, 976 (2001) (citations omitted) (quoting *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 860, 10 P.3d 1079 (2000)).

¹⁰⁹ *Stevens v. Gordon*, 118 Wn. App. 43, 53, 74 P.3d 653 (2003).

¹¹⁰ *Capers*, 91 Wn. App. at 143.

¹¹¹ *Utterback*, 91 Wn. App. at 772.

subsequent impacts or collisions, even though no one other than Ms. Suljic may have been at fault.¹¹²

But what does “regain control” mean? State Farm objected that instruction number six was contrary to *Utterback* and that it invited the jury to speculate that if Ms. Suljic regained control for “a fraction of a second,” that there would be a separate accident.¹¹³ While the Court considered *Utterback*’s definition of control, acknowledged that it “went to the issue of control,” and stated that the control issue in *Utterback* was “really the crux of what’s at issue here”—it still refused to add the *Utterback* definition to instruction number six.¹¹⁴

In closing argument, counsel for respondents took advantage of the absence of the *Utterback* language in the instruction by arguing that since eyewitnesses said that Ms. Suljic “sped off,” was “swerving,” and “weaved in and out of traffic,” this was evidence of her “controlling” the Navigator.¹¹⁵ Counsel for State Farm argued that this was not what “control” meant.¹¹⁶ But State Farm had no support for its argument in

¹¹² CP 171 (last paragraph of instruction no. 6).

¹¹³ Verbatim Report of Proceedings 6/11/2014 p. 102, l. 24 – p. 103, l. 7 and p. 106, ll. 13-22.

¹¹⁴ Verbatim Report of Proceedings 6/11/2014 p. 104, ll. 3-10 (emphasis added).

¹¹⁵ Verbatim Report of Proceedings 6/11/2014 p. 91, l. 6 – p. 92, l. 2.

¹¹⁶ Verbatim Report of Proceedings 6/11/2014 p. 97, l. 19 – p. 98, l. 4 and p. 99, l. 22 – p. 100, l. 4.

the jury instruction, which simply used the word “control” with no qualifiers.

In *Capers v. Bon Marche, Div. of Allied Stores*,¹¹⁷ the Court of Appeals held that an appellate court may examine closing arguments to determine whether the jury instructions and verdict forms were erroneous and prejudicial:

This facial inconsistency between the correct instruction and the special verdict form *was made manifest by the inaccurate closing arguments* of The Bon’s counsel.

The *Capers* court considered closing arguments in determining whether a special verdict form was misleading and cause for a new trial: “we find counsel’s closing argument, together with the omitted ‘substantial factor’ language in the special verdict form, undermined the efficacy of the jury instructions as a whole.”¹¹⁸

Just like in *Capers*, the erroneous jury instruction combined with the misleading closing arguments (and the beside-the-point special verdict form questions) prejudiced State Farm. The jury was not instructed as to what “control” meant. By reading instruction number six in the manner suggested by respondents’ counsel in closing statements

¹¹⁷ 91 Wn. App. 138, 144, 955 P.2d 822 (1998).

¹¹⁸ *Capers*, 91 Wn. App. at 145.

(i.e., that “swerving” and “weaving in and out of traffic” was evidence of control), the jury could have concluded (and possibly did conclude) that if Ms. Suljic was pressing the accelerator or brake pedals, or attempting to steer, then this meant she was “controlling” the Navigator as it hit other vehicles, ran a red light,¹¹⁹ “went airborne”¹²⁰ and entered the wrong lane of traffic.¹²¹ This is not what “control” means in *Utterback*. The tortfeasor in *Utterback* was also “controlling” her vehicle in this sense because in striking Mr. Utterback, she was pressing the accelerator, reversing the vehicle, braking, and pressing the accelerator again. But the Court of Appeals ruled that she never “regained a full measure of control over either the car’s injury inflicting potential or the situation in general.”¹²² The Superior Court did not instruct the jury that this is what “control” means and therefore the term was up for grabs, to the detriment of State Farm.

¹¹⁹ CP 492.

¹²⁰ CP 494.

¹²¹ CP 273.

¹²² *Utterback*, 91 Wn. App. at 772.

G. COURTS REVIEW SPECIAL VERDICT FORM QUESTIONS DE NOVO

The standard for appellate review of a trial court's rejection of special verdict form questions is *de novo* if the trial court's rejection is based on a legal ruling:

We review a trial court's decision regarding a special verdict form under the same standard of review as we apply to decisions regarding jury instructions. Thus, we review a trial court's refusal to submit a special verdict form to the jury, when that refusal is based on the facts of that case, for abuse of discretion. And if the trial court's refusal is based on rulings of law, we review that decision *de novo*.¹²³

In this case, the Court refused to submit State Farm's proposed special verdict form questions, and wrote and submitted its own verdict form questions based on its interpretation of the appellate cases.¹²⁴

Special verdict form questions (and jury instructions) that inadequately present the contested issues or include an erroneous statement of the applicable law are reversible error if prejudicial:

When reviewing jury instructions, they are considered in their entirety and are sufficient if they: (1) permit each

¹²³ *State v. Azpitarte*, 95 Wn. App. 721, 726, 976 P.2d 1256 (1999) vacated, 140 Wn.2d 138, 995 P.2d 31 (2000).

¹²⁴ CP 12 (in the "Order on Post-Trial Motions to Enter Findings of Fact and Conclusions of Law," the Court wrote, "[a]pplying case law, the court formulated questions for the special verdict form that would allow the jury to make findings of fact that would permit the court to make a finding as a matter of law regarding how many accidents occurred." (emphasis added)).

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. Special verdict forms are reviewed under this same standard. Essentially, when read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner. An erroneous statement of the applicable law is reversible error if it is also prejudicial.¹²⁵

H. THE COURT SHOULD HAVE ASKED THE JURY ABOUT TIME, DISTANCE, AND CONTROL IN THE SPECIAL VERDICT FORM

The special verdict form did not ask the jury to answer the relevant factual questions that the Court needed answered in order to rule on the “one accident” issue. The jury’s answers to the verdict form questions said—if they said anything at all—that this was not a classic “chain reaction” accident. But under *Utterback*, there does not have to be a “chain reaction” for multiple impacts to constitute a “single accident” under an automobile liability insurance policy.

The case law in Washington, and other states, identifies three key factors that must be analyzed to determine if multiple automobile collisions constitute a “single accident” for purposes of the at-fault party’s automobile liability insurance. Those factors are: (1) temporal proximity (were the impacts close in time?); (2) geographic proximity (were impacts close in space?); and, (3) a common cause (were the

¹²⁵ *Capers*, 91 Wn. App. at 142 (citations omitted).

impacts caused by the negligence of an at-fault driver?).¹²⁶ As the *Utterback* court held, “[t]he interdependent nature of the two impacts and their continuity and proximity *in time* and *location* all require the conclusion that just one accident occurred.”¹²⁷ In *Rohde*,¹²⁸ the Court factored in the distance of 150 feet traveled by the tortfeasor. In *Banner*,¹²⁹ the Court held there was one accident because of “the *distance* between the cars in the eastbound lane prior to the first collision” and “the *rapid* succession of the collisions”¹³⁰ For some reason, the Superior Court refused to give State Farm’s proposed special verdict form questions about temporal proximity, geographic proximity, and common cause.

There is and was no factual dispute that the collisions at the intersection of Everett Avenue and Broadway on April 1, 2011, were temporally and geographically proximate. But since this was a jury trial on unspecified “material issues of fact,”¹³¹ the Superior Court should

¹²⁶ See *Utterback*, 91 Wn. App. at 772; *Rohde*, 49 Wn.2d at 471-472; and *Banner*, 31 F.Supp.2d at 594.

¹²⁷ *Utterback*, 91 Wn. App. at 772 (emphasis added).

¹²⁸ 49 Wn.2d 465, 303 P.2d 659 (1956).

¹²⁹ 31 F.Supp.2d 591, 591-592 (N.D. Ohio 1998).

¹³⁰ *Id.*, 31 F.Supp.2d at 594.

¹³¹ CP 454.

have asked the jury about these two factors. What would have been the harm in doing so?

The only *possible* issue of fact was whether they were the result of a common cause. But the Court refused to submit a special verdict form question (despite the many requests by appellant that it do so) about whether Ms. Suljic's negligent, intoxicated and out-of-control driving was a proximate cause of the impacts at the intersection of Everett Avenue and Broadway (which it clearly was). State Farm's proposed Special Verdict Form question read:

Has the plaintiff met its burden of proof that Suzanna Suljic was not in control of the vehicle she was driving from the time it struck the vehicle being driven by George Maxfield until the time it struck the vehicle being driven by Lynsey Price?¹³²

Instead of using this (and correctly instructing the jury on the meaning of "control"), the Court submitted a special verdict form that asked three irrelevant questions, the import of which was basically whether the impacts after the collision between the Suljic Navigator and the Maxfield Cadillac was a "chain reaction," during which the Suljic Navigator basically "bounced off" the Maxfield Cadillac and into the Kennedy Mustang, which in turn caused further collisions. That is

¹³² CP 176.

precisely where the Court misapprehended the relevant case law on what constitutes a “single accident” for purposes of a tortfeasor’s automobile liability insurance. Washington case law has *never* required that there, in essence, be actual physical propulsion from one vehicle to another to constitute a “single accident.” Yet that is the erroneous assumption implicit in the special verdict form.

I. THE COURT PRESIDED OVER A MEANINGLESS TRIAL

Distance, time, causation, and control are the key factual determinants of whether there has been one “accident” for purposes of an automobile liability insurance policy. But the Superior Court did not ask the jury about any of those things. After the jury answered the questions that the Court did ask, the Court refused to enter findings of fact and conclusions of law. This was not surprising: the Court asked the jury the wrong questions and received information that had no bearing on the legal issue to be decided in the declaratory judgment action.

The Court apparently believed that all was not lost because in its Order on Post-Trial Motions, the Court stated that the coverage issue could be decided in the underlying tort case against Ms. Suljic:

At trial on defendant’s [respondents Price, Thayer, and Kennedy] claim for damages [i.e., the underlying tort case against Ms. Suljic], the burden will be on those

defendants to establish separate proximate causation for the collisions which they assert constituted separate accidents, which, in turn, may implicate separate insured losses.¹³³

Counsel for respondent Price pointed out that this contradicted the Court's previous order denying a request to consolidate the declaratory judgment action with the tort case. He explained to the Court that the trial was meaningless but the Court was okay with that, and responded that it could leave the coverage issue "twisting slowly in the wind."¹³⁴

Instead of stubbornly insisting on its own jury instruction and verdict form questions, the Court should have simply submitted more questions to the jury so that it had more "data" from which to make legal conclusions. The Court had the final say on interpreting the jury's findings of fact. What would have been the harm in asking the jury, "How quickly did the collisions take place?" "Over what distance?" "Did Ms. Suljic ever regain control during the course of the collisions as 'control' is defined in *Utterback*?" The Court refused to ask the jury any of these questions, and then refused to give the parties a meaningful ruling at the conclusion of the case. The Court denied State Farm's motion for a new trial, even though State Farm and respondent Price—

¹³³ CP 12.

¹³⁴ Verbatim Report of Proceedings 7/28/2014 p. 8, l. 24 – p. 9, l. 3.

never allies until that moment—explained to the Court that the first trial had been a waste of the parties' time.

VI. CONCLUSION

This case should never have gone to trial. State Farm encourages this Court to review the summary judgment pleadings and the entire record to find any evidence that, when taken in the light most favorable to respondents, creates an issue of fact as to the short time and distance of the accident and its sole common cause: Ms. Suljic's out-of-control driving.

If the Court does grant a new trial, State Farm requests that it order the Superior Court to follow the case law in its jury instructions and special verdict form questions, which counsel for State Farm essentially begged the Superior Court to do:

MR. WAKEFIELD: So the only possible question, Your Honor, is was Suzanna Suljic in control of this vehicle? That is the third factor under *Utterback, Rhode* [sic], and *Greengo*. I don't even hear an argument from the defense on that point.

Those are the criteria. I don't know how you can read those cases and not be—and not take that away from the cases. That's what they say. The one question we did not ask was common cause. Washington is a causation state, as my learned friend, Mr. Alexander, just said. It's a causation state, and we never asked the one causation question that I asked you to ask when we were doing

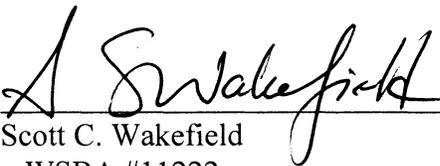
special verdict form. Which is was Ms. Suljic in control of her vehicle from the time it hit the Maxfield vehicle until the time it came to rest after hitting the Lynsey Price vehicle?

. . . I did everything but get down on my knees and beg for you to ask that question, Your Honor, on the special verdict form. And for reasons that still escape me, the Court refused to do that. And that, quite frankly, is an error of law. And –

THE COURT: Well, you're welcome to take that up on appeal, counsel.¹³⁵

DATED this 8th day of April, 2015.

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¹³⁵ Verbatim Report of Proceedings 7/3/2014 p. 11, l. 18 – p. 12, l. 16.