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NO. 72267-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

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

Respondents.

Appeal from Superior Court of Snohomish County
Honorable George N. Bowden
NO. 13-2-02251-4

BRIEF OF RESPONDENTS' TERRY KENNEDY,
MATTHEW THAYER AND LYNSEY PRICE

WILLIAMS LAW OFFICES, PLLC
John M. Williams, WSBA #36144
Attorney for Respondents Kennedy &
Thayer
Everett, WA 98213
(425) 252-8547

THE JOHN ALEXANDER LAW FIRM pllc
John R. Alexander, WSBA #8839
Attorneys for Respondent Price
2520 Colby Ave., Ste. 113
Everett, WA 98201
(206) 452-5585

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I. INTRODUCTION

This appeal arises from a jury trial on June 9, 2014 through June 13, 2014, before the Honorable George N. Bowden of the Snohomish County Superior Court. The Appellant/Plaintiff State Farm brought a declaratory action in an attempt to establish that the multiple collisions on April 1, 2011 (April Fool's Day) caused by its insured Suzanna Suljic constituted only one insurable event. Defendants Thayer, Kennedy and Price denied those allegations by Plaintiff State Farm and requested a jury trial. (The titles "Appellant" and "Plaintiff" are used herein interchangeably in reference to State Farm. The titles "Defendants" and "Respondents" are used interchangeably in reference to Thayer, Kennedy, and Price.)

The only live testimony offered at time of trial was that of Plaintiff witness, Tim Moebes, an accident reconstruction expert. The bulk of the evidence is the relatively voluminous police reports, which include witness statements (some cryptic and others with a modicum of details), BAC laboratory test results showing Suljic has a .14% blood alcohol at time the blood was drawn, narrative reports by the responding and investigating police officers and detectives, police photos, and police diagrams of the collision scenes. These police reports and statements constitute a large notebook of documents, which the parties agreed were admissible evidence, and all of which were admitted into evidence, although the huge bulk of them could successfully be objected to as hearsay evidence.

In short, Plaintiff State Farm chose to not call the approximately 15 collisions scene witnesses available to call live. But rather Plaintiff State Farm chose to go forward with just the testimony of Mr. Moebes and the above-stated police reports and witness statements. This was agreeable to Defendants Thayer, Kennedy and Price. It was agreeable to Defendants because their counsel knew the witness statements and the police reports and narratives in and of themselves contained much evidence that supported the reality that Suljic maintained or regained control of her vehicle before each collision.

Also, because Plaintiff State Farm has the burden of proof, its failure to call for live testimony the witnesses whose statements were admitted into evidence, the jury could and did have multiple doubts about what the substance of their live testimony would have been. This greatly contributed to the belief by the jury that Plaintiff failed to meet its burden of proof. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended narratives. Also please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove.

By the same token, it is noteworthy that Appellant State Farm when ordering the s for this appeal did not include the exhibit of the police reports and statements as described above. Nonetheless, there is sufficient record herein of these police records and witness statements for this Court to conclude there are a host of issues of material facts in controversy, such

that summary judgment is not an appropriate judicial act in this case. Further, there is sufficient evidence in the trial record for this Court to appreciate that the Trial Court's Instructions to the Jury and its Special Verdict Form are very appropriate to allow both sides of the case to argue their theories.

II. RESTATEMENT OF ISSUES

- A. Is the record on appeal sufficient for this Court to rule on Appellant's assignment of errors regarding the Snohomish County Superior Court not granting Plaintiff State Farm's Summary Judgment Motion?**

Answer: No

- B. Did the Snohomish County Superior Court commit error by not granting Plaintiff State Farm's Summary Judgment Motion?**

Answer: No.

- C. Did the Trial Court commit reversible error by not implementing as part of its Instructions to the Jury Plaintiff State Farm's Proposed Instruction No. 7 (CP 210)?**

Answer: No.

D. Did the Trial Court commit reversible error by not implementing Plaintiff State Farm's Proposed Special Verdict Form (CP 215)?

Answer: No.

III. STATEMENT OF FACTS

On April 1, 2011 at approximately 9:30 p.m. in Everett, Washington, Appellant's insured Suzanna Suljic was driving a 2000 Lincoln Navigator. She had been entrusted with driving the car by a passenger and the other Appellant's insured Christopher Shaw, who because he was "tipsy" permitted Ms. Suljic to drive. Mr. Shaw was the possessor and regular user of the Lincoln, having been given the regular use of the car by his mother who resides in Illinois. In addition to Mr. Shaw as a passenger in the Lincoln, there was a second passenger, Brittany Dixon-Taylor. Ms. Suljic was later determined to be driving under the influence of alcohol with a blood alcohol concentration of 0.14 % as of the time of the blood draw taken of her at the hospital, some undetermined time after she was removed from the collision scene. She was likely more intoxicated during the events of the separate collisions.

Ms. Suljic began her negligent driving actions southbound on Broadway in Everett on the evening of April 1, 2011, when she departed the AM-PM mini mart at 1806 Broadway, driving the 2002 light-colored Lincoln Navigator. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended

narratives. And please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove.

Collision No. 1: As Suljic drove southbound on Broadway, she struck two parked cars in the 2300 block of Broadway. Suljic did not stop; she continued to control the car and volitionally drive forward. This is the first, separate insurable event caused by Ms. Suljic. In footnote 11 of Appellant's brief, Appellant indicates that these collisions with the parked vehicles are not at issue in this case; however, this collision is essential in determining the extent of control that Ms. Suljic maintained over her vehicle. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended narratives. And please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove. And finally, please see CP 520 through 548.

Collision No. 2: Ms. Suljic continued driving southbound on Broadway in the left lane. She then drove over the center lane and continued driving southbound in the northbound lane of travel on Broadway. She struck a 2001 Cadillac Seville that was traveling in the oncoming northbound traffic. Suljic did not stop; she continued to control the car and volitionally drive forward. This is the second, separate insurable event caused by Ms. Suljic. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports,

and appended narratives. And please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove. And finally, please see CP 520 through 548.

Collision No. 3: Ms. Suljic drove into the left turn lane of southbound Broadway at Everett Avenue, where she violently collided with a red 2005 Ford Mustang, driven and occupied by Respondent Terry Kennedy. Mr. Kennedy was at a safe and legal stop for a red light while waiting to make a left turn onto Everett Avenue.

Ms. Suljic slammed into the stopped Mustang which caused the Mustang to slam into a 2006 Volkswagen Passat in front of it, occupied by Respondent Matthew Thayer and by Jason Harder who is not a party to this case. The Mustang then rotated and struck a 2000 Dodge Ram 1500 which was going southbound on Broadway in the left lane, driven by Jason Tastad, who is not a party to this matter.

These impacts and collisions are the third separate insurable event caused by Suljic. Plaintiff State Farm alleges Suljic was “out of control” and was not controlling or directing the Lincoln after it collision with Kennedy. Defendants Price, Kennedy and Thayer allege the evidence establishes that Suljic continued to exert control over the car and volitionally and intentionally drive forward. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended narratives. And please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael

Anthony Christoph and CP 494, the statement of Michael Anthony Grove. And finally, please see CP 520 through 548.

Collision No. 4: Suljic continued to control and volitionally drive the Lincoln Navigator southbound, at which point she crossed the centerline into the northbound lane of Broadway. Suljic drove into the intersection with Everett Avenue just as the light turned green. In the intersection she violently collided head-on with Lynsey Price who was driving northbound in her 2009 Mitsubishi Lancer.

After Suljic drove the Navigator into a head on impact with Ms. Price's Lancer, the Navigator spun and struck Ms. Price's Lancer a second time, on the passenger side of Ms. Price's car. These impacts upon Ms. Price are the fourth, separate insurable event.

After Suljic smashed into Ms. Price's Lancer a second time, the Lincoln Navigator finally came to a complete stop. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended narratives. Also please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove.

Finally it behooves one to be cognizant that these were very violent and high impact collisions, the visual trauma and cacophony of which very likely had a significant impact upon the perceptions of time and distance of the witnesses. There were auto parts and car debris strewn

widely over the roadway. The photos of the scenes of the collision are impressive.

Collision No. 5: A 1998 Buick Century had been driving closely behind Ms. Price. After Suljic collided head-on with Ms. Price's car, a Buick Century driven by Amber Conner was following behind Ms. Price too closely and could not stop in time; and it smashed into the rear of Ms. Price's Lancer. This is the fifth collision and the fifth, separate insurable event brought about by Suljic's negligence. Please see CP 258 through 280 and 482 through 488, the Police Traffic Collision Report, the police reports, and appended narratives. And please see CP 490, the statement of Jamie Mae Holman. Please also see CP 492, the statement of Michael Anthony Christoph and CP 494, the statement of Michael Anthony Grove. And finally, please see CP 520 through 548.

IV. ARGUMENT

A. The record lacks sufficient completeness for appellate review of Appellant's Motion for Summary Judgment

Appellant is requesting this Court to reverse the Superior Court's order denying summary judgment and to hold as a matter of law, that there was one accident. Appellant states in its brief, "As often happens, respondents survived summary judgment because of bluster and the general reluctance of a Superior Court to grant summary judgment if the pleadings are thick enough."¹ Oh well, how does one respond that? In any

¹ Appellant's Brief p. 37 – 38.

event, bluster or not, the briefing and arguments of Defense Counsel were and are sufficient to defeat summary judgment motion. The *verbatim* record of the hearing is not available for review because Appellant did not have it transcribed and transmitted pursuant to RAP 9.1 (a)(b) and RAP 9.2.

RAP 9.1 (a) states: Generally. The “record on review” may consist of (1) a “report of proceedings”, (2) “clerk’s papers”, (3) exhibits, and (4) a certified record of administrative proceedings. RAP 9.1 (b) states in pertinent part, “Report of Proceedings. The report of any oral proceeding must be transcribed in the form a typewritten report of proceedings.”

Appellant’s failed to transmit a *verbatim* report of proceedings of the summary judgment argument to the Court of Appeals. This is likely a tactical decision, since it will show the extensive argument by counsel and the deliberative reasoning of the Judge. Appellant’s statement that the Superior Court denied summary judgment because the pleadings were “thick enough” does not deserve to be addressed, nor responded to.

Because the records lack sufficient completeness for review of the summary judgment proceeding, Respondents request that this Court refuse to consider this assignment of error.

B. The Standards of review

If this Court does decide to review the Superior Court’s denial of Appellant’s summary judgment motion, the Snohomish County Superior Court’s summary judgment ruling is reviewed *de novo*. Errors in jury

instructions are also reviewed *de novo*. Jury instructions are to be read as a whole and each instruction is read in the context of all others given. A specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given. *State v. Brett*, 892 P.2d 29, 126 Wn.2d 136, 171 (1995); *State v. Gentry*, 125 Wn.2d 570, 613, 888 P.2d 1105 (1995); *State v. Rice*, 110 Wn.2d 577,603, 757 P.2d 889 (1988); and *State v. Benn*, 120 Wn.2d 631,655, 845 P.2d 289, (1993). *State v. Brown*, 940 P.2d 546, 132 Wn.2d 529 (1997).

C. The trial court properly denied summary judgment on the issue that the multiple collisions constituted one “accident”.

Summary Judgment should be granted only if the pleadings, affidavits, depositions and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Bales v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). In ruling on a motion for summary judgment, a Court's function is to determine whether a genuine issue of material fact exists, and a Court should not resolve any existing factual issue. *McConiga v. Riches*, 40 Wn. App. 532, 700 P.2d 331 (1985); *Blaise v. Underwood, supra*. A Court should consider the material evidence and all reasonable inferences there

from most favorably to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2nd 140 (1960).

The object and function of a summary judgment motion is to avoid a useless trial. However, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. *Preston v. Duncan*, 55 Wn.2d 678, 348 P.2d 605 (1960); *Jolly v. Fossum*, 59 Wn.2d 20, 365 P.2d 780 (1961). All facts and reasonable inferences must be construed in favor of the non-moving party; the motion should be granted only if, from all evidence, reasonable persons could reach only one conclusion. *Turgren v. King County*, 104 Wn.2d 293, 705 P.2nd 258 (1985); *Spurrell v. Booch*, 40 Wn. App. 854, 701 P.2nd 29 (1985).

A Court should not grant summary judgment where there is a question as to the credibility of a witness whose statements are critical to an important issue. *Powell v. Viking Insurance Company*, 44 Wn. App. 495, 722 P.2nd 1343 (1986); *Meadows v. Grant's Autobrokers Inc.*, 71 Wn.2d 874, 431 P.2nd 216 (1967). A Court should not resolve issues of credibility at a summary judgment hearing, and if such an issue is present, the motions should be denied.

Appellant moved the Superior Court for summary judgment based upon the police report and the statements of witnesses as documented in the police investigation documents and upon the declaration of Tim Moebes, an accident reconstruction expert on behalf of Appellant State Farm. See CP pages 608 through 613. Those statements and documents include the

following statements:

I was northbound on Broadway between Everett Avenue and 26th street with I first heard and then saw a fast moving southbound SUV vehicle. It sounded as if he swerved to avoid someone and the[n] collided with a northbound car . . .

Statement of Donald Lee Lord, CP p. 273.

Traveling southbound on Broadway going through the traffic light (green) was hit on the driver's side front corner (sic) panel. believe (sic) the vehicle was red. Happened too fast to tell . . .

Statement of Jason Don Tastad CP p. 274.

I was in the turn lane southbound broadway (sic), preparing to turn right on everett ave (sic). I heard a crash and looked left to see a blue/green truck; & the red mustang (sic) spinning. It appeared the truck had hit the mustang as they wove between it & my vehicle. The truck sped off, weaving through traffic [underlining added.]

Statement of Jamie Mae Holman, CP p. 490.

I saw a Jeep waving in and out of traffic, hitting cars and then he ran a red light, and hit 3 more cars. Looked like 2 black men in the Jeep.

Statement of Michael Anthony Christoph, CP p. 492

I was sitting in my van facing Broadway in the QFC parking lot. When I heard a car speeding southbound on Broadway. I looked-up and saw a light colored SUV type car speeding throw (sic) the intersection when it hit a red mustang (sic).

It hit the mustang (sic) so hard that the SUV went airborne (sic) hitting a couple more cars

Statement of Michael Anthony Grove, CP p. 494.

These statements cast a great deal of doubt on time sequences, identity of the vehicles involved in the collisions, distances traveled, and other details pertinent to having a reliable picture of the events on the street. All of these things are greatly contrary to Plaintiff's assertions of only one insurable event and upon the cryptic opinions of the Plaintiff's expert Tim Moebes. Please see CP pages 608 through 613. Based upon the evidence presented at the summary judgment hearing, Appellant's motion for partial summary judgment should have been denied and it was.²

D. The law of the case at time of trial.

In *Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764; 960 P.2d 453 (Wash. App. 1998.) James Utterback was walking along a sidewalk by a parking lot when Jeanette Heinz-Naehr tried to move her car forward into a parking space. *Id. at 766*. Unfortunately, her car lurched forward, jumped the

² Appellant's motion was titled "State Farm's Motion for Partial Summary Judgment for Declaratory Relief", however during oral argument, Appellant conceded that the motion was completely dispositive of all issues and not partial.

curb and hit Mr. Utterback. Ms. Heinz-Naehr had lost control of her vehicle which backed up and immediately lurched forward a second time, striking Mr. Utterback a second time. *Id.* The Court applying the “cause theory” as adopted by the Washington Supreme Court in *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 303 P.2d 659 (1956), found that under these facts there was a single accident. *Id. at 772.*

The *Utterback* Court, citing *Rohde*, described the “cause” analysis for determining the number of accidents, that all injuries or damage within the scope of a single “proximate, uninterrupted and continuing cause” must be treated as arising from a single accident. *Id. at 768.* In *Rohde*, a driver crossed the centerline, striking three motorcycles, each about 75 feet apart, while his car was spinning out of control. *Id.* The *Utterback* Court stated that because the insured’s vehicle went out of control, either before or at the time of the first collision, and remained out of control until it came to rest after the third collision, the *Rohde* Court determined that just one “accident” occurred.

The Parties of this case are in agreement that the primary consideration in determining the number of accidents caused by Ms. Suljic is whether or not she maintained or regained control of her vehicle before each collision with Defendants, pursuant to the “cause” analysis adhered to by Washington courts. This was as well the opinion of the Trial Court and request that this Court read the Trial Court’s ORDER ON POST-TRIAL MOTIONS TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW, CP page 127 through 130.

Despite ample evidence to the contrary, Plaintiff confidently asserts that Ms. Suljic never regained control of her vehicle after striking driver Maxfield and that the proximate cause of all the injuries and damage was Ms. Suljic's intoxication and alleged panicked and out-of-control driving. Ms. Suljic's BAC was above the legal limit admittedly, but there is also much evidence to show that she was in control of her vehicle. Drunks are most often "in control" of their vehicles, but unfortunately they often make bad decisions because of their intoxication. If blood alcohol levels above the legal limit were the standard of "control of a vehicle," a drunk driver could never be involved in more than one accident, regardless of other collisions caused by them with other vehicles in close proximity and time.

Further and likely of greatest importance, are the statements of the witnesses of the events on the street which are part of the police reports and referenced in the foregoing Statement of Facts which raise numerous issues of material fact. Ms. Suljic was in control of her vehicle enough to hit two parked cars, continue for another three (3) blocks, hit another car, then hit another group of cars north of the Broadway/Everett Avenue intersection, and then continue on through the intersection, and collide with another group of cars on the south side of the intersection. Being in control of a vehicle is not synonymous with being a good driver. Ms. Suljic was sufficiently in control of her vehicle to distinguish this case from the facts of *Utterback* and *Rohde*.

E. Appellant’s assertion of error in the Trial Court’s Jury Instructions is fatally flawed because Appellant never proposed to the Trial Court an appropriate instruction regarding control to correct the alleged error of the Trial Court’s instructions.

It is agreed by Respondents that the essence of the issue of whether there are multiple insurable “accidents” in the case at hand was whether the at-fault driver Suljic had “control of the vehicle” at each instance that she caused there to be an impact with cars occupied by the Defendants-Respondents. *Pemco Mut. Ins. Co. v. Utterback*, 960 P.2d 453, 91 Wn. App. 764 (Wash.App. Div. 1 1998). To reiterate, the Parties and the Trial Court recognized this and discussed it before, during and after the trial and during arguments on the jury instructions. See also *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 814-815, 959 P.2d 657 (1998)³. Accordingly the Trial Court and all the parties were in agreement that the facts to be determined by the jury were whether Suljic maintained control or regained control after each impact with the cars with which she collided.

Appellant asserts the trial court failed to adequately instruct the jury

³ **Error! Main Document Only.**“Under our approach if each accident, collision, or injury has its own proximate cause then each will be deemed a separate "accident" for insurance policy purposes even if the two accidents occurred coincident, or nearly coincident, in time. For example, in *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir.1968), the Fifth Circuit found two separate accidents where one car was involved in two collisions two to five seconds apart and 30 to 300 feet apart. If, however, the collisions or injuries were all caused by a single, uninterrupted proximate cause, then the multiple collisions or injuries will be deemed a single accident.” At 814 - 815.

with a definition of control in conformance with *Utterback*. However, review of the clerk's papers reveals that Plaintiff never offered to the Trial Court an appropriate instruction stating the law of *Utterback* that would have "cured" the Trial Court's alleged error regarding its jury instructions on control. If a party is not satisfied with an instruction, it must propose a correct instruction. If a party fails to propose a correct instruction, it cannot complain about the court's failure to give it. *Hoglund v. Raymark Indus., Inc.*, 50 Wn.App. 360, 368, 749 P.2d 164 (1987), review denied, 110 Wn.2d 1008 (1988). Appellant State Farm's failure to offer-up to the Court a correct instruction regarding control is a fatal flaw in the appeal of the Trial Court's instructions to the jury, and this Court of Appeals need not take its analysis of State Farm's appeal on this issue any further beyond this conclusion.

State v. Jacobson, 74 Wn. App. 715, 724, 876 P.2d 916 (1994), review denied, 125 Wn.2d 1016 (1995), states "If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it." citing *Hoglund* at 368, *supra*. Plaintiff State Farm's offered instruction No. 7 (CP 210) does not state the law of *Utterback*, *Greengo* or *Rohde*. Instead, Plaintiff's Instruction No. 7 is just a recitation of the facts that Appellant asserts its expert witness Moebes established.

Plaintiff's Proposed Instruction No. 7 reads,

The plaintiff State Farm has the burden of proving
that the 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).

[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.] [Alternative]

See CP 210.

Appellant asserts that somehow the testimony of Moebes is uncontroverted and thereby proves without question there is only one proximate cause of the collisions with the Defendants, and thereby only one insurable event. But this assertion was rejected by the Trial Court when denying Plaintiff's motion for summary judgment. And it was rejected by the jury when it found Plaintiff did not meet its burden of proof.

In short, Plaintiff's arguments to the Trial Court about proper jury instructions regarding control were this: that the facts of the case permit no other factual determination to be made by the jury apart from the issues it

raises in its Instruction No. 7.

Hinzman v. Palmanteer, 81 Wn.2d 327, 334, 501 P.2d 1228 (1972), states, "[t]he court is under no obligation to give an instruction which is erroneous in any respect." The Trial Court correctly rejected State Farm's Instruction No. 7 because had the Trial Court given this instruction, it would have limited the jury's deliberation to solely whether the Plaintiff State Farm's offers of proof and arguments of evidence were true or not. That then would not have permitted the jury to determine what the actual facts were established by the evidence.

It would have been wholly improper for the Trial Court to limit the jury's deliberations to Plaintiff's arguments of what the scope of the facts are, or are not. And in so giving this flawed instruction, the Trial Court would have improperly limited the jury's determination whether Suljic maintained control or did not maintain control based upon the jury's independent determination of the facts of the events on the street the evening of April 1, 2011. Jury instructions are sufficient if they (1) allow each party to argue its 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. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). The Plaintiff proposed Instruction No. 7 would have misled the jury, improperly limited the jury's deliberations, and would not have stated the

correct law of *Utterback* and *Greengo*.

Even so, Appellant says that the Trial Court further failed to offer Plaintiff's "instruction" with its definition of control, when the Trial Court did not give Plaintiff's offered Special Verdict form, which reads as follows⁴,

QUESTION NO. 1: 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 less than five seconds from the time the Suljic vehicle struck the vehicle being driven by George Maxfield and the time the Suljic vehicle struck the vehicle being driven by Lynsey Price?

Answer: Yes ____ No ____

See CP page 215.

First, a verdict form is not a jury instruction. Plaintiff's Special Verdict Form below is not a jury instruction and does not cure the fatal flaw of Appellant failing to offer a properly stated "jury instruction" on control. Second, the Plaintiff's offered Special Verdict form is word for word no different than the flawed and wholly inappropriate Plaintiff's Jury Instruction

⁴ **Error! Main Document Only.** It must be noted the Special Verdict Form as set in the body of text above was amended by Counsel for Respondents to results of the jury's verdict. The form and information in the form is correct and fully consistent with CP 161.

No. 7 as discussed above.

F. When read as a whole the Trial Court's jury instructions and Special Verdict Form were sufficient and allowed the Parties to argue their theories of the case.

The Trial Court's Jury Instructions No. 6 is wholly sufficient. Jury instructions are sufficient if they (1) allow each party to argue its 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. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). We review the adequacy of jury instructions *de novo* as a question of law. *Hall v. Sacred Heart Med. Ctr.*, 100 Wash.App. 53, 61, 995 P.2d 621 (2000). The Trial Court's Jury Instruction in whole No. 6 reads,

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 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.

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.

See CP p. 74.

The foregoing instruction is well-tailored to the testimony and

evidence, as has been provided in the foregoing Statement of Facts by Respondents. It allowed the Parties to argue their theories of the case. Specifically, it allowed in whole, Appellant to argue it had proved all of its theories regarding loss of control by Suljic. Further, it afforded Appellant the opportunity to argue the testimony of Tim Moebes was dispositive, and to argue the time sequences were so short, that Ms. Suljic never regained control of her car after she slammed into Defendant Kennedy.

The Appellant claims the Trial Court's Special Verdict Form was inadequate so as to be in error. The Court's Special Verdict Form reads as follows:

We, the jury, answer the questions, submitted by the Court as follows:

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?

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 the vehicle driven by Suzanna Suljic and the vehicle driven by Linsey Price?

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 Linsey Price?

YES NO

DATED this 12th day of June, 2014.

PRESIDING JUROR: /s/ Thomas Hyldahl

See CP 164 and 165.

The Special Jury Verdict form as given by the Trial Court is consistent with law of *Utterback* and *Greengo* as had been agreed by the parties is the law of the case. It is consistent with the testimony and evidence admitted and allowed both parties to argue to the jury their theories of the events of the case and their theories regarding proof of the central issue of the proximate cause or proximate causes of the collisions.

The jury did not accept the arguments and assertions of proof by Plaintiff State Farm, simply because the testimony and evidence allowed for very divergent conclusions to be drawn regarding the actions of Ms. Suljic as

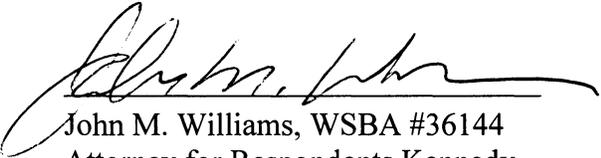
she drove the car she occupied, regarding the length of time sequences, and regarding the actualities of the events on the street during the collisions. The jury justly concluded State Farm failed to meet its burden of proof.

V. CONCLUSION

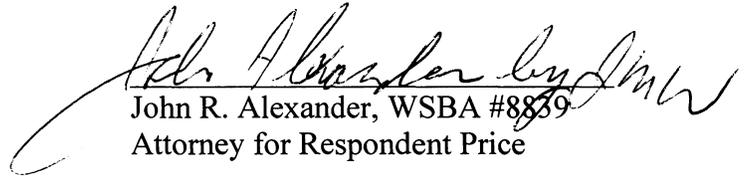
Appellant State Farm's appeal regarding the denial of its motion for summary judgment fails because the supporting evidence and the evidence cited by Respondents in response the Summary Judgment Motion are, in and of themselves, replete with material issues of fact that required resolution by the jury, and required the jury's determination of whether Plaintiff State Farm met its burden of proof.

Appellant State Farm's appeal regarding the alleged error in the jury instructions and special verdict form fails because the Trial Court's Jury Instruction Number 6 and its Special Verdict form are fair, a correct statement of the law, neutral, balanced and more than adequately allowed both sides to argue their theories. In particular the Instruction and Special Verdict Form adequately permitted Plaintiff to fully argue loss of control based upon all of the facts admitted into information and based upon the testimony of Tim Moebes.

Respectfully submitted this 3rd day of August, 2015.



John M. Williams, WSBA #36144
Attorney for Respondents Kennedy
& Thayer


John R. Alexander, WSBA #8839
Attorney for Respondent Price

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document:

Counsel for Appellant
Scott Wakefield
Dan Kirkpatrick
Todd & Wakefield
1501 Fourth Ave., Ste. 2000
Seattle, WA 98101
swake@twlaw.com
dkirkpatrick@twlaw.com

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

Pro Se Respondent
Christopher Shaw
114 20th Ave. E., #15
Seattle, WA 98112

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

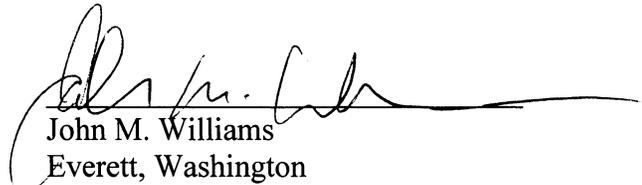
Pro Se Respondent
Vicki Thayer
9710 11th Place S.E.
Lake Stevens, WA 98258

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

Court of Appeals, Division 1
Clerk's Office
600 University St.
Seattle, WA 98101

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

DATED: August 3, 2015.


John M. Williams
Everett, Washington
E-Mail: john@williamslawpllc.com