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63232-9

No. 63232-9-1

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

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ROBERT OSBORN, a single person,

Appellant,

v.

LARRY D. GREENE and JANE DOE GREENE; and STATE OF  
WASHINGTON DEPARTMENT OF CORRECTIONS

Respondents,

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BRIEF OF APPELLANT

Appeal from Snohomish County Superior Court  
Cause No. 05-2-09915-0 SEA  
Hon. Eric Z. Lucas

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## TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities .....	ii, iii
Introduction and Summary .....	1
Assignments of Error .....	2
Issues Pertaining to Assignments of Error.....	3
Statement of Issues .....	2
Statement of Facts.....	3
Argument .....	11
A. Standard of review .....	11
1. The Standard of Review for Jury Instructions .....	11
2. The Standard of Review for Errors in the Admission of Testimony .....	13
B. The non-party at fault jury instruction should not have been given because it was not supported by substantial evidence .....	13
C. The following driver instruction should not have been given because it was not supported by substantial evidence .....	18
D. A limiting instruction should have been given to preclude Mathern from arguing that he was in an emergency situation.....	19
E. The State’s expert should not have been permitted to proffer speculative expert testimony in contravention of the court’s order in limine barring the same.....	20

Conclusion ..... 24

## TABLE OF AUTHORITIES

### Cases

Case	Page
<i>Adcox v. Children's Orthopedic Hosp.</i> , 123 Wn.2d 15, 25, 864 P.2d 921 (1993).....	18
<i>Brown v. Spokane County Fire Prot. Dist. No. 1</i> , 100 Wn.2d 188, 197, 668 P.2d 571 (1983).....	21
<i>Clements v. Blue Cross of Washington and Alaska</i> , 37 Wn. App. 544, 549, 682 P.2d 942 (1984).....	23
<i>Cooper's Mobile Homes, Inc. v. Simmons. Co.</i> , 94 Wn.2d 321, 327, 617 P.2d 415 (1980).....	13, 21
<i>Davidson v. Municipality of Met. Seattle</i> , 43 Wn. App. 569, 575-77, 719 P.2d 569 (1986).....	23
<i>Hagen v. Seattle</i> , 54 Wn.2d 218, 223, 339 P.2d 79 (1959).....	23
<i>Hines v. Todd Pacific Shipyards Corp.</i> , 127 Wn. App. 356, 359, 112 P.3d 522 (2005).....	18
<i>Langan v. Valicopters, Inc.</i> , 88 Wn.2d 855, 866, 567 P.2d 218 (1977).....	13
<i>Kirk v. WSU</i> , 109 Wn.2d 448, 459, 746 P.2d 285 (1987).....	13
<i>Mills v. Park</i> , 67 Wn.2d 717, 409 P.2d 646 (1966).....	21
<i>Prentice Packing and Storage Co. v. United Pacific Ins. Co.</i> , 5 Wn.2d 144, 164, 106 P.2d 314 (1940).....	23
<i>Sandberg v. Spoelstra</i> , 46 Wn.2d 776, 285 P.2d 564 (1955).....	21
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 177, 817 P.2d 861 (1991).....	23

<i>Snohomish v. Joslin</i> , 9 Wn. App. 495, 498, 513 P.2d 293 (1973).....	17
<i>State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997).....	12
<i>State v. Clausing</i> , 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).....	13, 18, 20, 22, 24
<i>State v. Franco</i> , 96 Wn.2d 816, 639 P.2d 1320 (1982) .....	17
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996).....	12
<i>State v. McGraw</i> , 127 Wn.2d 281, 288, 898 P.2d 838 (1995).....	17
<i>State v. Walker</i> , 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).....	12, 14
<i>State of Wash. v. Greive</i> , 63 Wn.2d 126, 385 P.2d 846 (1963).....	17
<i>Svehaug v. Donoghue</i> , 5 Wn. App. 817, 819, 490 P.2d 1345 (1971).....	19, 20
<i>Szupkay v. Cozzetti</i> , 37 Wn. App. 30, 32, 678 P.2d 358 (1984).....	19
<i>Thompson v. King Feed &amp; Nutrition Serv. Inc.</i> , 153 Wn.2d 447, 105 P.3d 378 (2005).....	12, 13, 20, 22, 24
<i>Tuttle v. Allstate Ins. Co.</i> , 134 Wn. App. 120, 138 P.3d 1107 (Div. II 2006).....	6, 14
<i>Vita Food Prods, Inc. v. State</i> , 91 Wn.2d 132, 134 587 P.2d 535 (1978).....	17
<i>Zook v. Baier</i> , 9 Wn. App. 708, 714, 514 P.2d 923 (1973).....	21

**Other Authority**

RCW 46.61.645 .....14, 15, 16, 17, 19

RCW 4.22.070 .....18

RCW 5.40.050 .....16

WPI 70.04 .....19

## **I. INTRODUCTION AND SUMMARY**

This case presents the relatively unusual situation in which a "good Samaritan" dangerously increased the risk of harm to other motorists by attempting to remove a tire tread from a busy freeway.

On the afternoon of April 12, 2004, an employee of Respondent State of Washington Department of Corrections (the "State"), Michael Mathern ("Mathern"), negligently slowed, stopped and parked his vehicle on the shoulder of Northbound Interstate 5 to remove a piece of tire debris from the roadway. Shortly thereafter Respondent Larry D. Greene ("Greene") also negligently slowed and stopped his vehicle in the slow lane of Northbound Interstate 5 adjacent to Mathern's vehicle. Together, these two vehicles blocked both the freeway slow lane and the shoulder at this location, significantly increasing the risk of harm to oncoming drivers.

Simultaneously, Appellant Robert Osborn ("Osborn") was traveling Northbound in the slow lane at freeway speed, 55 miles per hour. Osborn was following behind a large, box-shaped truck ("box truck") at a safe distance, but the box truck was tall enough to completely obstruct his view of the roadway ahead. Suddenly, as the box truck merged left out of the slow lane, Osborn saw the Respondents' stopped vehicles for the first time and recognized that they were blocking the freeway. Osborn could not merge left and was forced to jam on his brakes, but with insufficient time to bring his dump truck to a complete

stop, struck the parked vehicles from the rear. On impact Osborn's wrist was caught in the spinning steering wheel of his truck and he suffered a serious and permanent wrist injury.

Osborn sued Mathern's employer, the State, and Greene for acting negligently and proximately causing his wrist injury.

At trial, over the objection of Osborn's counsel, the Court erroneously gave the "non-party at fault" and the "following driver" instructions to the jury. There was insufficient evidence upon which to base these instructions.

The Court also refused to give Osborn's requested limiting instruction related to the "emergency doctrine," thereby allowing Mathern to inappropriately claim that he was confronted with a "sudden" emergency.

Moreover, the State's expert, Timothy Moebes, violated the trial court's ruling in limine preventing experts from presenting speculative testimony during trial. Mr. Moebes speculated, without sufficient evidence, that Mr. Osborn was following the box truck too close.

These errors confused the jury and deprived Osborn of a fair trial. Osborn now seeks an Order of this Court granting him a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it gave the jury the "non-party at fault" instruction.

2. The trial court erred when it gave the jury the "following driver" instruction.

3. The trial court erred when it failed to give the jury a limiting instruction related to the emergency doctrine.

4. The State's expert violated the trial court's order in limine by offering unsupported, speculative expert testimony during trial.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the lower court commit prejudicial error by giving of the "nonparty at fault" jury instruction when insufficient evidence was presented at trial to support the instruction? (Assignment of Error 1.)

2. Did the lower court commit prejudicial error by giving the "following driver" jury instruction when insufficient evidence was presented at trial to support the instruction? (Assignment of Error 2.)

3. Did the lower court commit prejudicial error by refusing to give a limiting jury instruction, thereby allowing Mathern to wrongfully use the "emergency doctrine" to avoid liability? (Assignment of Error 3.)

4. Did the lower court commit prejudicial error by allowing the State's expert, Timothy Moebes, to proffer unsupported, speculative expert testimony? (Assignment of Error 4.)

5. Did the lower court's errors prejudice Osborn? (Assignments of Error 1-4.)

#### **IV. STATEMENT OF THE CASE**

##### **A. Mathern's Negligent Acts.**

Mathern was driving North on I-5 when he saw a piece of rubber tire debris in the slow lane of the freeway. [RP (Report of Proceedings) 81:23-24]. He concluded this rubber debris was a hazard and decided to remove it. [RP 86:13-15]. He then slowed his vehicle and parked his car on the shoulder next to the rubber debris. [RP 84-86].

Mathern left his vehicle intending to dart into the slow lane of the freeway and remove the rubber debris. Greene slowed his vehicle when he saw Mathern. Mathern waived at Greene to stop. [RP 167:11-20]. Greene stopped his vehicle in the slow lane of the freeway to allow Mathern to walk into the lane in front of Greene's car and remove the rubber debris. [RP 168]. Almost immediately, a collision occurred. [RP 99:13-14].

##### **B. Greene's Negligent Acts.**

As noted above, Greene was driving in the far right-hand lane of Northbound Interstate 5 when he saw Mathern outside of his vehicle waiving at him. Greene brought his vehicle to a full stop in the slow lane of the freeway just even with the rear of Mathern's vehicle. [RP 170-71]. Greene parked his car in the slow lane of the freeway and turned on his flashing hazard lights.

Almost immediately, a collision occurred.

##### **C. Osborn's Actions.**

On the day of the accident Osborn was working as a truck driver. [RP 315]. He was driving an empty dump truck and trailer on Northbound Interstate 5 in the far right-hand lane of the freeway. [RP 316]. The conditions that day were “bare and dry.” [RP 221:22-24]. He was traveling behind a truck with a box-shaped compartment for storage—the box truck. [RP 317]. Although Osborn was driving a safe distance behind the box truck, the box truck was large enough to completely obstruct Osborn’s view of cars in the lane directly ahead of the box truck. As Osborn approached the location of the respondents’ parked cars, the box truck quickly merged left into the next lane. [RP 319]. When the box truck changed lanes, Osborn was suddenly confronted with Greene and Mathern’s parked cars. [RP 319:23 – 320:6]. Osborn looked in his mirror, realized he could not merge, and then immediately applied his brakes, but his large rig was unable to completely stop before colliding with both Mathern and Greene’s vehicles. [RP 320-21].

Though the collision caused only minor damage to the vehicles, Osborn was severely injured. Osborn’s left wrist was caught in the spinning steering wheel and was horribly shattered. Osborn was left permanently disabled in the collision. [RP 340].

**D. The Court's Instructions.**

**1. Non-party At Fault Instruction.**

Based on the fact that a piece of rubber tire debris was lying in the slow lane of the freeway when Mathern approached, the court gave the "non-party at fault" instruction to the jury. Citing *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 138 P.3d 1107 (2006), Osborn objected to this instruction on the basis that there was no evidence presented at trial to show that a non-party was at fault. [RP 518-526].

Jury Instruction No. 19

\* \* \*

3. In addition, Defendants claim that a non-party entity was negligent in leaving tire debris on the freeway and that such conduct was a proximate cause of Plaintiff's injuries and damage.

[CP (Clerks Papers) 107, pg. 45]

Jury Instruction No. 25

Before a percentage of negligence may be attributed to any entity that is not a party to this action, the defendant has the burden of proving each of the following propositions:

First, that the entity was negligent; and

Second, that the entity's negligence was a proximate cause of the injury and/or damage to the plaintiff.

[CP 107, pg. 51]

Osborn objected to the inclusion of these instructions based on: (1) the lack of evidence showing how the tire tread ended up on the road; (2) the lack of evidence showing scienter on the part of the "non-party" regarding the deposit of the tire tread [RP 523-525]; and, (3) that absolutely no evidence was

put forth regarding a breach of any duty that may exist. [RP 491, 495, 518-526].

**2. Following driver Instruction.**

Over Osborn's objection the court gave the following driver instruction to the jury. There was no evidence presented at trial to show that Osborn was following any vehicle too close for the conditions, absent the unsupported, speculative testimony of the State's expert, Timothy Moebes.

Jury Instruction No. 12

A statute provides that a driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the street or highway.

When one vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the driver of the following vehicle. It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, in the absence of any emergency. The driver of the following vehicle is not necessarily excused even in the event of an emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions.

[CP 107, pg. 38]

**3. Emergency Doctrine Limiting Instruction.**

Osborn asserted that neither Mathern nor Greene should be allowed to argue that they were confronted with a sudden emergency, not of their own

making. Each of the defendants below made deliberate decisions to slow, stop and park on the freeway and shoulder respectively.

Osborn's Counsel objected to the emergency instruction as applicable to any parties outside of Mr. Osborn himself. Mr. Watkins stated:

I believe that there has been talk of an emergency for Mr. Mathern, and I want to be argued – pardon me. I want to argue that Mr. Mathern does not get the benefit of that when you read what the definition of emergency is. I would ask that that also be included in the packet.

[RP 527:4-9]. The trial court ultimately did not give the jury any limiting instruction regarding the emergency doctrine. [CP 107, RP 530].

**E. Speculative Testimony of Timothy Moebes.**

Prior to the start of trial, the trial court ruled in limine that experts would not be allowed to offer speculative testimony. Despite this ruling, the State offered testimony by its expert, Timothy Moebes, that Mr. Osborn was following too close to the box truck in front of him. During his trial testimony, Mr. Moebes testified about his assumptions. Among those assumptions was the spacing of the vehicles in front of Mr. Osborn as between each other. Mr. Moebes testified:

Q. Is it your opinion that a one-second gap between vehicle traveling at 55 miles an hour on Interstate 5 is a reasonable assumption?

A. It's reasonable. It may be less than ideal, but I think it's probably on the shorter end. You can have a one second gap.

[RP 411:17-22]

In testifying as to how far a vehicle traveled in one second traveling 55 miles per hour, Mr. Moebes confirmed that the distance would be about 81 feet.

[RP 411:8-11] Mr. Moebes then testified that he assumed, based on one portion of Mr. Osborn's deposition testimony that Mr. Osborn was 75 to 100 feet behind the box truck in front of him. [RP 418:7-9]. As such, even Mr. Moebes' assumed positioning of Osborn before the collision with respect to the box truck was, by his own admission, "reasonable" according to his own testimony of following distances for the other vehicles. [RP 411:17-22]

Unfortunately, Mr. Moebes' conclusion (and "validation" of that conclusion) that Osborn was following the box truck too close was based on calculations which he developed using a series of assumptions of speeds and distances to diagram the position of the vehicles. Mr. Moebes was questioned about the assumptions that formed the basis of his diagram and calculations from which he extrapolated distances:

Q. So you assumed the distance between Mr. Greene's vehicle and your first vehicle right here?

A. Yes.

Q. I will call that the first car.  
Was there any testimony in the record regard that distance?

A. The implication is that there wasn't a vehicle changing lanes within any distance that I'm speaking of here.

Q. So there certainly wasn't any testimony of that distance?

A. Correct.

Q. Okay.

There is no pictorial evidence of that distance?

A. Correct.

Q. So there is no evidence that you reviewed of that distance?

A. Correct.

Q. You also assumed the distance between the first car and the second car?

A. Correct.

Q. Again, with no evidence, just an assumption?

A. Yes.

Q. You did the same thing for the distance between the second car and the box van?

A. (Witness nodded head affirmatively).

Q. So you assumed that?

There is no evidence in the record for that. However, you did say that you were using a reasonable following distance.

A. I did say that, yes.

Q. Okay.

So you estimate the length of those two cars?

A. Yes.

Q. Okay.

In fact, you estimated – you made an assumption about the speed of Vehicle No. 1?

A. Yes.

[RP 425:25 – 427:12]

Thus, Mr. Moebes' most basic assumptions, which made up his diagram, his calculations of time and distance, and his ultimate opinions, were simply guesses. Then, without any other information, he inexplicably testified:

Q. Were you able to reach any conclusion as a result of your analysis of the collision?

A. I concluded basically two things. One is that if we really accept the testimony on its face value, he ought to have been able to stop. **Really, I guess the key conclusion is that no matter what the circumstance, Mr. Osborn did not leave himself adequate distance to be able to bring his vehicle to rest given his response and his level of attentiveness in this circumstance. He did not leave enough room and he drove into stopped traffic on a highway.**

[RP 419:19 – 420:2] [Emphasis added].

\* \* \*

Q. Okay.

On page 3, Discussion and Conclusions, it says: “ Mr. Osborn ought to have been able to stop if his testimony is accurate. **Ultimately, the reason Mr. Osborn did not stop was that he was leaving insufficient space in front of his vehicle for his ability to react to traffic conditions and his ability to stop from the speed he was driving.**”

A. Correct.

[RP 423:7-15] [Emphasis added].

Thus, Mr. Moebes opined that Mr. Osborn was following too close to the box truck in front of him and that is what caused the collision. This opinion was speculative because it relied almost exclusively on assumptions; assumptions, which Mr. Moebes admitted, were not based upon any evidence at all.

## V. ARGUMENT

### A. Standard of Review.

#### 1. *The Standard of Review for Jury Instructions.*

Generally, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). However, jury instructions may sometimes be reviewed under an abuse of discretion standard. The standard for review of jury instructions depends on whether the assignment of error is based upon a matter of law or of fact. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *Id.* Conversely, a trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The Washington Supreme Court summarized the standard of review for

jury instructions as follows:

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. A clear misstatement of the law, however, is presumed to be prejudicial.

*Thompson*, 153 Wn.2d at 453. A trial court must instruct the jury only on theories that are supported by substantial evidence. *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327, 617 P.2d 415 (1980) (citing *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 866, 567 P.2d 218 (1977)). The Court has further elaborated:

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. We review the adequacy of jury instructions de novo as a question of law. It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.

*State v. Clausung*, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

**2. *The Standard of Review for Errors in the Admission of Testimony.***

The standard of review governing the admission of expert testimony is abuse of discretion. *Kirk v. WSU*, 109 Wn.2d 448, 459, 746 P.2d 285 (1987).

**B. The non-party at fault instruction should not have been given because it was not supported by substantial evidence.**

In the instant suit, the trial court decided to give the jury a non-party at fault instruction. This decision was a ruling of law, which was based upon the

undisputed fact that tire-tread debris of unknown origin was in the freeway slow lane, and the Court's interpretation of RCW 46.61.645. The question is whether the evidence supported giving such an instruction and whether the Court properly decided the issue of law regarding interpretation of the statute. This Court should review de novo a trial court's decision to give an instruction based on a ruling of law. *See Walker*, 136 Wn.2d at 772.

The recent Division II case of *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120 (2006), is on point and instructive. In *Tuttle*, a motorist collided with an large truck tire, including the metal wheel, which caused her to flip. The motorist argued that she was covered under her underinsured motorist insurance (UIM) because the owner of the wheel caused the accident. The policy covered damages caused by "a phantom motor vehicle." The court found that the motorist "had no evidence of how the tire and wheel got into the roadway. And the mere presence of the tire in the roadway does not create a reasonable inference that the accident was caused by the phantom driver's negligence." *Tuttle*, 134 Wn. App. at 128. Thus, the motorist was not covered.

Analogously, in the instant suit, no party offered evidence of how the piece of rubber tire debris got into the roadway. And there can be no reasonable inference that the debris was the result of anyone's negligence. Instead, the Court apparently relied on an interpretation of RCW 46.61.645 to establish liability for any person who dropped, threw, *or lost without knowledge*, a piece

of debris from their vehicle.

In advocating for the inclusion of a non-party at fault instruction, Defendant Greene assumed that the debris was “dropped” within the meaning of RCW 46.61.645. [RP 488]. In fact, Greene argued that “[t]he statute says once you drop something, deposit something, you immediately have to remove it. That’s the fault . . .” [RP 492:20-22]. Thus, Greene argued, incorrectly, that the mere fact that debris was simply present in the roadway created a strict liability or negligence *per se* scenario under RCW 46.61.645, wherein, if the driver did not “immediately remove” the debris, the statute was violated and the driver would automatically be deemed negligent.

In ruling on the instruction, the Court agreed that the duty to “immediately remove” the debris was absolute, with no consideration of how the debris came to be in the roadway. The Court stated:

THE COURT: Okay. I understand that, counsel, but that’s not the argument. **The argument isn’t that somehow the wheel was negligently left there. That’s not the argument in this case. The argument from the statute that there is a duty, clearly, the Court did not consider that here [in Tuttle].** The analysis is fine except for that.

[RP 520:11-16] [Emphasis added].

\* \* \*

The other problem I have with this case, let’s call it the *Tuttle* case, and I mentioned this earlier, this is a Division II case to start out. But as happens sometimes, they made a detailed argument, and probably relying on the research of one of their clerks, and totally missed a potential issue. What that

detailed argument, and probably relying on the research of one of their clerks, and totally missed a potential issue. What that does for the trial court is, of course, it leaves us in kind of a weird spot when someone else points out actually there is a statute on this, that the Court of Appeals missed it.

I think that is where we are, to be quite frank. To put it on the record, **I just don't think this argument, this analysis is complete because it sort of ignores the statutory provision that is applicable in this situation. I think if they knew about that, this analysis would be adjusted.**

[RP 525:8-22]

The trial court apparently incorrectly assumed that the statute governed this situation by creating strict liability or negligence *per se* even where debris fell on the roadway without the driver's knowledge, thereby obviating the need for any type of negligence analysis—that is, that no evidence of breach of duty would be required to find a violation of the statute and the driver would be found liable. Under Washington law, violating a statute does not lead to negligence *per se*. RCW 5.40.050. Therefore, the belief that a statute may have been violated does not, without more evidence, constitute liability for the purposes of negligence.

The language of RCW 46.61.645 is does not support the trial court and Greene's interpretation. The statute states in full:

**RCW 46.61.645 Throwing materials on highway prohibited – Removal.**

(1) Any person who drops, or permits to be dropped or thrown, upon any highway any material shall immediately remove the same or cause it to be removed.

(2) Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle.

The statute contemplates an affirmative act of throwing or dropping debris on the highway, or failing to act to stop another from doing the same. “In judicial interpretation of statutes, the first rule is “the court should assume that the legislature means exactly what it says. Plain words do not require construction.” *State v. McGraw*, 127 Wn.2d 281, 288, 898, P.2d 838 (1995) citing *Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973). The Supreme Court in *McGraw* further stated that “[t]his court will not construe unambiguous language.” *Id.* (citing *Vita Food Prods, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978)).

The language at the heart of the statute, RCW 46.61.645 contemplates scienter on the part of the actor before a violation will be found, based on the plain meaning of the words used<sup>1</sup>. Indeed, the title of the statute contemplates “[t]hrowing” material on the highway. *See generally State v. Franco*, 96 Wn.2d 816 (1982); *State of Wash. v. Greive*, 63 Wn.2d 126 (1963) (holding it appropriate for the Court to consider the Title of a statute or act in determining legislative intent.)

The statute in this case requires evidence of, at a minimum, knowledge of the condition, *in addition to*, failure to immediately act in order for there to

be a breach. There was no evidence submitted at trial regarding the circumstances surrounding how the tire debris ended up on the freeway. Thus, there was no evidence in the record regarding breach of duty. See *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 359, 112 P.3d 522 (2005) (“To prove negligence, Hines must show (1) duty; (2) breach of that duty; (3) proximate cause; and (4) damages.”). It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. *Clausing*, 147 Wn.2d at 626-27. As such, it was improper to instruct the jury regarding non-party at fault.

The Supreme Court has stated that a defendant must provide evidence of the fault of a non-party; otherwise it is improper for the trial court to instruct the jury on that issue. *Adcox v. Children’s Orthopedic Hosp.*, 123 Wn.2d 15, 25, 864 P.2d 921. The Court stated:

“RCW 4.22.070 is not self-executing. It does not automatically apply to each case where more than one entity could theoretically be at fault. Either the plaintiff or the defendant must present evidence of another entity's fault to invoke the statute's allocation procedure. Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the issue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence.”)

Ultimately, the improper addition of a non-party served to confuse the issues and allow the jury to come to the absurd result that it did—that *neither* Greene (who stopped on the freeway) nor Mathern (who blocked the escape

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<sup>1</sup> The statute references “Anyone person who drops or permits to be dropped or thrown,”

route and flagged down Greene's vehicle) were negligent at all. [CP 109]. The trial court's submission of the non-party at fault instruction was prejudicial error.

**C. The following driver instruction should not have been given because it was not supported by substantial evidence.**

The trial court erred, as a matter of law, in giving the following driver instruction, WPI 70.04, to the jury.

In this case, Mathern and Greene's vehicles had come to a full stop and Osborn was not following them. Osborn did not see their stopped vehicles until he was 300-400 feet away. [RP 92:23-24]. Where a motor vehicle is stopped, it is impossible to "follow too closely" behind that vehicle and WPI 70.04 may not be given to the jury. *Szupkay v. Cozzetti*, 37 Wn. App. 30, 678 P.2d 358 (1984) (where the driver first saw the stopped vehicle 165 feet away, the following driver instruction was not appropriate). The undisputed facts in *Szupkay* were identical to this case.

*Szupkay* assigns error to the court's refusal to give WPI 70.04, the following driver instruction which is based upon RCW 46.61.145. It is undisputed that appellant's car was in a stopped position when it was first seen by either of the respondents. Under those facts, the following driver instruction is not appropriate.

*Szupkay*, 37 Wn. App. at 32. The *Szupkay* Court relied on *Svehaug v. Donoghue*, 5 Wn. App. 817, 490 P.2d 1345 (1971) (where the driver first saw

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evidencing use of the verb form of the term "drop."

the stopped vehicle 385 feet away, the following car instruction was properly rejected), which was clear in its reasoning:

Svehaug was never "following" Sno-King's truck. Because Sno-King's truck was standing still, she could not have "due regard for the speed of the vehicles." She could not "keep such distance" from the truck and "maintain such observation" as to enable her to make an "emergency stop."

*Svehaug v. Donoghue*, 5 Wn. App. at 819. The undisputed facts of this case are identical to those where courts have rejected the following driver instruction.

The following driver instruction is an issue of law, which should be reviewed de novo. Presenting this matter to the jury was a misstatement of the law, and was not warranted by the evidence. Thus, a presumption exists that this error was prejudicial. *Thompson*, 153 Wn.2d at 453, *Clausing*, 147 Wn.2d at 626-27.

**D. An emergency limiting instruction should have been given to preclude Mathern from arguing that he was in an emergency situation.**

The trial court erred as a matter of law in failing to give a limiting instruction to the jury regarding the emergency doctrine. The undisputed evidence is that Mathern saw a piece of rubber tire debris in the road, then determined it was a hazard, then pulled over, then stopped his car, then exited his vehicle, then waived for oncoming traffic to stop, and then entered a lane of traffic on foot. The State should not have been allowed to argue that Mathern was in an emergency situation because he was not confronted with a sudden

emergency and was not forced to make an instinctive choice.

The emergency doctrine applies when a person has been placed in a position of peril and must make an instinctive choice between courses of action after the peril has arisen. See *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 197, 668 P.2d 571 (1983) (citing *Sandberg v. Spoelstra*, 46 Wn.2d 776, 285 P.2d 564 (1955)). An emergency doctrine instruction is appropriate only when the trier of fact is presented with evidence from which it can conclude that the emergency arose through no fault of the party seeking to invoke the doctrine. *Brown*, 100 Wn.2d at 197 (citing *Mills v. Park*, 67 Wn.2d 717, 409 P.2d 646 (1966)).

The doctrine excuses an unfortunate human choice of action that would be subject to criticism as negligent were it not that the party was suddenly faced with a situation which gave him no time to reflect upon which choice was the best.

*Brown*, 100 Wn.2d at 197 (quoting *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P.2d 923 (1973)).

As noted above, a trial court must instruct the jury only on theories that are supported by substantial evidence. *Cooper's Mobile Homes, Inc.*, 94 Wn.2d at 327. Here, there was no evidence that Mathern was forced to make an instinctive choice when faced with a sudden emergency.

The facts concerning this matter are undisputed. Mathern was not avoiding an emergency but was taking a calculated risk in order to remove a

perceived danger. Presenting the emergency doctrine to the jury without a limiting instruction was unsupported by the law, and was not warranted by the evidence. Thus, a presumption exists that this error was prejudicial. *Thompson*, 153 Wn.2d at 453, *Clausing*, 147 Wn.2d at 626-27.

**E. The State's expert should not have been permitted to proffer speculative expert testimony in contravention of the court's order in limine barring the same.**

Osborn submitted Motion in Limine # 13 seeking the exclusion of speculative expert testimony. [RP 10:5-8]. The trial court granted Osborn's motion. [RP 10:11-12]. Despite this, the State offered speculative expert testimony by its accident reconstruction expert, Timothy Moebes, regarding Osborn's position relative to the vehicle he was following. This testimony was legally improper, contravened the court's ruling, and prejudiced Mr. Osborn.

Mr. Moebus attempted to establish that plaintiff Osborn was following too close to the box truck in front of him. [RP 423:7-15].

The only testimony on that issue comes from the plaintiff himself. [RP 317:20-25, 318:3-12]. Other than plaintiff Osborn's comments, there was no other evidence, of any kind, whether through testimony or physical evidence, which spoke to the distance Osborn was from the box van prior to the accident.

Expert opinion must be based upon the facts of the case and not an expert's bald speculation. "The rule is that an expert opinion must be based upon facts in the case **and not upon conjecture and speculation.**" *Clements*

*v. Blue Cross of Washington and Alaska*, 37 Wn. App. 544, 549, 682 P.2d 942 (1984) (emphasis added); *see also Prentice Packing and Storage Co. v. United Pacific Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940) (Stating that “the opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.”).

Further, it is clear under Washington law that expert testimony based on assumptions or conjecture, which contradicts the evidence, is of no value. *See Hagen v. Seattle*, 54 Wn.2d 218, 223, 339 P.2d 79 (1959); *see also Davidson v. Municipality of Met. Seattle*, 43 Wn. App. 569, 575-77, 719 P.2d 569 (1986). Expert opinion, which is based purely on speculation, and contrary to witness testimony, should be excluded. *See Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) (“It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.”).

During closing argument, the State argued that Osborn was the proximate cause of the accident because he was following too close. [RP 586:20 – 587:5]. The State used the improper testimony to attempt to impeach the credibility of Mr. Osborn and to argue its theory of the case—that Osborn was following too close. As such, Osborn was prejudiced.

Any opinions, reports, or testimony offered by defendants’ expert, Mr.

Moebes, which refer or relate to plaintiff Osborn's following distance should have been excluded by the lower court as improper expert opinion lacking the requisite foundation.

**F. Osborn was prejudiced by the trial court's errors in its instructions to the jury and the case should be reversed.**

Where a jury instruction, or lack thereof, is error as a matter of law, prejudice is presumed. *Thompson*, 153 Wn.2d at 453, *Clausing*, 147 Wn.2d at 626-27. Further, prejudice exists where an appellate court cannot be sure what the jury would have been done had the jury been properly instructed. *See Thompson*, 153 Wn.2d at 471 (“[W]e cannot say jury instruction 8 was harmless because we cannot be sure what the jury would have done had it been properly instructed.”). A jury instruction that prejudices a party is reversible error. *Id.*

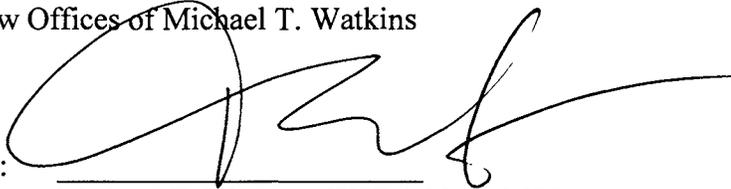
Here, the jury assessed no liability to either of the defendants or the nonparty entity. It cannot be known whether the jury would have found zero liability had they understood that no one was at fault for leaving the tire debris, that Osborn was not presumed negligent for rear-ending the vehicles, or that the emergency doctrine could not apply to Mathern. Each of the trial court's errors prejudiced Osborn and the ruling should be reversed. Moreover, the speculative and unsupported expert testimony offered by the State's expert only served to exacerbate the damage to be done by including the following too close instruction.

**VI. CONCLUSION**

The Court below erroneously gave the jury confusing and inconsistent instructions, and admitted prejudicial, inadmissible evidence that resulted in an unfair trial and verdict. As such, Osborn is entitled to a new trial.

Respectfully submitted this 7<sup>th</sup> day of August, 2009.

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**CERTIFICATE OF SERVICE**

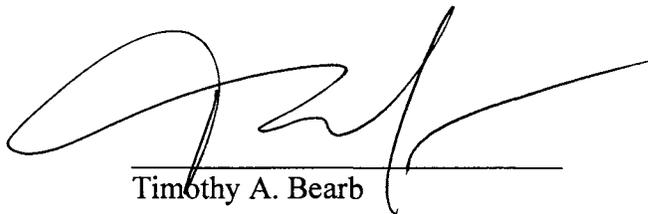
I hereby certify that on August 7, 2009, a true and correct copy of the Brief of Appellant, and this Certificate of Service, was served on the following by hand delivery to:

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