

66334-8

66334-8

NO. 66334-8-I

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

KOTI HU,

Respondent,

vs.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of
the STATE OF WASHINGTON,

Appellant,

vs.

INTRASTATE PAINTING CORPORATION, a Washington corporation; and
MICHAEL F. SAVO,

Defendants.

2011
MAY 19 10:59 AM
TAMARA G. HINE

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven C. Gonzalez, Judge

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Plaintiff was severely injured when a truck going 40-50 mph rear-ended him as he was stopped at a red light on a metered on-ramp. The truck driver, who failed to appear at trial, could not explain his failure to see plaintiff's car or the on-ramp's warning signs, flashing beacons, or signal lights, other than to blame—

the sun being in the windshield, you know, there's a million things. I still cannot ever come to a conclusion in my mind how I did not see his car.

Yet instead of finding the truck driver 100% at fault, the jury imposed 40% of the blame on the Washington State Department of Transportation.

II. ASSIGNMENTS OF ERROR

The trial court erred in—

- A. Entering a \$30,212,051 judgment against WSDOT (CP 4976-77);
- B. Denying WSDOT's postjudgment motion for judgment as a matter of law (CP 6120-22);
- C. Denying WSDOT's prejudgment motion for judgment as a matter of law (RP 2037);
- D. Denying WSDOT's motion for a new trial (CP 6117-19);
- E. Granting partial summary judgment that plaintiff was fault free (CP 2345-47);

- F. Denying reconsideration of that partial summary judgment (CP 2779);
- G. Giving Instruction 2 to the extent it did not address comparative fault (CP 4983);
- H. Giving Instruction 14 to the extent it did not address comparative fault (CP 4987);
- I. Giving Instruction 26 (CP 4990);
- J. Giving Instruction 28 to the extent it did not address comparative fault (CP 4991);
- K. Giving the special verdict form to the extent it did not address comparative fault (CP 4978-79);
- L. Refusing to give WSDOT's second supplemental proposed jury instruction 1 (CP 4642);
- M. Refusing to give WSDOT's second supplemental proposed jury instruction 2 (CP 4643);
- N. Refusing to give WSDOT's second supplemental proposed jury instruction 3 (CP 4644);
- O. Refusing to give WSDOT's second supplemental proposed jury instruction 4 (CP 4645);
- P. Refusing to give WSDOT's second supplemental proposed jury instruction 6 (CP 4647);

- Q. Refusing to give WSDOT's proposed second supplemental special verdict form (CP 4648-49);
- R. Refusing to give WSDOT's proposed prior accidents curative instruction (CP 6167);
- S. Alternatively, refusing to give the trial court's originally proposed prior accidents curative instruction (RP 2123);
- T. Giving its prior accidents curative instruction (RP 2128-29);
- U. Admitting evidence about other metered on-ramps (RP 1905-11);
- V. Denying WSDOT's motion to exclude evidence of signage predating design standards on unrelated roads (CP 5653-57);
- W. Refusing to give WSDOT's proposed no duty to upgrade instruction (RP 2023-24, 2030);
- X. Alternatively, refusing to give WSDOT's proposed no duty to upgrade instruction without its second sentence, as agreed to by WSDOT (RP 2023-24, 2025);
- Y. Alternatively, refusing to give the trial court's proposed no duty to upgrade instruction (RP 2027).

Challenged and proposed instructions and verdict forms are in the Appendix hereto or quoted verbatim herein.

III. ISSUES PRESENTED

A. Is the verdict that WSDOT's negligence proximately caused the accident based on speculation alone, where the only evidence *why* the truck driver did not see plaintiff's car or any signs or signals that were there to be seen was that he was not paying attention? (AE A-C)

B. Is a new trial required because the prior accidents curative instruction unconstitutionally commented on the evidence, improperly told the jury about excluded evidence, and/or impugned defense counsel's credibility and integrity? (AE A, R-T)

C. Should the jury have decided whether plaintiff was negligent in failing to securely attach his car's sound system to the car and/or having inadequate or inoperative brake lights, and if so, whether his negligence was a proximate cause of his injuries? (AE A, D-Q)

D. Was WSDOT deprived of a fair trial where inadmissible evidence of other on-ramps' signage was admitted, and in any event, the trial court initially agreed to give a no duty to upgrade instruction, but decided not to do so only after the evidence was admitted and the witness who testified about it was excused? (AE A, U-Y)

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

1. The Accident.

On July 29, 2007, defendant/respondent Michael Savo, in the course of his employment with defendant/respondent Intrastate Painting Corp., accelerated his truck down one lane of a metered on-ramp to merge onto I-405 northbound. Savo would later tell the investigating state trooper that he was looking at traffic on the mainline. Two persons in an SUV in the adjacent HOV lane saw him looking to his left at I-405 traffic. (CP 4037-38, 4043, 4054; RP 1243, 1254, 1259-63, 1290-91, 1297-98, 1317)

Savo did not, until it was too late, see a 1973 Datsun 240Z stopped near the bottom of the on-ramp for the metered red light. He plowed into the 240Z at 40-50 mph. Its driver/owner, plaintiff/respondent Koti Hu, is now a quadriplegic. (CP 974, 4054, 4061; RP 527-28, 544-46, 600, 1082, 1274, 1279, 1280, 1298, 1532)

2. The On-Ramp.

Ramp meters, which reduce congestion and improve safety in merging, have been used in this State since the 1960's. (RP 718, 719) Several signs and signals indicated that the on-ramp in question was metered and that the meter was running at the time. An aerial view of the on-ramp and its approach, Ex. 560, is in App. H hereto.

Savo had approached the on-ramp by going east over the 70th Street overpass and then turning right to go south on 116th. The on-ramp entrance was at the intersection of Northeast 70th Street and 116th, where there was a stop light and a “ramp metered ahead when flashing” sign with a flashing beacon. There he had turned right (heading west) onto the on-ramp. (CP 4052-54; Ex. 560; RP 689, 697-98, 946-47, 990, 1241)

The on-ramp then curved to the right. On the outside of the curve was a second “ramp metered ahead when flashing” sign with a flashing beacon. The sign was visible head-on as a driver approached it on the curve, even though it was to the driver’s left as the driver went by it. The on-ramp then straightened out, sloping downward to merge onto I-405 northbound. Traffic on I-405 could be seen by looking left, despite trees that intermittently lined the left side of this straightaway portion. (Exs. 264-67, 333, 335, 560, 564; RP 691, 694-95, 1292-93)

The stop line for the on-ramp’s metered lights was under the overpass. Two stop lights were on tall mast arms north of the overpass. Although not initially visible at the entrance of the on-ramp and during the first part of the straightaway, drivers were able to see each signal further down the straightaway. (RP 691, 1550, 1663; Exs. 302-14, 334)

Plaintiff’s highway design expert would later explain (RP 965):

Q. Now, when you analyzed the accident involving plaintiff Savo, you determined that he had sufficient time and distance to brake and bring his car to a stop without hitting Mr. Hu, correct?

A. If he had not had an attraction that was bringing his eyes in a different direction, that's correct.

3. The Eyewitness Testimony.

Only three people witnessed the accident—Savo and Mike and Tracy Wetsch. The Wetsches were following Savo in the HOV lane immediately to Savo's right. (RP 1254, 1259-60, 1269-71, 1273, 1289)

In his discovery deposition, Savo would later testify (CP 4054):

So made that right turn, headed down to the stoplight, no cars were coming. I don't know if it was green or red, but I made a right-hand turn. Very sunny day, I remember making that—you know, it's a complete 180 there, so as you're—as you do your 90 degree angle and ***then you go to your second 90 degree, you can look off. Noticed traffic had built up quite a bit, kind of was shocked on that, and proceeded down the on-ramp. And you know, at that point, hit Koti, you know, not too far after noticing the traffic.***

(Emphasis added.) Savo's accident report to the State Patrol said (Ex. 201):

I was driving the F-150 that impacted the back of another car. I was coming down decent [sic] on-ramp to 405 northbound at 70th St. N.E. The ramp was metered and a car was stopped at the light. As I approached the light I didn't notice the light was on or that there was a car stopped at it. I tried to slam on my brakes and swerve to miss but to no avail.

Although Savo admitted having been on the same on-ramp “[t]en

to twenty” times before and knew what a metered on-ramp was, this time he did not see either of the two “ramp metered ahead when flashing” signs or their flashing beacons. He also claimed he did not see any signal lights. (CP 4054-56, 4061) Asked whether he had ever revisited the accident scene, he testified (CP 4062):

I mean, I remember driving on the on[-]ramp and just kind of looking around, wondering just how that could have happened. I just, you know, at the end of the day, looking back on it, just how did all those circumstances come about to this outcome?

And finally, Savo testified in his deposition (CP 4068-69):

I would just say that I’m shocked that I hit him, and if you walk that back—I’m shocked I didn’t see him, I’m shocked I didn’t see the sign, whatever all those things are. I can blame that on the sun being in the windshield, you know, there’s a million things. I still cannot ever come to a conclusion in my mind how I did not see his car. And I blame a lot of it on the sun, and just the glare, his car being hidden under the shadow, his gray car. . . .

Mike Wetsch, an ex-police officer, was driving his wife’s SUV. He had no trouble seeing the sign and flashing beacon indicating the ramp meter was on. As he was in the unmetred HOV lane, he knew he would not have to stop, yet he saw the red light anyway and later plaintiff’s stopped car. (RP 1252, 1254, 1256-57, 1259, 1260-61, 1268-69, 1274)

Mr. Wetsch had noticed Savo’s white truck ahead of him:

. . . I could see the driver, and ***the driver was looking at the freeway.*** I would describe it as the way you enter on a regular ramp, you’re looking to see where you can merge

into traffic, and *his attention was not ahead. He was looking to the side.*

. . . In my mind, I thought . . . this is going to be ugly, and the pickup hit the back of the car

. . . .

I had the expectation it was going to hit the car, because . . . *the guy in the pickup was looking off to the side. He was not looking ahead.*

. . . .

. . . *he was not looking. He was not looking forward. He was looking off to his left, toward the freeway.* And so again, as I said, the expectation was this is not going to be good.

(RP 1259-60, 1262-63) (emphasis added).

Mrs. Wetsch had never seen and did not know what a metered ramp was. But she too saw the “ramp metered ahead when flashing” sign, the light atop it, Savo’s truck, and plaintiff’s car (RP 1296, 1297, 1298):

There was a white pickup truck with dark green markings on it that was ahead of us on the on-ramp, proceeded down the on-ramp; the pickup truck started to accelerate. There was another smaller car that was in front of him. The smaller car started to brake. I didn’t know what a metered ramp was, so I was going to turn and ask my fiancé at the time what a metered ramp was, and noticed that the white truck was accelerating, and *he obviously did not see the car braking in front of him. He was looking left over his shoulder.* The smaller car came to a stop at the stop line, and the white truck didn’t see him and drove into the back of him.

(RP 1298) (emphasis added). Savo told the responding state trooper he had been “looking at traffic on the mainline” “as he’s entering, preparing to enter traffic, traveling down the ramp”. (RP 1243)

B. STATEMENT OF PROCEDURE.

Plaintiff sued Savo and his employer, Intrastate Painting. Claiming negligent on-ramp design, plaintiff later joined defendant/appellant WSDOT as a defendant. (CP 1-7, 6154-56)

1. The Partial Summary Judgment Motion.

After the accident, a heavy, metal amplifier (sometimes referred to as a speaker, *see e.g.*, CP 1028, 1376, 1415) from plaintiff's vehicle's sound system was found lodged against the passenger side of his driver's seat. The investigating trooper believed that in the collision, the amplifier had flown forward from the back of the 240Z and hit plaintiff in the head, breaking his neck. Since plaintiff had participated in installing the sound system, WSDOT raised comparative fault as an affirmative defense. (CP 1217-18, 1409-13, 1429-31, 1442, 1455, 1456, 6160)

Plaintiff moved for partial summary judgment on comparative fault. The trial court ruled he had been fault free as a matter of law and denied reconsideration. (CP 2345-47, 2779)

2. The Trial.

A 3-week jury trial ensued. Savo failed to appear. The jury heard excerpts of his deposition. (CP 2818-50, 4029-83, 4062; RP 76-77, 88-90)

The jury also heard evidence of the parties' experiments at the accident site. When the sun was in the same position as it had been at the

time of the accident, WSDOT closed off the on-ramp, parked a facsimile car at the stop bar under the overpass, and had photos taken from a truck similar to Savo's as it came down the on-ramp. (RP 1442, 1488, 1490-95, 1497-98, 1523, 1525-26, 1531-35, 1539-42; Exs. 275-314) Some of these photos, Exs. 275, 284, 301-02, 305, 309, are set forth in App. I hereto.

On another day with similar sun conditions, plaintiff's experts parked a facsimile vehicle and driver at the stop line under the overpass while the on-ramp meter was running and took videos, Ex. 342, from a truck similar to Savo's. Because the on-ramp was not closed, the videos show traffic stopping at the stop line in one lane and behind the parked facsimile vehicle in the other lane. (RP 1442, 1443-49)

At the close of plaintiff's case, WSDOT moved for judgment as a matter of law, for lack of evidence that any negligence on its part had proximately caused the accident. The motion was denied. (CP 4702-12; RP 2035, 2037)

The jury found Savo 60% at fault, WSDOT 40% at fault, and awarded \$30,202,051. Pursuant to RCW 4.22.070(1)(b), judgment on the verdict was entered against WSDOT, Savo, and his employer, jointly and severally. Except for an order amending the interest rate on the judgment, WSDOT's post trial motions were denied. (CP 4976-79, 6117-25)

V. ARGUMENT

A. THE ON-RAMP DESIGN WAS NOT A PROXIMATE CAUSE.

WSDOT moved for judgment as a matter of law because there was no evidence that any negligence in its on-ramp design was a proximate cause of the accident. Judgment as a matter of law should be granted “when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). No discretion is involved; review is *de novo*. *Hill v. BCTI Income Fund I*, 144 Wn.2d 172, 187-88, 23 P.3d 440 (2001).

WSDOT was sued for negligence. Negligence requires duty, breach, and injury proximately caused by the breach. *See Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Proximate cause consists of cause in fact and legal causation. *Id.* “A cause in fact is a cause but for which the accident would not have happened.” *Channel v. Mills*, 77 Wn. App. 268, 272, 890 P.2d 535 (1995).

Plaintiff has the burden of showing cause in fact. *Holmes v. Wallace*, 84 Wn. App. 156, 161, 926 P.2d 339 (1996). That the alleged negligence “might have,” “could have,” or “possibly did” cause the injury

is insufficient. See *Xieng v. Peoples Nat'l Bank*, 63 Wn. App. 572, 582, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993).

Hence, “Washington [c]ourts have repeatedly held that in order to hold a governmental body liable for an accident based upon its failure to provide a safe roadway, the plaintiff must establish more than that the government’s breach of duty *might* have caused the injury.” *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (emphasis in original). In short, the State does not insure against all imaginable acts of negligent drivers. *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979).

While proximate cause is typically a question of fact, it is determined as a matter of law, when “the plaintiff has been ‘fully heard’ and ‘there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party.’” *Estate of Bordon v. State, Dept. of Corrections*, 122 Wn. App. 227, 239-40, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005). This court must evaluate the evidence “to ensure that the verdict was not founded on mere theory or speculation and that the evidence supporting the verdict was substantial.” *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991).

Further, “[t]he opinion of an expert which is only a conclusion or which is based on assumptions . . . is not evidence which will take a case to the jury.” *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 787, 819

P.2d 370 (1991). An expert's opinion is of no value unless based on the facts. *See Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940).

No one disputes Savo's colliding with plaintiff's car proximately caused plaintiff's injuries. But plaintiff had to show WSDOT's negligent on-ramp design somehow prevented Savo from seeing what he should have seen. Although plaintiff presented testimony that one or more aspects of the on-ramp design *might have* prevented Savo from seeing what was there, he failed to present evidence that any of these design aspects *did in fact* cause Savo not to see what was there.

Savo, Mike Wetsch, and Tracy Wetsch were the only eyewitnesses to the accident. Savo's testimony and statements showed that he—

- had been on the on-ramp “[t]en to twenty” times before (CP 4056)
- this time did not see the “ramp metered ahead when flashing” signs with the flashing beacons or red signal light (CP 4054, 4055, 4061)
- did not see plaintiff's vehicle in time to stop (CP 4061)
- told the investigating trooper he had been looking at traffic on the mainline and did not see the meter or plaintiff's car (RP 1243)
- never said anything at the scene or in his written accident report to the State Patrol about being misled or confused by the road or the ramp meter (Ex. 201; RP 1243, 1265)

- testified he kept “wondering just how that could have happened”, “just how did all those circumstances come about to this outcome?” and also said, “I still cannot ever come to a conclusion in my mind how I did not see his car” (CP 4062, 4068-69)

- had two football fields of sight distance—the distance traveled from when the driver sights an object to when he stops before hitting it—between him and plaintiff’s stopped car (RP 985-86)

The Wetsches’ undisputed testimony also showed—

- both saw a “ramp metered ahead when flashing” sign with flashing beacon on top. (RP 1256-57, 1271, 1297)

- even though he was in the unmetered HOV lane and knew he would not have to stop, Mr. Wetsch first saw the red signal light and then plaintiff’s car (RP 1259, 1274)

- Mrs. Wetsch saw plaintiff’s car moving down the ramp before it was in the shadow and saw its brake lights come on (RP 1298-1300)

- the Wetsches both saw plaintiff’s car in the shadow at the stop bar (RP 1260, 1299-1300; *see* Ex. 335)

- although they had initially been going as fast as Savo, the Wetsches were easily able to stop before reaching where plaintiff’s car had been stopped (RP 1260, 1279-80, 1290-91, 1300-01; *see* Ex. 335)

when plaintiff's experts parked a dark vehicle under the overpass when the sun was in the same position as it had been at the time of the accident, motorists had no problem avoiding it, even though they had not been told it would be there. (Ex. 342; RP 1443-50)

Savo would have had to have been looking straight ahead as he traveled down the straightaway portion of the on-ramp if he was to see one or both red lights. Yet the Wetsches agreed he was not looking straight ahead, but to his left. (RP 1262-63, 1298) Plaintiff offered no evidence to the contrary. Indeed, Savo himself never claimed he had been looking straight ahead, telling the investigating trooper he had been looking at traffic on the mainline. (RP 1243) When a driver fails to pay attention and is not looking ahead to see warnings there to be seen, any failure to post other warnings or signs is not a proximate cause of the accident. *See Garcia v. State Dept. of Transport.*, ___ Wn. App. ___, ___ P.3d ___ (2011) (2011 WL 1640041 at *9).

Savo also would have had to have been looking straight ahead to see plaintiff's car. Both Wetsches saw plaintiff's car. Mrs. Wetsch even saw it before it stopped in the overpass's shadow. She testified she had no trouble seeing it, even in the shadow. (RP 1260, 1298-1300; *see* Ex. 335)

Moreover, Savo, who had been on the same on-ramp ten or twenty times before, also failed to see either of the "ramp metered ahead when

flashing” signs with their flashing beacons. (CP 4055, 4056, 4061) One was at the ramp entrance, the other on the curve before the ramp straightaway. (Ex. 333; RP 697-98) There was **NO FACTUAL** evidence **why** Savo failed to see either or both. Indeed, plaintiff’s highway design expert, Robert Foster Douglas, admitted (RP 858, 978):

People ordinarily will see this [the sign and the flashing beacon on top of it]. It isn’t something that happens all the time.

Experts adverse to WSDOT did testify that WSDOT’s on-ramp system design had made the signs, signal lights, and plaintiff’s car difficult to see and that the design was a cause of the accident. (RP 866-67, 961-62, 1968-69) But these opinions depended on the theory that Savo was paying attention. Plaintiff’s expert, Mr. Douglas, testified (RP 1021):

Q. And [Savo] was exercising reasonable care on this date?

A. To his knowledge, he was. He had his head ahead. Even two or three of the experts involved in this agree that he was looking in the forward direction. .

..
No **facts** supported the theory that Savo was looking ahead at any relevant time. No **facts** showed that any aspect of the design actually caused Savo not to see what was there. “[T]he opinions of expert witnesses are of no weight unless founded upon facts in the case.” *Prentice*, 5 Wn.2d at 164.

Tarulis v. Prassas, 236 Ill. App. 3d 56, 603 N.E.2d 13 (1992), *app. denied*, 149 Ill. 2d 661 (1993), presents a helpful comparison. There the

defendant motorist hit a wheel stop while turning into the driveway of the defendant shopping center. She lost control and hit plaintiff's vehicle.

Plaintiff sued the motorist and the shopping center owner. Plaintiff claimed the shopping center owner had negligently designed and installed the wheel stop and driveway. A jury awarded \$1.4 million, finding defendant motorist 88% liable and the shopping center owner 12% liable.

The defendant motorist admitted hitting the wheel stop and losing control of her car. Plaintiff's expert testified the wheel stop should have been painted so it was readily visible.

The Illinois appellate court reversed and remanded for judgment in the shopping center owner's favor, explaining:

Although here, [the defendant motorist] testified that she struck the median, [plaintiff] . . . depends on the inference that she struck it because she did not see it and on the further inference that she did not see it because it was not readily visible. . . . [W]e find these inferences "merely speculative."

603 N.E.2d at 18. *See Clark v. Miller*, 760 So.2d 1236, 1242, 1243 (La. App.) (inadequate signage not proximate cause of accident where driver failed to look right or left), *writ denied*, 772 So.2d 660 (2000).

Even absent evidence that Savo had been looking left and not straight ahead, the result would be the same. If there are only two theories, under one of which defendant would be liable and under the other would

be absolved, a jury cannot be permitted to speculate on them. *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981). Specifically:

No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, without further showing that reasonably it could not have happened in any other way. The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.

Arnold v. Sanstol, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). See *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010), *rev. denied*, 171 Wn.2d 1004 (2011).

The Washington Supreme Court has explained:

“Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.”

Prentice, 5 Wn.2d at 163 (quoting *Georgia Power Co. v. Edmunds*, 233 Ala. 273, 171 So. 256, 258 (1936)).

For example, in *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941), plaintiff was in the inside southbound lane of a four-lane, two-way road, when defendant’s car crossed over from the inside northbound lane and hit him. Plaintiff sued the city, claiming the absence of a yellow line between the north and southbound lanes, plus the presence of a yellow line between the southbound lanes, proximately caused the accident.

The driver who hit plaintiff was killed. Only plaintiff testified about the accident. After the jury found for plaintiff, the city was granted judgment as a matter of law. The Washington Supreme Court affirmed:

Appellants say . . . that [the deceased driver] might have been and probably was deceived and misled by the yellow line. Appellants cannot recover herein because of what they claim might have happened, or because the driver . . . might have been misled by the location of the yellow line, or because there was no evidence upon which the jury could have found that [the driver] was not deceived.

Id. at 122 (emphasis omitted).

Similarly, in *Nakamura v. Jeffery*, 6 Wn. App. 274, 492 P.2d 294, *rev. denied*, 80 Wn.2d 1005 (1972), an intersection collision case, plaintiff claimed structures at the intersection obscured visibility, so defendant city should have posted a warning sign that the driver who hit him could have seen. This court affirmed a directed verdict for the city as there was no evidence that not posting such a sign had proximately caused the accident:

But plaintiffs argue that [the other driver] might have been and probably was deceived and misled.

. . . .

In this case it would be mere guessing, in view of all of the facts, to say that [the other driver] was in any way deceived or misled by the existence of the [obstructing structures].

Id. at 276-77. *See also Miller*, 109 Wn. App. at 147.

Here the jury had to guess why Savo did not see the signs, lights, or plaintiff's car. That he was looking left and not paying attention was as

likely a cause of the accident as the theory that faulty on-ramp design led him not to see what should have been seen. The jury should not have been allowed to speculate.

In sum, to conclude that on-ramp design caused Savo not to see what was there to be seen was not only speculation, but contrary to the facts. There was no substantial evidence or reasonable inferences therefrom that any negligent on-ramp design was a proximate cause of the accident. The judgment on the verdict against WSDOT must be reversed.

B. WSDOT IS ENTITLED TO A NEW TRIAL.

WSDOT moved for a new trial under CR 59(a)(1), (8), and (9). (CP 5104-05) An order denying a new trial is generally reviewable only for abuse of discretion. *Johnson v. Howard*, 45 Wn.2d 433, 436, 275 P.2d 736 (1954). A lesser showing of an abuse of discretion is needed to set aside an order denying a new trial than to reverse an order granting a new trial. *See id.* However, when the order is based on “rulings as to the law, such as those involving the admissibility of evidence or the correctness of an instruction, no element of discretion is involved.” *Id.*

A new trial is proper under CR 59(a)(1) if an irregularity prevented the moving party from receiving a fair trial and materially affected that party's substantial rights. *Ramey v. Knorr*, 130 Wn. App. 672, 687, 124 P.3d 314 (2005), *rev. denied*, 157 Wn.2d 1024 (2006). A prejudicial error

of law requires a new trial under CR 59(a)(8). *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992). Although granting a new trial under CR 59(a)(9) is rare, *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, *rev. denied*, 108 Wn.2d 1035 (1987), it is required where, as here, substantial justice has not been done. *Barth v. Rock*, 36 Wn. App. 400, 402-03, 674 P.2d 1265, *rev. denied*, 101 Wn.2d 1014 (1984).

1. The “Curative” Instruction Was Improper.

Even if WSDOT is not entitled to judgment as a matter of law, it is entitled to a new trial under CR 59(a)(1), (8), and (9) because the trial court gave an unconstitutional or otherwise improper “curative” instruction that substantially prejudiced WSDOT.

In closing argument, WSDOT’s attorney told the jury that the evidence showed that no one except Savo had ever had a reported problem on the on-ramp. No one objected. (RP 2093)

Ten pages later in the transcript, WSDOT’s attorney told the jury there had never been an accident and shortly thereafter said, “[W]e got the right that the Savos of the world will exercise ordinary care until we know something to the contrary, and there’s been no evidence.” Only at that point did plaintiff object. (RP 2103)

There was no finding that defense counsel had acted in bad faith. He had been trying to convey that the evidence showed that plaintiff, the

Wetsches, and the drivers in the videos taken at the scene by plaintiff's expert(s) had no trouble with the metered on-ramp. (RP 2093, 2117, 2119-24) However, his remarks could have been construed to mean there had never been accidents at the site. Prior accident evidence had been excluded under 23 U.S.C. § 409, text in App. J. (CP 864-67, 1351-52, 2855-56)

No one sought a mistrial. (RP 2115, 2121) Instead, the parties proposed curative instructions. (CP 6167, 6171; RP 2112) The trial court revised plaintiff's proposed instruction to read (RP 2123):

Accident history is kept as required by federal law for freeway on-ramps. The federal statute provides that this is kept to improve safety, and for no other purpose. The statute provides that this information is privileged to encourage states to keep this information, and it need not be disclosed. It balances competing interests. This information is not before the jury.

Under these circumstances, the assertion by WSDOT that there have been no other collisions at this location and that Mr. Savo was the only driver to have a problem were improper. You shall not consider those comments made by counsel for WSDOT in your deliberations, and you should also strike from your notes any reference to those remarks.

The trial judge deleted the word "inaccurate" in the second paragraph of plaintiff's proposed instruction "*because then I feel like I'm potentially commenting and saying the opposite is true, and I don't want to be commenting on the evidence.*" (RP 2125-26; CP 6171) (emphasis added).

WSDOT, whose proposed instruction would have told the jury to disregard counsel's lack of accidents comments and not to be concerned

with the presence or absence of prior accidents, agreed to the trial court’s proposal. (RP 2123; CP 6167)

The trial court, however, then reinserted the word “inaccurate” and instructed the jury using a modified version of the first paragraph *supra* and the following second paragraph:

Therefore, under those circumstances, the remarks yesterday of counsel for WSDOT that there have never been other collisions at this location and that Mr. Savo was the only driver to have a problem here were improper **and inaccurate**. You should not consider those comments made by counsel for WSDOT in your deliberations, and you should also strike from your notes any reference to those remarks.

(RP 2128-29) (emphasis added); *see* App. G hereto.

a. The “Curative” Instruction Improperly Commented on the Evidence.

The trial court was rightly concerned that instructing the jury that WSDOT’s counsel’s remarks were “inaccurate” would comment on the evidence. Telling the jury that counsel’s remarks were “inaccurate” allowed the jury to infer that there had in fact been accidents at the on-ramp and that others had had problems there—evidence that had been excluded by an order in limine. (CP 2855-56) The curative instruction also cast aspersions on the credibility and integrity of WSDOT’s counsel.

Article IV, section 16, of the Washington Constitution declares:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

“There is no other constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours.” *State v. Jackson*, 83 Wash. 514, 525, 145 P. 470 (1915). In fact, a comment on the evidence claim can be raised on appeal even absent an objection below. *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

Although denying a new trial is ordinarily reviewed for abuse of discretion, whether the trial court commented on the evidence is a question of law reviewable *de novo*. *State, Dept. of Corrections v. Fluor Daniel, Inc.*, 130 Wn. App. 629, 631, 126 P.3d 52 (2005), *aff'd*, 160 Wn.2d 786, 161 P.3d 372 (2007); *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 489-90, 713 P.2d 113 (1986); *see* K. Tegland, 4 WASHINGTON PRACTICE *Rules Practice* at 491 (5th ed. 2006).

Whether the trial judge has made a prohibited comment on the evidence depends on the facts and circumstances of each case. *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), *rev. denied*, 95 Wn.2d 1008 (1981). Nonetheless, *State v. Ratliff*, 121 Wn. App. 642, 90 P.3d 79 (2004), provides a helpful comparison.

In *Ratliff* defendant was convicted of robbery. The trial judge told the jury when and where defendant had been arrested, even though this evidence had not been admitted. The Court of Appeals ruled these comments “violated article IV, section 16, which commands that ‘[j]udges

shall not charge juries with respect to matters of fact.” 121 Wn. App. at 647. *See Patten v. Town of Auburn*, 41 Wash. 644, 84 P. 594 (1906).

Here, as in *Ratliff*, the trial judge told the jury about evidence not admitted at trial. This was an impermissible charge “with respect to matters of fact” within the meaning of article IV, section 16.

A trial court also impermissibly comments on the evidence when it rebukes counsel in language that would clearly tend to put counsel in an unfavorable light before the jury. For example, in *Kluge v. Northern Pac. Ry. Co.*, 167 Wash. 294, 9 P.2d 74 (1932), the judge told counsel in front of the jury that “[w]hen I try a case, myself, I will go out and try to get every one of the facts” and “I have my ideas how to try a lawsuit, and somebody else’s interpretation wouldn’t cut much figure with the court if I saw the situation.” *Id.* at 299. The trial court declined to instruct the jury to disregard the statements, but did give a general instruction to disregard the remarks of both the court and counsel.

The Washington Supreme Court reversed and remanded for a new trial:

[J]urors . . . are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. . . . Between the contrary winds of advocacy a juror would not be a man if he did not, in some of the distractions of mind which attend a hard-fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a

presiding judge has no way to measure the effect of his interruption.

Id. at 302-03.

Here the trial judge formally instructed the jury that not only were counsel's remarks improper, but they were also "inaccurate." This was tantamount to instructing that WSDOT's counsel had lied or was trying to hide the truth. It is hard to imagine anything more damaging to WSDOT.

b. Even If Constitutional, the "Curative" Instruction Was Nevertheless Erroneous.

Even if the curative instruction was not an unconstitutional comment on the evidence, giving the instruction was still reversible error.

First, the instruction injected excluded evidence into the case. An instruction that injects an issue not in evidence is erroneous. *See Symes v. Teagle*, 67 Wn.2d 867, 871, 410 P.2d 594 (1966).

Second, not only did the instruction inject inadmissible evidence, it also impugned WSDOT's trial attorney's credibility and integrity. By instructing the jury that his comments had been "inaccurate," the trial court implied counsel had been lying or, at the very least, trying to hide damaging evidence from the jury.

Any statement by the court that tends to impair or destroy counsel's influence or usefulness—even if it does not rise to the level of a comment on the evidence—is erroneous. *State v. Phillips*, 59 Wash. 252,

259, 109 P. 1047 (1910). Thus, a trial judge must not make comments that “reflect on the integrity of counsel” as such remarks “destroy[] the effectiveness of counsel in the eyes of the jury.” *State v. Whalon*, 1 Wn. App. 785, 799, 464 P.2d 730, *rev. denied*, 78 Wn.2d 992 (1970). Often used in criminal trials, this rule applies in civil trials as well. *See Annot., Prejudicial Effect of Remarks of Trial Judge Criticizing Counsel in Civil Case*, 94 A.L.R.2d 826 (1964). One court has explained:

A lawyer’s character and reputation for fairness, candor, and honorable dealing are as much a part of his professional worth as is his reputation for ability and learning. For the court to impeach it before the jury is to weaken in a measure the client’s cause.

Perry v. Perry, 144 N.C. 328, 57 S.E. 1 (1907).

The trial court here impeached WSDOT’s counsel’s character and reputation for fairness, candor, and honorable dealing before the jury. WSDOT’s case was weakened. The curative instruction was improper.

c. The “Curative” Instruction Was Prejudicial, Not Curative.

Unless the record affirmatively shows otherwise, prejudice is presumed when an instruction contains a comment on the evidence. *See Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945, *rev. denied*, 122 Wn.2d 1019 (1993). The record here does not affirmatively show the absence of prejudice. Further, even if the curative instruction were not a comment on the evidence, the record does show prejudice.

First, by telling the jury that counsel's remarks had been "inaccurate", the trial judge essentially informed the jurors of accidents at the site, a fact that had been excluded. (CP 2855-56) Armed with a *formal instruction from the trial judge* that previous accidents had occurred at the on-ramp, the jury assuredly used that instruction to find WSDOT liable.

Indeed, the jury had submitted questions about whether there had been prior accidents or complaints about the on-ramp. Pursuant to CR 43(k), the questions had not been asked of any witnesses. (CP 3217, 3218, 4686) The questions indicate, however, that the jury believed evidence of prior accidents at the site was important.

Second, by telling the jury that WSDOT's counsel's remarks had been "inaccurate", the trial judge impugned counsel's credibility and integrity. Because an attorney's credibility and integrity may be the most valuable attribute he or she has before a jury, destroying that credibility and integrity prejudiced WSDOT. A new trial is required.

d. The Invited Error Doctrine Does Not Apply.

WSDOT's counsel did not invite error by making the improper remarks in the first place. Two wrongs do not make a right.

Counsel's unfortunate but inadvertent remarks could have been cured if WSDOT's proposed curative instruction had been given. *See*

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993); *Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750, 753 (2007), *cert. denied*, (2008). That instruction would have told the jury why they had not heard evidence of whether there had been prior accidents, that counsel's remarks were "improper," and that the jury was to disregard them. (CP 6167) There was no legitimate reason to give the curative instruction the trial court gave.

State v Martin, 77 Conn. App. 818, 827 A.2d 1 (2003), provides a helpful comparison. There defense counsel argued in closing that the State had no evidence defendant and his alleged coconspirator had committed robbery and murder, saying, "[T]he only reason it's [the evidence] not there is because *they're not guilty*." 827 A.2d at 6 (emphasis in original). But the coconspirator had been convicted of robbery and felony murder.

A curative instruction told the jury that the alleged coconspirator had been convicted of robbery and felony murder, that that fact was not binding on them, although they could consider it conclusive, but that they were not to infer guilt simply because of the convictions.

The appellate court reversed and remanded for a new trial:

We generally accord deference to a court's efforts to eliminate prejudice through a curative instruction. . . . ***The court, however, did not simply identify defense counsel's improper comment and instruct the jury to disregard the comment.***

. . . .

Although the state maintains that defense counsel's remarks during closing argument invited or opened the door for the court to inform the jury of [the alleged co-conspirator's] conviction, we note that the "*opening the door*" or "*invited error*" doctrine "*cannot . . . be subverted into a rule for injection of prejudice.*"

Id. at 8, 9 (emphasis added).

As did the defense attorney in *Martin*, WSDOT's attorney made incorrect representations in closing argument. As in *Martin*, even though the defense's proposed curative instruction would have properly identified counsel's improper comments and instructed the jury to disregard them, the trial court here also told the jury the remarks were untrue. In so doing, the trial court impermissibly answered the jury's earlier questions about prior accidents, while at the same time telling it that WSDOT's counsel was not to be trusted. WSDOT was greatly prejudiced.

2. The Jury Should Have Determined Comparative Fault.

A new trial is also required under CR 59(a)(8)-(9), because the trial court erred in (1) granting partial summary judgment that plaintiff was fault free, and (2) refusing to allow the jury to decide whether plaintiff was at fault because of inoperative or inadequate brake lights.

a. Factual Issues Exist Re the Flying Amplifier.

After the accident, a heavy stereo amplifier was found lodged between the tops of the driver and front passenger seats. The amplifier,

which had been affixed to the vehicle's rear interior, must have come loose in the accident and flown forward. (CP 1061, 1209, 1217-18)

Experts agreed plaintiff's injuries resulted when his head was pushed forward and down, dislocating his C5 and C6 vertebrae. WSDOT's position was that this occurred because the amplifier had struck him on the head and that plaintiff had been negligent in failing to adequately secure the amplifier. Plaintiff argued he had not been negligent and that the amplifier could not have hit him because there was no evidence of head injury. Partial summary judgment that plaintiff had been fault free was granted. Reconsideration and a new trial were denied. (CP 1006, 1007, 1013-21, 1079-80, 1375, 1420-23, 2345-27, 2779, 5107-19, 6117-19)

Summary judgment is appropriate only if there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011). Facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party—here, WSDOT. *Id.* Only if a reasonable person could reach but one conclusion is summary judgment proper. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Comparative fault and proximate cause are typically questions for the jury. *See Hough v. Ballard*, 108 Wn. App. 272, 279, 31 P.3d 6 (2001);

Braegelmann v. County of Snohomish, 53 Wn. App. 381, 384, 766 P.2d 1137, *rev. denied*, 112 Wn.2d 1020 (1989). That is the case here.

i. Plaintiff Had a Duty To Securely Attach the Amplifier.

Plaintiff had a duty under both statute and the common law to ensure that the amplifier was securely attached to his vehicle.

RCW 46.37.680(1) provides:

(1) All vehicle sound system components, including any supplemental speaker systems or components, must be ***securely*** attached to the vehicle regardless of where the components are located, so that the components cannot become dislodged or loose during operation of the vehicle.

(Emphasis added.) Violation of this statute is not negligence per se, but may be considered as evidence of negligence. RCW 5.40.050.

Entitled the Courtney Amisson Act, RCW 46.37.680 was enacted in 2005, well before the instant accident, due to the death of Courtney Amisson, who was hit in the head by an airborne speaker in a car crash. The Act is intended to prevent vehicle sound system components from becoming “projectiles in the event of a vehicle collision.” Final Bill Report EHB 1246 (Wash. Legis. 2005). (CP 611, 616, 1464, 1465-66, 1467)

To determine whether a party has a duty under a statute, Washington courts use RESTATEMENT (SECOND) OF TORTS § 286 (1965):

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment . . . whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998).

Only one reason exists for preventing vehicle sound system components from becoming projectiles in a collision: to prevent a component from hitting an occupant. Legislative history bears this out. (CP 1461-67) The interest to be protected is preventing bodily harm. By requiring sound system components to be not only “attached,” but “securely attached,” the Courtney Amisson Act protects vehicle occupants from bodily harm that would otherwise occur in collisions. Hence, if the amplifier here hit plaintiff and caused his injuries, the statute was designed to protect him and others like him from the very bodily harm he suffered. *See Hansen v. Friend*, 118 Wn.2d 476, 481, 824 P.2d 483 (1992).

Moreover, even absent RCW 46.37.680(1), plaintiff had a common law duty to securely attach the amplifier to his vehicle. The existence of a

duty is a question of law and depends on the foreseeability of the injury. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 955-56, 29 P.3d 56 (2001). It is common knowledge that in a collision, inadequately secured objects in a vehicle can become projectiles and hit an occupant. Thus, plaintiff had a common law as well as a statutory duty.

ii. The Jury Should Have Decided Whether the Amplifier Caused Plaintiff's Injuries.

The evidence was sufficient to require the jury to decide whether the amplifier hit plaintiff and caused his catastrophic injuries. Trooper Dixon, the State Patrol investigator first on the scene, saw blood drips below the amp and opined in his accident report (CP 1130, 1132, 1455):

Hu was seated in the driver seat wearing his seatbelt. As he was struck from behind his seat broke and reclined to the rear. The rear of Hu's vehicle was pushed forward causing a speaker box to travel over the top right of Hu's seat. The speaker box struck Hu in the head breaking his neck. The speaker box was improperly installed as regulated by R.C.W.

The trooper later testified in his deposition as follows (CP 1442):

I'm saying that speaker box hit him in the head. I'm not saying it hit him on top of his head. I'm not saying it hit him in the ear, I'm not saying it hit him in the face, I'm saying it hit him in the head at some point, probably on the —towards the right side of the rear, but I don't know. . . .

Plaintiff and a friend had installed the stereo system. They mounted the amplifier on medium density fibreboard (MDF) with small screws. The board was then attached to the vehicle's suspension strut

housing with self-tapping screws (screws that could be inserted without first drilling a hole). Although Trooper Dixon assumed the stereo system had not been attached to the vehicle at all, there was no evidence his mistaken assumption made a difference to his opinion that the amplifier had struck plaintiff in the head. (CP 1126, 1127, 1137, 1409, 1413)

WSDOT's material science/metallurgical engineering expert, Randy Kent, examined the interior of plaintiff's vehicle and the stereo system. He found impact marks on the amplifier surface made by a smooth, round object. He also observed carbon-based transfers on the amplifier consistent with skin or skin-related material. (CP 1407-08, 1412)

After looking at the screw heads' contact with the amplifier, Mr. Kent opined that the screws had had very little torque applied when the amplifier was installed. (CP 1409) He further testified (CP 1413, 1415):

The weight of the connected amp and speaker surged forward during the accident and broke the board at the edge or wings, as well as pulled the screws through the board. The cause of the amp/speaker contacting Mr. Hu's head from behind was the improper use of the low strength non-structural MDF material and the improper amount of contact area under the screw head for this material.

... it is my opinion on a more probable than not basis that the audio speaker system, amplifier and components were not securely attached to the vehicle in compliance with the Washington Code, that a properly designed and installed system would have met the requirements of the code and would have withstood the crash, and that the system installed in the Hu vehicle catastrophically failed during the

collision sequence. It is further my opinion on a more probable than not basis, based upon the background and examination identified above, that once the speaker system catastrophically failed, the leading face of the audio amplifier struck a round and smooth object more probably than not the back of Mr. Hu's head, violently forcing it forward during the event.

Mr. Kent also explained why plaintiff's theory—that the seatback had “cradled” his head forward and down—was not viable. (CP 1028, 2675-76)

WSDOT's biomechanical/accident reconstruction expert, Louis Cheng, Ph.D., also inspected the vehicle, its stereo system, and reviewed medical records, amongst other documents. He noted that plaintiff's injury was of a type known to occur without significant head trauma. (CP 1375, 1418-23) Dr. Cheng further testified (CP 1376):

In all likelihood, impact of the speaker system into both seat backs significantly decelerated its initial speed of 20-30 mph, such that its impact to the head caused the spinal injury to Mr. Hu, without accompanying trauma to the head, such as a skull fracture.

Plaintiff did not deny the amplifier had come loose and flown forward in his car, but submitted evidence disputing that it had hit him or caused his injuries. The experts disagreed. (CP 1027-28, 1147-48, 1203-20, 1374-79, 1407-23, 1549-50, 1715-30, 2675-76) It was for the jury to decide which version of the accident was correct. *See Texas Refining & Marketing, Inc. v. Department of Revenue*, 131 Wn. App. 385, 404, 127

P.3d 771 (recognizing that disagreement between experts ordinarily creates issues of material fact), *rev. denied*, 158 Wn.2d 1012 (2006).

iii. The Jury Should Have Decided Whether Plaintiff Was Negligent.

Further, regardless of RCW 46.37.680(1), there were several facts from which a jury could reasonably infer that plaintiff had been negligent in installing the amplifier. First, although plaintiff claimed his friend, a professional installer, had installed the system without his participation, the friend, Socrates Chan, testified in his deposition (CP 1025, 1430):

Q. . . . In terms of this process of building the enclosure, the amp rack and attaching it and determining where it was going to be placed, did you make the decision, did Mr. Hu, or was it collaborative?

A. For the most part, it was collaborative.

Later Mr. Chan “corrected” his deposition, changing the foregoing answer to a completely contrary one: “I made the recommendations and decisions.” The reason given—“To correct my answer after reading the question”—was no reason at all: anyone who makes a correction to a deposition does so after reading the question. (CP 1235, 1438)

Just as a witness cannot, without adequate explanation, submit an affidavit contrary to his previously sworn deposition testimony, a witness cannot “correct” his sworn deposition testimony with contrary testimony. *See EBC, Inc. v. Clark Bldg. Systems, Inc.*, 618 F.3d 253, 268 (3d Cir.

2010); *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1225-26 (9th Cir. 2005). *Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999), *rev. denied*, 140 Wn.2d 1003 (2000). Thus, there are factual issues as to plaintiff's involvement in the installation.

Second, defense expert Kent testified that the screws had not been applied with sufficient torque. (CP 1409) A reasonable person would know that screws not tightened down will fail if enough force is applied.

Third, defense expert Kent testified the MDF board and screws were inadequate. (CP 1413) Even absent this testimony, a reasonable person—especially plaintiff, who was restoring his nearly 35-year-old 240Z—should have known they could not withstand the force of all but the most minor collisions. It is common knowledge MDF board—a particle board that is essentially glued sawdust—is not sturdy. (CP 1208) Plywood would have been better. It is also common knowledge that screws are not as secure as bolts mated to nuts and washers. In fact, RCW 46.37.680's legislative history refers to bolts. (CP 1210, 1413-15, 1462, 1465, 1467). A jury could find a reasonable person would have known the screws and MDF board would not hold in a collision. The jury should have decided this factual issue.

iv. Assuming Genuine Issues of Material Fact as to Cause in Fact, Legal Causation Existed.

Plaintiff also claimed there was no legal causation between the negligent stereo system installation and his injuries. (CP 1010-13) “Legal causation is a question of law.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311, 151 P.3d 201 (2006). Legal causation—

rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent."

Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)) (emphasis in original). The focus is “whether, as a matter of policy, the connection between the ultimate result and the act . . . is too remote or insubstantial to impose liability.” *Schooley*, 134 Wn.2d at 478-79.

Here, WSDOT’s biomechanical expert testified that “the speaker system was the cause of plaintiff’s spinal injuries” and “Mr. Hu’s neck injury was most likely the result of the amplifier/speaker box unit contacting his head from behind.” (CP 589, 1374, 1375) Consequently, a jury could believe the inadequately secured stereo system was the direct cause of plaintiff’s injuries and that had it been securely affixed, plaintiff would have been uninjured or suffered only minor injuries.

Washington courts recognize that even normal automobile use “will result in collisions.” *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 755, 522 P.2d 829 (1974). By enacting RCW 46.37.680(1), the Legislature made securely affixing vehicle stereo systems to prevent them from becoming “projectiles in the event of a vehicle collision” the public policy of this State. (CP 1464)

Accordingly, there is nothing “remote or insubstantial” about the direct causal connection between the inadequately secured stereo system and plaintiff’s injuries. Legal causation is no impediment to a jury determining whether plaintiff’s fault caused his injuries.

b. Factual Issues Exist Re Plaintiff’s Brake Lights.

The Westches’ eyewitness testimony and common sense indicate that the exclusive cause of the collision was Savo’s driving down the ramp at 40-50 mph while not looking where he was driving. Plaintiff’s 240Z was there to be seen whatever the condition of its brake lights. However, once plaintiff and his expert raised a brake lights issue at trial, WSDOT should have been able to argue alternative explanations for the collision.

The partial summary judgment precluded all comparative fault theories. Accordingly, WSDOT proceeded on the assumption that plaintiff’s vehicle was in working order, including its brake lights. Plaintiff’s human factors expert agreed that if the brake lights were

operating, plaintiff's vehicle would have been easier for Savo to see. In that event, the jury would be more likely to find Savo at fault for not seeing plaintiff's car. (CP 2345-47; RP 451, 474, 1440)

At trial, however, plaintiff himself testified that although his brake lights were working, he was not sure how bright they were due to the vehicle's age. Plaintiff's highway design expert, Robert Foster Douglas, had seen plaintiff's brake lights and testified, "They're almost nonexistent." Plaintiff also elicited testimony from Mr. Wetsch that he had not seen plaintiff's brake lights. (RP 601-02, 988, 1275-76) Finally, plaintiff submitted Savo's deposition testimony that when he finally did look ahead, he did not see any brake lights on plaintiff's car. (CP 4061-62)

Plaintiff's submission of this testimony was intended to show his vehicle was not very visible to Savo, in an attempt to absolve Savo and place most or all of the blame on WSDOT. If Savo had been looking ahead, as he should have been, he would have seen plaintiff's car whether its brake lights were on or not. His failure to do so was the proximate cause of the accident. But even if there had been evidence Savo had been looking ahead, properly working brake lights on plaintiff's vehicle would have been visible to him for more than a football field's length (300 ft)—more than enough time for him to stop safely. (RP 985-86)

Significantly, expert Douglas had not testified about the brake lights in his deposition nor disclosed his opinion as to their efficacy. (CP 3348, 5518, 5519) Thus, WSDOT could not know plaintiff would attempt to show at trial that his inadequate or inoperative brake lights made it harder for Savo to see him. Plaintiff cannot have it both ways. Once he raised whether his brake lights were properly working to try to shift blame to WSDOT, WSDOT should have been able to argue plaintiff was at fault because the brake lights were inadequate or inoperative.

RCW 46.37.200(1) requires that brake lights on a vehicle such as plaintiff's be visible for not less than 300 feet to the rear and must be actuated upon application of the brakes. Under RCW 5.40.050, violation of RCW 46.37.200(1) can be considered as evidence of negligence.

Since plaintiff was claiming for the first time that the failure or inadequacy of his own brake lights made WSDOT more culpable, WSDOT proposed Supplemental Instructions 1-4 and 6 and a special verdict form (copies in Apps. C-D) so the jury could determine comparative fault based on the inadequate brake lights. The trial court refused to give them. (CP 4642-49; RP 1888, 1898-99)

“The operator of an automobile is chargeable with notice of any defects that a reasonable inspection would disclose.” *Curtis v. Blacklaw*, 66 Wn.2d 484, 489-90, 403 P.2d 358 (1965). It is common knowledge

how easy it is to determine whether brake lights are working properly. Since plaintiff was restoring his nearly 35-year-old 240Z, he especially should have checked them. (CP 1004) The jury should have been allowed to determine whether they were inadequate, whether plaintiff was at fault if they were, and whether his fault, if any, was a proximate cause.

CR 15(b) governs whether the trial court should have permitted the brake lights affirmative defense. *Hubbard v. Scroggin*, 68 Wn. App. 883, 846 P.2d 580, *rev. denied*, 122 Wn.2d 1004 (1993). That rule allows issues not raised by the pleadings, but tried by the parties' express or implied consent, to be treated as if they had been raised in the pleadings. Applicable to affirmative defenses, *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504, 694 P.2d 7 (1985), CR 15(b) is liberally construed. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 878 n.55, 929 P.2d 379 (1996). Indeed, pleadings may be amended to conform to the evidence even after judgment. *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972).

Consent, notice, and lack of prejudice must be shown. *Hubbard*, 68 Wn. App. at 889. Because plaintiff himself and his expert introduced the evidence that his brake lights were inoperative or inadequate, there was notice, consent, and no prejudice. *See Knudson v. Boren*, 261 F.2d 15, 19

(10th Cir. 1958); *Hall v. National Supply Co.*, 270 F.2d 379, 383 (5th Cir. 1959). A new trial is required.

3. Parsonson's Other On-Ramps Testimony Was Inadmissible Absent a No Duty To Upgrade Instruction.

Evidentiary errors as to signal ahead signs also require a new trial under CR 59(a)(1), (8)-(9). Adverse experts said WSDOT should have used signal ahead signs on metered on-ramps. WSDOT expert Toby Rickman disagreed, testifying WSDOT did not use such signs in advance of ramp metered signs and he was unaware of such signs at metered ramps. (RP 931-35, 1753-56, 1765-68, 1963-65)

Savo's expert, Peter Parsonson, then testified he had seen metered on-ramps with signal ahead signs in the Seattle area. Photos of two of these on-ramps, Exs. 576 and 578, were admitted. (RP 1965-68, 1970-74)

WSDOT had earlier moved to exclude the evidence, partly because plaintiff could not show when the on-ramps were constructed, so their design could have been older than that of the on-ramp in question. And because WSDOT has no legal duty to update roads to present standards, the trial court had excluded evidence of traffic control device standards that went into effect after the ramp meter at issue had been installed.¹

¹ The only exception was for the second ramp metered when flashing sign, installed in 2006, 11 years after the ramp meter's original installation. (RP 686, 693-94; CP 2857-58)

(CP 2857-58, 5653-57; RP 1905-11) Plaintiff responded (RP 1906, 1910-11):

Mr. McInstry: Your Honor, this was impeachment. [WSDOT's expert, Toby Rickman] was unqualified in his statement that we don't do this We don't have to disclose . . . our impeachment material. . . .

. . . .
The Court: Plaintiff's counsel would concede that if the fact of the existence of the signs comes in, that additional instructions on the law would be required, be required such as the State's not required to update, et cetera?

Mr. McInstry: *I have no objection to that*, but I don't—*I have no objection to that*. . . .

. . . .
Mr. McInstry: *I have no problem with that instruction, upgrading instruction*.

(Emphasis added.) Overruling WSDOT's objection, the trial court assured:

Mr. Cooley: Will we get the [no duty to upgrade] instruction that the Court has indicated?

The Court: *I think it's required at that point*.

(RP 1911) (emphasis added).

After Parsonson was excused, WSDOT proposed the following instruction (CP 5659; RP 2023-24):

The State's duty does not require it to update roads and roadway structure to present-day standards. The existence of roads and roadway structures that pre-date present-day design standards may not be considered by you as evidence of negligence.

Plaintiff then did an about-face, opposing a no duty to upgrade instruction. WSDOT agreed to delete the proposed instruction's second

sentence and to amend the first sentence to read, “[T]he State’s duty does not require it to update road signs to present day standards.” Plaintiff objected, saying “We solely went for impeachment.” (RP 2024-25, 2027)

The trial judge declined to give a no duty to update instruction, saying, “I think it creates more problems than it addresses.” WSDOT objected, as the parties and trial court had agreed, *before* Parsonson’s testimony, that the instruction would be given. (RP 2030)

a. The Trial Court’s Flip-Flop on the No Duty To Upgrade Instruction Requires a New Trial.

Even if the other on-ramps evidence had been admissible (which it was not, as will be discussed), the trial court denied WSDOT a fair trial by saying it would give a “no duty to upgrade” instruction but *after* the evidence came in and the witness was excused, deciding it would not.

The on-ramps where Parsonson saw signal ahead signs all used older designs. (RP 1905) The other on-ramps evidence permitted the jury to infer that because WSDOT had constructed some on-ramps with signal ahead signs, it should have done so at the on-ramp at issue. But a governmental entity has no duty to update all roads or roadway structures to present standards. *See Ruff v. County of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995). Thus, an instruction that WSDOT has no duty to upgrade was crucial. The failure to give the instruction is reversible error.

Even if the failure to give the instruction does not alone require a new trial, the timing of the trial court's decision not to do so—*after* the witness testified and *after* assuring WSDOT's counsel that the instruction would be given—does. Changing the rules in the middle of the game deprived WSDOT of a fair trial.

A trial court has discretion in many instances to change its mind. ***“But the problem [here] is the way the court changed the rules.”*** *State v Brady*, 116 Wn. App. 143, 148-49, 64 P.3d 1258 (2003) (new trial where trial court changed voir dire procedure during voir dire) (emphasis added), *rev. denied*, 150 Wn.2d 1035 (2004); *see In re Shue*, 63 N. C. App. 76, 83, 303 S.E.2d 636 (1983) (new hearing where trial court changed the issue during hearing), *aff'd as modified on other grounds*, 311 N.C. 586, 319 S.E. 2d 567 (1984). Because the trial court had assured him that a no duty to upgrade instruction was ***“required at that point”***, WSDOT's counsel tailored his examination of Parsonson accordingly. (RP 1911, 1984-87, 2030) (emphasis added). Had counsel known the trial court would change its mind, he would have conducted his examination differently.

For example, he might have not asked about the other on-ramps, since that reemphasized the evidence at issue without the neutralizing effect of the expected instruction. Or he might have asked about the cost to upgrade all roads or whether there were jurisdictions that updated

roadways regularly. Either way, the cross-examination would have been aimed at neutralizing the other on-ramps evidence as much as possible.

Trial lawyers must be able to rely on what a trial judge says s/he will do. Because the trial judge here changed the rules in midstream, WSDOT was prejudiced. A new trial is required.

b. Other On-Ramps Evidence Was Inadmissible.

In any event, the other on-ramps evidence was inadmissible. Plaintiff was not trying to *impeach* Mr. Rickman's testimony with Mr. Rickman's own prior inconsistent statement. Rather, he was trying to *rebut* Mr. Rickman's testimony with Mr. Parsonson's testimony.

This is impeachment by contradiction, *i.e.*, rebuttal. *State v. Hubbard*, 103 Wn.2d 570, 576, 693 P.2d 718 (1985). Hence, the evidence must be "independently competent" and "admissible for a purpose other than that of attacking the credibility of the witness." *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972); *accord State v. Hubbard*, 103 Wn.2d at 576. Since plaintiff repeatedly said the sole purpose of the evidence was impeachment (RP 1906, 2024-25, 2027-28), the evidence should not have been admitted.

VI. CONCLUSION

Plaintiff's accident was tragic. But the question is whether *WSDOT* should share in the responsibility. It should not, because there was no evidence that on-ramp design was a proximate cause.

Mike Wetsch had no trouble seeing what was there to be seen. Neither did his wife, who was not even driving and had never seen a metered on-ramp before. The drivers in plaintiff's on-ramp experiment also had no trouble. Defendant Savo did not see what he should have because he was not paying attention.

At the very least, a new trial is required because the trial court improperly commented on the evidence, impugned *WSDOT*'s trial counsel's credibility and integrity before the jury, failed to let the jury decide comparative fault, allowed improper impeachment, and refused to give a no duty to upgrade instruction after assuring counsel otherwise.

Reversal and remand to dismiss the claims against *WSDOT* are required. Alternatively, a new trial should be ordered.

DATED this 9th day of June, 2011.

REED McCLURE

By *Pamela A. Okano*
Pamela A. Okano **WSBA #7718**
William R. Hickman **WSBA # 1705**
Attorneys for Appellant

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APPENDIX A

FILED
KING COUNTY, WASHINGTON

OCT 18 2010

SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KOTI HU,

Plaintiff,

v.

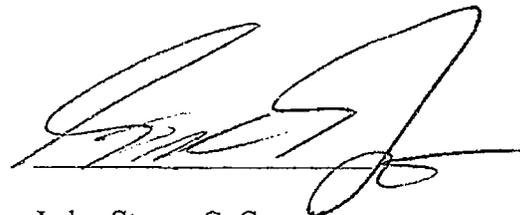
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, an agency of the
STATE OF WASHINGTON,
INTRASTATE PAINTING
CORPORATION, a Washington
corporation; and MICHAEL F. SAVO,

Defendants.

No. 08-2-18251-7 SEA

COURT'S INSTRUCTIONS TO THE JURY

DATED: 10/13/10



Judge Steven C. Gonzalez

ORIGINAL

about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

(1) The plaintiff claims that the defendants were negligent in one or more of the following respects:

- Defendant Michael Savo, an employee of defendant Intrastate Painting Corporation, acting within the scope of his employment, drove a truck that collided with the plaintiff's car.
- Defendant Washington State Department of Transportation improperly designed the on-ramp of NE 70th to Northbound I-405.

The plaintiff claims that one or more of these acts by the defendant(s) was a proximate cause of injuries and damage to plaintiff. The defendants deny these claims.

(2) The defendants further deny the nature and extent of the claimed injuries and damage.

INSTRUCTION NO. 13

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

INSTRUCTION NO. 14

The plaintiff has the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of one or more of the defendants was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved against one or more of the defendants, your verdict should be for the plaintiff and against the defendant or those defendants. On the other hand, if any of these propositions has not been proved against one or more of the defendants, your verdict should be for that defendant or those defendants.

INSTRUCTION NO. 23

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. The driver shall control speed to avoid colliding with others who are complying with the law and using reasonable care.

The statute provides that a driver shall drive at an appropriate reduced speed when special hazard exists with respect to pedestrians or other traffic when special hazard exists by reason of weather or highway conditions.

INSTRUCTION NO. 24

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

INSTRUCTION NO. 25

The state has a duty to exercise ordinary care in the design and maintenance of its public streets to keep them in a reasonably safe condition for ordinary travel.

INSTRUCTION NO. 26

Plaintiff has been determined to be fault-free as a matter of law. Plaintiff's damages, if any, are to be apportioned among the defendants according to each defendant's proportionate share of liability, if any. Plaintiff's damages may not be reduced based on any act or failure to act by plaintiff.

INSTRUCTION NO. 27

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to all defendants unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 28

If you find that more than one defendant was negligent, you must determine what percentage of the total negligence is attributable to each defendant that proximately caused the injury to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 29

According to mortality tables, the average expectancy of life of a man aged 30 years is 46.20 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

FILED
KING COUNTY, WASHINGTON

OCT 18 2010

KOTI HU,

Plaintiff,

vs.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, an agency of the STATE
OF WASHINGTON, INTRASTATE PAINTING
CORPORATION, a Washington corporation; and
MICHAEL F. SAVO,

Defendants.

NO. 08-2-18251-7 SEA

SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

SPECIAL VERDICT FORM

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

QUESTION 1: Were any of the defendants negligent?

(Answer "yes" or "no" after the name of each defendant.)

ANSWER:

Yes

No

Defendant WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

: Yes

Defendant MICHAEL F. SAVO / INTRASTATE
PAINTING CORP.

: Yes

(INSTRUCTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury or damage to the plaintiff?

(Answer "yes" or "no" after the name of each defendant found negligent by you in Question 1.)

ANSWER:

Yes

No

Defendant WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

: Yes

Defendant MICHAEL F. SAVO / INTRASTATE
PAINTING CORP.

: Yes

APPENDIX C

**DEFENDANT WSDOT'S PROPOSED SECOND SUPPLEMENTAL
INSTRUCTION NO. 1**

ISSUES

- (1) Plaintiff claims that the defendant WSDOT was negligent in one or more of the following respects:
 - (i) In failing to design and construct the ramp metering system to provide adequate sight distance;
 - (ii) In failing to post adequate warning signs and beacons.

- (2) Plaintiff claims that defendant Savo as negligent in:
 - (i) Failing to keep a proper lookout;
 - (ii) Failing to go at a safe speed; and
 - (iii) Striking plaintiff's vehicle as a stop bar.

- (3) Plaintiff claims that defendant Intrastate Painting Corporation is liable for the acts of Savo since he was its employee and acting in the scope of his work at the time of the accident.

The plaintiff claims that one or more of these acts were a proximate cause of injuries and damage to plaintiff. The defendants deny these claims.

In addition, WSDOT claims as an affirmative defense that Plaintiff was contributorily negligent in failing to maintain working brake lights on his vehicle.

WSDOT claims that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies this claim.

The defendants further deny the nature and extent of the damages claimed.

**DEFENDANT WSDOT'S PROPOSED SECOND SUPPLEMENTAL
INSTRUCTION NO. 2**

**BURDEN OF PROOF ON THE ISSUES—CONTRIBUTORY NEGLIGENCE—NO
COUNTERCLAIM**

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendants have the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendants, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence;

WPI 21.03

**DEFENDANT WSDOT'S PROPOSED SECOND SUPPLEMENTAL
INSTRUCTION NO. 3**

CONTRIBUTORY NEGLIGENCE—DEFINITION

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

WPI 11.01

**DEFENDANT WSDOT'S PROPOSED SECOND SUPPLEMENTAL
INSTRUCTION NO. 4**

STATUTE, ORDINANCE, OR ADMINISTRATIVE RULE

A statute provides that:

All vehicles shall be equipped with a stop lamp or lamps on the rear of the vehicle which shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than three hundred feet to the rear in normal sunlight, and which shall be actuated upon application of a service brake.

WPI 60.01; RCW 46.37.200(1) (modified)

**DEFENDANT WSDOT'S PROPOSED SECOND SUPPLEMENTAL
INSTRUCTION NO. 6**

FAULT TO BE APPORTIONED

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendants and the plaintiff.

APPENDIX D

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KOTI HU,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, an agency of the
STATE OF WASHINGTON,
INTRASTATE PAINTING
CORPORATION, a Washington
corporation; and MICHAEL F. SAVO,

Defendants.

No. 08-2-18251-7 SEA

DEFENDANT WSDOT'S PROPOSED
SECOND SUPPLEMENTAL SPECIAL
VERDICT FORM

We, the jury, answer the following questions submitted by the court:

QUESTION 1: Was WSDOT negligent?

ANSWER: ____ (Write "yes" or "no")

(INSTRUCTION: If "no," skip to Question 3; otherwise, proceed to Question 2)

QUESTION 2: Was WSDOT's negligence the proximate cause of Koti Hu's
injuries and damages?

ANSWER: ____ (Write "yes" or "no")

(INSTRUCTION: Proceed to Question 3).

QUESTION 3: Was Mr. Hu contributorily negligent?

ANSWER: ____ (Write "yes" or "no")

(INSTRUCTION: If "no," skip to Question 5; otherwise, proceed to Question 4)

DEFENDANT WSDOT'S PROPOSED SECOND
SUPPLEMENTAL SPECIAL VERDICT FORM - 1

4648

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QUESTION 4: Was Koti Hu's contributory negligence the proximate cause of his own injury and damages?

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: Proceed to Question 5)

QUESTION 5: What do you find to be the plaintiff's damages?
\$ _____

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused Koti Hu's injury and damages. What percent of this 100% is attributable to his own negligence (if any), what percentage of this 100% is attributable to the negligence of Michael Savo, and what percentage of this 100% is attributable to the negligence of WSDOT (if any)?

Your total must equal 100%. Do not fill in a percentage unless you have found that that particular person or entity was both negligent and a proximate cause of damages.

<u>ANSWER:</u>	<u>Percentage</u>
To <u>Koti Hu</u> _____:	_____%
To <u>Michael Savo</u> _____:	_____%
To <u>WSDOT</u> _____:	_____%
TOTAL:	<u>100%</u>

(INSTRUCTION: Sign this verdict and notify the bailiff.)

Dated this _____ day of _____, 2010.

Presiding Juror

APPENDIX E

1 The undersigned was certainly *not* intending to make a categorical
2 representation that nobody had ever been in an accident on the onramp. If that is
3 how it was heard—by either the Court or the jury—WSDOT takes responsibility for
4 that. If allowed, counsel will self-cure any problems caused, by clarifying to the
5 jury that prior accidents are not a part of this case—and should not be speculated
6 upon – and the only evidence of other motorists actions comes from the Johnson
7 video. Counsel will further emphasize that any comments in that regard were
8 directed *only* toward the Johnson video, which is in evidence. This, given the record
9 as a whole, will remedy any confusion or problems caused.

10 Alternatively, WSDOT respectfully submits the following strongly-worded
11 instruction to the jury:

12 In argument, counsel for WSDOT commented on a
13 lack of accidents at the onramp where this accident
14 occurred. An objection to this comment was
15 sustained, and you are instructed to disregard his
16 reference to a lack of accidents at this location. The
17 presence or absence of prior accidents at the onramp is
an issue that is outside of the evidence in this case, and
you are not to concern yourself with it.

18 Instead of, or in addition to, counsel self-curing his remarks, the Court can give this
19 curative instruction. Juries are presumed to follow instructions directing them to
20 disregard statements of counsel not supported by the law or evidence, and that
21 presumption will prevail until it is overcome by a showing otherwise. *A.C. v.*
22 *Bellingham School Dist.*, 125 Wn. App. 511, 521, 105 P.3d 400 (2004) (citing
23 *Nichols v. Lackie*, 58 Wn.2d 904, 907, 795 P.2d 722 (1990)).

24 Here, an isolated, objected-to comment—in the context of such lengthy trial
25 and argument—is surely not “misconduct” that will conclusively poison the record.
26 See *ALCOA v. Aetna Cas.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (must be
27

APPENDIX F

1 establish that those signs were installed at
2 locations that were during the design criteria in
3 1994, when this one was put in. They didn't make
4 that predicate proof, and therefore this
5 instruction makes it clear, that does not bear on
6 whether the State's negligent.

7 THE COURT: Why don't we say, the State's
8 duty does not require it to update road signs to
9 present day standards?

10 MR. COOLEY: I would live with that too.

11 MR. MCKINSTRY: Again, for the record, I
12 think that they -- that witness went out there and
13 said, we haven't done it, we wouldn't ever do it.
14 He's been impeached. And we're -- and that's
15 proper impeachment, and that's what we're getting
16 at here. We didn't put any of that evidence in.
17 We solely went for impeachment.

18 THE COURT: You remember what you said
19 when I indicated that I thought such an instruction
20 might be required, and you said you would agree to
21 that.

22 MR. MCINSTRY: I did say that at that
23 time. I've thought about it and reflected on it,
24 and I think that I spoke too quickly. I think the
25 -- I think it was simply impeachment, and for him

APPENDIX G

1 designation, and perhaps even let Trooper Dixon
2 testify.

3 THE COURT: Are you asking to reopen?

4 MR. KEMPER: I'm not, but that's why I
5 think the comment or the instruction that there
6 have been accidents essentially does the same thing
7 without reopening the whole case. Having said
8 that, plaintiff can live with your instruction that
9 counsel's remarks were inaccurate.

10 THE COURT: Very well. That is what we
11 will do.

12 Are we ready for the jury?

13 (Jury present.)

14 THE COURT: Please be seated. Members of
15 the jury, in a moment we'll continue with the
16 balance of WSDOT's closing argument. We thank you
17 for your patience this morning. We had to take up
18 an issue which has been addressed and now take care
19 of it by reading to you an additional instruction.

20 Members of the jury, accident history is kept
21 as required by federal law for freeway on-ramps.
22 The federal statute provides that this information
23 is kept to improve safety, and for no other
24 purpose. The statute provides that this
25 information is privileged to encourage states to

1 keep this information, and the information need not
2 be disclosed as discovery in lawsuits. The statute
3 is designed to balance competing interests.

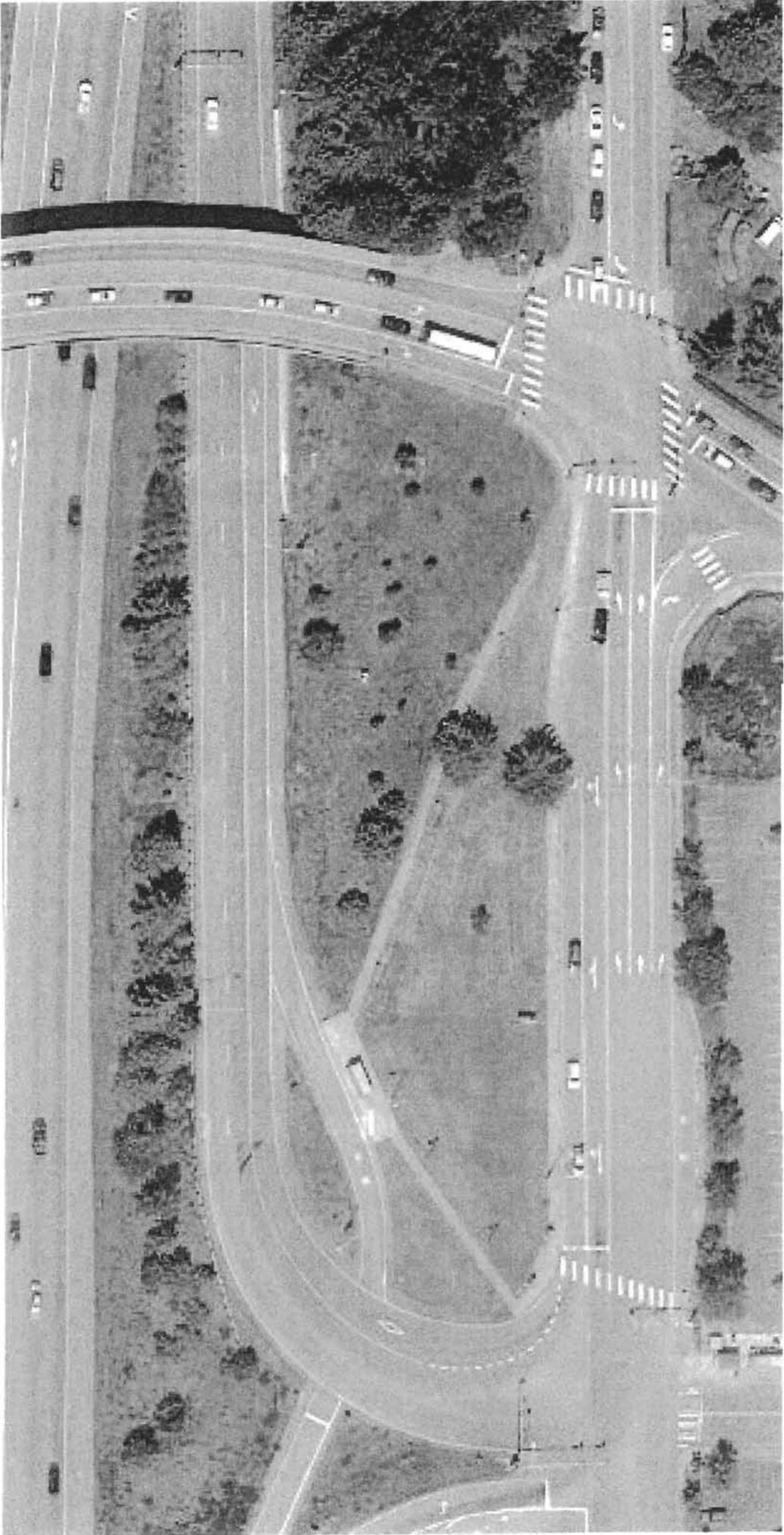
4 Therefore, under those circumstances, the
5 remarks yesterday of counsel for WSDOT that there
6 have never been other collisions at this location
7 and that Mr. Savo was the only driver to have a
8 problem here were improper and inaccurate. You
9 should not consider those comments made by counsel
10 for WSDOT in your deliberations, and you should
11 also strike from your notes any reference to those
12 remarks.

13 Mr. Cooley, please conclude your closing
14 argument.

15 MR. COOLEY: Thank you very much, your
16 Honor.

17 So ladies and gentlemen, in my last few
18 minutes to talk to you before I sit down, I want to
19 discuss Mike and Tracy Wetsch. These are the Good
20 Samaritans who saw the accident unfold and stopped.
21 What's significant about their testimony, and you
22 heard them talk about it, that they -- it was two
23 years after the accident before anyone contacted
24 them, and then the person or the entity that
25 contacted them was our office, the Department of

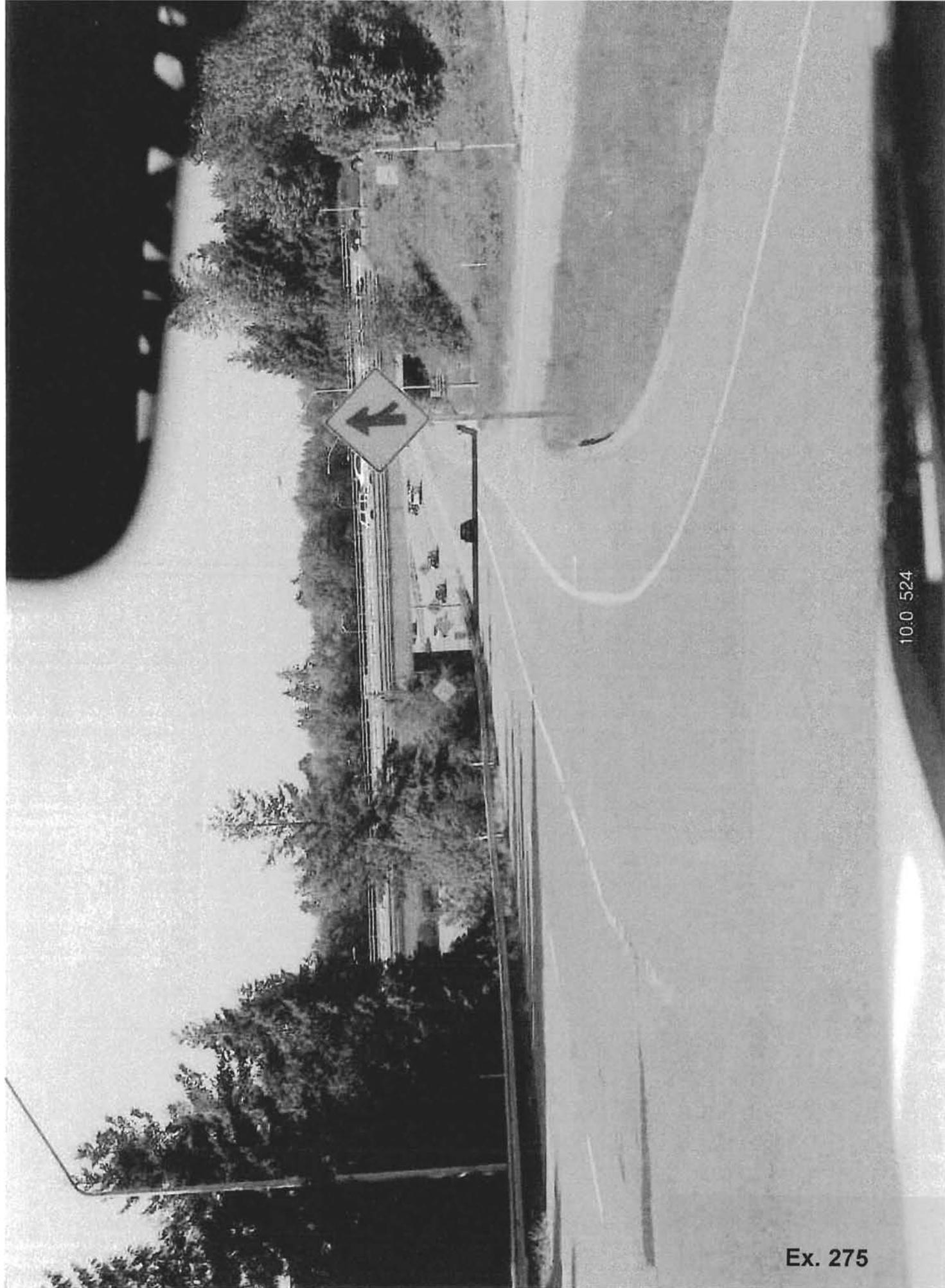
APPENDIX H



56

PLAINTIFF'S EXHIBIT 560

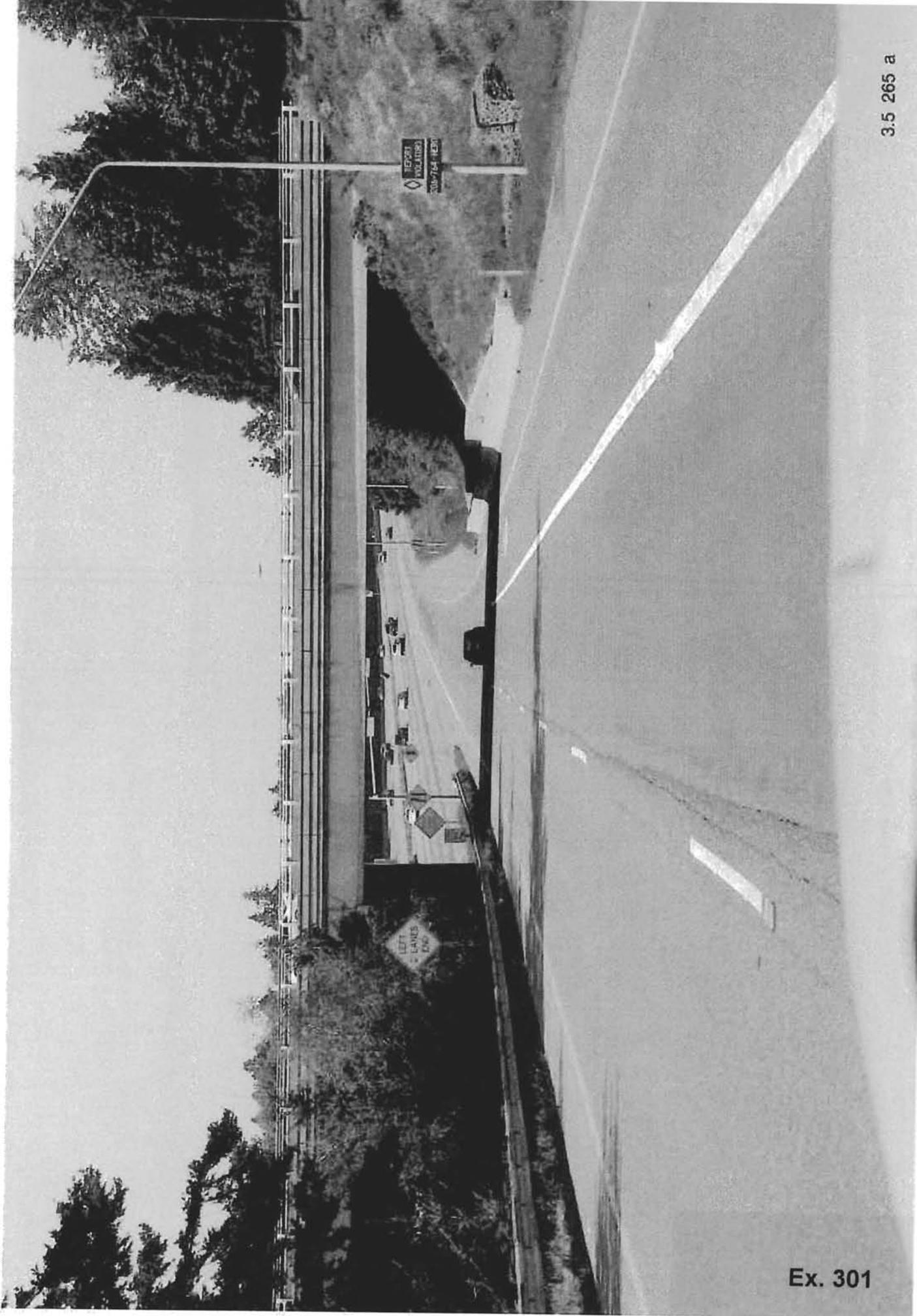
APPENDIX I



10.0 524

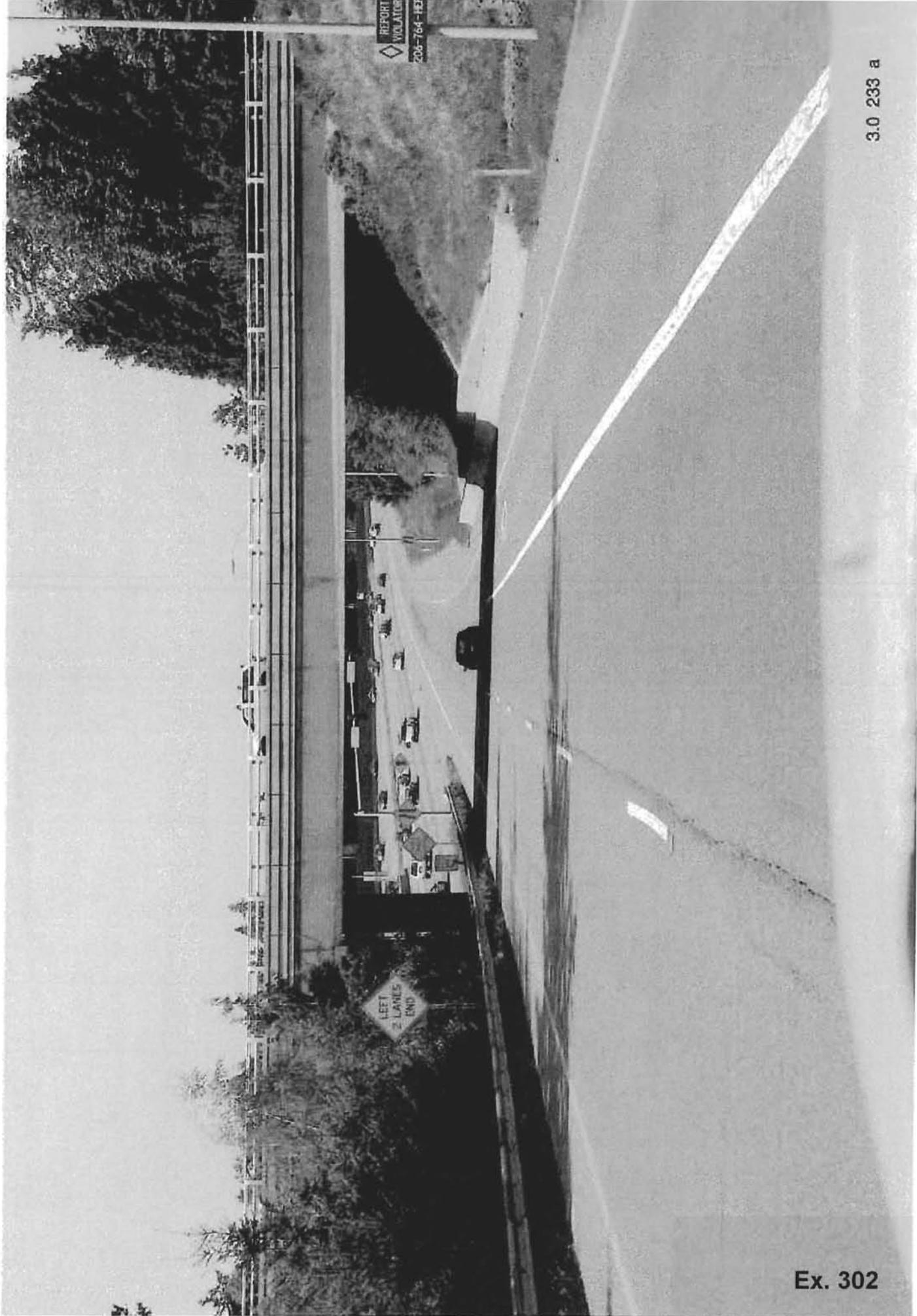
Ex. 275





Ex. 301

3.5 265 a



3.0 233 a

Ex. 302



2.0 162 a

Ex. 305



1.0 83 a

Ex. 309

UNITED STATES CODE ANNOTATED

Title 23
Highways

Title 24
Hospitals and Asylums

2010
Cumulative Annual Pocket Part

Replacing 2009 pocket part in the back of 2002 bound volume

Includes the Laws of the
111th CONGRESS, First Session (2009)

For close of Notes of Decisions
See page III

For Later Laws and Cases
Consult
USCA
Interim Pamphlet Service

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"(i) receive a mandatory minimum sentence of imprisonment for one hundred and twenty days; and

"(ii) have his license revoked for not less than three years; and

"(D) any person convicted of driving with a suspended or revoked license or in violation of a restriction due to driving under the influence of alcohol conviction shall receive a mandatory sentence of imprisonment for at least thirty days, and shall upon release from imprisonment, receive an additional period of license suspension or revocation of not less than the period of suspension or revocation remaining in effect at the time of commission of the offense of driving with a suspended or revoked license.

"(f) The Secretary shall, by rule, establish criteria for effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol, which criteria shall be in addition to those required for a basic grant under subsection (e)(1). The Secretary shall establish such criteria in cooperation with the States and political subdivisions thereof, appropriate Federal departments and agencies, and such other public and nonprofit organizations as the Secretary may deem appropriate. Such criteria may include, but need not be limited to, requirements—

"(1) for the establishment and maintenance of a statewide driver recordkeeping system from which repeat offenders may be identified and which is accessible in a prompt and timely manner to the courts and to the public;

"(2) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while intoxicated;

"(3) for the impoundment of any vehicle operated on a State road by any individual whose driver's license is suspended or revoked for an alcohol-related driving offense;

"(4) for the establishment in each major political subdivision of a State of locally coordinated alcohol traffic safety programs which

are administered by local officials and are financially self-sufficient;

"(5) for the grant of presentence screening authority to the courts;

"(6) for the setting of the minimum drinking age in such State at twenty-one years of age;

"(7) for the consideration of and, where consistent with other provisions of State law and constitution the adoption of, recommendations that the Presidential Commission on Drunk Driving may issue during the period in which rules are being made to carry out this section; and

"(8) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while under the influence of a controlled substance or for the establishment of research programs to develop effective means of detecting use of controlled substances by drivers.

"(g) There is hereby authorized to be appropriated to carry out this section, out of the Highway Trust Fund, \$25,000,000 for the fiscal year ending September 30, 1983, and \$50,000,000 per fiscal year for each of the fiscal years ending September 30, 1984, and September 30, 1985. All provisions of chapter 1 of this title that are applicable to Federal-aid primary highway funds, other than provisions relating to the apportionment formula and provisions limiting the expenditures of such funds to Federal-aid systems, shall apply to the funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section and except that sums authorized by this subsection shall remain available until expended. Sums authorized by this subsection shall not be subject to any obligation limitation for State and community highway safety programs."

Effective and Applicability Provisions

2005 Acts. Amendments to this section by Pub.L. 109-59, §§ 2002 to 2007, effective Oct. 1, 2005, see Pub.L. 109-59, § 2022, set out as a note under 23 U.S.C.A. § 402.

LAW REVIEW AND JOURNAL COMMENTARIES

Put down that drink!: Double jeopardy drunk driving defense is not going to save you. David G. Dargatis, 81 Iowa L.Rev. 775 (1996).

LIBRARY REFERENCES

American Digest System
Automobiles ¶5.

Highways ¶99.1.
Key Number System Topic Nos. 48A, 200.

Research References

ALR Library
54 ALR 4th 149, Validity, Construction, and Application of Statutes Directly Proscribing

Driving With Blood-Alcohol Level in Excess of Established Percentage.

§ 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-

highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170, and amended Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591; Pub.L. 109-59, Title I, § 1401(a)(3)(C), Aug. 10, 2005, 119 Stat. 1225.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2005 Acts. House Conference Report No. 109-203, see 2005 U.S. Code Cong. and Adm. News, p. 452.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S24.

Amendments

2005 Amendments. Pub.L. 109-59, § 1401(a)(3)(C), struck out "152" and inserted "148".

LIBRARY REFERENCES

American Digest System

Automobiles ⊕5.
Key Number System Topic No. 48A.

Corpus Juris Secundum

CJS Witnesses § 361, Official Information or Information Acquired by Public Officers; Executive Privilege.

Research References

ALR Library

192 ALR, Fed. 129, Validity, Construction, and Application of Intermodal Surface Transportation Efficiency Act.

181 ALR, Fed. 147, Validity, Construction, and Operation of Evidentiary Privilege of 23 U.S.C.A. § 409.

15 ALR 6th 1, Admissibility of Evidence of Prior Accidents or Injuries at Same Place.

84 ALR 4th 15, Discoverability of Traffic Accident Reports and Derivative Information.

165 ALR 1302, Constitutionality, Construction, and Effect of Statute or Regulation Relating Specifically to Divulgence of Information Acquired by Public Officers or Employees.

59 ALR 1555, Evidence: Privilege of Communications Made to Public Officer.

Encyclopedias

6 Am. Jur. Proof of Facts 2d 683, Defective Design or Setting of Traffic Control Signal.

17 Am. Jur. Proof of Facts 2d 413, Highway Defects—Barrier or Guardrail.

18 Am. Jur. Proof of Facts 2d 611, Extrahazardous Nature of Railroad Crossing—Obstruction of View.

27 Am. Jur. Proof of Facts 2d 471, Unreasonable Speed of Train at Railroad Crossing.

37 Am. Jur. Proof of Facts 2d 439, Inadequacy of Warning Device at Railroad Crossing.

50 Am. Jur. Proof of Facts 2d 63, Highway Defects—Liability for Failure to Install Median Barrier.

14 Am. Jur. Proof of Facts 3d 527, Highway Defects—Negligent Design or Maintenance of Curve.

30 Am. Jur. Proof of Facts 3d 307, Evidence of Subsequent Remedial Measures in Civil Cases.

31 Am. Jur. Proof of Facts 3d 351, Establishing Liability of a State or Local Highway Administration, Where Injury Results from the Failure to Place or Maintain Adequate Highway Signs.

41 Am. Jur. Proof of Facts 3d 1, Recovery and Reconstruction of Electronic Mail as Evidence.

41 Am. Jur. Proof of Facts 3d 109, Governmental Liability for Failure to Maintain Trees Near Public Way.

71 Am. Jur. Proof of Facts 3d 1, Proof of the Roadside Hazard Case.

86 Am. Jur. Proof of Facts 3d 1, Online Research and Evidence in Products Liability Litigation.

2 Am. Jur. Trials 409, Locating Public Records.

23 Am. Jur. Trials 1, Railroad Crossing Accident Litigation.

74 Am. Jur. Trials 1, Handling a Grade Crossing Collision for Locomotive Cab Occupants.

74 Am. Jur. Trials 157, Railroad Trespasser Accident Litigation.

103 Am. Jur. Trials 123, Admission of E-Mail Evidence in Civil Actions.

Forms

1 West's Federal Forms § 122, Motion to Determine Party Status.

Treatises and Practice Aids

Courtroom Handbook of Federal Evidence FRE R 402, Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

Courtroom Handbook of Federal Evidence FRE R 703, Bases of Opinion Testimony by Experts.

Courtroom Handbook of Federal Evidence FRE R 803(8)-(10), Public Records and Reports.

2. Affidavit of Service by Mail:

to the following parties:

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DATED this 9th day of June, 2011.


CATHI KEY

SIGNED AND SWORN to before me on June 9, 2011, by Cathi

Key.





Print Name: REBECCA BARRETT
Notary Public residing at LYNNWOOD, WA.
My appointment expires 4-9-2014

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