

No. 41180-6-II

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

NANETTE AURDAL and ARNOR STEVEN AURDAL  
Respondents,

v.

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

and

UNITED TELEPHONE COMPANY OF THE NORTHWEST, dba  
SPRINT, an Oregon corporation doing business in the State of  
Washington, JOHN BURNSTON AND "JANE DOE" BURNSTON,  
husband and wife, and the marital community composed thereof,  
Appellants.

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REPLY BRIEF OF APPELLANTS

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The trial court committed prejudicial error in this negligence action when it instructed the jury on Washington's inapplicable hit-and-run law, RCW 46.52.020.<sup>1</sup> Compounding the error and increasing the prejudice to Appellants, the trial court misstated the law in the jury instruction. The judgment entered in this case should be reversed.

**I. RESPONDENTS' STATEMENT OF THE CASE IS INCONSISTENT WITH THE TESTIMONY OF NANETTE AURDAL, JOHN BURNSTON, JOSEPH CRITTENDEN, AND PHILLIP HUNTINGFORD.**

Before addressing Respondents' legal arguments, Appellants take issue with Respondents' "Statement of the Case." Respondents state that deputy sheriff Dale Wurtsmith "arrived at the scene" of Nanette Aurdal's collision with the Huntingford's injured or dead horse "before Burnston returned." Brief of Respondents ("Resp. Br.") at 6. Respondents are so desperate to characterize Burnston's conduct as hit-and-run<sup>2</sup> that they ignore Aurdal's testimony about the events following her accident:

Q. Do you remember who arrived on the scene after you got out of the car?

A. After a while, the Sprint truck driver Mr. Burnston, the farrier, and Phil Huntingford, and then the sheriff came.

RP 566.

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<sup>1</sup> Citations in this brief to RCW 46.52.020 refer to the version of the statute in effect in December 2001, unless the text indicates otherwise.

<sup>2</sup> See, e.g., Resp. Br. at 1 ("This appeal arises out of a hit-and-run."); RP 1122.

If that admission were not clear enough regarding Burnston's return to the site of his collision with the Huntingfords' horse before the arrival of the deputy sheriff, Aurdal also testified:

Q. After you hit the horse, you got out of the car at some point, correct?

A. Yes.

Q. And you had a little bit of difficulty getting out of the car because you had difficulty getting your seat belt off?

A. Correct.

Q. And then after you got out of the car, you went behind your car?

A. I started to go back to make sure that the animal wasn't in the road.

Q. And at that point, Mr. Burnston arrived in the Sprint vehicle?

A. No. He -- I was out there by myself in the dark before he showed up.

Q. You were out there for some period of time, but Mr. Burnston showed up first?

A. I believe so, yes.

Q. And then, after that, the farrier showed up?

A. Correct.

Q. And then after that, Phillip Huntingford showed up?

A. Correct.

Q. And it was only after Mr. Burnston, the farrier, and Mr. Huntingford showed up, it was after that that the sheriff arrived?

A. Correct.

RP 703-04.

The testimony of Respondent Nanette Aurdal is consistent with the description of events provided by John Burnston. According to Burnston, after he parked his truck safely off the highway at Sprint's place of business a short distance beyond the Huntingfords' farm, it took him and his colleague, Dale Swearingen, just a few minutes to return in

Swearingen's van to the place where Burnston's truck had struck the horse. RP 1093, 1096-97. When they arrived there, Aurdal was the only person present. RP 1098. While Burnston went to check on Aurdal, Swearingen headed north to put out flares. *Id.* Burnston testified that it then took "about 15, 20 minutes" for the deputy sheriff to arrive. RP 1104. Before the deputy made it to the scene, a "younger gentleman stopped, and he told us he knew who the horse belonged to and that he would go get an owner." *Id.* Phillip Huntingford subsequently arrived "with a backhoe and a chain and was going to drag the horse away." *Id.* Aurdal objected, however, saying "she wanted it left there until the deputy arrived on scene." RP 1105.

Burnston's testimony is corroborated not only by Aurdal's admissions, but also by the testimony of the farrier and the testimony of one of the horse's owners. The farrier, Joseph Crittenden, testified that he was in the Huntingfords' milking parlor when Phillip Huntingford came in, told him that the horse had escaped her pen, and asked him to catch her. RP 1178, 1180. When Crittenden approached the horse and reached for her halter, she "bucked and ran ... heading down the driveway and around the corner." RP 1183-84. To try to persuade her to return, Crittenden went to the house to get some grain. RP 1185. After obtaining the grain, Crittenden headed back down the driveway and saw "some

lights on the road.” RP 1186-87. When he “got around that bend in the driveway,” he “ran out on the road” where he saw “two men,” “one woman,” and the horse “laying on the road.” RP 1187. After he “figured out everybody was okay,” and heard that someone had “already called ... the sheriff’s department,” Crittenden went “back up to the farm to get Phil.” *Id.*

Phillip Huntingford’s family owned the horse. RP 532. Huntingford testified that Crittenden “came running back into the [milking] parlor and said he thought the horse had been hit on the road.” RP 1029. On hearing Crittenden’s news, Huntingford “went and got the backhoe because [Crittenden] said he was sure it was down on the road.” *Id.* When he got to the highway, Huntingford first recognized John Burnston and then saw Nanette Aurdal. RP 1030. He also saw someone he did not know “standing by John.” *Id.* When Huntingford asked if he could move the horse “because it was laying on the road,” Aurdal told him “she didn’t want it moved until the sheriff got there.” RP 1032.

The admissions of Nanette Aurdal and the testimony of the other persons most closely involved in the incidents contradict the description of events Respondents have given this Court. Resp. Br. at 6-7. The same evidence refutes Respondents’ characterization of Burnston’s conduct as

“hit-and-run.” This mischaracterization set the stage for Respondents’ flawed legal arguments.

**II. BECAUSE RCW 46.52.020 IS NOT APPLICABLE TO THE CASE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING A JURY INSTRUCTION BASED ON THE STATUTE.**

**A. The Hit-and-Run Statute Is Inapplicable on Its Face.**

Respondents argue that RCW 46.52.020(2) applied to their negligence action because Burnston was the driver of a vehicle “involved in an accident resulting only in damage to a vehicle ... or other property....” Resp. Br. at 8-10. According to Respondents, because the Huntingfords’ horse “was ‘other property’” (an assertion with which Appellants have never disagreed), Burnston had a statutory duty to “immediately stop and remain at the accident scene.” Resp. Br. at 9-10.

The problem with Respondents’ argument is that it omits critical portions of the statutory language. RCW 46.52.020 does not require a driver involved in an accident resulting in property damage to stop at the scene and remain there indefinitely, as Respondents suggest. Rather, it mandates that a driver stop “at the scene of such accident or as close thereto as possible and ... forthwith return to, and ...remain at, the scene of such accident *until he or she has fulfilled the requirements of subsection (3) of this section.*” RCW 46.52.020(2) (emphasis added). The “requirements of subsection (3)” are to give identifying information

“to any person struck or injured or the driver or occupant of, or any person attending, any such vehicle collided with” and to “render to any person injured in such accident reasonable assistance.” RCW 46.52.020(3). Because there was no person “struck or injured” when Burnston hit the horse, and no driver or occupant of, or person attending, a vehicle “collided with,” there was no person at the scene to whom Burnston could have provided identifying information or rendered assistance. As Burnston could not have “fulfilled the requirements of subsection (3),” the statute was inapplicable.

The requirements of subsection (3) cannot be characterized as “irrelevant portions of the statute” as Respondents argue, Resp. Br. at 8, inasmuch as the purpose of the statute is “to assure that drivers stop *and* give aid and information.” *State v. Perebeynos*, 121 Wn. App. 189, 190, 87 P.3d 1216 (2004) (emphasis added); see also discussion at 9-11, *infra*. It is ironic that Respondents accuse Appellants of “[i]gnoring the applicable statutory language,” Resp. Br. at 10, when it is Respondents who would have this Court ignore crucial statutory language in order to turn an inapplicable statute into one that is applicable.

The Alaska Supreme Court recognized the inapplicability of Alaska’s hit-and-run statutes in an analogous case. *Parnell v. Peak Oilfield Serv. Co.*, 174 P.3d 757 (Alaska 2007) was a negligence action

brought by a person injured when the vehicle in which she was riding struck an unattended dead moose on the highway. The plaintiff sued the driver of a pickup truck who had continued driving after striking and potentially killing the moose. Based on a provision of Alaska's hit-and-run statutes, the plaintiff moved for summary judgment and then for judgment notwithstanding the verdict on her negligence per se claim. The trial court denied the plaintiff's motions, citing two cases describing the purposes of Alaska's hit-and-run statutes (preventing drivers from escaping liability and ensuring availability of prompt assistance to motorists in distress), and ruling the statute was "not applicable to the fact situation in this case." 174 P.3d at 766. The Alaska Supreme Court agreed. *Id.* The trial court here should have reached the same conclusion.

**B. The Hit-and-Run Statute Is Inapplicable Because It Is Not Intended to Prevent Accidents or Require Warnings of Hazardous Road Conditions.**

**1. Appellants Applied the Correct Test When Arguing that RCW 46.52.020 is Inapplicable.**

Although Respondents argue at length that Appellants applied "the wrong test" (i.e., the four-part test established by § 286 of the Restatement (Second) of Torts) when arguing that the trial court improperly instructed the jury that they could consider violation of RCW 46.52.020 as evidence of negligence, Resp. Br. at 11-21, it is Respondents who are wrong. Respondents ignore the Washington Supreme Court's directive that a

statute “must ... be shown to be applicable under the negligence per se test before its violation may be introduced even as mere evidence of negligence.” *Bauman v. Crawford*, 104 Wn.2d 241, 248 n.1, 704 P.2d 1181 (1985). Citing *Young v. Caravan Corp.*, 99 Wn.2d 655, 663 P.2d 834 (1983), which in turn cited § 286, 99 Wn.2d at 659-60, the supreme court explained further: “That is, the statute must be designed to protect the proper class of persons, to protect the particular interest involved, and to protect against the harm which results.” *Bauman*, 104 Wn.2d at 248, n.1. Thus, contrary to Respondents’ argument, regardless of whether a negligence claim is based on a duty created by statute or on a duty created by common law, § 286 sets forth the proper test to determine whether evidence of a statutory violation is admissible as evidence of negligence.<sup>3</sup>

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<sup>3</sup> The cases Respondents rely upon do not prove to the contrary. Citing *Bauman*, the court in *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) stated that “a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care,” but omitted any discussion of when a statute or regulation may be considered for that purpose. In *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002), the court not surprisingly held that statutes governing decisions on whether to release an inmate on parole “are not applicable” when the issue instead is whether parole should be revoked, and that it was not error for the trial court to refuse to give jury instructions based on inapplicable statutes. Neither decision purports to overrule *Bauman*’s mandate that the requirements of § 286 be met before a statute’s violation may be introduced as evidence of negligence. *Cresap v. Pac. Inland Navigation Co.*, 78 Wn.2d 563, 478 P.2d 223 (1970) and *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 419 P.2d 141 (1966) both pre-date *Bauman*, and involved administrative regulations not binding on the

**2. RCW 46.52.020 Does Not Protect Against Further Accidents.**

Respondents did not show and cannot show that the requirements of § 286 are met in this case. *See Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307(1989) (applying § 286 requirements and concluding purpose of statute was not to protect against particular hazard from which harm resulted). Although Respondents argue that the “underlying purpose of RCW 46.52.020 is to facilitate accident investigations, to provide aid to the injured, and to prevent further accidents,” Resp. Br. at 19, it is *not* a purpose of the hit-and-run statute to protect against “further accidents” (or, more specifically, to protect other motorists against accidents caused in whole or in part by livestock having been injured or killed on a public highway). *Cf. Parnell*, 174 P.3d at 766 (rejecting plaintiff’s argument that Alaska’s hit-and-run statute was intended to “protect the motoring public [from] any hazards associated with the accident” – the earlier accident in that case being defendant’s collision with a moose).

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defendants. *See Bayne v. Todd Shipyards Corp.*, 88 Wn.2d 917, 921-22, 568 P.2d 771 (1977) (distinguishing *Cresap* and *Vogel*; superseded on other grounds by statute). In any event, the regulations at issue in both cases appear to meet the requirements of § 286. Finally, Respondents cite no case suggesting that § 286 is rendered inapplicable to determine whether a statutory violation may be considered as evidence of negligence merely by the courts’ use of § 286 to determine whether a statute imposes a duty “that is additional to, and different from” the common law duty to exercise ordinary care. *Mathis v. Ammons*, 84 Wn. App. 411, 928 P.2d 431 (1996).

The authorities Respondents cite do not support their argument. In *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983), the court described the “underlying rationale” of the statute as “facilitating investigation of accidents and providing immediate assistance to those injured,” but said nothing about a legislative intent “to prevent further accidents.” In Respondents’ other case, *Lyle v. Fiorito*, 187 Wash. 537, 60 P.2d 709 (1936), the court said nothing about RCW 46.52.020 because the case did not involve an alleged hit-and-run. Taking it out of context, Respondents rely on the *Lyle* court’s dictum that the “purpose of laws and rules regulating the use of roads is to prevent accidents and to expedite traffic, in so far as speed is consistent with safety,” 187 Wash. at 543, and pay no attention to the fact that the hit-and-run statute is not part of this state’s “Rules of the Road,” which are found in RCW ch. 46.61.

In *State v. Perebeynos*, 121 Wn. App. 189, 190, 87 P.3d 1216 (2004), the court states plainly that “[t]he purpose of the hit-and-run statute is to assure that drivers stop and give aid and information.” According to that court, “the rationale underlying the hit-and-run statute ... is to facilitate investigation of accidents, identify those responsible, and provide immediate assistance to those injured.” *Id.* at 194.<sup>4</sup> The court’s

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<sup>4</sup> Respondents’ argument that the “primary statutory duty” is “to immediately stop and remain at the scene,” and that if this “predicate

description of the statute's purpose and underlying rationale contains no mention of "prevent[ing] further accidents." Although Respondents argue that *Perebeynos* is "inapposite" (apparently because the opinion arises out of a felony hit-and-run conviction instead of a tort case), Resp. Br. at 21-22, "statutory construction and policy concerns" are implicated here, just as they were in that case. *Perebeynos*, 121 Wn. App. at 194.

Similarly, that the decision in *City of Seattle v. Stokes*, 42 Wn. App. 498, 712 P.2d 853 (1986) arose out of another criminal matter does not render "inapposite" or "inapplicable," Resp. Br. at 21-22, the *Stokes* court's distinction between the reckless driving statute and the hit-and-run statute. The former is "aimed at preventing the danger of accidents" (and is part of RCW ch. 46.61), while the latter is "aimed at protecting accident victims." 42 Wn. App. at 502.

In sum, RCW 46.52.020 did not impose on Burnston any statutory duty "to prevent further accidents." It was prejudicial error to give an instruction allowing Respondents to suggest otherwise.

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obligation" is not satisfied, the "remaining duties" of providing aid and information become "irrelevant," Resp. Br. at 24, is inconsistent with the purpose of RCW 46.52.020, as described above, and is not supported by any legal authority. Further, it is Respondents', rather than Appellants', reading of the statute that is "perverse." Resp. Br. at 24. Respondents would have the Court read the statute to require that a person involved in a single-vehicle accident resulting only in damage to property stop and remain at the scene of the accident indefinitely even though there is no one present to whom information or assistance can be given.

3. **RCW 46.52.020 Does Not Require Drivers Involved in Accidents to Provide Warnings to Other Motorists.**

Respondents also did not show and cannot show that the purpose of the hit-and-run statute is to require warnings of road hazards. There is nothing in the language of RCW 46.52.020 that suggests a duty is imposed on a person involved in one accident to warn other motorists of potentially dangerous road conditions created by or related to the accident.

Respondents acknowledge this when they argue that Burnston “had an *independent duty* – under common law ... to warn Aurdal of the hazard he created.” Resp. Br. at 17 (emphasis added).

Because the hit-and-run statute did not require Burnston to take any action to warn Aurdal or other motorists of any roadway hazard, contrary to Respondents’ argument, the statute was *not* proper evidence that Burnston “*negligently failed to remain at the scene and warn Aurdal.*” Resp. Br. at 17 (emphasis added).<sup>5</sup> Burnston had no statutory duty to

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<sup>5</sup> Applying a “relevance-based evidentiary test,” as Respondents suggest, Resp. Br. at 16-18, would not change the outcome. *Cf. Bauman*, 104 Wn.2d at 248, n.1 (equating § 286 test to relevance). The factual question before the jury was whether, after striking the Huntingfords’ horse on the highway with his vehicle, Burnston was negligent in failing to take some warning action that could have prevented Aurdal or another motorist from sustaining injury caused in whole or in part by running into the horse Burnston had injured or killed. The fact that Burnston did not “stop and give aid and information” to anyone when he hit the horse makes it no more or less probable that Burnston exercised ordinary care to avoid

“remain and warn,” and it was prejudicial error to give an instruction allowing Respondents to suggest otherwise.

**4. RCW 46.52.020 Does Not Protect Against the Death of Livestock When That Livestock Runs Onto a Public Highway.**

Respondents’ argument that the trial court properly gave Instruction No. 18 because the hit-and-run statute’s purpose included protection of the Huntingfords, Resp. Br. at 20, is flawed on several grounds. First, the Huntingfords asserted no claim against Appellants, CP 58-63, and Respondents have no standing to assert claims on the Huntingfords’ behalf. Second, the Huntingfords proposed no hit-and-run instruction. CP 81-108. Third, the argument that RCW 46.52.020 is intended to protect the owners of a horse that wanders onto a public highway against a “hit and run” is, not surprisingly, an argument for which Respondents cite no authority. *Cf.* RCW 16.24.065 (statutory prohibition against allowing one’s livestock to wander or stray onto a public highway). Fourth, Phillip Huntingford testified that Burnston was already on site when Huntingford arrived at the scene of the accidents. RP 1030. From the Huntingfords’ perspective, this makes it impossible to characterize Burnston’s conduct as “fleeing” to escape liability.

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placing other motorists in danger. Accordingly, even under Respondents’ incorrect “relevance-based evidentiary test,” it was error to give Instruction No. 18.

**C. Appellants Excepted to the Giving of an Instruction Based Upon Inapplicable Law.**

Appellants excepted to the giving of Instruction No. 18 and told the trial court that the basis for the exception was that the hit-and-run statute, on which Instruction No. 18 was based, does not apply to the case. RP 1267, 1230-32; CP 142. Appellants therefore met their obligation to apprise the judge of the nature and substance of their objection. *See Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983).

**D. Because RCW 46.52.020 Was Inapplicable, It Was Reversible Error to Give a Jury Instruction Setting Forth Language from the Statute.**

Statutory language in a jury instruction “is appropriate only if the statute is applicable, reasonably clear, and not misleading.” *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002). Respondents do not contend otherwise; instead, they argue that RCW 46.52.020 is “applicable.” Resp. Br. at 9-23. But for all the reasons discussed above and in Appellants’ opening brief, this state’s criminal hit-and-run statute is *not* applicable to this case. Because the statute is inapplicable, it was reversible error to give an instruction containing a portion of the statutory language. *See Del Rosario v. Del Rosario*, 152 Wn.2d 375, 387, 97 P.3d 11 (2004).<sup>6</sup>

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<sup>6</sup> Because RCW 46.52.020 does not apply here and its partial inclusion in Instruction No. 18 is not consistent with precedent, Respondents’ attempt to distinguish *Del Rosario*, Resp. Br. at 23, is not well-taken.

### **III. INSTRUCTION NO. 18 CONTAINED AN INACCURATE AND MISLEADING STATEMENT OF THE LAW.**

Respondents do not deny that Instruction No. 18 contained a truncated description of what RCW 46.52.020 “provides.” They do not deny that the instruction failed to mention that RCW 46.52.020(2) requires a driver involved in an accident resulting in injury or death to a person or damage to property to stop and remain at the scene of the accident only “until” the driver has provided the information and assistance specified by RCW 46.52.020(3). Respondents’ sole response to Appellants’ contention that Instruction No. 18 contained an inaccurate and misleading statement of the law is that the Court should not reach this argument because Appellants “fail[ed] to preserve the issue.” Resp. Br. at 23.

The two cases Respondents cite in support of their argument do not help them. In *Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), the court declined to decide whether a claimed error in a jury instruction had been preserved. *Id.* at 326. As for *Farm Crop Energy, Inc. v. Old Nat’l Bank of Washington*, 109 Wn.2d 923, 750 P.2d 231 (1988), Respondents neglect to mention they are citing the dissent. See Resp. Br. at 23, citing page 942 of the *Farm Crop Energy* decision. The majority in that case *did* reverse the jury verdict due to instructional error and remanded the case for a new trial. 109 Wn.2d at 924.

This Court can and should address the error made by the trial court in giving a jury instruction that contained an inaccurate statement of the law. *See, e.g., State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011) (appellate court is not prohibited by RAP 2.5(a) from reviewing an issue not raised in trial court). The inaccurate statement was misleading and prejudicial.

**IV. THE JUDGMENT SHOULD BE REVERSED BECAUSE GIVING INSTRUCTION NO. 18 WAS NOT HARMLESS ERROR.**

Respondents do not dispute that when there is an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to be prejudicial, and to furnish ground for reversal, unless it affirmatively appears that the error was harmless. *See Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995); *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010). To try to prove that the trial court's error in giving Instruction No. 18 was harmless, Respondents argue that the hit-and-run statute "was merely cumulative" of evidence that "Burnston was obligated to immediately stop and remain at the scene." Resp. Br. at 26-27. Burnston, however, had no legal obligation to do anything other than exercise ordinary care. And while Respondents can argue, based on the evidence, that "ordinary care" required Burnston "to immediately stop and

remain at the scene,” it was error to tell the jury that this state’s hit-and-run statute obligated Burnston to do so. This error was *not* harmless because the jury might well have believed that Burnston’s post-accident conduct (continuing to drive just a short distance to a place where he could safely park his truck off the highway and then returning promptly with a colleague who could help locate the injured animal and/or set up warning devices) would have met the “ordinary care” standard but for Burnston’s violation of a statutory duty “to immediately stop and remain at the scene.”<sup>7</sup> The trial judge implicitly acknowledged the potential for this jury confusion when he agreed with Appellants that Respondents could argue for a verdict of negligence “on general negligence principles,” but wondered “if the statute is going to be ... confusing to the jury ....” RP 1232.

Respondents also argue that the error was “harmless” because “even without Instruction 18, the jury would still have to conclude that Burnston had an obligation to stop immediately and remain at the scene.” Resp. Br. at 28. But that simply is not true – there is no legal basis for a specific duty “to immediately stop and remain.” Moreover, Respondents

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<sup>7</sup> The jury did not find that “Burnston’s hit-and-run caused Aurdal’s injuries,” as Respondents claim. Resp. Br. at 20. Rather, the jury found that Appellants’ *negligence* caused the injuries. RP 292. The point of this appeal is that that negligence verdict was the result of prejudicial error.

again mischaracterize the record when they claim that Appellants “admitted there were alternative independent bases for the jury to find Burnston obligated to stop and remain at the scene.” Resp. Br. at 28. Respondents cite (a) Appellants’ lack of objection to the admission of a trial exhibit reflecting “a generic guideline” from Sprint’s insurance company about what to do in case of an accident, Resp. Br. at 28, citing RP 46-47, Ex. 26; see also RP 36-37;<sup>8</sup> (b) testimony of Respondents’ traffic accident reconstruction consultant, Resp. Br. at 28, citing RP 221; and (c) Appellants’ colloquy with the trial judge to the effect that while Respondents might argue an obligation to stop based on general negligence principles, the hit-and-run statute does not apply, Resp. Br. at 28, citing RP 1232. *None of the evidence cited by Respondents reflects any admission* by Appellants that there were alternative bases for a legally cognizable “stop and remain” duty.

Finally, while Appellants have never claimed that Respondents cannot submit their case to a jury based on common law negligence

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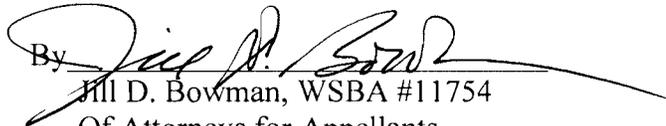
<sup>8</sup> Similarly, Respondents’ reference to “Sprint’s safety policy and common practice” Resp. Br. at 27, is misleading. The Sprint supervisor’s testimony at RP 37 and 42 is about the insurer’s “generic guideline” (“not a company safety practice product”) and the testimony at RP 56 indicates that Sprint had no common practice or procedure “written in concrete” about what to do in the event of an accident. Respondents have not established that there were any private standards requiring Burnston “to immediately stop and remain at the scene.”

principles, the whole point of the appeal is that the verdict on Respondents' common law claim was impermissibly tainted by the erroneous instruction telling the jury that Burnston had a statutory duty "to immediately stop and remain [indefinitely]" at the scene of his accident, and by Respondents' arguments that Burnston violated this duty and committed a "hit and run." Given the evidence presented to the jury, Instruction No. 18 may well have been the reason the jury rendered a verdict finding Appellants negligent.

When a respondent fails to show that an error in a jury instruction was harmless, the proper remedy is reversal of the judgment and remand. *See, e.g., Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997) (reversing and remanding for a new trial in a negligence action, after concluding it was not harmless error for jury to have been instructed on doctrine of assumption of risk, determining there was a reasonable likelihood of a skewed verdict based on instruction error). Respondents in this case have not met their burden of proving that the giving of Instruction No. 18 was harmless error. Accordingly, Appellants respectfully submit that this Court should reverse the judgment entered by the trial court and remand this matter for a new trial.

DATED this 15th day of June, 2011.

STOEL RIVES LLP

By   
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Of Attorneys for Appellants

CERTIFICATE OF FILING AND SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, the original and one <sup>K</sup> copy of the foregoing Reply Brief of Appellants, postage prepaid, via first class U.S. mail, on the 15th day of June, 2011, to:

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals: Division II  
950 Broadway, #300 MS TB-06  
Tacoma, WA 98402

I also certify that I mailed, or caused to be mailed, a copy of the foregoing Reply Brief of Appellants, postage prepaid, via first class U.S. mail, on the 15th day of June, 2011, to each of the following counsel of record at the following addresses:

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