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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

NANETTE AURDAL and ARNOR STEVEN AURDAL
Respondents,

v.

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,
Petitioners,

and

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,
Defendants.

PETITIONERS' SUPPLEMENTAL BRIEF

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I. The Trial Court Plainly Understood the Bases For Petitioners' Objection to Plaintiffs' Proposed Jury Instruction. It Therefore Was Error to Deny Appellate Review of the Defects in That Instruction.

Although this is a negligence case and not a criminal prosecution, Plaintiffs proposed a jury instruction based on a "highly truncated summary" of Washington's hit-and-run statute, RCW 46.52.020. *Aurdal v. Burnston*, No. 41180-6-II, 2012 Wash. App. LEXIS 1324, at *8 (Wash. Ct. App. June 5, 2012); CP 142.¹ The trial judge participated in an extended discussion about the proposed instruction and Petitioners' objection to it. RP 1228-32, 1267.

During the discussion, the trial judge took note of the statutory requirement that a driver involved in an accident render reasonable assistance to any injured person and provide identifying information to any person whose property is damaged. RP 1229:2-10, 1230:10-25. The assistance and information requirements are set forth in subsection 3 to RCW 46.52.020. *See* RCW 46.52.020(3). Another subsection of the same statute instructs the driver to stop at the accident scene and remain there "until he or she has fulfilled the requirements of subsection (3)...." RCW

¹ The proposed instruction was based on the version of RCW 46.52.020 in effect in December 2001, when the accidents leading to this lawsuit occurred. Citations to RCW 46.52.020 in this brief refer to that version of the statute, a copy of which is provided in the attached Appendix, at pages 1-2.

46.52.020(2). The trial judge observed that in their proposed instruction, Plaintiffs were “leaving out” that the driver’s statutory duty is to stop and remain at the accident scene “until” subsection 3’s assistance and information requirements are “fulfilled.” RP 1230:11-14. This observation showed the trial judge was aware of the omission of critical terms of the statute.

The trial judge then asked “how [does a driver] fulfill the requirements of [s]ubsection 3 if [he] hit[s] a horse?” RP 1230:16-18. Taken in context, this rhetorical inquiry reflected an acknowledgment that when a driver’s vehicle strikes an unattended animal, there is no one at the scene of the accident to whom the driver can render aid or provide information. Based on that acknowledgment, Petitioners objected to the instruction on the ground that RCW 46.52.020(3) does not apply when a vehicle strikes a horse on a public highway. RP 1232:6-15.²

After indicating he was aware that a driver’s collision with an animal does not fit within the terms of RCW 46.52.020(3), *see* RP 1229:2-12, 1230:17-19, the trial judge observed that the “whole object” of the hit-

² Petitioners reiterated their position when the trial judge invited formal exceptions. RP 1266:21-23. Excepting to the proposed instruction, they argued that RCW 46.52.020, “when read in its entirety,” does not “apply to an accident with an animal.” RP 1267:20-21.

and-run law is to ensure that “somebody’s property doesn’t get damaged and they don’t know how the damage occurred.” RP 1230:19-21. When Plaintiffs pointed out that the statute also “say[s] that you render assistance,” the trial judge agreed, but then asked again “[if] you hit a horse, does it apply?” RP 1230:22-1231:1. Petitioners’ negative response to this inquiry, RP 1231:2, took into account that the judge had already acknowledged the law’s entire purpose (*i.e.*, its “whole object”) was to protect accident victims.

Despite the trial court’s extended discussion of the proposed hit-and-run instruction (“instruction 18”³), the Court of Appeals, in a 2-1 decision, held that Petitioners’ objection “failed to comply with *CR 51(f)*” and did not adequately preserve for appellate review the issue of instruction 18’s defects.⁴ *Aurdal*, 2012 Wash. App. LEXIS 1324, at *6-7; *but see id.* at *10 (Quinn-Brintnall, J., dissenting) (stating that Petitioners “adequately apprised the trial court that *any* jury instruction related to Washington’s hit-and-run statutes was inappropriate”). The above discussion demonstrates, however, that the trial judge both knew that

³ A copy of instruction 18 is provided in the Appendix, at page 3.

⁴ The appellate court ignored key portions of the Report of Proceedings. *See Aurdal*, 2012 Wash. App. LEXIS 1324, at *5-6 (citing and quoting excerpts from RP 1231-32 and 1267, but omitting any mention of the discussion reported at RP 1229-30).

Petitioners' objection was based on the statute's inapplicability and was fully aware that the points of law supporting Petitioners' objection included (1) that the statute on its face does not require a driver to stop at the scene of a collision with an animal and remain there for an indeterminate period of time in order to perform unspecified acts when no one at the scene needs assistance or is present to accept identifying information; (2) that Plaintiffs "le[ft] out" of their proposed instruction the statutory requirement that a driver stop and stay at an accident scene "until" the statutory obligation to provide information and/or assistance is fulfilled; and (3) that the "whole object" of the hit-and-run statute is to protect accident victims. Given the trial judge's understanding of Petitioners' objection and the arguments supporting that objection, the Court of Appeals erred in holding that Petitioners failed to preserve for appellate review their challenge to instruction 18. *See Crossen v. Skagit County*, 100 Wn.2d 355, 358-59, 669 P.2d 1244 (1983) (holding it was error to deny review when "it was apparent ... the trial judge understood the basis of counsel's objection"); *see also Aurdal*, 2012 Wash. App. LEXIS 1324, at *10-17 (Quinn-Brintnall, J., dissenting) (concluding that Petitioners fulfilled CR 51(f)'s requirements and that their jury instruction

challenge was preserved for review because “the record definitively establishes that the trial court understood the grounds for objection”).

II. Giving Instruction 18 to the Jury Was Prejudicial Error.

The Court of Appeals conceded that Washington’s hit-and-run statute “does not apply” in situations such as Burnston’s “because [the statute] imposes no duty to stop and stay to *prevent further accidents.*” *Aurdal*, 2012 Wash. App. LEXIS 1324, at *7; *see also id.* at *11 n.1 (Quinn-Brintnall, J., dissenting). After making that concession, the Court of Appeals acknowledged that the trial court “err[ed] in giving jury instruction 18....” *Id.* at *7. Holding the error was harmless, the Court of Appeals refused to reverse the judgment. *Id.* at *7-10.

It is a long-standing rule in this state that whenever 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 have been prejudicial*, and to furnish ground for reversal, unless it affirmatively appears that it was harmless.” *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995); *accord State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1999); *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). An error is harmless only if it is “*trivial, or formal, or merely academic*, **and** was not prejudicial to the substantial rights of the party

assigning it, **and** *in no way affected the final outcome of the case.*”
Mackay, 127 Wn.2d at 311, 898 P.2d 284 (emphasis in italics in original;
emphasis added in bold). When it is claimed that an instructional error
was harmless, it is the appellate court’s duty to scrutinize the entire record
to determine whether the error was harmless or prejudicial. *See Blaney v.*
Int’l Ass’n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d
203, 211, 87 P.3d 757 (2004).

Contrary to the *Aurdal* court’s suggestion, it is *not* the burden of
“the party claiming error” to “show prejudice” when the appellate court
performs the record review. *Aurdal*, 2012 Wash. App. LEXIS 1324, at
*8.⁵ If an appellant proves an instruction given on behalf of the party in
whose favor the verdict was returned was erroneous, the error is
“presumptively prejudicial and supplies a ground for reversal.” *Mackay*,
127 Wn.2d at 312, 898 P.2d 284. The presumption of prejudicial error is

⁵ The *Aurdal* court cited *Magana v. Hyundai Motor Am.*, 123 Wn. App.
306, 316, 94 P.3d 987 (2004), for the proposition that an appellate court will
“reverse for instructional error only if the party claiming error can show
prejudice.” *Aurdal*, 2012 Wash. App. LEXIS 1324, at *8. The court failed to
take into account that the *Magana* appeal was based on a jury instruction the trial
court rejected. *Magana*, 123 Wn. App. at 316, 94 P.3d 987 (holding trial court
erred in rejecting defendant’s motion for a jury instruction regarding expert’s
stricken testimony). Because the case did not involve an erroneous instruction
given to the jury on behalf of the party in whose favor the verdict was rendered,
the *Magana* court had no reason to cite or follow the *Mackay* line of cases.

overcome only if it “affirmatively appears” the error was harmless. *Id.* at 311, 898 P.2d 284. Requiring the appellant to “show prejudice” at this stage of the proceedings would destroy the presumption and improperly skew the appellate court’s review of the record.

The flawed approach to record review espoused by the *Aurdal* majority may explain how the court arrived at the untenable conclusion that giving instruction 18 was harmless error. Scrutiny of the record reveals it was far from a “trivial,” “formal,” or “merely academic” matter to instruct the jury that Burnston had a *statutory* duty to “immediately stop” after a collision, when RCW 46.52.020 is the only statute that imposes a “duty to stop”⁶ and that statute was inapplicable.⁷ As the

⁶ Although Plaintiffs persist in arguing that Burnston had a “statutory ... duty to stop,” *see* Answer to Petition for Review at 5; *see also, e.g., id.* at 1 (“state-law mandate requiring Burnston to stop”), 4 (“statutory ‘mandate’ to stop”), 5 (“former RCW 46.52.020’s mandate that a driver involved in an accident must ‘immediately stop’”), the only source they have ever identified for this “statutory duty” is RCW 46.52.020 – a statute that was inapplicable under the circumstances of this case. Plaintiffs’ traffic accident reconstruction consultant testified that “state law mandates” a driver stop, RP 221, but later explained that the “law” he was referring to requires a driver “to stop, identify yourself, render aid, etc.,” RP 236, thus admitting that RCW 46.52.020 was the source of his statutory “mandate.” In any event, it is the trial judge’s “province alone to instruct the jury on the relevant legal standards.” *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (quoting *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997)).

⁷ This error was far from trivial because the jury might well have believed, as did the trial judge, that had Burnston immediately stopped when he hit the horse, *Aurdal* might have avoided her accident. *See* RP 1268:5-9.

dissent points out, the effect of giving that “incorrect and misleading instruction” was that it “all but directed the jury to find that Burnston breached a statutory duty.” *Aurdal*, 2012 Wash. App. LEXIS 1324, at *20 (Quinn-Brintnall, J., dissenting).

Compounding the prejudice is the fact that it was a hit-and-run statute that the jury was “all but directed to find” had been breached. Violating RCW 46.52.020 is a crime and it simply cannot be disputed that it is highly prejudicial to accuse someone of committing that crime. Plaintiffs would not otherwise have started both of their appellate briefs with that accusation. *See* Br. of Resps. at 1 (“This appeal arises out of a hit-and-run.”); Answer to Pet. for Review at 1 (“It is undisputed that Sprint employee John Burnston hit and ran....”). Giving instruction 18 to the jury was prejudicial to the substantial rights of Petitioners and may very well have affected the final outcome of the case.

The “evidence of Burnston’s wrongdoing” cited by the majority as the basis for their conclusion of harmless error, *see Aurdal*, 2012 Wash. App. LEXIS 1324, at *7-10, is insufficient to prove that instruction 18 in no way affected the final outcome of the case. Petitioners respectfully refer the Court to the dissenting opinion for a cogent explanation as to

why this is the case. *See id.* at *17-20 (Quinn-Brintnall, J., dissenting); *see also* Pet. for Discretionary Review at 10-11.

Giving instruction 18 was not a trivial error. It cannot be said that the error was not prejudicial to the substantial rights of Petitioners or that it did not in any way affect the final outcome of the case. Thus, out of the three criteria identified by this Court as necessary to prove an erroneous jury instruction is harmless, *see, e.g., Mackay*, 127 Wn.2d at 311, 898 P.2d 284, not a single one was satisfied. The presumption of prejudicial error was not overcome. The Court of Appeals' contrary conclusion was error.

III. Conclusion

For all the reasons stated in this supplemental brief and in the Petition for Discretionary Review, the Brief of Appellants, and the Reply Brief of Appellants, this Court should reverse both the opinion of the Court of Appeals and the judgment, and remand this case to the trial court for retrial.

DATED: March 8, 2013.

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APPENDIX

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CHAPTER 145

[Substitute House Bill 1649]

HIT AND RUN ACCIDENTS—DECEASED PERSONS

AN ACT Relating to hit and run causing injury to the body of a deceased person; amending RCW 46.52.020; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 46.52.020 and 2000 c 66 s 1 are each amended to read as follows:

(1) A driver of any vehicle involved in an accident resulting in the injury to or death of any person ~~or involving striking the body of a deceased person~~ shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

(2) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

(3) Unless otherwise provided in subsection (7) of this section the driver of any vehicle involved in an accident resulting in injury to or death of any person, ~~or involving striking the body of a deceased person, or resulting in damage to any vehicle which is driven or attended by any person or damage to other property~~ shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf. Under no circumstances shall the rendering of assistance or other compliance with the provisions of this subsection be evidence of the liability of any driver for such accident.

(4)(a) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident resulting in death is guilty of a class B felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

(b) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this

section in the case of an accident resulting in injury is guilty of a class C felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

(c) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident involving striking the body of a deceased person is guilty of a gross misdemeanor.

(d) This subsection shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying with this section.

(5) Any driver covered by the provisions of subsection (2) of this section failing to stop or to comply with any of the requirements of subsection (3) of this section under said circumstances shall be guilty of a gross misdemeanor: PROVIDED, That this provision shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying herewith.

(6) The license or permit to drive or any nonresident privilege to drive of any person convicted under this section or any local ordinance consisting of substantially the same language as this section of failure to stop and give information or render aid following an accident with any vehicle driven or attended by any person shall be revoked by the department.

(7) If none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (3) of this section, and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements of subsections (1) and (3) of this section insofar as possible on his or her part to be performed, shall forthwith report such accident to the nearest office of the duly authorized police authority and submit thereto the information specified in subsection (3) of this section.

Passed the House March 12, 2001.

Passed the Senate April 9, 2001.

Approved by the Governor May 2, 2001.

Filed in Office of Secretary of State May 2, 2001.

CHAPTER 146

[Substitute House Bill 1793]

COURT FILING FEES

AN ACT Relating to court filing fees; amending RCW 36.18.012, 36.18.016, 36.18.025, 40.14.027, 41.50.136, 46.87.370, 50.20.190, 50.24.115, 51.24.060, 51.48.140, 82.32.210, 82.36.047, and 82.38.235; and reenacting and amending RCW 51.32.240.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 36.18.012 and 1999 c 42 s 634 are each amended to read as follows:

(1) Revenue collected under this section is subject to division with the state for deposit in the public safety and education account under RCW 36.18.025.

JURY INSTRUCTION NO. 18

A statute provides that:

The driver of any vehicle involved in an accident resulting in damage to other property shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident; every such stop shall be made without obstructing traffic more than is necessary.

CERTIFICATE OF SERVICE BY MAIL

I certify that on March 8, 2013, I caused a copy of the foregoing
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Attached for filing in the matter of Nanette Aurdal et vir. v. United Telephone Company of the Northwest, et al., Washington Supreme Court Case No. 87915-0, is Petitioners' Supplemental Brief. I am one of the attorneys representing the Petitioners in this matter. My Washington State Bar number is 11754. My name, telephone number, and email address are provided below.

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