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COURT OF APPEALS
DIVISION II

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Supreme Court No. 879158
Court of Appeals No. 41180-6-II

STATE OF WASHINGTON

BY _____
DEPUTY

**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.

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STATE OF WASHINGTON
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PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF PETITIONERS

Petitioners are United Telephone Company of the Northwest,¹ and John Burnston and “Jane Doe” Burnston, husband and wife, and their marital community. Petitioners were appellants in the Court of Appeals.

COURT OF APPEALS’ DECISION

The Court of Appeals issued a 2-1 opinion on June 5, 2012. Appendix (“App.”) at 1-13. A motion to publish the opinion, filed on June 7, 2012, was denied on August 3, 2012. App. at 14; *see id.* at 19.

ISSUES PRESENTED FOR REVIEW

1. Respondents proposed, and the trial court gave, a legally incorrect and misleading jury instruction based on Washington’s hit-and-run statute. Although the record shows the trial judge understood the basis for Petitioners’ objection that the statute was inapplicable, the majority ruled that Petitioners did not satisfy CR 51(f) because trial counsel did not state all the arguments in support of his objection. Does the majority’s ruling regarding the scope of CR51(f) conflict with the Supreme Court’s decision in *Crossen v. Skagit County*, 100 Wn.2d 355,

¹ United Telephone Company of the Northwest does business under the trade name CenturyLink and is a wholly owned subsidiary of Embarq Corporation which is a wholly owned subsidiary of CenturyLink, Inc.

669 P.2d 1244 (1983), and/or raise an issue of substantial public interest that should be determined by this Court?

2. Although the majority acknowledged that the instruction based on Washington's hit-and-run statute was erroneous because the hit-and-run statute did not apply, it refused to reverse the judgment, ruling that "any error was harmless because Burnston suffered no prejudice." Does this ruling conflict with *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302 (1995), and *State v. Wanrow*, 88 Wn.2d 221 (1977), where this Court held that prejudice is presumed when an instruction contains a clear misstatement of the law?

STATEMENT OF THE CASE

A. Statement of Facts

On a dark evening in December 2001, John Burnston, a long-time installer/repairman employed by United Telephone Company of the Northwest, was driving a company "utility bucket truck" back to a company office. Following a vehicle driven by a co-worker, Burnston was nearing the company office when a black horse that had escaped its pen jumped out onto the public highway. Burnston swerved, but was unable to avoid a collision.

Burnston struggled to get his truck back under control and in his lane. Although he knew he had hit a horse, Burnston did not think the

horse had been killed. He had no working flashlight or truck radio, and no cell phone. He did not believe there was enough room on the shoulder of the road to park his utility truck safely off the pavement, and he knew it was against company policy to back up utility trucks without spotters. Believing it was better in these circumstances to drive the few hundred feet to the company office, park his truck safely off the road, and summon his co-worker to return to the scene with him and provide assistance, Burnston did just that.

Nanette Aurdal was driving her Ford Explorer on the same highway. Before Burnston and his co-worker could return to the site of the collision, Aurdal ran over the horse's body.

When the sheriff arrived at the scene, Burnston told him he had collided with the horse, that his truck's passenger side mirror had been knocked off, and that after the collision, he had gone up the road to his work station to get his co-worker to help him. He was cooperative in answering the sheriff's questions.

Aurdal told the sheriff she was fine, but a few days after the accident, she sought medical attention because she was sore. Her discomfort worsened over time, and she saw physical therapists and doctors, including a pain specialist.

B. Procedural Background

Aurdal and her husband filed a lawsuit in Jefferson County Superior Court. Asserting negligence claims against the Huntingfords for allowing their horse to escape their property and become a hazard on the road, and against Burnston and his employer for leaving the roadway without warning other drivers of a road hazard, the Aurdals sought damages for the injuries Aurdal sustained in her accident. Burnston and United Telephone (collectively, “Burnston”) denied having been negligent, as did the Huntingfords.

The dispute proceeded to trial before a jury. The Aurdals proposed an instruction based on portions of Washington’s hit-and-run statute, RCW 46.52.020. The proposed instruction told the jury:

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 the 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.

At the time of the accident, RCW 46.52.020(2) actually provided that:

The driver of any vehicle involved in an accident resulting in damage to a vehicle which is driven or attended by any person or damage to any 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.
(Emphasis added)

Subsection 3 of the statute directed the driver of a vehicle involved in an accident “resulting in injury to or death of any person, ... or resulting in damage to any vehicle which is driven or attended by any person or damage to other property” to give identifying information and/or provide reasonable aid “to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with”

Burnston objected to the instruction proposed by the Aurdals, arguing that the statute “*when read in its entirety*” did not “*apply to an accident with an animal*” (emphasis added). App. at 28 (RP 1267). The record reflects an extensive debate over the statute’s applicability, during which the trial judge indicated that he understood the basis for his objection, namely: a motorist involved in an accident with an animal could not give identifying information to a person struck or injured or to the driver or occupant of a vehicle collided with, nor could the motorist render reasonable aid to any such person, because there was no other person involved in the accident. App. at 27 (RP 1230).

The Aurdals argued in response that Burnston had “a duty to stop, to investigate, and ... according to his [employer’s safety] protocol, to do something else.” App. at 27 (RP 1231-32). The trial judge observed

that company rules “are something a little different” from a statute and stated that “[t]he question is whether he has a *statutory* requirement if he hit a horse to stop.” App. at 27 (RP 1232) (emphasis added). No instruction was proposed or given as to whether an employee’s violation of company safety policies or other private industry standards could be considered evidence of negligence, or how much weight such a violation should be given if the jury determined a violation had occurred.

Burnston’s counsel reiterated that the hit-and-run statute did not apply because the requirements of subsection 3 of the statute could not be met. App. at 27 (RP 1232). There was no person at the scene of Burnston’s accident to whom Burnston could have provided the information or aid required by RCW 46.52.020(3).

Despite acknowledging the potential for jury confusion, App. at 27 (RP 1232), the trial court gave the hit-and-run instruction. The jury found that Burnston was 100 percent at fault for Aurdal’s injuries and awarded the Aurdals \$2,714,102 in damages.

Burnston appealed. The Court of Appeals affirmed the judgment in a 2-1 unpublished opinion, holding that it did so “[b]ecause Burnston ... failed to provide the trial court with the specific legal basis of [his] objection to the instruction, and because ... the error was harmless....”

App. at 1-7. The majority reached this conclusion despite acknowledging that “the hit-and-run statute does not apply....” App. at 5.

ARGUMENT

A. **The Majority’s Decision Conflicts with Supreme Court Authority and Raises an Issue of Substantial Public Interest**

In *Crossen v. Skagit County*, 100 Wn.2d 355, 358-59 (1983), the Washington Supreme Court held that when it is apparent the trial judge understood the basis for trial counsel’s objection to a proposed jury instruction, the requirements of CR 51(f) were met and it was error to deny review. In this case, as in *Crossen*, the record contains extended dialogue evidencing the trial judge’s understanding of the bases for Burnston’s objection to the hit-and-run jury instruction. *See* App. at 27; *see also* App. at 9 (“At trial, United Telephone clearly objected to instruction 18 on the grounds that Washington’s hit-and-run statute “when read in its entirety” would not “apply to an accident with an animal.” RP at 1267. It is unclear what more the majority would require of trial counsel in this situation to satisfy CR 51(f).”) (dissent). The majority’s ruling that Burnston failed to preserve the error is in direct conflict with *Crossen* and warrants review.

Unless reviewed and corrected, the majority's ruling will send confusing signals to trial counsel preparing objections to jury instruction.² It means that even when the trial judge clearly indicates that he or she understands the basis for an objection, trial counsel must reiterate the objection *and* state all of the legal arguments supporting that objection. See App. at 11 (slip opinion at 11 n.2). This novel expansion of the requirements of CR 51(f) raises an issue of substantial public interest that warrants review.

B. The Majority's Decision Conflicts with Supreme Court's Well-Known Holding that A Jury Instruction is Presumptively Prejudicial When It Contains an Erroneous Statement of the Law

When there is an error in an instruction given on behalf of the party in whose favor the verdict was returned, this Court has long held that (a) "the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless," and (b) a harmless error is an error "which 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.*" *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) (emphasis in italics in original;

²² Although the decision is unpublished, it is available on electronic databases (e.g., Loislaw, Lexis), and is likely to cause confusion among practitioners. See App. 16-17.

emphasis in bold added); *accord Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311-12, 898 P.2d 284 (1995). Thus, this Court directs that when an appellate court scrutinizes a trial court record to determine whether an erroneous instruction was harmless or prejudicial, the review starts with the presumption that the error was prejudicial. *See Wanrow*, 88 Wn.2d at 237; *accord Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

The majority's decision afforded Burnston no such presumption, and instead placed the burden on him to show that the erroneous instruction was prejudicial, *see App. at 6* (citing *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 316, 94 P.3d 987 (2004)).³ In so doing, the Court of Appeals' methodology is in direct conflict with this Court's *Wanrow*, *Mackay*, and *Blaney* decisions.

Failing to analyze the record through the lens of a presumption of prejudice may have, in turn, caused the majority's conclusion that giving the jury an instruction based on Washington's hit-and-run statute was harmless error. This conclusion, too, was erroneous. It was far from a trivial matter for the trial court to instruct the jury incorrectly – as the

³ The majority fails to note that the *Magana* decision was reversed by this Court. *See Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 220 P.3d 191 (2009).

majority concedes -- that Washington's hit-and-run statute imposed a duty on Burnston to "immediately stop" at the scene of his collision with the horse and "remain" there indefinitely. The jury could well have taken failure to comply with that inapplicable *statutory* "duty" as proof that Burnston had committed a hit-and-run and therefore was a bad actor who should held liable for his wrongful conduct. It certainly is reasonably likely that the erroneous instruction skewed the jury's perception of Burnston's conduct and ultimately led to the verdict against him and his employer.

The majority's reasons for holding that the hit-and-run jury instruction was harmless error are insufficient to overcome the presumption of prejudice. First, as the dissent points out, a testifying expert's incorrect view of the law does not make a legally incorrect instruction somehow correct, nor does it negate the highly prejudicial effect of that legally incorrect and misleading instruction. Second, testimony about the existence of private industry standards, as found in the telephone company's safety policies, without any accompanying instruction explaining how a violation of those standards should be weighed or compared to a violation of duties established under the hit-and-run statute, does not negate the highly prejudicial effect of the legally

incorrect and misleading instruction. Third, the mere fact that the record contained conflicting testimony about Burnston's actions does not negate the highly prejudicial effect of the legally incorrect and misleading instruction. All of these reasons, whether taken individually or collectively, simply do not add up to proof that the erroneous instruction "in no way affected the final outcome of the case." This Court should accept review and reverse both the opinion of the Court of Appeals and the judgment, and remand the case to the trial court for a new trial.

CONCLUSION

For all the reasons stated, this Court should grant discretionary review.

DATED: September 4, 2012.

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Jill D. Bowman, WSBA #11754
Rita V. Latsinova, WSBA # 24447
Attorneys for Petitioners

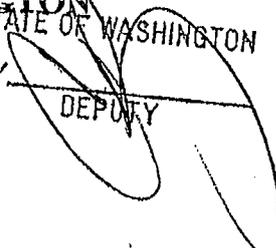
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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANETTE AURDAL and ARNOR STEVEN
AURDAL, wife and husband,

No. 41180-6-II

Respondents,

UNPUBLISHED OPINION

v.

JOHN BURNSTON and "JANE DOE"
BURNSTON, husband and wife, and the
marital community composed thereof,

Appellants,

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 d/b/a OUT R
WAY FARM,

Defendants.

ARMSTRONG, J. — Nanette Aurdal sued John Burnston and his employer, United Telephone (collectively Burnston), for personal injuries she allegedly sustained when she struck a dead horse on a country road at night. Moments before, Burnston had hit and killed the horse while driving a company truck. The jury returned a verdict for Aurdal of approximately \$2.7 million. On appeal, Burnston argues that the trial court erred in instructing the jury that he had a statutory duty to stop and remain at the scene. Because Burnston and United Telephone failed to

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provide the trial court with the specific legal basis of their objection to the instruction, and because we are satisfied the error was harmless, we affirm.

FACTS

BACKGROUND

On December 14, 2001, a tree blew down near Chimacum and broke the pen where Phillip Huntingford kept his horse, Vega. Shortly thereafter, Vega jumped out onto Center Road and was struck by a one-ton United Telephone Company "utility bucket truck" driven by employee John Burnston. VII Report of Proceedings (RP) (June 30, 2010) at 1093-95.

The collision shattered Burnston's passenger side mirror and cracked some of the plastic on the truck's passenger side headlight. After regaining control of the truck, Burnston decided to drive approximately a quarter mile to his office to have another employee, Dale Swearingen, help him find the horse. Burnston did not believe the collision killed Vega or that the horse was blocking the road. Burnston did not have a cell phone, a working truck radio, or a charged flashlight. United Telephone equipped the truck with a strobe light, reflective safety cones, and flares, but Burnston thought it prudent to get help rather than turn his truck around or expose himself to traffic by securing the accident scene alone. At the time of the accident, United Telephone had two applicable policies: (1) in the case of an accident, a driver should stop immediately, safely park, and take steps to prevent further accidents and (2) utility truck drivers should use a spotter when backing up large vehicles.

After Burnston left the scene to get help, another motorist, Nanette Aurdal, struck Vega's body in the road. Aurdal felt "sore and miserable" a few days after the accident and sought

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medical attention. V RP (June 29, 2010) at 570. Over time, Aurdal's pain worsened and she sought treatment from pain specialists, rehabilitation experts, and physical therapists.

PROCEDURAL HISTORY

Aurdal sued the Huntingfords, Burnston, and United Telephone (as Burnston's employer) for the injuries she allegedly sustained in the accident. During a jury trial in June 2010, Aurdal proposed and the trial court gave jury instruction 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.

Clerk's Papers at 142. The instruction was based on portions of Washington's hit-and-run statute, RCW 46.52.020. Burnston made a general objection to the instruction, arguing that the statute did not apply.

The jury found that Burnston was 100 percent at fault for Aurdal's injuries and awarded Aurdal \$2,714,102 in damages. Burnston appeals.

ANALYSIS

I. JURY INSTRUCTION 18

Burnston argues on appeal that the duty imposed by the hit-and-run statute, RCW 46.52.020, was not applicable to this action. Specifically, Burnston contends that before the trial court can instruct the jury that it may consider a statutory violation as evidence of negligence, the court must find that the statute was intended to protect against the kind of harm that resulted. Burnston further argues that the hit-and-run statute as it pertains to property damage was

intended to prevent people from leaving the scene of an accident without identifying themselves; it was not intended to prevent subsequent accidents.

But at trial, Burnston's counsel did not apprise the trial judge of the specific nature and substance of his objection. After a colloquy with the plaintiff's attorney regarding the applicability of the hit-and-run statute, the trial court asked defense counsel, "You hit a horse, does it apply?" Defense counsel responded, "I don't believe it does, Your Honor." VIII RP at 1231. Defense counsel stated no legal basis for his objection, but the trial court continued to inquire about the requirements of RCW 46.52.020.

[Trial Judge]: The question is whether he has a statutory requirement if he hit a horse to stop.

[Plaintiff's Counsel]: I don't think there's any doubt about that duty to stop.

[Defense Counsel]: Your Honor, I think -- but it says in -- as you pointed out in Subsection 3, what do you do when you stop? None of that applies. So, you know, I think the plaintiffs' argument could be made on general negligence principles, and I'm not sure the statute applies.

[Trial Judge]: Oh, absolutely. I agree for sure that they can make the argument on general negligence principles. I'm just wondering if the statute is going to be so confusing to the jury that -- all right.

VIII RP at 1232. Defense counsel later restated his objection to instruction 18: "Let me double-check. As we discussed earlier, if you read the section below that, 030, it does not appear that this statute, when read in its entirety, would apply to an accident with an animal." VIII RP at 1267.

CR 51(f) provides the framework for taking exceptions to jury instructions and states in relevant part:

Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

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This procedure allows the trial court to correct mistakes in instructions and avoid the unnecessary expense of a new trial. *Trueax v. Ernst Home Ctr. Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). “The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (citation omitted). A party who fails to apprise the trial court of the specific points of law or the claimed defect in the instruction fails to preserve the issue for appeal. *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979).

Defense counsel’s exception to jury instruction 18 failed to comply with CR 51(f) and also failed to apprise the trial court of the points of law raised in this appeal. See *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986) (citing *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978)). Before us, counsel argues persuasively that the hit-and-run statute does not apply because it imposes no duty to stop and stay to *prevent further accidents*. But counsel did not make the same critically important legal point to the trial court. Rather, counsel simply argued at trial that the statute did not apply, providing no legal explanation or distinct grounds for Burnston’s objection. We hold that Burnston failed to preserve the issue for appeal. RAP 2.5(a).

II. HARMLESS ERROR

Moreover, we are satisfied that the error in giving jury instruction 18 was harmless given the overwhelming evidence of Burnston’s wrongdoing. Burnston argues that jury instruction 18 was prejudicial because the “evidence could have persuaded the jurors that Burnston exercised ordinary care except for his failure to comply with a statutory ‘duty to stop’” as described in the trial court’s highly truncated summary of RCW 46.52.020. Br. of Appellant at 14.

We will reverse for instructional error only if the party claiming error can show prejudice. *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 316, 94 P.3d 987 (2004). An error is prejudicial if it presumably affects the outcome of a trial. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996). When considering an erroneous jury instruction, we presume prejudice subject to a comprehensive record review. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers Dist. No. 160*, 151 Wn.2d 203, 212, 87 P.3d 757 (2004).

Here, the record demonstrates that even if the jury instruction misstated the applicable law, any error was harmless because Burnston suffered no prejudice. Ed Wells, a former Washington State Patrol officer and traffic accident re-constructionist, testified that state law required Burnston to stop to protect the scene and keep others from potential harm. Daniel O'Connell trained Burnston on safety procedures and testified that United Telephone's safety rules require the driver to secure the scene after an accident. O'Connell stated that Burnston failed to comply with these company guidelines. O'Connell also testified that the day after the accident, Burnston told him that he stopped, returned to where the accident occurred, and checked on the horse before he left to get help from Swearingen. O'Connell read Burnston's statement to risk management in which Burnston described the accident as follows: "Horse entered roadway from ditch and was struck by Sprint vehicle. While the driver was stopped[,] putting out flares, another vehicle ran over the horse killing it." I RP at 45. Aurdal's attorney repeatedly characterized these statements as a "lie" and "far from the truth," and Burnston's counsel did not object. I RP at 43-45. Burnston later testified that he did not stop; he did not know whether the horse was dead and he drove down to the office before driving back to check

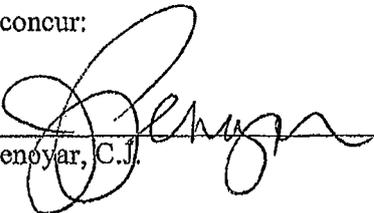
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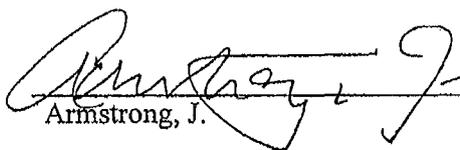
on the scene. Further, the trial court admitted a United Telephone publication entitled "In Case of Accident" that explains the driver must "[s]top at once" and "[t]ake steps to prevent further accidents - park safely, set out warning devices." Ex. 26. Defense counsel did not object to this additional testimony or evidence. On this record, we are satisfied the jury would have reached the same result without jury instruction 18.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I concur:


Penoyar, C.J.


Armstrong, J.

QUINN-BRINTNALL, J. (dissenting) — Because I believe United Telephone of the Northwest dba Sprint (United Telephone) adequately apprised the trial court that *any* jury instruction related to Washington's hit-and-run statutes was inappropriate in this case, and that giving such an instruction was not harmless, I respectfully dissent.

As a preliminary matter, I note that we review the adequacy of jury instructions de novo and that jury instructions must correctly state the applicable law *without misleading the jury*. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005); *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). The majority appears to concede that Washington's hit-and-run statutes are inapplicable to situations, like this one, where a driver unwittingly strikes someone else's escaped horse and shortly thereafter returns to the accident scene or otherwise attempts to notify the horse's owner of the accident.¹ Nevertheless, the majority holds that, despite clearly

¹ Such a concession is appropriate because Washington's hit-and-run statutes, as written, suffer from ambiguity when a driver strikes the nonstationary property of a person not present at the scene. A resort to statutory construction clarifies the legislature's intent. From 1937 to 1975, Washington's hit-and-run statute did not include reference to "other property," the language that, arguably, is applicable to hitting escaped chattel. When contemplating the proposed change, the following exchange occurred between Senators Woody and Guess:

Senator Woody: . . . "I understand that it is not proposed that there be any substantive changes in current law. Is that correct?"

Senator Guess: "That is correct."

Senator Woody: "If you would . . . explain this to me, Senator Guess. That relates to the hit and run and it adds 'or damage to other property' on line 21. The question that arises in my mind, is, who is the person supposed to give notice to as to damage *other than to a vehicle*?"

Senator Guess: "If it is at all possible, Senator, the man should, if he hits a house, for instance, he would not want to run off and leave the scene of the accident without informing the person who owns the house. If it is impossible for him to do so, then by writing a note to the individual and placing it on the property in a prominent place, I think it would serve the purpose."

objecting on the grounds that the statute is inapplicable and no jury instruction related to the statute should be given, United Telephone failed to preserve this objection for our review because it “failed to comply with CR 51(f)” and “failed to apprise the trial court of the points of law raised in this appeal.” Majority at 5.

CR 51(f) states that a party opposing “the giving of any instruction . . . shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given . . . and to which objection is made.” At trial, United Telephone clearly objected to instruction 18 on the grounds that Washington’s hit-and-run statute “when read in its entirety” would not “apply to an accident with an animal.” 8 Report of Proceedings (RP) at 1267. It is unclear what more the majority would require of trial counsel in this situation to satisfy CR 51(f). Here, the record reveals that the trial judge understood the nature of the objection and *extensive* debate occurred concerning the statute’s applicability. In the end, however, the trial judge ruled in favor of giving Nannette Aurdal’s proposed instruction:

Senator Woody: “It is your statement then that it was the legislative intent of the Transportation Committee that the notification required be made within twenty-four hours to the police authority is sufficient notice?”

Senator Guess: “It is sufficient notice when you cannot locate the person whose property it is immediately.”

1 SENATE JOURNAL, 44th Leg., Reg. Sess., at 340 (Wash. 1975) (emphasis added).

Thus, when adding the “other property” language to the statute, the legislature clearly intended that the driver striking the other property make efforts to notify the *owner* of the property if the owner was readily available at the scene or, if not, when later filing an accident report. In the present case, John Burnston returned to the scene shortly after colliding with the horse and, eventually, explained to the sheriff his involvement in hitting the horse. Nothing in the legislative history indicates that adding “other property” to the statutory language of the hit-and-run statutes created an additional duty to stop at the scene of an accident when stopping would not effectuate a driver’s ability to comply with the statutory duties imposed by the remaining provisions of the statute.

I've decided to give [instruction 18], even after the debate I had -- we had on that earlier because there is a duty to stop, and there's some evidence to indicate that he didn't stop and had he stopped it could have -- it could have -- changed things.

8 RP at 1268.

As the majority points out, "[t]he pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection" (Majority at 5), *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983), as this procedure "allows the trial court to correct mistakes in instructions and avoid the unnecessary expense of a new trial." Majority at 5 (citing *Trueax v. Ernst Home Ctr. Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994)).

In *Crossen*, the petitioner objected to the trial court's refusal to give a series of instructions and, in support of each objection, offered a single statutory or case citation. 100 Wn.2d at 358. Division One of this court held that, as a matter of law, "mere citation to a statute is inadequate to 'apprise the trial judge of the precise points of law involved.'" *Crossen*, 100 Wn.2d at 358 (internal quotations marks omitted) (quoting *Crossen v. Skagit County*, 33 Wn. App. 243, 246, 653 P.2d 1365 (1982), *aff'd on other grounds*, 100 Wn.2d 355). In disagreeing with the appellate court's analysis, our Supreme Court stated,

We believe the standard suggested by the Court of Appeals is too strict. The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection. . . .

. . . Here, counsel did cite the statute upon which his instruction was based. Although we believe the far better procedure is to cite the authority and then explain why the instruction is necessary, we are unable to share the Court of Appeals' view that failure to give a rationale *necessarily* precludes appellate review. Here, it was apparent, given the extended discussions concerning jury instructions, that the trial judge understood the basis of counsel's objection. Thus, it was error for the Court of Appeals to deny review on this basis.

Crossen, 100 Wn.2d at 358-59. Here, as in *Crossen*, the trial judge clearly understood the basis of United Telephone's objection. Accordingly, because United Telephone fulfilled the requirements of CR 51(f) and the record definitively establishes that the trial court understood the grounds for the objection, this issue is appropriately before this court.²

The majority also contends that, despite instruction 18 incorrectly informing the jury that John Burnston had a statutory duty to stop at the scene, the prejudicial effect of the instruction was harmless. In support of this argument, the majority notes that (1) a traffic reconstructionist testified that the law requires a person to stop in situations like this, (2) Burnston violated company safety policy, and (3) Burnston lied about whether he stopped at the scene immediately after the collision.

First, I disagree that a traffic reconstructionist's incorrect view of the law applies or can negate the prejudicial effect of a misleading and legally incorrect jury instruction. As the Washington Supreme Court has said, "Each courtroom comes equipped with a "legal expert," called a judge, and it is his or her province alone to instruct the jury on the relevant legal

² The majority also notes that, on appeal, United Telephone persuasively argued that the hit-and-run statute is inapplicable "because it imposes no duty to stop and stay to *prevent further accidents*." Majority at 5. But it dismisses this argument, concluding that United Telephone failed to preserve its objection to instruction 18. Because United Telephone properly preserved its objection to including any instruction based on Washington's hit-and-run statute, this argument is further evidence that instruction 18 misstated the applicable law. In other words, in my opinion, because United Telephone preserved its challenge to the appropriateness of giving such an instruction, it is proper for this court to address further argument on *why* such an instruction is a misstatement of the law. United Telephone's argument concerning preventing further accidents is not an independent grounds for objection that it failed to raise below but, rather, a more thoroughly articulated explanation of the *very objection*—Washington's hit-and-run statutes are inapplicable to unfortunate circumstances like this one—it raised at the trial court level.

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)).

Second, while I agree that Aurdal presented evidence that Burnston violated United Telephone’s own safety policies, the jury was never instructed on how it should weigh this information or whether violation of a private industry standard constitutes evidence of negligence.³ Having no jury instruction on the proper treatment of this violation of a private industry safety standard, it cannot negate the prejudice of a different, misleading instruction *actually given to the jury* as the appropriate law governing deliberations.

Last, while I agree that in my experience juries tend to disregard testimony consisting of contrasting statements, my research has failed to yield a case on point for the proposition that, *as a matter of law*, this truth renders prejudicial instructional error harmless. Here, we are not asked to assess (nor should we assess) whether the jury gave credence to Burnston’s testimony. Instead, we are asked to assess whether giving the misleading and incorrect instruction related to the applicability of Washington’s hit-and-run statute to the evidence was error that prejudiced United Telephone. At trial, Aurdal made little effort to establish that Burnston’s failure to stop constituted a breach of the standard of ordinary care Washington drivers are expected to

³ Washington does not have a pattern jury instruction specifically on point for situations like this. 6 *Washington Practice: Washington Pattern Jury Instructions: Civil* 60.03, cmt. at 456-57 (2011 Suppl.) states that

[s]tandards adopted by private parties or trade associations may be admissible on the issue of negligence when shown to be reliable and relevant, but are not conclusive evidence of negligence. . . . In a case involving private industry standards, practitioners will need to consider whether the pattern instruction should be used with appropriate modifications. Generally, jurors are less likely to be misled into thinking that violation of a private industry standard is per se negligence than they are in cases involving governmental standards. There is a risk that using this instruction for private industry standards could be interpreted as a judicial comment on the evidence.

No. 41180-6-II

exercise. Instead, she focused extensively on whether Burnston violated United Telephone's safety policies and whether Burnston committed a "hit and run" under Washington law. Because the jury was never instructed on the former and the latter is a clear misstatement of the law, I would hold that the erroneous instruction prejudiced United Telephone's right to present its defense and remand for retrial.

When considering erroneous jury instructions, we presume prejudice "subject to a comprehensive examination of the record." *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). Nothing in the record convinces me that instruction 18—an incorrect and misleading instruction that all but directed the jury to find that Burnston breached a statutory duty—was so innocuous as to overcome this presumption of prejudice. Accordingly, I respectfully dissent.


QUINN-BRINTNALL, J.

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JUN 07 2012

STOEL RIVES LLP

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

NANETTE AURDAL and ARNOR
STEVEN AURDAL, wife and
husband,

Respondents,

vs.

JOHN BURNSTON and "JANE
DOE" BURNSTON, husband and
wife, and the marital community
composed thereof,

Appellants,

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 d/b/a OUT R WAY
FARM,

Defendants.

No. 41180-6-II

RAP 12.3(e) MOTION TO
PUBLISH

I. IDENTITY OF MOVING PARTY AND STATEMENT OF INTEREST

The moving party, William R. Hickman, is a Washington attorney whose practice has been concentrated in insurance coverage, tort litigation, and appellate matters since 1970. The moving party has edited the **Washington Insurance Law Letter** since 1976. The moving party reads each insurance-related, tort-related opinion filed by the Court of Appeals or the Supreme Court.

II. RELIEF REQUESTED

Pursuant to RAP 12.3(e), the undersigned asks this court to publish its 2-1 opinion filed on June 5, 2012.

III. FACTS RELEVANT TO MOTION

On June 5, 2012, this court filed its unpublished 2-1 opinion. In this case, by majority vote, the court affirmed the trial court.

IV. GROUNDS FOR RELIEF AND ARGUMENT

The criteria for determining whether a case has precedential value are set forth in the Division II opinion *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev. denied*, 80 Wn.2d 1003 (1972):

OPINIONS OF THE COURT OF APPEALS SHOULD BE PUBLISHED:

- (1) Where the decision determines an unsettled or new question of law or constitutional principle.

(2) Where the decision modifies, clarifies or reverses an established principle of law.

(3) Where the decision is of general public interest or importance.

(4) Where the case is in conflict with a prior opinion of the Court of Appeals.

(5) Where the decision is not unanimous.

This case qualifies under grounds (5), (3), (2) and (1).

The majority set forth its analysis of what occurred at the trial and concluded:

1. Defense counsel failed to provide the trial court with "specific legal basis" for an exception to a jury instruction, which instruction was erroneous;

2. The error in giving the instruction was harmless.

The dissent set forth its analysis of what occurred at the trial, and concluded:

1. Defense counsel did adequately inform the trial judge that any jury instruction related to the statute was inappropriate;

2. Giving an incorrect and misleading instruction that was tantamount to a directed verdict was not harmless error.

That the court could not agree on whether the objection to the proposed instruction was not specific enough is something all trial counsel should know. If stating that RCW 46.52.020 does not apply to an accident

with an animal is not enough, then counsel needs to be made aware of the level of specificity which will be required to preserve the error on appeal.

It should also be noted that both the majority and the dissent agree that giving instruction 18 based on RCW 46.52.020 was error. This appears to be the first opinion to consider the question of the applicability of RCW 46.52.020 to such a fact situation

The court's opinions should be available to trial courts and, in particular, trial counsel throughout the state.

V. CONCLUSION

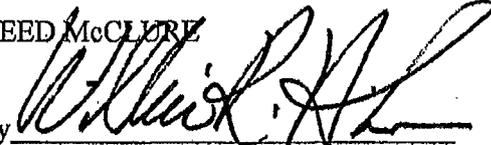
The court's opinion gives notice of the existence of a conflict of opinion as to the adequacy of an exception to a jury instruction. It also clarifies the applicability of RCW 46.52.020.

It should be published.

DATED this 6th day of June, 2012.

REED McCLURE

By



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Appellate Court Case Summary

About Dockets

Case Number: 411806
Filing Date: 08-27-2010
Coa, Division II

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Event Date	Event Description	Action
08-27-10	Notice of Appeal	Filed
08-27-10	Filing fee	Filed
09-09-10	Case Received and Pending	Status Changed
09-10-10	Court's Mot to Determine Appealability	Filed
09-10-10	E-mail	Sent by Court
09-10-10	Letter	Sent by Court
09-17-10	Response to motion	Filed
09-21-10	Telephone Call	Received by Court
09-24-10	Reply to Response	Information - not filed
09-27-10	Statement of Arrangements	Filed
10-01-10	E-mail	Sent by Court
10-01-10	E-mail	Sent by Court
10-01-10	Ruling on Motions	Filed
10-01-10	Perfection Letter	Sent by Court
10-05-10	Notice of Association of Counsel	Filed
10-25-10	Notice of Association of Counsel	Filed
10-29-10	Designation of Clerks Papers	Filed
11-08-10	Other filing	Received by Court
11-17-10	Clerk's Papers	Filed
11-29-10	Record Ready	Status Changed
11-29-10	Report of Proceedings	Filed
11-29-10	Filing of VRP by Crt Reporter	Received by Court
12-09-10	Report of Proceedings	Received by Court
12-09-10	ASCII Disk	Received by Court
12-23-10	Notice of Association of Counsel	Filed
12-31-10	Notice of Substitution of Counsel	Filed
01-04-11	Motion to Extend Time to File	Filed

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03-11-11	Motion to Extend Time to File	Filed
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03-25-11	Letter	Received by Court
04-05-11	Respondents brief	Not Required
04-14-11	Ready	Status Changed
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04-14-11	Respondents brief	Filed
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01-20-12	Oral Argument Hearing	Cancelled
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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.

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1

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.



13 of 19 DOCUMENTS

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*** STATUTES CURRENT THROUGH THE 2010 REGULAR AND 2ND SPECIAL SESSIONS ***
*** AND RESULTS OF NOVEMBER 2010 ELECTION ***

TITLE 46. MOTOR VEHICLES
CHAPTER 46.52. ACCIDENTS -- REPORTS -- ABANDONED VEHICLES

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 46.52.020 (2011)

§ 46.52.020. Duty in case of personal injury or death or damage to attended vehicle or other property -- Penalties

(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) (a) 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 must move the vehicle as soon as possible off the roadway or free-way main lanes, shoulders, medians, and adjacent areas to a location on an exit ramp shoulder, the frontage road, the nearest suitable cross street, or other suitable location. The driver shall remain at the suitable location until he or she has fulfilled the requirements of subsection (3) of this section. Moving the vehicle in no way affects fault for an accident.

(b) A law enforcement officer or representative of the department of transportation may cause a motor vehicle, cargo, or debris to be moved from the roadway; and neither the department of transportation representative, nor anyone acting under the direction of the officer or the department of transportation representative is liable for damage to the motor vehicle, cargo, or debris caused by reasonable efforts of removal.

(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.

Rev. Code Wash. (ARCW) § 46.52.020

(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.

HISTORY: 2002 c 194 § 1; 2001 c 145 § 1; 2000 c 66 § 1; 1990 c 210 § 2; 1980 c 97 § 1; 1979 ex.s. c 136 § 80; 1975-'76 2nd ex.s. c 18 § 1. Prior: 1975 1st ex.s. c 210 § 1; 1975 c 62 § 14; 1967 c 32 § 53; 1961 c 12 § 46.52.020; prior: 1937 c 189 § 134; RRS § 6360-134; 1927 c 309 § 50, part; RRS § 6362-50, part.

NOTES: EFFECTIVE DATE -- 1980 C 97: "This 1980 act shall take effect on July 1, 1980." [1980 c 97 § 3.]

EFFECTIVE DATE -- SEVERABILITY -- 1979 EX.S. C 136: See notes following *RCW 46.63.010*.

SEVERABILITY -- 1975 C 62: See note following *RCW 36.75.010*.

CROSS REFERENCES.

Rules of court: Bail in criminal traffic offense cases -- Mandatory appearance -- *CrRLJ 3.2*.

Arrest of person violating duty in case of injury to or death of person or damage to attended vehicle: *RCW 10.31.100*.

EFFECT OF AMENDMENTS.

2002 c 194, § 1, effective June 13, 2002, rewrote subsection (2).

2001 c 145 § 1, effective July 22, 2001, inserted "involving striking the body of a deceased person" near the beginning of subsection (1) and inserted "involving striking the body of a deceased person, or resulting in" near the beginning of the first sentence of subsection (3); inserted subsection (4)(c) and redesignated the former subsection (4)(c) as present subsection (4)(d).

JUDICIAL DECISIONS

ANALYSIS

Constitutionality
 Compensation of victims
 Corpus delicti

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think you have a taped conversation with John as how he gave the information out. That's somebody taking information that John gave and put it into their words. That's a second party. I mean, I -- again, with what that said and what we've sat and listened to for a week and a half, it does contradict. I'm not going to deny that.

Q. Going on to read this statement, it says: "Prior to this other vehicle running over the horse, it was still alive." That's a lie, too, isn't it?

A. How do we know that?

Q. We know that because John -- excuse me, David Maxwell, who came on the scene, saw this horse deader than a doornail in the middle of --

A. I don't know that.

Q. -- of the road.

A. I didn't hear that in that testimony. He never got out of his car. I mean, I didn't hear that in his testimony that he got out of the car and went over and felt the horse's throat. I mean, that's an assumption.

THE COURT: Let's go back to the question and answer mode.

Q. (By Mr. McGonagle) Looking at that statement, which purports to be a quote in the first person from John Burnston, would you agree with me that it is not a truthful representation of what happened on Center Road on

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the afternoon of December 14, 2001?

A. I can't answer that.

Q. Thank you.

MR. MCGONAGLE: I have nothing further.

THE COURT: Mr. Johnson, cross-examination?

MR. JOHNSON: No, Your Honor.

THE COURT: Mr. Boyle, any redirect?

MR. BOYLE: One moment, Your Honor. Nothing further on redirect, Your Honor.

THE COURT: Any questions from the jurors? There don't appear to be any.

Thank you, Mr. O'Connell.

Let's see. Mr. Boyle, your next witness.

MR. BOYLE: Your Honor, the defendant United Telephone Company of the Northwest and John Burnston rests.

THE COURT: Okay.

Mr. McGonagle, any rebuttal?

MR. MCGONAGLE: No rebuttal, Your Honor.

THE COURT: Well, ladies and gentlemen, that means you've heard all the evidence that you're going to hear. We've got some matters to take up outside your presence, so we're going to recess early for the noon hour. We'll come back at 1:30, and you'll hear the instructions that I'll give you on the law and then closing arguments from counsel, then you'll begin your deliberations. So once

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again, you've heard everything now, so -- but don't discuss the case amongst yourselves or with anyone else. Don't let anyone discuss it with you. Don't do any research on your own. And we'll see you back here ready to go at 1:30.

(Jury absent.)

THE COURT: Okay. Mr. McGonagle, have you got the resources -- the physical resources to prepare that limiting instruction on the citation issue?

MR. MCGONAGLE: Do we?

MS. SHANAHAN: I could type it up, as long as I can find some place to print it. I can put it on a USB, but I'd need a printer.

MR. MCGONAGLE: If we have --

THE COURT: I suppose that means we can print that, right, if she puts it on a USB?

THE CLERK: Yes (inaudible).

THE COURT: All right. Go ahead and do that.

MR. BOYLE: Your Honor?

THE COURT: Yes, Mr. Boyle.

MR. BOYLE: Before we do that, his instruction said the fact that a criminal citation was given or not. I think the use of the term "criminal" is inappropriate there. I think a traffic citation would be --

THE COURT: Well, it is a gross misdemeanor if it's a

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citation, a 46.52.020, Subsection 2, and that's kind of what I was looking at. But, you know, I don't know if it would even qualify because 46.52.020, Subsection 2 says you're supposed to stop if you're involved in an accident which results in damage to other property. And well, how long are you supposed to stop? What are you supposed to do? Well, it says until you comply with Subsection 3. And the only thing Subsection 3 requires is that you give the other driver, the person in charge of the property at the scene, your driver's license, insurance information. I don't even know if you have to stop when you hit a horse. That's what I'm looking at, anyway.

MR. MCGONAGLE: Your Honor, I've got the legislative history of that statute anticipating anybody's question about that.

THE COURT: My own question. All right.

MR. MCGONAGLE: And this statute has changed over the course of time, and that was the statute in existence when this event occurred. Your Honor, the WPI 60.01, RCW 46.52.020 is a correct statement of the law as it existed in December of 2001.

THE COURT: You're saying it didn't have the requirement until the Subsection 3 requirements are satisfied? You're saying that one part of the statute, 2001? I believe it was.

MR. MCGONAGLE: Well, you know, Your Honor, I -- in reviewing this legislative history, I can tell you that this is the correct statement of the law and --

THE COURT: Well, that's the statute as far as it goes. But doesn't it go further? I mean, you're -- what you're saying is that a driver involved in an accident that's got an injury to property has a duty to stop, and then the rest of it says "and forthwith return to the accident scene," right?

MR. MCGONAGLE: Correct.

THE COURT: What you're leaving out is until the duties described under Subsection 3 are performed, right? Are you saying that wasn't true in 2001? It is, because it's part of the -- it's a part of yours. "Until he or she has fulfilled the requirements of Subsection 3." I'm kind of just thinking out loud looking at all this. What I'm looking at is, though, how do you fulfill the requirements of Subsection 3 if you hit a horse? What are you supposed to do? I mean, the whole object of that is so somebody's property doesn't get damaged and they don't know how the damage occurred. But what's he supposed to do? I mean --

MR. JOHNSON: Doesn't it go on to say, though, that you render assistance?

THE COURT: Yeah. To injured persons or people occupied in the vehicle that you hit and all that. But I

stop, to investigate, and, you know, according to his own protocol, to do something else.

THE COURT: Well, I -- the phone company requirements --

MR. MCGONAGLE: Right.

THE COURT: -- are something a little different. The question is whether he has a statutory requirement if he hit a horse to stop.

MR. MCGONAGLE: I don't think there's any doubt about that duty to stop.

MR. BOYLE: Your Honor, I think -- but it says in -- as you pointed out in Subsection 3, what do you do when you stop? None of that applies. So, you know, I think the plaintiffs' argument could be made on general negligence principles, and I'm not sure the statute applies.

THE COURT: Oh, absolutely. I agree for sure that they can make the argument on general negligence principles. I'm just wondering if the statute is going to be so confusing to the jury that -- all right. Well, that's one thing. Let's -- let me go through, and we'll take a look at that, and I'll listen to -- right now I don't consider this formal exceptions.

Let me go through and tell you what's -- other problems I've got.

Mr. Johnson proposes an instruction based on WPIC 1.07.

mean, you hit a horse, does it apply?

MR. BOYLE: I don't believe it does, Your Honor.

THE COURT: I'm sure you would say that, Mr. Boyle. Somehow I knew you would say that.

MR. MCGONAGLE: Well --

THE COURT: I just said --

MR. MCGONAGLE: There was no stop. There was no notification to anybody there, you know. And, you know, what I -- the instruction I want to inform this jury is that he didn't comply with his statutory duty to stop.

THE COURT: Okay. And that had he stopped, would it make any difference? That's --

MR. JOHNSON: I think he didn't know, though. He didn't know -- well, he -- he should have at least stopped to find out if it would have made a difference.

THE COURT: Well, knowingly is required in that, too. In the elements by case law, it says you've got to know you were involved in an accident. But he knew he hit something.

MR. MCGONAGLE: And he didn't know --

THE COURT: He knew he hit a horse, actually. That's what his testimony was.

MR. MCGONAGLE: And the plaintiffs' theory is that he didn't know whether that horse was on the road or off the road. He just drove down the road. And he had a duty to

You guys probably want to sit down and maybe write this stuff down, because we'll take a quick break and I'm going to look at this some more on this 46. He proposed an instruction on WPIC or WPI: The law treats all parties equally whether they're corporations, partnerships, individuals. This means that corporations, partnerships and individuals are to be treated in the same fair and unprejudiced manner.

I would plan on giving that instruction if Mr. Johnson can get it to me on non-pleading paper.

MR. JOHNSON: Yes. Yes, I can, Your Honor.

THE COURT: And I think he was the only one that proposed that particular one.

Or did you propose it, Mr. Boyle?

MR. BOYLE: I thought I had.

THE COURT: I would have thought you did.

MR. BOYLE: If I didn't, it was a mistake.

THE COURT: All right. Let me tell you what I'm planning right now, and then we're going to take a break. And then we're going to come back about 12:00, and I'll have a copy for you all, I hope.

Giving Plaintiffs' Proposed Instruction No. 1.

Plaintiffs' Proposed Instruction No 2.

And I'll just tell you what those -- the first one is just an introductory instruction. No. 2 is the expert

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was going to give, do that to, will you? Decide the case of each defendant separately. That's a no-brainer, but -- all right. Come back in a half hour.

Ms. -- oh, Mr. McGonagle.

I'm sorry. I don't know your name.

MS. SHANAHAN: Wendy. I'm sorry. Wendy Shanahan.

THE COURT: You've been very helpful to Mr. McGonagle and to the Court. Have we got that instruction, the limiting instruction on the -- whatever it was? The --

MR. BOYLE: It's on a thingamajig.

THE COURT: Yeah. It's on a USB. I'll give it to -- you can do that? All right. We'll be at recess.

THE CLERK: Please rise. The court will be at recess.

(Lunch recess taken.)

(Jury absent.)

THE CLERK: Please rise. Pursuant to recess, Superior Court is again in session, the Honorable Craddock Verser presiding.

THE COURT: Good afternoon. Please be seated. That took a lot longer than I thought it would, but that's the way it goes. I've given each of the attorneys the instructions I plan on giving to the jury, and I'll listen to your exceptions now.

First, Mr. McGonagle.

MR. MCGONAGLE: Your Honor, comes now the plaintiff and

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1 excepts to the comparative or contributory negligence
2 instruction and -- which one is -- Instruction No. 8,
3 Your Honor, and No. 13. Then, of course, the special
4 verdict form which incorporates that.

THE COURT: Probably 24 as well.

MR. MCGONAGLE: Yes, Your Honor, 24.

THE COURT: Okay. I think there's enough evidence to support that that could -- that contributory negligence could have been involved, and so I'll -- that's why I gave those instructions.

Anything else, Mr. McGonagle?

MR. MCGONAGLE: No, Your Honor.

THE COURT: All right. Mr. Boyle.

MR. BOYLE: Your Honor, the defendant Telephone Company of the Northwest d/b/a Sprint and John Burnston respectfully excepts to -- takes exception to the Court's number -- Instruction No. 18. Let me double-check. No. 18, which is the instruction based on RCW 46.52.020. As we discussed earlier, if you read the section below that, 030, it does not appear that this statute, when read in its entirety, would apply to an accident with an animal.

Defendant also objects to the Court's failure to propose -- to give our Proposed Instruction No. 10, which is the instruction dealing with sudden emergency,

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1 WPI 12.02.

2 We also object to the Court's failure to give our
3 Proposed Instruction No. 15, which is the mitigation of
4 damages instruction based on WPI 33.01.

5 THE COURT: I've decided to give 18, even after the
6 debate I had -- we had on that earlier because there is a
7 duty to stop, and there's some evidence to indicate that
8 he didn't stop and had he stopped it could have -- it
9 could have -- changed things.

10 And regarding the emergency instruction, I've forgotten
11 the name of the case, but it's at 141 Wn. App. 950, I
12 think. Oh, here it is right here. Yeah. The Kappelman
13 case. And the reason I didn't give the emergency
14 instruction is because it didn't seem to me that the
15 evidence supported any contention that Mr. Burnston was
16 confronted by a sudden peril requiring an instinctive
17 reaction. And there is evidence that he faced a situation
18 that was unusual and thought it best to exercise judgment
19 and drive towards the substation, I'll call it, rather
20 than go back to where the accident happened because he
21 didn't have a flashlight and those kinds of things. But
22 that's not the -- I don't believe the type of situation
23 that justifies an emergency instruction because it wasn't
24 an instinctive thing. It was exercising judgment saying,
25 "Well, this is a better thing to do." And the jurors may

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1 well agree with -- that he exercised judgment and it was
2 fine, but it doesn't justify an emergency instruction.

3 The failure to mitigate the -- was one of the more
4 difficult decisions I thought I had to make. And I went
5 back and I looked through the medical reports, and
6 particularly Dr. Murphy's, and I was looking for evidence
7 that was roughly equivalent to that found in Fox v. Evans
8 at 127 Wn. App. 300, and I reread Fox as well.

9 And there has to be evidence -- and this is my
10 understanding, and this is the finding I'm making
11 regarding the law on this, that there has to be evidence
12 that, in this case Ms. Aurdal, that alternative treatment
13 options were available to her and that she acted
14 unreasonably in deciding on treatment. And there has to
15 be evidence that those treatment options would -- I don't
16 want to say just improve her condition, but there's a
17 better -- there's better language in here. Well, now I
18 can't find it. But there has to be medical evidence --
19 and there were a lot of physicians who testified, and then
20 through their reports there were a lot more -- that would
21 establish that her condition would be improved if she did
22 certain things and that she didn't do those things and her
23 failure to do those things contributed to her current
24 condition.

25 And then you have to have evidence that allows a jury

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CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON

I certify that on September 4, 2012, I caused copies of the
foregoing **PETITION FOR DISCRETIONARY REVIEW** to be served

DEPUTY

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