

NO. 41180-6-II

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

FILED IN PROCEEDING
STATE OF WASHINGTON
BY *K*

NANETTE & ARNOR AURDAL,

Respondents,

v.

UNITED TELEPHONE COMPANY OF THE NORTHWEST, d/b/a
SPRINT, and JOHN BURNSTON and JANE DOE BURNSTON,

Appellants,

and

PHILIP B. HUNTINGFORD, et ux, d/b/a OUT OUR WAY FARM,

Defendants,

BRIEF OF RESPONDENTS

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INTRODUCTION

This appeal arises out of a hit-and-run. John Burnston hit a horse with his Sprint utility truck and drove off to a Sprint station down the road. He left the mare's black body lying in the middle of the lane on a dark night. He ran from his responsibilities to immediately stop, return to the scene, render aid, contact the horse's owners, and most importantly, warn other drivers of the hazard he created. A short time later, Nanette Aurdal collided with the dead horse, suffering severe injuries. Substantial evidence supported the trial court's jury instruction that a driver involved in an accident that damages property must immediately stop and remain at the scene.

Sprint's other arguments are unpreserved and unsupported. In any event, the instruction was relevant to explaining the scope of Burnston's duty to exercise ordinary care. The instruction properly omitted those irrelevant parts of the statute pertaining to exchanging information with others – Burnston hit and ran, so his subsequent duties were irrelevant. Finally, the statute was merely cumulative of overwhelming evidence, so any error would be harmless. This Court should affirm.

COUNTERSTATEMENT OF THE ISSUES

- A. Did substantial evidence support the trial court's instruction based on the hit-and-run statute, where Burnston hit a horse and drove off without immediately stopping and remaining at the scene?
- B. Did Sprint fail to preserve its other arguments, never before asserting that former RCW 46.52.020 "was not intended to protect against the harm that occurred."? BA 9.
- C. In any event, is the hit-and-run statute admissible as evidence regarding the scope of Burnston's duties to exercise ordinary care and to avoid placing others in danger?
- D. Did Instruction 18 properly omit portions of the hit-and-run statute requiring drivers who stop to provide information and render aid at the scene, where Burnston failed to stop and remain at the scene, rendering his subsequent duties irrelevant?
- E. Is any alleged error harmless, where multiple witnesses testified that Sprint's safety policies, state law, and common sense, all required Burnston to stop and to take steps to prevent subsequent injuries, particularly in light of Sprint's admission that Burnston had a strobe light, flares, and safety cones in his truck?

STATEMENT OF THE CASE

United Telephone Company of the Northwest (d/b/a Sprint) relies almost entirely on its own evidence at trial. BA 3-5. The jury rejected Sprint's version of the facts, which conflicts significantly with other witnesses' testimony. CP 291-94. Aurdal states the facts in the light most favorable to the jury's verdict. ***Choi v. Sung***, 154 Wn. App. 303, 313, 225 P.3d 425, *rev. denied*, 169 Wn.2d 1009 (2010).

A. Sprint's policies required its drivers involved in an accident to stop and remain at the scene.

Sprint employee John Burnston was trained to stop and remain at the scene if he was in an accident. RP 36-37, 42, 1114-15. By 2001, Burnston had worked for Sprint as an installation/repair specialist for approximately 27 years. RP 1092-93. Sprint required Burnston to attend driving safety-training sessions and to follow company safety policies. RP 36-37, 40, 1013, 1114-15, 1168-71. Sprint's policies required its drivers in an accident to immediately stop and remain at the scene. RP 42, 56.

Although Burnston claimed that he did not remember Sprint's accident policies, his Sprint utility truck carried an "IN CASE OF ACCIDENT" card, provided by Sprint's insurance company, stating that "The Best Protection is Prevention." RP 36-

37, 47-48, 1013-15, 1169; Ex 26 (attached as App. A). The card told Burnston to stop and take steps to prevent further accidents, including setting out warning devices (App. A):

1. Stop at once.
2. Take steps to prevent further accidents – park safely, set out warning devices.

B. On a dark night, a black mare escaped from her pen on the Huntingfords' farm.

Phillip Huntingford, his brother, their father, and their business, Out R Way Farm, own a 120-acre farm in Chimacum. CP 131; RP 530. On December 14, 2001, the Huntingfords' horse escaped when a wind storm blew a tree down onto her pen. RP 538, 541, 1033. Huntingford attempted to catch the horse as she headed towards Center Road. RP 541, 1176, 1183-84.

C. Sprint employee John Burnston hit the horse with his Sprint truck and drove off, leaving the dead mare in the center of the lane.

Shortly after 5:00 p.m., Burnston and fellow Sprint employee, Dale Swearingen, drove southbound on Center Road, returning from a repair job. RP 1093-94. Burnston drove a Sprint utility truck about four or five car-lengths behind Swearingen's Sprint van. RP 1093-94. After Swearingen passed the Huntingfords' property, the Huntingfords' horse walked onto the southbound lane of Center

Road. RP 1095. Just past a curve, out of the darkness, Burnston saw the black mare and tried to swerve. RP 1095.

The front passenger side of Burnston's truck struck the horse between her head and neck, breaking the passenger-side headlight and side mirror. RP 1095. Burnston slowed to regain control. RP 1096. He knew he hit the horse. RP 1012, 1160. He thought she might still be alive. RP 1096, 1100, 1107-08.

Burnston kept on driving. RP 1096. He admitted that his Sprint truck was equipped with a strobe light, reflective safety cones, and flares. RP 1100. He claimed that his two-way radio had no reception. RP 1099, 1214-15. He drove to the Sprint station, less than one mile up the road, parked the truck, and went to the office. RP 96-97, 102-03, 105, 1096, 1117.

D. David Maxwell was driving behind Burnston, and after narrowly missing the horse, he spent 10-to-14 minutes contacting the authorities and trying to locate her owners.

David Maxwell, who was driving behind Burnston, narrowly missed the horse's body. RP 173-75. Concerned that an unwitting driver might not see the body, Maxwell immediately stopped and called his wife, asking her to call the Sheriff. RP 175. Maxwell then drove to the nearest farmhouse with a light on, trying to find the

horse's owner. RP 176-77. He returned to the scene 10-to-14 minutes after Burnston fled. RP 173-74, 178, 182.

E. Aurdal hit the dead horse, totaling her SUV.

Maxwell saw Aurdal's Ford Explorer SUV approaching the scene at about 45 mph – under the speed limit. RP 108-09, 177-78, 565, 568. She did not see the horse's body until it was too late. RP 177-78, 565.

Aurdal struck the horse – her Explorer flew several feet, landing hard on its undercarriage, causing sparks to fly. RP 177-78, 185-86, 566, 568. The impacts threw Aurdal about inside her SUV. RP 566, 568. Her chest slammed the steering wheel, her hip struck the console, and either her head or her hand broke the rearview mirror. RP 566, 593-94, 607, 609. Aurdal regained control and stopped on the side of the road. RP 566, 610-11. The collisions totaled her SUV. RP 957.

F. Contrary to Burnston's assertions, Jefferson County Sheriff's Sergeant Dale Wurtsmith arrived at the scene before Burnston returned.

Jefferson County Sheriff's Sergeant Dale Wurtsmith and another officer arrived shortly thereafter. RP 178, 196, 202. Sergeant Wurtsmith checked on Aurdal, who was visibly shaken.

RP 196-97. Maxwell also stopped, but left when the police assured him that everything was fine. RP 178-79.

Burnston claimed that he arrived at the scene first, but Wurtsmith and Maxwell both testified that Wurtsmith was first on the scene. RP 178, 202-03, 1104. Burnston returned several minutes after Wurtsmith, at least 15 minutes after he killed the horse. RP 173-74, 177, 197-98, 202-03.

Burnston initially told his supervisors and Sprint's insurance company that Aurdal collided with the horse while Burnston "was pulled over and going to put up flares." Ex 119 (attached as App. C), Ex 29 (attached as App. B); RP 43-45, 1223-25. He later admitted that he was not really there. RP 1097-98, 1113-14.

G. Aurdal suffers permanent disabling pain, requiring a pain pump.

As a result of the collision, Aurdal suffers persistent and chronic neck, back and hip pain. RP 574, 579. After trying more conservative treatments, a doctor implanted a pain pump under the skin of her abdomen, which delivers pain medication directly to her spine through a catheter. RP 283, 288, 576, 630. Aurdal cannot work. RP 587, 635. She cannot perform her regular daily activities

and hobbies. RP 587-89, 632-33, 635-36. She cannot have children due to her pain and her resulting lifestyle. RP 589-90.

H. The trial court instructed the jury that a statute requires that a driver involved in an accident damaging property must immediately stop and remain at the scene.

The Aurdals sued the Huntingfords, Sprint, and Burnston for negligence. CP 1-6. The Aurdals requested a jury instruction stating that a statute requires a driver in an accident to immediately stop and remain at the scene. CP 221. Sprint argued that the statute did not “apply to an accident with an animal.” RP 1231-32, 1267. The trial court gave the instruction (Instruction 18). RP 1288; CP 142. Sprint appeals solely on this instruction. BA 1.

ARGUMENT

A. Substantial evidence supported giving Instruction 18, which instructed the jury that former RCW 46.52.020(2) was evidence that Burston breached his duty of ordinary care.

Sprint first argues that former RCW 46.52.020 (2001) does not apply because no “person” was injured or immediately present, so Burnston could not render aid or provide information to anyone. BA 9. Sprint focuses on irrelevant portions of the statute, ignoring that the statute plainly requires drivers who damage “other property” to immediately stop and remain at the scene. Former RCW 46.52.020(2). The horse was property – Sprint does not

argue otherwise. As such, the statute applies and substantial evidence supported Instruction 18. This Court should affirm.

A trial court correctly includes statutory language in a jury instruction “if the statute is applicable, reasonably clear, and not misleading.” **Barrett v. Lucky Seven Saloon, Inc.**, 152 Wn.2d 259, 267, 96 P.3d 386 (2004) (citing **Bell v. State**, 147 Wn.2d 166, 177, 52 P.3d 503 (2002)). A litigant is entitled to jury instructions on her case theory, so long as substantial evidence supports giving the instruction. **Langan v. Valicopters, Inc.**, 88 Wn.2d 855, 866, 567 P.2d 218 (1977). “Failure to permit instructions on a party’s theory of the case, where there is evidence supporting the theory, is reversible error.” **Barrett**, 152 Wn.2d at 266-67.

Sprint’s argument raises two questions: (1) is former RCW 46.52.020(2) applicable?; and (2) if so, did substantial evidence support giving Instruction 18? The answer to both is plainly “yes.”

Former RCW 46.52.020(2) applied to collisions damaging “other property,” requiring the driver to immediately stop and remain at the accident scene:

The driver of any vehicle involved in an accident resulting only in damage to a vehicle . . . 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. . . .

The Huntingfords' horse was "other property." *Sohol v. Clark*, 78 Wn.2d 813, 820, 479 P.2d 925 (1971) (a horse is personal property); *Wall-A-Hee v. N. Pac. Ry. Co.*, 180 Wash. 656, 41 P.2d 786 (1935) (same). Burston plainly "damage[d] . . . other property" – he killed the horse. Sprint does not argue otherwise. BA 8-9. Thus, the statute plainly applied, and just as plainly required Burston to stop immediately and remain at the scene. Former RCW 46.52.020(2).

Answering this first question answers the second question. Burnston hit and killed the Huntingfords' horse. This is substantial evidence supporting an instruction that damaging property required Burston to stop and remain at the scene. The instruction was proper.

Sprint does even address the portion of the statute requiring drivers who damage property to stop and remain at the scene, focusing only on inapplicable statutory language. BA 8-9. Ignoring the applicable statutory language does not make it go away. This Court should not allow Sprint to co-opt and confuse the issue. It should affirm.

B. In any event, RCW 46.52.020 was admissible as relevant evidence of the scope of the duties Burnston owed to the Huntingfords and to Aurdal.

1. This Court reviews *de novo* Sprint's unpreserved and incorrect argument.

As discussed *infra*, Sprint did not preserve its next argument, that former RCW 46.52.020(2) does not protect against the type of harm that occurred here. BA 9-11. More importantly, Sprint applies the wrong test for determining whether the statute applies in this case. If this Court chooses to consider Sprint's unpreserved and incorrect argument, review is *de novo*. ***Kappelman v. Lutz***, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

2. Statutory instructions must be applicable, reasonable and not misleading – two tests determine whether the statute is applicable.

A trial court must instruct a jury on applicable statutes supported by substantial evidence. *Supra*, Argument § A. Our courts use two different tests to determine whether statutory language should be included in an instruction: (1) a four-part test derived from the negligence-per-se test in the RESTATEMENT (SECOND) OF TORTS § 286 (1965) (“§ 286”); and (2) a relevance-based evidentiary test. See ***Barrett***, 152 Wn.2d at 267, 269-74; ***Bell***, 147 Wn.2d 177-78. The § 286 test determines whether the statute creates a duty or standard of care, while the relevance-

based test determines whether the statute provides only evidence of negligence. As discussed *infra*, if this Court reviews this issue, it should apply the relevance-based evidentiary test here.

3. Sprint applies the wrong test: A statutory instruction explaining the scope of the duty to exercise ordinary care must simply be relevant.

Sprint asks this Court to apply the wrong test, § 286, to determine whether former RCW 46.52.020 could be introduced as evidence of negligence. BA 9-10. But that test determines whether a statute establishes an independent duty or standard of conduct. See, e.g., **Barrett**, 152 Wn.2d at 269 (discussed *infra*); **Estate of Kelly v. Falin**, 127 Wn.2d 31, 38-41, 896 P.2d 1245 (1995) (applying § 286 to hold that a tavern did not have a duty to the estate of a person who got drunk, crashed his car, and died); **Hansen v. Friend**, 118 Wn.2d 476, 480-83, 824 P.2d 483 (1992) (applying § 286 to hold that social hosts had a duty not to provide alcohol to a minor who subsequently drowned); see also **Mathis v. Ammons**, 84 Wn. App. 411, 417-18, 928 P.2d 431 (1996) (discussed *infra*).

Our courts use the § 286 test to determine whether a statute imposes a duty independent of the duty to exercise ordinary care:

a statute may impose a duty that is additional to, and different from, the duty to exercise ordinary care. A statute has this effect when it meets a four-part test drawn from [§ 286.]

Mathis, 84 Wn. App. at 416.¹ **Barrett** confirms that § 286 determines whether a statute imposes a different statutory duty or standard of conduct for civil liability. Barrett sued a tavern for overserving a drunk driver who injured the plaintiff. 152 Wn.2d at 263. The trial court refused Barrett's requested instruction that a statute and administrative rule prohibit people from providing liquor to a person "apparently under the influence of liquor," instead using the common law "obviously intoxicated" language. *Id.* at 263-66. The Supreme Court reversed. *Id.* at 275.

Holding that the common law and statutory standards differed meaningfully, the Court used the § 286 test to determine that the statute "establishes the standard of civil liability under the facts of this case." 152 Wn.2d at 267-69, 274. The Court held that the trial court should have instructed on that standard alone because instructions on both standards would have misled the jury.

¹ The **Mathis** Court added that RCW 5.40.050 changed the consequences of satisfying § 286: a breach of the statutory duty is only evidence of negligence. *Id.* at 417-18. But RCW 5.40.050 does not change the § 286 test "for determining whether a statutory duty exists in a negligence case." *Id.*

Id. (citing **Bell**, 147 Wn.2d at 176). The Court used the § 286 test to establish a duty different from the common law duty.

Our courts apply a relevance-based test when, as here, a statutory instruction is proposed merely as evidence of the scope of the duty or the extent of the standard of care in ordinary negligence. **Owen v. Burlington N. & Santa Fe R.R., Co.**, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (“a statute . . . may help define the scope of a duty or the standard of care”); **Bell**, 147 Wn.2d at 175-79 (discussed *infra*); **Cresap v. Pac. Inland Navigation Co.**, 78 Wn.2d 563, 566-67, 478 P.2d 223 (1970) (discussed *infra*); **Vogel v. Alaska S.S. Co.**, 69 Wn.2d 497, 501-02, 419 P.2d 141 (1966) (trial court properly instructed the jury about a statute that was not binding on the defendant, but was relevant evidence of its negligence).

In **Cresap**, the Court used a relevance-based evidentiary test to examine a regulatory instruction, where the regulations at issue were relevant to the defendant’s duty. 78 Wn.2d at 566-67. The plaintiff sued for injuries suffered from falling down a ladder while aboard the defendant’s barge, alleging that the barge was unseaworthy. *Id.* The trial court rejected the plaintiff’s proposed jury instruction regarding longshoring regulations (requiring ladders

of adequate strength) that were not binding on the defendant. *Id.* at 566-68. The Supreme Court reversed, holding that the regulations were “some evidence of the standard of care” relevant to the unseaworthiness claim (*id.* at 567):

While evidence of a violation of the regulations is not conclusive evidence of the fact that the ship is unseaworthy, nonetheless it is relevant evidence of such fact. **Vogel**[,] 69 Wn.2d 497.

The **Bell** Court also applied a relevance-based test, holding that the trial court properly rejected proposed statutory instructions. 147 Wn.2d at 177-78. There, Bell sued the State for negligent parole supervision after she was kidnapped and raped by a parolee. *Id.* at 170-72. The Court affirmed the trial court's rejection of jury instructions based on statutes governing the Indeterminate Sentence Review Board's (ISRB's) decision to release an inmate on parole, the conditions for the release, and the standard of proof the ISRB used at parole-revocation hearings, holding that the two statutes “do not apply to parole revocation, let alone negligent parole supervision actions.” *Id.* at 177-78.

In sum, this Court should apply the evidentiary test, not § 286. Even under Comment *g* to § 286, if Instruction 18 fails the § 286 test, giving the instruction is proper: “the requirements of the

statute may be considered as evidence bearing on the reasonableness of the actor's conduct." RESTATEMENT § 288B(2) adds that "[t]he unexcused violation of an enactment or regulation which is not so adopted [under § 286] may be relevant evidence bearing on the issue of negligent conduct." Prosser and Keeton also agree that the instruction should be given even if it fails the § 286 test: the statute "may be a relevant fact, having proper bearing upon the conduct of a reasonable person under the circumstances, which the jury should be permitted to consider." W. Page Keeton, et al., PROSSER AND KEETON ON TORTS, § 36, at 231 (5th ed. 1984).

4. Under the right test, Instruction 18 describes an applicable statute that was relevant to the issues before the jury.

Under the evidentiary test, RCW 46.52.020(2) (2001) applies to Burnston's negligence because he hit the Huntingfords' horse and ran from the scene. Read with the other instructions, Instruction 18 is relevant to the scope of the standard of ordinary care. *Cresap*, 78 Wn.2d at 566-67. The trial court instructed the jury as follows:

- ◆ Statutes may be evidence of negligence. RP 1287-88; CP 141.
- ◆ A driver who damages other property shall immediately stop and remain at the scene. RP 1288; CP 142.

- ◆ Negligence is the failure to exercise ordinary care – the care a reasonable person would exercise under the same or similar circumstances. RP 1286; CP 134-35.
- ◆ Every person using a public street has a duty to exercise ordinary care to avoid placing himself or others in danger and to exercise ordinary care to avoid a collision. RP 1287; CP 139.

Taking these instructions as a whole, Instruction 18 provides evidence relevant to the standard of ordinary care a person must use to avoid placing others in danger. See ER 401, 402, 403. The hit-and-run statute explains the “duties imposed upon the driver of a vehicle involved in an accident.” BA 8 (citing **State v. Vela**, 100 Wn.2d 636, 638, 673 P.2d 185 (1983)). The hit-and-run statute is thus evidence of the standard of care, showing that a certain practice – running from the scene – is unsafe. **Cresap**, 78 Wn 2d at 566-67. The hit-and-run statute was not independent proof of Burnston’s negligence, but it was some evidence that he negligently failed to remain at the scene and warn Aurdal. *Id.*

Since the trial court gave Instruction 18 to explain the scope of Burnston’s duty of ordinary care, not to establish an independent statutory duty, the relevance-based test applies. Burnston had an independent duty – under common law, state law, and Sprint’s own policies – to use ordinary care to warn Aurdal of the hazard he created. Sprint’s liability rested on Burnston’s breach of this

independent duty of ordinary care. The “immediately stop and remain at the scene” instruction was some evidence of Burnston’s negligence. See CP 1-6; BA 5. Under the *Cresap* line of cases, Instruction 18 was relevant and proper. This Court should affirm.

5. Even under the wrong test, which Sprint failed to raise below, former RCW 46.52.020 establishes a standard of conduct Burnston owed to the Huntingfords and to Aurdal.

The hit-and-run statute also meets Sprint’s inapposite § 286 test. Section 286’s four-part negligence-per-se test provides as follows:

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

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Barrett, 152 Wn.2d at 269; accord **Kelly**, 127 Wn.2d at 38; **Mathis**, 84 Wn. App. at 416-17.

Sprint focuses on only the third prong – that the statute was not intended to protect against “a subsequent accident.” BA 9-11.

Sprint never raised this argument or presented evidence of legislative intent below, so the trial court never had an opportunity to rule on § 286(c)'s application to former RCW 46.52.020.

This Court may refuse to review instructional errors raised for the first time on appeal. RAP 2.5(a); **Richmond v. Thompson**, 130 Wn.2d 368, 384, 922 P.2d 1343 (1996). An objection to an instruction “must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.” **Stewart v. State**, 92 Wn.2d 285, 298, 597 P.2d 101 (1979); CR 51(f). This Court cannot review an issue that the trial court never ruled on. *Id.*

In any event, former RCW 46.52.020(2) protects both the Huntingfords' interest and Aurdal's interest against the type of harm that occurred. The underlying purpose of RCW 46.52.020 is to facilitate accident investigations, to provide aid to the injured, and to prevent further accidents. **Vela**, 100 Wn.2d at 641; **Lyle v. Fiorito**, 187 Wash. 537, 544, 60 P.2d 709 (1936) (“The constant purpose of laws and rules regulating the use of roads is to prevent accidents”). The statute's ultimate – and obvious – objective is to discourage drivers from committing hit-and-runs.

Burnston hit the Huntingfords' horse and ran off, although the hit-and-run statute plainly required him to remain at the scene. The statute protected the Huntingfords' "particular interest" – their horse – and was supposed to protect them from the "type of harm that occurred" – a hit and run. § 286(b) & (c). For those reasons, the trial court properly gave Instruction 18.

The hit-and-run statute also protects Aurdal's interest in safe travel for slightly different reasons.² The fundamental statutory purpose of preventing hit-and-run accidents is served – Burnston's hit-and-run caused Aurdal's injuries, as the jury undisputedly found. While Sprint claims that Aurdal was injured in a "subsequent" accident (BA 11), Sprint does not challenge the jury's causation verdict, a verity on appeal. CP 292-93; *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 906 n.1, 246 P.3d 1254 (2011). And Sprint made

² The results and analyses under the § 286 test can differ with each party. Section 286 requires that part of the statute's purpose meet the test. See *Cook v. Seidenverg*, 36 Wn.2d 256, 259, 217 P.2d 799 (1950) (the statute is not applicable when the purpose is "wholly different" and "none of the consequences which the enactment was designed to guard against have resulted from its breach"); contrast *Kelly*, 127 Wn.2d 31 (RCW 66.44.200 fails the § 286 test when applied to an injured drunk driver suing a tavern for overservice) with *Barrett*, 152 Wn.2d 269 (RCW 66.44.200 satisfies the § 286 test when applied to a third party injured by a drunk driver who was overserved by a tavern).

(and makes) no supervening cause argument. This Court should not consider this unpreserved and meritless argument.

The hit-and-run statute protects Aurdal from the type of harm that occurred, requiring Burnston to “immediately stop” and remain at the scene. Former RCW 46.52.020(2). This facilitates the common law duties to warn others and to prevent further accidents. *Lyle*, 187 Wash. at 544; CP 139. If Burnston had followed the statute, he could have fulfilled his duty to warn Aurdal.

Former RCW 46.52.020 thus satisfies the § 286 test, whether applied to the Huntingfords or to Aurdal. Even if Sprint had preserved this argument, which it did not, the trial court did not err by instructing that a statute requires damaging drivers to immediately stop and remain at the scene. This Court should affirm.

6. Sprint’s cases are inapposite.

Sprint’s relies on three inapposite cases, *State v. Perebeynos*, 121 Wn. App. 189, 87 P.3d 1216 (2004), *City of Seattle v. Stokes*, 42 Wn. App. 498, 712 P.2d 853 (1986), and *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). BA 10-12. The *Perebeynos* Court refused to read into former RCW 46.52.020 a requirement that the defendant engage in illegal

or reckless conduct as a predicate to imposing a duty to stop. 121 Wn. App. at 195. If anything, **Perebeynos** contradicts Sprint's argument: it upheld a hit-and-run conviction even though the defendant did not actually make contact with another vehicle or violate any rules of the road. 121 Wn. App. at 193-96. Under **Perebeynos**, Burnston had to immediately stop and remain at the scene, even if he had exercised ordinary care before he killed the Huntingfords' horse.

Stokes is similarly inapplicable. The **Stokes** Court analyzed whether RCW 10.22.010 (allowing for the dismissal or compromise of a misdemeanor conviction when the injured party has a civil remedy) applied to the crime of reckless driving. 42 Wn. App. at 500-502. The Court held that the compromise of misdemeanor statute did not apply to reckless driving because, unlike the hit-and-run statute requiring the state to prove an injury, the reckless driving statute does not include an injury element. *Id.* at 502. Thus, when the Court stated that the hit-and-run statute "is aimed at protecting accident victims," the Court was noting only that an injury had to occur, which neither party here disputes. *Id.* **Stokes** does not help Sprint.

Del Rosario is similarly inapposite. *Contra* BA 11-12. There, the trial court's instruction contradicted well-settled case law. 152 Wn.2d at 383-84. Here, the statute plainly applies to the facts presented to the jury, and the instruction is consistent with precedent. In short, no apposite authority supports Sprint's position. Again, this Court should affirm.

C. This Court should not reach Sprint's unpreserved argument that the instruction improperly omitted parts of the statute.

For the first time on appeal, Sprint argues that Instruction 18 improperly omitted parts of former RCW 46.52.020. BA 12-13. This argument is not preserved. *Richmond*, 130 Wn.2d 368. Sprint's argument at trial was that the statute does not apply because no one was present, so Burnston could not comply with former RCW 42.56.020(3). RP 1267. Sprint failed to request an instruction with the omitted language, again failing to preserve the issue. RP 1228-68; see *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 326, 119 P.3d 825 (2005); *Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 942, 750 P.2d 231 (1988) (quoting *State v. O'Connell*, 83 Wn.2d 797, 819, 523 P.2d 872 (1974)). This Court should not reach this argument.

D. **In any event, Burnston breached his duties to immediately stop and remain at the scene, so his subsequent duties were irrelevant.**

Assuming *arguendo* that the Court reaches this argument, it is meritless. The omitted portions of the statute were irrelevant – Burnston had to stop and remain at the scene before he could provide aid or information. The Court should affirm.

Burnston hit the horse and ran, breaching his primary statutory duty to immediately stop and remain at the scene. As such, Burnston could not possibly meet the subsection (3) requirements to provide aid or information. Thus, the remaining duties under subsection (3) were irrelevant to this case. Instruction 18 properly focused on the predicate obligation that Burnston immediately stop and remain at the scene. RP 1288; CP 142.

Further, Sprint's reading of former RCW 46.52.020 would lead to the absurd result of encouraging hit-and-runs. See ***Densley v. Dep't of Ret. Sys.***, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (the Court will not interpret a statute in a way that leads to absurd results). Under Sprint's reading, a driver has to stop and remain at the scene only if the driver thinks someone is present, but may leave if he damages property when no one else is around. See BA 9. Sprint's misreading is perverse.

Of course, former RCW 46.52.020 expressly required Burnston to stop even if no one was at the scene. Former RCW 46.52.020(7) required a driver who could not provide information or render aid to anyone at the scene to “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.” Thus, the fact that Burnston believed that no one was at the scene did not release Burnston from his duty to stop and remain. He still was obligated to ensure no one was present and, if so, to then report to the police. Instead, Burnston hit the horse and ran to the Sprint station without attempting to secure the scene; locate the Huntingfords, or report the incident. RP 1117. Instruction 18 properly omitted irrelevant duties that Burnston did not and could not fulfill because he ran. This Court should affirm.

E. Any alleged error would be harmless.

Assuming *arguendo* that all of Sprint's unpreserved and unsupported arguments had merit and that the trial court erroneously provided Instruction 18, any alleged error would be harmless. A jury instruction containing an erroneous statement of law is reversible error when it prejudices a party – a clear misstatement of the law is presumed to be prejudicial. ***Thompson***

v. King Feed & Nutrition Serv., Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Such error will be reversed unless it is shown the error was harmless. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995).

An error is harmless if the admitted evidence – the statute – was merely cumulative. *Miller v. Arctic Alaska Fisheries, Corp.*, 133 Wn.2d 250, 261-62, 944 P.2d 1005 (1997); see also Dennis J. Sweeney, *An Analysis of Harmless Error In Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 319 (1995-96) (noting Washington has a long history of ruling an error is harmless if the erroneously admitted evidence was cumulative). An error is also harmless if it is (1) trivial, formal, or merely academic; (2) was not prejudicial to the substantial rights of the party assigning it; or (3) in no way affected the final outcome of the case. *Mackay*, 127 Wn.2d at 311. If the evidence shows the jury could have come to the same conclusion without the erroneous instruction, then there is no prejudice, and the error was harmless. *Thompson*, 153 Wn.2d at 459; *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 212, 87 P.3d 757 (2004).

Any alleged error is harmless because the admitted evidence – the statute – was merely cumulative of the

overwhelming evidence that Burnston was obligated to immediately stop and remain at the scene. Answering a question from Sprint's co-defendant, a former police officer and accident reconstruction expert testified, without objection, that state law required Burnston to stop and return to the scene. RP 208, 220-21. That expert also testified that Burnston should have stopped and remained at the scene. RP 220-21. In light of this testimony alone, the instruction was simply cumulative.

Burnston's supervisor testified, without objection, that Sprint's safety policy and common practice was to stop and remain at the scene. RP 37, 42, 56. If another car had hit the horse ahead of Burnston, he should have stopped, turned on his flashing lights, and lighted flares to prevent further accidents. RP 58. Burnston's truck was equipped with a strobe light, reflective safety cones, and flares, but he did nothing. RP 1100, 1120. This evidence too is independently sufficient to support the verdict.

Further, without objection, the trial court admitted an "IN CASE OF ACCIDENT" card like the one in Burnston's Sprint truck. RP 46-47, 1169; Ex 26. This card also required Burnston to stop and try to prevent further injuries. Ex 26. Sprint itself used this

exhibit in its direct examination of Burnston. RP 1108. This evidence too is independently sufficient to support the verdict.

Even during its objection to the proposed Instruction 18, Sprint admitted that Aurdal could rely on common law negligence theories. RP 1232. Sprint thus admitted that Aurdal had a sufficient independent theory to present the case to the jury.

This evidence was overwhelming. Instruction 18 was cumulative of the massive evidence submitted without objection by the Aurdals, Sprint, and the Huntingfords.

Any error would also be harmless because there was no prejudice. Even without Instruction 18, the jury would still have to conclude that Burnston had an obligation to stop immediately and remain at the scene. Sprint admitted there were alternative independent bases for the jury to find Burnston obligated to stop and remain at the scene. See RP 46-47, 221, 1232; Ex 26.

CONCLUSION

The trial court correctly instructed the jury that it could consider as evidence of Burnston's negligence a statute requiring him to immediately stop and remain at the scene. Burnston hit the horse and ran. Contrary to company policy, common sense, and state law, he did not stop, remain at the scene, or try to protect

others from the danger he created. As a proximate result of Burnston's negligence, Aurdal hit the dead horse, causing her permanent physical injuries. There was no error. This Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of April, 2011.

MASTERS LAW GROUP, P.L.L.C.



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Shelby R. Frost Lemmel, WSBA 33099
Paul M. Crisalli, WSBA 40681
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(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 13th day of April 2011, to the following counsel of record at the following addresses:

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Kenneth W. Masters, WSBA 22278



ITT SPECIALTY RISK SERVICES, INC.

The Best Protection
is Prevention

IN CASE OF ACCIDENT

DRIVER

1. Stop at once.
2. Take steps to prevent further accidents — park safely, set out warning devices.
3. Send for Police. If anyone is injured, ask for a doctor and ambulance.
4. Protect your passengers, your vehicle and/or cargo.
5. Distribute accident questionnaires to witnesses.
6. Give other driver(s) your name, address, your company's name and address, the vehicle's tag number and your operator's license number.
7. Discuss the specifics of the accident only with the police and your employer.
8. Complete the Driver's Report at the scene of the accident, if at all possible.
9. Telephone your Employer as soon as possible in cases involving injury or serious damage. If necessary, use "Passing Motorist" cards.
10. If unable to contact employer, call the nearest Hartford Claim Office listed under "Insurance" in the yellow pages of the Telephone Directory — if no answer, please call ITT HARTFORD'S toll free emergency telephone claim service number 800-762-0666.
11. Submit the completed report and accident questionnaires to your employer as soon as possible.

THIS REPORT IS FOR DRIVER'S
USE ONLY — IT IS NOT TO
TAKE THE PLACE OF A
REGULAR ACCIDENT REPORT

Form SRS-39-0 Printed in U.S.A.

To Passing Motorists Request For Emergency Telephone Report

NOTIFY POLICE
PLEASE CALL MY EMPLOYER COLLECT:

Employer's Name _____

Telephone Number _____

My name is _____

Location of Accident _____

Any Injuries? Yes No

Thank you.

Form LC-5677-1 Printed in U.S.A.

To Passing Motorists Request For Emergency Telephone Report

NOTIFY POLICE
PLEASE CALL MY EMPLOYER COLLECT:

Employer's Name _____

Telephone Number _____

My name is _____

Location of Accident _____

Any Injuries? Yes No

Thank you.

Form LC-5677-1 Printed in U.S.A.

To Passing Motorists Request For Emergency Telephone Report

NOTIFY POLICE
PLEASE CALL MY EMPLOYER COLLECT:

Employer's Name _____

Telephone Number _____

My name is _____

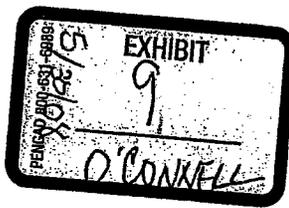
Location of Accident _____

Any Injuries? Yes No

Thank you.

Form LC-5677-1 Printed in U.S.A.





WA PLSB

Automobile Loss Report
Sprint Corporation, Matt McCoy, (913) 315-8560

Account #: Location Code: S281 Filing State: WA
Company: Sprint Corp.
Address: 75 N.W. Thompson Rd.
City: Poulsbo State: WA Zip Code: 98370-9443
Preparer's Name, Title, and Phone #: Matt McCoy, Casualty/Prop. Claims Administrator, 913-315-8560

Accident Information

Date of Accident: 12-14-01 Time: 5:15 PM
Date Reported to Insured: 12-20-01
Insured Driver's Name: John Burnston
Claimant's Name: horse (owner unknown)
Describe how accident occurred, injuries & damages: horse entered roadway from ditch and was struck by sprint vehicle. While the driver was stopped putting up glass, another vehicle ran over the horse killing it.
What authorities were contacted if any?
Location where accident occurred (i.e. parking lot, driver's home, etc.):
Address where accident occurred: Carter Road
City: Chimicum State: WA Zip Code:
Were there any tickets issued (if yes, who was issued)?

Insured Vehicle Information

Insured Driver: John Burnston Phone Number: 360-697-5103
Vehicle #: 47760 Year, Make, Model: 1997 GMC Bucket Truck
Vehicle Identification # (VIN): 4249 License Plate: A 12549C State: WA
Owner of Vehicle (if different than insured): Same
Address:
City: State: Zip Code:
Driver's Home Address:
City: State: Zip Code:
Home Phone: Business Phone:
Driver's relation to Insured (i.e. driver's title, employee's spouse, etc.):
Driver's birth date: License #: State:
Purpose of use (business or personal):
Did the driver have permission to use the vehicle?: YES / NO Unknown
Describe damaged parts of vehicle:

Claimant Vehicle Information

Describe claimant's damaged property (i.e. year, make, model, fence, home, etc.): Horse
Is claimant insured?: YES / NO If yes, by whom and policy #: Unknown owner
Claimant's home address:
City: State: Zip Code:
Home Phone: Business Phone:

APP. B

Describe damage to claimant's property: _____
Estimated dollar amount of damage: _____
Where can damaged property be seen?: _____
Were there any injuries? YES / NO _____ If yes, please complete the following:
Name: _____ Address: _____
City: _____ State: _____ Zip Code: _____
Which vehicle was injured in?: _____ Injured's Age: _____

Name: _____ Address: _____
City: _____ State: _____ Zip Code: _____
Which vehicle was injured in?: _____ Injured's Age: _____

Any Witnesses or passengers? YES / NO _____ If yes, please complete the following:
Name: _____ Address: _____
City: _____ State: _____ Zip Code: _____

Name: _____ Address: _____
City: _____ State: _____ Zip Code: _____

Contact person for this claim: Name: _____ Address: _____
City: _____ State: _____ Zip Code: _____

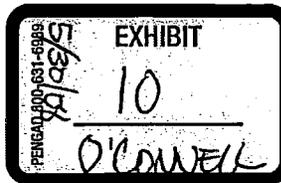
Phone #: _____ Fax #: _____

Comments: *Please contact John Burnston to discuss incident. This may be an LIT claim, however due to animal being killed, we wanted to report the claim. If horse owner not pursuing claim, lets let sleeping dogs lie.*
Thanks!

Matt My



Corporate Claims Management
PROFESSIONAL FLEET MANAGEMENT



Claim No:	32629
Page:	1 of 2
Claim Date:	12/19/2001
Claim Time:	02:03 PM

Automobile Loss Notice

Client Information

Name: Sprint LTD Western Operations
Address: 6550 Sprint Pkwy
Earhart A
Overland Park KS, 66251

Phone 1: (913)794-6483
Phone 2:
Fax: (913)315-0632

Address: 75 N.W. Thompson Road
Poulsbo, WA. 98370

Phone 1: (360)697-5103
Phone 2:

Operating Driver Information

Name: John Burnston License: BURNSJR501KF D/O/B: 5/6/1950 SS#/Emp#: 538441429

Business Unit: LTD

Driver Information

Name: John Burnston
Address: 75 N.W. Thompson Road
Poulsbo, WA. 98370

Phone 1: (360)697-5103 Office
Phone 2:

License: BURNSJR501KF WA
D/O/B: 5/6/1950
SS#/Emp#: 538441429
Group:

Supervisor Info

Name: Dan O'Connell
Phone#: 360-697-5103/360-697-5250
Cost Center: C/C/Respons N/A

Vehicle Information

Year/Make/Model: 1997 GMC Bucket Truck
Car #: 47760 Plate #: A12544C State: WA
VIN #: 1GDJK34J5VF054249

Damage: Fender, Head Light, Bed Side
Miles: 0

Police Information

Ofc/PDept/Badge#: Jefferson County Police Department
Phone #:

Report #:

Citations

To Insured: None
To Other Party 1: Unknown
To Other Party 2:

Loss Information

Date of Loss: 12/14/2001 Friday 5:15 am Business / Personal: B
Street: Center Road
City/State/County: Chemicum, WA
Recordable? Yes P/NP: NP Accident Type: 20 Accident Location: 03 Nature of Movement: 31

Weather conditions?	Cloudy	Speed Limit:	50
Road conditions?	Wet	Driver's Speed:	45
Traffic controls?	None		
Traffic conditions?	Moderate		
Wearing your seat belt?	Yes	Passenger Side?	No
Using a cell phone?	No	Time loss from work (Hrs):	0.00
Did the driver side air bags deploy?	No		
Time with the company?(Yrs)	28.00		

APP. C



Automobile Loss Notice

Description of Accident

I was traveling south on Center Road when a horse ran out from a ditch. I swerved to avoid it but hit it with the right side of my vehicle. The damage is to the right fender, headlight and bedside of my vehicle. While I was pulled over and going to put up flares, another vehicle traveling south on Center Road ran over the horse. Prior to this other vehicle running over the horse, it was still alive.

Other Driver Information

Other Vehicle Information

Injured / Passenger / Witness

Injured

Name: None
Address:

Phone:

Ext:

Notes:

Passengers

Name: None
Address:

Phone:

Ext:

Notes:

Witness

Name: None
Address:

Phone:

Ext:

Notes:

Taken By: ChuckC

Subro: No

No

Revision Date: 12/19/2001

Signature: _____

APP. C

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing letter and attachments on the 15th day of April 2011 to the following counsel of record at the following address:

William S. McGonagle (via hand delivery)
Sherrard McGonagle Tizzano
241 Madison Avenue North
Bainbridge Is, WA 98110

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Seattle, WA 98101-1346

Timothy R. Gosselin
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Seattle, WA 98101



Cheryl Fox, WSBA 21303