

63232-9

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No. 63232-9-1

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

ROBERT OSBORN, a single person,

Appellant,

v.

LARRY D. GREENE and JANE DOE GREENE; and STATE OF
WASHINGTON DEPARTMENT OF CORRECTIONS

Respondents,

REPLY BRIEF OF APPELLANT

Appeal from Snohomish County Superior Court
Cause No. 05-2-09915-0 SEA
Hon. Eric Z. Lucas

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I. ARGUMENT

A. The Non-Party at Fault Jury Instruction was Improper.

1. The Standard of Review for the Non-Party at Fault Jury Instruction.

The Washington Supreme Court summarized the standard of review for jury instructions as follows:

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. A clear misstatement of the law, however, is presumed to be prejudicial.

Thompson v. King Feed & Nutrition Serv. Inc., 153 Wn.2d at 447, 453, 105 P.3d 378 (2005) (emphasis added). The instructions made the basis of this appeal misled the jury and failed to properly inform them of the applicable law.

The application of the Non-Party at Fault jury instruction was based solely on the legal determination by the trial court below that RCW 46.61.645 applied and served as a basis to hold the driver of the vehicle from which the tire tread came a negligent party. [RP at 492, 496] This was necessarily grounded on the mistaken notion that the statute created an absolute legal duty to remove a tire tread that had inadvertently come off of a tire, regardless of whether the driver of the vehicle had any knowledge that the tire tread had been deposited on the roadway. A trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *See State v. Walker*, 136 Wn.2d 767,

771-72, 966 P.2d 883 (1998).

2. *The trial court misinterpreted RCW 46.61.645.*¹

In this case, the trial court made no factual determination regarding the non-party's knowledge of the tire tread on the roadway, but simply decided knowledge was unnecessary because the duty under the statute was absolute. [RP at 496:25, 522:6-15] This determination on the part of the trial court was an error in law.

Indeed, the legislative history cited by the Department of Corrections (DOC) in its response brief supports the idea that the statute does not create an absolute duty. The DOC stated:

In enacting current RCW 46.61.645, the legislature found:

. . . that the littering of potentially dangerous products poses a greater danger to the public safety than other classes of litter.... As such, the legislature find that a higher penalty should be imposed on those who improperly dispose of potentially dangerous produces, such as it is imposed on those who improperly dispose of tobacco products.

[Br. Resp't DOC at 18] [Emphasis added].

The word "litter" is defined, in its verb form, as "(3a) to strew with scattered article; (3b) to scatter about in disorder." Webster's Ninth New

¹ RCW 46.61.645 Throwing materials on highway prohibited – Removal.

(1) Any person who drops, or permits to be dropped or thrown, upon any highway any material shall immediately remove the same or cause it to be removed.

Collegiate Dictionary 698 (9th ed. 1990). Both of those definitions contemplate an affirmative act, or failure to act born of knowledge. Indeed, the legislative history also includes the term “improperly dispose of” thereby further indicating a volitional act. The history reveals that the legislature was contemplating the affirmative act or failure to act by a party in either disseminating “potentially dangerous products” or allowing them to be disseminated by way of disposal. As such, a conscious act was contemplated and scienter is necessary for the statute to apply.

Further, the DOC mentions, without further elucidation, RCW 46.61.655, which governs the failure to secure a load. On its face, that statute is inapplicable. However, the legislature includes the terms “dropping, sifting, leaking, or otherwise escaping therefrom” which, if applied to RCW 46.61.645, would encompass situations that do not require knowledge. Statutes should be read as a whole and a legislature's decision to use a word in one part of a statute and not another is deemed by the court to be intended.

Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). We assume the legislature means exactly what it says and interpret the wording of statutes according to those terms. Where the legislature uses different terms we deem the legislature to have intended different meanings.

(2) Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle.

In re Forfeiture of One 1970 Chevrolet Chevelle, No. 81116-4 (Sept. 3, 2009) (en banc).

The language of RCW 46.61.645 and 655 that the legislature chose to use, or not use, is significant in evidencing its intent to require knowledge on the part of the actor for a violation of RCW 46.61.645. The trial court misapplied the relevant law to create an absolute duty where one does not exist—an issue that should be reviewed by this Court de novo.

3. *Insufficient evidence existed to provide a tenable basis for the trial court's inclusion of the non-party at fault jury instruction.*

Even if the abuse of discretion standard applies, the trial court abused its discretion by allowing the non-party at fault jury instruction based on violation of RCW 46.61.645 because no evidence was presented regarding breach of any applicable duty. “An abuse of discretion occurs when the trial court’s decision is based on untenable grounds or untenable reasons.” *State v. Athan* 160 Wn.2d 354, 376, 158 P.3d 27 (2007).

As discussed in Plaintiff’s opening brief, with regard to the controlling issue, *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 138 P.3d 1107 (Div. II 2006), is on point and instructive. In *Tuttle*, the court found that the motorist “had no evidence of how the tire and wheel got into the roadway. And the mere presence of the tire in the roadway does not create a reasonable inference that the accident was caused by the phantom driver's negligence.” *Tuttle*, 134 Wn.

App. at 128. In doing so, the trial court implicitly recognized that fault cannot be imputed to another party without evidence of the mechanism by which they were negligent. The DOC and Mr. Greene never pled, asserted, or argued *res ipsa loquitor* in this case. Instead, those defendants relied solely on the statute to relieve them of having to provide any evidence regarding breach of duty. [RP at 492,496] See *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 359, 112 P.3d 522 (2005) (“To prove negligence, Hines must show (1) duty; (2) breach of that duty; (3) proximate cause; and (4) damages.”).

During argument Defendant Greene simply assumed that the debris was “dropped” within the meaning of RCW 46.61.645. [RP at 488] In fact, Greene argued that “[t]he statute says once you drop something, deposit something, you immediately have to remove it. That’s the fault . . .” [RP at 492:20-22] [Emphasis added].

In ruling on the instruction, the Court agreed that the duty to “immediately remove” the debris was absolute, with no consideration of how the debris came to be in the roadway. The Court stated:

THE COURT: Okay. I understand that, counsel, but that’s not the argument. **The argument isn’t that somehow the wheel was negligently left there. That’s not the argument in this case. The argument from the statute that there is a duty, clearly, the Court did not consider that here [in Tuttle].** The analysis is fine except for that.

[RP at 520:11-16] [Emphasis added].

* * *

The other problem I have with this case, let's call it the *Tuttle* case, and I mentioned this earlier, this is a Division II case to start out. But as happens sometimes, they made a detailed argument, and probably relying on the research of one of their clerks, and totally missed a potential issue. What that does for the trial court is, of course, it leaves us in kind of a weird spot when someone else points out actually there is a statute on this, that the Court of Appeals missed it.

I think that is where we are, to be quite frank. To put it on the record, **I just don't think this argument, this analysis is complete because it sort of ignores the statutory provision that is applicable in this situation. I think if they knew about that, this analysis would be adjusted.**

[RP at 525:8-22] [Emphasis added].

The defendants misinterpreted the statute and the trial court misapplied *Tuttle*. Absent those 2 errors, there is no evidence regarding breach of duty and there can be no reasonable inference that the mere presence of tire debris on the roadway, without anything more, was the result of anyone's negligence. Therefore, no tenable ground for giving the non-party at fault jury instruction existed and the trial court abused its discretion. This abuse of discretion, in turn, prejudiced Mr. Osborn. *State v. Clausing*, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002) ("It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.")

Moreover, under Washington law, violating a statute does not lead to negligence *per se*. RCW 5.40.050. Therefore, the belief that a statute may have

been violated does not, without more evidence, constitute liability for the purposes of negligence.

The Supreme Court has stated that a defendant must provide evidence of the fault of a non-party, otherwise it is improper for the trial court to instruct the jury on that issue. *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 25, 864 P.2d 921. There the Court stated:

“RCW 4.22.070 is not self-executing. It does not automatically apply to each case where more than one entity could theoretically be at fault. Either the plaintiff or the defendant must present evidence of another entity's fault to invoke the statute's allocation procedure. Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the issue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence.”

Id. [Emphasis added].

Ultimately, the improper addition of a non-party served to confuse the issues and allow the jury to come an absurd result—that *neither* Greene (who stopped on the freeway) nor Mathern (who blocked the escape route and flagged down Greene's vehicle) were negligent at all. [CP at 109] The trial court's submission of the non-party at fault instruction was prejudicial error.

B. The Failure to Give a Limiting Instruction for the Sudden Emergency Doctrine Jury Instruction was Improper.

1. *The Standard of Review for the inclusion of the Sudden Emergency Doctrine Jury Instruction.*

Subsequent to the submission of the Appellant's opening brief, and the Defendants' responsive briefs in this matter the Washington Supreme Court handed down an en banc decision in *Kappelman v. Lutz*, 2009 WL 2960972. In that case the Court stated:

We have not previously defined the proper standard of review for a trial court's decision to give or refuse to give an emergency instruction. . . . The trial court must merely decide whether the record contains the kind of facts to which the doctrine applies. Therefore, we review the trial court's decision to give an emergency instruction for abuse of discretion.

Kappelman, 2009 WL 2960972 at *2.

Because the trial court misapplied the doctrine to Mr. Mathern and Mr. Greene² in this case, the court abused its discretion and Mr. Osborn should be granted a new trial.

2. *Osborn properly excepted to the proposed instruction, proposed a limiting instruction, and preserved error.*

The DOC contends that Osborn failed to preserve error with regard to the sudden emergency doctrine jury instruction because he failed to provide language for a limitation to the judge in writing. However, appellate courts recognize that "[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."

Goehle v. Fred Hutchinson Res. Ctr., 100 Wn. App. 609, 615, 1 P.3d 579 (Div.

² Both defendants cite to Plaintiff's closing argument for the proposition that the arguments therein show that Mr. Greene was not at fault, however, it is well settled that

I 2000) (citing *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)). "[U]nder some circumstances compliance with the purpose of the rule will excuse technical noncompliance." *Id.* (citing *Queen City Farms*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994)).

Here, Plaintiff stated the following during argument regarding objections to proposed jury instructions:

I believe that there has been talk of an emergency for Mr. Mathern, and I want to be argued – pardon me. I want to argue that Mr. Mathern does not get the benefit of that when you read what the definition of emergency is. I would ask that that also be included in the packet.

[RP at 527:4-9]

The trial court was apprised of the objection that Osborn proffered, as well as, the nature of the limitation that Osborn was suggesting. The trial court simply refused to so instruct. [RP at 527-30]

3. *The trial court abused its discretion by failing to limit the application of the Sudden Emergency Doctrine jury instruction.*

A trial court must instruct the jury only on theories that are supported by substantial evidence. *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327, 617 P.2d 415 (1980). Here, the uncontroverted evidence showed that Mr. Mathern and Mr. Greene failed to meet the threshold conditions necessary to make the sudden emergency doctrine applicable to their conduct.

arguments of counsel are not evidence. *See State v. Frost*, 160 Wn.2d 765, 161 P.3d 361,

The sudden emergency doctrine can be stated as follows:

The doctrine excuses an unfortunate human choice of action that would be subject to criticism as negligent were it not that the party was suddenly faced with a situation which gave him no time to reflect upon which choice was the best.

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 197, 668 P.2d 571 (1983) (quoting *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P.2d 923 (1973)).

Necessary to the application of the doctrine is the notion that the party seeking its protection is “suddenly faced with a situation” that offers “no time” to decide the best course of action. Indeed, one Court has stated that “[t]he essential element to invoke the emergency doctrine is confrontation by a sudden peril requiring instinctive reaction.” *Zook*, 9 Wn. App. at 713 (citing *Seholm v. Hamilton*, 69 Wn.2d 604, 419 P.2d 328 (1966) (emphasis added)).

Here, the uncontroverted evidence establishes that Mr. Mathern did not make an instinctive reaction due to a sudden peril:

1. Mr. Mathern saw the debris hundreds of feet ahead of him. [RP at 117]
2. The roadway in between Mr. Mathern and the debris was clear of obstructions. [RP at 83]
3. Mr. Mathern slowed as he approached the debris. [RP at 83-4]
4. Mr. Mathern pulled his vehicle to the shoulder. [RP at 84]
5. Mr. Mathern stopped his vehicle nearly even with the debris. [RP at 84-5]
6. Mr. Mathern made sure that his car was tucked on the shoulder as close to the guardrail as he could get it before exiting. [RP at 84-6, 146, 156]
7. Mr. Mathern then looked for a break in traffic before attempting to enter I-5 to remove the debris. [RP at 84-6]

370 (2007).

8. Mr. Mathern considered whether he should call the Department of Transportation instead to remove the debris. [RP at 146]

These are not the actions of a person who is required by the circumstances to make a split second decision. Indeed, Mr. Mathern testified at length regarding his decision making. Mr. Mathern testified:

Q. . . . When you first saw the – I guess we call it the tire tread or whatever it’s called. When you first saw it, did you make a split-second decision that you were going to remove it from the freeway?

A. No, sir.

Q. Okay. Did you make a decision to remove it from the freeway before you came to a complete stop on the shoulder?

A. Yes, sir, I sure did.

Q. Can you tell us when you made that decision, when you are traveling towards the tread?

A. Well, I made it well in advance of getting there. It wasn’t just a – I didn’t just make the decision. I weighed the risk benefit of stopping and removing it. . . .

[RP at 86:7-21] In fact, Mr. Mathern testified that the risk-benefit analysis took 3 to 4 seconds. [RP at 127:9-13]

In *Kappelman*, the Supreme Court noted that the emergency doctrine “applies only in limited circumstances and recognizes the necessity of a quick choice between courses of action when such a peril arises.” *Kappelman*, 2009 WL 2960972 at *4. The Court noted in the *Kappelman* decision that the trial court did not err in giving the instruction because “[d]eer are quick, erratic, and unpredictable; they may run to the road and then across or suddenly freeze.” *Id.* Indeed, the Court noted that “[t]he appearance of a deer on the road can happen

suddenly—as it did here—and is rare enough that a driver might not anticipate its occurrence.” *Id.* The Court fleshed out its reasoning in a footnote, stating:

We stress that the sudden emergency instruction is not appropriate in every situation where a driver’s way is obstructed. When drivers take to the roads, they assume the risks that are inherent in the task at hand. Drivers faced with reasonably anticipated risks should be held to an ordinary negligence standard when determining fault.

Kappelman, 2009 WL 2960972 at *4, fn. 13.

The Court’s reasoning is instructive in the instant case. Here, the tire tread was not moving. It was seen hundreds of feet away. Mathern contemplated and executed a long series of actions with regard to the tire tread. As such, Mathern was not faced with a sudden emergency, but a normal risk inherent in the task of driving.

On the other hand, the forced stoppage of traffic on I-5 by Mr. Mathern, abrupt and contra to the normal slowing of all vehicles due to traffic, *was* the type of emergency situation that Mr. Osborn faced and that is contemplated by the doctrine.

In its responsive papers, the DOC claims that it never argued that Mr. Mathern was acting in an emergency situation. [Br. Resp’t DOC at 29] The testimony of Mr. Mathern elicited by the DOC is a little different. Mr. Mathern stated:

Q. What occurred on April 12, 2004, the events that you have been describing, those weren’t normal circumstances, were they?

A. They were not normal; no, they were not.

[RP at 120:10-13]

Mr. Mathern had previously discussed the deep concern he had that the tire tread would cause a fatal accident based on seeing the vehicles in front of him:

Q. What was your concern when you observed these vehicles making the motions that you just described?

A. The first vehicle almost went into a vehicle that was to its left when it went hard left, missed it. It looked like it missed it by inches. I thought there was going to be an accident. At that speed, I anticipated a fatality.

[RP at 123:19-25] Then in closing argument, counsel for Greene argued:

Unfortunately, and it's uncontested, he can't get to the left. He can't move over like these other cars did. You heard about cars veering over sharply. You heard about a car Mr. Mathern drives, why he thought this was a serious situation, losing control, skidding somehow, and I forget the words, and almost hits somebody. . . . You will also see in those instructions that there are time you get to do that, frankly. There are emergency situations. . . . The stopping on freeway instruction is No. 11. Guesses what? I'm not going to discuss Mr. Matthern in terms of stopping on the shoulder, but in terms of what a statute provides on a freeway, you shouldn't stop on it except this provision shall not apply to vehicles stopped for emergency causes.

[RP at 561]

Mr. Greene's counsel then couched the emergency instruction in terms of the hazard that the tire tread posed to all:

There is on other instruction I want to point out. The emergency

instruction is No. 9. I'm concerned that somebody will say he should have just barreled over this tire. . . . I call the emergency instruction the second-guessing instruction. There has been argument already about split-second decisions and you're confronted with something such as a tire debris that you don't think you can go over and nobody else is. . . .

[RP at 562] Counsel for DOC then tied the concepts together by arguing:

Those two cars were stopped because of a tire carcass on the road. That tire carcass is absolutely, certainly, indisputably the reason that Mr. Green stopped in the road and the reason that Mr. Mathern stopped to get it out of the road.

[RP at 571]

* * *

What did he do? He embraced the mission statement of the State of Washington Department of Corrections, which is to keep the community safe. . . He decided to remove that carcass from the highway to help protect public safety.

[RP at 576] As such, counsel for DOC was clearly reinforcing the statements of Greene's counsel and the instruction itself to suggest that the tire carcass was an emergent public safety issue that Mr. Mathern was compelled to respond to.

As a matter of law, the trial court should have found that Mr. Mathern contemplated his actions with respect to the tire debris. As such, he must not be allowed the benefit of the sudden emergency instruction. Further, Mr. Greene, who testified about his slow stop and interaction with Mr. Mathern clearly involved contemplation, despite the space on the shoulder behind Mr. Mathern being perfectly free to accept his car. Based on the arguments made by the

defendants and the testimony they proffered, the risk of misuse of the instruction by the jury was so great that the trial court needed to affirmatively act with regard to a limiting instruction.

That the trial court did not limit the instruction to prevent its use with respect to Mr. Mathern and Mr. Greene's conduct was a clear abuse of discretion given the uncontroverted evidence before the court because the trial court's decision was based on untenable grounds—an improper application of the emergency doctrine to a “reasonably anticipated risk” attendant to driving a car and the uncontroverted, contemplative steps taken by Mr. Mathern when faced with the tire debris.

C. The Trial Court erred in giving the Following Driver Jury Instruction.

1. The Standard of Review for the Following Driver Jury Instruction.

The trial court determined that the following driver jury instruction applied to Mr. Osborn despite Plaintiff counsel's objection and argument to the contrary. In doing so, the trial court made a legal determination regarding the applicability of *Tuttle v. Allstate* which led to its inclusion of the instruction to the jury. As such, that legal determination should be reviewed de novo.

However, even if this Court decides that the trial court was simply applying the instruction to this particular factual scenario to determine whether the instruction was proper, thereby necessitating an abuse of discretion standard,

the uncontroverted facts before the trial court show that the trial court abused that discretion in allowing the following driver instruction in this case.

2. *The following driver jury instruction does not apply to this case.*

Contrary to the defendants' arguments, the following driver doctrine applies to the *vehicle ahead not the roadway ahead*. Evidence that Mr. Osborn was behind the box truck is not the same as evidence that he was following too close to the vehicle involved in the collision

During trial, counsel for Greene argued to the trial court that "if you had left yourself a sufficient safe margin given the circumstances, he should have been able to stop in the distance available." [Br. Resp't DOC at 21] This statement, however, is based on a logical fallacy and is not supported by the evidence.

The defendants make an overly simplistic "if-then" argument to advance the notion that Mr. Osborn's following distance to the box truck is relevant to the instant case. They are essentially asserting that if Osborn was X feet behind the box truck, he would have been X plus Y (the distance from the box truck to Mr. Greene's vehicle) feet behind the negligent act and therefore would have been able to stop as long as X is far enough. In other words, if Y, based on the testimony, is 300 or so feet, then, as the defense argument seems to go, simply

making the X distance 400, 500, 1000 or more feet would eliminate the accident.

The law does not require that kind of second-guessing or anticipation of unknowable future conditions by Mr. Osborn. Indeed, the defendants' logic imposes on a driver all of the responsibility for avoiding the result of any negligence occurring in front of that driver and asserts that if they were simply farther away from the danger, they could avoid it. It is equivalent to arguing that if someone did not drive into an intersection after the light turned green, but instead waited 5 seconds, they would never have been hit by the drunk driver running the red light. Of course, had they not been in their car on that day they would have also avoided the drunk driver's negligence. This argument is logically flawed.

The DOC states in its responsive brief that “[i]n practice, this means that the trial court’s determination that the instruction was supported by Mr. Osborn’s testimony that he was following a box truck shortly before the accident and that he saw the Greene’s and Mathern’s [sic] stopped vehicles only after the box truck moved into the left lane is entitled to deference by this court.” [Br. Resp’t DOC at 21] But the same logic would apply if a pedestrian running onto I-5 in front of the box truck was hit by Osborn after the box truck swerved to avoid the pedestrian. Yet the following driver instruction clearly cannot apply to that situation.

This tends to show the fallacy of the defendants' "if-then" argument as applied in this case. Surely, Mr. Osborn would not be charged with following the box van too close in that scenario; however, it is conceptually correct that had he been farther back he would not hit the pedestrian. Of course, had he been in a different lane, or not on I-5, he would not have hit the pedestrian either.

Instead, the law requires that Osborn was driving properly, obeying the rules of the road. In this case, Mr. Moebus admitted that 1 second (the minimum distance that Mr. Osborn could possibly have been following the box truck, based on Mr. Moebus' calculations) was appropriate and safe on the freeway. [RP at 411:17-22] Thus, Mr. Osborn was obeying the rules of the road. Mr. Osborn is simply not charged under the law with maintaining a safe distance behind the vehicle he is following *plus* an extra distance to account for the unfolding negligence ahead of that vehicle. The legal principal behind the following driver instruction does not apply or fit Mr. Osborn in this context just as it does not fit Mr. Greene or Mr. Mathern and should not have been given.

In the DOC's responsive brief it argues that the following driver instruction applies when a driver hits a stopped vehicle. To support this contention, the DOC cites to the case of *Greenwalt v. Lane*, 4 Wn. App. 94, 484 P.2d 939 (1971). In fact, the DOC states that "The facts as claimed by Mr. Osborn are virtually identical to those found in *Greenwalt v. Lane*. . . ." [Br.

Resp't DOC at 25] In reality, the *Greenwalt* facts differ from the instant case in almost every conceivable relevant way.

In *Greenwalt*, the defendant, Mr. Lane, was traveling on a two lane highway. Directly in front of him was a car and then a van-type truck. *Greenwalt*, 4 Wn. App. at 896. Directly in front of the van-type truck was the Plaintiff. *Id.* Mr. Lane was doing about the speed limit, 60 mph, but decided to pass the cars ahead of him. *Id.* Mr. Lane increased his speed to well above the posted speed limit to 70 mph and began passing the car and van-type truck on the left. *Id.* at 896-97. While this was occurring, the Plaintiff was slowing to attempt a left turn across oncoming traffic. The Plaintiff had applied his turn signal for about 900 feet and slowed to about 10 mph before beginning his turn. *Id.* at 896-97. At that moment, the defendant was racing up the left side of the line of vehicles at 70 mph and struck the left-turning plaintiff on the left side. *Id.* at 897.

The first major difference in the *Greenwalt* case is that the plaintiff (who is analogous to Greene and Mathern in this case) was doing nothing wrong. There was no evidence presented in the opinion to suggest it was improper for the plaintiff to slow, signal, and begin the left-hand turn.

Second, the defendant, Mr. Lane, was breaking the law at the time of the accident. He was speeding as he attempted to pass several vehicles on the left. As such, the defendant became the initiator of the event that led to the

collision—namely, his car speeding up the left side to pass. That is the opposite of the events in the instant case wherein Mr. Osborn was simply driving in the right-hand lane with the flow of traffic, following the vehicle in front of him at a safe distance. Of course Mr. Lane would be charged with a heightened duty of observation ahead of him at the time that he chose to illegally pass the cars ahead on the left. That is not true in the instant case.

In fact, the sentence directly before the block quote provided by the DOC in its brief illuminates the differences in the cases and the analysis:

In other words, reasonable minds can differ on the proposition that defendant was necessarily in the passing lane at that time, and the issue of contributory negligence of plaintiffs' driver was for the trier of the fact and not for the court to rule upon as a matter of law. *McGlothlin v. Cole*, 3 Wn. App. 673, 477 P.2d 47 (1970).

The three Washington cases that cite to *Greenwalt* further illuminate the differences. In *Hardke v. Schanz*, 6 Wn. App. 660, 495 P.2d 700 (Div. III 1972) the court stated:

We have made it clear that whether a driver is favored or disfavored, he has a duty to look out for approaching traffic. Whether or not he actually looks or sees what was there, he is charged with seeing what was there to be seen. . . . negligence of the driver of the "oncoming car" in being where he was, could not affect the negligence of the driver who turns directly into the path of the "oncoming car." *See, also, Rae v. Konopaski*, 2 Wn. App. 92, 467 P.2d 375 (1970); *McGlothlin v. Cole*, 3 Wn. App. 673, 477 P.2d 47 (1970); *Greenwalt v. Lane*, 4 Wn. App. 894, 484 P.2d 939 (1971).

6 Wn. App at 663. (ellipses in original). This case speaks to the issues surrounding a passing situation where one vehicle turns into the path of the other.

In *Schaffner v. Saunders*, 6 Wn. App. 657, 495 P.2d 702 (Div. III 1972)

the court stated:

Neither Niven nor Hurst should be read for the proposition there were skid marks in the passing lane, ergo the turning driver was negligent per se. In Niven, while there were skid marks, there was also evidence the passing car had passed three cars before the collision. Surely that car was in the passing lane to be seen had the turning driver looked immediately before commencing his turn. In Hurst not only did the driver not look immediately prior to turning, after having seen the following car with its turn indicator on, but the short length of skid marks indicate had he looked he could not have missed seeing the passing driver. *In Rae v. Konopaski*, 2 Wn. App. 92, 467 P.2d 375 (1970), *McGlothlin v. Cole*, *supra*, and *Greenwalt v. Lane*, 4 Wn. App. 894, 484 P.2d 939 (1971) factual questions were presented such as in the instant case.

6 Wn. App. at 659. Again, *Greenwalt* is cited for its holding regarding a passing driver and a turning driver. *See also Brown v. Cannon*, 6 Wn. App. 653, 495 P.2d 705 (Div. III 1972). The discussion and holding in *Greenwalt* does not support defendants' arguments in this case.

In contrast, the cases cited by Osborn in his opening brief are on point and support Osborn's interpretation of the doctrine. The Court in *Svehaug v. Donoghue*, interpreting when the following driver instruction is appropriate, stated:

"[T]he so-called 'following car' doctrine is based upon reason and authority, and . . . it has been recognized and followed in many [Washington] decisions." *Grapp v. Peterson*, 25 Wn.2d 44, 47, 168 P.2d 400 (1946). A following driver is in the best position to avoid a collision with the vehicle he follows. It is therefore reasonable that he should be burdened with a presumption that "he is negligent if he **runs into the car ahead.**"

5 Wn. App. 817, 819, 490 P.2d 1345 (1971) (emphasis added).

The Court in *Szupakey v. Cozzetti* stated:

[1] Szupkay assigns error to the court's refusal to give WPI 70.04, the following driver instruction which is based upon RCW 46.61.145. **It is undisputed that appellant's car was in a stopped position when it was first seen by either of the respondents. Under those facts, the following driver instruction is not appropriate.**

37 Wn App. 30, 32, 678 P.2d 358 (1984) (emphasis added). These cases clearly show that the following driver instruction was not legally appropriate in this kind of case, not factually appropriate based on the undisputed trial testimony, and, therefore, its inclusion was error on the part of the trial court.

D. Osborn was prejudiced by the trial court's errors in its instructions to the jury and the case should be reversed.

Where a jury instruction, or lack thereof, is error as a matter of law, prejudice is presumed. *Thompson v. King Feed & Nutrition Serv. Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005), *Clausing*, 147 Wn.2d at 626-27. Further, prejudice exists where an appellate court cannot be sure what the jury would have been done had the jury been properly instructed. *See Thompson*, 153 Wn.2d at 471 ("[W]e cannot say jury instruction 8 was harmless because we

cannot be sure what the jury would have done had it been properly instructed.”).

A jury instruction that prejudices a party is reversible error. *Id.*

1. The jury’s verdict shows the prejudice to Mr. Osborn from the improper jury instructions.

The jury in this matter reached a result—a finding that Mr. Greene and Mr. Mathern were not negligent—which is nearly impossible absent reliance on the improper jury instructions.

It is clear, based on the uncontroverted testimony, that it is negligent to 1) park your car on the side of the road adjacent to an obstacle, thereby eliminating any potential escape route as Mr. Mathern did, 2) to wave a vehicle to stop on the freeway, as Mr. Mathern did, 3) to stop his car in the right lane of travel instead of moving over to the shoulder, as Mr. Greene did, and 4) to walk into oncoming traffic on I-5 during morning rush hour, waving a car to stop in its lane as he did, to pick up tire debris, as Mr. Mathern did.

The only way reasonable minds could find no negligence on the part of Mr. Mathern and Mr. Greene in this scenario is if the jurors were given the “out” of finding that they could benefit from the sudden emergency doctrine.

Had the Court not erroneously failed to give a limiting instruction making it clear to the jury that Mr. Mathern and Mr. Greene could not avail themselves of that doctrine since they were not confronted with an emergency that required a non-contemplative, split-second decision, the jury would have

had no way under the instructions to come to the result they did. As such, the inappropriate application of the emergency doctrine by the trial court was clearly prejudicial to Mr. Osborn. This Court cannot say, as a matter of law, that the jury would have continued to reach its improbable result if properly instructed on the emergency doctrine. *See Thompson*, 153 Wn.2d at 471.

Further, by erroneously applying the following car doctrine—a precept of law—to a situation in which it is not applicable, the jurors were also left to turn their attention from the acts of Greene and Mathern to the acts of Mr. Osborn. That the following driver issue is anything but “harmless error” is reinforced by the DOC’s own statement in its briefing that the following driver instruction was “key to the defendants’ theory of the case....” [Br. Resp’t DOC at 21]

Moreover, in conjunction with the emergency doctrine error, the jury was given a confusing and contradictory set of instructions that set the conditions for them to decide the case in error. That they also found Mr. Osborn not at fault does not lessen the impact of the erroneous rulings. Where an error of law is made, a presumption exists that this error was prejudicial. *Thompson*, 153 Wn.2d at 453, *Clausing*, 147 Wn.2d at 626-27.

Even were this Court to find that all instructions in this matter were subject to an abuse of discretion standard, the result itself lends credence to the idea that the jury was confused—and Osborn was harmed—by the erroneous

instructions given. It simply cannot be known whether the jury would have found zero liability for all parties had they understood that non-parties were not subject to fault for leaving the tire debris, that Osborn was not presumed negligent for rear-ending the vehicles, that he was in fact traveling a safe distance behind the box truck, or that the emergency doctrine could not apply to Mathern. Each of the trial court's errors prejudiced Osborn and the ruling should be reversed.

II. CONCLUSION

The Court below erroneously gave the jury confusing and inconsistent instructions that resulted in an unfair trial and verdict. As such, Osborn is entitled to a new trial.

Respectfully submitted this 15th day of October, 2009.

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CERTIFICATE OF SERVICE

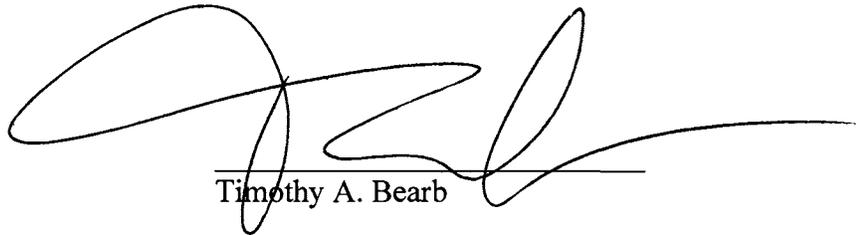
I hereby certify that on October 15, 2009, a true and correct copy of the Reply Brief of Appellant, and this Certificate of Service, was served on the following by hand delivery to:

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