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No. 66334-8-1

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

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KOTI HU,

Respondent,

vs.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,  
an agency of the STATE OF WASHINGTON,

Appellant,

vs.

INTRASTATE PAINTING CORPORATION, a Washington  
corporation; and MICHAEL F. SAVO,

Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Steven C. Gonzalez, Judge

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INTRASTATE PAINTING CORPORATION and MICHAEL F.  
SAVO'S JOINT BRIEF OF RESPONDENTS

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## **I. NATURE OF THE CASE**

Plaintiff Koti Hu was injured when he stopped his 1973 Datsun 240Z at a freeway onramp metering signal stop line located under an overpass. Defendant/Respondent Michael Savo did not see the metering signal, the warning signs, or Plaintiff's small, dark car in the shadows until it was too late to avoid impact. Sufficient evidence was presented at trial to support the jury's reasonable inference that the design of the onramp and metering system was a proximate cause of the accident. WSDOT received a fair trial and the jury's verdict should not be overturned.

## **II. ASSIGNMENTS OF ERROR**

Defendant/Respondent Michael Savo does not assign error to the verdict or to the trial court's rulings, orders, or jury instructions given in this matter.<sup>1</sup>

## **III. STATEMENT OF THE ISSUES**

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<sup>1</sup> Defendant/Respondent Savo opposed Plaintiff's motion for partial summary judgment on the comparative fault/speaker issue. CP 1353-1361. Savo does not challenge the trial court order granting Plaintiff's motion on appeal, and will not address the substantive issues on that topic herein.

Michael Savo disagrees with Appellant's Issues Presented and submits the following Statement of the Issues which more appropriately reflect the questions before this court:

1. Was the jury's verdict based on substantial evidence when sufficient evidence was presented to support the reasonable inference that WSDOT's negligent design of the I-405 onramp metering system was a proximate cause of the accident?
2. Was the trial court's curative instruction appropriate when counsel for WSDOT improperly and inaccurately told the jury that there was no evidence of prior accidents at the onramp?
3. Was Dr. Parsonson's testimony regarding first-hand observations of "signal ahead" signage proper rebuttal evidence not requiring an additional instruction when WSDOT's expert had already testified that the State did not use such signage?

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL BACKGROUND**

1. The Accident and Metered On-ramp

This case arises out of an automobile accident that occurred on July 29, 2007. On that day, Plaintiff Koti Hu stopped his small, dark 1973 Datsun 240Z at an onramp metering signal located at I-405 and NE 70<sup>th</sup> Street. RP 527-528; CP 6. The metering signal and stop line are located underneath the 70<sup>th</sup> Street overpass. RP 528, 670-89. The onramp descends in elevation as vehicles approach the overpass. RP 691. The signal heads are suspended from a mast arm located on the far side of the 70<sup>th</sup> Street overpass as cars approach. RP 693. The signals are obscured by the overpass for more than half the length of the onramp. RP 691. One “ramp metered ahead when flashing” sign was placed at the intersection at 116<sup>th</sup>, where the entrance to the onramp was located. Ex. 560, RP 697-98. Another “ramp metered ahead while flashing” sign was placed on the left hand side of the onramp itself. RP 697. Vehicles stopped at the stop bar at the metering signal are in the shadow of the overpass. *Appendix to WSDOT’s Opening Brief.*

## 2. Savo testimony.

The day of the accident was a sunny day. CP 4054. Traveling down the onramp, Michael Savo did not see the Plaintiff’s

vehicle stopped under the overpass or notice the onramp metering signal light in operation:

As I approached the light I didn't notice the light was on or that there was a car stopped at it....

Ex. 201. Mr. Savo had encountered metered onramps before.

Q. Have you had experience with metered ramp onramps in the past?

A. Yes. \*\*\*

Q. And describe for me, if you're on one of these onramps that has a metered operation, what do you do as a motorist? What is your role in this –

A. Stop at the light and wait till [sic] you have the green signal to proceed.

CP 4055-56. Nevertheless, his ability to see the Plaintiff's car was made difficult by the positioning of the stop bar in the shadow under the overpass.

Q. Did you ever – do you know if in your mind you ever realized that there was the metered ramp in operation or not? Is that something you'd thought about or –

A. No. It wasn't.

(Exhibit No. 1 was marked for identification)

Q. Mr. Savo, I'm showing you what we've marked as Exhibit 1. Let me ask you, do you recognize what that photograph depicts?

A. I recognize it subsequent to the accident, due to all the pictures I've seen.

Q. Do you recall whether you saw that sign that's shown in Exhibit 1 on the date of the incident or not?

A. **I mean, I recall that I did not see a sign flashing at me saying meter is on.**

CP 4054-55 (emphasis added). Savo explained in his testimony the connection between the improperly placed warning signs, the obscured metering signals, the Plaintiff's shadowed vehicle under the overpass, and the accident:

...I did not see a signal that we had a metered light was ahead, nor did I see the metered light lights on themselves, and – or see Koti's car, did not come into focus until obviously it was too late and I couldn't swerve out of the way.

CP 4061.

This is direct evidence that design deficiencies of the ramp metering system contributed to the accident. Savo's later testimony only solidified his inability to perceive the Plaintiff's small gray car because the location of the stop line placed it in the shadow of the 70<sup>th</sup> Street overpass on a sunny day:

I would just say that I'm shocked that I hit him, and if you walk that back – I'm shocked I didn't see him, I'm shocked I didn't see the sign, whatever all those things are. ... I still cannot ever come to a conclusion in my mind how I did not see his car. And I blame a

lot of it a lot on the sun, just the glare, **his car being hidden under the shadows, his gray car.**

CP 4069 (emphasis added). The glare of the sun made Plaintiff's car that more difficult to see under the contrasting dark of the overpass. Savo's account and recollection of the accident is exactly the type of evidence from which a reasonable juror could infer, when combined with expert testimony and other witness accounts, that WSDOT's negligent design of the metered onramp was a proximate cause of the accident.

3. Trooper Dixon testimony.

At the accident site, Savo told Washington State Patrol Trooper Brian Dixon that he didn't see the metering signal or the Plaintiff's vehicle stopped under the overpass until it was too late. RP 1243. The jury heard Trooper Dixon's subsequent observations of the onramp configuration:

- Q. And you include in your roadway description report the items that you think are important about roadway description?
- A. Yes.
- Q. In your report, you indicated the greater the ramp created a visual obstruction of the meter lights behind the 72<sup>nd</sup> overpass. The shadow cast by the overpass makes it difficult to see dark car stopped for meter at stop line. You put that in your report?

A. That's correct.

Q. And that's a problem you believed was there?

A. Yes.

Q. And that problem that you described has been there as long as you've been patrolling the area?

A. That's correct.

RP 1244-45. WSDOT did not object to this testimony. Nor did

WSDOT object to the following opinion elicited from Trooper Dixon:

Q. In your opinion, does the shadow that is cast by the overpass create a problem for drivers seeing other cars as they approach, as they go down the on-ramp?

A. It can certainly create a problem. It does create a problem, but it doesn't create a problem for everybody. It's just a shadows. In my opinion they shadows are not [cloaking], but they reduce or can diminish visibility.

Q. Do you agree that that's what happened on this ramp as well, this is what this ramp presents here?

A. Yes.

RP 1248.

#### 4. Wetsch testimony.

Michael Savo wasn't the only one who had trouble seeing the "ramp metered ahead while flashing" signs. Contrary to

WSDOT's suggestion that eyewitness Mike Wetsch "had no trouble seeing the sign and flashing beacon indicating the ramp meter was on," he actually testified that he *failed* to notice the second of the two "ramp metered ahead" signs.

Q. So you didn't see a second sign out there?

A. I don't recall seeing one, no.

RP 1272. In fact, as he turned into the onramp he did *not* see the metered light itself or Plaintiff's car stopped under the overpass.

Q. So is it your testimony, if I understand you correctly, as you came around this turn, at the top of the ramp you couldn't see either the traffic signal or the car at the bottom?

A. No I could not.

Q. Now how far down the ramp do you think that you were when you first saw or noticed the black car at the bottom of the ramp?

A. Well, okay, when I noticed the car, I was down the ramp quite – I mean how many feet I don't know. I was down the ramp quite a ways when I noticed the car.

RP 1274. Mike Wetsch's wife, Tracy Wetsch similarly noticed only one of the two "ramp metered ahead while flashing" beacons, and she failed altogether to see the metering signal itself. RP 1312, 1320.

WSDOT makes much of Mr. Wetsch's testimony that he saw Savo looking left at traffic, but ignores that he also saw Savo looking ahead:

Q. So at the point that you're describing what you were doing, you were looking ahead and you were accelerating to merge with freeway traffic?

A. That's correct.

Q. And was it your impression that the driver of the white pickup truck was doing the same thing?

A. He was.

RP 1279-80. Clearly Mr. Wetsch was not looking at Savo continuously for the entire length of the onramp:

Q. Is it safe to say, Mr. Wetsch, that as you came down this on-ramp you were staring the entire time at the driver of the white pickup driver to see where he was looking?

A. No. I wasn't staring at him, not at all.

Q. In fact, you were paying attention to where you were going?

A. That's correct.

RP 1277. The left-side view of the freeway was partially obstructed by trees. RP 1292-93. In fact, to see traffic, Mr. Wetsch testified he *looked out ahead, past the ramp metering signal*. RP 1294.

Savo did the same, as he testified that after making the right hand turn onto the on-ramp, “you can look off” out at traffic. CP 4029.

5. Dr. Daniel Johnson testimony.

During investigations for purposes of this case, human factors expert Dr. Daniel Johnson also had trouble seeing the metering signals:

Q. ...Were the things that you saw out there on the roadway in your first impression you thought that would make it difficult for a driver to negotiate that stretch of road?

A. Yes.

Q. What types of things did you notice?

...

THE WITNESS: One was that the vehicles coming down the ramp were accelerating from about 40, the go around a curve. They were accelerating from about 41 or so miles an hour at the top of the ramp, and when they went under the overpass, they were at a speed of on average of about 47 miles an hour. When I drove the ramp in my Toyota vehicle, which was about the same height I believe as Mr. Savo’s vehicle, I noticed that, one, **I did not see the traffic lights, the signal, until I was close to the overhead ramp.**

RP 1395 (emphasis added). Dr. Johnson explained that although the “ramp meter ahead” signs were there to be seen, they may not be easily focused on, or perceived, by drivers. RP 1429.

6. Robert Douglas testimony.

Traffic engineering expert Robert Douglas testified that he would not place a ramp metering warning sign at the location of the signalized intersection at the onramp entrance, as WSDOT did in this case:

The problem is, you're paying attention to the traffic signal. You're – in this case, if you're coming northbound, you're going to want to turn right. So you're stopping and then you're looking for traffic, if you have a red light, as an example, and you're turning. If you have a green light, you're paying attention again to the signals, and so you would enter onto the ramp and high likelihood because of the height of all of these that you would miss them.

RP 948-49. Mr. Douglas also testified that the design of the onramp was a cause of the collision:

Q. Based on your education and experience in highway design, do you have an opinion as to whether the on-ramp in question is reasonably safe for ordinary travel?

A. In my opinion it's not.

Q. Do you have an opinion as to whether the on-ramp in question was reasonably safe for ordinary travel on the day of the collision, July 28<sup>th</sup>, 2007?

A. No it was not.

Q. Do you have an opinion as to whether or not the design of the on-ramp in question was a contributing factor to the collision of July 28, 2007?

A. In my opinion, it certainly was.

RP 866-67. In fact, Mr. Douglas' testified that **"the ramp metering system was the primary cause of the accident."** RP 962 (emphasis added).

7. Dr. Stuart Parsonson testimony.

Highway engineering expert and member of the signals committee on the National Committee for Uniform Traffic Control Devices (MUTCD), Dr. Stuart Parsonson, concurred with Mr. Douglas. RP 1921, 1932. He testified that, because the onramp failed to meet certain design guidelines, this accident was foreseeable:

Q. Dr. Parsonson, do you have an opinion as to whether this accident in this lawsuit was foreseeable?

A. Yes, I do.

Q. What is that opinion?

A. I'd say it was definitely foreseeable. This was an accident waiting to happen, as far as I'm concerned.

Q. And why is that?

A. Because of the problems that we've talked about.

MR. COOLEY: Objection, your Honor. Lack of foundation.

THE COURT: You may answer. You may answer.

THE WITNESS: You're asking why is it an accident waiting to happen? Because of the combination of problems that I've been talking about this morning and that I will not reiterate.

RP 1968-69.

The "problems" recounted by Dr. Parsonson were significant:

Q Dr. Parsonson, has this on-ramp always had an overpass?

A Yes.

Q And what effect does that have on the visibility?

A It tends to block the visibility of that signal in the background, and it also casts a shadow that we'll talk about later.

...

Q And in your review of all of the file materials and the testimony in this case, did you find any evidence that the original design engineers considered the overpass obstruction when they were designing this ramp metering system?

A No. There was no indication of that at all.

RP 1934-36. Dr. Parsonson testified that the placement of the stop bar under the overpass did not confirm with the compulsory Manual on Uniform Traffic Control Devices (MUTCD):

Q What does the MUTCD require as far as these devices, a stop bar and a stop here on red

sign, being placed in the shade of an overpass?

A Well, of course the MUTCD does not specifically bring up the question of one of these traffic control devices in the shadow of an overpass, but the MUTCD does handle that by saying that any -- every and any traffic control device should command attention, and by that it's meant that the traffic engineer is supposed to consider such things as placement and illumination in order to make a judgment as to whether a device is drawing enough attention to itself.

Q Does a stop bar or stop line, must it command attention?

A Yes. Every traffic control device should command attention.

Q And under the same answer, a stop here on red sign must as well; is that correct?

A It should. I use the word should because that is the wording of the MUTCD, and if you want, we can get into the literal meaning of should, but it really amounts to shall for most practical purposes.

Q And do you have an opinion on whether the stop bar and the stop here on red sign in this case command attention?

A I do have an opinion.

Q What is that opinion?

A I believe that they do not command attention because of that shade.

RP 1960-61. Dr. Parsonson also spent a significant portion of his testimony explaining how the sight distance of the metering lights is significantly diminished because the overpass blocks an oncoming driver's view. RP 1936-44, 1948-56. This testimony provides substantial support for the jury's conclusion that WSDOT's design was improper and a proximate cause of the accident.

## **B. PROCEDUAL HISTORY**

Plaintiff sued Michael Savo and his employer, Intrastate Painting, on May 29, 2008. CP 5-7. Plaintiff filed an Amended Complaint naming WSDOT as a defendant on July 30, 2008. CP 6152-56. WSDOT asserted Plaintiff's comparative fault as an affirmative defense. CP 6160. The trial court dismissed this claim on summary judgment, finding that Plaintiff was fault-free as a matter of law. CP 2345-47. Reconsideration of the ruling was denied. CP 2779. A three week trial began on September 21, 2010. CP 2818-1850.<sup>2</sup>

1. WSDOT's counsel's improper remarks necessitated a curative instruction.

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<sup>2</sup> WSDOT moved for judgment as a matter of law at the close of Plaintiff's case. RP 2036; CP 4702-4712. The motion was denied. RP 2037.

Prior to trial the Court granted WSDOT's motion in limine to exclude certain evidence of prior accidents at the onramp under 23 U.S.C. § 409, including:

1. All Police Traffic Collision Reports;
2. All HAL (High Accident Location) data, regardless of in which documents it occurs;
3. Any procedure relating to the identification and treatment of the location as a High Accident Location;
4. All TRACTS reports or TRACTS information;
5. All documents indicating traffic counts; and
6. All documents indicating accident history.

CP 2855-56. The Court had previously denied Plaintiff's motion to compel discovery of these documents. CP 864-66. The Order in Limine specifically stated:

All parties are prohibited from introducing into evidence, discussing, or in any way referring to the above listed documents or information at trial, whether directly or indirectly.

CP 2856.

During closing arguments, counsel for WSDOT told the jury that "nobody but Savo has ever had a problem here. That's what the evidence shows." RP 2093. Speaking of Dr. Parsonson's testimony, counsel went on to state:

We got a right to assume others will obey ordinary care. He says this was an accident waiting to happen. **Our answer is there had never been an accident. That's not what the evidence shows.** He says we've got to design our roads safe for the people paying attention. This instruction tells you no, we got the right that the Savos of the world will exercise ordinary care until we know something to the contrary, **and there's been no evidence.**

RP 2103 (emphasis added). Plaintiff objected to the statements, which were factually untrue, and the trial was stopped. *Id.*

The parties proposed curative instructions. CP 6167, 6171, RP 2112. The court crafted an instruction informing the jury that evidence of accident history cannot be presented because of a federal statute balancing competing interests, and that the jury should disregard WSDOT's counsel's remarks because they were improper. RP 2123, 2126-2127. Plaintiff and Savo argued that such an instruction was insufficient, as the jury would still be left with the impression that there had been no accidents at the onramp: "it takes a little stronger language than that to balance that, because the jury's under the impression now that there were no accidents there." RP 2123-25.

After argument, WSDOT ultimately agreed to the instruction given:

THE COURT: All right. I'm going to add the following sentence: After I state that it balances competing interests, I will say, there have been accidents on the on-ramp, and otherwise leave it as stated. I understand that that perhaps still doesn't go far enough for the plaintiff and goes farther than WSDOT would like it to go.

MR COOLEY: Yeah. With that addition, it goes beyond curative instruction, and it has now injected evidence into the case, and it's going to be a problem.

THE COURT: Otherwise I have to say your statement was inaccurate. Would you prefer that approach?

MR. COOLEY: Yes, I would prefer that approach than your statement that there have been collisions....

RP 2127.

The court's instruction to the jury included the following statement:

Therefore, under those circumstances, the remarks yesterday of counsel for WSDOT that there have never been other collisions at this location and that Mr. Savo was the only driver to have a problem here were improper and inaccurate. You should not consider those comments made by counsel for WSDOT in your deliberations, and you should also strike from your notes any reference to those remarks.

RP 2128-29. WSDOT now complains that the trial court should not have used the term "inaccurate," though it made no objection, and in fact agreed when the court read the instruction to the jury. *Id.*

2. Evidence on WSDOT's use of the "signal ahead" sign was admitted.

Dr. Parsonson and Mr. Douglas both testified that the MUTCD required WSDOT to install a "signal ahead" warning sign at the metered onramp rather than the "ramp meter ahead when flashing" sign WSDOT used instead. RP 932-33, 938-40, 1963-65, 1974. In fact, Mr. Douglas rejected WSDOT's contention that its substitution of the "ramp meter ahead" sign was appropriate:

Q. Now the State maintains that they, as the State of Washington, have authority to make the decision to substitute the other sign for this sign where – even in cases where visibility is a problem. Are you aware that they're maintaining that position?

A. I'm aware of that.

Q. And explain to the jury your response to that, your opinion on that.

A. It's not the appropriate sign to use since when you get into this ramp, you cannot even see the signals.

Q. How about the position that we, the State of Washington, have always been doing this, and we have the right to use the ramp metered ahead when flashing as an alternate? Is there any authority under the MUTCD for that?

A. No.

RP 939-40.

Nevertheless, WSDOT's expert traffic engineer, Toby Rickman, emphatically maintained that the State of Washington employs only "ramp metered when flashing signs" at metered onramps:

Q. Now, what advance warning sign does WSDOT use at all of the ramp metered operations in the state?

A. It's – as an advanced warning sign, we use the ramp metered ahead when flashing.

RP 1747.

Q. Now, with respect to the warning signs, your testimony, as I understand it, is that Washington state simply does not use the signal ahead on metered on-ramps; do I understand you correct?

A. The symbol, the signal ahead symbol, we do not use in advance of the ramp metering signals, that's correct.

RP 1765-66. Mr. Rickman absolutely refused to concede that the "signal ahead" sign had been installed at **any** metered onramps in Washington State.

Q. In fact, the State of Washington does use signal aheads on ramp meters; isn't that correct, Mr. Rickman?

A. Not that I'm aware of, no.

RP 1767.

Q. Are you aware of any on-ramp metering systems in Washington that have the signal ahead sign installed?

A. The signal ahead meaning the symbol sign?

Q. Yes.

A. Not that I'm aware of, no.

Q. And in your 21 plus years at WSDOT, you were never aware of that being used, that signal ahead sign?

A. Not that I'm aware of.

RP 1794.

Mr. Rickman was incorrect. The State of Washington has installed "signal ahead" signs at metered onramps. Photos of such signs were shown to Mr. Rickman during his testimony. RP 1766-67. The next day WSDOT moved to exclude the photos and any testimony describing Washington's use of "signal ahead" signs. WSDOT argued this was "collateral evidence." RP 1905-1906. The trial court denied the motion. RP 1907-11.

Dr. Parsonson subsequently described during his testimony at least **four locations** in the greater-Seattle area where he had directly observed WSDOT's current use of "signal ahead" signs. RP 1965-68, 1970-74. Photos of two of these signs were admitted as evidenced and published to the jury. Exs. 576, 578; RP 1971-

72. WSDOT was aware of what Dr. Parsonson's testimony would be before Dr. Parsonson took the stand. RP 1905. WSDOT had the opportunity to cross-examine Dr. Parsonson with regard to his observations and the photos, and in fact did so. RP 1980, 1984-87.

Knowing it was damaged by Dr. Parsonson's testimony, WSDOT proposed an instruction *after* Dr. Parsonson was excused to inform the jury that "the State's duty does not require it to update roads and roadway structure to present day [standards]." The existence of roads and roadway structures that predate present day standards may not be considered by you as evidence of negligence." RP 2023-24. During argument on the instruction, the court stated:

The second sentence is a little complicated in that the existence of the signal ahead signs, which are graphic, not verbal, was, as I understood it, for impeachment, and they're not evidence of negligence on the ramp in question, since they're different ramps altogether. So I'm not sure why this second sentence would be included.

RP 2024. Counsel for WSDOT agreed to remove the second sentence, but the trial court pointed out that there was **no evidence establishing *when* the "signal ahead" signs had been installed.** RP 2025-26. They could have reflected either present day or earlier standards (or both, according to Dr. Parsonson. RP 1973-

74.) Savo's counsel added "[i]t's almost like you're telling that the State is not liable in this case and that duty about signs and roadways." RP 2029. The court ultimately refused to include the instruction, stating "I think it creates more problems than it addresses." RP 2030. WSDOT declined the Court's invitation to present any rebuttal evidence or testimony on the "signal ahead" sign issue at the close of Michael Savo's case. RP 2035.

The jury found Michael Savo to be 60% at fault for the Plaintiffs' injuries and WSDOT to be 40% at fault. CP 4978-79. Judgment on the verdict was entered against the defendants jointly and severally. CP 4976-77, 6123-25. WSDOT's post-trial motions for a new trial and for judgment as a matter of law were denied. CP 6117-25.

## **V. ARGUMENT**

### **A. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT ON PROXIMATE CAUSE**

WSDOT moved for judgment as a matter of law at the close of Plaintiff's case and again after the jury's verdict, arguing that there was insufficient evidence to sustain the jury's verdict that the design of the onramp was a proximate cause of the accident. The trial court denied WSDOT's motions. A trial court properly denies a

motion for judgment as a matter of law if, viewing the evidence most favorably to the nonmoving party, it can say as a matter of law that there is substantial evidence to sustain the verdict for the nonmoving party. *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn. App. 443, 453, 158 P.3d 1183 (2007); *Sing v. John L. Scott, Inc.*, 134 Wn. 2d 24, 29, 948 P.2d 816 (1997).

Judgment as a matter of law under CR 50 is appropriate only when no competent and substantial evidence exists to support a verdict. *Delgado Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001)....One who challenges a judgment as a matter of law “admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn [from it].” *Davis v. Early Constr. Co.*, 63 Wn. 2d 252, 254, 386 P.2d 958 (1963). We interpret the evidence “against the [original] moving party and in a light most favorable to the opponent.” *Id.* A judgment as a matter of law requires the court to conclude, “as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). However, **the court “must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.”** *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). **“Overturning a jury verdict is appropriate only when [the verdict] is clearly unsupported by substantial evidence.”** *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994).

*Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208, 1212 (2009) (emphasis added). Evidence is substantial enough to support a verdict if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

In reviewing a decision on a motion for a judgment as a matter of law, the Court of Appeals applies the same standard as the trial court. *Corey v. Pierce County*, 154 Wn. App. 752, 760-61, 225 P.3d 367 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 775 (2010). The inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict. *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992). If it is clear that the evidence and reasonable inferences are sufficient to support the jury's verdict, then WSDOT's motions were properly denied. *Hizey*, 119 Wn.2d at 272.

In this case, the jury returned a verdict determining that WSDOT negligently designed the onramp and metering system and that such negligence was a proximate cause of the accident. Clearly, the evidence presented during the course of the trial was *in fact* sufficient to persuade the jurors that WSDOT's design of the onramp was deficient and that such deficiency directly contributed

to Plaintiff's injuries. Issues of negligence and proximate cause are generally not susceptible to judgment as a matter of law. *Ruff v. King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Plaintiff had the burden to produce evidence that would allow a jury to reasonably infer causation from a preponderance of the evidence. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). This does *not* require proof to an absolute certainty. *Id.* (citing *123 v. Seymour*, 27 Wn.2d 802, 808-809, 180 P.2d 564 (1947)). "The party with the burden of production need only show a logical basis for making the inferences necessary to support causation." *Id.* There may be more than one proximate cause of an injury. *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 207, 667 P.2d 78 (1983).

WSDOT relies on *Miller v. Likins*, 109 Wn. App. 140, 145-46, 34 P.3d 835 (2001), *Nakamura v. Jeffrey*, 6 Wn. App. 274, 492 P.2d 294, *rev. denied*, 80 Wn.2d 1005 (1972), and *Johanson v. King County*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941), to argue that there was no direct evidence that Michael Savo was deceived and misled by the poor design of the onramp and metering system, and

that any determination otherwise is nothing but speculation.<sup>3</sup> In *Johanson*, however, the court suggested that a mere **reasonable inference** that the driver of an automobile was misled or deceived would in fact be **sufficient** to defeat summary judgment. *Johanson*, 7 Wn.2d at 122; see also *Breivo v. City of Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976) (whether City's breach of duty to a driver was proximate cause of accident is generally an issue of fact to be resolved by the jury)).

Although Washington courts have held that summary judgment is warranted when the most a plaintiff can show is that an accident might not have happened if the defendant had done something differently, judgment as a matter of law is not warranted and the jury's verdict should stand if there is substantial evidence that the poorly designed onramp and metering system was a proximate cause of the accident. See *Johanson*, 7 Wn.2d at 122; *Radosevich v. County Comm'rs of Whatcom County*, 3 Wn. App. 602, 605, 476 P.2d 705 (1970).

In *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988), for example, the plaintiff sustained injuries when his car

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<sup>3</sup> WSDOT also improperly relies on *Garcia v. State of Washington Dept. of Transp.*, 160 Wn.App. 1010 (2011), an unpublished opinion that may not be cited as authority. GR 14.1(a). See Appellant's brief at p. 16.

went out of control, struck a utility pole on the side of the road, and overturned. The plaintiff sued the county, alleging that inadequate striping and maintenance of the road's shoulder had proximately caused his injuries. *Wojcik*, 50 Wn. App. at 850. The Court of Appeals reversed the trial court's grant of summary judgment in favor of the county, holding that the evidence presented by the plaintiff created an issue of material fact and that it was up to the jury to determine proximate cause. Specifically, the court pointed out that the plaintiff had submitted, among other things, an affidavit and excerpts of deposition testimony in which he provided an account of what happened just before the collision based on his own recollection. *Id.* at 851-83.

Such evidence is also present in this case. In his Witness Collision Statement, Defendant Savo stated:

I was driving the F-150 that impacted the back of another car. I was coming down decent (sic) on-ramp I 405 Northbound at 70<sup>th</sup> St. N.E. The ramp was metered and a car was stopped at the light. **As I approached the light I didn't notice the light was on or that there was a car stopped at it....**

Ex. 201 (emphasis added). Mr. Savo testified at his deposition, which was read at trial, that he was familiar with metered onramps, yet the configuration of this one was clearly misleading as he

believed it was not in operation on the day of the accident. He stated repeatedly that he did not see the flashing warning sign or the metering signals:

I mean, I recall that I did not see a sign flashing at me saying meter is on.

CP 4054-55.

...I did not see a signal that we had a metered light was ahead, nor did I see the metered light lights on themselves, and – or see Koti's car, did not come into focus until obviously it was too late and I couldn't swerve out of the way.

CP 4061.

Savo's account and recollection of the accident provides the exact type of evidence from which a reasonable juror could infer, when combined with expert testimony and other witness accounts, that WSDOT's negligent design of the metered onramp was a proximate cause of the accident

I would just say that I'm shocked that I hit him, and if you walk that back – I'm shocked I didn't see him, I'm shocked I didn't see the sign, whatever all those things are. ... I still cannot ever come to a conclusion in my mind how I did not see his car. And I blame a lot of it a lot on the sun, just the glare, **his car being hidden under the shadows, his gray car.**

CP 4069 (emphasis added). WSDOT complains that this excerpt indicates that Michael Savo's failure to see Koti Hu's car can be

blamed on the glare of the sun and not the design of the metered onramp. WSDOT fails to read the entire sentence. Michael Savo plainly stated that the glare of the sun made Koti Hu's small dark car difficult to see at the stop line under the overpass, "**his car being hidden under the shadows, his gray car.**" CP 4069 (emphasis added).

Trooper Dixon and experts Douglas and Parsonson went on to explain that the positioning of the metering light and stop bar at the far end of the overpass created a hazard for precisely this reason. RP 866-67, 876, 1244-45, 1960-61. In fact, Mr. Douglas specifically criticized the WSDOT for putting the metering signal and stop line in such a visually obscure location:

...They could have done a number of things, including move the stop bar out from the bridge and the sign, stop here on red, which would have been a tremendous benefit. When the signs and the stop bar are in the shadows, there's no reflectance from natural light, and so they're just that much more difficult to see when your eyes are adjusted to the outside. If you brought those out, you would at least have reflectance from that, which could then be seen and make it something that you could at least target for when you are approaching.

Q. In your work in traffic engineering in the state of California and other states, in your work on the committee for MUTCD, and your experience, have you ever seen a design consideration set up like this one?

A. Never.

RP 876. Human factors expert Dr. Johnson testified that the placement of the metering signal and stop line under the shadow of the overpass could create a dangerous situation where a following driver would not see a vehicle such as the Plaintiff's small Z-car stopped in the shadows. RP 1445-47. In fact, that is precisely what happened.

The jury is entitled to consider expert testimony on causation in making its determinations.<sup>4</sup> See *Burke v. Pepsi-Cola Bottling Co. of Yakima*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964), where the trial court refused to grant judgment as a matter of law to the plaintiff because the court found ample evidence, even without direct testimony from the actual driver in the accident at issue, to support the verdict, stating “[t]he credibility of witnesses and the weight to be given to the evidence are matters which rest within the province of the jury.” In this case, as in *Burke*, WSDOT did not ask the trial court to strike the experts' testimony on causation. Such testimony provides sufficient evidence to support the jury's determination that the design of the onramp was a proximate cause of the accident

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<sup>4</sup> Instruction No. 1 stated “You are the sole judges of the credibility of the witness.” CP 4981.

even without Michael Savo's direct testimony that he couldn't see the Plaintiff's car stopped under the shadow of the overpass.

Even circumstantial evidence is sufficient to establish a reasonable inference of proximate cause. The Court is urged to follow the 9<sup>th</sup> Circuit's application of Washington law in *Sketo v. Olympic Ferries*, 436 F.2d 1107 (9th Cir. 1971). In that case, the Court upheld judgment in favor of the parents of a child who had died as a result of an unwitnessed fall from a ferry boat. The defendant admitted negligence but challenged the appellant's proof that such negligence proximately caused the fall which had resulted in the death. The 9<sup>th</sup> Circuit stated:

Unwitnessed fatal accidents have traditionally posed problems of proof for plaintiffs in wrongful death actions. 'Difficulty in regard to proximate cause has arisen in some wrongful death actions where there were no witnesses to the accident and no direct evidence of the proximate cause of death. In such cases courts have admitted circumstantial evidence to enable the jury to arrive at a conclusion as to the proximate cause of death.' Anno. 64 A.L.R.2d 1199, 1218.

Circumstantial evidence is clearly proper in Washington to support liability, including proximate cause, in negligence cases. 'Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for men of reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.' *Wise v.*

*Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171, 172 (1961).

*Sketo*, 436 F.2d at 1109, *see also Ulve v. City of Raymond*, 51 Wn.2d 241, 317 P.2d 908 (1957) (summary judgment deemed inappropriate in the case of an unwitnessed wrongful death, when circumstantial evidence presented questions of fact regarding the design and signage of the roadway in the context of skid marks, broken guardrails, and evidence establishing how fast and how far the decedent's car had gone off a dock into the water); *Cornejo v. State*, 57 Wn. App. 314, 988 P.2d 554 (1990) (circumstantial evidence sufficient to support liability in roadway case where the death was otherwise unwitnessed); and *Unger v. Cauchon*, 118 Wn. App. 165, 73 P.3d 1005 (2003) (in case where motorist died in one-vehicle accident, genuine issues of material fact existed as to whether county's construction or maintenance of road created condition that was unsafe for ordinary travel and whether condition of road proximately caused accident, precluding summary judgment).

In this case, there was sufficient evidence to support the jury's finding that WSDOT was negligent and that such negligence was a proximate cause of the accident. The jury considered

testimony from Defendant/Respondent Savo, Trooper Dixon, human factors expert Dr. Johnson, and highway design and engineering experts Robert Douglas and Dr. Parsonson, all of whom supplied factual information from which the jury could **and did** conclude that the overpass obscured the metering signal and that the stop line was improperly placed under the shadow of the overpass, increasing the likelihood that a driver would not see a vehicle stopped there. Indeed, the evidence was uncontroverted: Michael Savo *did not* see the plaintiff's vehicle stopped there.

On a post-trial motion for judgment as a matter of law, the moving party must *admit the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom*, and the evidence must be interpreted "most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved." *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963). No element of discretion should be exercised here. When viewed most favorably to the non-moving party, the evidence strongly supports the jury's conclusion that the design of the onramp and metering system was a proximate cause of the accident.

**B. THE TRIAL COURT'S CURATIVE INSTRUCTION WAS PROPER AND WSDOT IS NOT ENTITLED TO A NEW TRIAL**

WSDOT is not entitled to a new trial under CR 59(a)(1), (8) or (9) because the curative instruction given by the trial court after WSDOT's prejudicial remarks during closing argument was both *warranted* and *proper*. Counsel for WSDOT told the jury in closing argument that "nobody but Savo has ever had a problem [at the onramp]. That's what the evidence shows," and that "**there had never been an accident**" at the onramp. RP 2093, 2103. These statements were factually untrue and were in violation of the Order in Limine WSDOT itself requested, which prevented all parties and their counsel from introducing evidence of accident history at the onramp. CP 2856. Plaintiff objected to WSDOT's counsel's remarks and the trial was stopped. RP 2103.

Counsel's assertion that there had never been any accidents at the onramp was inaccurate, egregious, and highly prejudicial. A mistrial would have been warranted had it not been for the Court's curative instruction. RP 2128-29.

A new trial may properly be granted based on the prejudicial misconduct of counsel. As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record.... The

movant must ordinarily have properly objected to the misconduct at trial, ... and the misconduct must not have been cured by court instructions.

*Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539-40, 998 P.2d 856 (2000); 12 James Wm. Moore, *Federal Practice* § 59.13(2)(c)(I)(A), at 59-48 to 58-49 (3d ed.1999).

WSDOT now demands a new trial based on the curative instruction, even though WSDOT offered no objection when the instruction was read to the jury. RP 2128-29. WSDOT's motion for a new trial after the verdict was denied. CP 6117-19. The standard of review for an order denying or granting a new trial is abuse of discretion. *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

1. The trial court's curative instruction was not an unconstitutional comment on the evidence.

WSDOT claims the trial court's curative instruction was an improper comment on the evidence because it instructed the jury that WSDOT's counsel's statements about accident history were not only improper, they were also *inaccurate*. Article 4, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." For a comment on evidence to be

grounds for new trial, it must be *prejudicial*. *State v. Williams*, 68 Wn.2d 946, 416 P.2d 350 (1966). A trial judge's comment upon a fact that is *undisputed* or *not an issue* does not fall within the constitutional prohibition against commenting upon the evidence. *Hansen v. Wightman*, 14 Wn. App. 78, 538 P.2d 1238 (1975). In addition, a statement by the court constitutes a comment on the evidence only when the court's *attitude toward the merits of the case* or the court's *evaluation relative to the disputed issue* is inferable from the statement. *State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009) (*citing State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)). Such a comment violates the constitution only if those attitudes are “reasonably inferable from the nature or manner of the court's statements.” *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999).

In this case, the curative instruction does not fall within the constitutional prohibition against commenting on the evidence because accident history at the onramp was not *at issue* in the case and because the instruction conveyed no attitude or evaluation on the part of the court. WSDOT's counsel's closing comments were factually incorrect and the curative subsequently instruction offered by WSDOT was insufficient. WSDOT proposed

that the trial court tell the jury to simply disregard its “lack of accidents” comments and to not be “concerned with the presence or absence of prior accidents.” CP 6167. The trial court properly recognized that WSDOT’s instruction *did not actually correct* its prejudicial statement that there had been no accidents. Even if the jury heard WSDOT’s instruction, it still would be under the misapprehension that the onramp was accident-free when in fact it was not. RP 2123-25.

WSDOT fails to consider the entire context of the curative instruction:

Members of the jury, accident history is kept as required by federal law for freeway on-ramps. The federal statute provides that this information is kept to improve safety, and for no other purpose. The statute provides that this information is privileged to encourage states to keep this information, and the information need not be disclosed as discovery in lawsuits. The statute is designed to balance competing interests.

Therefore, under those circumstances, the remarks yesterday of counsel for WSDOT that there have never been other collisions at this location and that Mr. Savo was the only driver to have a problem here were improper and inaccurate. You should not consider those comments made by counsel for WSDOT in your deliberations, and you should also strike from your notes any reference to those remarks.

RP 2128-29. Clearly, it would have been extremely prejudicial to the Plaintiff and Defendants Intrastate and Savo for the court to explain to the jury why documentation of accident history is inadmissible while leaving intact the jury's impression that there had been no accidents at the onramp.

Curative instructions should be tailored to address the remark that was made.

It is axiomatic that the trial court has considerable discretion in how the instructions will be worded and whether the rules contained in general instructions will be or should be repeated in specific instructions in more detail to guard against a misunderstanding by the jury.

*Roberts v. Goerig*, 68 Wn.2d 442, 455, 413 P.2d 626 (1966). The trial court here was required to correct the factual misstatements of counsel and neutralize jury speculation by stating that WSDOT's counsel's remarks were inaccurate. The instruction conveyed no opinion or beliefs about counsel's remarks, stated nothing about the actual accident history at the onramp, and conveyed no attitude about the merits of the case. The instruction was tailored to address WSDOT's counsel's egregiously prejudicial statements and, under the circumstances, was both appropriate and warranted.

2. WSDOT agreed to the curative instruction that was given and cannot claim it was unconstitutional on appeal.

WSDOT is not entitled to a new trial under CR 59 because it ultimately agreed to the instruction that was given:

THE COURT: All right. I'm going to add the following sentence: After I state that it balances competing interests, I will say, there have been accidents on the on-ramp, and otherwise leave it as stated....

MR COOLEY: Yeah. With that addition, it goes beyond curative instruction, and it has now injected evidence into the case, and it's going to be a problem.

THE COURT: Otherwise I have to say your statement was inaccurate. Would you prefer that approach?

MR. COOLEY: Yes, I would prefer that approach than your statement that there have been collisions....

RP 2127.

As a general rule, the court will not grant a new trial on the basis of an error or irregularity that was not brought to the court's attention when it occurred. 14A Wash. Prac., Civil Procedure § 30:41. Counsel for WSDOT did not object to the instruction when it was given, but now claims it can raise the issue under RAP 2.5(a)(3) because the instruction was an unconstitutional comment on the evidence. RAP 2.5(a)(3) permits a party to raise a "manifest error affecting a constitutional right" for the first time on appeal.

Review under this provision is not warranted, however, because any error that may have occurred was not *manifest*:

Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on appeal, we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) “truly of constitutional magnitude.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). RAP 2.5(a)(3) was not designed to allow parties “a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *Scott*, 110 Wn.2d at 687, 757 P.2d 492 (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)). If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted. *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). Cf. *State v. Contreras*, 92 Wn. App. 307, 311-14, 966 P.2d 915 (1998).

*State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Under *Lynn*, an alleged error is *manifest* only if it results in a concrete detriment to the claimant's constitutional rights. RAP 2.5(a)(3) is construed narrowly. *WWJ Corp.*, 138 Wn.2d at 693. “Appellate courts will not waste their

judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *Id.*

WSDOT cannot complain that the instruction resulted in a “concrete detriment” to WSDOT’s “constitutional rights” because, as a state agency, WSDOT has no constitutional rights. *See City of Mountlake Terrace v. Wilson*, 15 Wn. App. 392, 394, 549 P.2d 497 (1976) (“The due process clause protects people from government; it does not protect the state from itself. Municipal corporations are political subdivisions of the state, created for exercising such governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause...”)

Moreover, WSDOT’s counsel knew his statements during closing argument were improper, he agreed to a curative instruction, and he made no objection to the instruction that was given. He cannot now argue to the Court of Appeals that the instruction was in error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. *State v. Barnett*, 104 Wn. App. 191, 16 P.3d 74 (2001). “A party may not request an instruction and later complain on appeal that the requested instruction was given.” *State v. Henderson*, 114

Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (*quoting State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). *Henderson* involved erroneous WPIC instructions proposed by a defendant and later complained of. The court held that “even if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error.” *Henderson*, 114 Wn.2d at 870. Even manifest constitutional errors which were invited cannot be raised for first time on appeal. *State v. Phelps*, 113 Wn. App. 347, 57 P.3d 624 (2002); *State v. McLoyd*, 87 Wn. App. 66, 939 P.2d 1255 (1997).

WSDOT argues that the invited error doctrine does not apply, but ignores that **any other instruction would have left the jury with the impression that no accidents had ever occurred at the onramp**. A party may not materially contribute to an error at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The trial court was required to correct any juror speculation that the onramp was accident free and it did so with the blessing of counsel for WSDOT. WSDOT cannot now claim that the correction was in error and it should get a new trial.

**C. THE COURT PROPERLY REFUSED TO GIVE WSDOT'S "NO DUTY TO UPGRADE" INSTRUCTION**

Both Plaintiff's and Michael Savo's experts agreed that WSDOT should have installed a "signal ahead" sign at the metered onramp to comply with MUTCD requirements. RP 932-33, 938-40, 1963-65, 1974. WSDOT's expert traffic engineer, Toby Rickman, testified that the State of Washington employs only "ramp metered when flashing signs" at such locations. RP 1747.

Q. Now, with respect to the warning signs, your testimony, as I understand it, is that Washington state simply does not use the signal ahead on metered on-ramps; do I understand you correct?

A. The symbol, the signal ahead symbol, we do not use in advance of the ramp metering signals, that's correct.

RP 1765-66. Mr. Rickman denied, not once, but several times that the "signal ahead" sign had been installed at **any** metered onramps in Washington. RP 1767, 1794.

In fact, the State of Washington has installed "signal ahead" signs at metered onramps, and Mr. Rickman was shown photos of such signs during his testimony. RP 1766-67. Dr. Parsonson then described in his testimony at least four locations where he had directly observed the current use of "signal ahead" signs. RP 1965-

68, 1970-74. Photos of two of these signs were admitted into evidence. Exs. 576, 578. WSDOT was aware of the evidence and cross-examined Dr. Parsonson with regard to the photos and his observations. RP 1980, 1984-87.

Even so, WSDOT tried to salvage the damage caused by Parsonson's testimony by asking the Court to instruct the jury that "the State's duty does not require it to update road signs to present day standards." RP 2024-25, 2027. The Court declined to give the instruction. RP 2030. Experts Douglas and Parsonson both testified that the "signal ahead" signs **did** comply with current day standards, but there was no evidence in the record establishing **when** the "signal ahead" signs observed by Dr. Parsonson had been installed. In fact, Dr. Parsonson specifically testified that the "signal ahead" signs were required under both 1988 MUTCD standards (in effect when the onramp and metering system was initially installed), as well as 2003 MUTCD standards (in effect when an additional warning sign was installed in 2006). RP 1973-74.

In light of this, WSDOT's proposed "no duty to upgrade" instruction did not make sense. The jury would have had no way of knowing whether the "signal ahead" signs were installed pursuant

to *current* or *earlier* MUTCD standards, and a “no duty to upgrade” charge was therefore meaningless. WSDOT declined the Court’s invitation to present any rebuttal evidence or testimony on the “signal ahead” signage issue when it had the chance to at the close of Savo’s case. RP 2035.

Evidence establishing Washington’s use of the “signal ahead” signs was proper. When evidence is introduced that contradicts earlier testimony of another witness, it is simply “rebuttal in impeachment form.” *Jacqueline’s Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788, 498 P.2d 870 (1972). The evidence must be independently competent and admissible for a purpose other than that of attacking the *credibility* of the witness. *State v. Oswald*, 62 Wn.2d 118, 381 P.2d 617 (1963).

In this case, evidence establishing that WSDOT had installed “signal ahead” signs at metered onramps had direct and independent relevance to a material fact in issue. Experts Douglas and Parsonson testified that “signal ahead” signs were required under both the 1988 and 1993 MUTCD. WSDOT’s expert asserted that the State was permitted to substitute “ramp metered ahead while flashing” signs and that WSDOT never uses “signal ahead” signs at metered onramps. Clearly, someone at the State was

aware that the “signal ahead” signs could have or should have been used because Dr. Parsonson observed four locations where *they were* used. This testimony is directly relevant to WSDOT’s ability to properly design the onramp metering system in compliance with MUTCD standards and its failure to do so here. For this reason, the evidence was properly before the court and the “no duty to upgrade” instruction was correctly declined.

#### **D. REQUEST FOR FEES AND REASONABLE EXPENSES**

RAP 14.2 allows for costs and reasonable expenses to be awarded to the prevailing party on appeal. Pursuant to RAP 18.1(b), Respondents respectfully request that the Court issue an order awarding the reasonable attorneys’ fees, costs, and expenses allowed under RAP 14.3 should Respondent prevail on appeal.

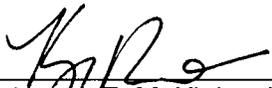
**VI. CONCLUSION**

Substantial evidence was presented at trial establishing that Michael Savo did not see the metering signal, warning signs, or the Plaintiff's small, dark car at the stop bar in the shadows under the overpass until it was too late to avoid impact. The jury rightfully concluded that the negligent design of the onramp and metering system was a proximate cause of the accident. WSDOT received a fair trial and the jury's verdict should not be overturned.

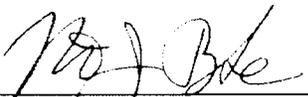
DATED this 28<sup>th</sup> day of July, 2011.

Respectfully submitted:

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No. 66334-8-I

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

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KOTI HU,

Respondent,

vs.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,  
an agency of the STATE OF WASHINGTON,

Appellant,

vs.

INTRASTATE PAINTING CORPORATION, a Washington  
corporation; and MICHAEL F. SAVO,

Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Steven C. Gonzalez, Judge

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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON  
2011 JUL 29 PM 1:02

**CERTIFICATE OF SERVICE**

Lauren Elliot, being first duly sworn on oath, deposes and states:

That on the 28th day of July, 2011, she caused to be sent a copy of  
Intrastate Painting Corporation and Michael F. Savo's Joint Brief of Respondents;  
and this Certificate of Service to the below listed parties of record as follows:

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