IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANETTE AURDAL and ARNOR STEVEN AURDAL, wife and husband, Respondents, v. JOHN BURNSTON and "JANE DOE" BURNSTON, husband and wife, and the marital community composed thereof, Appellants, And PHILLIP B. HUNTINGFORD and "JANE DOE" HUNTINGFORD, husband and wife, and the marital community composed thereof; CHARLES R. HUNTINGFORD and "JANE DOE" HUNTINGFORD, husband and wife, and the marital community composed thereof; GLEN J. HUNTINGFORD and "JANE DOE" HUNTINGFORD, husband and wife, and the marital community composed thereof, as individuals and as a partnership d/b/a OUT R WAY FARM, Defendants.	No. 41180-6-II UNPUBLISHED OPINION

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

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

FACTS

Background

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

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

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

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

Procedural History

Aurdal sued the Huntingfords, Burnston, and United Telephone (as Burnston's employer) for the injuries she allegedly sustained in the accident. During a jury trial in June 2010, Aurdal proposed and the trial court gave jury instruction 18:

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

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

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

ANALYSIS

I. Jury Instruction 18

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

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

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

> [Trial Judge]: The question is whether he has a statutory requirement if he hit a horse to stop.
> [Plaintiff's Counsel]: I don't think there's any doubt about that duty to stop.
> [Defense Counsel]: Your Honor, I think – but it says in – as you pointed out in Subsection 3, what do you do when you stop? None of that applies. So, you know, I think the plaintiffs' argument could be made on general negligence principles, and I'm not sure the statute applies.
> [Trial Judge]: Oh, absolutely. I agree for sure that they can make the argument on general negligence principles. I'm just wondering if the statute is going to be so confusing to the jury that –all right.

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

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

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

> the instruction to be given or refused and to which objection is made.

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

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

II. Harmless Error

Moreover, we are satisfied that the error in giving jury instruction 18 was harmless given the overwhelming evidence of Burnston's wrongdoing. Burnston argues that jury instruction 18 was prejudicial because the "evidence could have persuaded the jurors that Burnston exercised ordinary care except for his failure to comply with a statutory 'duty to stop'" as described in the

trial court's highly truncated summary of RCW 46.52.020. Br. of Appellant at 14.

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

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

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

We affirm.

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

Armstrong, J.

I concur:

Penoyar, C.J.

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

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

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

> Senator Woody: . . . "I understand that it is not proposed that there be any substantive changes in current law. Is that correct?"
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> Senator Guess: "That is correct."
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> Senator Woody: "If you would . . . explain this to me, Senator Guess. That relates to the hit and run and it adds 'or damage to other property' on line 21. The question that arises in my mind, is, who is the person supposed to give notice to as to damage *other than to a vehicle*?"
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> Senator Guess: "If it is at all possible, Senator, the man should, if he hits a house, for instance, he would not want to run off and leave the scene of the accident without informing the person who owns the house. If it is impossible for him to do so, then by writing a note to the individual and placing it on the property in a prominent place, I think it would serve the purpose."
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> . . . .
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> Senator Woody: "It is your statement then that it was the legislative intent of the Transportation Committee that the notification required be made within

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

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

I've decided to give [instruction 18], even after the debate I had -- we had on that

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twenty-four hours to the police authority is sufficient notice?"

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

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

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

> earlier because there is a duty to stop, and there's some evidence to indicate that he didn't stop and had he stopped it could have -- it could have -- changed things.

8 RP at 1268.

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

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

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

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

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

First, I disagree that a traffic reconstructionist's incorrect view of the law applies or can negate the prejudicial effect of a misleading and legally incorrect jury instruction. As the Washington Supreme Court has said, "'Each courtroom comes equipped with a "legal expert,'" called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.'" *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (quoting *Burkhart v.*

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

Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997)).

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

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

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

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

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

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

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QUINN-BRINTNALL, J.