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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 Trial Court: DISTRICT COURT OF THE 19TH JUDICIAL DISTRICT WELD COUNTY, STATE OF COLORADO Trial Court Judge: Daniel Maus Trial Court Case No. 2011cv107 Plaintiffs/Appellants: JOHN WINKLER AND LINDA WINKLER, v. Defendants: JASON SHAFFER, MICHAEL GARTLEY, and GERALD H. PHIPPS, INC. d/b/a GH PHIPPS CONSTRUCTION COMPANY	**COURT USE ONLY**
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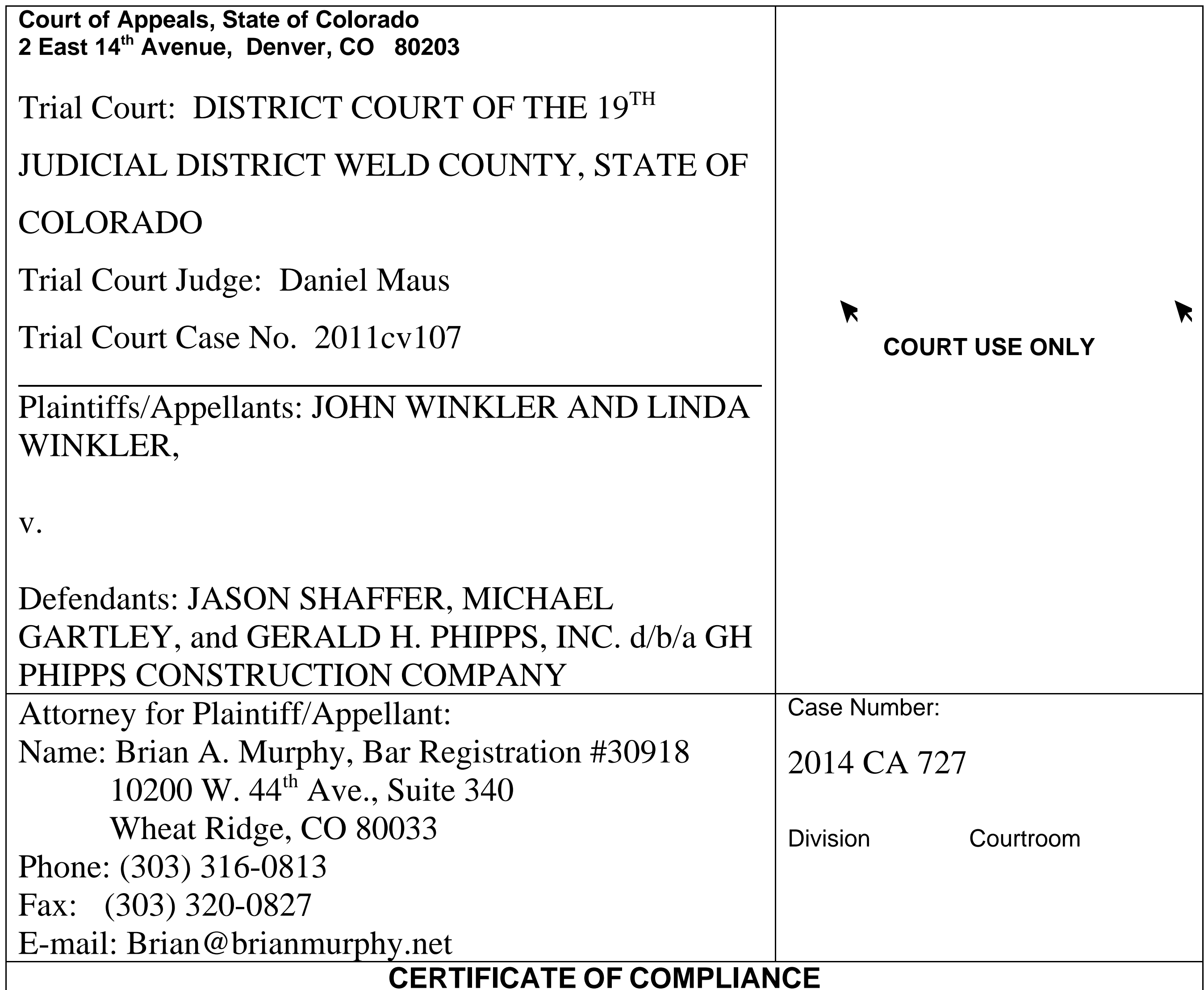

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

✠It contains 8,359 words.

❑It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

✠For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

By: /s Brian A. Murphy

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I
ISSUES PRESENTED FOR REVIEW

1. **Standard of review applicable to question 1) Did the Trial Court in allowing Defendants to present undisclosed opinion testimony of Defendants' expert witness Sgt. Gates?**

2. **Did the Trial Court commit reversible error when in refused to instruct the jury on Plaintiff's Negligence Per Se Claim even though Plaintiff's expert witness testified that Defendant Shaffer was driving too fast for conditions and following too closely in violation of Colorado safety statutes?**

II
STATEMENT OF THE CASE

A. Nature Of the Case And Procedural History

This is personal injury case arising from multiple vehicle collisions which occurred on March 26, 2009. The trial court granted Defendants' unopposed motion to bifurcate the trial and a jury trial solely on the issue of liability was held from May 14, 2013 to May 16, 2013.

After trial on the liability issues, Plaintiffs settled all claims with Defendant National Farmers Union Property And Casualty Company. Therefore, this former Defendant is no longer part of the case.

The jury found that Defendants Kmet Volodymyr and Bogo Transportation, Inc. were negligent and their negligence caused 100% of both Plaintiffs' injuries resulting from the March 26, 2009 collision at issue in the case; and found Defendants Jason Shaffer, Michael Gartley, and Gerald H. Phipps, Inc. d/b/a/ GH Phipps Construction Company were not negligent in the March 26, 2009 collision at issue in the case.

Plaintiff filed an earlier appeal of this verdict. However, this Court dismissed that appeal without prejudice finding that the trial court's entry of judgment did not contain the necessary language to render the verdict ripe for appeal. On March 10, 2014, the trial court entered an Amended Entry of Judgment On Jury Verdict certifying as final the judgment and issues addressed in this appeal.

This appeal follows.

B. Statement Of the Facts Relevant To Issues Presented For Review

Plaintiffs specifically pleaded a claim for negligence *per se* against Defendant Shaffer in their Complaint and Jury Demand, based on violations of "C.R.S. § 42-4-1101, Driving Too Fast for Conditions, and C.R.S. § 42-4-1008 Following Too Closely." **R. CF, p. 7.** Plaintiffs' Second Amended Complaint And Jury Demand, reasserted these same claims for negligence per se against both Defendant Shaffer and Defendant Gartley. **R. CF, p. 223 & 226-27.** The Trial Management Order documents that Plaintiffs were still proceeding to trial with negligence per se claims against Defendants Shaffer and Gartely. **R. CF, p. 796.**

Plaintiffs offered the testimony of an expert engineering witness at trial, Mr. Railsback, to testify that both Defendants Shaffer and Gartley were driving too fast for conditions and following too closely. However, based on the objection of Mr. Gartley's attorney that Plaintiffs had failed to disclose that Mr. Railsback would testify that Mr. Gartley specifically was going too fast or following too closely, the Court prohibited Mr. Railsback from testifying about Mr. Gartely**. R. Tr. May 14, 2013, p. 151, l. 21-23.** Plaintiffs have chosen not to appeal that ruling.

However, Mr. Railsback was allowed to testify to these opinions regarding the negligent per se actions of Defendant Shaffer. At trial, Mr. Railsback testified in relevant part as follows:

23 Q. Okay. So please summarize your criticisms
24 of Mr. Shaffer and the cause of this collision.
25 A. Sure. I have one overarching criticism,
216
1 that he didn't control his vehicle. Because he
2 didn't control his vehicle he came to rest blocking
3 the southbound lanes of travel.
4 And that's really supported by two
5 conclusions: One, that he was following vehicles
6 too closely and violating the rules of operating a
7 truck according to the commercial driver's license
8 manual.
9 And the second is that he is just driving
10 too fast for the roadway conditions. The driver's
11 license handbook has a rule to reduce your speed to
12 a crawl in the event of icy roadway conditions.
13 And I just don't think based on the
14 physical evidence and how much speed and energy, he
15 would have to use to get into that jackknifed
16 position, that he was traveling at a crawl, but he
17 didn't control his vehicle ultimately.
18 Q. Had Mr. Shaffer followed those two safety
19 rules, would he have jackknifed the rig?
20 A. I don't think so, no.
21 Q. If he hadn't jackknifed the rig, would the
22 Winklers be injured?
23 A. I don't think so, no. **R. Tr. May 14, 2013, p. 215, l. 23-p. 216, l. 23.**

Plaintiffs tendered to the trial court a proposed jury instruction modeled directly on the standard Colorado Jury Instruction for Civil Trials 9:14. **R. Supr., Suppressed, p. 64.** The tendered instruction read as follows:

> JURY INSTRUCTION No. _________
> At the time of the occurrence in question in this case, the following statutes
> of the State of Colorado were in effect:
> C.R.S. § 42-4-1008. Following too closely
> C.R.S. § 42-4-1101. Speed limits
> A violation of either of these statutes constitutes negligence.
> If you find such a violation, you may only consider it if you also find that it
> was a cause of the claimed injuries, damages, losses.
> **R. Supr., Suppressed, p. 64.**

The instruction was then followed with the text of both C.R.S. § 42-4-1008. Following and C.R.S. § 42-4-1101. **R. Supr., Suppressed, p. 65-69.**

The trial court rejected the proposed instruction without offering any reason for the decision in an unrecorded session which was held in chambers in the presence of all counsel. Plaintiff Counsel made a record of Plaintiffs' objection to the trial court's refusal to give a 9:14 negligence per se instruction the next day on the record in open court. **R. Tr. May 16, 2013, p. 114, l. 1-p. 115, l. 16**.

Just ten days before trial, Counsel for Defendants Shaffer, Gartley, GH Phipps[1], and NFU[2] all solicited previously undisclosed expert opinion testimony from one of Defendant Shaffer's nonretained expert witnesses, Sgt. Gates, during a trial preservation video which was made because Sgt. Gates is a Wyoming State Trooper who was not going to be available to testify live at trial in Colorado. It is undisputed that the testimony in question which was the subject of Plaintiffs objection had not previously been disclosed. Plaintiffs moved the trial court to strike the portions of Sgt. Gates' testimony which constituted previously undisclosed opinion testimony pursuant to C.R.C.P. 37(c). **R. CF, p. 1159.** However, the trial court did not apply the standards from C.R.C..P. 37(c) in considering and denying Plaintiff's motion. Instead of apply Rule 37, the trial court denied Plaintiffs' Motion, holding:

> Discovery was extended in this matter until April 26, 2013. After the close of discovery, the Plaintiffs agreed to allow the deposition of Sgt. Gates to be taken on May 4, 2013. Plaintiffs now complain about opinions given by Sgt. Gates during his deposition. By

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[1]Defendants Gartley and GH Phipps are joint Defendants represented by the same attorneys. Therefore, references made throughout the brief to Defendant Gartley apply equally to Defendant GH Phipps.

[2]Defendant NFU settled with Plaintiffs after trial and is no longer part of this appeal.

> agreeing to allow the deposition to be taken, the Plaintiffs cannot object to what was disclosed. **R. CF, p. 1380.**

Defendant Shaffer's initial expert disclosures filed on February 6, 2013. **R. CF, p. 342.** Pursuant to an unopposed extension, Defendant Shaffer's final expert disclosures were due on March 5, 2013. **R. CF, p. 381.** Defendant Shaffer met this deadline and served his final supplemental expert disclosures on March 5, 2013. **R. CF, p. 1167.**

Sgt. Gates was an eye-witness to some of the collisions that occurred on March 26, 2009. Sgt. Gates is also a Wyoming State Trooper. In addition to listing Sgt. Gates in Rule 26(a)(1) disclosures, Defendant Shaffer also included Sgt. Gates in his Rule 26(a)(2)(B)(II) disclosures. **R. CF, p. 1169.** Defendants Gartley and GH Phipps did not provide any expert disclosures.

Regarding Sgt. Gates, Defendant Shaffer provided the following complete statement describing the substance of all opinions to be expressed:

> Sergeant Gates may be called to testify based on his education, training, and experience, and/or to discuss his observations and investigation on March 26, 2009. Sgt. Gates was on site when this incident occurred and was the first law enforcement officer to respond to the accident. Sgt Gates was responding to a three-to-four car motor vehicle accident when he observed a straight-truck (later identified as the Schroll Cabinets truck) pass him on the right. The straight-truck started to slide sideways. The

> vehicles immediately behind the straight truck slowed in an attempt to avoid hitting the straight-truck, including the tractor-trailer driven by Jason Shafer. Weather conditions on March 26, 2008 were snowy, icy, and windy with visibility in the area of south I-25 near the Wyoming border extremely low and at times less than 100 feet. Sgt. Gates attempted to warn additional southbound drives of the accident by running in the northbound median along the southbound lanes. During this time at least two to three vehicles drove into the median towards Sgt. Gates and Sgt Gates had to run across the northbound lanes to avoid being hit. Colorado State Patrol was contacted and the southbound lanes of I-25 were closed. **R. CF, p. 1169.**

During his trial testimony preservation video, attorneys for all Defendants elicited previously undisclosed opinion testimony from Sgt. Gates which is not included in the above statement, or any other previous disclosure, as shown below:

> Questions by Ms. Garcia:
> Page 27
> 22 Q. Okay. In your opinion, if the semi
> 23 tractor-trailer were traveling southbound on I-25 and still
> 24 moving and was rear-ended on the right -- I'm sorry, in the
> 25 left rear corner of the vehicle, given the icy road
> Page 28
> 1 conditions, could that cause the tractor to start to slide?
> 2 MR. MURPHY: Objection, assumes facts not in
> 3 evidence.
> 4 A. I believe it could. I'm not an engineer, but --
> 5 but based on experience, I believe it is possible that that
> 6 type of a rear-end collision potentially could cause a
> 7 change in direction or a change in movement of another
> 8 vehicle, even a vehicle of the size of a semi.
> 9 Q. (BY MS. GARCIA) Okay. And that opinion is based

10 on your background, training and experience as a highway
11 patrol officer?
12 A. It is.
Page 31
5 Q. Okay. Based on your background, education,
6 training and experience, did you find any compelling
7 evidence that Mr. Shaffer was driving too fast for road
8 conditions on March 26, 2009?
9 A. I did not.
10 Q. Based on your background, training, education and
11 experience, did you find any compelling evidence that
12 Mr. Shaffer was traveling too close for conditions?
13 A. I did not.
14 Q. Okay. When you first observed Mr. Shaffer, did
15 he appear to you to be driving at an unreasonable or high
16 rate of speed?
17 A. I -- I -- no, I did not observe that. I did not
18 necessarily believe that was the case.
Page 31
20 Q. Okay. Did -- do you have any criticisms of Jason
21 Shaffer?
22 A. I do not.
23 Q. In your background, education, training and
4
24 experience, given the weather conditions, tell me what kind
25 of difficulties a driver would have had stopping at any
Page 32
1 speed?
2 A. Starting with the visibility, they -- they would
3 not have seen a vehicle, a crash, or any other event, ahead
4 of them until literally the last second. So that, in and
5 of itself, would create problems with -- or -- or it would
6 affect the ability of a driver to react to something on
7 such a short notice of observing that incident in front of
8 them.

9 Compounded by the road conditions, had they had
10 even that amount of time, slightly more amount of time to
11 react, as slick as the roads were at that location at that
12 time, any movement of the vehicle at all, at any speed
13 would have made it difficult to avoid or stop and -- before
14 colliding with something in front of them -- directly in
15 front of them.
16 So -- so again, you know, the -- the road and
17 weather conditions were such that it would have made it
18 difficult for anybody -- anybody to react appropriately to
19 avoid that -- a collision in that area at that time.
20 Q. If you had been the lead investigator for this
21 multi-vehicle accident, would you have issued any traffic
22 citations?
23 MR. MURPHY: Objection, foundation, calls for
24 speculation.
25 A. Not moving violations, I would not have.
Page 33
1 Q. (BY MS. GARCIA) Okay. And when you say not
2 moving violations, can you . . .
3 A. You know, had -- had we in our investigation
4 found an insurance violation or a -- a driver's license
5 violation or equipment violation or something like that,
6 then, yes, we would have written citations for something
7 like that. A moving violation would have been something
8 that, you know, speeding, failure to maintain their lane,
9 failure to yield, failure to use turn signals and things
10 like that. Things that are more typically common with a
11 moving vehicle or an action on the part of the -- an actual
12 action on the part of the driver.
13 Q. And you would not have issued any traffic
5
14 citations on this March 26, 2009 accident?
15 MR. MURPHY: Objection, leading, foundation.
16 Go ahead.

17 A. Correct, I would not have.
18 MS. GARCIA: Okay. And for the record, and for
19 editing purposes, I'm afraid that you spoke over his
20 answer, and so I'm going to ask the question again. Your
21 objection is acknowledged and preserved for the record, so
22 that we can appropriately edit the videotape.
23 MR. MURPHY: That's fine.
24 Q. (BY MS. GARCIA) Sergeant Gates, in your
25 background, training and experience as a Wyoming State
Page 34
1 patrol officer for 11 years, you would not have issued any
2 moving violations to any driver for the motor vehicle
3 accident that occurred on March 26, 2009; is that fair?
4 A. It is fair.
Questions by Mr. Olivera:
Page 35
1 Q. I wanted to ask a few follow-up questions. With
2 regard to all of these vehicles that you're seeing around
3 you, can you specifically assess blame to any individual
4 driver for the accidents that occurred that morning?
5 A. I cannot.
6 Q. And from your observations, did you observe
7 anyone driving unreasonably that morning?
8 A. I did not.
9 Q. And from your observations, did you observe
10 anyone driving inappropriately that morning?
11 A. I did not.
12 Q. And would you agree with the statement that the
13 weather was the culprit for this accident?
14 A. I would agree with that, yes.
Questions by Mr. Menk:
Page 36
2 Q. I assume that the -- the questions that you
3 answered for Mr. Olivera, as to the fact that you didn't
6

4 see anyone driving unreasonably, would apply to Mr. Gartley
5 as well as everyone else?
6 A. It would, yes.
7 Q. And that you didn't see anything to indicate that
8 Mr. Gartley did anything inappropriate so as to cause this
9 accident?
10 A. Correct, I did not.
11 Q. All right. And you -- you talked about folks
12 coming upon this accident, literally seeing things ahead of
13 them at the last second. Would that have been a
14 circumstance confronted by Mr. Gartley as one of those
15 vehicles?
16 A. It would, yes.
17 Q. And -- and basically, those vehicles would have
18 seen the road entirely blocked from shoulder to shoulder?
19 A. Or pretty close to that, yes.
20 Q. Okay. And they would have seen that in this
21 extremely poor visibility that you described?
22 A. Most likely. I mean, you take into account the
23 possibility of a white van against white snow could have
24 affected -- in my opinion, could have affected vision.
25 Q. It might have made it worse?
Page 37
1 A. It could have, yes. It could have made it more
2 difficult to see what was -- what was ahead of them, yes. . . .
16 Q. Okay. And when you said that you didn't notice
17 any vehicles acting -- or driving unreasonably, would that
18 include traveling too fast?
19 A. It would, yes.
20 Q. Or following too closely?
21 A. Yes, correct.
22 Q. You didn't see that and couldn't point to any
23 vehicle that did that?
24 A. Correct. Quoted Sections of Sgt. Gates Deposition, **R. CF, p. 1175-1184**.

All of the above testimony, which was solicited on direct by Defense Counsel, was previously undisclosed opinion testimony which should never have been presented to the Jury in any form.

III
ARGUMENT

A. Summary of Argument

1) Did the Trial Court in allowing Defendants to present undisclosed opinion testimony of Defendants' expert witness Sgt. Gates?

Defendant Shaffer timely disclosed a summary of the testimony of Sgt. Gates as a non-retained expert witness on March 5, 2013. Then, merely 10 days before trial, during a trial preservation video of Sgt. Gates, Defense Counsel elicited previously undisclosed expert opinions from Sgt. Gates to the effect that Defendants did not drive negligently and did not cause the collisions which injured Plaintiffs.

Plaintiffs moved the trial court to strike the previously undisclosed opinions of Sgt. Gates pursuant to C.R.C.P. 37(c). The trial court failed to apply the standards of C.R.C.P. 37 in deciding the motion and committed reversible error in allowing the jury to hear Sgt. Gates testimony regarding the undisclosed opinions.

The failure to disclose was neither harmless nor substantially justified and the undisclosed opinions should have been removed from the preserved testimony of Sgt. Gates and not played for the jury. Sgt. Gates' undisclosed opinion testimony severely harmed Plaintiffs' case and unfairly prejudiced their ability to fairly present their case to the jury. Therefore, the verdict and judgment should be reversed and the trial court should be instructed to exclude the undisclosed portions of Sgt. Gates' opinions on retrial.

2) Did the Trial Court commit reversible error when in refused to instruct the jury on Plaintiff's Negligence Per Se Claim even though Plaintiff's expert witness testified that Defendant Shaffer was driving too fast for conditions and following too closely in violation of Colorado safety statutes?

Plaintiffs properly pleaded and maintained claims against Defendant Shaffer for negligence *per se* based on his violation of C.R.S. § 42-4-1008 by following too closely and his violation of C.R.S. § 42-4-1101 by driving too fast for conditions. Plaintiffs presented expert testimony at trial that Defendant Shaffer was driving too fast for conditions and was following too closely, and those actions caused the collisions which injured Plaintiffs. Plaintiffs were members of the class of people meant to be protected by the safety statutes at issue.

Therefore, the trial court should have given the jury the Colorado standard jury instruction 9:14 on negligence per se. The trial court's failure to give the instruction unfairly prejudiced Plaintiffs' case and resulted in a defense verdict for Defendant Shaffer which must be reversed.

B. ARGUMENT REGARDING QUESTION (1)

Did the Trial Court in allowing Defendants to present undisclosed opinion testimony of Defendants' expert witness Sgt. Gates?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE FOR REVIEW

The Court of Appeals will "review de novo the trial court's determination of the proper legal standard to apply to the issue before it." *Young v. Bush*, 2012 COA 47, 277 P.3d 916, 920 (Colo.App. 2012). Appellate Courts "review de novo questions of law concerning the application and construction of statutes. . . . Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law." *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept.*, 196 P.3d 892, 897-898 (Colo. 2008).

Since the trial court failed to apply the proper legal standard contained in C.R.C.P. 37 to Plaintiffs' motion to strike the undisclosed opinion testimony of Sgt. Gates, this Court should review that decision de novo.

Plaintiffs preserved this issue for appeal and raised it with the trial court in a Motion To Strike The Undisclosed Opinion Testimony By Sgt. Gates. **R. CF, p. 1159.** The trial court denied the Motion in its Order Re: Plaintiff's Motion To Strike Undisclosed Opinion Testimony By Sgt. Gates. **R. CF, p. 1380.**

ARGUMENT

Just ten days before trial, Counsel for Defendants Shaffer, Gartley, and NFU all solicited previously undisclosed expert opinion testimony from one of Defendant Shaffer's nonretained expert witnesses, Sgt. Gates, during a trial preservation video which was made because Sgt. Gates is a Wyoming State Trooper who was not going to be available to testify live during trial in Colorado. It is undisputed that the testimony in question had not previously been disclosed.

Plaintiffs moved the trial court to strike the portions of Sgt. Gates' testimony which constituted previously undisclosed opinion testimony pursuant to C.R.C.P. 37(c). **R. CF, p. 1159.** However, the trial court did not apply the standards from C.R.C..P. 37(c) in considering and denying Plaintiff's motion. Instead of apply Rule 37, the trial court denied Plaintiffs' Motion, holding:

> Discovery was extended in this matter until April 26, 2013. After the close of discovery, the Plaintiffs agreed to allow the deposition of Sgt. Gates to be taken on May 4, 2013. Plaintiffs now complain about opinions given by Sgt. Gates during his deposition. By agreeing to allow the deposition to be taken, the Plaintiffs cannot object to what was disclosed. **R. CF, p. 1380.**

The trial court's failure to apply the standard of C.R.C.P. 37 constitutes reversible error. A trial court's failure to resolve a "in accordance with clearly-defined legal criteria applicable to such a motion" constitutes reversible error. *Buckmiller v. Safeway Stores, Inc*., 727 P.2d 1112, 1115 (Colo. 1986).

"When there does exist a controlling legal standard, however, a court may not disregard that standard in favor of some other legal rule. The fact that the legal standard requires the consideration and application of several elements to the facts of a case does not alter in the least the court's obligation to decide the controversy in accordance with that standard." *Id.*

Here, the trial court failed to apply the well-established clearly-defined legal criteria applicable to a motion to strike undisclosed expert testimony pursuant to C.R.C.P. 37(c). Instead, the trial court created its own standard that by consenting to allow a witness to testify via a preservation video, Plaintiffs had waived their

right to expect that Defendants would not be allowed to solicit previously undisclosed expert opinions from the witness.

Pursuant to Rule 37, "A party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial." C.R.C.P. 37(c). Rule 26(a)(2)(B)(II) states that "[w]ith respect to a witness who may be called to provide expert testimony but is not within the description contained in subsection (a)(2)(B)(I) above, the report or summary shall contain the qualifications of the witness and a complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor." C.R.C.P. 26(a)(2)(B)(II).

The Colorado Supreme Court has repeatedly held that:

> A party that does not comply with the disclosure deadlines in C.R.C.P. 26(a) (2) faces possible sanction under C.R.C.P. 37(c), including the preclusion of any evidence that was not properly disclosed. We have held that 'under C.R.C.P. 37(c), a trial court has a duty to sanction a party for failure to comply with certain discovery deadlines by precluding evidence or witnesses, unless the party's failure to comply is either substantially justified or harmless.' The non-disclosing party has the burden of proving that the failure to disclose was either substantially justified or harmless to the other party. *Cook v. Fernandez-Rocha*, 168 P.3d 505, 506 (Colo. 2007) *citing and partially quoting* Todd v.BearValley Vill. Apartments, 980 P.2d 973, 975 (Colo. 1999).

Defendant Shaffer's initial expert disclosures filed on February 6, 2013. **R. CF, p. 342.** Pursuant to an unopposed extension, Defendant Shaffer's final expert disclosures were due on March 5, 2013. **R. CF, p. 381.** Defendant Shaffer met this deadline and served his final supplemental expert disclosures on March 5, 2013, which included Sgt. Gates in his Rule 26(a)(2)(B)(II) disclosures. **R. CF, p. 1167 & 1169.**

Defendants Gartley and GH Phipps did not provide any expert disclosures and did not disclose that Sgt. Gates would offer any opinion testimony at all.

Regarding Sgt. Gates, Defendant Shaffer provided the following statement describing the substance of all opinions to be expressed:

> Sergeant Gates may be called to testify based on his education, training, and experience, and/or to discuss his observations and investigation on March 26, 2009. Sgt. Gates was on site when this incident occurred and was the first law enforcement officer to respond to the accident. Sgt Gates was responding to a three-to-four car motor vehicle accident when he observed a straight-truck (later identified as the Schroll Cabinets truck) pass him on the right. The straight-truck started to slide sideways. The vehicles immediately behind the straight truck slowed in an attempt to avoid hitting the straight-truck, including the tractor-trailer driven by Jason Shafer. Weather conditions on March 26, 2008 were snowy, icy, and windy with visibility in the area of south I-25 near the Wyoming border extremely low and at times less than 100 feet. Sgt. Gates attempted to warn additional southbound drives of the accident by running in the northbound

median along the southbound lanes. During this time at least two to
three vehicles drove into the median towards Sgt. Gates and Sgt
Gates had to run across the northbound lanes to avoid being hit.
Colorado State Patrol was contacted and the southbound lanes of
I-25 were closed. **R. CF, p. 1169.**

However, attorneys for all Defendants elicited opinion testimony from Sgt. Gates which is not included in the above statement, which is demonstrated below:

Questions by Ms. Garcia:
Page 27
22 Q. Okay. In your opinion, if the semi
23 tractor-trailer were traveling southbound on I-25 and still
24 moving and was rear-ended on the right -- I'm sorry, in the
25 left rear corner of the vehicle, given the icy road
Page 28
1 conditions, could that cause the tractor to start to slide?
2 MR. MURPHY: Objection, assumes facts not in
3 evidence.
4 A. I believe it could. I'm not an engineer, but --
5 but based on experience, I believe it is possible that that
6 type of a rear-end collision potentially could cause a
7 change in direction or a change in movement of another
8 vehicle, even a vehicle of the size of a semi.
9 Q. (BY MS. GARCIA) Okay. And that opinion is based
10 on your background, training and experience as a highway
11 patrol officer?
12 A. It is.
Page 31
5 Q. Okay. Based on your background, education,
6 training and experience, did you find any compelling
7 evidence that Mr. Shaffer was driving too fast for road
8 conditions on March 26, 2009?
9 A. I did not.

10 Q. Based on your background, training, education and
11 experience, did you find any compelling evidence that
12 Mr. Shaffer was traveling too close for conditions?
13 A. I did not.
14 Q. Okay. When you first observed Mr. Shaffer, did
15 he appear to you to be driving at an unreasonable or high
16 rate of speed?
17 A. I -- I -- no, I did not observe that. I did not
18 necessarily believe that was the case.
Page 31
20 Q. Okay. Did -- do you have any criticisms of Jason
21 Shaffer?
22 A. I do not.
23 Q. In your background, education, training and
4
24 experience, given the weather conditions, tell me what kind
25 of difficulties a driver would have had stopping at any
Page 32
1 speed?
2 A. Starting with the visibility, they -- they would
3 not have seen a vehicle, a crash, or any other event, ahead
4 of them until literally the last second. So that, in and
5 of itself, would create problems with -- or -- or it would
6 affect the ability of a driver to react to something on
7 such a short notice of observing that incident in front of
8 them.
9 Compounded by the road conditions, had they had
10 even that amount of time, slightly more amount of time to
11 react, as slick as the roads were at that location at that
12 time, any movement of the vehicle at all, at any speed
13 would have made it difficult to avoid or stop and -- before
14 colliding with something in front of them -- directly in
15 front of them.
16 So -- so again, you know, the -- the road and
17 weather conditions were such that it would have made it

18 difficult for anybody -- anybody to react appropriately to
19 avoid that -- a collision in that area at that time.
20 Q. If you had been the lead investigator for this
21 multi-vehicle accident, would you have issued any traffic
22 citations?
23 MR. MURPHY: Objection, foundation, calls for
24 speculation.
25 A. Not moving violations, I would not have.
Page 33
1 Q. (BY MS. GARCIA) Okay. And when you say not
2 moving violations, can you . . .
3 A. You know, had -- had we in our investigation
4 found an insurance violation or a -- a driver's license
5 violation or equipment violation or something like that,
6 then, yes, we would have written citations for something
7 like that. A moving violation would have been something
8 that, you know, speeding, failure to maintain their lane,
9 failure to yield, failure to use turn signals and things
10 like that. Things that are more typically common with a
11 moving vehicle or an action on the part of the -- an actual
12 action on the part of the driver.
13 Q. And you would not have issued any traffic
5
14 citations on this March 26, 2009 accident?
15 MR. MURPHY: Objection, leading, foundation.
16 Go ahead.
17 A. Correct, I would not have.
18 MS. GARCIA: Okay. And for the record, and for
19 editing purposes, I'm afraid that you spoke over his
20 answer, and so I'm going to ask the question again. Your
21 objection is acknowledged and preserved for the record, so
22 that we can appropriately edit the videotape.
23 MR. MURPHY: That's fine.
24 Q. (BY MS. GARCIA) Sergeant Gates, in your
25 background, training and experience as a Wyoming State

Page 34
1 patrol officer for 11 years, you would not have issued any
2 moving violations to any driver for the motor vehicle
3 accident that occurred on March 26, 2009; is that fair?
4 A. It is fair.
Questions by Mr. Olivera:
Page 35
1 Q. I wanted to ask a few follow-up questions. With
2 regard to all of these vehicles that you're seeing around
3 you, can you specifically assess blame to any individual
4 driver for the accidents that occurred that morning?
5 A. I cannot.
6 Q. And from your observations, did you observe
7 anyone driving unreasonably that morning?
8 A. I did not.
9 Q. And from your observations, did you observe
10 anyone driving inappropriately that morning?
11 A. I did not.
12 Q. And would you agree with the statement that the
13 weather was the culprit for this accident?
14 A. I would agree with that, yes.
Questions by Mr. Menk:
Page 36
2 Q. I assume that the -- the questions that you
3 answered for Mr. Olivera, as to the fact that you didn't
6
4 see anyone driving unreasonably, would apply to Mr. Gartley
5 as well as everyone else?
6 A. It would, yes.
7 Q. And that you didn't see anything to indicate that
8 Mr. Gartley did anything inappropriate so as to cause this
9 accident?
10 A. Correct, I did not.
11 Q. All right. And you -- you talked about folks
12 coming upon this accident, literally seeing things ahead of

13 them at the last second. Would that have been a
14 circumstance confronted by Mr. Gartley as one of those
15 vehicles?
16 A. It would, yes.
17 Q. And -- and basically, those vehicles would have
18 seen the road entirely blocked from shoulder to shoulder?
19 A. Or pretty close to that, yes.
20 Q. Okay. And they would have seen that in this
21 extremely poor visibility that you described?
22 A. Most likely. I mean, you take into account the
23 possibility of a white van against white snow could have
24 affected -- in my opinion, could have affected vision.
25 Q. It might have made it worse?
Page 37
1 A. It could have, yes. It could have made it more
2 difficult to see what was -- what was ahead of them, yes. . . .
16 Q. Okay. And when you said that you didn't notice
17 any vehicles acting -- or driving unreasonably, would that
18 include traveling too fast?
19 A. It would, yes.
20 Q. Or following too closely?
21 A. Yes, correct.
22 Q. You didn't see that and couldn't point to any
23 vehicle that did that?
24 A. Correct. Quoted Sections of Sgt. Gates Deposition, **R. CF, p. 1175-1184.**

All of the above testimony, which was solicited on direct by Defense Counsel, was previously undisclosed opinion testimony which should never have been presented to the Jury in any form.

It is undisputed that the above testimony was not disclosed until May 4, 2013, a full two months after Defendants' expert disclosures were due and only 10 days before trial! Therefore, Defendants failed to disclose the information required by C.R.C.P. 26(a) until 10 days before trial and long after the expert disclosure deadline had passed.

Pursuant to Rule 37, "A party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial." C.R.C.P. 37(c).

There is no justification for Defendants soliciting previously undisclosed expert opinions from a witness 10 days before trial. The witness was not new and he was being asked about opinions he had apparently formed years beforehand at the scene of the collision. Therefore, even if the trial court had required Defendants' to show that their failure to disclose the opinions was substantially justified, Defendants could never make such a showing.

It is difficult to imagine what could be more harmful to Plaintiffs' case than to have an expert witness, who also happens to be a Sgt. with the Wyoming State Patrol who actually witnessed the events of the day state the opinion the weather

was the true cause of the collision and that none of the Defendants: were driving inappropriately; driving at an unreasonable or high rate of speed; traveling too close for conditions; or the cause of the collisions.

The fact that Sgt. Gates had these opinions is not the harm and prejudice Plaintiffs are complaining about. Had these opinions of Sgt. Gates been disclosed in Defendant Shaffer's final expert disclosures on March 5, 2013, Plaintiffs would have had the opportunity to develop expert opinions to refute those opinions, or could have at least prepared to effectively cross-examine Sgt. Gates about those opinions in his trial testimony.

However, allowing such new opinions to be presented to the jury without affording Plaintiffs such opportunities to address Sgt. Gates' newly expressed opinions, was extremely prejudicial and was undoubtedly the leading reason for the Defense verdict in the case. It was an extreme example of the sort of trial by ambush Colorado rules of civil procedure are meant to prevent. Therefore, even if the trial court had required Defendants' to show that their failure to disclose the opinions was harmless, Defendants could never make such a showing.

This Court has previously recognized that:

> Among the many important purposes of discovery, the most central to a fair trial is the parties' production of all relevant evidence. *Trattler v. Citron*, 182 P.3d 674, 679 (Colo.2008). Under C.R.C.P. 26(a)(2)(B)(I), a party must disclose (1) the identity of each expert witness; (2) the expert's qualifications; (3) a summary or report of the expert's findings as to the case; (4) any exhibits to be used; (5) a list of the expert's past publications; (6) the compensation the expert will receive for his or her work; and (7) a list of previous cases in which the expert testified. Under C.R.C.P. 37(c)(1), failure to disclose evidence without substantial justification requires preclusion of that evidence at trial, unless the failure is harmless. However, the court may, on motion and after affording an opportunity to be heard, impose other appropriate sanctions. C.R.C.P. 37(c)(1). *Camp Bird Colorado, Inc. v. Board of County Com'rs of County of Ouray*, 215 P.3d 1277,1290 (Colo.App.Div. 1 2009).

Plaintiffs in this case asked for the specific relief approved by the Court of Appeals in *Camp Bird Colorado* -- the exclusion of the portions of Sgt. Gates opinion testimony disclosed 10 days before trial, rather than exclusion of Sgt. Gates as a witness. *Id.* Under Rule 37 and the circumstances of the case, the trial court was required to grant that request and committed reversible error in allowing the testimony without even applying the correct legal standard contained in C.R.C.P. 37.

The Colorado Supreme Court has recognized that trial courts must comply with Rule 37's framework when considering a motion to strike undisclosed evidence, stating:

> The trial court has broad discretion in managing discovery, including an ability to issue discovery sanctions. But the trial court's discretion cannot change the rule and Rule 37(c) provides for the exclusion of non-disclosed evidence unless the failure to disclose is either substantially justified or harmless to the opposing party. A party offering late-disclosed evidence bears the burden of showing that the failure to disclose was harmless." *Warden v. Exempla, Inc.*, 2012 CO 74, 291 P.3d 30, 36-37 (Colo. 2012)(*internal quotations and citations omitted*).

The undisclosed opinions of Sgt. Gates should have been stricken by the trial court and its failure to do so deprived Plaintiffs of a fair trial. Therefore, the jury verdict and judgment of the court should be reversed and the case should be remanded to the trial court with instructions to reset the case for a new trial and to strike the above referenced undisclosed opinions of Sgt. Gates.

C. ARGUMENT REGARDING QUESTION (2)

Did the Trial Court commit reversible error when in refused to instruct the jury on Plaintiff's Negligence Per Se Claim even though Plaintiff's expert witness testified that Defendant Shaffer was driving too fast for conditions and following too closely in violation of Colorado safety statutes?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE FOR REVIEW

The Court of Appeals reviews "jury instructions de novo to determine whether as a whole they accurately inform the jury of the governing law. A trial court's decision to give a particular jury instruction is reviewed for abuse of discretion. However, when instructing a jury in a civil case, the trial court should generally use those instructions contained in the Colorado Jury Instructions that apply to the evidence under the prevailing law." *Ochoa v. Vered*, 06CA2134, at 5 (Colo. App., April 17, 2008); C.R.C.P. 51.1(1).

This Court should evaluate the trial court's failure to give the Plaintiffs' proposed 9:14 standard jury instruction on negligence per se for an abuse of discretion.

Plaintiffs preserved this issue for appeal by submitting their proposed jury instructions to the trial court, including the subject 9:14 instruction on negligence per se. **R. Supr., Suppressed, p. 64.** The trial court rejected the proposed instruction without offering any reason for the decision in an unrecorded session which was held in chambers in the presence of all counsel. Plaintiff Counsel preserved the issue for appeal and made a record of Plaintiffs' objection to the trial

court's refusal to give a 9:14 negligence per se instruction the next day on the record in open court. **R. Tr. May 16, 2013, p. 114, l. 1-p. 115, l. 16.**

ARGUMENT

The trial court denied the Motion in its Order Re: Plaintiff's Motion To Strike Undisclosed Opinion Testimony By Sgt. Gates. **R. CF, p. 1380.**

Plaintiffs specifically pleaded a claim for negligence *per se* against Defendant Shaffer in their Complaint and Jury Demand, as well as in their Second Amended Complaint and Jury Demand based on violations of "C.R.S. § 42-4-1101, Driving Too Fast for Conditions, and C.R.S. § 42-4-1008 Following Too Closely." **R. CF, p. 7, 223 & 226-227.** The Trial Management Order documents that Plaintiffs were still proceeding to trial with negligence per se claims against Defendants Shaffer. **R. CF, p. 796.**

Plaintiffs presented the testimony of an expert engineering witness at trial, Mr. Railsback, to testify that Defendant Shaffer was driving too fast for conditions,

following too closely, and that these actions caused the collisions which injured Plaintiffs. At trial, Mr. Railsback testified as follows:

23 Q. Okay. So please summarize your criticisms
24 of Mr. Shaffer and the cause of this collision.
25 A. Sure. I have one overarching criticism,
216
1 that he didn't control his vehicle. Because he
2 didn't control his vehicle he came to rest blocking
3 the southbound lanes of travel.
4 And that's really supported by two
5 conclusions: One, that he was following vehicles
6 too closely and violating the rules of operating a
7 truck according to the commercial driver's license
8 manual.
9 And the second is that he is just driving
10 too fast for the roadway conditions. The driver's
11 license handbook has a rule to reduce your speed to
12 a crawl in the event of icy roadway conditions.
13 And I just don't think based on the
14 physical evidence and how much speed and energy, he
15 would have to use to get into that jackknifed
16 position, that he was traveling at a crawl, but he
17 didn't control his vehicle ultimately.
18 Q. Had Mr. Shaffer followed those two safety
19 rules, would he have jackknifed the rig?
20 A. I don't think so, no.
21 Q. If he hadn't jackknifed the rig, would the
22 Winklers be injured?
23 A. I don't think so, no. **R. Tr. May 14, 2013, p. 215, l. 23-p. 216, l. 23.**

Plaintiffs tendered to the trial court a proposed jury instruction modeled directly on the standard Colorado Jury Instruction for Civil Trials 9:14. The specific tendered instruction read as follows:

> JURY INSTRUCTION No. _________
> At the time of the occurrence in question in this case, the following statutes
> of the State of Colorado were in effect:
> C.R.S. § 42-4-1008. Following too closely
> C.R.S. § 42-4-1101. Speed limits
> A violation of either of these statutes constitutes negligence.
> If you find such a violation, you may only consider it if you also find that it
> was a cause of the claimed injuries, damages, losses.
> **R. Supr., Suppressed, p. 64.**

The proposed instruction was then followed with the text of both C.R.S. § 42-4-1008. Following and C.R.S. § 42-4-1101. **R. Supr., Suppressed, p. 65-69.** "Although the content of a Colorado Jury Instruction is not legally definitive, its long and common usage is persuasive on the matter of being a correct summary of the law." *Bayer v. Crested Butte Mountain Resort, Inc*., 960 P.2d 70, 73 n.2 (Colo. 1998).

The trial court rejected the proposed instruction without offering any reason for the decision in an unrecorded session which was held in chambers in the presence of all counsel. Plaintiff Counsel made a record of Plaintiffs' objection to

the trial court's refusal to give a 9:14 negligence per se instruction the next day on the record in open court. **R. Tr. May 16, 2013, p. 114, l. 1-p. 115, l. 16.** The trial court also offered no reason for its rejection of the 9:14 instruction on the record.

A trial court should give the negligence per se instruction when plaintiffs are injured on the roadways and there is evidence that a defendant violated a safety statute regulating the use of the roadways. *Pyles-Knutzen v. Board of County Com'rs of County of Pitkin*, 781 P.2d 164, 169 (Colo.App. 1989). The trial court committed reversible error by refusing to give the jury an instruction on negligence per se because Plaintiffs properly pleaded the claim and presented evidence at trial that Defendant Shaffer had violated the two roadway safety statutes identified in the instruction. *Hageman v. TSI, Inc*., 786 P.2d 452, 454-55 (Colo.App. 1989)(holding trial court committed reversible error in refusing to give negligence per se instruction when plaintiff introduced evidence that defendant violated a roadway safety statute).

"A trial court is obligated to instruct the jury correctly on the law applicable to the case. This duty requires the trial court to instruct on a party's theory of the case if it is supported by competent evidence and entitles a party to an instruction embodying the party's theory if there is sufficient evidence in the record to support

it." *Gordon v. Benson*, 925 P.2d 775, 777-78 (Colo. 1996) citing *Jordan v. Bogner*, 844 P.2d 664, 667(Colo.1993); *Stephens v. Koch*, 192 Colo. 531, 533, 561 P.2d 333, 334 (1977); *Davis v. Cline*, 177 Colo. 204, 208, 493 P.2d 362, 364 (1972); and *Federal Ins. Co. v. Public Serv*., 194 Colo. 107, 112, 570 P.2d 239, 242 (1977).

"An instruction on negligence per se is proper if there is evidence to support a finding that the ordinance was violated." Kepley v. Kim, 843 P.2d 133, 136 (Colo. App. 1992).

Generally, negligence per se is applicable when the statute which is alleged to have been violated "was enacted to protect that class of persons of which plaintiff is a member from the type of injury suffered . . , a violation of the duty imposed by the statute which results in injury may indeed provide the basis for recovery on the theory of negligence per se. If there is conflicting evidence as to whether the statute was violated, the question is properly submitted to the trier of fact." *Russo v. Birrenkott*, 770 P.2d 1335, 1137 (Colo. App. 1988) citing *Converse v. Zinke*, 635 P.2d 882 (Colo.1981).

The Colorado Supreme Court has long held that "the violation of a statute or ordinance regulating the use of roadways is negligence as a matter of law." *Reed*

v. Barlow, 386 P.2d 979, 981 (Colo. 1963). The Colorado Court of Appeals has stated: "Negligence per se serves to establish the existence of the defendant's breach of a legally cognizable duty owed to the plaintiff. The violation of a safety statute regulating the use of roadways is evidence of negligence. Thus, a violation of § 42--4--1204 conclusively establishes negligence, and the instruction submitted to the jury was proper." *Pyles-Knutzen v. Bd. of County Commissioners*, 781 P.2d 164, 169 (Colo. App. 1989).

Plaintiffs properly pleaded and maintained a claim for negligence *per se* against Defendant Shaffer, and presented competent evidence at trial that Defendant Shaffer violated C.R.S. § 42-4-1008 by following to closely and violated C.R.S. § 42-4-1101 by driving too fast for conditions. It is undisputed that the Plaintiffs are members of the group of persons the statute or ordinance was intended to protect. Therefore, the trial court was required to give the jury the standard 9:14 Colorado jury instruction on negligence per se when requested to do so by Plaintiffs.

The trial court committed reversible error as to the verdict and judgment in favor of Defendant Shaffer when it refused to do so. Therefore, the jury verdict and judgment in favor of Defendant Shaffer should be reversed and the trial court

should be instructed to give the jury a 9:14 negligence per se instruction at a new trial against Defendant Shaffer.

IV.

CONCLUSION

The trial court committed reversible error both in allowing Sgt. Gates to offer undisclosed opinion testimony at trial and by failing to give Plaintiffs' proposed instruction 9:14 on negligence per se. The trial court's error in allowing the undisclosed opinion testimony of Sgt. Gates resulted in Plaintiffs being deprived of a fair trial as to all Defendants appearing in this appeal. Therefore, the jury verdict and judgement of the court should be reversed and the case returned to the trial court with instructions to set a new trial. The trial court should also be instructed to strike the undisclosed opinion testimony of Sgt. Gates and not allow those opinions at the new trial.

Further, the trial court's failure to give Plaintiffs' proposed 9:14 jury instruction on negligence *per se* independently resulted in Plaintiffs being deprived of a fair trial as to Defendant Shaffer. This constitutes an additional and independent reason to reverse the jury verdict and judgment in favor of Defendant

Shaffer. The trial court should be instructed to give a 9:14 instruction to the jury concerning negligence per se at the new trial.

WHEREFORE, Plaintiffs/Appellants ask this Honorable Court to reverse the jury verdict and judgment as to all Defendants appearing in this appeal, and instruct the trial court to set the case for a new trial at which the undisclosed opinion testimony of Sgt. Gates will not be allowed and the jury will be given a 9:14 instruction on negligence per se.

Dated: September 2, 2014

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2014, I requested the Court's electronic filing system to serve a true and correct copy of the foregoing to:

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