COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 30, 2014 3:48 PM
Appeal from Judgment of the Weld County District Court Civil Action No.: 2011CV107 Honorable Daniel Maus	
Plaintiffs-Appellants: JOHN WINKLER and LINDA WINKLER Defendants-Appellees: JASON SHAFFER, MICHAEL GARTLEY, and GERALD H. PHIPPS, INC. d/b/a GH PHIPPS CONSTRUCTION COMPANY	
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DEFENDANT-APPELLEE JASON SHAFFER'S ANSWER BRIEF

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).

■ It contains 7,997 words.

□ It does not exceed ** 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 ®. , p.), not to an entire document, where the issue was raised and ruled on.

■ For the party responding to the issue: It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Elizabeth C. Moran
Signature of attorney or party

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I. STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in admitting the testimony of a state highway patrolman who was an eyewitness to a multi-vehicle accident, concerning his observations and conclusions about the speed of the vehicles, the following distance between vehicles, the weather conditions, and the extent to which these factors contributed to the accident?

2. Did the court abuse its discretion in refusing Plaintiffs' tendered instructions on negligence *per se*, where statutes underlying the instructions defined the applicable standard of care as that of a "reasonable person," which was already covered in pattern jury instructions defining negligence and reasonable care?

II. STATEMENT OF THE CASE

A. Nature of the Case and Court of Proceedings

This personal injury case arose from a multi-vehicle accident on Interstate 25 in northern Colorado in March 2009. Plaintiffs John and Linda Winkler, who were in one of many vehicles involved in the accident, sued several drivers of other vehicles, including Jason Shaffer, the driver of a semi-tractor/ trailer, alleging negligence and negligence *per se* in causing or aggravating the accident. *R.CF 1-11; 215-229.*

Many of the defendant drivers were dismissed or entered into settlements prior to trial. The trial was bifurcated (*R.CF 898*) and issues of liability only were tried against three drivers: Mr. Shaffer; Michael Gartley (employed by GH Phipps Construction); and Kmet Volodymyr (employed by Bogo Trucking), against whom the trial court had previously entered a default. *R.CF 88.* The Winklers' UM/UIM insurer, National Farmers Union Property and Casualty Company, was also a defendant at trial. *See R.Supr. 181.* Defendants Shaffer and Gartley designated several other involved drivers as nonparties pursuant to C.R.S. § 13-21-111.5. *See R.Supr. 169-172.*

After a three day trial (May 14-16, 2013), the jury found for the Winklers as against Volodymyr/Bogo and allocated 100% of the fault to those defendants. As against Mr. Shaffer and Mr. Gartley, and all of the designated nonparties, the jury found no negligence and no causation. *R.Supr. 169-174.*

Plaintiffs appeal from the judgment entered on the jury's verdict.

B. Statement of Relevant Facts

1. The multi-vehicle accident

This case arises from a multi-vehicle accident on Interstate 25 in northern Weld County, Colorado on March 26, 2009.

At about 9:30 that morning, Jason Shaffer set out from Cheyenne, Wyoming toward I-25, driving a semi tractor-trailer partially loaded with windows for construction projects. *R.Tr.5/15 159:22-24.* Because it was snowing lightly and he was carrying a light load (which makes it more difficult for the truck to stop), Mr. Shaffer maintained his speed at about 60 mph. *Id., 157:2-19; 160-4-7; 180:25-181:5.* Shortly after he turned onto southbound I-25, the snow and wind increased and the road began to get slick, so he decreased his speed to 40-45 mph. *Id., 181:13-21.* At Wyoming Hill, a few miles north of the Colorado/Wyoming state line, the west wind increased and Mr. Shaffer felt the wind pushing on his truck, so he slowed to 30-35 as he went down the hill in the right lane, with a white SUV and a red and white Chevy Blazer ahead of him. *Id., 160:17-161:18; 162:3-12; 181:20-182:14.* A white "straight" truck[1] passed him on the left, kicking up snow, and Mr. Shaffer moved into the left lane to create more space as a "safety cushion" between his truck and the vehicles ahead, because of the deteriorating conditions. His headlights and flashers were on. *Id., 162:3-164:3.*

Virtually every witness confirmed the weather and road conditions south of the Wyoming/Colorado border worsened considerably, with heavier snowfall,

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[1] In contrast to a tractor-trailer, a "straight" or "box" truck is a non-articulated truck. The white straight truck was identified as a truck operated on behalf of Schroll Cabinets.

strong crosswinds, and increasingly icy road surfaces, which several witnesses described as among the worst driving conditions they had ever encountered. *R.CF 1337:7;1338:15 (Gates); R.Tr.5/15, 6:12-8:5 (Proulx); id., 69:24-70:14 (Winkler); R.Tr.5/16, 94:18-95:4 (Foss).* Mr. Shaffer, a commercial truck driver who has driven difficult mountain passes in Colorado during the winter, agreed the weather was "some of the worst weather that I've seen in that area, and in my career as a driver ...The weather got very bad, very fast." *R.Tr.5/15, 177:6-20.*

Shortly after crossing the state line, Mr. Shaffer approached a bridge deck and saw, just beyond the bridge, a state patrol vehicle (driven by Sergeant Jim Gates of the Wyoming State Patrol) in the left median with its lights flashing, and two or three vehicles pulled over on the right shoulder. *Id., 166:7-167:7.* In accordance with the "Move Over" law[2] in effect in Wyoming and Colorado, Mr. Shaffer moved from the left to the right lane to be out of the trooper's way. *Id., 167:11-21; 198:9-199:17.* Realizing the upcoming bridge deck would be icier than the main road surface, Mr. Shaffer slowed even further, traveling "basically at a crawl" of 20 mph or less. *Id., 168:18-169:2, 192:5-13.* The white SUV

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[2] See C.R.S. C.R.S. §42-4-705(1)(b)("On a highway with at least two adjacent lanes proceeding in the same direction on the same side of the highway where a stationary authorized emergency vehicle ... is located, the driver of an approaching or passing vehicle shall proceed with due care and caution and yield the right-of-way by moving into a lane at least one moving lane apart from the stationary authorized emergency vehicle ....")

(identified as either a Pontiac Vibe or Saturn Vue) was ahead of Mr. Shaffer in the right lane, with the red Blazer in front of the SUV. *Id.,169:14-18.*

Ahead in the left lane, Mr. Shaffer saw the white straight truck pass over the bridge and begin to fishtail, appearing to lose control. The white SUV and red Blazer ahead of Mr. Shaffer hit their brakes abruptly, and in response, Mr. Shaffer steered around them to the left, as the white SUV slid into the tail end of the Blazer. *Id., 169:3-24; 176:6-23.* As he began to transition to the left lane, Mr. Shaffer felt the impact of another vehicle striking the back of his trailer (which was still in the right lane). *Id. 169:23-170:10; 170:20-171:23.* He looked in his mirror and saw that a minivan, driven by Shelly Proulx, was attached to the back of his trailer, lifting the trailer wheels off the ground on the left side. *Id., 170:4-10.*

Mr. Shaffer felt a second impact from behind, and looking in his mirror, saw his trailer in motion, swinging around to his right. He applied his brakes in an attempt to stop the slide, but his tractor ended up turned 180 degrees and the tractor-trailer came to a stop across the roadway. *Id., 170:14-19, 172:2-17.* He felt additional impacts as several other vehicles, including Plaintiffs' Expedition and Defendant Gartley's Ford pick-up, collided in the pile-up. Finally, a Bogo transport truck driven by Kmet Volodymyr emerged from the snow "like a rocket" and hit Mr. Shaffer's vehicle with enough force to shove it backwards. *Id.,*

193:15-194:10. In all, more than 20 vehicles were involved in the collision. *R.CF 629.*

2. Sergeant Gates's testimony

Sergeant Gates, who was stopped in the center median to respond to an earlier accident, observed much of the accident as it unfolded. He confirmed the road was slick, the snow was blowing "almost horizontal" and road conditions and visibility became "extremely poor" as he proceeded into Colorado. *R.CF 1337:17-1338:7; 1348:11-14.* "Probably near the top of some of the worst conditions that I've experienced." *Id., 1338:6-7.* As he was getting out of his patrol car to assess the earlier accident, he observed a straight truck in the right lane, which appeared to be losing control and fishtailing slightly as it traveled past him. *Id., 1340:9-1341:10.* A semitruck following behind the straight truck appeared to make an evasive maneuver in response, and began losing control, ultimately sliding sideways, jackknifing the tractor/trailer, and blocking the highway. *Id., 1341:14-1342:4.* Sergeant Gates radioed dispatch to report the accident, and then moved his car to a safer position down the median and away from the roadway. *Id., 1343:4-14.*

Sergeant Gates saw and heard additional vehicles coming upon and colliding with the semitruck, as well as sliding vehicles and crashes all the way back up the

highway. *Id., 1349:20-1350:9.* The roadway remained extremely slick. *Id., 1352:15-21.* He ran up the highway in an attempt to warn oncoming vehicles of the pile-up ahead. *R.CF 727.*

Plaintiffs obtained Sergeant Gates's accident report. *See e.g., R.CF 723, 727-728.* Mr. Shaffer disclosed Sergeant Gates as both a lay and expert witness, to testify to his observations and perceptions of the accident as it occurred. *Id., 1308, 1311-12.* Plaintiffs designated him as a "may call" witness in the Trial Management Order, filed April 26, 2013, as did Mr. Shaffer and NFU. *Id., 805, 824, 828.* Because Sergeant Gates was not available to testify at trial, the parties agreed to preserve his testimony in a videotaped deposition on May 4, 2014, after the discovery deadline. *Id., 908,* ¶*5.*

After the deposition, Plaintiffs moved to strike portions of Sergeant Gates's testimony, specifically, his observations and conclusions about the role of weather in the accident, the speeds and following distances of vehicles he observed, and the reasonableness of various drivers' driving behavior and reactions. Plaintiffs contended Sergeant Gates's testimony on these subjects constituted untimely disclosed expert opinion testimony. *R.CF 1159-1165.*

The trial court denied the motion, concluding Plaintiffs acquiesced in the preservation of Sergeant Gates's trial testimony after the discovery deadline had

passed. *R.CF 1380.* At trial, the court also indicated that Gates's testimony was lay opinion testimony, not expert testimony; however, the court was interrupted by Plaintiffs' counsel and was unable to finish its statement:

> THE COURT: But he's not being designated as an expert.
>
> MR. MURPHY: He is. Defendants designated him as an expert. This is opinion testimony.
>
> THE COURT: Well, he's not going to give opinions about a layperson -- he can give an opinion – [*sic*]
>
> MR. MURPHY: He's disclosed as a 26A2/B2 expert witness for defendant, Defendant Shaffer. The others didn't bother to designate him as anything. But Defendant Shaffer designated him as an expert witness to give opinions at trial, and that's why I move to strike those opinions.

R.Tr.5/14 155:4-13.

The Court allowed most of Sergeant Gates's designated deposition testimony, but held that testimony about the non-issuance of traffic citations was inadmissible (no traffic citations were issued in connection with this accident). *R.Tr.5/14171:11-22.*

3. Plaintiffs' tendered negligence *per se* instructions

Plaintiffs requested the court to instruct the jury on the theory of negligence *per se*, based on the opinion of Plaintiffs' expert witness, Mr. Railsback, that Mr. Shaffer had exceeded reasonable and prudent speed and following distance under

the existing conditions, in violation of C.R.S. §§ 42-4-1008 and -1101. *R.Supr. 64-69; R.Tr.5/16 114:12-115:8.* The court declined to give these instructions, in an off-the-record instruction conference. *Id.*

After deliberating for approximately one hour (*R.CF 1474*), the jury found Mr. Volodymyr negligent for causing all of Plaintiffs' injuries and damages, but found that neither Mr. Shaffer, nor any other defendants or nonparties, negligently caused Plaintiffs' injuries and damages. *R.Tr.5/16 184:8-188:12; R.Supr. 167-174.*

III. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion is allowing Sergeant Gates's testimony recounting his observations as an eyewitness, or his conclusions—based on his observations—that the extreme weather was the culprit in this accident, and that the drivers he observed were driving reasonably, were not traveling at an unreasonable speed, and were not following too closely for conditions. Although Sergeant Gates spoke from his experience as a state patrolman, his conclusions were not based on specialized knowledge, training or analysis, but were based on his on-scene observations, and hence, were admissible lay opinions under C.R.E. 701. His conclusions about vehicle speed, distance, and the effect of the weather on visibility and the road surface are the type of conclusions that ordinary citizens

are fully capable of reaching based on the everyday reasoning and the ordinary experience of driving a vehicle in bad weather.

Moreover, in the context of all the evidence at trial, Sergeant Gates's testimony was harmless, did not prejudice Plaintiffs' substantial rights, and did not influence the outcome of trial. Sergeant Gates's lay opinion testimony was cumulative of the testimony of Defendant's accident reconstructionist Mr. Scott, and was corroborated by Mr. Shaffer and other drivers involved in the accident, who testified to their conclusions about the speed and following distance of their own and other vehicles, their efforts to drive safely and cautiously, and the impact of the poor visibility and icy roads on their efforts to avoid the accident.

The trial court acted well within its discretion in refusing Plaintiffs' tendered "negligence *per se*" instructions. Those instructions were based on statutes providing that drivers shall not travel faster, nor follow more closely, than is "reasonable and prudent" under the existing circumstances. The standard of reasonable and prudent behavior is the same standard defined by the common law negligence instructions, which the jury received. Thus, Plaintiffs' tendered instructions were unnecessarily cumulative, and even if given, would not have impacted the verdict of the jury, which found Mr. Shaffer was not negligent. In addition, Plaintiffs' tendered instructions incorporated statutory provisions that

were irrelevant to the evidence and issues at trial, which only would have confused the jury. As the jury was properly instructed on all applicable principles of law, there is no basis for reversal of the judgment.

IV. ARGUMENT

A. The Trial Court did not Abuse its Discretion in Allowing Sergeant Gates's Testimony

1. Standard of review and preservation of error

While Plaintiff correctly states that a *de novo* standard of review applies to a court's determination of the proper legal standard, Defendant disagrees that the legal standard contained in C.R.C.P. 37 applies to this case. The Court reviews a district court's evidentiary rulings, including its determination as to whether testimony is lay or expert testimony, for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo.2002); *Mullins v. Medical Lien Management, Inc.*, __ P.3d __, 2013 COA 134, ¶¶48-50 (Colo.App. Sept. 26, 2013). Moreover, because a trial court acts within its discretion to admit or preclude an expert witness not disclosed in a timely manner, such decision is reviewed for abuse of that discretion. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 337 (Colo.App. 2012).

It is well established that the reviewing court is not restricted to the grounds or reasons relied on by the trial court, but may affirm on any grounds supported by the record. *See Serna v. Kington Enterprises,* 72 P.3d 376, 380 (Colo.App. 2002,

cert. denied (2003)("on appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court.").

Defendant Shaffer agrees Plaintiffs preserved their objection that Sergeant Gates's testimony was inadmissible under C.R.C.P. 37 as undisclosed expert testimony. *R.CF 1159-1166.* However, as discussed below and in Defendant Shaffer's Response to Plaintiffs' motion to strike Sergeant Gates's testimony, the patrolman's testimony was not expert testimony, but was lay opinion testimony admissible under C.R.E. 701.

Plaintiffs did not object to Sergeant Gates's testimony as improper lay opinion testimony or on any other grounds, and therefore may not raise additional grounds for objection on appeal, including in his Reply Brief. *Just In Case Bus. Lighthouse, LLC v. Murray,* __ P.3d __, 2013 COA 112, ¶35 (Colo.App. July 18, 2013), *cert. granted on other grounds* (Colo. Sept. 8, 2014)(where defendant failed to object to testimony as improper lay opinion under CRE 701, issue was not preserved for appeal); *Am. Family Mut. Ins. Co. v. Allen,* 102 P.3d 333, 340 n.10 (Colo. 2004) ("Arguments not raised before the trial court may not be raised for the first time on appeal."). *People v. Simpson,* 93 P.3d 551, 555 (Colo. App. 2003)(court will not consider "a bald legal proposition presented without argument

or development, nor will we consider an appellate argument presented for the first time in a reply brief.")

2. Sergeant Gates's Testimony

Although Plaintiffs' Opening Brief quotes at length from Sergeant Gates's direct examination, Plaintiffs do not explain exactly *what* they felt was objectionable or prejudicial about his testimony, except to say that they were harmed by his "expert" testimony that "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." *Amended Opening Brief, 30-31.* Accordingly, this Court's review should be limited to whether those specific aspects of Sergeant Gates's testimony constitute untimely disclosed "expert" testimony, and Defendant Shaffer will focus on the same.[3]

As pertinent to Plaintiffs' arguments on appeal, Sergeant Gates testified to the following eye-witness observations and opinions:

> He saw no compelling evidence that Jason Shaffer was driving too fast for conditions, at an unreasonable rate of speed, or traveling too close for conditions. *Id.,1355:5-18;*

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[3] Again, any additional complaints Plaintiffs may raise in their Reply Brief about the details of Sergeant Gates's testimony should be disregarded by this Court. *See People v. Simpson,* 93 P.3d at 555.

He did not have any criticisms of Mr. Shaffer. *Id.,1356:20-22*;

With the poor visibility and icy road conditions, any driver would have difficulty stopping at any speed, would not have seen the accident ahead until the last second, and would have had difficulty stopping or avoiding the collision on the icy road. *Id.,1356:23-1357:19;*[4]

Sergeant Gates does not blame any individual driver for the accidents that occurred. *Id.,1360:1-5;*

He did not observe anyone driving unreasonably, traveling too fast, or following too closely that morning. *Id.,1360:6-11; 1362:16-24;*

He agreed the weather was the culprit in this accident. *Id.,1360:12-14;*

He didn't see anything to indicate Mr. Gartley was driving unreasonably or did anything inappropriate to cause this accident. *Id., 1361:2-10*

Under the poor visibility conditions, Mr. Gartley would have been confronted with this accident at the last second. *Id.,1361:11-16;*

Drivers approaching the collision would have seen the road almost entirely blocked from shoulder to shoulder. *Id.,1361:17-19;*

The poor visibility could have made it more difficult to see a white van against white snow. *Id.,1361:20-1362:2.*

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[4] Plaintiffs' Brief quotes Sergeant Gates's testimony (*R.CF 1357:20-1359:4)* that he would not have issued any traffic citations if he had been the investigating officer. These statements were edited out of the trial videotape (which Plaintiffs did not include in the record on appeal) because the trial court ruled that testimony about the non-issuance of traffic citations was inadmissible. *R.Tr.5/14 171:11-22.* In any event, this edited testimony is irrelevant to this appeal, because Plaintiffs are only complaining about Sergeant Gates's testimony about the reasonable speed, following distance and behavior of drivers, and the weather as the "culprit" in the accident (*Opening Brief, pp. 30-31).*

3. Sergeant Gates's observations and opinions were admissible lay testimony under C.R.E. 701

Sergeant Gates's testimony was not expert testimony. Sergeant Gates was not offered or qualified as an expert witness during his deposition or when his testimony was offered at trial. *See R.CF 1329-1373.* As Defendant Shaffer pointed out in his Response to Plaintiffs' motion to strike, Sergeant Gates's opinions were lay opinions based upon his perceptions and observations, and were the types of opinions that were well within the kinds of conclusions an ordinary person would reach based upon everyday reasoning. *R.CF 1310-21.*

C.R.E. 701 defines admissible lay opinion testimony: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Disclosure of non-expert witnesses is governed by C.R.C.P. 26(a)(1)(A), which states: "[A] party shall, without awaiting a discovery request, prove to other parties: (A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts

alleged with particularity in the pleadings, identifying who the person is and the subjects of the information." Defendant Shaffer properly identified Sergeant Gates in his Rule 26(a)(1) disclosures, which incorporated the Rule 26(a)(1) disclosures filed by other parties. *R.CF 1308, 1311.* [5]

In contrast, C.R.E. 702 governs expert testimony: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Expert witness testimony is subject to the disclosure requirements of C.R.C.P. 26(a)(2)(B). With respect to non-retained experts, parties are required to disclose "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).

In an abundance of caution, Mr. Shaffer disclosed Sergeant Gates as both a lay witness and a non-retained expert witness. *See R.CF 1311-20.* However, the

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[5] C.R.C.P. 16(f)(3)(VI) also requires each party to attach to the proposed Trial Management Order a list of witnesses the party "may call" or "will call" at trial. Plaintiffs, Mr. Shaffer and NFU all listed Sergeant Gates as a "may call" witness in their witness lists, which were filed with the proposed TMO on April 26, 2013, before Gates's May 4, 2013 deposition. *R.CF 805, 824, 828.*

distinction between lay and expert opinion testimony does not turn on the witness's designation as a lay or expert *witness*, but rather, on whether the testimony is lay or expert *testimony*. *People v. Rincon,* 140 P.3d 976, 982 (Colo.App. 2005)(C.R.E. 701 "does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*... .")(quoting Advisory Committee Comment to identical provision in Fed.R.Evid. 701)(emphasis in original); *People v. Russell,* __ P.3d __, 2014 COA 21M, ¶26 (Colo.App. March 13, 2014)(officer's lay opinions admissible; even if attorney's questions included language implicating CRE 702, officer appropriately limited his testimony to his own observations and experience, rather than any specialized training).

Police officers regularly, and appropriately, offer testimony under CRE 701 based on their perceptions and experiences. *People v. Stewart,* 55 P.3d at 123. Merely because an officer has training and experience that others do not possess does make an officer's testimony "expert" testimony. *See People v. Gallegos,* 644 P.2d 920, 928 (Colo.1982)("That [a police officer] based his conclusion in part on his experience as a police officer does not render his testimony inadmissible."); *People v. Souva,* 141 P.3d 845, 850-851 (Colo.App. 2005)(mere fact that witness was a certified addiction counselor did not cause her testimony that defendant did

not appear to be under the influence of drugs to become expert testimony, where opinion was based on common knowledge and experience).

"It is only when the officer's opinions rely on specialized skills and training, rather than information ordinary citizens could be expected to know, that the officer must be qualified as an expert before testifying." *People v. Douglas,* 296 P.3d 234, 247 (Colo.App. 2012); *see also Rincon,* 140 P.3d at 982 (the critical inquiry is whether a witness's testimony is based upon "specialized knowledge.") If an officer's opinion could be reached by an ordinary person based on a process of reasoning familiar in everyday life, it is admissible as lay opinion evidence. *People v. Mollaun,* 194 P.3d 411 (Colo.App. 2008)(officer's opinion that defendant's eyes appeared dilated admissible as lay opinion "because an ordinary person reasonably could come to have such an opinion based on a process of reasoning familiar in everyday life").

In determining whether an opinion is one "which could be reached by any ordinary person," courts consider: (a) whether ordinary citizens can be expected to know certain information or to have had certain experiences; and (b) whether the opinion results from "a process of reasoning familiar in everyday life," or "a process of reasoning which can be mastered only by specialists in the field." *Rincon*, 140 P.3d at 983, *citing* Fed.R.Evid. 701 advisory committee note.

Sergeant Gates's testimony was based on his own perceptions and observations at the scene and was admissible under C.R.E. 701. He was not testifying as an accident reconstructionist and did not perform calculations, deductions, experimentation or analyses requiring specialized training or education. His observations and conclusions about the speed of vehicles, following distances between vehicles, driving behavior, and the effect of the weather conditions were the types of observations and conclusions that any reasonable lay person could reach using his or her own experiences and common sense reasoning.

It is well established that estimations of the speed of a vehicle are within the common knowledge of laypersons, who may express opinions based on their personal observations: "[L]ay witnesses of reasonable intelligence and ordinary experience may testify to the speed of a moving object without proof of further qualification." *Stamp v. Vail Corp.,* 172 P.3d 437 (Colo. 2007), citing *Sherry v. Jones,* 133 Colo. 160, 292 P.2d 746, 748 (1956), C.R.E. 701; *see also Eagan v. Maiselson,* 142 Colo. 233, 350 P.2d 567, 569 (1960).

Moreover, the assessment of whether a driver's speed and following distance are "reasonable" or "safe" is within the common experience of laypersons and does not require specialized expertise. Indeed, all drivers are expected to know and to

observe reasonable and prudent speeds and following distances under existing conditions and circumstances. *See* CJI-Civ. 11:8 ("The operator of a vehicle has a duty at all times to drive at a speed no greater than is reasonable under the conditions then existing"); C.R.S., §§ 42-4-1101 (prohibiting driving at "a speed greater than is reasonable and prudent under the conditions then existing"); 42-4-1008 (driver "shall not follow another vehicle more closely than is reasonable and prudent" under the conditions).

Thus, Sergeant Gates's conclusions, based on his personal observations, about whether any driver was driving at an "unreasonable" or high rate of speed or following too closely for the weather conditions are the types of conclusions a reasonable lay person could reach based upon the experience of driving in bad weather. The fact that Sergeant Gates has more experience than ordinary persons in observing highway drivers does not transform his perceptions and conclusions into expert testimony, because lay testimony is properly based upon a witness's *experience* as well as his perceptions. *See Gallegos,* 644 P.2d at 928; *Rincon,* 140 P.3d at 983. Sergeant Gates's conclusions that the defendants were driving appropriately for the conditions are conclusions that could be reached, without special expertise, by any ordinary person who has driven a car.

Similarly, Sergeant Gates's opinion that the weather was the culprit in this accident, rather than the actions of any drivers he observed, was a rational inference drawn from his observations and perceptions, required no specialized knowledge or training, and was not an expert opinion. *See Mitchell v. Steward Oldford & Sons, Inc.,* 415 N.W.2d 224, 228 (Mich.App. 1987)(officer's opinion that driver turned too soon, based on observations of accident scene, was permissible lay opinion); *Robinson v. Bump,* 894 F.2d 758, 762-763 (5th Cir.1990)(witness's opinion that driver was in "total control" before being struck by another vehicle was admissible under F.R.E. 701); *United States v. Myers,* 972 F.2d 1566, 1577 (11th Cir. 1992)(officer's testimony that red mark was caused by a stun gun was not expert testimony because it was rationally based upon his experience and personal perception of the victim's back).

Just as ordinary persons can draw conclusions about proper speed and following distance using everyday reasoning, ordinary persons can conclude, using the same everyday reasoning and experience, that accidents occur on icy roads with poor visibility even though drivers are observing reasonable speeds and distances.

Indeed, several lay witnesses testified about these issues at trial, without any objection by Plaintiffs. Nearly all of the witnesses were asked and gave opinions

based on their observations about the speed of other vehicles, and whether they and other drivers were driving "safely."

Mr. Winkler testified on direct examination that before he crossed into Colorado, a white semi truck passed him at about 60 mph, driving "so fast." *R.Tr.5/15 45:15-46:15.* At the time, Mr. Winkler was behind a Blazer that was traveling "5 to 10 miles per hour," which he believed was "too slow," so he passed the Blazer and drove at about 25-30 mph, which he felt was "safe." *Id., 45:8-12; 47:5-48:4, 77:21-78:15.* Linda Winkler testified that the truck that passed them in Wyoming was going "very fast … like … he [didn't] even think there was bad weather out here or something." *Id., 95:17-96:7.* After her husband passed the slow-moving Blazer, she was "comfortable" with his speed. 96:21-24.

Mr. Gartley testified that "way before the Colorado/Wyoming line" a semi passed him, going "quite a bit" faster than Mr. Gartley's speed of 40 mph. *Id., 127:19-24; 128:14-17.* He also opined that the Volodymyr/Bogo truck "seemed to be moving pretty good" when it collided. *Id., 143:2-6.* Mr. Foos, a passenger in Gartley's truck, testified the Bogo truck was "going quite fast." *R.Tr.5/16 92:6-8.*

Mr. Shaffer testified that the blue Bogo semi truck "seemed to be going fast" and "shot like a rocket" out of the wall of snow, ultimately hitting Mr. Shaffer's truck with enough force to move it down the road. *R.Tr.5/15 193:24-194:10.*

These eyewitnesses also testified at length about the poor visibility, extremely icy road surface, the difficulty of driving in those conditions, and the inability of drivers to avoid the accident in those conditions, despite their attempts to drive reasonably and "safely."

Mr. Winkler described the poor road conditions, lack of visibility, and his concern that if he went too fast he might lose control, but if he went too slowly he could be rear-ended. *R.Tr.5/15 69:24-71:23.* He felt his speed of 20-25 mph was "safe," but when he first saw the jackknifed semi when it was only about two car lengths away, he was surprised and told his wife "I can't stop," and slammed his brakes as hard as he could before hitting the semi. *Id., 48:16-49:14; 78:16-79:10.* He agreed he had no option to avoid hitting the semi; he did the best he could but there was nowhere to go. *Id., 79:11-19.*

Plaintiffs' counsel elicited testimony from Defendant Gartley that he had slowed down to about 30 mph before the accident, but was concerned about someone hitting him from behind at that speed. *Id., 130:9-13.* He believed he was in control of his vehicle and was "going along fine," but when he saw the jackknifed semi, the Winkler's Expedition, and another car stopped ahead, he was unable to stop or turn, even with ABS brakes and studded snow tires, and hit the Winklers' car. *Id., 130:16-132:1, 137:20-138:23; 146:8-10.* He testified that, as

icy as it was, even had he been going slower, he "probably would have kept sliding anyhow." *Id., 145:17-146:10.*

Mr. Foos stated he believed Mr. Gartley's speed of about 30 mph was "a safe speed," and that Gartley "was handling the conditions as he should." *R.Tr.5/16 85:18-24.* When they suddenly came upon the jackknifed semi, it was "very snowy, very windy," with poor visibility, and icy roads. *Id., 86:17-24.* He testified Mr. Gartley did not drive "unreasonably" or unsafely, did nothing unreasonable to cause the accident, and "did a great job keeping the vehicle straight and under control." *Id., 93:7-94:9.*

Mr. Shaffer testified that when the weather conditions worsened at Wyoming Hill, he reduced his speed and moved into the left lane to increase the distance between his truck and other vehicles as a "safety cushion." *R.Tr.5/15 162:17-163:7.* After seeing Sergeant Gates's vehicle in the left median beyond the bridge deck, he slowed until he was "basically at a crawl," moved back into the right lane as required by the "Move Over" law, and was driving "as safely and slowly as I possibly could." *Id., 168:18-169:2.* When his trailer was struck from behind and started to swing around, he tried to brake to stop the slide but could not. *Id., 172:2-13.*

As this testimony demonstrates, the opinions and conclusions of eyewitnesses about the speed and following distance of vehicles, the reasonableness of drivers' speed and driving behavior, and the effect of severe weather conditions on drivers' ability to avoid the accident are conclusions that ordinary persons can rationally draw using nothing more than their observations, driving experience, and everyday reasoning. Sergeant Gates's testimony, as an eyewitness to the accident, was properly admitted as lay opinion testimony.

4. Even if classified as "expert" testimony, the Court did not abuse its discretion in admitting Sergeant Gates's testimony.

To the extent Sergeant Gates's testimony could be characterized as expert testimony, which is a significant stretch, admission of his testimony was well within the court's discretion, and was harmless.

Plaintiffs admit Sergeant Gates was timely disclosed as both a lay and expert witness. Plaintiffs had Sergeant Gates's accident report, had equal access to Sergeant Gates, and even endorsed him as their own "may call" witness in the Trial Management Order, which was filed before Sergeant Gates's May 4, 2013 preservation deposition. *R.CF 805.* Plaintiffs' counsel spoke with Sergeant Gates by telephone before the deposition. *R.CF 1165, ¶ 13; 1311.* Plaintiffs agreed to the deposition after the discovery deadline, and during the deposition—which Plaintiffs knew would be used in lieu of his live testimony at trial—did not object

to Sergeant Gates's opinions as untimely expert opinions. *R.CF 908, ¶5; 1325-1373.*

As discussed above, all of the opinions Plaintiffs challenge as "expert opinions" were based on conclusions Sergeant Gates drew from his observations, which are within the realm of common sense reasoning. Moreover, he was specifically disclosed to "discuss his observation and investigation," to testify that he observed a straight-truck pass him on the right, that the straight-truck started to slide sideways, and that "the vehicles immediately behind the straight-truck slowed in an attempt to avoid hitting the straight-truck, including the tractor-trailer driven by Jason Shaffer." Sergeant Gates was also disclosed to testify that the weather conditions were "snowy, icy, and windy," with extremely low visibility, at times less than 100 feet. *R.CF 1169.*

In any event, any arguable error in admitting Sergeant Gates's testimony, whether as lay or expert testimony, was harmless and provides no ground for reversal. Evidentiary rulings constitute reversible error only when they affect a "substantial right" of the objecting party. CRE 103(a). "A substantial right is affected if the error substantially influences the outcome of the case." *Rojhani v. Meagher,* 22 P.3d 554, 557 (Colo.App. 2000)

Sergeant Gates's opinions about the chronology of the accident, the speed and cautious behavior of the vehicles, and the effect of the severe weather conditions were, as discussed above, corroborated by the testimony of other lay witnesses, as well as by Mr. Shaffer's expert witness, John Scott, P.E.

Mr. Scott, an engineer specializing in accident reconstruction,[6] testified that Ms. Proulx, traveling behind Mr. Shaffer in the right lane, struck Mr. Shaffer's semi from the right rear while Mr. Shaffer was moving from the right to the left lane to avoid the reactions of the two drivers in front of him. *See R.Tr.5/16 25:4-26:3; 26:17-27:6; 29:6-30:9.* After being impacted twice, Mr. Shaffer saw the end of his trailer start to come around and applied his brakes in an attempt to stop the slide and bring his vehicle to a stop, ultimately ending up across the two highway lanes. *Id., 38:7-20; 40:3-16.*

Mr. Scott opined that Mr. Shaffer was not following too closely, was not traveling too fast for the conditions, and was driving reasonably and appropriately

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[6] Mr. Scott was not a witness to the accident, but used specialized engineering expertise and scientific calculations to analyze the evidence (including accident reports, photographs, site inspection, weather information and witness statements), and to determine the events, points of impact, forces, and other factors involved in the accident. In contrast to Sergeant Gates, his opinions were not based upon his perceptions, observations, and everyday reasoning processes, but upon his reconstruction of the accident by means of his specialized knowledge and scientific reasoning. As such, his opinions were expert opinions under C.R.E. 702, rather than lay opinions.

for the weather and road conditions. He was attentive to the roadway, aware of the traffic situation ahead of him, attempted to maintain a safety cushion, and traveled at a slower speed in light of the weather and road conditions. *Id., 43:19-44:15.* As such, Sergeant Gates's testimony about the reasonableness of Mr. Shaffer's speed and driving behavior was merely corroborative of Mr. Scott's testimony.

Thus, Plaintiffs cannot show that Sergeant Gates's testimony substantially impacted the outcome of the case. *See People v. McMinn,* __ P.3d __, 2013 COA 94, ¶48 (Colo.App. June 20, 2013)(admission of officer's estimate of vehicle speed was harmless where other witnesses testified to vehicle speed); *Stewart,* 55 P.3d at 124-25 (admission of officer's testimony harmless where his conclusions about vehicle speed, angle and acceleration were corroborated by the testimony of defendant and eyewitnesses); *People v. Russell,* __ P.3d __, 2014 COA 21M, ¶¶27-29 (Colo.App. March 13, 2014)(where officer's lay opinion that defendant appeared to be under influence of methamphetamine was cumulative of testimony of doctors, social worker and defendant, any error in admitting opinion was harmless).

Moreover, Plaintiffs' counsel had ample opportunity to counter the testimony of Sergeant Gates and to challenge the reasonableness of Mr. Shaffer's and the other drivers' actions, through cross-examination and through the

testimony of Plaintiffs' witnesses, including Plaintiffs' expert, Mr. Railsback. Plaintiffs' counsel conducted a comprehensive cross-examination of Sergeant Gates and was not restricted in his cross-examination of any of the other witnesses who testified about vehicle speed, driving behavior, or the effect of the severe weather.

Contrary to Plaintiffs' argument that they had no "opportunity to develop expert opinions to refute [Sergeant Gates's] opinions," Plaintiffs had already disclosed their own accident reconstructionist, Mr. Railsback, to testify that Mr. Shaffer was driving too fast for conditions, was following too closely, and caused or contributed to the accident, which was in direct opposition to Sergeant Gates's opinions. *See R.CF 332-336 (Mr. Railsback's January 2013 report).* Because Mr. Railsback testified at length regarding his analysis and opinions on these issues at trial, there is no merit to Plaintiffs' contention that they were denied the opportunity to obtain expert testimony to address Sergeant Gates's testimony. *R.Tr. 5/14 206:14-213:13; 215:23-216:23.*

As Plaintiffs have failed to demonstrate that Sergeant Gates's testimony substantially influenced the outcome of the case, any error in the admission of his testimony cannot justify reversal of the judgment.

B. The Trial Court Correctly Refused Plaintiffs' Tendered Instructions on Negligence *Per Se*

1. Standard of review and preservation of error

Defendant agrees that an appellate court reviews for abuse of discretion a trial court's decision not to give a particular jury instruction. A trial court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Schuessler v. Wolter,* 310 P.3d 151, 158 (Colo.App. 2012).

A judgment will not be reversed for refusal to give requested instructions where there was no resulting substantial, prejudicial error. *Armentrout v. FMC Corp.,* 842 P.2d 175, 186 (Colo.1992). Prejudicial error exists when the record shows that a jury might have reached a different verdict if a proper instruction had been given. *See Williams v. Chrysler Ins. Co.,* 928 P.2d 1375, 1377 (Colo.App. 1996).

Defendant agrees Plaintiffs preserved this issue.

2. The court properly refused Plaintiffs' negligence *per se* instructions, which were duplicative of the "reasonable care" standard covered by the general negligence instructions

The trial court properly refused Plaintiffs' three instructions on the theory of negligence *per se*. *R.Supr. 64-69.* The instructions were, at best, unnecessary and cumulative to other instructions the jury received which defined negligence and

reasonable care, both generally and in the specific contexts of vehicle speed, visibility, and distance between vehicles. Moreover, the instructions Plaintiffs tendered were overbroad, largely inapplicable to the evidence and issues in the case, and addressed matters improper for the jury's consideration.

A violation of a statute adopted for the public's safety may be negligence *per se* if it is established that the violation proximately caused the injury. *Canape v. Peterson,* 897 P.2d 762, 763 (Colo. 1995). When a statute serves as the basis for a negligence *per se* instruction, its effect is to establish the defendant's standard of care. *Silva v. Wilcox,* 223 P.3d 127, 136 (Colo.App. 2009), *cert. denied* (Colo. 2012). However, before a negligence *per se* theory can be applied, the plaintiff must show, among other things, "that the statute prescribes or proscribes specific conduct." *Hageman v. TSI, Inc.,* 786 P.2d 452, 454 (Colo.App. 1989), *citing Sego v. Mains,* 578 P.2d 1069, 1071 (Colo.App. 1978).

Plaintiffs argue their tendered instructions were supported by evidence that Mr. Shaffer was "driving too fast for conditions," and "following too closely for conditions." *Amended Opening Brief, 35-36.* Thus, Plaintiffs' purported basis for the instructions was § 42-4-1101(1) and (3), and 42-4-1008(1).

§42-4-1101 provides:

> (1) No person shall drive a vehicle on a highway at a speed greater than is *reasonable and prudent* under the conditions then existing. ...

> (3) No driver of a vehicle shall fail to decrease the speed of such vehicle from an otherwise lawful speed to a *reasonable and prudent speed* when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

C.R.S §42-4-1101(1), (3)(emphasis added)

C.R.S. § 42-4-1008(1) states: "The driver of a motor vehicle shall not follow another vehicle more closely than is *reasonable and prudent*, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." *Id.,* (emphasis added)

These statutes do not prescribe or proscribe specific conduct. Rather, they require that drivers adhere to a standard of reasonable care and prudence under existing circumstances and conditions—a standard which is *identical* to the common law negligence standard. *See* CJI Civ. 9:6 ("negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect others from bodily injury."); CJI-Civ. 9:8("Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances."). Thus, Plaintiffs' tendered instructions were merely cumulative to the negligence instructions the jury received.

In *Silva v. Wilcox*, a panel of this Court addressed a negligence *per se* instruction based on "careless driving" statutes and ordinances, and held the instruction was unnecessarily cumulative of the general negligence instructions: "Where ... the statutory standard of care is merely a codification of common law negligence, the negligence *per se* instruction has no practical effect when given alongside a common law negligence instruction." *Silva*, 223 P.3d at 136.

The modern trend among courts, according to *Silva*, is to reject these duplicative instructions. *Id.,* citing Restatement (Third) of Torts: Liability for Physical Harm § 14 cmt. e (2005) (explaining that courts generally reject negligence *per se* instructions when the underlying statute codifies common law); *see also Fishman v. Kotts,* 179 P.3d 232, 234-235 (Colo.App.2007)(no error in declining negligence *per se* instruction where ordinance implied a negligence standard); *Downing v. Lillibridge,* 39 Colo.App. 231, 566 P.2d 714, 716 (1977) (finding no error in a trial court's decision not to issue a negligence *per se* instruction when the underlying statute required a finding of negligence to impose liability).

Indeed, instructions that are unnecessarily repetitive have a tendency to over-emphasize particular aspects of a claim or defense and potentially confuse the jury. *See Pizza v. Wolf Creek Ski Development Corp.,* 711 P.2d 671, 680

(Colo.1985) (negligence *per se* instruction overly emphasized statutory presumption of negligence, which was covered by another instruction: "[I]t is error to give two instructions, virtually the same, which would tend to confuse the jury by overly emphasizing a defense."); *Pletchas v. Von Poppenheim,* 365 P.2d 261, 263 (Colo. 1961)("Repetition of instructions, ... giving undue prominence to one feature of a case, is deemed bad practice and should be avoided.")

Here, the instructions given by the court were more than adequate to inform the jury of the law to be applied in determining whether the defendants were negligent. The jury was specifically instructed about the standard of "reasonable care and prudence" drivers must employ with respect to speed, driving behavior, visibility, and following other vehicles, with proper regard for existing conditions and "circumstances":

> Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect oneself or others from bodily injury, death, property damage. CJI-Civ. 9:6, *R.Supr. 186*
>
> Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances. CJI-Civ. 9:8, *R.Supr. 185*
>
> A driver must maintain a proper lookout to see what that driver could and should have seen in the exercise of reasonable care. CJI-Civ. 11:1, *R.Supr. 191*

> The operator of a vehicle has a duty at all times to drive at a speed no greater than is reasonable under the conditions then existing. CJI-Civ. 11:8, *R.Supr. 190*
>
> If you find by a preponderance of the evidence that any party or designated non-party hit another vehicle in the rear, the law presumes that the driver was negligent. No. 17 11:12, 3:5, R.Supr. 192

The court's instructions must be read together and considered as a whole in determining whether the jury has been adequately informed of the applicable legal principles. *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.,* 117 P.3d 60, 70 (Colo.App. 2004). These instructions adequately informed the jury of the legal principles to be applied in determining the issues of negligence; thus the court did not abuse its discretion in refusing Plaintiffs' additional tendered instructions.

Apart from being duplicative, Plaintiffs' tendered instructions were confusing and overbroad. As tendered, the instructions recited the entire statutes verbatim, including many provisions that had no arguable relevance to any issue or evidence in this case. *See, for example,* §42-4-1101(2)(lawful speeds on mountain highways, business districts, residential areas, etc.); -1101(4)(prima facie evidence); -1101(5), (6)(procedural provisions); §42-4-1108)(2),(3)(distance requirements for truck following a truck and for vehicles in a caravan); -1108(4) (violation constitutes class A traffic infraction). These concepts were inapplicable to the evidence in the case and could only have confused the jury. It was not the

court's responsibility to redraft Plaintiffs' instructions to tailor them to the evidence and issues in the case. *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.,* 95 P.3d 571, 587 (Colo. 2004); *Hansen v. State Farm Mut. Auto. Ins. Co.,* 957 P.2d 1380, 1384-85 (Colo. 1998).

Finally, refusal of Plaintiffs' tendered instructions was harmless. *See* C.R.C.P. 61; *Vista Resorts, Inc.,* 117 P.3d at 70 ("Absent a showing of substantial, prejudicial error, a trial court's refusal to give requested jury instructions does not warrant reversal of a judgment.") Because the statutory standard of care is the same as the common law standard, there is essentially no difference between negligence and negligence *per se* in this case; the jury would have to find simple negligence in order to find that Mr. Shaffer was negligent *per se* in traveling too fast or following too closely for existing conditions. *See Silva,* 223 P.3d at 136.

Here, the jury found Mr. Shaffer was not negligent under the common law standard set forth in the general negligence instructions; therefore, it could not have found Mr. Shaffer negligent *per se* under the identical standard stated in the tendered negligence *per se* instructions. Thus, the court's refusal of those instructions was not only within its discretion, but could not have had any impact on the outcome of the case.

V. CONCLUSION

Based on the reasons and authorities discussed herein, Defendant Jason Shaffer respectfully requests that this Court affirm the trial court's rulings and judgment.

Respectfully submitted this 30th day of October, 2014,

PRYOR JOHNSON CARNEY
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CERTIFICATE OF SERVICE

I, the undersigned individual, do hereby certify that a true and correct copy of **DEFENDANT-APPELLEE JASON SHAFFER'S ANSWER BRIEF** was filed and served by ICCES this 30th day of October, 2014, to the following:

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