

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

Attorney for Plaintiff/Appellant:
Name: Brian A. Murphy, Bar Registration #30918
10200 W. 44th Ave., Suite 340
Wheat Ridge, CO 80033
Phone: (303) 316-0813
Fax: (303) 320-0827
E-mail: Brian@brianmurphy.net

Case Number:
2014 CA 727
Division:

REPLY BRIEF

<p>Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203</p> <p>Trial Court: DISTRICT COURT OF THE 19TH JUDICIAL DISTRICT WELD COUNTY, STATE OF COLORADO</p> <p>Trial Court Judge: Daniel Maus</p> <p>Trial Court Case No. 2011cv107</p> <hr/> <p>Plaintiffs/Appellants: JOHN WINKLER AND LINDA WINKLER,</p> <p>v.</p> <p>Defendants: JASON SHAFFER, MICHAEL GARTLEY, and GERALD H. PHIPPS, INC. d/b/a GH PHIPPS CONSTRUCTION COMPANY</p>	 <p>COURT USE ONLY</p>
<p>Attorney for Plaintiff/Appellant: Name: Brian A. Murphy, Bar Registration #30918 10200 W. 44th Ave., Suite 340 Wheat Ridge, CO 80033</p> <p>Phone: (303) 316-0813 Fax: (303) 320-0827 E-mail: Brian@brianmurphy.net</p>	<p>Case Number: 2014 CA 727</p> <p>Division Courtroom</p>
<p>CERTIFICATE OF COMPLIANCE</p>	

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 4,530 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	<u>3</u>
CASES	<u>3</u>
STATUTES	<u>4</u>
COURT RULES	<u>4</u>
1. Did the Trial Court in allowing Defendants to present undisclosed opinion testimony of Defendant’s expert witness Sgt. Gates?	<u>5</u>
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?	<u>14</u>
CONCLUSION	<u>23</u>

TABLE OF AUTHORITIES

CASES

<i>Buckmiller v. Safeway Stores, Inc.</i> , 727 P.2d 1112, 1115 (Colo. 1986)	<u>13</u>
<i>Pyles-Knutzen v. Board of County Com'rs of County of Pitkin</i> , 781 P.2d 164, 169 (Colo.App. 1989)	<u>14-16</u>
<i>Silva v. Wilcox</i> , 223 P.3d 127 (Colo.App.Div. 5 2009)	<u>14</u>
<i>Warden v. Exempla, Inc.</i> , 2012 CO 74, 291 P.3d 30, 36-37 (Colo. 2012)	<u>13</u>
<i>Buckmiller v. Safeway Stores, Inc.</i> , 727 P.2d 1112, 1115 (Colo. 1986)	<u>13</u>

Pyles-Knutzen v. Board of County Com'rs of County of Pitkin, 781 P.2d 164, 169 (Colo.App. 1989) [14](#), [15](#)

Silva v. Wilcox, 223 P.3d 127 (Colo.App.Div. 5 2009) [14](#)

Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30, 36-37 (Colo. 2012) [13](#)

STATUTES

C.R.S. § 42-4-1008 [15](#)

C.R.S. § 42-4-1101 [19](#), [22](#), [23](#)

C.R.S. § 42-4-1101 [22](#)

COURT RULES

C.R.C.P. 26(a)(2)(B)(II) [10-13](#)

C.R.C.P. 37© [11](#), [24](#)

C.R.C.P. Rules 26(a) [11](#)

C.R.E. 701 [5](#)

C.R.E. 702 [5](#)

Plaintiffs have reached a settlement with all Defendants other than Defendant Shaffer. Therefore, this Reply deals only with Defendant-Appellee Shaffer.

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

Defendant makes two equally unconvincing arguments in an attempt to justify the trial court's decision to allow Sgt. Gates to offer undisclosed opinions at trial. Defendant first argues that all of Sgt. Gates opinions were mere lay person opinions. Defendant next argues that, even if some of Sgt. Gates opinions were expert opinions their admission into evidence was harmless because Defendant had disclosed the Sgt. Gates had opinions, even if Defendant failed to disclose what those opinions might be. Both arguments are irreconcilable with the rules of civil procedure and the holdings of this Court and the Colorado Supreme Court regarding those rules.

The opinion testimony Plaintiffs are addressing in this appeal are clearly expert opinions. Lay opinions are specifically "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." C.R.E. 701. Rule 702 defines expert opinion if based upon the witnesses specialized "knowledge, skill, experience, training, or education." C.R.E. 702.

Here, although Defendant now argues that Sgt. Gates' opinions were not based on his special training, education, and experience, Defendant at trial made sure to elicit from Sgt. Gates that he had such credentials. Under Defense Counsel Garcia's questioning, Sgt. Gates testified as follows:

Record Page 1200

23 Q. How long have you been a police officer?

24 A. I've now been with the Wyoming Highway Patrol for
25 just over 11 years.

Record Page 1201

4 Q. I understand that you today are a sergeant?

5 A. I am.

6 Q. Were you a sergeant in 2009?

7 A. I was.

8 Q. When were you promoted to the rank of sergeant?

9 A. August 1st, 2006.

10 Q. What rank did you hold prior to becoming
11 sergeant?

12 A. I was a Trooper II. 13 Q. Do you have specific training as
a traffic

14 officer?

15 A. I do.

16 Q. Tell me what that training is.

17 A. I attended the Wyoming Law Enforcement Academy in
18 Douglas, Wyoming, the beginning of 2002. Upon
completion

19 of that academy, I then entered the Wyoming Highway
Patrol

20 Basic Academy where I completed additional training in
21 traffic enforcement and crash investigation.

22 Q. Over your career, how many traffic accidents have

23 you responded to?

24 A. It -- it would be an estimate, but probably well

25 over 1 to 200 crashes.

Record Page 1202

5 Q. In your training and experience as a Wyoming

6 Highway Patrol officer, have you responded to accidents

7 near or at the Colorado/Wyoming border?

8 A. I have.

9 Q. Approximately how many occasions?

10 A. In that immediate vicinity, probably one to two

11 dozen.

12 Q. Okay. Are you familiar with the southbound

13 section of I-25 near the Colorado/Wyoming border?

14 A. I am.

15 Q. How many times have you been in that area as a

16 traffic officer over your career?

17 A. I probably get down there two or three times a

18 week. Again, thousands, probably. I mean, it's a fairly

19 regular occurrence to go patrol that part of the -- the

20 state.

R. CF, p. 1200, l. 23-25; p. 1201, l. 4-25; p. 1202, l. 5-20.

Not only did Defense Counsel establish Sgt. Gates specialized expert training, education, and experience consistent with a Rule 702 expert witness, in each of the questions eliciting the undisclosed opinions which Plaintiffs referenced in their Plaintiffs' Motion to Strike Undisclosed Opinion Testimony By Sgt. Gates, Defense Counsel specifically tied those opinions to Sgt. Gates

education, training and experience, rather than his ordinary lay knowledge, as shown in bold 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**
24 **experience, given the weather conditions, tell me what**
25 **kind**
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. . . .

R. CF, p. 1161-1162.

Defense Counsel's questions above make it clear that each of these opinions were not merely Mr. Gate's lay views, but the expert opinions of Sgt. Gates of the Wyoming State Patrol who had completed Wyoming Law Enforcement Academy, then went on to the Wyoming Highway Patrol Basic Academy where he completed additional training in traffic enforcement and crash investigation. **R. CF, p. 1200-1201.**

Rule 26(a)(2)(B)(II) states that if a party wishes to present the expert opinions of witnesses like Sgt. Gates they must provide a time report or summary which "shall contain . . . 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).

Defendant argues that Shaffer's disclosure complied with Rule 26(a)(2)(B)(II) on the following grounds:

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-trucic 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. [Defendant-Appellee Jason Shaffer's Answer Brief, p. 34].

Comparing Defendant Shaffer's disclosure to the solicited opinions above, it is clear that Defendant Shaffer's disclosure came nowhere near providing a complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor.

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©.

Both the trial court and Defendant Shaffer on appeal have confused the deadline for disclosing expert opinions in Rule 26(a)(2)(B)(II) and the deadline for conducting depositions, which is the discovery cut-off. As applicable here, Rule 37 requires sanctions when a party fails to provide expert disclosures pursuant to Rule 26, before the expiration of the expert disclosure deadline, not the overall discovery deadline.

The trial court recognized that "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.” **R. CF, p. 1380.** However, Defendant Shaffer’s final expert disclosures were due on March 5, 2013. **R. CF, p. 381.**

Although Plaintiffs agreed to allow Sgt. Gate’s trial preservation deposition to be taken 8 days after the general discovery cut-off, Plaintiffs never agreed to extend the expert disclosure deadline by 60 days!

Defendant Shaffer’s failure to disclose, which occurred when his incomplete Rule 26(a)(2)(B)(II) disclosures were served on March 5th, was not cured by disclosing those opinions during Sgt. Gates deposition 60 days after the disclosure deadline and just 10 days before trial.

This failure was neither substantially justified nor harmless. As stated in Plaintiffs Opening Brief, 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 highly trained and experienced 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 Defendant Shaffer was not driving inappropriately; driving at an unreasonable or high rate of speed; traveling too close for conditions; or the cause of the collisions.

This was devastating testimony which came out only 10 days before trial, long after the deadline for offering rebuttal expert testimony and too close to trial for Plaintiffs to even get Sgt. Gate's testimony reviewed by independent experts. Had these opinions been included in the written summary of Sgt. Gates expected testimony as required by Rule 26(a)(2)(B)(II), Plaintiffs would have known these opinions 70 days before trial and had 3 weeks to disclose rebuttal expert opinions under the Rules.

The trial court's failure to apply the standards of Rule 37 to Plaintiffs motion to strike constitutes reversible error. *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1115 (Colo. 1986). "The trial court's discretion cannot change the rule and Rule 37© 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). Defendant Shaffer failed to demonstrate that his failure to disclose was either substantially justified or harmless. Therefore, the trial court committed reversible error in allowing the undisclosed opinions of Sgt. Gates to be presented to the jury.

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?

Defendant's Brief misstates the controlling precedent on the requirement to give the negligence per se instruction by relying on dicta from *Silva v. Wilcox*, 223 P.3d 127 (Colo.App.Div. 5 2009) and ignoring the actual holding in *Pyles-Knutzen v. Board of County Com'rs of County of Pitkin*, 781 P.2d 164, 169 (Colo.App. 1989).

In *Silva*, the Court of Appeals upheld the trial court's decision to give a negligence per se instruction. *Silva*, 223 P.3d at 136. Therefore, the Court's musings about the "modern trend" regarding whether negligence per se instructions were nothing more than duplicative of normal negligence instructions, was pure dicta. Had the Court of appeals in *Silva* issued a holding on the issue, it would have had to address the fact that the Court of Appeals had previously directly held that the careless driving statute, which prohibits driving "in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances,"

C.R.S § 42-4-1402, “conclusively establishes negligence, and the [negligence per se] instruction submitted to the jury was proper.” *Pyles-Knutzen*, 781 P.2d at 169.

In addition, the negligence instructions given did not duplicate the proposed negligence instructions. The proposed negligence per se instruction Plaintiffs tendered to the trial court is modeled directly on the standard Colorado Jury Instruction for Civil Trials 9:14 and 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.

In relevant part, C.R.S. § 42-4-1008 states that “[t]he 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.” No other instruction given by the trial court references a driver’s duty regarding following distance.

Defendant's argument that any safety statute which reference reasonable or prudent conduct cannot be the source of a negligence per se instruction would amount to an absolute bar on using the negligence per se instruction. All negligence instructions inform the jury of a person's obligation to act in a reasonable and prudent manner, and violating safety statutes is neither reasonable nor prudent.

Further, it is one thing to instruct a jury that "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," as was done here, **R. Supr., Suppressed, p. 190.** , and quite another to instruct the jury that a driver must be found negligent if the driver follows 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 as stated in *C.R.S. § 42-4-1008*.

The general instruction given applies equally to all human activity. The proposed negligence per se instruction on following too closely gives very direct instruction on how to apply the general legal theory of negligence to the very

specific act of distance between vehicles while driving. Therefore, they are not duplicative.

Further, the issue at trial was not just whether Shaffer was driving like a reasonable person, Plaintiff's expert, Mr. Railsback, testified that because Mr. Shaffer was driving a tractor-trailer with a commercial drivers license (CDL) he was required to comply with specific following distance requirements, not just what he thought was reasonable, and that he failed to comply with those required following distances. Mr. Railsback testified as follows:

190

19 He was following
20 only a distance of about four car lengths behind
21 those vehicles at that point in time. And so he
22 was forced to make a sudden steering input to the
23 left to get back into the left lane. So he
24 immediately steered to the left. . . .

207

7 Q. Now, that safe following distance, did the
8 CDL manual that you reviewed have anything to say
9 about that?
10 A. What it basically does is it lays out rules
11 for safe driving. And one of the rules for driving
12 a truck is a safe following distance. And it is
13 different than the safe following distance that
14 most people learn as a operator of a car, because
15 trucks are heavier, because they don't have the
16 same tires as passenger cars have on them.
17 It takes longer to stop those vehicles. So

18 safe following distance in a heavy truck is defined
19 as one second per 10 feet of truck length. So for
20 example, Mr. Shaffer's truck had roughly a 50-foot
21 trailer on it, another at least 10 feet associated
22 with the truck itself. It's roughly a 60-foot-long
23 truck and trailer, probably a little bit longer
24 than that, but we'll call it 60 feet.

25 So when you're traveling at speeds below
208

1 about 40 miles an hour, you should have one second
2 per 10 feet of truck length. That's six seconds of
3 following distance. . . .

209

7 Q. So based on your analysis, what's the
8 absolute shortest distance that Mr. Shaffer should
9 have had between him and the next vehicle in front
10 of him in the same lane?

11 A. It would have been 220 feet. He should
12 have a minimum of 220 feet between his truck and
13 any vehicle that's in front of him in his lane of
14 travel.

15 Q. And why is that?

16 A. Well, again, heavy trucks have different
17 braking systems. The air brakes take longer to
18 apply. The tires are different rubber compounds
19 than in a passenger car. And the weight of the
20 vehicle is a lot different than the weight of your
21 passenger car, so it takes longer for those heavy
22 trucks to stop.

23 And therefore there are rules laid out for
24 commercial truck drivers about how close they can
25 follow behind a vehicle that's in front of them.

R. Tr. May 14, 2013, p. 190, l. 19-24; p. 207, l. 7- p. 208, l. 3; p. 209, l. 7 - 25.

The jury could have readily found that Defendant Shaffer did not fail to do an act a reasonably careful person would do, nor do an act a reasonably person would not do, but did, in fact, follow the vehicles in front of him too closely because the road conditions required him to keep a larger following distance in a large tractor-trailer.

In relevant part, C.R.S. § 42-4-1101 states that “[n]o 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.”

Also with this statute, the issue is not merely whether Shaffer’s speed was reasonable for an ordinary reasonably careful person, Plaintiff’s expert, Mr. Railsback, testified that because Mr. Shaffer was driving a tractor-trailer with a commercial drivers license (CDL) he was required to comply with specific speed requirements in bad weather, not just what he personally thought was reasonable, and that he failed to comply with those required following distances. Mr. Railsback testified as follows:

193

24 Q. As part of your investigation, did you
25 examine the CDL handbook and other documents on how

1 commercial drivers are supposed to be driving?

2 A. Yes, because you need a frame of reference
3 to understand what commercial truck drivers are
4 instructed to do in the case of how to operate that
5 truck. So I always reference back to a commercial
6 driver's license handbook. It's a handbook very
7 similar to the handbook you would use to pass your
8 original driver's license exam, only for commercial
9 trucks.

10 Q. And what did you determine based on that
11 research that Mr. Shaffer, what speed should he
12 have been driving at?

13 A. Well, when you start talking about bad
14 roadway conditions, there's very specific
15 instructions and rules about what a driver is
16 supposed to do in poor weather conditions. When
17 the roadways are wet, the truck driver is supposed
18 to reduce his speed by a third. So if you have a
19 60-mile-per-hour roadway, you would reduce your
20 speed by one-third. You'd only travel about
21 40 miles per hour.

22 When the road is snowpacked, you're
23 supposed to reduce your speed by a half. So again,
24 if you have a 60-mile-per-hour speed limit, you
25 would reduce your speed down to 30 miles per hour.

1 When you have icy roadway conditions, which
2 are obviously probably the worst driving
3 conditions, you are supposed to reduce your speed
4 to a crawl and immediately begin looking for an
5 area to stop your vehicle in a safe position. So
6 icy roadway conditions you should be traveling at a
7 crawl.

8 Q. Now, in your education and experience in

9 these low-speed crashes that we've looked at, how
10 fast is a crawl compared to that?
11 A. I would define a crawl as somewhere between
12 zero and 10 miles an hour, especially when you're
13 talking about highway conditions. You're not
14 talking about speeds -- normal highway speed may be
15 55 to 75 miles an hour. You should be traveling at
16 such a low speed that it's very difficult for you
17 to lose traction, very difficult for you to lose
18 any kind of control on that roadway surface.

183

15 Q. Tell me what your investigation revealed
16 about how Mr. Shaffer entered the scene and what he
17 was doing before, how fast he was going. Well,
18 let's start with that.

19 How fast was Mr. Shaffer going? Did you
20 make a determination?

21 A. Well, according to the traffic accident
22 report, the officer's estimate of Mr. Shaffer's
23 speed was 45 miles per hour. My subsequent
24 investigation indicated the speed at the time that
25 he lost control of the vehicle was a little bit

184

1 lower than that, but the initial report indicates
2 about 45 miles per hour.

3 Q. And did you determine he was going a little
4 slower than that?

5 A. That's correct.

6 Q. How fast do you think he was going?

7 A. I would estimate that when he lost control
8 of the truck he was traveling on the order of 30 to
9 40 miles per hour.

R. Tr. May 14, 2013, p. 193, l. 24 - p. 195, l. 18; p. 183, l. 15 - p. 184, l.9.

Therefore, Plaintiff's expert presented evidence of a very specific standard of conduct regarding whether Defendant Shaffer's speed and following distance complied with the requirements of a reasonable commercial driver of a tractor-trailer in icy conditions.

There was another instruction given, Jury Instruction No. 15, stating "[t]he 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." **R. Supr., Suppressed, p. 190.** However, there was no instruction that violation of this duty constituted negligence. Further, even the general negligence instruction given, Jury Instruction No. 11, does not state that violation of a legal duty constitutes negligence. **R. Supr., Suppressed, p. 186.**

The negligence per se instruction regarding C.R.S. § 42-4-1101 was not duplicative of Jury Instruction No. 15, because the proposed instruction clearly stated that violation of the statute constituted negligence. Therefore, the jury could have readily found that Shaffer violated the duty to drive at a reasonable speed and still find that he was not negligent under the instructions given.

Lastly, the duty described to the jury in Jury Instruction No. 15, is not the same duty imposed by C.R.S. § 42-4-1101. Jury Instruction No. 15, states "[t]he

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.” **R. Supr., Suppressed, p. 190.**

Whereas C.R.S. § 42-4-1101 states that drivers are negligent if they “fail to decrease the speed of such vehicle from an otherwise lawful speed to a reasonable and prudent speed when a special hazard exists.” Maintaining a reasonable speed and failing to decrease one’s speed when confronted with a special hazard are not the same duty.

Mr. Railsback’s testimony specifically indicates that Shaffer’s negligence regarding speed was that he failed to reduce his speed to adjust for a special hazard - a rapidly worsening storm that created icy conditions quickly.

For all of these reasons, Defendant’s arguments regarding the negligence per se instruction are not convincing. Plaintiffs were entitled to a negligence per se instruction given the testimony of Mr. Railsback, their tendered instruction tracked the standard jury instruction precisely, and the tendered instruction reasonably could have resulted in a verdict in favor of Plaintiffs given the evidence. Therefore, the trial court committed reversible error in refusing to give the instruction.

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 in violation of C.R.C.P. 37© resulted in Plaintiffs being deprived of a fair trial. 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. 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 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: November 20, 2014

Respectfully submitted:

S/ Brian A. Murphy
Brian A. Murphy #30918
The Murphy Law Firm, LLC
10200 W. 44th Ave. Suite 340
Wheat Ridge, CO 80033
E-mail: Brian@brianmurphy.net
Voice: 303-316-0813
Fax: 303-320-0827

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, I requested the Court's electronic filing system to serve a true and correct copy of the foregoing to:

Counsel for Defendant National Farmers Union Property and Casualty Company:

Counsel for Defendant Shaffer:
Valerie A. Garcia, Esq.
Pryor Johnson Carney Karr Nixon, P.C.
5619 DTC Parkway, Suite 1200
Greenwood Village, CO 80111
Phone: 9303) 773-3500
Email: vgarcia@pjckn.com

By: /s Brian A. Murphy