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COLORADO COURT OF APPEALS 2 EAST 14TH AVENUE DENVER, CO 80203	
Appeal from District Court, Delta County District Court Judge: Hon. Mary Deganhart Civil Action Number: 2019CV30075	
Defendant-Appellant: ADAM CARPENTER v. Plaintiff-Appellee: CECIL NORRID	**▲COURT USE ONLY ▲**
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 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 8,876 words.

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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, not to an entire document, where the issue was raised and ruled on.

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

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

PATTERSON RIPPLINGER, P.C.

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II. Whether the trial court erred by refusing to give Defendant-Appellant's proposed jury instructions related to Plaintiff-Appellee overdriving his headlights;

III. Whether the trial court erred by tendering Plaintiff-Appellee's jury instruction regarding negligence *per se* regarding the lack of taillights on the tractor, thereby instructing the jury that Defendant-Appellant was negligent violating the purview of the jury as the finder of fact;

IV. Whether the trial court erred by refusing to allow Defendant-Appellant's accident reconstructionist, George Merlo, to testify as to his opinions as to

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V. Whether the trial court erred by refusing to tender a jury instruction related to the presumption of negligence in a rear-end accident.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises out of a jury verdict in favor of the Plaintiff[1] following a seven (7) day jury trial held between August 30, 2021, and September 8, 2021, in the Delta County District Court, State of Colorado, before the Honorable Mary Deganhart. Judgment was entered on September 9, 2021. (CF p 3350) Defendant

[1] Throughout the Opening Brief, the parties will be referred to as they were designated in the underlying matter. The Appellee will be referred to as the Plaintiff and the Appellant as Defendant.

filed his Notice of Appeal on October 28, 2021. (CF pp 3540-3553) An Amended Judgment was entered on September 16, 2021. (CF p 3367)

Defendant contends that the trial court erred in: (1) allowing Plaintiff's non-retained expert, Mr. Averett, to testify Defendant's conduct constituted "careless driving," thereby allowing Mr. Averett to usurp the function of the jury by rendering an opinion as to whether the applicable law or legal standard had been breached by Defendant; (2) failing to give Defendant's proffered negligence *per se* jury instruction patterned after C.R.S. § 42-4-1101, which provides that "[n]o person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing" when the evidence presented at trial clearly demonstrated that Plaintiff, driving a 60 mph with his low beam headlights on, would not be able to stop within the range of his headlights; (3) in giving Plaintiff's tendered jury instruction regarding, *inter alia*, the use of taillights as set forth in C.R.S. § 42-4-204 and 42-4-211, taking the issue of proximate cause out of the hands of the jury when evidence presented at trial demonstrated Defendant's taillights were on just seconds prior to the subject accident, effectively rendering the statutes as strict liability; (4) striking Defendant's expert, George Merlo, PE, from providing testimony as an accident reconstructionist; and (5) failure to give

Defendant's proposed presumption of negligence in a rear-end accident jury instruction.

II. Relevant Facts

The underlying matter arises from an accident which occurred on December 10, 2018, at approximately 5:30 p.m., on eastbound Colorado Highway 92, in Delta County, Colorado. Defendant, Adam Carpenter, was operating a 1990 Case International Tractor Model 5120, eastbound on Highway 92, at approximately 15 mph, unknowingly without his taillights illuminated, and with a non-standard slow-moving vehicle emblem affixed to the rear of his tractor. At that same time, Plaintiff, Cecil Norrid, was driving a 1998 Ford Contour traveling behind Defendant, at approximately 60 mph with only his low beam headlights on and collided into the rear of the tractor operated by Defendant. (CF pp 3-7; 712)

The testimony at trial, which was uncontradicted, was that Defendant had loaded a bale of hay at his home and traveled a short distance on Highway 92, approximately 800 to 1,000 feet, to enter a gated area to feed his bulls.[2] (TR

[2] The evidence demonstrated there was no entrance to the field where the bulls were located other than the use of Highway 92 because of a canal that ran along the highway. (TR 08/31/21, p 192) Defendant testified that some entity, presumably the county, has since piped the canal which allows him to access his field without driving on Highway 92. (TR 08/31/21, p 131)

08/31/21, pp 144-145; 176) While in the field, Defendant used the taillights to cut the strings from the bale of hay. (TR 08/31/21, p 157) After feeding the bulls, Defendant exited the field and. again using the taillights, secured the gate. (TR 08/31/21, pp 203-204) Defendant further testified that, as he was driving back to his home on Highway 92, three (3) vehicles were safely able to pass him on the left. (TR 08/31/21, p 165) The undisputed evidence was Defendant's headlights were operating at the time of the subject accident, indicating illumination around the truck. (TR 08/31/21, p 99)

Plaintiff was driving his 1998 Ford Contour from Delta to his home in Crawford, traveling at approximately 60 mph eastbound on Highway 92. (TR 08/31/21, p 136; 09/01/21, p 39) Plaintiff was traveling with his low beams on because he "wasn't worried about what's ahead" of him, but rather, was concerned about an animal running in front of his vehicle and he wanted to see up close. (TR 08/30/21, p 184; 09/02/21, p 133) Plaintiff further testified in his deposition that the roadway in front of him was "black." (TR 09/02/21, p 133)

Tamela Seipel was driving eastbound on Highway 92 behind Plaintiff and saw the Plaintiff's vehicle as she crested the hill. (TR 09/01/21, p 162) The testimony of Ms. Seipel was that, very quickly after cresting the hill, she saw an object in front of Plaintiff's vehicle. (TR 09/01/21, p 163) Ms. Seipel was able to

discern that the object in front of Plaintiff was a tractor and wondered by Plaintiff did not see it as well. (TR 08/31/21, p 243) Ms. Seipel saw Plaintiff strike the rear of the tractor at which time, she was at least 300 feet behind Plaintiff. (TR 09/07/21, p 82) Ms. Seipel was able to bring her vehicle to a controlled and safe stop after Plaintiff drove his vehicle into the rear of the Defendant's tractor. (TR 08/31/21, p 243)

The evidence at trial further demonstrated that low beam headlights illuminate approximately 100 feet, while high beams illuminate approximately 350 feet. (TR 09/01/21, p 118) Testimony was offered at trial by Defendant's expert, George Merlo PE that, had Plaintiff been operating his vehicle with his high beams on, he would have been able to see the tractor in front of him and had ample time and room to bring his vehicle to a controlled stop without hitting the tractor. (TR 09/07/21, p 86)

In his Complaint, Plaintiff alleged claims of negligence and negligence *per se* against Defendant alleging the following: (1) Defendant was traveling well under the posted speed limit; (2) Defendant was traveling without proper safety signals, lights, and the required "slow-moving vehicle emblem; and (3) Defendant was traveling on the highway when the shoulder/other roads were able to

accommodate the tractor. (CF pp 3-7) Plaintiff alleged certain injuries as a result of the subject accident. (CF pp 3-7)

III. Procedural History

Plaintiff filed his Complaint on August 5, 2019, alleging claims of negligence and negligence *per se* against Defendant. (CF pp 3-7) Defendant filed his Answer and Jury Demand on September 12, 2019, denying that he was negligent and asserted, as an affirmative defense, Plaintiff's comparative negligence in causing the subject accident. (CF pp 13-19) The Case Management Order was entered on November 1, 2019. (CF pp 27-33) On February 24, 2020, Plaintiff sought to extend the expert disclosure deadlines, moving Plaintiff's deadline to April 24, 2020, and Defendant's to May 22, 2020. (CF pp 48-50) The Motion was granted by the Trial Court on February 25, 2020. (CF p 52)

On April 17, 2020, Plaintiff requested another extension of expert disclosures, moving Plaintiff's deadline to May 12, 2020, and Defendant's to June 9, 2020. (CF pp 795-798) The Motion was granted by the Trial Court on April 21, 2020. (CF p 800) On May 8, 2020, Plaintiff sought an extension of time to file *Daubert* motions up to and including June 12, 2020. (CF pp 816-818) The Trial Court granted the Motion, making the parties' *Daubert* Motions due June 12, 2020. (CF p 819)

On May 27, 2020, Defendant filed his Motion in Limine to Exclude Evidence of Traffic Citations and Limitation of the Testimony of Trooper Patrick Averett. (CF pp 1245-1255) On June 12, 2020, Defendant filed his Motion to Strike Trooper Patrick Averett as a Non-Retained Expert. (CF pp 1357-1372) On June 24, 2020, Plaintiff filed his Response to Defendant's Motion in Limine to Exclude Evidence of Traffic Citations and Limitation of the Testimony of Trooper Patrick Averett and his Response to Motion to Strike Trooper Averett as a Non-Retained Expert. (CF pp 1681-1699) On July 15, 2020, Defendant filed his Reply in Support of His Motion in Limine to Exclude Evidence of Traffic Citations and Limitation of the Testimony of Trooper Patrick Averett and Motion to Strike Trooper Patrick Averett as a Non-Retained Expert. (CF pp 1859-1868) On September 14, 2020, the Trial Court entered its Order Regarding Motions in Limine holding that Trooper Averett was prevented from providing any opinion on the ultimate issue of fault. (CF pp 2054-2060) Furthermore, the Trial Court held that testimony concerning the traffic citation issued to Defendant was precluded at trial. (CF 2054-2060)

Defendant filed his expert disclosure identifying George Merlo, P.E., as an accident reconstructionist on May 20, 2020, including Mr. Merlo's Initial Report, Supplemental Report, Fee Schedule, Curriculum Vitae, and Testimony List. (EF pp

2101-2156; 3049-3051) On June 9, 2020, Defendant filed his First Supplemental C.R.C.P. 26(a)(2)(B)(I) Retained Expert Witness Disclosure of George Merlo, P.E. (EX pp 2157-2189) On June 12, 2020, Defendant filed his Second Supplemental C.R.C.P. 26(a)(2)(B)(I) Retained Expert Witness Disclosure of George Merlo, P.E, disclosing Mr. Merlo's entire file. (EX pp 2190-2331)

On July 12, 2021, Defendant filed his Notice of Proposed Jury Instructions. (CF pp 2784-2843) Likewise, on July 12, 2021, Plaintiff filed his Proposed Jury Instructions. (CF pp 2860-2914) Following the jury verdict, Judgment was entered on September 9, 2021. (CF p 3350) An Amended Judgment to include pre-judgment interest was entered on September 16, 2021. (CF p 3367)

SUMMARY OF THE ARGUMENT

Defendant contends that the determination of fault was a matter that was solely for the jury. *Johnson v. Phillips*, 494 P.2d 112, 113 (Colo. App. 1972). It is solely within the province of the jury to determine both the credibility and weight to be given to the testimony. *Id.* An "**expert may not usurp the function of the court by expressing an opinion regarding the applicable law or legal standards**." *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202, 205 (Colo. App. 2003)(emphasis added).

Careless driving references a legal standard -- i.e., that conduct which a "reasonable person" would exercise. The Trial Court erred by allowing Trooper Averett to testify that the cause of the subject accident was Defendant's careless driving, thereby allowing Trooper Averett to render an opinion "regarding the applicable law or legal standards." *See id.*

The Trial Court erred in failing to give Defendant's proffered negligence *per se* jury instruction. C.R.S. § 42-4-1101 provides that "[n]o person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." C.R.S. § 42-4-1101. The evidence at trial from Plaintiff's expert, Dr. Harvey, was that Plaintiff would require at least one hundred ninety-eight (198) feet to stop if driving at 60 mph. (TR 09/01/21, p 109) As Plaintiff was operating his vehicle with only his low beam headlights, according to Plaintiff's expert, Plaintiff could not have stopped within the scope of the illumination of his headlights, effectively, Plaintiff was overdriving his headlights and, as such, Defendant contends that Plaintiff's conduct constituted negligence *per se*. Defendant argued, and the evidence established, the subject accident was unavoidable because Plaintiff was driving with his low beam headlights only.

The Trial Court erred in tendering a negligence *per se* jury instruction regarding, *inter alia*, the use of taillights as set forth in C.R.S. § 42-4-204 and 42-

4-211. (CF pp 1391-1393) In order to establish a claim for negligence *per se*, it must be established that the defendant violated a statute adopted for the public's safety, that plaintiff was a member of the group of persons the statute was intended to protect, and that the violation of the statute was a proximate cause of the plaintiff's claimed injuries. *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1166 (Colo. 2002). Generally, the issue of proximate cause is for the jury. *Id.*

The Trial Court erred in giving the negligence *per se* instruction because it took the issue of proximate cause out of the hands of the jury. The evidence presented in this case demonstrated that Plaintiff was driving at 60 mph with his low beam headlights on because he wanted to see up close and was not worried about what was ahead of him. (TR 08/30/21, p 293; 09/02/21, p 133) Evidence further demonstrated that: (1) Plaintiff's low beam headlights only illuminated approximately one hundred (100) feet (TR 09/01/21, p 118); and (2) Plaintiff, travelling at that speed, 60 mph, would need, at a minimum, one hundred and ninety-eight (198) feet to stop. (TR 09/01/21, p 119) Based upon these undisputed facts, it was impossible for Plaintiff to stop within the scope of his headlights, and, as such, the jury could have found that the proximate cause of the accident was Plaintiff's unreasonable conduct of operating a motor vehicle at 60 mph with his low beam headlights only. The Trial Court erred by giving the negligence *per se*

instruction, essentially making it one of strict liability, by taking the issue of proximate cause from the jury and instructing them Defendant was negligent as a matter of law.

The focus of a Rule 702 inquiry should be whether the evidence is both reliable and relevant, and evidence that is reasonably reliable and that will assist the trier of fact should be admitted. *See* People v. Shreck, 22 P.3d 68, 77 (Colo. 2001). Defendant contends that Mr. Merlo was qualified to render expert opinions as an accident reconstructionist at trial, regardless of the fact that he had not provided expert testimony in the field of accident reconstruction in the prior four (4) years. As detailed herein, Mr. Merlo obtained his master's degree in engineering in 1961 (fifty-nine years prior to his testimony) and had taken three (3) courses geared toward accident reconstruction in 1994, 2000, and 2006 and had provided accident reconstruction services to attorneys and other entities.

Defendant contends that any failure to provide prior testimony history which dated further back than the rules required was harmless to Plaintiff, but severely prejudicial to Defendant. Plaintiff was in possession of Mr. Merlo's complete set of opinions, testimony history and CV for sixteen (16) months prior to trial. By contrast, Defendant was highly prejudiced by the Trial Court's striking Mr. Merlo from rendering opinions as an accident reconstructionist and limiting his testimony

to basic engineering mathematical calculations. Defendant has continually maintained that the cause of the subject accident was Plaintiff's failure to operate his vehicle in a safe, prudent, and reasonable manner under the conditions then existing. Defendant was severely prejudiced by the Trial Court's error in prohibiting Mr., Merlo from testifying as to these and other issues.

C.R.C.P. 16(c) states that motions challenging the admissibility of expert testimony be filed no later than 70 days (10) weeks before trial. A further purpose of the C.R.C.P. 16 disclosure obligations is to provide parties with adequate time to prepare for trial and prevent a trial by ambush. *Freedman v. Kaiser Found. Health Plan of Colo.*, 849 P.2d 811, 815 (Colo. App. 1992); *Daniels v. Rapco Foam, Inc.*, 762 P.2d 717, 719 (Colo. App. 1988); *Conrad v. Imatani*, 724 P.2d 89, 92-93 (Colo. App. 1986). In the present action, Plaintiff failed to file any challenge to Mr. Merlo as required by C.R.C.P. 16(c). The test in determining whether exclusion of Mr. Merlo as an expert would have been harmful to the Plaintiff. *See Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973, 979 (Colo. 1999). Any error was harmless to the Plaintiff as Plaintiff was in full possession of Mr. Merlo's anticipated testimony for sixteen (16) months prior to trial.

In the present action, any failure to disclose Mr. Merlo's prior testimony or work as an accident reconstruction prior to 2016 was harmless. Plaintiff had Mr.

Merlo's report, along with his supporting calculations, for sixteen (16) months prior to trial. Accordingly, the Trial Court erred in striking and prohibiting Mr. Merlo from rendering opinions as an accident reconstructionist and remand of this matter is warranted.

The Trial Court erred in failing to give Defendant's proposed presumption of negligence instruction, based upon Plaintiff's car striking Defendant's tractor from the rear. The cases when the rear-end instruction should be given are, "those situations in which the negligence followed by the collision occurred while both vehicles were on the roadway or shoulder, in relatively close proximity, and facing in the same direction." *Id.*, quoting *Boring v. Bettner*, 739 P.2d 884, 886 (Colo.App.1987). That is exactly what happened in the present action. Plaintiff and Defendant were both on the roadway on Colorado Highway 92. They were in relatively close proximity, and they were both travelling in the same direction when Plaintiff's vehicle struck the rear of Defendant's tractor because Plaintiff failed to see the tractor, which Ms. Seipel was clearly able to see, even though she was approximately 300 feet behind Plaintiff. That is more than sufficient to support giving the negligence *per se* instruction. Accordingly, it was an abuse of discretion for the Trial Court's refusal to give the proposed rear-end presumption instruction.

STANDARD OF REVIEW

A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. *Gonzales v. Windlan*, 411 P.3d 878, 883 (Colo. App. 2014). A trial court's decision whether to issue a jury instruction is reviewed for abuse of discretion. *Chapman v. Harner*, 339 P.3d 519, n. 2 (Colo. 2014). An "abuse of discretion" applies when the trial court's order is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999).

ARGUMENT

I. The trial court erred in permitting Mr. Averett, the former State Trooper who investigated the subject accident, to testify as to his opinion as to fault in contradiction of Colorado law and the trial court's order of September 14, 2020.

This issue for appeal was preserved at TR 08/31/21, pp 17-20; 70.

On September 14, 2020, the trial court entered an Order limiting the scope of Trooper Averett's testimony as follows:

> The Court agrees with Defendant's position because 'when the jury is the trier of the fact and the issue to be determined is what constitutes reasonable and due care, the jury function cannot be usurped by the introduction of expert or lay opinion of witnesses as to what constitutes either due care or negligence.

(CF pp 2054-2060)

On the morning of trial, over the objection of Defendant, the Trial Court allowed, reversing its prior ruling, Trooper Averett to testify that Defendant's conduct on the night of the subject accident constituted careless driving. (CF p 321) "The law of the case doctrine is a discretionary rule providing that courts must generally follow prior rulings in the same case." *Fortner v. Cousar*, 992 P.2d, 697, 700 (Colo. App. 1999). "The law of the case doctrine applies to decisions of law, not to determinations of fact." *Id.* The Trial Court, contrary to its Order, ignored the law of the case doctrine and allowed Trooper Averett to testify that the cause of the subject accident was Defendant's careless driving. (TR 08/31/21, p 17) The Trial Court erred in failing to follow the law of the case doctrine, which constituted an abuse of discretion.

A. A witness cannot render an opinion on an ultimate issue of fact as to whether a legal standard was or was not met. *Hartman v. Cmty. Responsibility Ctr., Inc.* 87 P.3d 202, 205 (Colo. App. 2003); *People v. Collins*, 730 P.2d 293, 306 (Colo. 1986).

C.R.E. 702 provides the standard for introduction of 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.

C.R.E. 702.

C.R.E. 702 provides for the admission of expert testimony if it is both reliable and relevant. *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). "Generally, expert opinion testimony is not inadmissible merely because it touches on an ultimate issue of fact. However, an **expert may not usurp the function of the court by expressing an opinion regarding the applicable law or legal standards**." *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202, 205 (Colo. App. 2003)(emphasis added).

Defendant contends that the determination of fault was a matter that was solely for the jury. *Johnson v. Phillips*, 494 P.2d 112, 113 (Colo. App. 1972). It is solely within the province of the jury to determine both the credibility and weight to be given to the testimony. *Id.* This is especially true in the instant case, where the fault and/or apportionment of negligence between the parties was at issue. Consequently, allowing Trooper Averett to render an opinion as to negligence by allowing testimony that Defendant's conduct constituted careless driving was highly prejudicial to the Defendant.

Careless driving defines a legal standard. "Careless driving requires that the defendant drive a motor vehicle "without due regard. . . A person who grossly deviates from the standard of care that **a reasonable person** would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a

circumstance exists, has necessarily acted without due regard for safety." People v. Zweygardt, 298 P.3d 1018, 1025 (Colo. App. 2012)(emphasis added); *See also* C.R.S. § 42-4-1402(1). As set forth, careless driving encompasses a legal standard, i.e., that conduct which a "reasonable person" would exercise. The Trial Court erred by allowing Trooper Averett to testify that the cause of the subject accident was Defendant's careless driving, thereby allowing Trooper Averett to render an opinion **regarding the applicable law or legal standards**." (TR 08/31/21, p 71)

Based upon the foregoing, it was an abuse of discretion for the Trial Court to allow Trooper Averett to render an opinion on an ultimate issue of fact as to whether a legal standard was, or was not, met, and remand of this matter is warranted.

II. The trial court erred by refusing to give Defendant's proposed jury instructions related to Plaintiff overdriving his headlights.

This issue for appeal was preserved at TR pp 08/02/21, 50-54; 09/03/21, 125-136.

The Trial Court had a duty to correctly instruct the jury on all manner of law provided sufficient evidence supports the giving of a particular jury instruction. Cassels v. People, 92 P.3d 951, 955 (Colo. 2004); People v. Garcia, 28 P.3d 340, 343 (Colo. 2001). The appellate court, in considering whether the proffered instruction by the defendant should have been given, the court must consider the

evidence in the light most favorable to the defendant. *Cassels*, 92 P.3d at 955; *Mata-Medina v. People*, 71 P.3d 973, 979 (Colo. 2003). "A defendant is entitled to an instruction on a particular affirmative defense when he or she raises some credible evidence to support it." *Cassels*, 92 P.3d at 955; *Gorman v. People*, 19 P.3d 662, 668 (Colo. 2000). "A party is entitled to an instruction if it fairly presents the issues and is supported by the evidence." *Regents of Univ. of Colo. ex rel. Univ. of Colo. at Boulder v. Harbert Const. Co.*, 51 P.3d 1037, 1042 (Colo. App. 2001).

Defendant submitted CJI-CIV 9:14 2020 Ed., negligence per se instruction, related to C.R.S. § 42-4-1101, which provides that "[n]o person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." C.R.S. § 42-4-1101. The Trial Court did not give the proposed instruction, finding that Plaintiff had no duty to operate his vehicle with his high beam headlights, at night, with no oncoming traffic, on a road without artificial lighting, and driving 60 mph. (TR 09/07/21, pp 151-154) Defendant contends that the Trial Court's failure to give the instruction constitutes abuse of discretion.

All drivers are under a duty to drive with reasonable care under the circumstances than existing. *Hesse v. McClintic*, 176 P.3d 759, 762 (Colo. 2008).

The general duty of care involves the examination of all attendant circumstances of an accident. *See, e.g.,* Brice v. Miller, 218 P.2d 746, 752 (Colo. 1950). Consistent with that, the jury instructions defining negligence and reasonable care, CJI-Civ. 9:6 and 9:8, both instruct jurors to consider the conduct of a reasonable person "under the same or similar circumstances."

"A person may not drive a motor vehicle upon a highway at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead. This requires that a driver operate his vehicle in such a manner that he can always stop within the distance that he can clearly see. This distance will vary with the visibility at the time and other attendant circumstances. . . . At night, the assured clear distance is determined by the scope of the driver's headlights." ASSURED CLEAR DISTANCE; 2 HANDLING MOTOR VEHICLE ACCIDENT CASES 2D § 10:86. In other words, a person cannot overdrive their headlights.

As discussed above, Plaintiff was operating his vehicle at 60 mph, or 88 feet per second (TR 09/07/21, p 80), with only his "dim" lights activated, illuminating only about 100 feet in front of him (TR 09/07/21, p 85) because he was "not worried about what was ahead" of him. (TR 08/30/21, p 184) By contrast, high beams would illuminate approximately 350 feet. (TR 09/07/21, p 85) The evidence at trial from Plaintiff's expert, Dr. Harvey, was that Plaintiff would require at least

one hundred ninety-eight (198) feet to stop while driving 60 mph. (TR 09/01/21, p 109) As Plaintiff was operating his vehicle with only his low beam headlights, according to Plaintiff's expert, Plaintiff could not have stopped within the scope of the illumination of his headlights.

Moreover, and as discussed above, the evidence at trial established that the driver behind Plaintiff, Tamela Seipel, was able to see Defendant and wondered why the Plaintiff was unable to see the tractor. (TR 08/31/21, p 243) Finally, Ms. Seipel was able to bring her vehicle to a controlled stop far enough behind Plaintiff after the accident. (TR 08/31/21, p 243)

Other jurisdictions addressing this issue have held that when a driver is "overdriving" his headlights, such can constitute negligence: *Tippit v. Gohman*, 145 S.W.2d 908, 912 (Tex. Civ. App. 1940)("[i]t might be that one overdriving his headlights is negligent."); *Larocca v. Aetna Cas. Ins. Co.*, 181 So.2d 482, 486 (La. App. 1965)(plaintiff guilty of contributory negligence in failing to see what he should have seen and for likely overdriving his headlights); *Carlson v. Peterson*, 284 NW 847, 849 (Minn. 1939)(statute requiring automobiles to have headlights with a distribution of light sufficient to reveal persons and vehicles at a safe distance, driver who collided with another automobile backing across the highway, whose distribution of light only illuminated 100 feet ahead of his car, raised a

question for the jury as to whether the lights conformed to the statutory standard and whether failure to do so had a causal connection to the subject accident); *Blanford v. Connery*, 148 NE.2d 824 (Ill App. 1958)(in an accident in which plaintiff's vehicle struck the rear of a truck in front of him, an issue existed as to whether the collision was proximately caused by the plaintiff's negligence in driving 45 to 50 mph with his lights on dim); *Mansur v. Abraham*, 164 So. 418, 419 (La. App. 1935)(violation of statute requiring headlights sufficient to illuminate objects and people in the road 200 feet ahead was found to be negligence); *Wing v. A.R. Blossman*, 79 So.2d 133, 134 (La. App. 1955)(plaintiff who testified that his headlights only illuminated 50 feet ahead was held to be contributorily negligent for running into the rear of defendant's truck); *Buescher v. Ellenberger*, 34 N.E.2d.2d 1013, 1014 (Ohio App. 1940), *aff'd* *Buescher v. Ellenberger*, 34 N.E.2d 777 (Ohio 1941)(plaintiff's operation of a motor vehicle with headlights that only illuminated 100 to 150 feet which prevented plaintiff from seeing defendant's standing truck until 30 to 40 feet out, which violated the statute, was held to constitute negligence by plaintiff precluding recovery by the plaintiff); *Lorenzen v. Feucht*, 490 P.2d 176, 178 (Or. 1971)(it was proper for trial court to submit a charge of contributory negligence as plaintiff's headlights only

illuminated 100 feet, which caused plaintiff to be unable to see defendant's unlit tractor on the road)

Defendant argued, and the evidence established, that the subject accident was unavoidable because Plaintiff was driving with his low beam headlights only. It is not necessary that a specific statute require that Plaintiff use his high-beams—the duty of care is larger than that. Rather, the question for the jury was whether it was reasonable for Plaintiff to be driving at a speed where he would not be able to perceive unlit objects in time to avoid colliding with them.

C.R.S. § 42-4-216(1) requires that motor vehicles, such as Plaintiff's Ford Contour, have both high and low beam headlights. It also requires that the high beam headlights project 3.5 times as far as the low beam headlights. C.R.S. § 42-4-216(1). In interpreting statutes, courts assume that the legislature had a purpose in mind in enacting the law and do not interpret them in a manner that would render them meaningless or absurd. *See* Stevinson Imports, Inc. v. City & Cty. of Denver, 143 P.3d 1099, 1103 (Colo. App. 2006). To suggest that there would never be a time when either statutory or common law duties would require the use of high-beam headlights would render § 42-4-216(1) largely meaningless.

C.R.S. § 42-4-1101(1) provides "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions

then existing." The term, "conditions," is not defined in Title 42. However, it is used in this and other sections of Title 42 to refer to both weather and other circumstances affecting driving. For example, in C.R.S. § 42-4-1101(3), the statute provides, "[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." By listing weather separately, the term, "conditions," logically must refer to other circumstances affecting driving on the highway.

Defendant contends that Plaintiff failed to operate his vehicle at a speed that was reasonable and prudent as required pursuant to C.R.S. § 42-4-1101. In fact, the evidence at trial demonstrated that Plaintiff was driving at a speed which would not enable him to stop within the illumination of his low beam headlights, in contradiction of C.R.S. § 42-4-1101. Moreover, Plaintiff's action in overdriving his headlights was a proximate cause of the subject accident and constituted a violation of C.R.S. § 42-4-1101. Accordingly, the Trial Court erred in failing to give Defendant's proffered negligence *per se* jury instruction.

III. The trial court erred by tendering Plaintiff's jury instruction regarding negligence *per se* regarding the lack of taillights on the tractor, thereby instructing the jury that Defendant was negligent violating the purview of the jury as the finder of fact.

This issue for appeal was preserved at TR 09/07/21, pp 109-110; 151-158.

The Trial Court erred in tendering a negligence *per se* jury instruction regarding, *inter alia*, the use of taillights as set forth in C.R.S. § 42-4-204 and 42-4-211. (CF pp 1391-1393) The jury instruction specifically noted that violation of the statutes constituted negligence.

As discussed herein, Defendant's taillights, unbeknown to Defendant, failed sometime after he got onto Highway 92 and prior to the subject accident. During trial, Defendant testified that, shortly before entering Highway 92 after feeding his cattle, the taillights were operational on the rear of the tractor as he used the illumination from the taillights to cut the strings to the bale of hay and then to secure the gate. (TR 08/31/21, pp 144-145; 157; 176; 203-204) There was no evidence presented at trial that Defendant's taillights were not operational at the time he entered Highway 92. The Trial Court, by tendering the negligence *per se* instruction related to the use of taillights, effectively made the statute one of strict liability.

"The difference . . .between a claim for negligence and negligence per se and one for strict liability is in the focus of the standard of care and in what constitutes a breach of the duty established by such standard. Negligence and negligence per se are established by a showing that the defendant's conduct was such that it breached a duty to meet a certain standard of care. Strict liability in

tort arises not from conduct proscribed or prescribed under a common law or statutory duty of care, but from circumstances that may exist independent of and regardless of the conduct of the tortfeasor." *Lui v. Barnhart*, 987 P.2d 942, 945 (Colo. App. 1999). When an ordinance "regulates defendant's conduct, it must be shown that his [Defendant's] conduct violated the Ordinance." *Id.* "Negligence is not the logical equivalent of strict liability. Negligence requires proof that a defendant's conduct fell below an acceptable standard of care and thus involved proof of fault." *Wallman v. Kelley*, 976 P.2d 330, 333 (Colo. App. 1998).

As discussed above, the evidence in this case established that Defendant's taillights were operational at the time he secured the gate to the field after feeding his bulls and prior to entering Highway 92. Defendant testified he did not know the taillights on the tractor had failed sometime after securing the gate and the time of the subject accident, nor was there any indication that the taillights had gone out. (TR 08/31/21, pp 205-206) "If the operator or person in charge of such vehicle has done all that would be expected of an ordinarily prudent person, and a failure of his equipment occurs, not reasonably foreseen, he is not guilty of negligence." *Eddy v. McAninch*, 347 P.2d 499, 504 (Colo. 1959)(*citing White v. Pinney*, 108 P.2d 249, 253 (Utah 1940)).

In order to establish a claim for negligence *per se*, it must be established that the defendant violated a statute adopted for the public's safety, that plaintiff was a member of the group of persons the statute was intended to protect, and that the violation of the statute was a proximate cause of the of plaintiff's claimed injuries. Scott v. Matlack, Inc., 39 P.3d 1160, 1166 (Colo. 2002). "Proximate cause is that which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred." Stout v. Denver Park & Amusements Co., 287 P. 650 (Colo. 1930). Generally, the issue of proximate cause is for the jury. Id.

The Trial Court erred in giving the negligence *per se* instruction because it took the issue of proximate cause out of the hands of the jury. As discussed above, evidence was presented at trial demonstrating that Plaintiff was driving at 60 mph with his low beam headlights on because he wanted to see up close and was not worried about what was ahead of him. (TR 08/30/21, p 184; 09/02/21, 133) Evidence further demonstrated that: (1) Plaintiff's low beam headlights only illuminated approximately one hundred (100) feet (TR 09/01/21, p 118); and (2) Plaintiff travelling at that speed, 60 mph, would need, at a minimum, one hundred and ninety-eight (198) feet to stop. (TR 09/01/21, p 109) Based upon these undisputed facts, it was impossible for Plaintiff to stop within the scope of his

headlights, and, as such, the jury could have found that the proximate cause of the accident was Plaintiff's unreasonable conduct of operating a motor vehicle at 60 mph with his low beam headlights only. The Trial Court erred by giving the negligence *per se* instruction, essentially making it one of strict liability, by taking the issue of proximate cause from the jury and instructing the jury that Defendant was negligent as a matter of law.

There was evidence that the proximate cause of the subject accident was Plaintiff's decision to operate his vehicle at 60 mph with his low beam headlights only. The Trial Court erred in finding Defendant was negligent, as a matter of law, because his taillights went out, without his knowledge, when traveling on Highway 92 after feeding his bulls. Proximate cause is a question for the jury, and it was an abuse of discretion for the Trial Court to take that issue from the jury. Accordingly, this matter should be remanded for a new trial.

IV. The trial court erred by refusing to allow Defendant's accident reconstructionist, George Merlo, P.E., to testify as to his opinions as to fault and overdriving of headlights, and his other properly disclosed opinions.

This issue for appeal was preserved at TR 09/07/21, pp 33-59.

Rule 702 of the Colorado Rules of Evidence states as follows:

> 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.

C.R.E. 702.

The focus of a Rule 702 inquiry should be whether the evidence is both reliable and relevant, and evidence that is reasonably reliable and that will assist the trier of fact should be admitted. *See* People v. Shreck, 22 P.3d 68, 77 (Colo. 2001)(internal citations omitted). A trial court's reliability inquiry under C.R.E. 702 should be broad in nature and consider the totality of the circumstances of each specific case. *Id.* The Colorado Supreme Court in *Brooks v. People*, 975 P.2d 1105 (Colo. 1999) identified a two-tiered analysis in determining the admissibility of expert testimony. Specifically, the Court held:

> A court must first consider whether the substance of the proffered testimony will be helpful to the fact finder. [citations omitted] The court must then decide whether the witness serving as the conduit for such information is competent to render an expert opinion on the subject in question.

Id. at 1109.

Plaintiff argued at trial for the exclusion of Mr. Merlo as an expert, contending he lacked the qualifications to render accident reconstruction opinions stating that his qualifications were not fully set forth in Mr. Merlo's qualifications and his prior testimony history. (TR 09/07/21, pp 33-59) The Trial Court prohibited Mr. Merlo from providing testimony that he had performed hundreds of

accident reconstructions in the past and had been qualified as an expert in accident reconstruction in several jurisdictions in Colorado as the same was not included in Mr, Merlo's testimony history. Defendant contends that the Trial Court erred, which error was an abuse of discretion, by prohibiting Mr. Merlo from providing the following opinions: (1) opinions regarding "safe driving"; (2) opinions regarding the use of "high beams versus low beams"; (3) whether Plaintiff was "overdriving [his] headlights"; (4) whether Defendant was operating his tractor in a safe manner; and (5) any "opinion that the [Plaintiff's use of] high beams would have been more appropriate."[3] (TR 09/07/21, p 58)

A. C.R.C.P. 26(a)(2)(B)(I)(h) only requires a listing of cases in which the expert testified in the preceding four (4) years and Defendant was not required to provide a list of cases exceeding four (4) years.

Defendant filed his expert disclosure identifying George Merlo, P.E. as an accident reconstructionist on May 20, 2020, and attached thereto, Mr. Merlo's prior trial testimony consistent with C.R.C.P. 26(a)(2)(B)(I)(h). (EX pp 2335-2338) Prior to trial or at the Pre-Trial Conference, Plaintiff never raised any issue

[3] The Trial Court only permitted Mr. Merlo to testify as to facts such as the stopping distance for a vehicle traveling 60 mph. He was also allowed to testify as to the stopping distance with headlights illuminated at 100 feet and 350 feet. He was not allowed to render any opinions as to what those facts suggest as it relates to the claims in this case.

as to the adequacy of Defendant's disclosure of Mr. Merlo. (TR 09/07/21, pp 36-42)

At trial, Mr. Merlo testified consistent with his Curriculum Vitae (hereinafter "CV") which provided that: (1) he obtained a Master of Science in 1961 from Lehigh University, Bethlehem, PA in engineering; (2) he became a licensed Professional Engineer in Pennsylvania in 1996, New Jersey in 1969, Colorado in 1978, Arizona in 1992, and New Mexico in 2008; (3) he had taken the Highway Accident Reconstruction Continuing Education course sponsored by the National Academy of Forensic Engineers in 1990; (4) he had taken the Low Speed Rear Impact Collision TOPTEC Seminar in 1994; and (5) he had taken the SAE International "Vehicle Accident Reconstruction Methods Seminar" in 2006. Mr. Merlo further testified that speed calculations in accident reconstruction are based on basic principles of physics, of which Mr. Merlo was intimately familiar as a licensed engineer. Mr. Merlo's CV further provided that he had also "served as a forensic consultant to numerous attorneys and private clients in cases involving . . .automobile accident reconstruction" (EX pp 3049-3051), but because such information was not set forth in detail, the Trial Court would not permit Mr. Merlo to expand on his prior experience, which included that he had performed hundreds of accident reconstructions over the course of his career. Defendant contends that

the qualifications discussed above, in and of themselves, was adequate to qualify Mr. Merlo as an accident reconstructionist.

As set forth above, Mr. Merlo was not permitted to answer any questions during *voir dire* regarding how many times he had performed work for or testified as an accident reconstructionist as the Trial Court held that such was not contained in Mr. Merlo's testimony history. (TR 09/07/21, pp 33-59) The Trial Court then concluded that Mr. Merlo was not qualified to render an opinion as an accident reconstructionist.

C.R.C.P 26(a)(2)(B)(I)(h) requires a retained expert to provide:

> A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

C.R.C.P 26(a)(2)(B)(I)(h).

The purposes of pretrial discovery include elimination of surprise at trial; discovery of relevant evidence; simplification of the issues; promotion of expeditious settlement. *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002).

Defendant complied with C.R.C.P. 26(a)(2)(B)(I)(h) by providing Mr. Merlo's deposition and trial testimony for the prior four years. (EX pp 2335-2338) Even assuming Defendant was required to produce a more detailed listing of Mr. Merlo's prior work as an accident reconstructionist, Defendant contends that the

Trial Court's limitations on Mr. Merlo's testimony was an abuse of discretion. The Court's failure to allow Mr. Merlo to testify as an accident reconstructionist is equivalent to a C.R.C.P. 37(c) sanction.

> Under Rule 37(c), even where a violation lacks substantial justification, the sanction of evidence or witness preclusion is inappropriate if the lateness of the disclosure is harmless to the other party. In evaluating whether a failure to disclose evidence is harmless under Rule 37(c), the inquiry is not whether the new evidence is potentially harmful to the opposing side's case. Instead, the question is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence.

Todd v. Bear Valley Village Apts., 980 P.2d 973, 979 (Colo. 1999).

Defendant contends that any failure to provide prior testimony history which dated further back than the Rules required was harmless to Plaintiff. As set forth above, Plaintiff was in possession of Mr. Merlo's complete set of opinions, testimony history and CV for sixteen (16) months prior to trial.

The Colorado Supreme Court, in the case of *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008), was faced with the question whether the sanction of expert witness preclusion was appropriate for a defendant's failure to provide a complete testimony history of her experts. *Id.* In rejecting the trial court's decision to exclude the expert witnesses, the Colorado Supreme Court held:

> Here, the defendants knew the identity of Trattler's experts and had timely received other disclosures required by Rule 26(a)(2)(B)(I),

> including written summaries of the experts' proposed testimony describing the bases for the experts' findings, exhibits to be used as support for their opinions, a list of the experts' qualifications, and a list of the experts' recent publications. Thus, the only evidence not disclosed in violation of Rule 26(a)(2)(B)(I) was a portion of the expert's past testimonial history.
>
> While an expert's past testimony may be useful when the opposing party seeks to impeach that expert during cross-examination, the expert's testimony history is not central to the case.

Id. at 682.

Trattler is analogous to the case at issue. Plaintiff was in full possession of all opinions that Mr. Merlo intended to offer at trial and Plaintiff could inquire, on cross-examination, about Mr. Merlo's prior testimony as an accident reconstructionist.

Defendant contends Mr. Merlo was qualified to render expert opinions as an accident reconstructionist at trial, regardless of the fact that he had not provided expert testimony in the field of accident reconstruction in the prior four (4) years. As detailed above, he obtained his master's degree in engineering in 1961 (fifty-nine years prior to his testimony), had taken three (3) courses geared toward accident reconstruction in 1994, 2000, and 2006, and had performed accident reconstructions in the past.

This Court, in addressing whether a fingerprint expert who had only taken one class years prior to his testimony, had undergone no formal testing since 2011,

held no national certification or specialized licensing, never published or taught classes in fingerprinting, and had never been tested to determine his error rate, held that the expert was qualified to render an expert opinion. *People v. Lowe*, 486 P.3d 398, 406 (Colo. App. 2020). Specifically, the trial court in that case allowed the expert to testify, during *voir dire*, to *inter alia*, that he had conducted seventy-three (73) fingerprint examinations. *Id.* In the present action, Defendant was prohibited from introducing evidence of the hundreds of accident reconstructions Mr. Merlo had performed in his more than twenty-four (24) years since taking courses related to accident reconstruction. Clearly the Colorado Rules of Civil Procedure do not require that an expert provide every case in which he had provided expert testimony over his career, rather, the rules specifically limit the requirement to only the preceding four (4) years.

By contrast, Defendant was highly prejudiced by the Trial Court's decision to strike Mr. Merlo. Defendant has continually maintained that the cause of the subject accident was Plaintiff's failure to operate his vehicle in a safe, prudent, and reasonable manner under the conditions then existing. This included whether Plaintiff was overdriving his headlights and whether it was reasonable for Plaintiff to be driving at 60 mph with only his low beam headlights illuminated. Defendant

was severely prejudiced by the Trial Court's error in prohibiting Mr. Merlo from testifying as to these and other issues.

Based upon the foregoing, the Trial Court erred in striking Mr. Merlo as an accident reconstructionist and remand of this matter is warranted.

B. C.R.C.P. 16(c) requires that challenges to the admissibility of expert testimony pursuant to C.R.E. 702 be made seventy (70) days prior to trial.

C.R.C.P. 16(c) provides in part:

> Unless otherwise ordered by the court pretrial motions. . . challenging the admissibility of expert testimony pursuant to C.R.E. 702, . . . must be filed no later than 70 days (10 weeks) before the trial.

C.R.C.P. 16(c).

> C.R.C.P. 16(b) and 16(c) of the Colorado Rules of Civil Procedure provide discovery and disclosure deadline obligations of the parties.

Antero Resources Corp. v. Strudley, 347 P.3d 149, 156 (Colo. 2015).

A purpose of the C.R.C.P. 16 disclosure obligations is to provide parties with adequate time to prepare for trial and prevent a trial by ambush. *Freedman v. Kaiser Found. Health Plan of Colo.*, 849 P.2d 811, 815 (Colo. App. 1992); *Daniels v. Rapco Foam, Inc.*, 762 P.2d 717, 719 (Colo. App. 1988); *Conrad v. Imatani*, 724 P.2d 89, 92-93 (Colo. App. 1986). "Ambush" adequately describes what occurred in the instant action.

As set forth above, Defendant served his expert disclosure identifying George Merlo, P.E., as an accident reconstructionist on May 20, 2020, including Mr. Merlo's Initial Report, Supplemental Report, Fee Schedule, CV, and Testimony List. (EX pp 2101-2156; 2335-2339, 3049-3051) On June 9, 2020, Defendant served his First Supplemental C.R.C.P. 26(a)(2)(B)(I) Retained Expert Witness Disclosure of George Merlo, P.E. (EX pp 2157-2189) Plaintiff was in possession of these reports for sixteen (16) months prior to trial. Plaintiff failed to file any challenge to Mr. Merlo as required by C.R.C.P. 16(c).

As discussed above, the test in determining whether exclusion of Mr. Merlo as an expert was whether such was harmful to the Plaintiff. *Todd*, 980 P.2d at 979. In the present action, any failure to disclose Mr. Merlo's prior testimony or work as an accident reconstruction prior to 2016 was harmless. Plaintiff had Mr. Merlo's report, along with his supporting calculations, for sixteen (16) months prior to trial as such, any error by Defendant was harmless. *See id.*

Any failure to disclose Mr. Merlo's testimony prior to the four (4) years as required by the Colorado Rules of Civil Procedure was harmless. Plaintiff had sixteen (16) months to depose Mr. Merlo or challenge Mr. Merlo's disclosure pursuant to C.R.C.P. 16(c). Plaintiff chose neither. Based upon the foregoing, the

Trial Court erred in striking Mr. Merlo as an accident reconstructionist and remand of this matter is warranted.

V. The trial court erred by refusing to tender a jury instruction related to the presumption of negligence in a rear-end accident.

This issue for appeal was preserved at CF pp 1185-1187.

Defendant also tendered two presumption of negligence instructions based upon Plaintiff's vehicle striking Defendant's tractor from behind. The first instruction, patterned on CJI-CIV 3:5, would have instructed the jury that they are permitted to infer that, because Plaintiff struck Defendant from the rear, Plaintiff was negligent. The second tendered instruction was the stock rear-end negligence instruction, CJI-CIV 11:12, which states the legal presumption of negligence when one driver strikes another from behind.

The Trial Court failed to give the instruction finding that the instruction was inapplicable because Plaintiff didn't see the tractor in front of him, so he didn't know it "existed." (CF p 1185-1187)

The cases when the rear-end instruction should be given are "those situations in which the negligence followed by the collision occurred while both vehicles were on the roadway or shoulder, in relatively close proximity, and facing in the same direction." *Bettner v. Boring*, 64 P.2d 829, 834 (Colo. 1988)(*quoting, Boring v. Bettner*, 739 P.2d 884, 886 (Colo.App.1987)). That is exactly what happened in

the present action. Plaintiff and Defendant were both traveling eastbound on Colorado Highway 92. They were in relatively close proximity, and they were both travelling in the same direction when Plaintiff's vehicle struck the rear of Defendant's tractor because Plaintiff failed to see the tractor, when Ms. Seipel was clearly able to see it even though she was approximately 300 feet behind the Plaintiff. That is more than sufficient to support giving the traditional CJI-CIV 11:9 instruction. At a minimum, the jury should have been informed that they may infer Plaintiff was negligent, based upon the nature of the accident, again, which the Trial Court refused to do.

Based upon the foregoing, it was an abuse of discretion by the Trial Court for failing to give a rear-end presumption jury instruction and such abuse of discretion, warrants remand of this matter.

CONCLUSION

For the reasons set forth herein, the cumulative errors of the Trial Court constitute an abuse of discretion and this matter should be remanded for a new trial.

Respectfully submitted this 12th day of April, 2022.

PATTERSON RIPPLINGER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to C.A.R. 25 and C.R.C.P. 5, on this 12th day of April 2022, a true and correct copy of the foregoing **OPENING BRIEF** was filed with the trial Court and the Court of Appeals, and a true and correct copy served, via Colorado Courts E-Filing, upon the following:

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