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COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203

Delta County District Court
The Honorable Mary Deganhart
2019CV30075

Defendant-Appellant: ADAM CARPENTER,

v.

Plaintiff-Appellee: CECIL NORRID.

▲COURT USE ONLY▲

Case No.: 2021CA1687

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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 9,436 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 (CD 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/Nelson A. Waneka
Nelson A. Waneka

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE ii

I. ISSUES PRESENTED FOR REVIEW 1

II. STATEMENT OF THE CASE 2

A. Nature Of The Case, Course Of Proceedings, And Disposition Below 2

B. Statement Of Facts 6

1. Plaintiff Cecil Norrid's Testimony 6

2. The Testimony of Tamela Seipel 8

3. The Testimony of Trooper Patrick Averett 11

4. Defendant Adam Carpenter's Testimony 16

II. SUMMARY OF THE ARGUMENT 19

III. ARGUMENT 22

A. The District Court Did Not Abuse Its Discretion In Allowing Trooper Averett To Testify That One Of The "Driver Behaviors" He Believed To Be At Issue In The Crash Was Careless Driving 22

1. Preservation And Standard Of Review 22

2. Trooper Averett's Isolated Reference To "Careless Driving" Did Not Usurp The Jury's Role 23

a. Defendant Carpenter Clarified Trooper Averett's Testimony On Cross-Examination 25

b. Trooper Averett Did Not Opine On The Applicable Law Or Legal Standards 26

c. The Jury Was Properly Instructed On The Law And That It Could Reject Trooper Averett's Testimony 27

d. Trooper Averett Did Not Testify That Defendant Carpenter Committed The Crime Or That There Was A Particular Likelihood That He Did So 28

3. Any Error In Admitting Trooper Averett's Testimony Was Harmless 29

B. The District Court Did Not Abuse Its Discretion In Declining To Instruct The Jury That Mr. Norrid Was Negligent Per Se 30

1. Preservation And Standard Of Review 30

2. Defendant's Proffered Negligence Per Se Instruction Contained The Same Standard Of Care In The District Court's General Negligence Instruction 30

3. Any Error In Refusing Defendant's Negligence Per Se Instruction Was Harmless 33

4. Defendant's Negligence Per Se Instruction Is Unsupported By Colorado Law And Would Lead To An Absurd Result 34

C. The District Court Did Not Abuse Its Discretion In Instructing The Jury That It Could Find Defendant Negligent Per Se 37

1. Preservation And Standard Of Review 37

2. The District Court's Negligence Per Se Instruction Did Not Hold Defendant Strictly Liable 37

3. The District Court's Negligence Per Se Instruction Did Not Strip The Issue Of Proximate Causation From The Jury 42

D. The District Court Did Not Abuse Its Discretion By Limiting The Expert Testimony Of Structural Engineer George Merlo..... 43

1. Preservation And Standard Of Review 43

2. Defendant Failed To Disclose Mr. Merlo's Qualifications Before Trial 43

3. Despite The Opportunity, Defendant Failed To Convince The District Court Of Mr. Merlo's Alleged Qualifications 46

E. The District Court Did Not Abuse Its Discretion In Declining To Instruct The Jury That Mr. Norrid Was Presumed Negligent 48

1. Preservation And Standard Of Review 48

2. A Presumption Of Negligence Instruction Was Not Supported By The Evidence Or The Law 48

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Bettner v. Boring,
764 P.2d 829 (Colo. 1992) 50

Bridges v. Lintz,
140 Colo. 582, 346 P.2d 571 (Colo. 1959) 24

Day v. Johnson,
255 P.3d 1064 (Colo. 2011) 31, 38, 49

Gravina Siding & Windows Co. v .Gravina 45
2022 COA 50, ¶ 64.

Hines v. Denver & Rio Grande Western R. Co.,
829 P.2d 419 (Colo. App. 1991)..... 25

Lawrence v. People,
2021 CO 28..... 24

Lui v. Barnhart,
987 P.2d 942 (Colo. App. 1999)..... 38, 39, 40, 41

Martin v. Minnard,
862 P.2d 1014 (Colo. App. 1993)..... 35

Masters v. People,
58 P.3d 979 (Colo. 2002) 23

Meier v. McCoy,
119 P.3d 519 (Colo. App. 2004)..... 48

People v. Payne,
2019 COA 167 25

People v. Robles-Sierra,
2018 COA 28 25

People v. Ramirez,
155 P.3d 371 (Colo. 2007) 43, 44

People v. Rector,
248 P.3d 1196 (Colo. 2011) 24

Scott v. Matlack, Inc.,
39 P.3d 1160 (Colo. 2002) 39

Silva v. Wilcox,
223 P.3d 127 (Colo. 2009) 32, 37

Specht v. Jensen,
853 F.2d 805 (10th Cir. 1988) 29

Suydam v. LFI Fort Pierce, Inc.,
490 P.3d 930 (Colo. App. 2020) 36, 49

Winkler v. Shaffer,
356 P.3d 1020 (Colo. App. 2015) 31, 33, 34

Statutes

C.R.S. § 42-4-1008 ..... 31, 33, 34

C.R.S. § 42-4-1101 37

Plaintiff-Appellee Cecil Norrid, through his attorneys, LEVIN SITCOFF WANEKA PC, submits the following Answer Brief:

I. ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in allowing Trooper Patrick Averett to make an isolated reference to Defendant's "careless driving" when: (1) Defendant admitted he was driving a tractor on a highway at night with no illuminated taillights; (2) Defendant admitted that his conduct was "careless;" (3) Defendant admitted his tractor did not have the Slow Moving Vehicle emblem required by Colorado law; and (4) the trial evidence overwhelmingly supported that Defendant was negligent.

2. Whether the district court appropriately exercised its discretion to reject a jury instruction stating that Plaintiff was negligent per se when: (1) Plaintiff was driving 5-12 miles per hour **below** the speed limit; (2) the conditions were **clear and dry**; and (3) the jury **considered and rejected** the notion that Plaintiff was negligent under an identical standard of care.

3. Whether the district court was within its discretion to instruct

the jury that it could find Defendant was negligent per se for driving a tractor on a public highway at night without any illuminated taillights and without the required Slow Moving Vehicle emblem.

4. Whether the district court abused its discretion in limiting the expert testimony of Structural Engineer George Merlo when: (1) Defendant failed to disclose Mr. Merlo's alleged qualifications as an "accident reconstructionist" before trial; and (2) Defendant failed to convince the court of Mr. Merlo's qualifications during trial.

5. Whether the district court appropriately exercised its discretion to decline a jury instruction stating that Plaintiff was "presumed negligent" for causing the crash when, based upon the evidence at trial, Defendant was negligent per se as a matter of law and any presumption of Plaintiff's negligence was rebutted.

II. STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Disposition Below

On December 10, 2018, 84-year-old Cecil Norrid was driving on Highway 92 enroute to his home in Crawford, Colorado. (TR 8/31/21 p. 52, ll. 5-9). It was approximately 5:30 at night. (TR 8/31/21 p. 52, ll.14-

14). The conditions were clear. (TR 8/31/21 p. 56, ll. 15-16). The roads were dry. (TR 8/31/21 p. 56, ll. 10-12). Further, Mr. Norrid had his low-beam headlights as well as his fog lights illuminated. (TR 9/2/21 p. 68, ll. 1-6).

As Mr. Norrid crested a hill on Highway 92, he saw no objects or vehicles in the roadway ahead of him—it was "just black." (TR 9/2/21 p. 129, l. 19). And although the speed limit was 65 miles per hour, it was undisputed at trial that Mr. Norrid was driving between 53 and 60 miles per hour. (TR 9/2/21 p. 66, ll. 16-22).

At the same time Mr. Norrid was descending the hill, Defendant was driving a 10,800-pound tractor in the same direction of travel. (TR 8/31/21 p. 52, ll. 5-9). It was undisputed that the tractor **did not** have the Slow Moving Vehicle emblem required by Colorado law. (TR 8/31/21 p. 86, ll. 1-21). And despite that it was a dark, nearly moonless night—Defendant admitted at trial that the tractor's taillights **were not** illuminated.

> Q: And your testimony is that between getting from that gate and driving less than 800 to 1,000 feet, [the taillights] turned off?

A: If the witness says they were off, they must have. I don't know if, if something happened.

Q: But, yes, sir. And I, I'm just trying to be clear. Somehow between those two periods of time they turned off, yes?

A: Must have.

Q: Yes?

A: Yes.

(TR 8/31/21 p. 216, ll. 9-22).

While obeying all laws, and without time to avoid a collision, Mr. Norrid's car slammed into the back of Defendant's tractor. (EX p. 9). He sustained 11 broken ribs, two sternum fractures, and a collapsed lung. (TR 9/2/21 p. 82, ll. 11-21). He sustained hand, knee, and shoulder injuries. (TR 9/2/21 p. 83, ll. 8-25). He was bleeding from his face and hands. (TR 9/2/21 p. 170, ll. 23-24). He had bruising to his eyelids, nose, chin, throat, liver, and abdomen. (TR 9/1/21 pp. 232:15-233:5). And the resulting swelling rendered him nearly unrecognizable to his own daughter. (TR 9/2/21 p. 172, ll. 8-10).

Mr. Norrid spent 24 days in the hospital. (TR 9/2/21 p. 87, ll. 10-13). Day and night—for three straight months—he had to wear a "heart

hugger" vest that painfully compressed his shattered ribcage until the bones could set. (TR 9/2/21 pp. 89:14-90:25). Among other things, Mr. Norrid endured two separate procedures to hypodermically remove two liters of accumulated fluid from his right lung. (TR 9/1/21 p. 245, ll. 8-11).

On September 8, 2021, following seven days of testimony, the jury unanimously returned a verdict in Mr. Norrid's favor. (TR 9/8/21 p. 118, ll. 14-21). The jury determined that Mr. Norrid had injuries, damages, or losses. (*Id.*). The jury determined that Defendant was negligent. (*Id.*). The jury determined that Defendant's negligence caused Mr. Norrid's injuries and damages. (*Id.*). The jury determined that Mr. Norrid was **not** negligent for "overdriving" his headlights. (*Id.*). And the jury determined that Mr. Norrid's injuries and damages were **not** caused by his own alleged negligence. (*Id.*). In other words, the jury considered and rejected every factual argument raised in the Opening Brief.

On September 16, 2021, the trial court entered an amended judgment in Mr. Norrid's favor totaling $546,000. (CF p. 3367). This appeal followed.

B. Statement Of Facts

1. Plaintiff Cecil Norrid's Testimony

The Opening Brief repeatedly states that Mr. Norrid "wasn't worried about what's ahead of him" in the obvious hope of suggesting that he was somehow driving negligently. (Opening Brief at pp. 5, 11, 20). To call this a mischaracterization of the record is an understatement.

Mr. Norrid testified that the crash occurred around seven miles from his house. (TR 9/2/21 p. 64, l. 25). He testified that the roads were clear and had neither snow nor ice upon them. (TR 9/2/21 p. 66, ll. 7-15). He testified there were no adverse weather conditions, the visibility was clear, and there were no conditions obstructing his view. (TR 9/2/21 p. 66, ll. 5-11).

Mr. Norrid testified that he was driving "carefully" because he knew there to be a lot of wildlife on that stretch of Highway 92. (TR 9/2/21 p. 67, ll. 3-18). Despite his concern for this wildlife, Mr. Norrid was "paying attention to the road" and "wasn't staring off at the sides of the road or anything." (TR 9/2/21 pp. 68:22-69:4). He wasn't on his

phone. (TR 9/2/21 p. 69, ll. 24-25). He wasn't listening to music. (TR 9/2/21 p. 69, ll. 22-23). His windshield didn't have cracks impeding his view. (TR 9/2/21 p. 76, ll. 23-25). He didn't have any major health issues that affected his ability to drive. (*See* TR 9/2/21 p. 56, ll. 18-24). And he wasn't drinking alcohol—given that he's been a non-drinker his entire life. (TR 9/2/21 p. 50, ll. 1-4).

Although Mr. Norrid was not required to do so, he was wearing his eyeglasses. (TR 9/2/21 pp. 57:24-58:25). In fact, Mr. Norrid renewed his driver's license a few months before the crash and passed his vision test both with and without his eyeglasses. (*Id.*). As a result, Mr. Norrid had no vision restrictions on his driver's license on the night of the crash. (TR 9/2/21 p. 59, ll. 11-15).

Despite the speed limit being 65 miles per hour, Mr. Norrid testified that he was driving between 53 and 60 miles per hour. (TR 9/2/21 pp. 66:16-67:4). He had his "regular" headlights on, which also turned on his fog lights. (TR 9/2/21 p. 68, ll. 1-6). Mr. Norrid testified that he prefers to drive with his lights on this setting because it allows him to see down the road with the regular lights while the fog lights illuminate the side

of the road where wildlife is. (TR 9/2/21 p. 68, ll. 7-18). Indeed, Mr. Norrid testified that driving with his regular headlights and fog lights in this fashion didn't interfere with his ability to see the road, and that he normally used this light setting when driving along this section of Highway 92. (TR 9/2/21 pp. 68:19-69:15).

In addition to all of this, Mr. Norrid testified that he replaced his headlights five months before the crash. (TR 9/2/21 p. 53, ll. 13-21). He also testified that he cleaned the headlight lenses at that time such that there were no issues with their ability to cast light on the road. (*Id.*). He testified that his fog lights were "real bright." (TR 9/2/21 p. 125, ll. 11-13). And he testified that even without his high beams illuminated, he could see "way down the road." (TR 9/2/21 p. 125, l. 20).

2. The Testimony of Tamela Seipel

The Opening Brief likewise suggests that although she was driving behind Mr. Norrid, Tamela Seipel "was able to discern that the object in front of Plaintiff was a tractor and wondered why Plaintiff did not see it as well." (Opening Brief at 6, 21,39). Again, the record paints a different picture.

Ms. Seipel witnessed the crash. (8/31/21 p. 219, ll. 6-10). She was driving 65 miles per hour until she saw Mr. Norrid's taillights, at which point she slowed down to 55 miles per hour. (8/31/21 p. 221, ll. 14-22). According to Ms. Seipel, the roads were clear and dry with no adverse weather conditions. (8/31/21 p. 222, ll. 17-22). Further, it appeared to her that Mr. Norrid was driving under the speed limit—which is why she slowed down. (8/31/21 pp. 221:23-222:5).

Ms. Seipel testified that she turned her high beams **off** when she crested the hill on Highway 92. (8/31/21 p. 226, ll. 20-22). Drawing upon her experience driving on Highway 92 every day, Ms. Seipel testified that she believes it is reasonable for a person to use their regular headlights and fog lights where the crash occurred. (8/31/21 p. 227, ll. 17-22).

When Ms. Seipel first saw Mr. Norrid's taillights, she became alerted to the presence of his car but did not see anything in front of him. (8/31/21 p. 228, ll. 1-11). Immediately before the crash, she became aware of a "brown shape" in front of Mr. Norrid's car. (8/31/21 p. 229, ll. 10-17). But she could **not** discern that the "brown shape" was a tractor. (8/31/21 p. 229, ll. 21-23). Indeed, she couldn't even tell if the shape was moving

or standing still. (8/31/21 p. 229, ll. 18-20).

It was only after the crash, or perhaps immediately before, that she learned the object was a tractor. (8/31/21 pp. 229:24-230:1). In this regard, Ms. Seipel testified that the entire incident took "seconds," and that it was possible Mr. Norrid's headlights helped to illuminate the brown object for her just before he crashed into it. (8/31/21 p. 231, ll. 19-21).

Ms. Seipel testified that Defendant Carpenter's tractor had no illuminated lights whatsoever on its rear:

> Q: Okay. Okay. And did that brown object have any lights, not just taillights, did it have any lights, period, turned on the back of it?
>
> A: No.
>
> Q: And you're positive of that?
>
> A: Yes.

(8/31/21 p. 230, ll. 2-7; *see also* 8/31/21 p. 234, ll. 18-21).

Additionally, after being shown photographs of compliant and non-compliant Slow Moving Vehicle emblems, Ms. Seipel testified that Defendant's tractor had no such emblems displayed at the time of the

crash. (8/31/21 p. 230, ll. 11-21; *see also* 8/31/21 p. 234, ll. 22-24).

3. The Testimony of Trooper Patrick Averett

Prior to trial, the district court ruled that CSP Trooper Patrick Averett could not offer certain opinions until an appropriate foundation had been laid. (CF 2055-56).

When Mr. Norrid called Trooper Averett as a witness on the second day of trial, the district court clarified that it intended to reserve ruling on whether Trooper Averett could offer the opinions. (TR 8/31/21 p. 12, ll. 4-8). Further, Defendant's counsel acknowledged that the court's prior ruling was interlocutory. (TR 8/31/21 p. 13, ll. 20-21).

After considering extensive arguments from both sides, and with the benefit of a clearer picture of the evidence the parties intended to present at trial, the district court concluded that Trooper Averett could opine regarding the results of his accident investigation:

> If he says that it was in his opinion due to careless driving, if I actually qualify him as an expert, **I think he can speak to that and I don't think that it necessarily invades the province of the jury to then ultimately make that determination about the standard of care because there's going to be a lot of other information and evidence that's going to**

> **come in in this trial, about what that means and whether, ultimately, Mr. Carpenter, has liability to Mr. Norrid, with regard to his actions, the night that the crash happened**.

(TR 8/31/21 p.17:12-18:6).

After this lengthy sidebar, Trooper Averett testified that he had been a Colorado State Patrol Trooper for 22 years when the crash occurred. (TR 8/31/21 p. 34, ll. 15-17). He received 22 weeks of training at the CSP Academy, including crash investigation training. (TR 8/31/21 p. 35, ll. 13-25). Specifically, he completed 76 hours of Level I accident investigation training. (TR 8/31/21 p. 36, ll. 2-4). He then completed 96 hours of Level II accident investigation training a few years after he graduated. (TR 8/31/21 p. 36, ll. 14-23). Finally, Trooper Averett testified that he had investigated between 30 and 50 crashes per year for 24 years before he retired from law enforcement—including a few automobile versus tractor collisions. (TR 8/31/21 pp. 37:22-38:11).

Tellingly, after a morning of arguing whether Trooper Averett was qualified, Defendant **did not object** to Trooper Averett's qualification to offer opinions in the fields of accident investigation and law enforcement. (TR 8/31/21 p. 43, ll. 16-18).

Trooper Averett testified that he received a dispatch call at 5:40 p.m. to respond to the crash. (TR 8/31/21 p. 45, ll. 16-18). It was dark outside, he needed his headlights and taillights to safely drive to the scene, and he believed it would have been unreasonable not to have either. (TR 8/31/21 p. 46, ll. 5-12).

Trooper Averett testified that he believed Mr. Norrid was driving approximately 60 miles per hour while Defendant was driving approximately 15 miles per hour. (TR 8/31/21 pp. 53:16-54:3). And like all the other witnesses, he testified that the road conditions were dry and there was no inclement weather. (TR 8/31/21 p.56, ll. 10-16).

Although Mr. Norrid's headlights were destroyed in the crash, upon Trooper Averett's inspection they were still in the "on" position. (TR 8/31/21 p. 68, ll. 19-25). This was in stark contrast to the taillights on Defendant's tractor:

> When I, once I got out of the vehicle and looked, like I said, Mr. Norrid's vehicle was in that lane. It had heavy front-end damage. The horn was going off. The airbags were deployed. The tractor had gone off the right side of the roadway through a fence and was out in the field and it was still running out there. I observed the tractor. I observed that there were headlights on the tractor,

but I did not see any taillights on the tractor.

(TR 8/31/21 p. 65, ll. 3-10; *see also* TR 8/31/21 p. 80, ll. 4-12). Indeed, the tractor's lack of illuminated taillights, according to Trooper Averett, was the most significant contributing factor to the crash. (TR 8/31/21 p. 94, ll. 8-12).

Consistent with his observations, Trooper Averett testified that the back of Mr. Carpenter's tractor is primarily black and is difficult to see at night. (TR 8/31/21 p. 76, ll. 2-20). Further, like Ms. Seipel, Trooper Averett testified that he **did not** see either a conforming or a "nonstandard" Slow Moving Vehicle emblem on the back of the tractor. (TR 8/31/21 p. 86, ll. 1-25; *see also* TR 8/31/21 p. 76, ll. 23-25).

In addition to all of this, Trooper Averett spoke to Defendant on the night of the crash. (TR 8/31/21 p. 94, ll. 14-18). Even after Trooper Averett told him his taillights were off, Defendant at no point asserted that the taillights were on and then somehow turned off before the crash. (TR 8/31/21 p. 94, ll. 14-18). To the contrary, Trooper Averett heard Defendant tell his wife "that they would have to follow the tractor to feed [the cows] in the future because the lights weren't working." (TR 8/31/21

p. 74, ll. 16-18).

As to the suggestion that Mr. Norrid was "overdriving" his low beams, Trooper Averett testified there's never a time when drivers like Mr. Norrid are *required* to use their high beams. (TR 8/31/21 p. 90, ll. 6-8). Rather, drivers are *prohibited* from using their high beams within 200 feet of the rear of another vehicle or within 500 feet of a vehicle approaching in the opposite direction. (TR 8/31/21 p.93, ll. 1-15).

In fact, prior to his deposition in this case, Trooper Averett had never even heard of "overdriving" one's headlights. (TR 8/31/21 p. 91, ll. 14-17). Of course, after Trooper Averett looked into it, the concept would mean that anyone driving the highway speed limit at night with their regular headlights illuminated would be "overdriving" their headlights—which he believed to be unreasonable:

> Q: And based on your understanding of what ["overdriving" one's headlights] means, does that mean based on your understanding, that anyone driving on a highway at night with their regular lights on, is overdriving their headlights?
>
> A: Yeah. Again, I looked it up and yeah, anybody traveling the speed limit at night would be consider[ed] under what I, what I read, would be considered overdriving [their] headlights.

Q: Is, is that reasonable to you, sir?

A: No.

(TR 8/31/21 p. 92, ll. 3-12).

Trooper Averett was on the stand for hours. (*See* TR 8/31/21 pp. 34-119). Further, Defendant conducted vigorous cross-examination. (TR 8/31/21 pp. 98-114). When referring to a single line on the Accident Report concerning "driver behaviors"—and without mentioning the citation he issued to Defendant—Trooper Averett testified that one behavior he believed significant to the crash was "careless driving" because Defendant was operating a vehicle on a public road with no taillights. (TR 8/31/21 pp. 70:20-71:9; EX p. 3).

The record wholeheartedly supports that this was an isolated reference, buried in a half-day of testimony from Trooper Averett, within the greater context of a 7-day jury trial.

4. Defendant Adam Carpenter's Testimony

Besides admitting at trial that his taillights were off, Defendant's trial testimony belies the Opening Brief's suggestion that his taillights

mysteriously turned off in the 35 seconds he was driving on Highway 92 before the crash occurred.

Namely, Defendant testified that he put the lights in "Position 4." (TR 8/31/21 pp. 151:5-151:19). Because he had only owned the tractor for two days and hadn't studied the manual, he was "guessing" on which position to use. (TR 8/31/21 p. 152, ll. 13-17). That is, he saw the front lights come on, and he assumed that his taillights came on too. (TR 8/31/21 p. 152, ll. 17-22).

The problem, however, is that the tractor's manual (which was admitted into evidence as Exhibit 142, EX p. 2565) states that the taillights are only illuminated in "Position 2":

> Q: [T]his is the owner's manual image of that light switch that we just, that you used at your deposition where you circled the position you used, right?
>
> A: Yes, sir.
>
> Q: Okay. [A]nd so, there's an off position, then you turn the position on, and then when you do that there's four positions.
>
> * * *

> Q: [Y]ou would agree that the only position that the, this owner's manual says where the taillamps come on, you agree after reading this that is position two, the second position that turns—
>
> A: That's what that says, yes.
>
> Q: -on the taillamps? And this position two is a position that you did not use on the night of the crash?
>
> A: As far as I remember back, no.
>
> Q: Well, not as far back as you remember. You just testified here in court, sir, that you used the fourth position?
>
> A: Yes, sir.

(TR 8/31/21 pp. 154:17-155:25).

Thus, in addition to admitting that his taillights were off, Defendant admitted that he affirmatively put the light switch into a position which, according to the tractor's manual, did not illuminate the taillights.

Like Mr. Norrid and Ms. Seipel, Mr. Carpenter testified that he was **not** using his high beams. (TR 8/31/21 p. 168, ll. 7-20). He testified that when he drives, he has to trust that other drivers are obeying the law—including that they will be using their headlights and taillights. (TR

8/31/21 pp. 122:23-123:3). He testified that driving without headlights or taillights creates "a high probability" that other drivers will not be able to see a vehicle. (TR 8/31/21 p. 123, ll. 1-7). And he testified that one month after the crash he gave a recorded statement in which (contrary to his story at trial) he claimed to be "uncertain" if his taillights were on. (TR 8/31/21 pp. 176:21-177:16).

But perhaps most importantly given the challenge to Trooper Averett's testimony, Defendant Carpenter admitted in his deposition, as well as during trial, that driving after sunset without illuminated taillights is "careless":

> Q: The question was, if the crash happened after sunset, and your taillights are off, do you believe that that's careless and your answer in the deposition was yes, that was careless.
>
> A: Okay. Yes, that was careless.

(TR 8/31/21 p. 169, ll. 16-19).

II. SUMMARY OF THE ARGUMENT

The arguments raised in the Opening Brief fail in law and fact. Not one of them amounts to an abuse of discretion warranting reversal.

First, the district court was well within its discretion to allow

Trooper Averett to testify that one of the "driver behaviors" at issue in the crash was Defendant's careless driving. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the jury." CRE 704. Here, not only was the jury never tasked with deciding whether Defendant was guilty of careless driving (this wasn't traffic court), it was also properly instructed on the elements of negligence and that it could reject the testimony of any witness in whole or in part. Regardless, Defendant's admission that he was driving carelessly (coupled with the other evidence at trial) rendered any error harmless.

Second, the trial court did not abuse its discretion in declining to instruct the jury that Mr. Norrid was negligent per se. No Colorado law expressly or impliedly states that a driver must be able to come to a complete stop within the range of their headlights. More important still, the jury was properly instructed on contributory negligence, and it rejected the notion that Mr. Norrid was negligent for allegedly "overdriving" his headlights.

Third, the district properly exercised its discretion to instruct the

jury that it could find Defendant was negligent per se for driving without illuminated taillights and without a Slow Moving Vehicle emblem. Unlike the use of high beams, or "overdriving" one's headlights, Colorado law expressly prohibits a person from driving a tractor on a highway at night without taillights and without a conforming Slow Moving Vehicle emblem. These laws are specific. They exist to protect the public. And their aegis includes people like Mr. Norrid. Based upon his admissions and the overwhelming evidence at trial, the district court could have concluded that Defendant was negligent per se as a matter of law. Allowing the jury to consider the issue was more like a gift than an abuse of discretion.

Fourth, the district court did not abuse its discretion when it limited the expert testimony of Structural Engineer George Merlo. Rather than having anything to do with his testimonial history, the district court limited Mr. Merlo's opinions because his disclosure failed to identify his supposed qualifications as an "accident reconstructionist." Even then, the district court gave Defendant multiple opportunities to lay an appropriate foundation during trial—which he failed to do.

Fifth, the trial court did not abuse its discretion in declining to instruct the jury that Mr. Norrid was "presumed negligent" for rear-ending a tractor without taillights. A jury instruction is only appropriate if it is supported by the evidence and the law. And here, there was no credible evidence that Mr. Norrid was negligent. At a minimum, the instruction was inappropriate because the evidence at trial rebutted any presumption.

Because the district court acted within the wide bounds of its discretion, the jury verdict and resulting judgment should be affirmed.

III. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Allowing Trooper Averett To Testify That One Of The "Driver Behaviors" He Believed To Be At Issue In The Crash Was Careless Driving

1. Preservation And Standard Of Review

Plaintiff agrees that Defendant preserved this issue, and he agrees that the admissibility of expert testimony is reviewed for an abuse of discretion. A trial court's exercise of discretion will not be overturned unless it is manifestly erroneous. *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002).

2. Trooper Averett's Isolated Reference To "Careless Driving" Did Not Usurp The Jury's Role

Contrary to the Opening Brief's suggestion, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." CRE 704.

Instead, Colorado courts consider the following non-exhaustive list of factors when examining whether opinion testimony impermissibly usurps the role of the jury: (1) whether the testimony was clarified on cross-examination; (2) whether the expert's testimony expressed an opinion of the applicable law or legal standards and thereby usurped the function of the court; (3) whether the jury was properly instructed on the law and that it could accept or reject the expert's opinion; and (4) whether the expert "opined that the defendant had committed the crime or that there was a particular likelihood that the defendant did so." *Lawrence v. People*, 2021 CO 28, ¶40.

Applying these principles, the Colorado Supreme Court has repeatedly upheld the admission of expert testimony like that at issue here—including testimony by a police officer that the defendant acted

negligently. *See, e.g., Lawrence*, 2021 CO 28 at ¶¶ 51-55 (holding that the trial court did not abuse its discretion in allowing the Colorado Securities Commissioner to opine that the agreement at issue in a criminal securities case was, in fact, a security); *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011) (holding that, in a criminal prosecution for child abuse, the trial court did not abuse its discretion in admitting testimony from a physician regarding his diagnosis of "child physical abuse."); *Bridges v. Lintz*, 140 Colo. 582, 587, 346 P.2d 571, 574 (Colo. 1959) (holding that the trial court did not abuse its discretion in a negligence case when it allowed a police officer to opine that the defendant driver caused the accident by driving at a speed that was unsafe for the conditions).

Numerous divisions of the Colorado Court of Appeals have done the same. *See, e.g., People v. Payne*, 2019 COA 167, ¶ 10 (holding that, where the defendant was charged with second-degree assault while lawfully confined or in custody, the trial court did not abuse its discretion in allowing a responding police officer to testify that the defendant was "lawfully confined or in custody."); *People v. Robles-Sierra*, 2018 COA 28,

¶ 26 (holding that, in a criminal case for distribution of child pornography, the trial court did not abuse its discretion in admitting expert testimony from investigating officers that "they had more than enough evidence that met the elements of the crime," and that there had been a "violation" of the applicable criminal statute); *Hines v. Denver & Rio Grande Western R. Co.,* 829 P.2d 419, 423 (Colo. App. 1991) (holding that the trial court did not abuse its discretion in a negligence case when it allowed an expert to opine that the defendants were "grossly negligent," that the accident occurred "because of the negligence" of the defendants, and that the defendants' conduct was "outrageous.").

These cases make clear that reversing a jury verdict based on expert testimony which allegedly usurps the role of the jury is exceptionally rare. This is not one of those cases.

a. Defendant Carpenter Clarified Trooper Averett's Testimony On Cross-Examination

First, Defendant vigorously cross-examined Trooper Averett and clarified his testimony. (*See* TR 8/31/21 pp. 98-114). For example, Defendant pointed out that Trooper Averett had not investigated how far Mr. Norrid's headlights projected. (TR 8/31/21 p. 99, ll. 8-10). He

illustrated that Trooper Averett did not know of "overdriving" one's headlights (which suggested he did not investigate whether Mr. Norrid was careless and/or contributorily negligent). (TR 8/31/21 pp. 102:19-104:20). He confirmed through Trooper Averett that Mr. Norrid was not using his high-beam headlights. (TR 8/31/21 p. 108:23-24). And he got Trooper Averett to acknowledge that Mr. Norrid needed about 200 feet to stop. (TR 8/31/21 pp. 111:18-112:8).

In other words, Defendant clarified Trooper Averett's testimony during cross-examination and used it to advance his theory that the accident was proximately caused by Mr. Norrid "overdriving" his headlights rather than by Defendant's "careless driving."

b. Trooper Averett Did Not Opine On The Applicable Law Or Legal Standards

Second, at no point did Trooper Averett testify regarding the applicable laws of negligence and thereby usurp the role of the district court. The jury was never tasked with deciding whether Defendant was guilty of "careless driving." It was given no further context by Trooper Averett on what this meant. And it was never informed that Defendant was cited for careless driving.

The jury's charge was to decide if Defendant was negligent and, if so, whether his negligence caused Mr. Norrid's damages. It was also tasked with determining whether Mr. Norrid was contributorily negligent and whether Mr. Norrid's alleged contributory negligence caused his own damages. In this regard, the jury heard seven days of testimony and reviewed over 100 exhibits. By making a single reference to "careless driving" being one of the "driver behaviors" he believed to be at issue in the crash, Trooper Averett did not wrest the negligence and causation determinations from the jury's hands.

c. The Jury Was Properly Instructed On The Law And That It Could Reject Trooper Averett's Testimony

Third, there's no question that the jury was properly instructed. At the beginning of the case the district court orally instructed the jury that it could accept or reject the testimony of any witness in whole or in part. (TR 8/30/21 p. 13, ll. 22-23). It did the same at the conclusion of the evidence. (TR 9/8/21 p. 5, ll. 4-20). Then it issued commensurate written instructions before the jury deliberated. (CF 3339).

In addition to triplicate instructions stating that the jury could accept or reject the testimony of any witness, the jury was separately

instructed (again in triplicate) that it could accept or reject the testimony of any *expert* witness. (TR 8/30/21 p. 13, ll. 6-23; TR 9/8/21 p. 5, ll. 4-20; CF 3338). And were this somehow not enough, the jury was properly instructed on negligence, contributory negligence, and causation. (*See* CF 3310-46). It received no instructions whatsoever on careless driving—let alone an instruction equating it with negligence.

d. Trooper Averett Did Not Testify That Defendant Carpenter Committed The Crime Or That There Was A Particular Likelihood That He Did So

Finally, because this is a civil rather than a criminal case, it's questionable whether the fourth factor even applies. Regardless, Trooper Averett never testified that Defendant committed any crime—including careless driving. There was no reference to the traffic citation issued to Defendant. And there was no mention of any traffic court proceedings.

Indeed, Trooper Averett didn't even testify that Defendant engaged in careless driving. Rather, when referring to an innocuous section of the Accident Report that had been stipulated into evidence, Trooper Averett testified that one of the "driver behaviors" he "believed" to be at issue in the crash was Defendant's careless driving. This is a far cry from the sort

of usurpial expert testimony warranting the reversal of a unanimous jury verdict. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (holding that attorney expert usurped the roles of judge and jury by testifying for an entire day about what the applicable law was and why every element of the case was met).

3. Any Error In Admitting Trooper Averett's Testimony Was Harmless

Even assuming (counterfactually) that Trooper Averett's testimony was somehow improper, any error in admitting it was harmless. Substantial, if not overwhelming, evidence supported the jury's determination that Defendant was negligent.

Every witness who was involved in, saw, or investigated the crash—including the Defendant—testified that the tractor's taillights were not illuminated when the crash occurred. Further, neither Mr. Norrid, nor Ms. Seipel, nor Trooper Averett saw any Slow Moving Vehicle emblem on the tractor. In this regard, while Defendant testified that he had a "nonstandard" Slow Moving Vehicle emblem, it did not comply with governing regulations as a matter of law. All of this is to say that Trooper

Averett's testimony could not have possibly changed the result of the trial.

Of course, Defendant also admitted on the stand (without objection) that driving at night without his taillights illuminated was "careless." For obvious reasons, Trooper Averett's isolated reference to careless driving cannot be grounds for reversal when Defendant personally informed the jury of that very same matter.

B. The District Court Did Not Abuse Its Discretion In Declining To Instruct The Jury That Mr. Norrid Was Negligent Per Se

1. Preservation And Standard Of Review

Plaintiff agrees that Defendant preserved this issue, and he agrees that a district court's decision to tender or reject a particular jury instruction is reviewed for an abuse of discretion. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). A trial court only abuses its discretion in this regard if its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

2. Defendant's Proffered Negligence Per Se Instruction Contained The Same Standard Of Care In The District Court's General Negligence Instruction

The Opening Brief claims that the district court abused its discretion in failing to tender a jury instruction patterned after C.R.S. sections 42-4-1008 and 42-4-1101. Because those statutes contain precisely the same standard of care in the common law negligence instruction given to the jury, the requested negligence per se instruction was redundant.

Where a statutory standard of care codifies common law negligence, a negligence per se instruction is redundant when given alongside a common law negligence instruction. *Winkler v. Shaffer*, 356 P.3d 1020, 1024 (Colo. App. 2015). "The modern trend is to reject these instructions" because "[w]hen given together, this sort of negligence per se instruction adds nothing to the common law instruction." *Silva v. Wilcox*, 223 P.3d 127, 136 (Colo. 2009). That is, "in order for the jury to find negligence per se, first it would have to find simple negligence." *Id.*

The notes on use for Colorado Pattern Jury Instruction 9:14 expressly state that a district court does **not** need to give both a common law negligence instruction and a negligence per se instruction:

> If a statutory standard of care is a codification of common-law negligence, the negligence per se

> instruction has no practical effect when given alongside a common-law negligence instruction. In such cases, the court need not give both a common-law negligence instruction and a negligence per se instruction.

CJI-CIV 9:14 (2020), Note on Use No. 3.

Here, in addition to a common law negligence instruction, Defendant requested a negligence per se instruction stating, in part:

> At the time of the occurrence in question in this case, the following statutes of the State of Colorado were in effect:
>
> 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. (C.R.S. § 42-4-1008)
>
> No 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)

(CF 2825).

In rejecting this instruction, the district court explained that, pursuant to *Winkler*, it was redundant of simple negligence. (TR 9/3/21 p. 1180, ll. 11-21). In this regard, and with the agreement of the parties, the district court instructed the jury that:

> Negligence or comparative negligence means a failure to do an act which a 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.

(CF 3311).

The duty to exercise reasonable care under the circumstances contained in the simple negligence instruction given to the jury is exactly the same standard contained in Defendant's proffered negligence per se instruction. That is, in order to conclude that Plaintiff violated C.R.S. sections 42-4-1008 and 42-4-1101, the jury would first have to determine that he did not act reasonably under the circumstances (such as by "overdriving" his headlights or following too closely).

Because C.R.S. sections 42-4-1008 and 42-4-1101 codify the common law, and because the jury was properly instructed on simple negligence, the district court did not abuse its discretion in declining to give the redundant negligence per se instruction requested by Defendant. *Winkler*, 356 P.3d at 1024.

3. Any Error In Refusing Defendant's Negligence Per Se Instruction Was Harmless

For similar reasons, any error in declining Defendant's proffered negligence per se instruction was harmless. In his Opening and Closing Arguments, as well as during his examination of every liability witness, Defendant urged that Mr. Norrid was "overdriving" his headlights, did not have his high beams on, could not stop or react in time to avoid the crash, and therefore was not acting reasonably under the circumstances. The jury, having been properly instructed on simple negligence, rejected this argument and determined that Mr. Norrid **was not** contributorily negligent and **was not** a cause of the crash.

As a result, instructing the jury that Plaintiff was negligent per se for "following another vehicle more closely than is reasonable and prudent," or "driving a vehicle on a highway at a speed greater than is reasonable and prudent," could not have possibly led to a different result when the jury considered and rejected the same issues and standards in its contributory negligence determination. *Martin v. Minnard*, 862 P.2d 1014, 1018 (Colo. App. 1993).

4. Defendant's Negligence Per Se Instruction Is Unsupported By Colorado Law And Would Lead To An Absurd Result

With regard to Defendant's requested negligence per se instruction, the majority of the Opening Brief is devoted to arguments concerning the "assured clear distance rule," or how ancient decisions from other jurisdictions once recognized the "overdriving" headlight argument, or how Mr. Norrid allegedly had a duty to drive with his high beams on. (*See* Opening Brief at 20-24).

The problem, however, is that Defendant never requested a jury instruction reflecting these theories of the case. None of Defendant's tendered jury instructions, including its negligence per se instruction, asked the district court to inform the jury that Mr. Norrid was negligent per se if he was "overdriving" his headlights. (CF 2784-832). None of them mentioned the "assured clear distance rule." (*Id.*). And none of them indicated that Mr. Norrid was negligent per se on the night of the crash if he wasn't using his high beams. (*Id.*).

Having failed to request an instruction on these bases, Defendant cannot argue error now. *Suydam v. LFI Fort Pierce, Inc.*, 490 P.3d 930, 934 (Colo. App. 2020) (stating that "the trial court may not assume the role of an advocate and bears no responsibility to redraft tendered civil

instructions to correct errors in those instructions.") (citing *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 587 (Colo. 2004)).

More fundamentally, a jury instruction is only appropriate if it accurately states the law. *See id.* Colorado's traffic laws, unlike the foreign cases cited in the Opening Brief, do not state that a person must be able to stop their vehicle within the reach of their headlights. Colorado does not require drivers to use their high beams. In fact, it prohibits drivers from using their high beams within 200 feet of the rear of another vehicle or within 500 feet of a vehicle approaching from the opposite direction. And it's doubtful whether the everyday darkness of night can appropriately be called a "condition" that required Mr. Norrid to act any differently than he did.

Because no specific Colorado law supports the theory that Mr. Norrid was negligent per se for "overdriving" his headlights, Defendant has attempted to cabin the argument within the general duty to operate a vehicle reasonably under the circumstances as reflected in C.R.S. section 42-4-1101. Yet that law, like any other, must be interpreted to

avoid absurd results. *Silva*, 223 P.3d at 136. Simply put, the district court did not abuse its discretion in refusing to give a negligence per se instruction that would transform anyone driving more than 30 miles per hour[1] at night with their low beam headlights on into a negligent actor.

C. The District Court Did Not Abuse Its Discretion In Instructing The Jury That It Could Find Defendant Negligent Per Se

1. Preservation And Standard Of Review

Plaintiff agrees that Defendant preserved this issue, and Plaintiff agrees that a district court's decision to tender or reject a particular jury instruction is reviewed for an abuse of discretion. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011).

2. The District Court's Negligence Per Se Instruction Did Not Hold Defendant Strictly Liable

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[1] According to Defendant, at 60 miles per hour Mr. Norrid needed 198 feet to stop but his low-beam headlights only illuminated 100 feet. Applying this logic, Mr. Norrid would need to have driven at approximately half the speed he was traveling (*i.e.* 30 miles per hour in a 65 mile per hour zone) while using his low beams in order to avoid being negligent. That's absurd.

The Opening Brief repeatedly suggests that, because Defendant allegedly didn't know his taillights were out, the district court's negligence per se instruction amounted strict liability. Not so.

Strict liability in tort does not require proof of fault. *Lui v. Barnhart,* 987 P.2d 942, 945 (Colo. App. 1999). "Generally, it is applied in those situations—such as those involving product liability, ultrahazardous activities, and trespass—that inherently may inure to the harm of another regardless of the conduct of the tortfeasor." *Id.* As a result, strict liability is established by proving the nature of the dangerous product or activity *without regard to the defendant's actions*. *Id.*

Conversely, negligence per se occurs when the defendant violates a statute adopted for the public's safety and the violation proximately causes the plaintiff's injury. *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1168 (Colo. 2002). "Necessarily, this involves proof of fault." *Lui*, 987 P.2d at 945. Specifically, the proof of fault required in a negligence per se claim is that the defendant violated the standard of care set forth in a statute or ordinance implemented for the public's safety. *Id.* "In such situations,

the statute itself establishes the standard of care and its violation is equivalent to a breach of duty and conclusively establishes that aspect of a plaintiff's negligence claim." *Id.*

There is, therefore, a big difference between strict liability and negligence per se claims which the Opening Brief fails to perceive. If strict liability attaches to the occurrence of a certain circumstance, the defendant can be held liable even if they acted reasonably, even if the injury was not their fault, and even if it resulted from the actions of another. *See id.* For example, if a statute indicates that a person is strictly liable for keeping a tiger as a pet, the defendant is liable if the tiger causes injury regardless of how carefully the defendant guarded against the tiger's escape, and even if the plaintiff's injuries resulted from somebody else letting the tiger out. This stands in stark contrast to negligence per se which requires proof that *the defendant* engaged in the conduct proscribed by statute.

In *Lui*, an injured plaintiff asserted that strict liability attached to an ordinance requiring that "[n]o person owning or keeping any animal, other than an ordinary domesticated house cat, shall fail to keep said

animal on the premises of the owner . . . ." *Id.* at 944. When the plaintiff sustained injuries after colliding with a horse in the road, he asserted that the horse's owner was strictly liable regardless of the level of care they exercised and even if somebody else let the horse out. *Id.*

In rejecting this entreaty, a division of this Court concluded that the ordinance was properly characterized as negligence per se rather than strict liability because it regulated *the owner's* conduct instead of focusing on the animal or its mere presence in a roadway:

> Here, the Ordinance requires an owner to keep animals restrained or confined. Thus, it regulates an owner's conduct. In contrast to certain other codes and statutes, the focus of this Ordinance is not on the dangerous animal. Nor does it flatly prohibit the presence of such an animal on a public road. Rather, concerning the animal, the Ordinance sets forth what an owner is to do.
>
> **By its focus on the owner's conduct and not on the animal, the Ordinance reflects that only under certain circumstances within the owner's control, may domestic animals be considered dangerous.** Thus, the Ordinance establishes a duty and a standard of care. Hence, a claim based on an alleged violation of the Ordinance, such as here, is properly characterized as negligence per se.

Id. at 945-46 (emphasis added, internal citations omitted).

Here, all of the laws set forth in the district court's negligence per se instruction are firmly rooted in the conduct of a tractor's *owner* rather than the happening of a mere circumstance related to the tractor. For example, there's no credible argument that Defendant could be held liable if *someone else* drove the tractor on a highway at night without taillights or a conforming Slow Moving Vehicle emblem.

Further, the conduct addressed by the instruction was at all times within Defendant's control. Defendant could have complied with the statutes and avoided liability by: (1) not driving the tractor; (2) not placing the light switch in "Position 4"; or (3) purchasing the required Slow Moving Vehicle emblem and installing it on the back of the tractor before he went on the highway. This bears none of the indicia of strict liability.

All of this is to say that the negligence per se instruction given to the jury did not hold Defendant strictly liable. Rather, Defendant was held liable because he breached a statutory duty of care governing his own conduct. As a result, the district court did not abuse its discretion in giving the instruction.

3. The District Court's Negligence Per Se Instruction Did Not Strip The Issue Of Proximate Causation From The Jury

The Opening Brief asserts that because there was evidence that Mr. Norrid caused the crash by allegedly "overdriving" his headlights, the district court's negligence per se instruction "took the issue of proximate cause out of the hands of the jury." (Opening Brief at 27). It's difficult to see how.

Whether Defendant breached the statutory standard of care set forth in the negligence per se instruction had nothing to do with whether Mr. Norrid was contributorily negligent by "overdriving" his headlights. These are, indeed, two completely separate inquiries. Regardless, the jury was properly instructed on causation with respect to both negligence per se and contributory negligence, and it considered and rejected the argument that Plaintiff caused the crash.

Thus, contrary to the Opening Brief's suggestion, the district court's negligence per se instruction did not take the issue of proximate causation from the jury. Despite that Defendant admittedly violated the statutes at issue in the negligence per se instruction, the jury was at all

times free to conclude (and Defendant argued that it should conclude) that Plaintiff proximately caused the crash. There is, quite frankly, a world of difference between a jury that rejects a proximate causation argument and a jury that doesn't get to consider it at all.

D. The District Court Did Not Abuse Its Discretion By Limiting The Expert Testimony Of Structural Engineer George Merlo

1. Preservation And Standard Of Review

Plaintiff agrees that Defendant preserved this issue, and Plaintiff agrees that a district court's limitation of expert testimony is reviewed for an abuse of discretion. *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007). "This deference reflects the superior opportunity of the trial judge to gauge both the competency of the expert and the extent to which his opinions would be helpful to the jury." *Id.*

2. Defendant Failed To Disclose Mr. Merlo's Qualifications Before Trial

The Opening Brief devotes several pages of argument to the notion that a litigant is not required to disclose more than four years of testimonial history from an expert. Unfortunately, the district court didn't limit the opinions of Structural Engineer George Merlo because

Defendant failed to disclose his testimonial history. Rather, the district court held that Defendant completely failed to disclose anything supporting Mr. Merlo's alleged qualification as an accident reconstructionist.

In addition to four years of testimonial history, the disclosure requirements of C.R.C.P. 26(a)(2)(B)(I)(e) expressly state that an expert's report must set forth "*the qualifications of the witness*, including a list of all publications authored by the witness within the preceding ten years." (emphasis added).

Further, C.R.C.P 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial . . . unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm." The burden is on the nondisclosing party to establish that its failure to disclose was substantially justified or harmless, or that excluding the evidence would be disproportionate to the harm caused by the

nondisclosure. *Gravina Siding & Windows Co. v .Gravina*, 2022 COA 50, ¶ 64.

Here, rather than having anything to do with his testimonial history, the district court concluded that aside from one sentence in Mr. Merlo's report indicating that he performs accident reconstructions, there was no information whatsoever identifying his qualifications to do so. (TR 9/7/21 pp. 45:22-51:7). Indeed, the district court indicated that there was "a void with regard to Mr. Merlo's qualifications as an accident reconstructionist." (TR 9/7/21 p. 49, ll. 4-6). It observed that aside from the lone sentence in Mr. Merlo's report, "everything else" in his CV "talks about structural kinds of things and not accident reconstruction." (TR 9/7/21 p. 51, ll. 2-7). It stated that Defendant "didn't fully disclose all of the information that [he] thought was going to be important in order for Mr. Merlo to be qualified in this court today." (TR 9/7/21 p. 50, ll. 4-7). And the court said, "I think that's **disingenuous** and I think it is **sandbagging**." (TR 9/7/21 p. 50, ll. 9-10).

As a result, the district court would have been well within its considerable discretion to exclude Mr. Merlo's accident reconstruction

opinions due to the fact that Defendant failed to timely disclose his alleged qualifications. But the court didn't do that. Instead, it gave Defendant ample opportunity at trial to establish Mr. Merlo's qualifications—which he couldn't do.

3. Despite The Opportunity, Defendant Failed To Convince The District Court Of Mr. Merlo's Alleged Qualifications

Divergent from the Opening Brief's suggestion, the district court did not exclude Mr. Merlo's opinions in their entirety. Rather, the district court allowed Mr. Merlo to offer *engineering* opinions but prevented him from offering *accident reconstruction* opinions because Defendant failed to establish that he was qualified to do so.

Namely, prior to tendering Mr. Merlo to the district court for qualification as an expert witness, Defendant established only that Mr. Merlo had been an engineer since 1961 and had "taken courses" in accident reconstruction. (TR 9/7/21 pp. 7:5-9:14).

During Plaintiff's voir dire examination, however, Mr. Merlo confirmed that he is a *structural* engineer. (TR 9/7/21 p. 13, ll. 2-3). He received a bachelor's degree in civil engineering in 1960. (TR 9/7/21 p.

10, ll. 7-24). He did not take any classes in accident reconstruction when pursuing his degree. (TR 9/7/21 pp. 14:16-15:25). Rather, spread out over the course of 31 years, he went to three seminars on accident reconstruction. (TR 9/7/21 pp. 16:13-19:11).

Mr. Merlo confirmed that he has no professional affiliations which uniquely address accident reconstruction. (TR 9/7/21 pp. 21:19-22:6). He confirmed that his work experience from 1984 to the time of trial involved improper construction, expansive soils, and the design of oil-filled arctic facilities. (TR 9/7/21 p. 22:7-23:14). He testified that his work experience from 1961 to 1984 didn't have anything to do with accident reconstruction either. (TR 9/7/21 pp,24:1-25:2). He testified that he's not accredited by the Accreditation Commission for Traffic Accident Reconstruction. (TR 9/7/21 pp. 28:21-29:11). Moreover, since 2016, he's only been qualified as an expert witness in *construction* cases. (TR 9/7/21 p. 32, ll. 10-20).

Whether an expert is qualified is a matter left to the district court's sound discretion. *Meier v. McCoy*, 119 P.3d 519, 521 (Colo. App. 2004). Here, the district court did not abuse its discretion in concluding that

three seminars over the course of 31 years did not make Mr. Merlo an expert in accident reconstruction.

Further, despite that the district court limited his opinions in this manner, Mr. Merlo testified for more than half a day. (*See* TR 9/7/21 pp. 5:12-150:7). Among other things, he testified that the opinions of Plaintiff's expert were "totally bogus," and that if Plaintiff had used his high beams the crash potentially wouldn't have happened. (TR 9/7/21 p. 89, ll. 16-21; TR 9/7/21 pp. 141:21-142:12). Thus, even though the district court purported to limit Mr. Merlo's testimony, Defendant managed to elicit much of the same information anyway.

E. The District Court Did Not Abuse Its Discretion In Declining To Instruct The Jury That Mr. Norrid Was Presumed Negligent

1. Preservation And Standard Of Review

Plaintiff agrees that Defendant preserved this issue, and he agrees that a district court's decision to tender or reject a particular jury instruction is reviewed for an abuse of discretion. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011).

2. A Presumption Of Negligence Instruction Was Not Supported By The Evidence Or The Law

Finally, the Opening Brief contends that the district court abused its discretion in failing to instruct the jury that Plaintiff was "presumed negligent" for causing a rear-end automobile accident. Defendant is mistaken.

A jury instruction is appropriate only if it is supported by the evidence and the law. *Suydam*, 2020 COA 144M at ¶ 11. In Colorado, a rear-end collision instruction is not required in all cases, regardless of the circumstances of the collision, solely because the front of one vehicle makes contact with another. *Bettner v. Boring*, 764 P.2d 829, 834 (Colo. 1992). Rather, such an instruction is appropriate only in the scenario where a vehicle is following "directly behind" another vehicle and strikes it from behind—as when a car caught in traffic runs into the car immediately in front of it. *Id.* Finally, a party can rebut the presumption by presenting evidence that their negligence was not the cause of the alleged loss. *Id.* at 832.

Here, aside from driving well under the speed limit in clear conditions with his headlights and fog lights illuminated, there was no evidence whatsoever that Mr. Norrid was negligent. Further, the

evidence did not support that Mr. Norrid was driving "directly behind" Defendant so as to justify the presumption. At a minimum, the evidence at trial rebutted any presumption that Mr. Norrid was negligent.

Indeed, when taken to its logical conclusion, Defendant's argument would mean that Mr. Norrid would be presumed negligent even if Defendant had parked the tractor in the highway with no illumination or warning emblems so that he could attend to other matters. This is not the law, and the district court did not abuse its discretion in recognizing as much.

IV. CONCLUSION

For these reasons, Plaintiff-Appellee Cecil Norrid respectfully requests that the Court affirm the jury verdict and judgment below.

DATED this 27th day of June 2022.

Respectfully submitted,

LEVIN SITCOFF WANEKA PC

s/ Nelson A. Waneka
Nelson A. Waneka, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2022 a true and correct copy of the foregoing **ANSWER BRIEF** was served via Colorado Courts E-Filing or by email as indicated to the following:

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