DATE FILED: August 1, 2022 1:43 PM
FILING ID: FAED865D6097C
CASE NUMBER: 2021CA1687

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 ▲**
Attorneys for Defendant-Appellant Adam Carpenter Kevin Ripplinger, No. 35165 Jennifer L. White, No. 36466 Debra P. DeRee, No. 30722 PATTERSON RIPPLINGER, P.C. 5575 Tech Center Drive, Suite 100 Colorado Springs, CO 80919 (719) 575-0010 (719) 575-0020 (Fax) E-mail: kripplinger@prpclegal.com jwhite@prpclegal.com dderee@prpclegal.com	Court of Appeals Case Number: 2021CA1687

REPLY 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 5,606 words.

☐ It does not exceed 25 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, 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 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.

/s/ Debra P. DeRee
Kevin Ripplinger, No. 35165
Jennifer L. White, No. 36466
Debra P. DeRee, No. 30722
Attorneys for Appellant Adam Carpenter

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE.....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....1

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. 4

A. An expert 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).…… 5

II. The Trial Court erred by refusing to give Defendant's proposed jury instructions related to Plaintiff overdriving his headlights. 11

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. 17

IV. The Trial Court erred by refusing to allow Defendant's accident reconstructionist, George Merlo, to testify as to his opinions as to overdriving of headlights, and his other properly disclosed opinions. 20

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.....20

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 22

V. The Trial Court erred by refusing to tender a jury instruction related to the presumption of negligence in a rear-end accident 23

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Bettner v. Boring, 64 P.2d 829 (Colo. 1988) 24

Blood v. Qwest Services Corp., 224 P.2d 301 (Colo. Ap. 2009) 12

Boring v. Bettner, 739 P.2d 884 (Colo. App. 1987) …….. 24

Cassels v. People, 92 P.3d 951 (Colo. 2004) 11

Conrad v. Imatani, 724 P.2d 89 (Colo App. 1986) …….……...23

Daniels v. Rapco Foam Inc., 762 P.2d 717 (Colo. App. 1988) ……...23

Eddy v. McAninch, 347 P.2d 499 (Colo. 1959) ……..20

Flechsig v. U.S., 991 F.2d 300 (6th Cir. 1993) ……12

Freedman v. Kaiser Found. Health Plan of Colo., 849 P.2d 811 (Colo. App. 1992) ……...23

Gorman v. People, 19 P.3d 662 (Colo. 2000) ……..11

Hageman v. TSI, Inc., 786 P.2d 452 (Colo. App. 1989) ……..12

Hartman v. Cmty. Responsibility Ctr., Inc., 87 P.3d 202 (Colo. App. 2003) ……5

Heagy v. City and County of Denver, 472 P.2d 757 (Colo. App. 1970) ……9

Lui v. Barnhart, 987 P.2d 942 (Colo. App. 1999) ...……17

Mayer v. Sampson, 402 P.2d 185 (Colo. 1965) ……...13

Palisade Nat. Bank v. Williams, 816 P.2d 961 (Colo. App. 1991) ……9

People v. Baker, 485 P.3d 1100 (Colo. 2021) ..…….7, 9

People v. Collins, 730 P.2d 293 (Colo. 1986) ...……5

People v. Lowe, 486 P.3d 398 (Colo. App. 2020) ...……22

People v. Rector, 248 P.3d 1196 (Colo. 2011) ……6, 7

Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999) ……...23

Trattler v. Citron, 182 P.3d 674 (Colo. 2008) ……21

White v. Pinney, 108 P.2d 249 (Utah 1940) ……..…….20

Statutes

C.R.S. § 42-4-1101 ..……..11, 12, 13, 14, 15, 16

Civil Jury Instructions

CJI-CIV 2:1 ……..…….15

CJI-CIV 9:13 ……..……...16

CJI-CIV 9:14 ……15

CJI-CIV 11:18 ……..……...16

Rules

C.R.C.P. 16(c) 22, 23

C.R.S. 26(a)(2)(B)(I)(h) 20, 21

C.R.C.P. 37(c) ……21

Treatises

Black's Law Dictionary (11th ed. 2019) 6

STATEMENT OF THE CASE

Defendant addresses Plaintiff's material misrepresentations in his "Issues Presented for Review." First, Defendant never admitted he was driving on the highway with an unilluminated tractor and that his conduct was careless, but rather, testified to the exact opposite. (TR 08/31/21, pp. 157, 203-204) Defendant testified the taillights were operational on the tractor at the time he left the field after feeding his bulls as he used the light from the taillights to cut the strings to the bale of hay and to secure the gate after feeding the bulls prior to entering Highway 92 to return home. (TR 08/31/21, pp. 201-203)

Second, Defendant never testified he turned the light dial to a setting that did not illuminate the taillights. Defendant testified he set the light dial to a setting which illuminated the front headlights and work lights, and which also illuminated the taillights as he saw the taillights activated in the field while he was cutting the strings for the bale of hay and securing the gate. (TR 08/31/21, pp. 198, 201-203) Moreover, when Defendant was returning to his home, three (3) other vehicles saw the tractor and went around Defendant. (TR 08/31/21, p. 204)

Notwithstanding the foregoing, absent from Plaintiff's Answer Brief is reference to the fact that **every setting** that illuminated the headlights on the tractor would also activate rear lighting. (EX p. 1904) As such, whether Defendant set the

dial to the second, third or fourth setting is immaterial as rear lights on the tractor would be activated. Plaintiff's argument is nothing more than a red herring.

Third, contrary to Plaintiff's contention, eyewitness Tamela Seipel was able to discern that the vehicle in front of Plaintiff was a tractor prior to Plaintiff colliding with the rear of the tractor. Tamela Seipel, who was traveling behind Plaintiff, was able to observe the tractor in the roadway, recognize that it was a tractor, and bring her vehicle to a safe and controlled stop behind Plaintiff's vehicle.[1] In fact, Ms. Seipel had time to ask herself **before** Plaintiff hit the tractor, why Plaintiff didn't see the tractor in front of him. (TR 08/31/21, p. 243)

> **Q**. **Okay. But it was before the accident and in fact you had time to see the tractor, recognize it was a tractor, and then question why didn't the car [in front of her] see the tractor?**
>
> **A. That was just the thought that floated through my mind.**
>
> . . .
>
> **Q. After the vehicle in front of you, the Plaintiff's vehicle, hit the tractor, you were able to come to a controlled stop, correct?**
>
> **A. Yes.**
>
> **Q. You didn't have to squeal your brakes?**

[1] Ms. Seipel attempted to change her testimony at trial, which was later impeached with her prior deposition testimony of May 18, 2020).

A. No

Q. It was a controlled safe stop, correct?

A. Yes.

Q. And you were at least two car lengths behind Plaintiff's vehicle, when you came to a controlled stop, correct?

A. To, my judgment of distance, yes.

(TR 08/31/21, pp. 243, 246.)

Furthermore, at her deposition, Ms. Seipel testified to the following:

A. . . . I noticed the shape. And as I got a little bit closer, I noticed that the shape was a tractor, but there were no lights on the back, and then the car hit the back of the tractor.

(EX pp. 1728-1729)

Contrary to Plaintiff's representation, Ms. Seidel was able to recognize the vehicle in front of Plaintiff was a tractor prior to the accident.

Fourth, contrary to Plaintiff's contention, Defendant was not permitted to inquire into George Merlo's qualifications as an expert in the field of accident reconstruction. In fact, it was the Trial Court's failure to permit Defendant to inquire into Mr. Merlo's past experience in the field of accident reconstruction, which occurred more than four (4) years prior, that is the subject of one of the issues on appeal.

Fifth and finally, Plaintiff's implication Defendant knew the taillights were not operational at the time of the accident is unsupported. Trooper Averett's testimony that Defendant, **after** learning his taillights were no longer working, told his wife that, in the future, she would need to follow him to feed the bulls actually supports Defendant's position he was unaware his taillights had failed on his way home. Upon learning the taillights were no longer operational on the tractor, Defendant immediately took action by discussing an alternative plan with his wife for the future which would include her following him on Highway 92 when he went to feed the bulls.

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.

In his Answer Brief, Plaintiff never addressed the law of the case doctrine as discussed in Defendant's Opening Brief, and as such, confesses the same such that the law of the case doctrine should have been applied at trial. In summary, on September 14, 2020, the Trial Court entered the following Order regarding the scope of Trooper Averett's testimony:

> 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 Defendant's objection, the Trial Court, contrary to its prior 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. (CF p. 321) (TR 08/31/21, p. 17) The Trial Court's failure to follow the law of the case doctrine constitutes an abuse of discretion.

A. An expert 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).

The pivotal issues in this case were whether Defendant had turned on his taillights prior to entering the roadway and whether he knew his taillights were not operational prior to the subject accident. The uncontradicted testimony at trial was that the taillights on the tractor were operational at the time Defendant left his home to feed his bulls; Defendant used the taillights from the tractor to cut the strings from the bale of hay; and Defendant used taillights for securing the gate after feeding the bulls and turning onto Highway 92. (TR 08/31/21, pp. 157, 203-204) Plaintiff presented no evidence to contradict Defendant's testimony. Despite the same, the Trial Court allowed Plaintiff to present opinion testimony through Trooper Averett, a former Colorado State Patrol Officer, as to a legal standard

(careless driving) and that Defendant breached that legal standard. Specifically, Trooper Averett was permitted to testify the Defendant was driving carelessly, it was his careless driving that caused the motor vehicle accident, and it was more probable than not that Defendant did not have operating taillights at any time.

Contrary to Plaintiff's contention, Trooper Averett did provide testimony as to a legal standard. While Trooper Averett may have not explicitly defined the term "careless," careless driving encompasses a legal standard --- i.e., conduct which a "reasonable person" would exercise. The term "careless" is synonymous with the word "negligent." *Careless*, Black's Law Dictionary, (11th ed. 2019). By testifying that Defendant's conduct was careless, he was, in fact, testifying that Defendant's conduct was negligent, which is a legal standard.[2]

Plaintiff's contention the Trooper's reference to careless driving was "innocuous" is simply unsupported. The fact that Trooper Averett was allowed to testify Defendant's conduct was careless amounted to telling the jurors that Defendant was negligent.

Plaintiff's reliance on *People v. Rector*, 248 P.3d 1196 (Colo. 2011) involved a criminal case involving child abuse, and is distinguishable from the

[2] Contrary to Plaintiff's contention the Accident Report referencing careless driving was not stipulated into evidence as an exhibit, and, in fact, was the subject of debate prior to the first witness being called at trial. (TR 08/31/21, pp. 4-5)

present action. First, defendant "waived appellate review of whether Dr. Sirotnak's, [the State's expert] testimony usurped the jury's role by failing to object to the testimony pursuant to CRE 704." *Id.* at 1203. As the issue was not properly preserved for appeal, the Court reviewed the record under the standard of plain error. Second, in *Rector*, the Court held the expert, Dr. Sirotnak "did not testify as to the primary issue. He did not testify that Rector inflicted T.D.'s injuries nor did he testify that Rector committed abuse." *Id.* In essence, the Court found that Dr. Sirotnak was not rendering an opinion as to the legal standard and whether such had been breached. By contrast, the Trial Court in this case allowed Trooper Averett to testify what the legal standard was, that Defendant breached that standard, and that it was more likely than not, Defendant had never had his taillights on. As such, *Rector* is clearly distinguishable from the present action.

In the case of *People v. Baker* 485 P.3d 1100, 1108 (Colo. 2021), the Colorado Supreme Court specifically held "proffered expert testimony was inadmissible when the expert either opined on whether the prosecution's factual allegations were true, gave opinion testimony that another witness was telling the truth on a specific occasion, or applied the law to the facts in such a way as to suggest that the expert had determined that the defendant was guilty." *Id.* at 1107. That is precisely what the Trial Court permitted Trooper Averett to do in the

present action. An authoritative individual, a former Colorado State Trooper, was permitted to testify Defendant's conduct was careless (negligent), and that Defendant's careless conduct caused the subject accident.

Not only did Trooper Averett's testimony provide a legal standard, and whether Defendant breached such a standard, Trooper Averett was permitted to opine as to whether Defendant had operational taillights at any time he entered Highway 92.

> Q. . . .And in the course of your investigation, there was no taillamp, is it more likely true than not that Mr. Carpenter complied with his legal requirement?[3]
>
> . . .
>
> A. It's not. **He, it's more probable that he did not have them**. (TR 08/31/21, pp. 384-385)

Defendant contends the determination as to whether Defendant complied with his "legal requirement," which specifically addresses whether Defendant knew his taillights were not operating and whether he was telling the truth regarding his knowledge, rested solely within the province of the jury.

To establish a claim for negligence, Plaintiff must demonstrate Defendant owed a duty, breached that duty, a causal connection between the breach and the

[3] The "legal requirement" referenced relates to whether Defendant had operational taillights. (TR 384)

injury complained of, and injury to the plaintiff. *Heagy v. City and County of Denver*, 472 P.2d 757, 758-759 (Colo. App. 1970). In order to establish that causal connection, the question is whether the Defendant knew or reasonably should have known that his conduct could cause a risk of injury to the plaintiff. *Palisades Nat'l Bank v. Williams,* 816 P.2d 961, 963 (Colo. App. 1991). As applicable to this case, whether Defendant knew, or reasonably should have known, he had no operational taillights at the time of the subject accident was a question for the jury, not Trooper Averett. Instead, the Trial Court permitted Trooper Averett to testify it was more probable than not Defendant did not have operational taillights.

The Trial Court's error was not harmless. In determining whether the error is harmless, this Court must reverse "if the error affected the substantial rights of the parties." *Baker*, at 483 P.3d 1108. In determining the foregoing, the Court must decide whether the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* Defendant contends that he has met both of these requirements.

As discussed previously, Trooper Averett was a former Colorado State Trooper and was likely seen as an authority figure by the members of the jury. This authority figure was permitted to tell the jury Defendant was negligent, that Defendant's negligence was a cause of the subject accident, and Defendant was

negligent because it was more probable than not Defendant did not have operational taillights. In essence, the accident was the sole fault of the Defendant. To suggest that such testimony was harmless is clearly contrary to the outcome of this case. As set forth above, Plaintiff presented no evidence Defendant entered Highway 92 with no illuminated taillights or Defendant had any way of knowing the taillights on the tractor had gone out. Rather, it is clear that the jury was improperly influenced by the erroneous opinions of an authority figure, Trooper Averett.

In his Answer Brief, Plaintiff improperly and erroneously suggests Defendant knew his taillights were not operational. That is simply incorrect. (TR 08/31/21, pp. 157, 203-204) Defendant acknowledged **if** he had driven on Highway 92 without operational taillights, it would be careless, however, Defendant testified his taillights were operational at the time he got back into the cab of the tractor following the feeding of the bulls. (TR 08/31/21, pp. 201-203)

Trooper Averett was permitted to testify as to the "legal requirements," that Defendant breached those "legal requirements," that this breach constituted carelessness (negligence) on the part of Defendant, and that it was more probable than not Defendant did not have operational taillights. As this was an issue of fact for the jury to decide, the Trial Court usurped the jury's fact-finding role. 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.

"A defendant is entitled to an instruction on a particular affirmative defense when he or she raises some credible evidence to support it." *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004); *Gorman v. People*, 19 P.3d 662, 668 (Colo. 2000). In the present action, Defendant presented evidence Plaintiff was overdriving his headlights at the time of the subject accident. Contrary to Plaintiff's contention, the Trial Court erred by failing to give Defendant's proposed instruction finding Plaintiff had no duty to operate his vehicle with his high beam headlights, at night, with no oncoming traffic, on a rural road without artificial lighting, and driving 60 mph. (TR 09/07/21, pp. 151-154)

Plaintiff's contention the comparative negligence instruction was sufficient is incorrect. Defendant's tendered instruction specifically instructed the jury that Plaintiff was negligent if he violated C.R.S.§ 42-4-1101. Defendant has maintained Plaintiff had a duty to operate his vehicle at a speed and in such a manner, as would allow him to see a clear distance ahead consistent with C.R.S. § 42-4-1101. In the present action, the undisputed testimony at trial was Plaintiff was operating

his vehicle at 60 mph, which equates to 88 feet per second (TR 09/07/21, p. 80), with only his "dim" lights activated, which illuminated 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) Plaintiff's own expert, Dr. Harvey, testified Plaintiff traveling at 60 mph would need at least 198 feet of room to stop. (TR 09/01/21, p. 109) Based upon the undisputed evidence, Plaintiff could not have stopped within the scope of the illumination of his headlights for any object in the road in front of him, including an animal that was more than 100 feet in front of him. (TR 09/01/21, p.155)

Negligence *per se* is a violation of a statute or ordinance adopted for the public's safety which establishes liability for damages proximately caused. Hageman v. TSI, Inc., 786 P.2d 452, 453 (Colo. App. 1989) "The underlying principle of the common law doctrine of negligence *per se* is that legislative enactments such as statutes and ordinances can prescribe the standard of conduct of a reasonable person such that a violation of the legislative enactment constitutes negligence." Blood v. Qwest Services Corp., 224 P.2d 301, 326 (Colo App. 2009) *quoting* Flechsig v. U.S., 991 F.2d 300, 304 (6th Cir. 1993). C.R.S. § 42-4-1101(1) provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

The evidence at trial demonstrated Plaintiff was driving at a speed which would not enable him to stop within the illumination of his low beam headlights, in violation of C.R.S. § 42-4-1101. The evidence at trial established that, had Plaintiff been operating his vehicle in compliance with C.R.S.§ 42-4-1101, at a speed which was reasonable to see and react to what was in front of him, or use his high beams, he would have been able to see Defendant's tractor, react, and be able to stop without striking the tractor. (TR 09/02/21, p. 86) Operation of a motor vehicle at 60 mph with only low beams on under the circumstances of this case was not reasonable and prudent and the jury should have been instructed Plaintiff was negligent *per se*.

Plaintiff next contends C.R.S.§ 42-4-1101 does not define "conditions." While that may be so, certainly the lighting conditions a driver encounter constitutes a "condition" under the statute. The Colorado Supreme Court in the case of *Mayer v. Sampson*, 402 P.2d 185 (Colo. 1965) looked at driving conditions with respect C.R.S. § 42-4-1101. Conditions the Court considered were location of the accident, (mountain road), snow and ice (weather), the location of curves and hills (terrain), and the lighting conditions existing at the time of the accident such as dark or light. *Id.* at 287 (underline emphasis added). Contrary to Plaintiff's

contention, the lighting conditions encountered by a driver is a "condition" that the Trial Court was required to consider pursuant to C.R.S. § 42-4-1101.

Defendant disagrees with Plaintiff's contention he was driving below the posted speed limit of 65 mph suggests he was not negligent. Plaintiff failed to provide any legal support for his position because none exists. Nevertheless, the speed at which someone is traveling is not conclusive under C.R.S. § 42-4-1101.

> The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

Id. at 288-289.

In the present action, the overwhelming evidence at trial was Plaintiff was driving his vehicle at 60 mph, with only his low beam headlights which was unreasonable because he could not stop within the illumination of his headlights.

Plaintiff's contention the Trial Court's error was harmless is without merit. Had the jury been properly instructed as to Plaintiff's negligence, then his negligence would have been noted in the jury verdict. Defendant contends, and the

evidence showed, Plaintiff violated C.R.S. § 42-4-1101 and the jury should have been so instructed.

Finally, while Defendant did not submit a proposed negligence *per* se jury instruction using the term "overdriving one's headlights," Defendant submitted jury instructions regarding Plaintiff's negligence *per se* that were stricken by the Trial Court. First, Defendant submitted instruction 2:1 with the following language:

> **Defendant admits that he was operating a Case International Model 5102A tractor eastbound on Colorado Highway 92 on December 10, 2018, at approximately 5:30 p.m. when Plaintiff rearended Defendant's tractor. Defendant denies that he was negligent and a cause of Plaintiff's claimed injuries. Defendant, Adam Carpenter, claims that the accident was the result of Plaintiff's negligence by <u>overdriving his headlights</u>. Specifically, Plaintiff was operating his vehicle at approximately 60 mph on a rural road while only using his low beam headlights.**

The Trial Court specifically struck from Defendant's proposed instruction that Plaintiff was "overdriving his headlights." Additionally, Defendant submitted CJI-CIV 9:14, also rejected by the Trial Court, which provided:

> **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)**
>
> **A violation of one or more of these statutes constitutes negligence. If you find such a violation, you must consider it if you also find that it was a cause of the claimed injuries.**

Defendant also submitted CJI-CIV 9:13 and 11:8 which the Trial Court also refused to give, which provided:

> **To look in such a manner as to fail to see what must have been plainly visible is to look without a reasonable degree of care and is of no more effect than not to have looked at all.**
>
> **The operator of a vehicle has a duty at all times to drive at a speed no greater than is reasonable under the conditions then existing.**

As is clearly evident, Defendant did submit negligence *per se* jury instructions which the Trial Court did not tender. (CF p. 2169)(08/02/21 pp. 49-54)

Plaintiff's argument that Defendant would have the Plaintiff drive his vehicle at 30 mph to avoid the subject accident is unsupported. Defendant has never claimed that Plaintiff should have been driving his vehicle at 30 mph, but rather, Plaintiff driving 60 mph, on a rural road with no oncoming traffic and no artificial lighting, with only low beam headlights illuminated, constituted negligence *per se* and the jury should have been properly instructed. Defendant has consistently maintained Plaintiff was overdriving his headlights. Had Plaintiff complied with C.R.S. § 42-4-1101 by driving at 60 mph with his high beam

headlights on, Plaintiff would have had ample time to see the tractor, slow down and even bring his vehicle to a complete stop without striking the tractor. (TR 09/07/21, p. 86) Accordingly, the Trial Court erred in failing to give Defendant's proffered negligence *per se* jury instruction and remand is warranted.

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.

As discussed herein, Defendant's taillights, unbeknownst to him, failed sometime after he got onto Highway 92 and prior to the subject accident. No evidence was presented at trial to the contrary.

> 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).

"[N]egligence requires proof that a defendant's conduct falls below an acceptable standard of care. Necessarily, this involves proof of fault." Id. Plaintiff acknowledges proof of fault is necessary to establish negligence *per se*. As fully discussed herein, Defendant did not know his taillights had failed and had no way

of knowing such prior to the subject accident, and, as such, no proof of fault Defendant was operating his tractor without taillights was presented. Despite the same, the Trial Court, not the jury, determined that Defendant was "at fault" for the subject accident by tendering Plaintiff's negligence *per se* instruction --- particularly, in also in refusing to submit Defendant's proffered negligence *per se* instructions.

While Plaintiff makes repeated references to the light setting on the tractor, such is nothing more than a red herring intended to mislead this Court. Defendant testified he did not recall whether he set the knob on the lights to the 2nd, 3rd or 4th setting, but rather, he would turn the knob on the lights until the headlights and the overhead work lights were illuminated which also illuminate the taillights. (TR 08/31/21, p. 198) Notwithstanding the same, the tractor manual sets forth what lights are illuminated at which setting:

> First Position - Front and rear amber warning lamps.
>
> Second Position - Front and rear amber warning lamps, tail lamps, side console lamp and head lamps. The Hi/Lo switch can be used to select high or low beam head lamps.
>
> Third Position - Head lamps, rear fender work lamps and side console lamp.
>
> Fourth Position - Head lamps, rear upper work lamps, front upper work lamps, rear fender work lamps and side console lamp.

(EX p. 1904)

As clearly evident, anytime the headlights are illuminated, lighting is also illuminated on the rear of the tractor. The mere fact Defendant could not recall specifically the dial setting on the lighting panel does not mean he set the light dial to a setting that did not include rear lights. Based on the manual, such was not even possible to do (short of the lights being turned off).

Plaintiff raises yet another red herring with respect to the slow-moving vehicle emblem on the back of the tractor, which Defendant did not know was incorrect. Nevertheless, a slow-moving vehicle emblem would not have changed the outcome. As discussed above, Plaintiff's headlights would only illuminate 100 feet in front of him and would not have reflected off the slow-moving emblem until he was 100 feet behind the tractor. As acknowledged by Plaintiff's own expert, Plaintiff would need 198 feet to stop traveling at 60 mph. (TR 09/01/21 p. 87) As such, whether the slow-moving vehicle emblem was compliant would not have changed the outcome of this case.

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 by instructing the jury that Defendant was negligent, as a matter of law, because his taillights went out, without his knowledge. "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 the present action, no evidence was presented Defendant knew of any mechanical problems with the lights or knew the lights had failed after he left the field.

The issue of proximate cause was 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 overdriving of headlights, and his other properly disclosed opinions.

The Trial Court's finding Defendant failed to disclose anything supporting Mr. Merlo's alleged qualifications as an accident reconstructionist is simply incorrect. The record clearly reflects Mr. Merlo was an accident reconstructionist and qualified to render opinions in the field of accident reconstruction. (TR 09/07/21, pp. 37-38)

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, nearly sixteen (16) months prior to trial. (EX pp. 2335-2338) Plaintiff never raised any issue as to the adequacy of Defendant's disclosure of Mr. Merlo. (TR 09/07/21, pp. 36-42) 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).

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 *arguendo* Defendant was required to produce a more detailed listing of Mr. Merlo's prior work as an accident reconstructionist, Defendant contends 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.

Defendant contends 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. As set forth in Defendant's Opening Brief, *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008) is

applicable to the facts of the present action and the sanction of exclusion of Mr. Merlo's opinions as an accident reconstructionist, specifically opining Plaintiff was overdriving his headlights constituted error.

Furthermore, Mr. Merlo was qualified to render expert opinions as an accident reconstructionist at trial, regardless of the fact he had not provided expert testimony in the field of accident reconstruction in the prior four (4) years. The trial court in *People v. Lowe*, 486 P.3d 398 (Colo. App. 2020) allowed the proffered expert to testify to, *inter alia*, he had conducted seventy-three (73) fingerprint examinations despite that such was not set forth in his CV or testimony list. *Id.* at 406. In the present case, Defendant was prohibited from introducing evidence of the hundreds of accident reconstructions Mr. Merlo had performed in his more than twenty-four (24) years as an accident reconstructionist.

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.

Initially, it should be noted Plaintiff, in his Answer Brief, does not deny that C.R.C.P. 16(c) required him to file C.R.E. 702 Motions seventy (70) days before trial, nor does Plaintiff provide any basis for his late challenge of Mr. Merlo. Notwithstanding the same, 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.

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 at the trial of this case. Plaintiff was in possession of Mr. Merlo's reports for nearly sixteen (16) months prior to trial, yet failed to assert 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 is whether such was harmful to Plaintiff. *See Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973, 979 (Colo. 1999). In the present action, any failure to disclose Mr. Merlo's prior testimony further back than what the Colorado Rules of Civil Procedure required was harmless as Plaintiff was in possession of Mr. Merlo's report for nearly sixteen (16) months prior to trial and yet failed to challenge the same. 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.

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)). While Plaintiff contends no evidence was presented to demonstrate negligence on Plaintiff's part, Defendant disagrees. Defendant has continually maintained Plaintiff was overdriving his headlights. Had Plaintiff been operating his vehicle at a speed that would allow him to observe objects in the roadway within the illumination of his headlights, the accident would not have occurred.

Based upon the foregoing, it was an abuse of discretion by the Trial Court to fail to give a rear-end rebuttable 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 1st day of August, 2022.

PATTERSON RIPPLINGER, P.C.

/s/ Debra P. DeRee
Kevin Ripplinger, No. 35165
Jennifer L. White, No. 36466
Debra P. DeRee, No. 30722
Attorneys for Defendant-Appellant Adam Carpenter

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to C.A.R. 25 and C.R.C.P. 5, on this 1st day of August, 2022, a true and correct copy of the foregoing **REPLY 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:

Nelson A. Waneka, No. 42913
LEVIN SITCOFF PC
1512 Larimer Street, Ste. 650
Denver, Colorado 80202
Attorney for Plaintiff-Appellee Cecil Norrid

/s/Gordon L. Beck
Gordon L. Beck, Paralegal