IN THE
MISSOURI SUPREME COURT

No. SC90583

RYAN SEELER,

Appellant,

v.

STATE OF MISSOURI,

Appellee.

On Appeal from the Circuit Court of St. Louis County,
State of Missouri
The Honorable John A. Ross, Circuit Judge

APPELLANT'S REPLY BRIEF

Respectfully Submitted,

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JURISDICTIONAL STATEMENT

Appellant incorporates the Jurisdictional Statement from page 1 of Appellant's Opening Brief.

STATEMENT OF FACTS

Appellant incorporates the Statement of Facts from pages 10-19 of Appellant's Opening Brief.

REPLY ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S: (1) MOTION TO DISMISS INDICTMENT . . . ; (2) MOTION TO DISMISS INDICTMENT, OR ENTER A JUDGMENT OF ACQUITTAL FOR LACK OF JURISDICTION; (3) MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S EVIDENCE; AND (4) MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL OF THE EVIDENCE, BECAUSE THE PROPER INTERPRETATION OF § 565.024.1(3)(a) REQUIRES THE STATE TO PROVE "LEAVING A HIGHWAY . . . OR HIGHWAY'S RIGHT-OF-WAY," IN THAT THE PHRASE "INCLUDING A DEATH CAUSED BY THE DEFENDANT'S VEHICLE LEAVING A HIGHWAY . . . OR THE HIGHWAY'S RIGHT-OF-WAY," IS AMBIGUOUS AND MUST BE CONSTRUED LIBERALLY FOR THE DEFENDANT.

A. Plain and Natural Meaning

In his first point, Respondent argues that the plain and natural meaning of § 565.024.1(3)(a) is equivalent to a parent telling his child, "You are not to leave the house including leaving to go to the movies." (Resp. Br: 36). While that interpretation might be applicable in the everyday domain of parental discipline, it is wholly inapposite in the legal context because courts must "presume that the legislature included every word for a purpose, and that every word has meaning." *Robinson v. Advance Loans II, L.L.C.*, 290 S.W.3d 751, 755 (Mo. App. 2009); *see also Berra v. Danter*, 299 S.W.3d 690, 696 (Mo. App. 2009)(stating, "We [the court] must presume that the legislature does not insert idle words or superfluous language into a statute"). Respondent's interpretation of § 565.024.1(3) renders the "including" phrase in the statute meaningless.[1] Using Respondent's rationale and plain language approach, it would be appropriate for a statute that purports to "prohibit fishing in the Lake of the Ozarks," to state that it "prohibits fishing in the

[1]As discussed in Appellant's Statement of Facts, after a lengthy discussion the prosecuting attorney declared the "including" language as mere "surplusage," yet still requested leave to file an information in lieu of the indictment to exclude that "surplus" language that he intentionally inserted into the original indictment. Statement of Facts (hereinafter "SF:") 16-17.

Lake of the Ozarks, including fishing for trout." This interpretation of § 565.024.1(3)(a) would reach an absurd, unjust, and inappropriate result, and it would be contrary to the rules of statutory construction, because the "including" language would be rendered totally meaningless and superfluous. A more appropriate comparison is a statute that allows a plaintiff in a negligence case to "recover for personal injuries, including bodily injuries or injuries to personal property." Under this interpretation, a plaintiff could only recover for injuries to his person or property. Likewise, in Appellant's case, a defendant can only be found guilty if he causes the death of a non-passenger by leaving the highway or right-of-way. At the very least, these various examples show that the statute at issue in this case is subject to multiple interpretations, thereby making it hopelessly ambiguous, vague, and thus unconstitutional.

B. Rules of Construction

In Respondent's Brief, the State argues that Appellant's interpretation of the phrase "including the death of an individual that results from the defendant's vehicle leaving a highway, as defined by section 301.010 RSMo, or the highway's right of way" as an additional element of § 565.024.1(3)(a) that must be proven, is "implicitly" based on the doctrine of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another). Respondent's Brief 37

(hereinafter "Resp. Br:")(citing *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005)). As Respondent points out, this doctrine is only invoked in exceptional circumstances. (Resp. Br: 38). Contrary to Respondent's assertion, that doctrine is not being invoked in this case.

As support for the argument that Appellant is "implicitly" relying on this doctrine, the State cites *Rice v. Board of Adjustment of Village of Bel-Ridge*, 804 S.W.2d 821(Mo. App. 1991), for the proposition that the General Assembly could have used the words "and" or "limited to," rather than "including," if it intended for the "including" language to be an additional element (Resp. Br: 39). In *Rice*, the court held that "including" is used as a term of enlargement and as a partial list "[w]hen used in connection with a number of specified objects . . . [which] implies that there may be others which are not mentioned." *Id*. at 824. In *Rice*, "Including" was a term of enlargement because it was followed by a list of fourteen different types of businesses that were permitted uses pursuant to a city ordinance. In its reasoning, the court noted that it would be nearly impossible to list all of the businesses that were specifically permitted. *Id*. Appellant's case, however, is entirely different, as the General Assembly did not provide a list of specific acts that would be subsumed by that part of the statute that preceded "including"; what

followed was only one particular act.[2] Respondent argues that the term "including," as used in this case, suggests that what follows is a partial list. (Resp. Br: 39). However, it makes little sense that a "partial list" would only include one particular act–leaving the highway or highway's right-of-way. In *Rice*, the partial list included fourteen additional "acts;" in this case the statute includes one additional

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[2]While at first glance it may appear that two acts are listed, leaving the highway *or* the highway's right of way, the statutory definitions of each word demonstrate that the legal effect of "leaving" the highway would necessarily include leaving the right-of-way, and vice versa. A "highway" is defined as "any public thoroughfare for vehicles, including state roads, county roads, or public streets." Mo. Rev. Stat. § 301.010(19) (2000); "Right-of-way" is defined as "the entire width of land between the boundary lines of a state highway." § 304.001(11) (2000). Thus, if one leaves the highway, one presumptively leaves the highway's right-of-way. The converse is true as well–if one leaves the right-of-way, one presumptively leaves the highway–which further demonstrates the ambiguity inherent in the statute. Nothing in either definition mentions "lanes," "Authorized lanes," or "construction zones." (*See* Resp. Br: 49). Based on the legal definitions of both highway and right-of-way, Seeler never left either, even if he did drive into a closed construction zone.

act, and thus provides further support that the proper interpretation of the statute is that the "including" language was intended to be an additional element that had to be proven beyond a reasonable doubt, not as a partial list of unauthorized acts. If, as Respondent argues, the "including" language is merely a "partial list" of possible acts, the public is left to wonder what other acts might fall under the purview of this "partial list." The "including" language in § 565.024.1(3) only makes sense and has meaning if it is construed as an additional element that must be proven by the State.

As further support for its argument, Respondent claims that the proper canon of construction is *ejusdem generis* (meaning of a general term is implied to embrace items/acts similar to the specific terms)(relying on *State v. William*, 100 S.W.3d 828 (Mo. App. 2003))(Resp. Br: 40). *William*, when properly read, offers no support for the proposition advanced by Respondent. In *William*, the court stated that "where general words follow specific words, the general are construed to include *only* objects similar in nature to those *enumerated specifically*. *Id*. at 833 (emphasis added). The statute in that case prohibited the defendant from concealing "any gun, knife, weapon, or *other article or item of personal property* that may be used in such a manner as to endanger the life or limb of any . . . employee." *Id*. at 832 (emphasis added). The general words in that case were "other article or item of personal property," thus the court held that a defendant who concealed a cell phone

could not be charged under the statute because it was dissimilar to the specifically enumerated items–a gun, knife, or weapon. *Id*. at 833. In reaching its holding, the *William* court relied on *State v. Lancaster*, 506 S.W.2d 403 (Mo. 1974). In that case, the defendant was charged under a statute which prohibited "willfully and maliciously destroy[ing] any building or other property. . . by use of bombs, dynamite, nitroglycerine, or *other kinds of explosives*." *Id*. at 404 (emphasis added). The court held that the defendant's use of a firecracker did not fall under the statute because it was not a "high explosive" like a bomb, dynamite, or nitroglycerine–the specifically enumerated items in the statute. *Id*. at 405.

William and *Lancaster*, and the charging statutes at issue in those cases, are clearly distinguishable from the statute at issue in Appellant's case. In Appellant's case, it can hardly be said that the phrase "including the death of an individual that results from the defendant's vehicle leaving a highway . . . or highway's right-of-way constitutes "general words," similar to "*other kinds* of explosives" or "*other articles* or items of personal property" (emphasis added). Nothing about that phrase is general; rather, it requires a specific act–leaving the highway. In fact, the act of leaving the highway is more specific than the language which precedes "including"–causing the death of a non-passenger. To say that the doctrine of *ejusdem generis* applies in this case is a complete misstatement of the law and facts

of the case. Thus, the State's reliance on this doctrine as support for its argument that what follows the "including" language is actually a partial, non-exclusive list, is devoid of merit and has no basis in law or fact.

In a third attempt to salvage the statute, Respondent argues that the doctrine of *noscitur a sociis* (using accompanying and associated terms to interpret an ambiguous term) applies in this case. (Resp. Br: 39-40). The United States Supreme Court has noted that this maxim "is often widely used where a word is capable of many meanings in order to avoid the giving of unintended *breadth*" in statutory construction. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)(emphasis added). Missouri courts have interpreted this maxim to mean that "general words are restricted to a sense analogous to the less general, and the meaning of the word may be enlarged or restrained by reference to the object of the whole clause in which it is used." *Foremost Dairies, Inc. v. Thomason,* 384 S.W.2d 651, 660 (Mo. banc 1964). In applying this maxim to the statute at issue, as briefly discussed above the death of a non-passenger is the more general phrase in the statute, and what follows "including"–leaving the highway or highway's right-of-way," is the more specific act. Because both parties recognize that "including" is capable of many meanings, according to the *noscitur a sociis* maxim it should be interpreted to avoid giving the statute unintended *breadth*. *Jarecki*, 367 U.S. at 307

(emphasis added). If the Court were to adopt the State's interpretation of that phrase, it would be applying the broadest possible interpretation of that section, rendering the "including" language superfluous, because all that would be required would be the death of a non-passenger. However, if the Court adopted Appellant's interpretation, it would be in accordance with the *noscitur a sociis* maxim because it would be restricting the general word–including–to the more specific act which follows–causing the death of a non-passenger by leaving the highway or highway's right-of-way, rather than the more general act of merely causing the death of a non-passenger. Thus, Respondent's interpretation actually violates the *noscitur a sociis* maxim by giving unintended breadth to the statute.

Respondent also argues that "including" can be used as an illustration of a particular act (Resp. Br: 40, 42), and cites to *Automobile Club of Mo. v. City of St. Louis*, 334 S.W.2d 355 (Mo. 1960) as support for that assertion. However, the statute in *Automobile Club* is significantly different from the statute at issue in this case and the cases are readily distinguishable from one another. In *Automobile Club*, the statute at issue authorized the city to finance and pay for off-street parking by general revenue funds, "[i]ncluding any proceeds derived from the leasing of said parking facilities." *Id*. at 361. The court held that the "including" phrase emphasized and illustrated one item that was within the purview of "general

revenue funds." *Id*. However, "general revenue funds" is an extremely broad category and undoubtedly there are hundreds of possible funds that might constitute "general revenue" as the court noted in *Rice*, *supra*, and listing all of the types of businesses that would be permitted by the statute would have been virtually impossible. In Appellant's case, the statute at issue is not meant to be as broad and expansive as the statute in *Automobile Club*. Section 565.024.1(3) provides that a person commits the crime of involuntary manslaughter if he operates a motor vehicle in an intoxicated condition, acts with criminal negligence, and in doing so, causes the death of a non-passenger by leaving the highway or highway's right-of-way. The term that the "including" phrase purports to qualify–the death of a non-passenger–is not vastly expansive as "general revenue funds." (Resp. Br: 37)("It is clear that the phrase following "including" should be read as being related to causing the death of a person"). By its definition, the death of a non-passenger means precisely what it says–the death of a non-passenger caused by a motor vehicle; there are not hundreds of possible acts which might qualify or illustrate that phrase. Thus, it is entirely unnecessary and illogical to include a single "illustration" of how the death might be caused.

Furthermore, the State's perception that the list that follows "including" as being a subcategory of a broader category of actions taken by the defendant, or as

being a mere "illustration" of a particular way a non-passenger might be killed, is not supported by existing case law. (Resp. Br: 40). The United States Supreme Court has held that use of the word "including" as a word of enlargement "is its exceptional sense." *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911). While some Missouri cases have said the opposite, "including" is only a word of enlargement when "used in connection with a number of specified objects, impl[ying] that there may be others which are not mentioned." *Rice*, 804 S.W.2d 821 at 824; *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. 2005). In Appellant's case, the statute at issue clearly does *not* imply any other acts which are not specifically mentioned. Instead, it mentions one specific act, leaving the highway or right-of-way. Thus, these cases do not support Respondent's contention that the "including" language should be interpreted as a mere "illustration" or a "partial list." (Resp. Br: 40). In sum, Respondent's interpretation of the statute renders the entire "including" phrase a collection of meaningless words, even though the law presumes that "the legislature included every word of a statute for a purpose." *Robinson*, 290 S.W.3d at 755.

C. Legislative History

Using legislative history as an aid to statutory construction is a slippery slope

because "reliance on bills not passed provides a tenuous basis for determining legislative intent." *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 601 (Mo. 1977). Even if it is unclear or confusing exactly what the legislature intended, "The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996)(Scalia, J. concurring). Furthermore, as the Missouri Supreme Court has noted, there is "no legislative record in Missouri to disclose the explanation offered in committee or on the floor to aid in understanding the purpose for which the bill is introduced . . . [nor] do we have a record of debate on the bill when it was considered." *Blue Springs Bowl*, 551 S.W.2d at 601. Thus, while a court knows whether a bill is adopted or rejected, it does not know why. "Under such circumstances, it is not really possible to look at the legislative record and know why the legislature rejected a proposed bill," or adopted another one. *Id*.

In this case, we know that in 2005 a bill was introduced that made it a class A felony to cause a death by leaving the highway or right-of-way while in an intoxicated condition. (Resp. Br: 45); Respondent's Appendix 19-20 (hereinafter "Resp. A-"). There was also a bill that made it a class B felony to cause the death of a non-passenger. (Resp. Br: 45); Resp. A-6. There is no explanation why neither of these bills was adopted in their proposed forms; all we know is that they were

not. Thus, reliance on the legislative history of this statute is tenuous at best and renders the reviewing court a super-legislature, stripping the court of its role as an interpreter and adopting that of an enactor. While it is not implausible that the legislature intended to combine the two provisions into one, the legislative history on this issue is unclear. Since there is no record of debate on the issue, any reliance on the legislative history of this statute has little, if any, value as a canon of statutory construction. The plain language of the statute requires that the "including" language be interpreted as an additional element that must be proven; if it is not construed in such a way, then the statute is void for vagueness, as no reasonable person can determine what acts are prohibited.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND TO DECLARE STATUTE UNCONSTITUTIONAL AND DEFENDANT'S MOTION FOR NEW TRIAL, BECAUSE § 565.024.1(3)(a) IS UNCONSTITUTIONALLY VAGUE, IN THAT THIS STATUTE CAN BE READ IN SEVERAL CONTRADICTORY WAYS AND THEREBY DOES NOT GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT CONDUCT IS PROHIBITED, AND FURTHER THE STATUTE DOES NOT CONTAIN SUFFICIENTLY EXPLICIT STANDARDS TO GUIDE

ENFORCEMENT IN A WAY THAT AVOIDS DISCRIMINATORY OR ARBITRARY APPLICATION, IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 18(a) OF THE MISSOURI CONSTITUTION.

A. Respondent's First Interpretation

As discussed above, Respondent's interpretation of the "including" language as being a "partial list" or "illustration" of one of numerous alternative acts of causing the death of a non-passenger while operating a motor vehicle in an intoxicated condition is wholly unsupported by the rules of statutory construction, and would render that language superfluous and meaningless. It cannot be the proper interpretation of the statute at issue in this case.

B. Respondent's Second Interpretation

The State also asserts that one possible interpretation of the statute is that the "including" clause is intended as an alternative to the death of a non-passenger. (Resp. Br: 42). Essentially, the State is arguing that a defendant can be found guilty of the class B felony of involuntary manslaughter if he causes the death of *any* passenger, but does so by leaving the highway or right-of-way. The basic

assumption of the argument is that the "including" phrase is an alternative element to the death of a non-passenger. (Resp. Br: 49). This interpretation is clearly inconsistent with the plain language of the statute, as it specifically states "the death of any person not a passenger in the vehicle." § 565.024.1(3)(a).

Respondent also sets forth a blanket assertion that the evidence in the case would be consistent with this interpretation of the statute. (Resp. Br: 42-43). This argument is clearly erroneous because it fails to take into account the statutory definitions of "highway" or "right-of-way."[3] The evidence in this case clearly showed that the construction zone was in the middle of the highway, and that the accident occurred in the center lane of the highway. Thus, even if Appellant did drive into a construction zone, he did not "leave" the highway or right-of-way, as Respondent contends. Accordingly, he cannot be guilty of Respondent's alternative suggestion as to how the statute can be applied.

C. Respondent's Third Interpretation (i.e. Appellant's Interpretation)

Respondent also asserts that even if Appellant's interpretation of the "including" language is correct as being an additional element, the State would only have to prove that "Appellant drove his vehicle outside the authorized lanes of traffic," and there was "substantial proof" of that fact. (Resp. Br: 49, FN 23). This

[3] *See* FN 2, *supra*.

argument fails for the reason previously discussed above; it neglects to consider the definitions of "highway" or "right-of-way." The statutes defining these terms mention nothing about "authorized lanes of traffic," nor is there any reference at all to "lanes" or "lanes of traffic." Taking into account the statutory definitions of "highway" and "right-of-way," it is clear that the State presented no evidence of Appellant's vehicle leaving either; thus this argument also fails and directly contradicts the evidence presented at trial.

Contrary to Respondent's assertion that Appellant's "main argument supporting his claim that the statute is void for vagueness" is based on the fact that the trial attorneys and the judge reached different conclusions as to its meaning, Respondent fails to recognize that the prosecutor believed that the "including" language had to be alleged in order for a defendant to be charged as a class B felon. The original complaint charged Appellant with a class C felony; two days later an amended complaint was filed that charged Appellant with the class B felony, subsequently adding the language "thereby leaving said highway's right of way," even though, according to the prosecutor, that language was "surplusage." Legal File:1, 4; SF:16. At the very least, it is evident that the prosecutor was uncertain as to what he needed to allege in order to prove and convict Appellant of the class B felony. His attempt to straddle the statute demonstrates that its application is

arbitrary, confusing, and discriminatory in this particular context, and thus void for vagueness. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Finally, Appellant's "theory of the case" does not always make the mere use of the term "including" in a criminal statute void for vagueness. (Resp. Br: 50). By way of example, Mo. Rev. Stat. § 563.011(3) (2009 Supp.) defines "forcible felony" as "any felony involving the use or threat of physical force or violence against any individual, *including but not limited to* murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense" (emphasis added). Certainly, this statute is unambiguous on its face. If the General Assembly intended for the "including" phrase of § 565.024.1(3) to be a mere "illustration" or "partial list" as the State suggests, then it could have added four simple words, "But not limited to," to make its intent sufficiently clear, as it did in § 563.011(3). Because it chose not to do so, the proper interpretation of the convicting statute is that the "including" language was intended as an additional element, which had to be proven beyond a reasonable doubt; a burden which the State clearly failed to meet. Another valid criminal statute which properly uses the word "including" would be where a statute prohibits "assault with a deadly weapon, including assault with guns, knives, daggers, or explosives." The words following "including" would be considered a partial list, because there are a number of other specific objects not

included that might be considered "deadly weapons," for example a vehicle or a baseball bat. Contrary to Respondent's sweeping generalization, Appellant never asserted that "the mere use of the term 'including' would make any criminal statute void for vagueness." (Resp. Br: 50). Rather, the use of the word "including" in the context of this specific statute renders it unconstitutionally vague.

III. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION DURING CROSS-EXAMINATION AND PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE ON THE CONSTRUCTION ZONE'S CONFORMANCE WITH THE NATIONAL MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES ("MUTCD"), BECAUSE THE EVIDENCE WAS RELEVANT AND MATERIAL AND SUCH EXCLUSION VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 18(A) OF THE MISSOURI CONSTITUTION BY DEPRIVING HIM OF A VIABLE DEFENSE, IN THAT THE EXCLUDED EVIDENCE TENDED TO SHOW THAT A REASONABLE PERSON WOULD HAVE BEEN CONFUSED AND UNABLE TO ASCERTAIN WHAT PART OF THE ROADWAY/HIGHWAY WAS A CONSTRUCTION ZONE AND WHICH

LANES WERE CLOSED TO TRAFFIC BECAUSE THE DISTANCE BETWEEN THE CONES SEPARATING THE CONSTRUCTION ZONE AND THE LANE OPEN FOR TRAFFIC WAS ALMOST TWICE THAN THAT REQUIRED AND CONSIDERED REASONABLE PURSUANT TO THE MUTCD.

The majority of Respondent's argument on this point is based on a misunderstanding of Appellant's position. Appellant is not arguing that the real issue is whether a reasonable person would have been confused about "whether the lanes were closed." (Resp. Br: 60). It is apparent from the evidence and from Appellant's testimony that some of the lanes were closed that night, but it is Appellant's contention that he was confused about *which* lanes were closed. Similarly, Appellant has never asserted that there was "no valid construction zone or lane closure because the closure was *done by the construction company*;" therefore it is impossible to conclude that Section 1A.08 (A-3) of the *Manual* "hurts" Appellant. (Resp. Br: 63)(emphasis added). Likewise, even if the spacing of the channelizing devices is only a Guidance Statement, and therefore deviation is authorized, Appellant was not trying to "convince the trial court and the jury that such deviations somehow *invalidated* the construction zone." (Resp. Br: 64)(emphasis added). Obviously, based on the entire record, there *was* a

construction zone; that was not contested. Nothing in Appellant's argument suggests that the construction zone was "invalid," or that any suggested "invalidity" would justify an acquittal. What was contested is whether a reasonable person would have known which lanes in the construction zone were closed and which lanes were open, and whether a reasonable person would know those facts given the improper spacing of the cones. Evidence of the spacing of the cones would have helped in deciding whether a reasonable person would have known which lanes were, in fact, closed, because if the cones had been placed closer together, it would have been extremely difficult, if not impossible, for an automobile and a dump truck to drive in and out of the lane to the left of the cones without striking a single one. A proper spacing of the cones would have made it abundantly clear to a reasonable person that the left two lanes were closed that night and could not be intruded upon without disturbing the cones.

Respondent also claims that Appellant was not prejudiced by the exclusion of the evidence because "he saw the cones and recognized the existence of the construction zone." (Resp. Br: 64-65). This argument is flawed for the same reason. Contrary to what Respondent asserts, there is no controversy in this case as to the existence of a construction zone. As Respondent correctly points out, Seeler testified that he knew that there was a construction zone. (Resp. Br: 65-66). He

also knew "that the cones were intended to separate the closed lanes from the open lanes." (Resp. Br: 66). What he did not know, however, was *which lanes* were closed and *which lanes* were open. Obviously, he knew the "purpose of the cones was to indicate that a lane was closed" (Resp. Br: 66), but he was uncertain as to *which lanes* were closed. Respondent even cites to testimony wherein "Appellant admitted knowing that *either* the paved lane *or* the unpaved lane was closed." (Resp. Br: 66)(emphasis added). It can hardly be said that these statements constitute "judicial admissions" that Seeler knew where the proper lane of travel was, yet still intentionally chose to drive into the construction zone. Thus, this entire argument is based on a misunderstanding and misinterpretation of Appellant's point regarding this issue. As such, this argument is meritless.

IV. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S PRESENTATION OF EVIDENCE REGARDING THE SPEED OF APPELLANT'S VEHICLE, BECAUSE THE EVIDENCE WAS IRRELEVANT, UNRELIABLE, AND ITS PREJUDICIAL EFFECT OUTWEIGHED ITS PROBATIVE VALUE, IN THAT THE EVIDENCE OF SPEEDING WAS NOT ALLEGED IN THE INDICTMENT AS A CONTRIBUTING FACTOR OR AN ACT OF NEGLIGENCE, NOR WAS IT AN ELEMENT OF THE OFFENSE CHARGED; AND THE

WITNESS COULD NOT IDENTIFY APPELLANT'S VAN AS THE VEHICLE HE SAW SPEEDING.

Contrary to the State's assertion, Appellant is not "implicitly" arguing that evidence of speeding five miles before the accident scene is "propensity" evidence (Resp. Br: 68) i.e. that introduction of the speeding evidence was admitted for the sole purpose of showing that Appellant had a "propensity" to speed. *See State v. Smith*, 32 S.W.3d 532, 550 (Mo. 2000)(stating, "[E]vidence of prior uncharged misconduct is not admissible for the purpose of showing the propensity of the defendant to commit such crimes"). Rather, Appellant is arguing that the evidence was unfairly prejudicial, wholly unreliable, and completely irrelevant to the charged crime because it was not a charge of the offense, nor was it related to the alleged act of criminal negligence–driving in a closed construction zone.

In order for evidence to be logically relevant, it must have some legitimate tendency to directly establish the defendant's guilt of the charges for which he is on trial. *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. 2001). The evidence must be legally relevant, in that its probative value outweighs its prejudicial effect. *Id*. The speeding evidence in this case was neither logically nor legally relevant. The allegation of criminal negligence was that Appellant drove into a closed construction zone, not that he was speeding. Furthermore, the prejudicial effect of

the evidence outweighed its probative value because of the improper inferences and conclusions that the prosecutor drew from the evidence and relayed to the jury. *State v. Barton*, 936 S.W.2d 781, 783 (Mo. 1996).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Judgment of the Circuit Court be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06

The undersigned certifies that on this day of March 11th, 2010, one true and correct copy of the foregoing brief, and one CD-Rom containing the foregoing brief, were mailed, postage pre-paid to:

Office of the Attorney General
Supreme Court Building
207 West High St.
P.O. Box 899
Jefferson City, MO 65102

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief: 1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 5,013 words determined using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 12 format, on disk to the Court. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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