

COURT OF APPEALS No. 73926-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ANNE CUTONE,

Appellant/Plaintiff

v.

WAI K. LAW and JANE DOE LAW,
and their marital community,

Respondents/Defendants

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
DIVISION I
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I. INTRODUCTION

Appellant Anne Cutone files this appeal because the trial court erred by admitting evidence of a collarbone injury that Appellant had twenty-eight years before the car accident that is the subject of this case. Not only did the trial court admit evidence of the collarbone injury that occurred in either 1981 or 1982, it did so despite the complete absence of any subsequent symptoms related to Ms. Cutone's collarbone injury.

Prior to the trial commencing, Ms. Cutone moved to exclude this evidence in her motions in limine. Despite well-established Washington case law prohibiting this information from being introduced into evidence, the trial court denied Mrs. Cutone's motion in limine. The trial court expressly permitted the Defendant to question any witnesses during trial about Ms. Cutone's collarbone injury as a possible cause of her current diagnosis of thoracic outlet syndrome.

Based upon the trial court's ruling regarding her prior collarbone injury, Ms. Cutone was forced to address this issue with her treating medical providers who were called to testify at trial. Ms. Cutone's three treating medical experts testified that Ms. Cutone's thoracic outlet syndrome was caused by the automobile accident of November 22, 2010. In contrast, Defendant's medical expert, Dr. Richard Kremer, testified that he believed Ms. Cutone's collarbone injury was related to her current medical problems.

After deliberating, the jury returned a verdict in favor of Ms. Cutone, but only for \$5,480. During trial, two of Ms. Cutone's treating medical physicians testified that her past medical bills of \$23,000 were caused by this accident. The only reasonable interpretation of the verdict is that the jury believed that Ms. Cutone's injuries were caused by her pre-existing collarbone injury.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1

The trial court erred when it denied Anne Cutone's motion in limine to exclude evidence of her 28 year old collarbone injury without any evidence of pre-existing symptoms since the time of the original injury in 1982.

(i) Issue Pertaining to Assignment of Error No. 1

Whether the trial court erred when it denied Anne Cutone's motion in limine to exclude any reference to her 1982 collarbone injury, given that Defendant offered no evidence of preexisting symptoms within a reasonable time of her automobile accident in November 2010.

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B. Assignment of Error No. 2.

The trial court erred when it admitted evidence of Ms. Cutone's 28 year old collarbone injury that was completely asymptomatic since the time of the original injury in approximately 1982.

(i) Issue Pertaining to Assignment of Error No. 2

Whether the trial court abused its discretion when it permitted the Defendant to introduce evidence of Ms. Cutone's collarbone injury from 1982 when there was absolutely no evidence that this injury was symptomatic for over 28 years.

(ii) Issue Pertaining to Assignment of Error No. 2

Whether the trial court's decision to allow evidence of a 28 year old injury was prejudicial and constitutes grounds for a new trial, given that Defendant's principal alternative medical explanation for Anne Cutone's ongoing medical problems was her 1982 collarbone injury.

III. STATEMENT OF THE CASE

A. Basic Facts of the Accident

This case arises out of a motor vehicle collision that occurred on November 22, 2010 at a Chevron gas station located in Bellevue, Washington. (RP 154-56). Plaintiff Anne Cutone was in a parked position,

waiting in her vehicle for an available gas pump. (Id.). Defendant Wai K. Law had just finished pumping gas into his vehicle. (Id.). The gas station was full and all pumps were in use. (Id.). There was a line of cars waiting to pump gas. (Id.).

Defendant Wai K. Law began backing his vehicle out of the gas pumping area at a high rate of speed. (RP 155, 157). He swung his vehicle outward, and forcefully struck the front of Ms. Cutone's vehicle. (RP 157). Ms. Cutone was in her vehicle, but was unable to move out of the way due to the line of cars. (Id.). Ms. Cutone braced herself in anticipation of the impact. (RP 155-56). Defendant admitted that he was negligent for causing the collision prior to trial.

B. Medical Facts

Following the accident, Anne Cutone contacted her primary care physician, Dr. Daniel Riegel, for his first available appointment. (RP 160-61). Because of her underlying medical conditions, she did not want to go to an emergency room or another provider for treatment until she could be seen by Dr. Riegel.¹ (RP 71-72). Dr. Riegel testified at trial as one of Anne Cutone's three treating medical physicians. (RP 58-149).

Ms. Cutone presented to Dr. Riegel on December 1, 2011, nine days following the collision, complaining of a gradual onset of pain since

¹ Anne Cutone has an underlying blood disorder that has not been fully diagnosed but is somewhat related to hemophilia.

the accident date which was now significant in her right neck, shoulder, low back with occasional radiation down her right arm and leg. (RP 64). Ms. Cutone did not see Dr. Riegel sooner because she travelled with her daughter to visit family over the Thanksgiving holiday. (RP 153-54). Dr. Riegel's assessment on December 1, 2010 was: Cervical strain; Trapezius sprain; and Lumbosacral sprain. (RP 67-68).

At the referral of Dr. Riegel, Anne Cutone began chiropractic and massage therapy treatment at Bellevue Wellness on January 11, 2011. (RP 161-62). Among her symptoms, Ms. Cutone experienced numbness and tingling in both of her arms. (RP 74-75).

On June 15, 2011 Ms. Cutone returned to Dr. Riegel. (RP 73). While she reported improvement with her ongoing chiropractic care and massage therapy, she had continued numbness and tingling in her arms and had increased pins-and-needles sensation. (RP 73-74). Dr. Riegel's assessment was neck pain and arm paresthesia, which was persistent and related to the accident. (Id.). During trial, Dr. Riegel testified that he was concerned Ms. Cutone might have Thoracic Outlet Syndrome but wanted her to be seen by a specialist in this field. (RP 117). As a result, Dr. Riegel referred Ms. Cutone to Andrew Lynch, D.O. to assess her thoracic outlet type symptoms. (RP 78-79). Dr. Lynch also testified at trial. (RP 319-69).

Dr. Lynch first started treating Anne Cutone on August 2, 2011.

(RP 323). Ms. Cutone returned to Dr. Lynch on May 10, 2012. At this time, Dr. Lynch referred Ms. Cutone to Mark Ombrellaro, M.D. for a vascular evaluation for thoracic outlet syndrome. (RP 327-28). Dr. Ombrellaro also testified at trial. (RP 252-318).

C. Procedural Background

This case was originally arbitrated on September 22, 2014 consistent with the King County Mandatory Arbitration Rules. On October 31, 2014, Defendant filed for trial de novo.

On May 4, 2015, Ms. Cutone filed her motions in limine. (CP 22-38). Among other motions, Ms. Cutone moved to exclude evidence that she suffered from pre-existing injuries that were not symptomatic within a reasonable period of time prior to the car accident of November 22, 2010. (CP 7-13). Defendant opposed Ms. Cutone's motions. (CP 64-125). In particular, Defendant argued that Ms. Cutone's collarbone injury that occurred in either 1981 or 1982 was admissible at trial in this case. (CP 65-68). Additionally, Defendant produced two expert reports and a declaration from its paid forensic medical expert, Dr. Richard Kremer. (CP 85-95, 96-102). In his sworn declaration, Dr. Kremer stated:

“I noted that plaintiff suffered a fractured clavicle in the 1981-82 automobile accident. The fractured clavicle resulted in structural change and fracture calcification, evident on my physical examination of the plaintiff. This condition, as well as an increase in plaintiff's weight, is more probably than not the cause of plaintiff's alleged thoracic outlet syndrome symptoms, due to intermittent partial obstruction of the right subclavian artery and/or the right subclavian vein.”

See CP 73.

According to Dr. Kremer's own report, Ms. Cutone was 5'6" tall and weighed approximately 168 lbs. at the time of her CR 35 examination on June 18, 2014. (CP 88). Dr. Kremer further noted in his report that Ms. Cutone weighed approximately 30 lbs. less in 2010. (CP 86). Ms. Cutone testified that she stopped exercising regularly after the accident occurred. (RP 169-70). Ms. Cutone was 50 years old at the time of the automobile accident in November 2010.

On the first day of trial, the trial court heard oral argument on the parties' motions in limine. (RP 1-46). In particular, the court heard argument pertaining to Ms. Cutone's motions to exclude evidence relating to her pre-existing conditions, including the collarbone issue. (RP 6-23). Counsel for Ms. Cutone specifically argued that Ms. Cutone's old collarbone injury was inadmissible under well-established Washington case law. (RP 9).

After hearing further argument, the trial court ruled that Ms. Cutone's 28 year old clavicle/collarbone injury was admissible during trial. (RP 23). The trial court ruled: "I'm going to allow counsel to question witnesses, expert witnesses about whether or not, and his own, about whether or not a prior injury such as a broken clavicle can cause this." (RP 23; see also RP 310-11).

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D. Trial Testimony About Anne Cutone's 1981-1982 Collarbone Injury.

Once the trial court ruled that Ms. Cutone's collarbone injury was admissible, counsel for Ms. Cutone had a strategic obligation to address the issue during trial. Consequently, Plaintiff's counsel asked Ms. Cutone about her collarbone injury:

Q. All right. So -- and then let me also ask you about did you ever have a collarbone injury?

A. Yes.

Q. And the collarbone injury was when?

A. 1980 something, one or two.

Q. How old were you?

A. 22 or 23.

Q. Did you ever have any problems with your collarbone injury after that point?

A. No. I forgot about it.

See RP 182. Ms. Cutone was also cross-examined about her collarbone injury by defense counsel, James Mendel. (RP 216, 229-30).

At trial, Ms. Cutone called three of her own treating physicians to testify as treating expert witnesses. Daniel Riegel, M.D., was Ms. Cutone's board certified primary care physician and he opined that Ms. Cutone suffered from thoracic outlet syndrome as a result of the November 2010 automobile accident. (RP 59, 89). Dr. Riegel referred Ms. Cutone for further consultation with Andrew Lynch, D.O., who is a board certified

rehabilitation and physical medicine physician. (RP 322-23). Dr. Lynch also testified at trial, via video perpetuation deposition, that Ms. Cutone's thoracic outlet syndrome was caused by the 2010 automobile accident. (RP 363-64).

After diagnosing Ms. Cutone with thoracic outlet syndrome, Dr. Lynch referred Ms. Cutone to Dr. Mark Ombrellaro for a surgical consultation. Dr. Ombrellaro is a board certified thoracic and vascular surgeon who specializes in thoracic outlet surgery. (RP 255-56). Dr. Ombrellaro also testified that Ms. Cutone's thoracic outlet syndrome was caused by the November 2010 automobile accident. (RP 268). In addition, Dr. Ombrellaro also recommended that Ms. Cutone undergo thoracic outlet decompression surgery. (RP 267).

It is important to note that Ms. Cutone never was diagnosed with thoracic outlet syndrome before this accident. (RP 159-60). Further, Dr. Ombrellaro and Dr. Lynch were both asked about Ms. Cutone's 28 year old collarbone injury. Both Dr. Ombrellaro and Dr. Lynch opined that Ms. Cutone's collarbone injury was unrelated to her current diagnosis of thoracic outlet syndrome. (RP 272-77, 282-83, 360-63).²

In contrast to Ms. Cutone's treating medical professionals, Defendant hired a forensic medical physician by the name of Richard Kremer, M.D. At trial, Dr. Kremer testified as follows:

² Dr. Riegel was not asked about Ms. Cutone's collarbone injury during trial.

- Q. Now, given your clinical examination did you notice something on plaintiff's clavicle?
- A. Yes, she had a -- an area on the right Clavicle between the mid and distal thirds.
- Q. Would you demonstrate where that is?
- A. Right here. Which is a -- which is a -- and I asked her if she had broken her clavicle and she said that she had. It was a -- an enlargement of the bone where the bone heals by forming a callous. In other words, it was sort of an exaggerated callous, if you will, that I felt on physical exam.
- Q. And after you felt that, did you then -- did you have a discussion with the plaintiff and it was only at that point that she remembered actually that happening in the '80s?
- A. Yes. That was my -- I asked her how it had happened and she then remembered that how it had happened.
- Q. Okay. And so once you felt that, what, did it ring in the bells for you, or what were your thoughts or your opinions as a result of hearing what her symptoms are and then feeling this prominence in her clavicle area?
- A. Well, I was concerned about that. Because in general in my experience, most patients with thoracic outlet syndrome do have an antecedent history of trauma in that area. And so I thought well, perhaps that was -- it had -- she had trauma that had occurred which would make the thoracic outlet a more viable possibility in her.

See RP 410-11.

In closing argument, counsel for Ms. Cutone asked the jury to award past and future economic damages in the form of medical expenses,

and past and future non-economic damages. Previously during trial, Dr. Riegel and Dr. Ombrellaro both testified that Ms. Cutone's past medical bills of \$23,000 were reasonable and necessary, and related to the car accident of November 2010. (RP 107, 272).

On July 21, 2015, the jury returned a verdict in favor of Anne Cutone on causation (CP 190). However, the jury provided very limited compensation as follows:

\$4,980.00	for past economic damages
\$0.00	for future economic damages
\$500.00	for past noneconomic damages
\$0.00	for future noneconomic damages

IV. ARGUMENT

A. Standard of Review

Under Washington law, the standard of review in this case is an abuse of discretion. Hoskins v. Reich, 142 Wn. App. 557, 566, 174 P.3d 1250, 1254 (2008). "A trial court makes a manifestly unreasonable decision when that decision is exercised on untenable grounds or based on untenable reasons." Id. (citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision

is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. Mayer, 156 Wn.2d at 684 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)) (internal quotations partially omitted). “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” Mayer, 156 Wn.2d at 684 (quoting Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

B. Ms. Cutone’s Twenty-Eight Year Old Collarbone Injury was Inadmissible under Black Letter Washington Law.

Washington’s appellate courts have repeatedly held that if there is no evidence that a pre-existing condition was causing pain or disability before the occurrence, then the lighting up of that pre-existing condition makes a defendant liable for all damages proximately caused to the person in that condition. There is no prior pain or disability to segregate. Bennett v. Messick, 76 Wn.2d 474, 457 P.2d 609 (1969); Greenwood v. Olympic, Inc., 51 Wn.2d 18, 315 P.2d 295 (1957); Reeder v. Sears, Roebuck & Co., 41 Wn.2d 550, 250 P.2d 518 (1952).

In Bennett, the plaintiff injured his ankle prior to the accident. The defense argued that a dormant arthritic condition caused such injury despite evidence that the earlier injury had healed and plaintiff suffered no pain or disability prior to the accident. The Court upheld a jury verdict in favor of plaintiff and held:

The rule is that when a latent condition itself does not cause pain, suffering, or a disability, but that condition plus an injury brings on pain or disability by aggravating the pre-existing condition and making it active, then the injury, and not the dormant condition, is the proximate cause of the pain and disability. Thus, the party at fault is held for the entire damage as the direct result of the accident.

Id. at 478; see also Xieng v. Peoples Nat'l Bank, 63 Wn. App. 572, 821 P.2d 520 (1991).

In this case, there was a complete absence of evidence that Plaintiff Anne Cutone had any symptoms related to her collarbone injury after 1982. If there is no evidence that a prior injury was symptomatic, evidence of that prior injury is inadmissible because it only invites the jury to speculate. Id.

In Vaughan v. Bartell Drug Co., 56 Wn.2d 162, 351 P.2d 925 (1960), there was evidence that a plaintiff had suffered an injury of the same type and in the same location as an injury previously suffered. Id. There was no evidence, however, that any previous injury was symptomatic at the time of the injuries forming the subject of the lawsuit. The court held that admission of prior injury evidence would be irrelevant and speculative, and ultimately ordered a new trial. Id. at 167.

The law has not changed in the fifty-five years since Vaughan. In Harris v. Drake, 116 Wn. App. 261, 288-89, 5 P.3d 350 (2003), the court held that evidence of injuries sustained 14 months prior to the injury complained of, and which had resolved 6 months before the complained of injury, were properly excluded. In excluding evidence of the previous

injury, the court stated:

Drake argues that the trial court erred by not permitting her to prove that in February 1995, about 14 months before the accident in issue here, Harris had complained of pain to a chiropractor. She did not call the chiropractor in her offer of proof, relying instead on testimony from Harris, Dr. Nacht, and Dr. Finkleman. Harris testified that he had seen the chiropractor for “mid and low back pain” that had subsided prior to the accident in issue here. Dr. Nacht testified that one of the chiropractor’s chart notes said, “left shoulder pain, MRI 2/24/95” that he had no idea what that means”; and that he did not know whether a MRI (magnetic resonance imaging) had been done at that time. Dr. Finkleman testified that in the six months prior to the accident, Harris had not suffered from “ongoing pain or discomfort” in his left shoulder. Dr. Finkleman also testified that after the accident, Harris suffered from an “impingement syndrome” of the left shoulder that “was directly related to the motor vehicle accident” and was not a preexisting condition. **There was no evidence that Harris was experiencing shoulder or back pain just prior to the accident, so that trial court sustained Harris’ relevance objection.**

We agree with the trial courts’ ruling. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition IS NOT A PROXIMATE CAUSE of the resulting damages. Even assuming that Harris had some sort of preexisting condition in his left shoulder, the only reasonable inference from Drake’s offer of proof was that such condition was dormant and asymptomatic prior to the accident.

Id. at 288-89 (emphasis added).

The exclusion by the trial court of evidence regarding previously resolved asymptomatic conditions was upheld on appeal by the

Washington Supreme Court:

[Harris's] surgeon testified that painters often have impingement syndrome problems caused by their profession. **However, there was no evidence of a shoulder problem prior to trial. Even allowing for the possibility of a preexisting condition, the defense failed to show that such a condition was symptomatic prior to the accident. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages.**

Harris v. Drake, 152 Wn.2d 480, 494, 99 P.3d 782 (2004) (citing Bennett v. Messick, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969)) (emphasis added); see also Hoskins v. Reich, 142 Wn. App. 557, 174 P.3d 1250 (2008), rev. denied, 164 Wn.2d 1014, 195 P.3d 88 (following Harris v. Drake, on this issue) (emphasis added).

Like the plaintiff in Harris v. Drake, Anne Cutone was asymptomatic after injuring her collarbone in 1981 or 1982. Permitting the Defendant to ask questions as to whether Ms. Cutone ever suffered from a prior collarbone injury invited the jury to speculate as to whether she merely aggravated a pre-existing condition when no evidence was ever offered to show she was symptomatic prior to the collision of November 22, 2010.

In Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), the Washington Supreme Court addressed why the introduction of such evidence would be improperly prejudicial to plaintiff in the context

of post-accident speculative evidence, which equally applies to pre-accident speculative evidence:

Sherman was involved in two rear-end collisions after his 1972 industrial accident. Dr. Bridgeford, Sherman's medical witness, testified that these accidents had no effect on Sherman's low back condition but may have resulted in some injury to his neck and upper back. Respondent's counsel asked Dr. Bridgeford and Dr. Monk, Sherman's other medical witness, whether automobile accidents or other trauma could also aggravate pre-existing low back condition.

Because no showing was made that Sherman's subsequent auto accidents had any effect on his disability, respondent's questions were misleading. **Such questions improperly suggested to the jury that there may have been a superseding cause of Sherman's condition although no proof of such a cause is in the record.**

Id. at 691-92 (emphasis added).

The Sherman logic applies equally in this case. As a result of the trial court's ruling on the collarbone issue, counsel for Ms. Cutone was forced to confront this issue from the trial's inception, including opening statement. Defense counsel questioned three medical expert witnesses throughout the trial in regards to the collarbone injury. Defense counsel also cross-examined Ms. Cutone extensively on her collarbone injury. And finally, defense counsel's principal explanation as to the cause of Ms. Cutone's ongoing medical problems was focused upon her collarbone injury that she suffered at 22 or 23 years old.

The Court manifestly abused its discretion by ignoring 55 years of Washington precedent. See e.g., Harris v. Drake, 152 Wn.2d 480, 494, 99 P.3d 782 (2004); see also Hoskins v. Reich, 142 Wn. App. 557, 174 P.3d 1250 (2008), rev. denied, 164 Wn.2d 1014, 195 P.3d 88 (following Harris v. Drake, on this issue). The only explanation the trial court provided to explain its decision to admit evidence of Ms. Cutone's 28 year old collarbone injury was the following: "I'm going to allow counsel to question witnesses, expert witnesses about whether or not, and his own, about whether or not a prior injury such as a broken clavicle can cause this." (RP 23). The Court's analysis and conclusion is untenable, insupportable, and unjust. Consequently, the trial court clearly abused its discretion.

C. The Trial Court's Abuse of Discretion was Prejudicial.

In Hoskins v. Reich, the Court of Appeals determined that the trial court abused its discretion by admitting into evidence the plaintiff's prior asymptomatic medical conditions. Hoskins v. Reich, 142 Wash. App. 557, 570-71, 174 P.3d 1250, 1256 (2008). In Hoskins, the Court further noted: "[W]e examine the record to determine whether the prejudice arising from the admission of such evidence requires a new trial." Id.

This case is distinguishable from Hoskins v. Reich. In this case, the focus of Defendant's entire defense was based upon finding some other explanation – some other cause – for Anne Cutone's ongoing medical

problems. The only other substantive medical cause that was proffered to explain Anne Cutone's ongoing medical problems was her collarbone injury in 1982 or 1982. The jury's findings, as shown in the special verdict form itself, offer a clear explanation to show that the jury found that Anne Cutone's ongoing medical symptoms were not caused by the automobile accident, but rather by her pre-existing collarbone injury. There is no other reasonable interpretation of the jury's verdict.

When "there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal and error will not be considered prejudicial unless it affects the outcome). "But improper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole." Hoskins v. Reich, 142 Wash. App. 557, 570-71, 174 P.3d 1250, 1256 (2008) (citing Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

In contrast to Hoskins, the evidence of Ms. Cutone's prior collarbone injury was not cumulative. Instead, evidence of her 1982 collarbone injury constituted the opposite of cumulative evidence, given that this evidence was diametrically different from the medical explanation advanced by Ms. Cutone's three treating medical physicians. The

collarbone evidence also cannot be characterized as evidence of “minor significance in reference to the evidence as a whole,” given that this medical explanation constituted Defendant’s principal medical hypothesis. See Hoskins, 142 Wash. App. at 570-71.

In short, Anne Cutone is entitled to a new trial because the trial court’s admission of the collarbone evidence was manifestly wrong and extremely prejudicial. This trial boiled down to a contest between two competing medical theories as to the source of Ms. Cutone’s ongoing medical problems: (1) the car accident of November 2010; versus (2) the collarbone injury of 1982. The inherent and innate problem with this contest is that the collarbone injury was completely and utterly inadmissible under Washington law. Plaintiff Anne Cutone is clearly entitled to a new trial.

V. CONCLUSION

For more than 50 years, the appellate courts of Washington have held that pre-existing injuries are inadmissible without evidence of recent symptoms. In this case, there is not a shred of evidence that Anne Cutone suffered pain, discomfort or symptoms of any kind related to her collarbone for 28 years prior to her automobile accident of November 2010. No interpretation or creative analysis can logically explain the trial court’s ruling in a manner that is consistent with Washington law.

Anne Cutone is entitled to a new trial because the introduction of her 28 year old collarbone injury was inherently prejudicial. The Defendant focused his defense upon Ms. Cutone's 1982 collarbone injury as an alternative explanation for causing Ms. Cutone's ongoing medical problems. The only appropriate remedy, under the law, is to remand this case for a new trial.

Respectfully submitted this 23rd day of February 2016.

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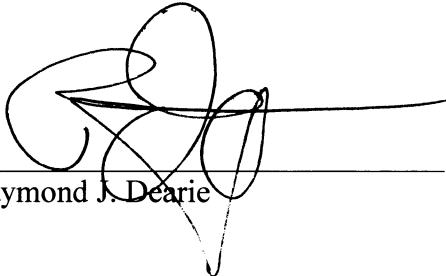
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 23rd day of February 2016 a true and correct copy of the foregoing *Appellant's Opening Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

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