

68943-6

68943-6

No. 68943-6

WASHINGTON COURT OF APPEALS
DIVISION ONE

**AIMEI CRETTOL and MARTIN CRETTOL, individually and the
Marital Community composed thereof**

Plaintiff / Appellant

v.

**FILBERTO GONZALEZ-REYES and JANE DOE GONZALEZ-
REYES individually and the marital COMMUNITY THEREOF**

Defendants / Respondents

OPENING BRIEF OF PLAINTIFF / APPELLANT

**F. Hunter MacDonald and John A Sterbick of
The Law Offices of John A. Sterbick, P.S.
Attorneys for Plaintiffs / Appellants AIMEI
CRETTOL and MARTIN CRETTOL,**

**1010 South I Street
Tacoma, WA 98401
Tel 253-383-0140
Fax 253-383-6352**

FILED
2009 OCT 23 AM 9:29
CLERK OF COURT
JAN 11 2010

TABLE OF CONTENTS

| | | Page(s) |
|-----------------------|---|----------------|
| Assignments of Error | | 1 |
| Issues Presented | | 1-2 |
| Statement of the Case | | 2 |
| | Background | 2 |
| | Uncontradicted Evidence of Damages | 3 |
| | The Defense Verdict | 4 |
| | Witness Steiner's Testimony Regarding the Accident | 4 |
| | Defendant Gonzalez-Reyes' Testimony Regarding the Accident | 6 |
| | Sending of Emergency Instructions to the Jury | 9 |
| | Gonzalez-Reyes' Testimony About His Leukemia | 10 |
| | Evidence and Testimony as to "Somatic Focus" Allegations and "Pain Behaviors" | 10 |
| | Overruling of Crettol's Objections Regarding "Somatic Focus" and "Pain Behaviors" Evidence and Testimony | 15 |
| | Relief Requested | 15 |
| Argument | | |
| | The New Trial Standard Has Been Met Because The Verdict Cannot Be Objectively Reconciled With The Evidence Entered at Trial | 15 |
| | | |

| | | |
|------------|---|----|
| | The Trial Court Erred in Issuing An Emergency Instruction to the Jury | 16 |
| | The Trial Court Erred in Allowing Defendant Gonzalez-Reyes to Testify Concerning His Now-Existing, But Legally Irrelevant, Leukemia | 20 |
| | The Trial Court Erred in Admitting Evidence of an Irrelevant and Unsubstantiated Condition Through the Allegations of a Non-Testifying Witness | 21 |
| Conclusion | | 28 |

TABLE OF AUTHORITIES

| | <u>Page Nos.</u> |
|--|------------------|
| <u>Washington Cases</u> | |
| <u>Berry v Coleman Sys Co</u> , 23 WnApp 622, rev denied, 92 Wn2d 1026 (1979) | 16 |
| <u>Bertsch v. Brewer</u> , 97 Wn 2d 83, 640 P2d 711 (1982) | 26-27 |
| <u>Brown v Spokane Fire Protection District</u> , 100 Wn2d 188, 668 P2d 571 (1983). | 16-17, 19-20 |
| <u>Easley v. Sea-Land Serv. Inc.</u> , 99 Wn App 459, 472, 994 P2d 271 (2000) | 15-16 |
| <u>Erwin v. Roundup Corp.</u> , 110 Wn App 308, 40 P3d 675 (2002). | 15-16 |
| <u>Getzendaner v United Pac Ins Co</u> , 52 Wn2d 61, 322 P2d 1089 (1958) | 16 |
| <u>Grays Harbor Ry and Light Co</u> , 115 Wn 217, 196 P 625 (1921) | 16 |
| <u>Harris v. Robert C. Groth, M.D., Inc.</u> , 99 Wn.2d 438, 663 P.2d 113 (1983) | 25-26 |

| | |
|---|------------|
| <u>Hayes v Wieber Enterprises</u> , 105 WnApp 611, 20 P3d 496 (2001) | 20 |
| <u>Ide v Stoltenow</u> , 47 Wn2d 847, 289 P2d 1007 (1955) | 16 |
| <u>Kirk v. WSU</u> , 109 Wn.2d 448, 746 P.2d 285 (1987) | 26-28 |
| <u>Mothershead v Adams</u> , 32 Wn App 325, 647 P2d 525 (1982), rev denied, 98 Wn2d 1001 | 14, 21, 25 |
| <u>Scobba v City of Seattle</u> , 31 Wn2d 685, 198 P2d 805 (1948) | 16 |
| <u>State v. Bromley</u> , 72 Wn2d 150, 432 P2d 568 (1967) | 26 |
| <u>State v Nation</u> , 110 WnApp 651, 41 P3d 1204, (2002) rev denied 148 Wn2d 1001, 60 P3d 1212 | 21-22 |
| <u>State v Phillips</u> , 123 WnApp 761, 98 P3d 838, rev denied 154 Wn2d 1014 | 22-24 |
| <u>State v Rivera</u> , 95 WnApp 132, 974 P2d 882 (1999), rev granted, cause remanded 139 Wn2d 1008, 989 P2d 1142, on remand 95 WnApp 132, 992 P2d 1033 | 20 |
| <u>State v Willis</u> , 151 Wn2d 255, 87 P3d 1164 (2004) | 24 |
| <u>Vaughan v. Bartell Drug Co.</u> , 56 Wn2d 162, 163, 351 P2d 925 (1960) | 26-27 |
| <u>Zook v. Baier</u> , 9 Wn. App. 708, 714, 514 P.2d 923 (1973) | 19-20 |
| <u>Washington Evidence Rules</u> | |
| ER 702 | 22-24 |
| ER 803(a)(4) | 22 |

ASSIGNMENTS OF ERROR

Appellants Crettol assign error to:

1. The defense verdict and judgment that the trial court entered in favor of Defendants Gonzalez-Reyes. (CP 102-105 and 643-44).
2. The trial court's issuance of emergency instructions to the jury.
3. The trial court's admission of testimony concerning Gonzalez-Reyes' unrelated leukemia.
4. The trial court's admission of evidence containing unfounded allegations that Plaintiff Amei Crettol had somatic focus and pain behaviors.

ISSUES PRESENTED

1. Whether the trial court erred in entering a defense verdict and judgment in favor of Defendant Gonzalez-Reyes?
2. Whether a defense verdict can be reconciled with the facts before the jury?
3. Whether the trial court erred in issuing emergency instructions to the jury when there were no facts before the jury which allowed emergency instructions?
4. Whether allowing Gonzalez-Reyes to elicit testimony from Gonzalez-Reyes regarding his current condition of leukemia was irrelevant, given that his condition is not related to any facts in issue and, inevitably, created sympathy, passion, and prejudice in favor of Gonzalez-Reyes?
5. Whether allowing Gonzalez-Reyes to admit testimony and evidence of unfounded allegations that Plaintiff Amei Crettol had somatic focus and pain behaviors created impermissible passion

and prejudice against Plaintiff Amei Crettol?

6. Whether the above-described errors and the issuance of a defense verdict require the Court of Appeals to grant Plaintiffs Crettol a new trial.

STATEMENT OF THE CASE

Background - This case arises from a car accident that took place between Aimei Crettol and Filberto Gonzalez-Reyes in Kent, Washington on February 25, 2008. A previously consolidated case for a separate motor vehicle accident, Crettol v Hicks, was resolved prior to trial.

It is undisputed that, prior to the accident, witness Michael Steiner, (“Steiner”), Plaintiff Aimei Crettol, (“Crettol”), and Defendant Gonzalez-Reyes, (“Gonzalez-Reyes”), were all in the same lane of travel and traveling in the same direction on 212th Street in Kent, Washington.¹ It is also undisputed that, before the accident, a piece of broken cement was in the path of the Steiner vehicle and become stuck under his car whereupon he slowly proceeded another 30 or 40 feet, then came to a stop in his original lane of travel. (Witness Steiner’s Testimony, infra). Neither Crettol, nor Gonzalez-Reyes, allege that Steiner was at fault for the accident, but all agree that he was the lead vehicle.

¹ Initially witness Steiner identified the accident site as Frager Road, (4/24/12 VRP of Steiner, p 6), then later 212th Street, (4/24/12 VRP of Steiner, p 7).

Crettol and her husband were the sole plaintiffs at trial and are seeking, on appeal, a reversal of the defense verdict entered in favor of Gonzalez-Reyes. The appeal is based on the trial court's erroneous issuance of an emergency instruction to the jury and the admission of certain prejudicial and irrelevant evidence at trial related to Gonzalez-Reyes' current condition of leukemia and the erroneous admission, from an unqualified and unsworn witness, of testimony that Amei Crettol failed to improve her post-accident conditions because of her "somatic focus" or the existence of a somatoform disorder.

There is no issue as to whether Crettol suffered damages following the accident. Both her treating physician, (Marvin Brooke, M.D.), and Gonzalez-Reyes' medical expert, (Allen Jackson, M.D.), testified that Crettol suffered damages which were proximately caused by the accident between Crettol and Gonzalez-Reyes. (See next paragraph). The medical testimony merely differed on the amount and extent of damages related to the accident. (See next paragraph).

Uncontradicted Evidence of Damages - Evidence of damages and causation was entered, in Crettol's favor, via the testimony of her treating psychologist, Martha Davis, Ph.D., her treating physician, Marvin Brooke, M.D., and Crettol's medical records and bills. CP 106-139, 140-637, and 638-640.

Martha Davis, Ph.D., testified that Crettol has a driving phobia caused, in part, by the Gonzalez-Reyes accident, and, in part, by an accident that occurred approximately 14 months before. (CP 117- 119 and 125-6). There was no contrary testimony concerning Crettol's psychological damages of driving phobia. As for medical damages and physical pain and suffering, Dr. Brooke's testimony appears at CP 140-637 which includes the medical records attached as exhibits to his perpetuation deposition and later admitted as trial exhibits 4-11, 13, 16, 18, and 20-22. (CP 639-40).

Gonzalez-Reyes' medical expert, Dr. Allen Jackson, related some of Crettol's medical treatment and bills to the accident, although to a lesser extent than Dr. Brooke.

The Defense Verdict - The defense verdict is contained within CP 102-105 and the judgment on the verdict is at CP 643-44.

Witness Steiner's Testimony Regarding the Accident – Michael Steiner identified Aimei Crettol and Filberto Gonzalez-Reyes as the persons involved in an accident he witnessed a little more than four years before the day he was called to the stand. (4/24/12 VRP of Steiner, pp 2-3). He identified the driver of the van that was following behind him that day as Aimei Crettol, ("Crettol"). (4/24/12 VRP of Steiner, pp 3-4).

Following the accident, Steiner had a brief conversation with

Crettol. (4/24/12 VRP of Steiner, p 13). Steiner described the Crettol van as a large van, "like a nine-passenger van." (4/24/12 VRP of Steiner, pp 5 and 12). He identified trial exhibit 15 as being the Crettol van. (4/24/12 VRP of Steiner, pp 5 and 15-16 and CP 639).

Steiner believes the accident occurred about 7:00 A.M. (4/24/12 VRP of Steiner, p 8). He confirmed that there were two lanes moving in his direction. (4/24/12 VRP of Steiner, pp 8-9). He was driving westbound, (4/24/12 VRP of Steiner, p 3), in the left-hand lane of the two westbound lanes. (4/24/12 VRP of Steiner, p 9).

Steiner noticed that a truck in front of him drove over what appeared to be a piece of a broken yellow roadway meridian in its path. (4/24/12 VRP of Steiner, p 3). Steiner looked to see if he could change lanes but he had a "semi" along the right side of his car, so the only thing he could do was "slow way down." (4/24/12 VRP of Steiner, p 3 and 16-17). Steiner ran over the meridian piece at slow speed and his car travelled another 30 to 40 feet before coming to a stop. (4/24/12 VRP of Steiner, p 19).

Steiner did not see how the meridian piece got in the road, but it was 6-8 inches tall and in an angled position that made it tall enough to become stuck under his car. (4/24/12 VRP of Steiner, p 9).

According to Steiner, "the piece got wedged under my car ... so I

had to stop my car at that point. The [Crettol] van behind me stopped, and I heard other sounds after that” which were like a collision. (4/24/12 VRP of Steiner, pp 3 and 6). Steiner’s car, though, was not impacted by the Crettol van or any other vehicle. (4/24/12 VRP of Steiner, pp 3 and 6).

Steiner estimated that less than a minute passed between the time he stopped his car and the time he heard the accident sounds, (4/24/12 VRP of Steiner, pp 11-12). He testified that it sounded like someone “locked up their brakes” before the accident. (4/24/12 VRP of Steiner, p 12). He believes his car was already stopped when he heard the impacts. (4/24/12 VRP of Steiner, pp 4 and 17-18).

After hearing the sounds of the accident, Steiner got out of his car and walked back to the accident scene. (4/24/12 VRP of Steiner, p 4). Steiner testified there were multiple cars behind the Crettol van and that Gonzalez-Reyes was the driver of the first car behind the Crettol van. (4/24/12 VRP of Steiner, pp 4-5). His visual observation indicated that Gonzalez-Reyes had run into the back of the Crettol van. (4/24/12 VRP of Steiner, p 5). This observation is confirmed by Gonzalez-Reyes’ testimony, infra.

Defendant Gonzalez-Reyes’ Testimony Regarding the Accident -

Defendant Filberto Gonzalez-Reyes, (“Gonzalez-Reyes”), testified, on 4/23/12, that he recalled the accident with Crettol. (4/23/12 VRP of

Gonzalez-Reyes, 3:13-18). He described driving down “212,” a roadway with two lanes proceeding in his direction and two lanes proceeding in a reverse direction. (4/23/12 VRP of Gonzalez-Reyes, 4:18 - 5:1 and 10:17-18). According to Gonzalez-Reyes, he was, like Steiner and Crettol, in the left-hand lane of the two lanes that were proceeding in his direction of travel. (4/23/12 VRP of Gonzalez-Reyes, 5:2-4 and 10:19-21).

Gonzalez-Reyes testified there was a red car in front of him, going the same direction and in the same lane of travel. (4/23/12 VRP of Gonzalez-Reyes, 4:5-17 - 5:5-9 and 10:22-23). Also, that Plaintiff Amei Crettol, (“Crettol”), was in a van in front of the red car. (4/23/12 VRP of Gonzalez-Reyes, 4:5-17 - 5:5-9).

Gonzalez-Reyes then testified there was no car between himself and Crettol when he hit her, (VRP of Gonzalez-Reyes, 5:19-21), because, prior to that, the red car between his car and Crettol’s van went into the right lane. (VRP of Gonzalez-Reyes, pp 5:22 - 6:23).

Gonzalez-Reyes testified that after the red car went “to the right side,” he (Gonzalez-Reyes) kept going and ran into Crettol. Id. Gonzalez-Reyes then testified that, other than the red car moving into the right lane, nothing else caused him to run into the back of Crettol’s van, except:

... when [Crettol’s] car was stopped, she didn’t put on the emergency lights ...

Q. Okay. Do you mean ... her brake lights, or do you mean her flashing emergency lights?

A. The emergency ones.

Q. The flashing lights?

A. Yes.

(4/23/12 VRP of Gonzalez-Reyes, 6:13-23).

...

Q. So the first time you saw [Crettol's] car it was stopped?

A. Yes.

Q. When that happened, did you try to stop?

A. Yes.

Q. What happened with your car when you put – when you applied the brakes?

A. Well, my car just hit a little bit, because in that road there is a ramp and she was a little lower.

(4/23/12 VRP of Gonzalez-Reyes, 11:3-13).

Gonzalez-Reyes, elsewhere, clarified that he ran into Crettol

because he failed to brake in time:

... I was behind a red car, not too close ... the car that was in front of mine could see the lady [Crettol] that was stopped. But he go to one side, and I couldn't see, and I tried, but I couldn't do it as fast as I should have ... I couldn't see it and I stopped, but it wasn't as fast as it should have been, (4/23/12 VRP of Gonzalez-Reyes 4:6-16) ... the car that was in front of me go to one side.

And because of that, I couldn't avoid the accident with [Crettol]. (VRP of Gonzalez-Reyes, 5:5-9).

According to Gonzalez-Reyes, his car was damaged, he could not move his car after the accident, and he needed to call a tow truck to take it out of the street. (4/23/12 VRP of Gonzalez-Reyes, 9:2-11).

Sending of Emergency Instruction to the Jury – The trial court sent two instructions to the jury over Crettol's objections. (4/26/12 VRP of Colloquy, p 2). Specifically, Crettol objected and took exception to "instructions 12 and 15, to the extent they refer to the emergency rule." (CP's 87 and 90 and 4/26/12 VRP of Colloquy, p 2).

Instruction No. 12, (CP 87), included the following emergency language:

"It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, in the absence of an emergency. The driver of the following vehicle is not necessarily excused even in the event of any emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions." (CP 87).

Instruction No. 15, (CP 90), included the following emergency language:

"A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed

in such a position might make, is not negligent even though it is not the wisest choice.” (CP 90).

Gonzalez-Reyes Testimony About His Leukemia – The first question posed by Gonzalez-Reyes’ counsel in this case, over Crettol’s relevance objection, was an inquiry about Gonzalez-Reyes’ leukemia. (4/23/12 VRP of Gonzalez-Reyes, 9:19-24).

Q. Filberto, it’s obvious you walk with a limp now. Can you tell us what’s going on with your health right now?

Mr. MacDonald: Objection, relevance.

The Court: Overruled.

A. It was about the treatment I had for leukemia.

The trial court allowed this testimony to come in. (4/23/12 VRP of Gonzalez-Reyes, 9:22 –24).

Evidence and Testimony as to “Somatic Focus” Allegations and “Pain Behaviors”– During *in limine* motions, the trial court reserved ruling on the issues of: (1) the admissibility of any physician’s opinions regarding other witnesses’ credibility and (2) whether adequate foundation was present for any expert opinions that either party intended to offer. CP 9.

Crettol received treatment at Capen Occupational Therapy. (Exhibit 11 – CP 639). Her treatment provider there was an occupational

therapist, (id), but the Capen therapy is referred to as “physical therapy” in treating physician, Dr. Marvin Brooke’s, perpetuation deposition and in the oral arguments of both counsel during colloquy. (4/25/12 VRP of Colloquy).

The Capen “Work Conditioning Physical Therapy Discharge” record of 4/30/09 states that Crettol completed 22 visits, without any cancellations or no-shows, and “made good progress overall, however, has been limited in her own somatic focus and overall fear to progress.” (Exhibit 11 – CP 639).

A separate Capen “Work Conditioning Discharge Report Occupational Therapy” record of 4/30/09 states, in the “Assessment” section, that: “The client demonstrates significant somatic focus and self-limiting pain behaviors ... It is likely the client could make further treatment gains, however, outcomes may be guarded due to client’s significant somatic focus and perceptions of disability.” (Exhibit 11 – CP 639).

Prior to offering the testimony of her treating physician, (CP 140-260), and her Capen therapy records, (trial exhibit 11 – CP 639), Crettol moved to exclude certain portions of the Capen therapy records and certain parts of Gonzalez-Reyes’ examination of Dr. Brooke concerning “somatic focus” and “pain behavior” allegations in the Capen records.

(CP 56-66 and 4/25/12 VRP of Colloquy, 3:19 – 4:15).

Gonzalez-Reyes' counsel, in colloquy, conceded that nobody at Capen was diagnosing Crettol for purposes of treatment of somatic focus and pain behaviors, or saying that she had somatic focus or pain behaviors, but argued those portions of the Capen records were still admissible.

(4/25/12 VRP of Colloquy, 5:21 – 6:2).

In the colloquy, Gonzalez-Reyes' went on to erroneously state that Dr. Brooke said Crettol had "progressed overall well, but she could have done better ... except for her focus on her somatic symptoms and pain behaviors." (4/25/12 VRP of Colloquy, 5:21-25). Dr. Brooke never stated that or testified in that manner.

Crettol objected to Gonzalez-Reyes' direct examination of Dr. Brooke concerning these two terms and the portions of Exhibit 11, (CP 639), that referred to them. (CP 56-66 and CP 229:24 – 235:8).

No expert witnesses called by either party, including Dr. Brooke, ever testified that Crettol suffered from the condition alluded to in the Capen records, i.e. somatic focus, or "pain behaviors." (Defined in next paragraph).

Dr. Brooke defined "somatic focus" as behaviors that are in some way connected with pain but aren't necessarily connected with any finding or, alternatively, as subjective complaints without correlating objective

findings. (CP 233:4-17). He testified that the definition of “pain behaviors” is “similar.” (CP 233:4-17).

In response to questioning, Dr. Brooke agreed with Gonzalez-Reyes’ counsel that when the above terms are “in reports that way, it’s a sign of poor prognosis,” but also stated that “if they’re used as simple terms like that out of context, they aren’t helpful.” (CP 234:11-22). Dr. Brooke denied that he believed Crettol had somatization risks or pain behavior risks, despite the allegations in the Capen therapy records. (CP 229:24 - 235:8, esp. 235:4-8).

Gonzalez-Reyes’ medical expert, (Allen Jackson, M.D.), did not testify, nor was he examined upon, the “somatic focus” or “pain behavior” allegations in the Capen records or his own opinions, if any, concerning somatic focus or pain behaviors by Crettol.

The Court: Okay. So let me clarify ... [to Gonzalez-Reyes’ counsel] ... do you have a doctor that says or an expert that says [Crettol] has behavioral disorder or somatoform disorder or some kind of somatoform behavior?

Ms. Canifax: No. I guess the simple question – answer to that is no. (4/25/12 VRP of Colloquy, 5:7-13).

Crettol objected to publishing the portion of Gonzalez-Reyes’ examination of Dr. Brooke where Gonzalez-Reyes asked Dr. Brooke if the Capen therapy records allege that: “[Crettol] made good progress overall,

however, has been limited by her own somatic focus and overall fear to progress.” (CP 230:10-20). Crettol also objected to a series of follow-up questions regarding somatic focus and pain behaviors. (CP 230:21 - 235:8). There could not, of course, be any ruling from the trial court during the perpetuation deposition, so Dr. Brooke answered the questions as posed. (CP 229:24 - 235:8).

Crettol filed a written motion to exclude portions of the Capen records and the testimony of Dr. Brooke. (CP 56-66, esp 57-59). Oral argument, in colloquy, was heard. (4/25/12 VRP of Colloquy, pp 2-8). The written motion includes a Mothershead objection, foundation objection, ER 702 objection, and hearsay objection. (CP 56-66, esp 57-59). The trial court acknowledged Crettol’s written motion and heard oral argument on foundation, ER 702, and hearsay objections. (4/25/12 VRP of Colloquy, pp 2-8).

Crettol’s oral argument included the following: “... given that Ms. Crettol is not at ... Capen Industrial Rehabilitation for psychological treatment, the statements and opinions of the doctor [occupational therapist]² are not an exception under the hearsay rule.” (4/25/12 VRP of

² Crettol’s counsel meant to say “occupational therapist,” not “doctor,” given that an occupational therapist, not a doctor, actually attended Crettol at Capen and it is clear in Crettol’s written motion to exclude, and in the trial court colloquy, that Crettol is referring to the Capen occupational

Colloquy, 7:21 – 8:8).

Overruling of Crettol’s Objections Regarding “Somatic Focus” and “Pain Behaviors” Evidence and Testimony - Crettol’s motion to exclude the portions of the Capen records and examination of Dr. Brooke concerning “somatic focus” and “pain behaviors,” (CP 56-66), was denied by the trial court. (4/25/12 VRP of Colloquy, 7:1-11).

Exhibit 11, (CP 639), and the objected-to portion of the perpetuation deposition, (CP 229:24 – 235:8), were published to the jury. (See 4/25/12 VRP of Colloquy, pp 7-8).

Relief Requested - The Court should, upon remanding this case for new trial, reverse the trial court’s decisions to: (1) issue emergency instructions to the jury, (2) admit testimony concerning Gonzalez-Reyes’ leukemia, and (3) admit the somatic focus and pain behavior references in Exhibit 11 and the testimony of Marvin Brook, M.D.

ARGUMENT

A. **THE NEW TRIAL STANDARD HAS BEEN MET BECAUSE THE VERDICT CANNOT BE OBJECTIVELY RECONCILED WITH THE EVIDENCE ENTERED AT TRIAL**

If a verdict cannot be objectively reconciled with the evidence, it is

therapy records. (CP 56-66 and 4/25/12 VRP of Colloquy 3:19 - 4:15 and 7:21 - 8:8).

incumbent upon the Court of Appeals to order a new trial because uncertainty as to the basis for a verdict is fatal to the verdict and requires remand. Easley v. Sea-Land Serv. Inc., 99 Wn App 459, 472, 994 P2d 271 (2000) and Erwin v. Roundup Corp., 110 Wn App 308, 317, 40 P3d 675 (2002). Likewise, a new trial may be granted where damages awarded were clearly inadequate. Ide v Stoltenow, 47 Wn2d 847, 850-51 (1955).³ It is not enough for a party opposing a new trial to simply argue that the jury could have disbelieved all of the plaintiff's evidence because, carried to its logical conclusion, a new trial could never be granted. Ide at 850-51.

The jury verdict in the above-captioned case cannot be reconciled with the evidence because all evidence entered in the case showed Gonzalez-Reyes was at fault, his acts were a proximate cause of Crettol's damages, and Crettol had damages.

B. THE TRIAL COURT ERRED IN ISSUING AN EMERGENCY INSTRUCTION TO THE JURY

In Brown v Spokane Fire Protection District, the counterclaim plaintiff, a Mr. Holmes, requested an emergency instruction to attempt to

³ See also Grays Harbor Ry and Light Co, 115 Wn 217 (1921), Scobba v City of Seattle, 31 Wn2d 685 (1948), Getzendaner v United Pac Ins Co, 52 Wn2d 61 (1958), and Berry v Coleman Sys Co, 23 WnApp 622, rev denied, 92 Wn2d 1026 (1979)

excuse his own negligence in running into a fire truck. Id., 100 Wn2d 188, 197-8, 668 P2d 571 (1983).

Holmes testified his injuries were created when he chose to swerve to the right and deliver a glancing blow to the fire truck, rather than hitting the fire truck straight on, after unexpectedly encountering the fire truck in an intersection. Brown at 197-8. The Brown court ruled that an emergency instruction was “properly refused” for Mr. Holmes, even though Mr. Holmes made a choice to swerve, in an emergency situation, to avoid a head-on impact. Id at 197-8. Brown did not find Holmes’ choice of *how to crash* into the fire truck fulfilled the emergency doctrine’s requirement that the choice be one that is made on *how to avoid* an accident, even during a bona fide emergency situation. Id at 197-8.

the sudden emergency presented to Mr. Holmes [in Brown] ... afforded him no alternative courses of action. He reacted instinctively by swerving to strike the fire engine a glancing blow rather than proceeding forward to strike the fire engine squarely. Since there were no alternative courses of action available to Mr. Holmes other than to strike the fire engine, the emergency doctrine was inapplicable. Brown at 197-8.

In the above-captioned case, the trial court was required to, likewise, refuse an emergency instruction to Gonzalez-Reyes because Gonzalez-Reyes never testified that he even made a choice, poor or otherwise, in an attempt to avoid an accident. He simply testified he did

not have time to stop before hitting the rear-end of Crettol's van.

(Gonzalez-Reyes' Testimony, supra).

The exculpatory value of Gonzalez-Reyes' testimony is nil. He testified that, previously, a red car had been between him and Crettol, so at least a car length existed in which to stop. (Gonzalez-Reyes' Testimony, supra). In addition, the lead vehicle driver, Steiner, testified that, after having the median piece lodged under his car:

(1) Steiner proceeded very slowly for 30 to 40 feet before stopping

and

(2) the Crettol van stopped safely far enough behind him that she never impacted Steiner, even after Gonzalez ran into Crettol.

Therefore, Gonzalez-Reyes was not even facing a situation where he was compelled to make a quick stop. In other words, he did not confront an emergency of any kind. Crettol, on the other hand, stopped in plenty of time to avoid Steiner, while Steiner, by his testimony, was slowing down.

There is no credible evidence that Gonzalez-Reyes could not have stopped in time if he was following at a safe distance. An emergency, if it existed, was caused by Gonzalez-Reyes when he ran into the back of Crettol.

Gonzalez-Reyes testimony, at best, puts him in a much weaker position than that of Mr. Holmes from the Brown case. More importantly, though, Brown cites and follows a prior case, Zook, which is explicit about **not** issuing an emergency instruction for someone in Gonzalez-Reyes' circumstances for two reasons:

(1) Gonzalez-Reyes did not make a choice between courses of action in an attempt to avoid an accident which is a requirement under Brown at 197-8, supra, and Zook at 714, infra,

and

(2) simply not having time to stop does not invoke the emergency doctrine. See Brown at 197-8, citing Zook, below:

As the Court of Appeals in Zook v. Baier ..., explained:

The doctrine excuses an unfortunate human choice of action that ... the party was suddenly faced with [in] a situation which gave him no time to reflect upon which choice was the best. [But] [w]hen, as here, there were not alternatives available[,] but only an instant of time on a slippery [*198] road for a single instinctive reaction, an emergency doctrine instruction was doubly improper. Zook v. Baier, 9 Wn. App. 708, 714, 514 P.2d 923 (1973).

The sudden choice between swerving or proceeding straight into another vehicle did not garner an emergency instruction in Brown and braking quickly, but not in time, when hitting a slippery patch of road, did not garner an emergency instruction in Zook.

Gonzalez-Reyes did not make any choice, let alone a choice that could have reasonably been an attempt to avoid an accident. The failure to make a choice absolutely bars an emergency instruction under Zook and Brown.

The emergency instruction is not available to Gonzalez-Reyes. He simply ran into Crettol and, as explained by Zook, supra, applying one's brakes too late or without effect is not a "choice" that is designed to avoid an accident. An emergency instruction was clearly erroneous.

C. **THE TRIAL COURT ERRED IN ALLOWING DEFENDANT GONZALEZ-REYES TO TESTIFY CONCERNING HIS NOW-EXISTING, BUT LEGALLY IRRELEVANT, LEUKEMIA**

Evidence may be unfairly prejudicial if it is dragged in for the sake of its prejudicial effect or is likely to trigger an emotional response, rather than a rational decision, among the jurors. Hayes v Wieber Enterprises, Inc., 105 Wn App 611, 617-18, 20 P3d 496 (2001). Evidence that is likely to elicit an emotional response, rather than a rational decision, is unfairly prejudicial, and thus inadmissible. State v Rivera, 95 WnApp 132, 137, 974 P2d 882, (1999), rev granted, cause remanded 139 Wn2d 1008, 989 P2d 1142, on remand 95 WnApp 132, 992 P2d 1033.

Gonzalez-Reyes made no counterclaims or cross-claims for injury in the above-captioned case. His physical condition at time of trial clearly

was irrelevant. Drawing attention to his leukemia was clearly impermissible in such a circumstance. The Court of Appeals should reverse the trial court's ruling allowing evidence of Gonzalez-Reyes leukemia to be admitted.

D. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF AN IRRELEVANT and UNSUBSTANTIATED CONDITION THROUGH THE ALLEGATIONS OF A NON-TESTIFYING WITNESS

- 1. The trial court abused its discretion by admitting allegations from a non-testifying party that “somatic focus” and “pain behaviors” by Crettol impaired her recovery because such evidence was hearsay irrelevant, prejudicial, lacked foundation, and violated the Mothershead rule.**

There are a number of reasons why the somatic focus / pain behaviors' line of questioning should have been excluded. First, and foremost, Gonzalez-Reyes was attempting to use the treating physician, Dr. Brooke, as its own expert, which is prohibited under Mothershead. See Mothershead v Adams, 32 Wn App 325, 331-32, 647 P2d 525 (1982), rev denied, 98 Wn2d 1001. Gonzalez-Reyes' own expert, Allen Jackson, M.D., was not even questioned about “somatic focus,” the Capen Records, or “pain behaviors.”

The second prohibition on admitting any questions and answers on pain behaviors and somatic focus is that Dr. Brooke denied that, even after reviewing the Capen records, there were sufficient findings therein to

make a somatic focus or pain behavior diagnosis. See State v Nation, 110 WnApp 651, 661-667, 41 P3d 1204 (2002), rev denied 148 Wn2d 1001, 60 P3d 1212.

The third prohibition, which Dr. Brooke inadvertently refers to in his testimony, is that ER 702 requires a showing that the person purporting to issue a non-lay opinion must be an **expert** in the relevant field and describe his or her reasoning. State v Phillips, 123 WnApp 761, 765-66, 98 P3d 838, rev denied 154 Wn2d 1014. No evidence is in the record as to the Capen therapist's expertise or his/her reasoning for his allegations and his conclusions were rejected by Dr. Brooke. As a result, they were clearly inadmissible.

Ironically, then, a scurrilous allegation that remains unwelcome in the houses of both medical experts was allowed to enter the jury room without benefit of the cross-examination of its maker. This is simply not allowable under Washington's evidence rules. (See argument below).

2. The somatic focus and pain behavior allegations cannot be admitted through the hearsay exception for medical records

There is a hearsay exception, under ER 803(a)(4), for statements made for purposes of diagnosis or treatment and, if reasonably pertinent to diagnosis or treatment, other statements, e.g, those describing medical history, past or present symptoms, and pain or sensations. Nevertheless,

the admissibility of any testimony on a scientific or technical issue, including those contained within the records of a professional, can only be entered by “a witness qualified as an expert by knowledge, skill, experience, training, or education.” ER 702. This is a threshold requirement under Frye, not an afterthought. Phillips, supra, at 765.

Dr. Brooke, himself, stated that the opinion of the Capen therapist was not something he could rely upon and that he, himself, did not believe Crettol had somatization or pain behavior. In fact, his testimony goes on to state, inadvertently and in scientific terms, the basis for ER 702.

Dr. Brooke, in essence, testified that an opinion issued in a vacuum by another treating professional might be something to look at, but it does not rise to the level of a fact or diagnosis in the absence of a lot more information. See his testimony at CP 233-35 below.

Q. Have you ever diagnosed anyone with pain behavior?

A. I usually don't just use that phrase. I usually add a lot more information.

Q. Would it be important for you as a treating physician to know whether one of the ancillary modality providers believed that there was somatic focus or pain behaviors in your patient?

A. It would be helpful to know that's what they felt, yes.

Q. And why would that be?

- A. Well, then I could correlate that with my own impression and look for other supporting or conflicting information and other factors that may or may not explain what was observed.
- Q. Isn't pain behaviors and somatization, aren't those some signs of a poor prognosis?
- A. In general when they're in reports that way, it's a sign of a poor prognosis.
- Q. Meaning that it's not likely that any treatment is going to help the person recover because the focus isn't necessarily physiological in terms of muscle damage, correct?
- A. Well, I'd have to say no and yes. **I think if they're used as simple terms like that out of context, they aren't helpful. I think if it's in context, as I've intimated with other information – it is important.** (CP 233-34).
- ...
- Q. **Did you believe [Aimei Crettol] had these somatization risks or pain behavior risks?**
- A. **Oh no.** I felt that there was obvious anxiety and other issues that needed to be evaluated and treated in conjunction with her other treatment. (CP 235).

The whole purpose of ER 702 is to provide a threshold or gate before this type of testimony can be entered. Phillips, supra, and State v Willis, 151 Wn2d 255, 262, 87 P3d 1164 (2004). There is no evidence, though, that the Capen therapist composing the Capen therapy records has, or that even Dr. Brooke has, enough information and specialized knowledge to diagnose, or issue opinions on “somatic focus” or “pain behaviors” by Crettol. In fact, Gonzalez-Reyes’ counsel conceded, in

argument, that no one at Capen was diagnosing Crettol for purposes of treatment of somatic focus or pain behaviors or, curiously, “saying she has that.” (4/25/12 VRP of Colloquy, 5:21 - 6:2). Therefore, any pretense that the somatic focus or pain behavior references in Exhibit 11, (CP 639), could be excepted from the hearsay rule as being statements “for purposes of diagnosis or treatment” should not even be considered.

In addition, there is no information in the Capen records, (Exhibit 11 – CP 639), that even states **why** the Capen therapist believes somatic focus or pain behaviors have been demonstrated by Crettol.

Finally, even if Dr. Brooke had enough information and the proper psychological training and Mothershead allowed him to testify regarding the above conditions, he testified in the negative. The somatic focus and pain behavior references and testimony, therefore, are completely irrelevant. As such, the testimony admitted on these issues, through Dr. Brooke or Exhibit 11, presented misleading evidence to the jury. It had no place in Crettol’s trial and should have been excluded because its basis was not explained. See Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983). (“Medical facts in particular must be proven by expert testimony unless they are “observable by [a layperson’s] senses and describable without medical training.”)

The prejudice in admitting such allegations of the non-testifying

occupational therapist is apparent and plain because the jury instructions issued in the above-captioned case direct the jury to consider “all evidence,” (CP 74, paras 2-4) and “the reasonableness of the witnesses’ statements in the context of all of the other evidence.” (CP 75). As a result, the jury is compelled to conclude that the references within, and to, the Capen records must be considered.

2. Any argument that expert foundational testimony “on a more-probable-than-not” is not necessary for admitting evidence of an alternative cause for a litigated injury is flat wrong.

In order to make the relevance link for admission of the non-testifying occupational therapist’s allegation, an expert would need to testify, on a more-probable-than-not basis, to a connection between the condition and an issue in litigation. See Kirk v. WSU, 109 Wn.2d 448, 462, 746 P.2d 285 (1987). See also Bertsch v. Brewer, 97 Wn 2d 83, 640 P2d 711 (1982), Vaughan v. Bartell Drug Co., 56 Wn2d 162, 163, 351 P2d 925 (1960), State v. Bromley, 72 Wn2d 150, 151-3, 432 P2d 568 (1967), and Harris v. Robert C. Groth, preceding section, *supra*. This clearly did not happen in the above-captioned case.

3. The error was prejudicial because admitting allegations of unrelated conditions is presumptively prejudicial.

Presumptive prejudice is present when a connection to other injuries is suggested, without proof, because the suggestion that other

injuries are present “inject[s] into the case an issue on which there [is] no evidence.” Vaughan v. Bartell Drug Co., 56 Wn.2d 162, 163, 351 P.2d 925 (1960). (it was prejudicial error to instruct a jury to segregate a plaintiff’s pre-existing injuries, even though no evidence had been entered that there were any pre-existing injuries, even if the instruction “might have been harmless.”) Vaughan at 164.

Likewise, in Bertsch v. Brewer, the Washington Supreme Court ruled that admission of a psychological personality profile of the plaintiff/patient was prejudicial error in a medical malpractice case. In its decision, the Washington Supreme Court stated that: “To assume that the jurors could relate the [psychological] description of Bertsch solely to the issue of damages, even if a limiting instruction had been given, is naive and unrealistic. The admission of such a personality profile into evidence constituted prejudicial error, necessitating a new trial. Bertsch at 88.

Finally, in Kirk v. WSU, 109 Wn.2d 448, 462, 746 P.2d 285 (1987), a “possible” relationship between plaintiff Kirk’s prior abortions and her asserted damages of depression was prejudicial in the absence of foundational evidence, on a more probable than not basis, that the two events were related. Id. at 462-63. As a result, the trial court’s exclusion of evidence concerning Kirk’s prior abortions was affirmed, even though

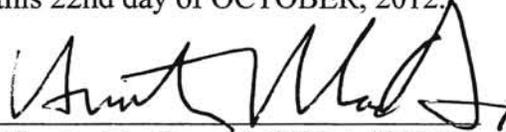
those procedures were “possibly” a factor in making a damage determination. *Kirk* at 462-63.

CONCLUSION

This Court must remand this case for a new trial so that Crettol may be compensated for her damages and, upon remand, reverse the trial court’s decisions to:

- (1) issue emergency instructions to the jury,
- (2) admit testimony concerning Gonzalez-Reyes’ leukemia,
and
- (3) admit the somatic focus and pain behavior references previously complained of.

Respectfully submitted this 22nd day of OCTOBER, 2012.



F. Hunter MacDonald, WSBA #22857
Attorney for Plaintiff/Appellant CRETOL