

NO. 71955-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

PAULA TERRELL, an individual,

Respondent,

vs.

GORDON HAMILTON, an individual,

Appellant.

---

APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Mary I. Yu, Judge

2011 OCT -6 AM 9:44  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
10

---

BRIEF OF APPELLANT

---

Address:  
Financial Center  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1087  
(206) 292-4900

REED McCLURE  
By Michael N. Budelsky WSBA #35212  
Attorneys for Appellant

524 Tacoma Avenue South  
Tacoma, WA 98402-5416  
(253) 383-4704

KRILICH, LAPORTE, WEST &  
LOCKNER, P.S.  
By Richard Lockner WSBA #19664  
Attorneys for Appellant

## TABLE OF CONTENTS

	Page
<b>I. NATURE OF THE CASE.....</b>	<b>1</b>
<b>II. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>III. ISSUES PRESENTED.....</b>	<b>2</b>
<b>IV. STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>A. BACKGROUND ON THE ACCIDENT .....</b>	<b>2</b>
<b>B. REFERENCES TO INSURANCE DURING VOIR DIRE .....</b>	<b>3</b>
<b>C. THE TRIAL COURT IMPROPERLY INSTRUCTED THE         JURY THAT TERRELL HAD TO SUE HAMILTON TO         ACCESS INSURANCE .....</b>	<b>5</b>
<b>D. LIABILITY ISSUES AND JURY INSTRUCTIONS.....</b>	<b>9</b>
<b>E. JURY VERDICT AND POST-TRIAL MOTIONS.....</b>	<b>10</b>
<b>V. ARGUMENT.....</b>	<b>11</b>
<b>A. STANDARD OF REVIEW.....</b>	<b>11</b>
<b>B. THE TRIAL COURT IMPROPERLY INJECTED         INSURANCE INTO THE CASE .....</b>	<b>13</b>
<b>1. Evidence of Liability Insurance Is            Prejudicial to a Defendant and Not            Admissible at Trial.....</b>	<b>13</b>
<b>2. The Trial Court's Instruction on            Insurance Was Error.....</b>	<b>14</b>
<b>3. The Instruction Is Exploited and            Reinforced Throughout the Trial.....</b>	<b>15</b>
<b>4. The Trial Court Erred in Not Ordering a            New Trial .....</b>	<b>18</b>

5.	Hamilton Was Prejudiced by the Instruction .....	20
C.	THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE <i>RICKERT</i> CASE.....	22
1.	Hamilton Was Entitled to an Instruction Per the <i>Rickert</i> Case .....	22
2.	Hamilton Was Prejudiced by the Court’s Failure to Give the Instruction .....	25
D.	THE TRIAL COURT FAILED TO GRANT A NEW TRIAL.....	26
1.	Hamilton Was Entitled to a New Trial or Remittitur .....	26
2.	The Court’s Erroneous and Prejudicial Instructions to the Jury Warranted a New Trial.....	27
3.	The Jury Award of General Damages Was Excessive.....	28
VI.	CONCLUSION .....	30
APPENDIX A		
Court’s Instruction to the Jury (RP 247)		
APPENDIX B		
Proposed Instruction (CP 105)		

## TABLE OF AUTHORITIES

### Washington Cases

	<b>Page</b>
<i>Boeing Co. v. Harker-Lott</i> , 93 Wn. App. 181, 968 P.2d 14 (1998), <i>rev. denied</i> , 137 Wn.2d 1034 (1999) .....	12
<i>Bunch v. King County Dept. of Youth Services</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	12
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 108, 864 P.2d 937 (1994).....	22
<i>Carle v. Earth Stove, Inc.</i> , 35 Wn. App. 904, 670 P.2d 1086 (1983) .....	13
<i>Cresap v. Pac. Inland Navigation Co.</i> , 78 Wn.2d 563, 478 P.2d 223 (1970).....	22
<i>Intalco Aluminum Corp. v. Dep't of labor &amp; Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992), <i>rev. denied</i> , 120 Wn.2d 1031 (1993).....	11
<i>Izett v. Walker</i> , 67 Wn.2d 903, 410 P.2d 802 (1966).....	22
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	11
<i>Lyster v. Metzger</i> , 68 Wn.2d 216, 412 P.2d 340 (1966).....	13
<i>Moore v. Smith</i> , 89 Wn.2d 932, 578 P.2d 26 (1978) .....	12
<i>Morris v. Nowotny</i> , 68 Wn.2d 670, 415 P.2d 4 (1966).....	27
<i>Rickert v. Geppert</i> , 64 Wn.2d 350, 391 P.2d 964 (1964).....	1, 2, 10, 22, 23, 24, 28, 30
<i>Rowe v. Safeway Stores</i> , 14 Wn.2d 363, 128 P.2d 293 (1942).....	22
<i>Ryan v. Westgard</i> , 12 Wn. App. 500, 530 P.2d 687 (1975).....	29

<i>Skeels v. Davidson</i> , 18 Wn.2d 358, 139 P.2d 301 (1943), <i>overruled in part on other grounds by Lockhart v. Besel</i> , 71 Wn.2d 112, 426 P.2d 605 (1967).....	27, 29
<i>Sommer v. Department of Social and Health Services</i> , 104 Wn. App. 160, 15 P.3d 664, <i>rev. denied</i> , 144 Wn.2d 1007 (2001).....	27
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997) .....	12
<i>State v. Buzzell</i> , 148 Wn. App. 592, 200 P.3d 287 (2009).....	22
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	11
<i>State v. Jackson</i> , 83 Wash. 514, 145 P. 470 (1915).....	21
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996) .....	12
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	11, 25
<i>Thompson v. King Feed &amp; Nutrition Serv., Inc.</i> , 153 Wn.2d 447, 105 P.3d 378 (2005).....	11
<i>Tuttle v. Allstate Ins. Co.</i> , 134 Wn. App. 120, 138 P.3d 1107 (2006).....	22
<i>Williams v. Hofer</i> , 30 Wn.2d 253, 265, 191 P.2d 306 (1948) .....	13

**Statutes**

RCW 4.76.030 .....	26
--------------------	----

**Rules and Regulations**

CR 59(a).....	26
CR 59(a)(1).....	26
CR 59(a)(5).....	26
CR 59(a)(7).....	26
CR 59(a)(8).....	26
CR 59(a)(9).....	26

ER 411 .....13

**Other Authorities**

WPI 2.13 .....6, 8, 19, 21

Tegland, 5A WASHINGTON PRACTICE, *Evidence*, § 411, p. 102).....13

067824.099415/488329

## I. NATURE OF THE CASE

This appeal stems from a case involving a one-car accident in which an injured passenger sued the driver, who was also her domestic partner. First, the trial court improperly instructed the jury that the passenger had to sue the driver to access available insurance. The court also failed to give a necessary jury instruction on skidding and negligence. After trial, the court denied defendant's motion for a new trial or remittitur. These errors warrant a new trial.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred by instructing the jury about the existence of insurance and plaintiff accessing the insurance through the lawsuit. (RP 247)

2. The trial court erred by failing to instruct the jury about skidding and negligence in accordance with the case of *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964). (RP 1248, 1267)

3. The trial court erred in entering judgment for plaintiff. (CP 527-28)

4. The trial court erred in failing to order remittitur or a new trial. (CP 598-99)

Challenged and proposed instructions are in the Appendix hereto or quoted verbatim herein.

### **III. ISSUES PRESENTED**

1. Did the trial court make a reversible error when it instructed the jury that defendant was insured and the only way plaintiff could access the insurance was through the lawsuit? (Pertaining to Assignment of Error No. 1)

2. Did the trial court make a reversible error in failing to instruct the jury about skidding and negligence pursuant to the *Rickert* case? (Pertaining to Assignment of Error No. 2)

3. Did the trial court make a reversible error in denying defendant's motion for remittitur or a new trial where: 1) the court improperly instructed the jury about insurance; 2) the court failed to properly instruct the jury on skidding; 3) the jury award was so excessive as to unmistakably indicate the result of passion or prejudice; and 4) substantial justice was not done? (Pertaining to Assignments of Error Nos. 1-4)

### **IV. STATEMENT OF THE CASE**

#### **A. BACKGROUND ON THE ACCIDENT.**

Driver Gordon Hamilton and passenger Paula Terrell were involved in a single-car accident on December 14, 2008. (CP 2) Hamilton lost control of his vehicle, left the roadway, travelled down an embankment, and hit a tree. (CP 2) Terrell sued Hamilton for her

injuries. (CP 1-4) Terrell and Hamilton had been in a relationship since approximately 2003, and they entered into a domestic partnership after the accident. (RP 291, 318)

**B. REFERENCES TO INSURANCE DURING VOIR DIRE.**

Hamilton's liability insurance was an issue throughout the litigation process and especially at trial. One of Terrell's motions in limine sought to preclude testimony related to a potential change in insurance rates or premiums. (CP 237) That motion was not opposed by Hamilton and was granted by the court. (CP 277, 285; RP 63) Another of Terrell's motions in limine sought to exclude argument that the accident was unavoidable. (CP 234). Terrell's counsel explained that she specifically sought to exclude a statement Terrell made to her insurance representative about skidding on black ice; Terrell later testified at her deposition that she had lied to the insurance representative about the nature of the accident. (RP 47-48; CP 400-02) The court denied Terrell's motion. (CP 284) The court noted that if defense counsel inquired about the statement, plaintiff's counsel could question Terrell about it being a statement to an insurance company representative. (RP 56-57)

Hamilton also filed a motion in limine related to references to insurance. Hamilton sought to prevent reference to "the fact that the defendant's defense costs and any possible judgment is paid for through

insurance coverage.” (CP 191) The trial court granted that motion. (RP 72-73; CP 285) Indeed, the court commented that “in general, insurance is not relevant other than in the way that we’ve already described that would permit it.” (RP 73)

The issue of insurance then arose several times during voir dire. During voir dire questioning by Terrell’s counsel, members of the jury discussed personal experiences with insurance companies paying for injuries from car accidents. (RP 160-61, 164, 180-81) Terrell’s counsel then asked the jury pool if anyone had “a problem with a wife suing her husband for his negligent act.” (RP 182) One potential juror responded that he/she did not have a problem with it, but he/she was not sure “how it would be pursued.” (RP 183) Another potential juror referenced the “emotional investment in a case like that.” (RP 183) Plaintiff’s counsel followed up with those two jurors and asked them if it was okay for a spouse to seek compensation for her damages and what they would do if they could not pay. (RP 183) Neither potential juror expressed concerns with that scenario. (RP 183-84)

Terrell’s counsel then asked the potential jurors whether they felt that she, as an attorney, had “an absolute obligation and a duty to do as my client requests in representing her best interests.” (RP 184) Terrell’s counsel asked whether the defense attorney should be held to the same

standard, “that he should do what’s best for his clients as well.” (RP 185) Then, Terrell’s counsel inquired whether everyone agreed that attorneys should talk to their clients and only take steps “that our clients are in agreement with those actions and those steps.” (RP 185) There were no recorded responses to this colloquy.

During his voir dire and following up on the questioning by Terrell’s counsel, Hamilton’s counsel asked the jury pool whether they felt it was important to know whether or not there is insurance available. (RP 205; CP 551) One juror expressed concern about knowing whether a person’s insurance would be able to cover the medical bills. (RP 205) Hamilton’s counsel followed up by asking whether the existence of insurance should affect the jurors’ decision-making process. (RP 206) One juror responded “[p]robably not,” and another said “I guess I’m not sure. I guess depending on the situation.” (RP 206-07) The parties selected a jury without issue. (RP 212)

**C. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT TERRELL HAD TO SUE HAMILTON TO ACCESS INSURANCE.**

After the conclusion of voir dire, and outside the presence of the newly-selected jury, the court addressed counsel about a concern:

Counsel, let me have a discussion with you, and the question is a general one and that is just because in voir dire issues came up that I have a concern. And because it’s not going to be explained to them.

Why wasn't the real party in interest substituted in in terms of the insurance company?

MR. LOCKNER: The real party in interest is Mr. Hamilton. This is not an underinsured claim, Your Honor, this is a third party claim.

THE COURT: Okay. All right. And, I mean, the real reason why is this gap of information that's floating out there now of why would somebody sue a spouse, or why somebody sues a domestic partner, or why somebody sues a significant other, that somehow is very, one, misleading and really presents a real question that I have some concerns about in terms of how it is that people are going to try to address this.

...

THE COURT: Yeah. What I'm thinking, given my prior rulings, which I'm not changing.

MS. SARGENT: Right.

THE COURT: Is some sort of advance instruction that puts it out there but tells them still, that in terms of determining damages it really doesn't come into play. But what I want them to know is that that's real, I mean, that's just a fact here, because there's got to be a way that this doesn't get out of control if I don't.

And that's why I'm looking at an initial instruction from the very get-go that recognizes that's a fact and yet instructs them later when they make a determination, they need to make a determination based on the evidence, not just because somebody is insured.

(RP 219-21) (emphasis added). Defense counsel suggested the standard WPI instruction that the jury was not to consider the existence of insurance. (RP 221-22) The court responded:

Yeah, well, I would give an instruction, the standard one. That's really almost a second point. The primary point I'm making is the fact that she is in this litigation with her significant other is because of insurance....

(RP 222) (emphasis added). Defense counsel reiterated that it was not an underinsured claim (in which the insurance company would be a party), but was "a case of A versus B." (RP 223) The trial court persisted:

Well, that's not all that clear. Using the language you and I use doesn't make it clear for 12 people, who are saying, "I don't understand this, because if you're a community, why are you suing yourself and it's a community? It doesn't make sense." And it was never resolved and never addressed.

(RP 223) (emphasis added) The court instructed counsel to come up with a proposed instruction. (RP 224)

But no, it's not – I'm trying to craft this in a way that advises them that there is a third party payor in this situation and that she is having to sue this individual – and I'm not using this language and I would not use that to instruct the jury, but that she is having to litigate this question because that is the only way that we are able to do this, or that's the only way that it's done.

And then a second instruction with the fact that there is a third party payor does not come into play and cannot come into play, it's the standard WPIC. And that's one that goes to damages.

I have had marital communities have to sue each other in the past, but I haven't had it come up in jury selection in such a way that it leaves this jury thoroughly confused about the issue.

(RP 225-26) (emphasis added).

Defense counsel objected to the instruction for the record. (RP 237) The court again addressed its purpose in seeking this instruction, “to put this issue aside of her having to litigate against Mr. Hamilton.” (RP 240) The court noted that the instruction did not open the door to inquiry on insurance other than what was decided in limine motions. (RP 240) Plaintiff’s counsel was specifically instructed that she could not elicit insurance information from Hamilton on direct examination. (RP 244)

In response to the court’s directive, Hamilton submitted a proposed instruction based on WPI 2.13. (CP 311) Terrell submitted a proposed instruction referring to the insurance company as a “third party,” and the court indicated that Terrell’s submission was more in line with what it sought. (CP 556, 558) At the beginning of trial, the court instructed the jury as follows:

As you heard in jury selection, Ms. Paula Terrell and Mr. Gordon Hamilton, the plaintiff and the defendant, are domestic partners. There was some discussion about litigating against your own marital community. Because your sole focus will be the factual issues that this court gives to you for consideration, I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case. The fact that there is insurance shall not be considered in any way in the way that you view the facts and shall not be considered in any award of damages if any are awarded.

(RP 247) (emphasis added).

**D. LIABILITY ISSUES AND JURY INSTRUCTIONS.**

During trial, Terrell testified that on the day of the accident it was snowing, the roads were wet, and Hamilton's car slipped and crashed off the road. (RP 1110, 1115, 1152) In the statement to her insurance company, Terrell indicated that Hamilton was going well below the speed limit, but at her deposition she indicated he was speeding. (RP 1111) At trial, she testified that Hamilton was "probably going below the speed limit" but that he was going faster than other cars. (RP 1111) Terrell admitted to purposely typing up a statement to the insurance company that was false. (RP 1158; CP 400-01)

At trial, Terrell indicated that she did not know whether the accident was due to "black ice." (RP 1180) Hamilton did not recall how the accident occurred. (RP 296) He did remember that Terrell said to him after the fact that "[w]e hit black ice." (RP 321) Terrell's medical records also reference "black ice." Terrell's physical therapist, Mr. McGavin, recorded in a chart note that Terrell was riding in a car that hit black ice and slid into a tree. (RP 401) Terrell also told Dr. Pepin, her primary care doctor, that her car lost control because of ice and slid into a tree. (RP 395) Terrell told Dr. Meinhofer, her chiropractor, that the road conditions were wet because it was snowing. (RP 1030)

Hamilton requested that the court include a jury instruction based on *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964), as follows: “The mere skidding of a pickup truck, alone, is not evidence of negligence.” (CP 105) In denying the requested instruction, the Court drew a distinction between “skidding” on ice (as in *Rickert*) and “sliding” on ice (as in this case). (RP 1253-55) The court did give the jury an instruction that: “Every person has a duty to see what would be seen by a person exercising ordinary care.” (RP 1267; CP 421)

**E. JURY VERDICT AND POST-TRIAL MOTIONS.**

On March 6, 2014, the jury returned a verdict in favor of Terrell and awarded her \$1,454,500.00 in damages as follows: \$60,000.00 for past health care expenses; \$172,000.00 for future health care expenses; \$6,500.00 for wage loss; \$2,000.00 for non-medical expenses; and \$1,214,000.00 for past and future non-economic damages. (CP 407-08) The Court entered judgment in the amount of \$1,455,201.49 (which also included \$501.49 in costs and statutory attorney fees) on April 14, 2014. (CP 527-28)

Hamilton moved for remittitur or a new trial. (CP 533-62) The court denied the motion, and specifically addressed the insurance instruction as follows:

The Ct. instructed the jury after Defense counsel raised the issue in jury selection and insisting on impeaching the Plaintiff with a statement to the insurance claim adjuster. The issue of insurance remained central to the case and the only way to address the question was through an instruction.

(CP 598-99) (emphasis in original). Hamilton filed a timely notice of appeal. (CP 600-05)

## V. ARGUMENT

### A. STANDARD OF REVIEW.

Jury instructions are reviewed de novo by an appellate court. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). An incorrect or misleading jury instruction will be cause for reversal if there is prejudice. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). An error is prejudicial if it affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). “In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety.” *Intalco Aluminum Corp. v. Dep’t of labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992), *rev. denied*, 120 Wn.2d 1031 (1993). The court reviews a challenged jury instruction de novo within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

The trial court's decision whether to give a particular, proper instruction to the jury is reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Refusal to give a particular instruction is an abuse of discretion if the decision was manifestly unreasonable or if the decision was based on untenable grounds. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998), *rev. denied*, 137 Wn.2d 1034 (1999).

In this case, the trial court's refusal to give the requested instruction on skidding and negligence is reviewed for an abuse of discretion. However, the decision to give the jury an instruction informing it that the only way plaintiff could collect insurance was to sue her domestic partner is reviewed *de novo*. That instruction was incorrect or misleading and constituted an error of law.

The Court of Appeals reviews a denial of remittitur for an abuse of discretion. *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 178, 116 P.3d 381 (2005). Similarly, abuse of discretion is generally the standard of review for an order denying a motion for new trial. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). In this case, the trial court abused its discretion by

failing to order remittitur or a new trial after the jury made an excessive award due to trial irregularities.

**B. THE TRIAL COURT IMPROPERLY INJECTED INSURANCE INTO THE CASE.**

**1. Evidence of Liability Insurance Is Prejudicial to a Defendant and Not Admissible at Trial.**

Washington courts have consistently held that evidence regarding liability insurance is not admissible at trial:

It is undoubtedly the general rule in this state, in personal injury cases, that the fact that the defendant carries liability insurance is entirely immaterial on the main issue of liability, and that the wanton intrusion of such fact by the plaintiff is positive error, essentially prejudicial to the defendant, and constitutes ground for reversal.

*Lyster v. Metzger*, 68 Wn.2d 216, 223-24, 412 P.2d 340 (1966) (emphasis added), quoting *Williams v. Hofer*, 30 Wn.2d 253, 265, 191 P.2d 306 (1948); see also Tegland, 5A WASHINGTON PRACTICE, *Evidence*, § 411, p. 102. Likewise, ER 411 states that evidence of insurance is not admissible at trial: “Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” ER 411. There has been a “long-standing rule that reference to insurance coverage during a trial of the type involved here [personal injury] is impermissible.” *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 906, 670 P.2d 1086 (1983).

## **2. The Trial Court's Instruction on Insurance Was Error.**

The court's decision to inform the jury that Hamilton had insurance was erroneous in its own right. Moreover, the particular language and implications of the instruction irrevocably tainted the trial proceedings and ultimately resulted in the excessive award. The court instructed the jury, "I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case." (RP 247) First, the court openly informed the jury that Hamilton had insurance coverage that applied to this accident. Further, the court apprized the jury that the purpose for the lawsuit was to allow Terrell to collect insurance money from Hamilton's insurance policy. Moreover, the instruction presumed that Terrell was entitled to the insurance money and that a lawsuit was the only way to collect. The instruction also implied that the insurance company was in some way reticent about paying what was owed to Terrell (thus forcing her to bring the lawsuit to "access" it. Ultimately, the court's instruction implied that the insurance company's actions were responsible for forcing Terrell into the unenviable position of having to bring a lawsuit against her domestic partner.

The instruction colored the entire trial proceedings. After the jury was so instructed, the case ceased to be about one individual suing another individual for negligent driving and causing her injuries, and it became

instead a case about the failure of Hamilton's insurance company to pay Terrell.<sup>1</sup> The injection of the insurance into this case demonstrates the very harm that Washington case law and rules of evidence seek to prevent. The trial court at least recognized this danger at one point when it initially excluded evidence of insurance by granting defendant's motion in limine. (RP 73; CP 285)

**3. The Instruction Is Exploited and Reinforced Throughout the Trial.**

The court's instruction on insurance did not go unnoticed, and it was further exploited by Terrell. Terrell's counsel made the issue of insurance a significant tactical point throughout trial. (CP 552) Essentially, Terrell set up Hamilton's insurance company as the defendant, and attacked this case as if it were a bad faith case directly against the insurance company. (CP 553)

On several occasions, Terrell's counsel sought to drive a wedge between defense counsel and Hamilton with the implication that defense counsel was solely aligned with Hamilton's insurance company. In voir dire, Terrell's counsel challenged the jurors to think about whether defense counsel had "an absolute obligation and a duty to do as [his] client

---

<sup>1</sup> Even the trial court demonstrated its confusion regarding the parties and the nature of the case: "Why wasn't the real party in interest substituted in in terms of the insurance company?" (RP 220)

requests.” (RP 184-85) Terrell’s counsel reinforced this notion during opening statements when she stated that Hamilton’s “attorney, on his behalf, has denied liability for this incident” (driving a wedge between Hamilton and his counsel). (RP 259)

When examining Hamilton, Terrell’s counsel inquired whether defense counsel had asked Hamilton if he wanted to hire experts. (RP 289) Hamilton testified that his lawyer had not asked him whether he wanted to hire experts in defense of the case. (RP 289) She asked Hamilton whether he spoke to any of those experts. (RP 290) He had not. (RP 290) She asked Hamilton whether he even wanted to be at trial. (RP 290) Hamilton testified that he did not want to be there at all, and he did not want the case to come to court. (RP 290-91) This line of questioning further exploited the fact that Terrell had to sue Hamilton in order to access the insurance money. When taken in the context of Terrell’s voir dire and opening statements, the implication of these questions was that defense counsel and the insurance company were steering the defense against Hamilton’s wishes.

On cross-examination of defense expert Russell Vandebelt, M.D., Terrell’s counsel asked him numerous questions about whether he knew or had met Hamilton. (RP 616-17) “Okay. And so you’re assuming that you were working on behalf of Mr. Hamilton and you’ve never met him.”

(RP 617) Defense counsel later objected to this conduct, and expressed his concern that such questioning raises “a clear inference that the insurance company has, you know, engaged in this.” (RP 687) The trial court agreed, and it instructed Terrell’s counsel for future witnesses as follows:

I’m going to allow you to ask the question of whether or not you interviewed Mr. Hamilton rather than – I do think there is an inference, and I think it’s a ---

MS. SARGENT: Okay.

THE COURT: -- strong inference that suggests otherwise.

(RP 6 88) (emphasis added).

During closing arguments, Terrell again sought to drive a wedge between Hamilton and his attorney.

What you have to determine here, the first is whether Gordon Hamilton is liable for this collision.

Well, he said he was. I know his attorney says he isn’t, but he said he was; that he was driving the vehicle.

(RP 1275) (emphasis added). Terrell’s counsel continued:

He [defense counsel] hired doctors without Mr. Hamilton’s knowledge or approval. He failed to complete discovery requests, and none of the doctors had any time to talk with Mr. Hamilton about the injuries that he know that his partner has sustained.

(RP 1324) (emphasis added). Terrell’s counsel also reminded the jury about the insurance instruction one last time. (RP 1292)

In addition, Hamilton's counsel observed Terrell's counsel instructing Hamilton at trial to sit with or near plaintiff's counsel table and at all times when the jury entered or exited the room. (CP 552) This had the effect of siding Terrell and Hamilton with one another and against defense counsel and the insurance company. On another occasion, the trial court admonished Terrell's attorneys about making audible comments and nodding or shaking their heads during Terrell's cross-examination. (RP 1163)

**4. The Trial Court Erred in Not Ordering a New Trial.**

In its order denying the motion for new trial, the trial court justified the insurance instruction by indicating that Hamilton's attorney had raised the issue during jury selection, and insisted on impeaching Terrell with a statement to the insurance adjuster. (CP 598) This is not accurate. First, the issue of insurance was originally raised in jury selection during voir dire conducted by Terrell's counsel. (RP 160, 161, 164, 180) Hamilton's counsel had no choice but to also address the issue of insurance, as that issue had already been explored by Terrell's counsel. (RP 205-07: CP 552)

Second, the trial court's explanation is logically unsound. If there was a problem with insurance discussions during voir dire, the standard Washington instruction informing the jurors not to consider the existence

of insurance during their deliberations (WPI 2.13) would have been sufficient. There was no reason for the court to affirmatively tell the jurors that Hamilton was insured and the only way for Terrell to access the insurance money was to bring this lawsuit. (RP 247) In addition, although Hamilton's counsel had indicated that he might seek to impeach Terrell with the statement to the insurance company, that had not been done, and it would have been a tactical decision as trial progressed. Indeed, Terrell was the last witness to testify. (RP 1220) Plaintiff's counsel was the first to ask Terrell about the statement to her insurance company during direct examination. (RP 1106) The decision of whether to open the door belonged with defense counsel, and defense counsel should have been permitted to introduce the issue if and when he deemed appropriate. However, that decision was made for him once the court instructed the jury at the outset of trial.

Third, neither party raised concerns during voir dire that questioning about domestic partners was misleading or that the potential jurors were in any way confused. The court raised this issue completely on its own. (RP 219) In fact, the record of voir dire does not reflect any such jury confusion requiring a radical and prejudicial instruction. (RP 182-84)

Finally, throughout the discussions of whether the instruction was necessary and what form it would take, the court consistently stated that the reason for the instruction was due to potential juror confusion about “why would somebody sue a spouse, or why somebody sues a domestic partner.” (RP 220, 223, 225-26) After the court decided on the language of the instruction, it commented that instruction “does achieve the purpose that I want, and that is to put this issue aside of her having to litigate against Mr. Hamilton.” (RP 240) Contrary to the court’s explanation in its order denying a new trial, the instruction was not related to insurance brought up by Hamilton’s counsel (or even Terrell’s counsel), but as a direct result of the court’s belief that the jurors were confused about a spouse suing a spouse. (CP 598) The trial court’s explanation in its order is refuted by its own comments throughout the process in an attempt to justify the prejudicial instruction.

#### **5. Hamilton Was Prejudiced by the Instruction.**

Although the court stated that the instruction was intended to resolve perceived juror confusion, it had the prejudicial consequence of turning Hamilton’s insurance company into the defendant. (RP 235-36) As discussed below, the prejudicial effects were ultimately manifested in the jury’s outrageous award (particularly the general damages award).

The parties were forced to address the issue in opening and closing statements and adjust tactics throughout the trial. (CP 552)

The instruction likely took additional weight with the jury because it was one of the first instructions from the court at the start of trial. Once the nature of insurance and the purported reason for the lawsuit were explained to the jury in this case, that bell could not be “unrung” by further limiting instructions. Certainly, this situation is different than one in which a vague or passing reference to insurance coverage was made by counsel or a witness. Rather, in this case, it was the court that specifically instructed the jury that insurance existed and that Terrell had to sue Hamilton to access it.<sup>2</sup>

The trial court did instruct the jury that it should not consider the existence of insurance in determining damages on two occasions. (RP 247, 1272) However, the subsequent WPI 2.13 instructions were ineffectual, or at the very least confused the jury about how to factor insurance into their deliberations. (RP 247; CP 429, Instruction No. 16) The prejudice to Hamilton colored the entire trial and affected the outcome. Once the jurors were told that Terrell had to sue Hamilton to get

---

<sup>2</sup> Jurors understand that the lawyers are partisans in a case, but they will attach importance to comments and instructions by the judge. *See State v. Jackson*, 83 Wash. 514, 523, 145 P. 470 (1915).

at the insurance money, the nature of the case changed dramatically. Terrell's counsel reminded the jury repeatedly, and defense counsel was forced to adjust tactics to meet the harm head-on.

**C. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE RICKERT CASE.**

**1. Hamilton Was Entitled to an Instruction Per the Rickert Case.**

A party is generally entitled to a particular instruction when there is evidence to support it. *See State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287 (2009). Washington courts have granted new trials in cases in which properly worded and relevant instructions were not given to the jury. *See Rowe v. Safeway Stores*, 14 Wn.2d 363, 128 P.2d 293 (1942); *Cresap v. Pac. Inland Navigation Co.*, 78 Wn.2d 563, 478 P.2d 223 (1970); *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966). If the evidence is conflicting, then the court should give the instruction. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006). Any matters of credibility and weight should be reserved for the jury. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

In *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964), the Washington Supreme Court upheld a jury instruction which stated that the mere skidding of an automobile, alone, is not evidence of negligence. If an automobile skids on slippery pavement, it does not automatically

follow that the driver created an unreasonable risk of harm to others. *Id.*

The *Rickert* Court noted further:

Respondent's awareness or lack of awareness of icy conditions on the roadway would be a factor for the jury to consider in determining what should be the conduct of a reasonably prudent man under similar circumstances, but it does not amount to negligence as a matter of law, as appellant suggests.

*Id.* In the end, the *Rickert* Court reasoned that the instruction was properly given because it "is a correct statement of the law and is applicable to the present case." *Id.*

In the case before this Court, Hamilton's automobile slid on an unseen icy patch while driving in snowy conditions and on wet pavement. (RP 1115-16, 1152) The facts of the case align closely with those in *Rickert*, where the car skidded on an unseen icy patch of road in foggy conditions. 64 Wn.2d at 351-52. There is no relevant difference between the "skidding" in *Rickert* and the "sliding" in this case. Specifically, the jury should have received the requested instruction that the fact that sliding occurred, by itself, was not enough to establish Hamilton's negligence. The exclusion of the requested instruction is problematic due to the inclusion of an instruction that a driver must see what a reasonable person would see (Instruction No. 10). (RP 1267; CP 421) By its very nature, black ice is not something that can be seen.

The instruction requested by Hamilton was a correct statement of the law. (CP 105) It was particularly applicable and necessary to this case, due to the facts weighing on the issue of liability. The evidence in the case about exactly how the accident occurred necessitated that this instruction be given to the jury. Without the instruction, the defense was unable to fairly argue its liability theory of the case, namely that not seeing the black ice and merely skidding on a road does not automatically result in the conclusion that the driver was negligent. Without the instruction, the jury was left only to conclude that regardless of what caused Hamilton's car to skid, the fact that it skidded off the road and into a tree was necessarily a result of his negligence. It was an abuse of the trial court's discretion not to provide the jury with the requested instruction.

The black ice theory is rooted in the element of breach of duty. (CP 607-12) No person, whether acting reasonably or not, can see black ice, but the jury was instructed that every person has a duty to "see what would be seen" by a person exercising ordinary care. (RP 1267) With only this instruction, the jury was left to believe that a driver confronted with black ice has a duty to see it. The combination of the black ice, lack of clarity by the parties as to how the accident occurred, and the other jury instructions necessitated the requested *Rickert* instruction.

**2. Hamilton Was Prejudiced by the Court's Failure to Give the Instruction.**

The failure to include this instruction was necessarily prejudicial to Hamilton. The jury determined that Hamilton was solely negligent. (CP 407) Particularly when taking the instructions as a whole, the prejudice is patent because it affected the outcome of the case. *Thomas v. French*, 99 Wn.2d at 104. The only instructions on negligence informed the jurors that ordinary care was what a reasonably careful person would do under similar circumstances, and that every person has a duty to “see what would be seen” by a person exercising ordinary care. (RP 1267) The jury was never instructed that “mere skidding” is not necessarily evidence of negligence, and thus left to conclude that the fact that Hamilton lost control of the vehicle (regardless of the circumstances) meant that he was negligent. A key legal instruction to help the jury determine the factual puzzle was missing. Had the jurors been instructed on this point (especially considering the evidence of black ice and the lack of clarity about how the accident actually occurred), it is possible that the jury would have delivered a defense verdict. At the least, defense counsel was prevented from making the argument to the jury during closing arguments.

**D. THE TRIAL COURT FAILED TO GRANT A NEW TRIAL.**

**1. Hamilton Was Entitled to a New Trial or Remittitur.**

A trial court has discretion to vacate a verdict and grant a new trial in instances in which certain events materially affected the substantial rights of the parties. CR 59(a). In this case, Hamilton was entitled to a new trial due to erroneous court rulings, an error in law objected to by the defense, damages that were so excessive that they unmistakably indicate that the verdict was the result of passion or prejudice, and a lack of substantial justice. CR 59(a)(1), (5), (7), (8) and (9). Moreover, RCW 4.76.030 provides for the alternative remedy of remittitur as follows:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

Based on the errors or irregularities in this case, Hamilton was entitled to a new trial, or in the alternative, the granting of remittitur. (CP 533-47)

A new trial is properly granted where no evidence or reasonable inference from the evidence would sustain the verdict. *Sommer v. Department of Social and Health Services*, 104 Wn. App. 160, 172, 15 P.3d 664, rev. denied, 144 Wn.2d 1007 (2001). A reversible irregularity can exist where the comments or actions of the trial court have an unintended effect on the jury to the prejudice of a party. See, e.g., *Morris v. Nowotny*, 68 Wn.2d 670, 415 P.2d 4 (1966). A new trial may also be granted where the verdict so grossly exceeds a just award that passion or prejudice must be presumed. *Skeels v. Davidson*, 18 Wn.2d 358, 374-75, 139 P.2d 301 (1943), overruled in part on other grounds by *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

**2. The Court's Erroneous and Prejudicial Instructions to the Jury Warranted a New Trial.**

First and foremost, Hamilton was entitled to a new trial based on the prejudice caused at the outset of trial by the court's instruction to the jury about Terrell suing to access the available insurance. The court informed the jury at the very start of trial that Hamilton had insurance and suing him was the only way for Terrell to collect it. The instruction inferred that the insurance company should have paid Terrell, but did not, forcing her to

sue her domestic partner. Terrell's counsel seized on this idea that the insurance company was the true party in interest and repeatedly sought to drive a wedge between Hamilton and his counsel (and the insurance company) throughout the trial.

In addition, Hamilton was entitled to a new trial based on the court's refusal to fully instruct the jury on the issue of negligence. The court failed to give the instruction based on the *Rickert* case, which was an accurate statement of the law and necessary in light of the other instructions and the testimony about how the accident occurred.

### **3. The Jury Award of General Damages Was Excessive.**

Finally, the inexplicably-large, non-economic damages award constitutes an irregularity in the proceedings (and one that was undoubtedly linked to the instruction on insurance proceeds). It is clear that the jury did not fully accept plaintiff's damages claims because it declined to award Terrell all of the economic damages she sought.<sup>3</sup> Terrell sought a total of \$615,117 in past and future economic damages, and she was awarded a total of \$240,500. The jury also awarded Terrell over \$1.2 million in general damages. This was over five times the

---

<sup>3</sup> Terrell sought \$9,094 in lost wages, \$83,627 in past medical expenses, \$328,835 in future psychological care expenses, \$117,761 for future physical therapy and massage therapy, and \$66,000 for future shoulder surgery,. In all, Terrell's total economic loss (past and future) was \$615,117. (RP 927-30, 942)

amount of past and future special damages it awarded. The jury's award is so inconsistent with the evidence that it must be the result of passion and prejudice. The award unmistakably evidences an attempt to punish the insurance company after the jury was told that the plaintiff was forced to bring the lawsuit to collect the insurance proceeds.

It is not within the province of the jury to punish the defendant by awarding an arbitrarily large amount, above the amount of full compensation for plaintiff's loss. *Ryan v. Westgard*, 12 Wn. App. 500, 530 P.2d 687 (1975). A new trial may be granted where the verdict so grossly exceeds a just award that passion or prejudice must be presumed. *Skeels v. Davidson*, 18 Wn.2d 358, 374-75, 139 P.2d 301 (1943), *overruled in part on other grounds by Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

In this case, the jury's large general damages award is inconsistent with the evidence at trial. Of the total award, 83% is for non-economic damages. The massive non-economic damages award amounts to punitive damages. Specifically, it can be seen as an award to punish Hamilton's insurance company after the jury learned of the insurance and Terrell argued the case as if it were against the insurance company. The court's instruction informed the jury that the entire reason for the lawsuit was to allow Terrell to collect money from Hamilton's insurance policy. Implicit

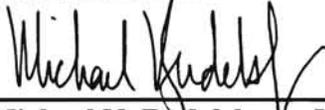
in that instruction is the notion that Terrell was entitled to that money and the insurance company shirked its duty in paying it, thus forcing Terrell to sue her domestic partner. Terrell's counsel hammered home the split between Hamilton and his defense throughout trial. The arbitrarily large award is inconsistent with the evidence, but it is consistent with an attempt to punish Hamilton's insurance company. Under the circumstances, the trial court erred in denying Hamilton's motion for remittitur or a new trial.

## VI. CONCLUSION

Similar to the underlying facts of this case, a relatively straightforward trial skidded off the road when the trial court instructed the jury at the outset that Terrell needed to sue Hamilton in order to access insurance funds. The case ceased to be about individual A suing individual B, and turned into the equivalent of a bad faith action against the insurance company. Terrell's counsel repeatedly sought to drive a wedge between Terrell and his attorney (and by implication, the insurance company), and defense counsel had to completely change strategy. The ultimate result of this error (when compounded with the denial of a *Rickert* instruction) was an excessive jury verdict meant to punish the insurance carrier. Because of these errors and in the interest of justice, Hamilton is entitled to a new trial.

DATED this 2<sup>nd</sup> day of October, 2014.

**REED McCLURE**

By   
**Michael N. Budelsky** WSBA #35212  
**Attorneys for Appellant**

067824.099416/472525.docx

## **COURT'S INSTRUCTION TO THE JURY**

As you heard in jury selection, Ms. Paula Terrell and Mr. Gordon Hamilton, the plaintiff and the defendant, are domestic partners. There was some discussion about litigating against your own marital community. Because your sole focus will be the factual issues that this court gives to you for consideration, I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case. The fact that there is insurance shall not be considered in any way in the way that you view the facts and shall not be considered in any award of damages if any are awarded.

(RP 247)

I INSTRUCTION NO.: \_\_\_\_

The mere skidding of a pickup truck, alone, is not evidence of negligence.

*Rickert v. Geppert*, 64 Wash.2d 350, 355, 391 P.2d 964, 967 (WASH. 1964)

**DEFENDANT'S AMENDED PROPOSED  
INSTRUCTIONS TO THE JURY AND  
SPECIAL VERDICT FORM- 22**

Krilich, La Porte,  
West & Lockner, P.S.  
524 Tacoma Avenue South  
Tacoma, Washington 98402  
(253) 383-4704

**APPENDIX B**

CP 105