

No. 35150-1-II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MICHAEL D. HOSKINS,

Plaintiff/Appellant,

v

DEREK REICH and "JANE DOE" REICH,

Defendants/Respondents.

**THE HONORABLE DONALD THOMPSON,
PRO TEM**

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

In the instant appeal, the appellant, plaintiff below, (hereinafter referred to as “plaintiff”), is requesting that the appellate court review the trial court’s application of this Appellate Court’s and the Supreme Court’s opinions in the case of *Harris v. Drake*, 116 Wn App 261, 55 P.3d 350 (2003), affirmed on review, 152 Wn 2d 480, 99 P.3d 872 (2004). Particularly, plaintiff is requesting that the appellate court address an issue regarding the introduction of evidence relating to asymptomatic pre-existing conditions during the course of a personal injury trial. The specific portion of the *Harris v. Drake* opinion which is at issue, is the Supreme Court’s holding that the trial court did not abuse its discretion in excluding such evidence during the course of trial in that case:

Even allowing for the possibility of a pre-existing condition, the defense failed to show that such condition was symptomatic prior to the accident. When an accident lights up and makes

active a pre-existing condition that was dormant and asymptomatic **immediately prior to the accident**, the pre-existing condition is not a proximate cause of the resulting damages. *Bennett v. Messick*, 76 Wn 2d 474, 478 -79, 457 P.2d 609 (1969) [emphasis added]

As discussed below, in the instant case, which involved a personal injury to the plaintiff as a by-product of a motor vehicle accident with defendant Derek Reich, the trial court, over strenuous objection and a motion for a mistrial, admitted evidence of an asymptomatic, pre-existing condition based on defense counsel's representations that such evidence would be "connected up" by the defendant's medical examiner, Dr. Robert Cofelt. Despite such representations, Dr. Cofelt never "connected up" the asymptomatic pre-existing condition to the injuries complained of at time of trial. Indeed, there was no evidence that Mr. Hoskins' pre-existing conditions had any relationship to any matter which was before the jury. Once the lack of relevancy

became indisputable following the close of the evidence, the trial court also erred by failing to grant plaintiff's motion for a new trial, despite a low jury verdict which suggested the irrelevant evidence had a real and prejudicial impact on the verdict.

II. ASSIGNMENT OF ERROR

1. The trial court erred by admitting evidence regarding an asymptomatic pre-existing condition that was not immediately present prior to the injuries at issue at time of trial.

2. The trial court erred by failing to grant plaintiff's standing motion for a mistrial, when, despite defense counsel's assertion to the contrary, no evidence was presented that plaintiff's asymptomatic pre-existing condition had any relationship to plaintiff's post automobile accident injuries and conditions.

3. The trial court erred in failing to grant plaintiff's motion for a new trial when, over plaintiff's objection, evidence

was admitted regarding asymptomatic pre-existing conditions that had no relationship to any matters at issue at time of trial, and predictably when as a result of the passion and prejudice engendered therefrom, plaintiff received what can be objectively characterized as a low verdict.

III. STATEMENT OF ISSUES RELATING TO ASSIGNMENT OF ERROR

1. What do the terms “immediately prior to the accident”, which were used in the *Harris v Drake* opinion, mean?
2. Did the trial court commit reversible error and/or abuse its discretion by admitting evidence of asymptomatic pre-existing conditions when there was no evidence that such pre-existing conditions

were in any way aggravated by the motor vehicle accident that was at issue in this instant matter?

3. Did the trial court err by determining that the defendants had laid a sufficient foundation for the admission of evidence of asymptomatic pre-existing conditions when, at time of trial, no physician or other health care provider testified that such conditions were aggravated or “lit up” by the automobile collision that was the subject of the litigation?
4. Did the trial court err in failing to grant plaintiff’s standing motion for a mistrial when, despite representations to the contrary, defendant’s counsel failed to connect up the “asymptomatic pre-existing conditions” to any conditions that were subject to dispute at time of trial?

5. Does it constitute misconduct of counsel worthy of a mistrial, to mis-represent that evidence will be “connected up” through subsequent testimony when such representations ultimately proved to be unfounded and untrue?
6. Finally, did the trial court err in failing to grant plaintiff’s motion for a new trial, when following the close of evidence and the verdict, it was exceeding clear that despite defense counsel’s representations to the contrary, there was no evidence supporting the admission of any testimony relating to “asymptomatic pre-existing conditions”, particularly when defendant’s own medical examiner acknowledged that plaintiff received new injuries as a result of the motor vehicle collision at issue, albeit not the same injuries as contended by plaintiff’s treating health care providers and physicians?

IV. STATEMENT OF THE CASE

A. Plaintiff's Contentions at Time of Trial.

On or about May 10, 2001, Michael Hoskins while in the course of his work, was driving on SR 512 near its intersection with Pioneer Way when he had to slow to a stop for traffic. Without warning, the rear of Mr. Hoskins 1978 Ford pick-up truck was violently struck from the rear by a 2000 Ford Mustang driven by Defendant Derek Reich. At the moment of the collision, Michael Hoskins' head was thrown backwards striking the rear window within his truck's cab. (CP72). Mr. Hoskins immediately began feeling neck pain and suffered from a severe headache. He was also disoriented. Emergency medical help arrived first by way of Puyallup Fire Department and then the Medic One Response Team from Central Pierce Fire and Rescue.

Mr. Hoskins was removed from the scene on a backboard with C-spine control and taken to the emergency room at Good Samaritan Hospital located in Puyallup, WA. At the emergency room, he was diagnosed with cervical, thoracic, and lumbar strain and told to apply ice to the area and to take Ibuprofen three times a day for pain. He was also prescribed Vicoden and told to follow up with his family physician, Dr. Barnett of Puyallup Tribal Health.

The following day, Mr. Hoskins reported to his family chiropractor, Gordon Rody for an evaluation and treatment. Dr. Rody evaluated Mr. Hoskins, took x-rays, and made a determination that as a byproduct of the May 11, 2001 accident, he suffered an acute to moderate sprain/strain to his cervical, thoracic, and lumbar spine with related headache, muscle spasm, mild radiculitis and subluxations. Dr. Rody underwent a conservative course of chiropractic treatment that extended until February 2002. (CP73).

A week later, on March 17, 2001, Mr. Hoskins reported to his family doctor at the Puyallup Tribal Health Care Facility. At that time he was complaining of neck pain that was a nine on a scale of one to ten. At the Tribal Health facility, Mr. Hoskins underwent a short course of physical therapy. From the point of the accident, and for a period of approximately six weeks, Mr. Hoskins was taken off of work.¹

Critical to the matters at issue in this case, on or about February 13, Mr. Hoskins reported to Puyallup Tribal Health indicating that his pain continued to get worse despite physical therapy and chiropractic care. He also continued to complain of headaches as well as right arm pain.

Significantly, on March 25, 2002, Dr. Barnett reported that Mr. Hoskins continued to have difficulties inclusive of neck pain around C6 -C7 area, and it was constant from a six to a seven out

¹ As a direct and proximate result of being taken off of work, and being in the subject collision, Mr. Hoskin was terminated by his employer NW Floor Covering where he was earning \$18.00 per hour.

of ten. He also indicated that movement of his head and sleeping would exacerbate the pain and that if he slept wrong, he tended to wake up with both arms numb. Dr. Barnett indicated that physical therapy provided some moderate level of relief, but then the pain would return and that anti-inflammatories helped to some degree. He also noted continuing complaints of right shoulder pain and a history of Mr. Hoskins right hand being on the steering wheel when he was rear ended by the Defendant. Dr. Barnett ultimately ordered that Mr. Hoskins undergo an MRI study.

In June 2002, the MRI study was performed and it showed a "central disc extrusion on C4-5 and a disc degeneration at C5-6 and C6-7".

Also significantly at this time, Mr. Hoskins was reporting to Dr. Rody that he continued to have severe neck pain. Mr. Hoskins last visit with Mr. Rody was on February 5, 2002, wherein the doctor made a determination that it was his assessment that Mr. Hoskins' condition had "worsened".

Following this phase of treatment, Mr. Hoskins attempted to, for lack of a better word, get on with his life, and despite the substantial pain that he suffered attempted to return to work in his own business, and failing that because of his injuries, various sales and construction jobs. All were thwarted by his injuries. There is and shall be no evidence that during this brief period of time, Mr. Hoskins suffered any form of re-injury or that he ever became symptom free. On September 11, 2003, Mr. Hoskins reported to Lowell C. Finkleman, M.D., a family physician in the Purdy area. Following a full examination, Dr. Finkleman came to a diagnosis of persistent neck pain secondary to chronic cervical strain, bilateral right and left upper arm radiculitis syndrome, (2) persistent post traumatic headaches likely occipital and in etiology, and (3) persistent low back pain secondary to lumbar axial strain secondary to motor vehicle accident. Dr. Finkleman recommended that a second MRI study and nerve conduction study be performed. (CP 74). A cervical MRI performed on

October 13, 2003, confirmed a small central disc protrusion at C4, 5, and C5-6 with lessor bulge at C 6-7. Nerve conduction study performed on October 13, 2003 confirmed right and left carpal tunnel syndrome. Thereafter, Dr. Finkleman provided a conservative course of care inclusive of anti-inflammatory medications, night splints for his arms, and vitamins. By February 5, 2004, Dr. Finkleman was once again ordering a new trial of physical therapy where he could strengthen and stabilize Mr. Hoskins cervical spine.

By April 29, 2004, Mr. Hoskins was not improving significantly despite conservative efforts at care and as a result Dr. Finkleman recommended that he consult with neurosurgeon Dr. Richard Wohns to determine if epidural steroids would be helpful and to assess if carpal tunnel syndrome release surgery would be indicated. Thereafter Dr. Finkleman followed up as a “quarterback” of Mr. Hoskins care of the various modalities as discussed below.

On May 7, 2004, Mr. Hoskins presented himself to Dr. Wohns who confirmed the previous diagnosis with respect to cervical disc disease and bilateral carpal tunnel syndrome. He also diagnosed occipital neuralgia and recommended right carpal tunnel surgery bilaterally and recommended trigger point injections and occipital nerve blocks to help the cervical pain and occipital neuralgia.

On July 2, 2004, Mr. Hoskins returned to Dr. Wohns following the trigger point injections and occipital nerve block injection which provided no substantial relief. Mr. Hoskins continued to complain of cervical pain and headache and was referred to Dr. Wendt for treatment of the headaches. Also, a cervical discogram was ordered to further evaluate the continuing cervical pain.

The cervical discogram demonstrated cervical spondylosis with axial instability at C3-4 and C4-5. At this point, Dr. Wohns

recommended anterior cervical fusion and disectomy at C3-4 and C4-5 using allograft bone graft and anterior fixation plate.

Prior to trial Mr. Hoskins had yet to be able to have the surgery recommended by dr. Wohns which has an estimated cost in excess of \$53,000.00. In addition, Mr. Hoskins has not had an opportunity to have a bilateral carpal tunnel release surgery, which according to Dr. Finkleman, is at least in part related to the accident of May 10, 2001. According to Mr. Finkleman, Mr. Hoskins probably had pre-existing carpal tunnel syndrome but, it was substantially light-up by the automobile collision, particularly on the right side, given the fact that he had his right hand on the steering wheel at the time of collision. Previously, Plaintiff only had a vague history of left side carpal tunnel syndrome, that is too remote in time to even be relevant. Past medical bills were in excess of \$25,000.00. (CP75-76).

In addition, Mr. Hoskins not only missed six weeks of work during his initial phase of care, but was removed from performing

any construction type work by Dr. Finkleman. Prior to this accident, Mr. Hoskins made a living as a flooring installer professional, for which he endeavored to continue on with despite his injuries but was unsuccessful in doing so. Through benefits available but unrelated to the cause of action herein, Mr. Hoskins has been subject to retraining at Tacoma Community College and currently has acquired his first employment in the area of drug and rehab counseling earning \$13.00 per hour. However, despite Mr. Hoskins successful efforts at mitigation, at least initially, he will be earning a lesser income than he would have been able to achieve had he been able to maintain a position in the field of flooring installer and had a substantial interim wage loss measured at \$18.00 per hour and forty hours per week less intern wages. As such, Mr. Hoskins has not only lost his earning capacity, but also can show a substantial loss of earnings, that will continue into the future.

In addition, Mr. Hoskins has suffered disability and will suffer disfigurement should he undergo the surgery recommended by Dr. Wohns. He has lost substantial enjoyment of life, and undoubtable has suffered, and will continue to suffer, extreme pain and suffering, both emotionally and physically as a byproduct of the actions of the Defendants. (CP 76).

B. Procedural History and Events at Time of Trial.

The instant case was filed on or about April 26, 2004. (CP 1-6). The defendants belatedly answered and asserted a number of affirmative defenses. (CP 7-8). After several delays, this personal injury action was tried before the Honorable Donald Thompson, pro tem, with a jury, from February 22, 2006 through March 3, 2006. On March 3, 2006, the jury returned a verdict in favor of the Plaintiff in the amount discussed below. This is a case where liability was admitted and the only issue before the jury was the nature and extent of Plaintiff's damages.

This case was well tried by both sides, however, there was a fundamental and well-debated controversy at time of trial with respect to what, if any, information should be provided to the jury with respect to the Plaintiff's past medical history. By way of motion in limine, the Plaintiff sought to exclude, pursuant to the case of *Harris v. Drake* 152 Wn. 2d 480, 99 P. 3d 872 (2004), any discussion with respect to Plaintiff's past medical (chiropractic) history upon which there was no evidence, before, or at time of trial, indicating Plaintiff was suffering from any symptomatic conditions prior to the subject accident of May 10, 2001. (CP 9-43)

The *Harris v. Drake* issue was hotly contested during the argument on motions in limine, which occurred on or about February 23, 2006 (see transcript of February 23, 2006, pgs. 5-21). (CP 206-222). Ultimately, at the conclusions of the motions in limine arguments, the Court concluded that it would reserve on the issue, and an order issued that there would be no mention of

any prior conditions during opening statements or voir dire “to the jury in any way until I’ve heard some testimony from the experts indicating that it would be relevant”. (CP 212) The Court also indicated that before any such testimony, it had to be submitted to the Court, by way of offer of proof, outside of the presence of the jury. (CP 222)

Though the Court did reserve on the issue, it is noted that in a number of instances, defense counsel made erroneous statements in Court that her “IME” Dr. Cofelt, a neurologist, would be testifying that the pre-existing asymptomatic conditions were somehow relevant to his analysis of Plaintiff’s physical condition after the subject accident. At page 11 of the transcript from the motion in limine hearing, defense counsel indicated, “and Dr. Cofelt will also testify about why those prior conditions are relevant”. During the course of such argument, the following colloquy occurred between the Court and primarily defense counsel:

JUDGE THOMPSON: Will they testify, or will Dr. Cofelt or any of the experts testify, that the prior conditions were aggravated by the accident?

MS. JENSEN: They will testify that it was, that it's relevant that the Plaintiff had prior complaints. Dr. Cofelt will say that's relevant and that that might be why he had more symptoms from this accident, that more probably than not that's why he had symptoms from this and - - -

JUDGE THOMPSON: On a more probable than not basis?

MR. LINDENMUTH: No, he won't.

MS. JENSEN: Now, then you also have the issue in this case of the Plaintiff's ability to continue working in the construction industry. The Plaintiff had a **bad back** before this accident and regularly used the chiropractor. He's claiming that because

of this accident he had to be retrained into a light duty position, and I would like to preserve my ability to make the argument to the jury that he would not have lasted in the construction industry anyway based on his prior bad back. Now, that's an argument, and whether that has weight with the jury or not is up to the jury.

I guess what Plaintiff's attorney is trying to do in this situation is to prevent the jury from deciding this case and have the Plaintiff come into this trial as a complete clean slate, that he was a perfect, physically fit person before this accident. . . (Emphasis added). (CP 213-214)

In other words, defense counsel during the course of argument on motions in limine promised the Court that the defense expert, Dr. Cofelt would, for lack of better terms, "connect up" any pre-existing condition that were asymptomatic

at the time of the subject collision to the injury and damages suffered as a byproduct of the collision. In addition, her stated and intended purpose apparently was to submit such evidence for the purpose of trying to show that Mr. Hoskins, again for lack of better terms, was “damaged goods” prior to the collision, thus somehow entitled to less of a recovery.

As discussed below, such arguments are plainly in violation of the rule of *Harris v. Drake* which emphasized that the existence of pre-existing asymptomatic conditions has no relevance to the issues of either proximate cause and/or damages, the only issue in this case.

The parties abided by the Court’s ruling with respect to the *Harris v. Drake* / pre-existing conditions issue until the testimony of Plaintiff’s chiropractor Gordon M. Rody. During the course of Dr. Rody’s testimony which occurred on or about February 27, 2006, counsel for the defense, broke Dr. Rody’s cross examination with a lengthy offer of proof that extended well into

the noon hour. (CP 344-374). Defense counsel's offer of proof and arguments related thereto commences at page 59 of the February 27, 2006 transcript of Dr. Rody's testimony and concludes on page 100 of the transcript. During the course of the colloquy on the Harris v. Drake issue, defense counsel represented that her "IME" Dr. Cofelt would provide the appropriate link of relevancy regarding Plaintiff's pre-accident chiropractic care and the symptoms he suffered following the May 10, 2001 accident. She again repeated this statement at page 80 of the transcript wherein she once again indicated that Dr. Cofelt would indicate that the pre-existing condition had some relationship to the injuries suffered and the symptoms related to the May 10, 2001 accident and thereafter. (CP 365).

During the courses of this colloquy, Dr. Rody was available to testify and in offer of proof format indicated to the Court that he was not treating Plaintiff Michael Hoskins for any pre-existing injuries or injuries that were lit up by the subject motor vehicle

accident. Dr. Rody repeatedly testified that after May 10, 2001, he was treating Mr. Hoskins for, “new injury”. (CP 371-372). Dr. Rody also testified emphatically that he did not believe that Mr. Hoskins was symptomatic immediately prior to the May 10, 2001 motor vehicle accidents. (CP 349-350).

Despite this, defense counsel continued to argue that the information was relevant and suggested that the relevance of such information would be connected up through testimony of Dr. Cofelt. In response, the Court indicated that its primary focus and concern was whether or not there was in fact a lighting up of a pre-existing condition. While it is unsure as to what the Trial Court ultimately contemplated in ultimately admitting such evidence, it is believed that the Court may have been impressed by the fact that it was understood that Dr. Cofelt was going to testify that Mr. Hoskins’ ongoing symptomatology was a byproduct of the existence of degenerative disc disease. (CP 372).

Ultimately, at page 89 of the transcript, the Trial Court allowed the evidence of pre-accident chiropractic care. (CP 374) Plaintiff's counsel's response was to immediately moved for a mistrial because such evidence would be violative of the *Harris v. Drake* opinion. The motion was denied. (CP 374-375).

After lunch, the Trial Court graciously permitted further argument on the *Harris v. Drake* issue. Ultimately, the Court was not swayed by the additional argument. (CP 375-385).

In conclusion, Plaintiff's counsel noted to the Court the following at page 98 of the transcript:

So, I have grave concern that this has a real potential for misuse and misabuse by the jury. It is a case killer, from what I can see. It can create such a taint in this case that I'm having to back and litigate literally five years worth of history - - or like three years of history prior to this accident where we don't have any strong causal link between that history and anything that occurred after this accident. There just isn't. I have a grave concern with that regard, Your Honor.

(CP 383)

Once cross examination of Dr. Rody recommenced, defense counsel went directly to Mr. Hoskin's medical history with Dr. Rody that dated as far back as September 25, 1998. (Id. at 386). The Court granted Plaintiff's counsel a continuing objection with respect to such testimony. (CP 393) Nowhere within the continued cross examination by defense counsel was there any indication that Dr. Rody was of the opinion that his treatment following the May 10, 2001 motor vehicle accident had any relationship to his prior treatment or that he was treating Mr. Hoskins for pre-existing conditions. In fact, on re-direct examination, Dr. Rody was emphatic that in fact there was no indication that Mr. Hoskins prior to the accident was suffering from any pain. Dr. Rody indicated that there was no indication that Mike was having any problems prior to the accident. (Id. p. 401-402). According to Dr. Rody, following the May 2001 accident, he was treating all "new injuries". (Id. p. 118). According to Dr. Rody, there was substantial indication that

following the subject motor vehicle accident Mr. Hoskins had ongoing problems. Dr. Rody's re-direct examination concluded at page 126 with the following colloquy:

MR. LINDENMUTH:

Q. Okay. And, again, based on reasonable chiropractic probability or certainty, when Mike came to you on May 11, 2001, you were dealing with new injuries?

A. Correct, new injuries.

(CP 411).

The true taint of the irrelevant and prejudicial introduction of Mr. Hoskin's unrelated history did not come to a level of clarity until Dr. Cofelt actually testified. Despite defense counsel's repeated promises that Dr. Cofelt would connect some aspect or some scintilla of the prior medical care to the post accident symptomology suffered by M. Hoskins, such promises were never fulfilled by Dr. Cofelt's testimony. Dr. Cofelt

testified on March 2, 2006. (CP 418-504). No time during the multiple opinions provided by Dr. Cofelt did he ever suggest that Mr. Hoskins was not in fact injured during the course of the May 10, 2001 automobile accident. Dr. Cofelt never testified that he believed that the injury suffered by Mr. Hoskins were an aggravation of a pre-existing condition or were a lighting up of a pre-existing condition.

Dr. Cofelt did testify about the degenerative changes within Mr. Hoskins spine but indicated that they were relatively minor and moderate and not suggestive of any specific injury. (CP 435-444). Dr. Cofelt testified that he was of the belief that Mr. Hoskins did in fact suffer, as a result of the accident, straining injuries to his neck, mid-back, and low back. (Id.) Dr. Cofelt did dispute the reasonableness and necessity of substantially all of Mr. Hoskin's medical care following a short period of time after the accident but conceded that in fact Mr. Hoskins continues to suffer from pain symptoms which in good faith Dr. Cofelt could

not and can not dispute. (CP 494). However, Dr. Cofelt felt that the pain was being generated not by the discs which were deemed surgical by Plaintiff's physician Dr. Wohns, but that it was pain from muscles and ligaments. (CP 463-465). The Court's instruction to the jury did not include an aggravation of a pre-existing condition instruction. (CP 150-167).

As predicted by Plaintiff's counsel, the introduction of such evidence relating to unrelated prior medical care hopelessly prejudiced the result in the instant case. As predicted by Plaintiff's counsel, the jury returned a verdict in Plaintiff's favor, (the only option the jury had), but the verdict was predictably low and frankly extremely inconsistent. (CP 167).

In the instant matter, Plaintiff was claiming past medical expenses up to the date of trial in the amount of \$25, 688.07 and future medical expenses in the form of a fusion surgery by neurosurgeon Wohns in the amount of \$53,359.00. (CP 195-197). Within its verdict, the jury, in the instant matter awarded

as past economic damages almost the exact amount requested by Plaintiff for his past medical expenses, (i.e. \$25,095.00). (CP 167). The jury failed to award any money for future economic damages which under the proof presented at time of trial only could have related to the future surgery. With respect to past and future non-economic damages, the jury awarded the paltry amount of \$15,000.00. (Id.)

As discussed below, it can be conceded that based on the testimony of Dr. Cofelt, the jury had a reasonable basis from which not to award Mr. Hoskins funding for the contested disc fusion surgery, however, given the fact that the jury awarded Mr. Hoskins essentially all of his past medical bills up to time of trial and only \$15,000.00 in general damages, one could presume that the tainted evidence in the form of irrelevant testimony regarding unrelated pre-existing medical conditions, had the intended impact of prejudicially causing the jury to believe that Mr. Hoskins was essentially, “damaged goods”, and as such, his

undisputed pain and suffering which commenced at the time of the May 10, 2001 accident and continued up to and through trial, was unworthy of full compensation. It is respectfully suggested that that is the only plausible explanation for the low general damage verdict in the instant case given the fact that the jury awarded all past medical expenses which included treatment in the form of painful trigger point injections and discography testing. It is suggested that one could reasonably conclude that the low general damage award was predicated on the assumption Mr. Hoskins would have suffered due to pre-existing conditions, even though there is absolutely no evidence supporting such a contention and in fact such evidence turned out to be simply a prejudicial red herring that had no relevance to any issue of consequence that was before the jury.

On or about June 9, 2006, plaintiff filed a motion for a new trial. With the motion for a new trial substantial materials were provided to the trial court. (CP 171-504).

On July 12, 2006, defense counsel provided an extensive response. (CP 505-541). On July 13, 2006, plaintiff filed a reply to defendants' response regarding the new trial issue. (CP 542-548).

On July 14, 2006, the Honorable Donald Thompson heard plaintiffs' motion for a new trial. The trial court denied plaintiffs' motion, and judgment was entered. (CP 549). This appeal followed. (CP 550-554).

From the reasons stated below, it is humbly and respectfully submitted that the appellate court reverse the trial court's decision and remand this matter for a new trial untainted by evidence of asymptomatic, pre-existing condition.

V. ARGUMENT

A. Plaintiff is Entitled to a New Trial Under a Number of Provisions of CR 59.

A grant or denial of a motion is a matter vested within the discretion of the Trial Court. *Wooldridge v. Woolett*, 96 Wn. 2d

659, 668, 638 P. 2d 566 (1981). Under the abuse of discretion standard, an Appellate Court will not disturb a Superior Court's determination to grant a new trial except upon a clear showing that the determination was "manifestly unreasonable" or was based upon "untenable grounds" or made for "untenable reasons".

Rivers v. Washington State Conference of Mason Contractors,

145 Wn. 2d 674, 684, 41 P. 3d 1175 (2002). A much stronger showing of abuse of discretion must be shown to set aside any order granting a new trial than one denying one, because denial of a new trial "concludes [the parties] rights". **Palmer v. Jensen**,

32 Wn. 2d 193, 197, 937 P.2d 597 (1997). Generally, the Trial Court has a responsibility to rule on motions for a new trial. See **Benjamin v. Randall**, 2 Wn. App. 50, 52, 467 P. 2d 196 (1970).

The Trial Court has the duty to see that justice prevails. (Id.).

In the case of **Oplinski v. Clemment**, 73 Wn. 2d 944, 950, 951 442 P.2d 260 (1968), the Supreme Court noted that the standards applicable to granting a new trial are predicated on the

notion that the trial judge is the gatekeeper that insures that all parties receive justice:

The basic question posed by an order granting a new trial based upon this grounds, be it civil or criminal, is whether the losing party received a fair trial, and it is in this area of the new trial field that the favored position of the trial judge in his sound discretion should be afforded the greatest deference, particularly when it involves the assessment of occurrences during the trial which cannot be made part of the record, other than through the voice of the trial judge in stating reasons for the actions taken. If the trial judge, in the exercise of his best judgment determines that a fair trial has not been had, he has the alternative in an appropriate situation of granting a partial, a conditional, or an unconditional new trial. This decision, in turn, calls for the weighing of factors and values such as the complexity of the issues, the length of the trial, the degree and nature of the prejudicial incidents, the nature and amount of the verdict, the cost of retrial, the probable results, the desirability of concluding litigation, and such other circumstances as may be appropos. (Citation omitted).

CR 59 (a) provides several basis upon which the Court can exercise its discretion to set aside a jury verdict. The rule states in its pertinent part, as it relates to this case:

A grounds for new trial or reconsideration. The verdict or other decision may be vacated and a new trial granted to all or any of the parties and on all or part of the issues when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any one of the following causes materially affecting the substantial right of such parties:

(2) Misconduct of prevailing party or jury . . .;

(5) Damages so excessive or inadequate as to unmistakably indicate that the verdict must have been the result of passion or prejudice;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to the law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done. (Emphasis added).

CR 59 (f) requires that in granting a new trial, the trial judge must state whether the order is based upon the record or

upon facts and circumstances outside the record and if based upon the record, the Court shall give definitive and definite reasons of law and fact for its order. The purpose of CR 59 (f) is to permit effective appellate review of jury cases where a new trial has been granted on the grounds of an adequate verdict or insufficiency of evidence. *Johnson v. Department of Labor and Industries*, 46 Wn. 2d 463, 466, 281 P. 2d 994 (1955).

Under CR 59 (a)(2), misconduct of a party is a grounds for a new trial if the misconduct materially affected the substantial rights of the moving party. *Aluminum Company of America (ALCOA) v. Aetna Casualty Insurance Company*, 41 Wn. 2d 517, 539, 998 P. 2d 856 (2000). In order to grant a new trial under this provision, the moving party must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy), and that the misconduct is prejudicial in the context of the entire records. In addition, the moving party must object to the misconduct at trial and the misconduct must

not have been cured by Court instructions. *Aluminum Company of America (ALCOA) v. Aetna Casualty Insurance Company*, 41 Wn. 2d 539-40.

In the instant case, whether inadvertently or intentionally, the defense counsel engaged in misconduct by interjecting into this case irrelevant evidence relating to past medical history which should have been excluded pursuant to the *Harris v. Drake* opinion discussed above. In addition, the admission of such evidence constitutes an error of laws subject to a new trial under CR 59 (a)(8). As noted in Washington Practice, Vol. IV (Orland and Tegland), p. 668, CR 59 (a)(8) is appropriately invoked to raise questions relating to rulings on evidence and questions relating to giving or failing to give jury instructions. *State v. Allen*, 89 Wn. 2d 651, 574 P. 2d 1182 (1978).

In order to preserve the error relative to such evidentiary ruling, the error complained of must have been prejudicial and subject to objection at the time of its occurrence. See *Fisher v.*

Berg, 158 Wn. 176, 290 P. 984 (1930); *Ralston v. Vessey*, 43 Wn. 2d 76, 260 P. 2d 324 (1953). When such objections are made, they should be specific enough to aid the Court in determining whether or not there has been an error. See *Corbitt v. Harrington*, 14 Wn. 197, 44 P. 132 (1896).

As is self evident and as discussed above, Plaintiff's counsel made vehement objection to the introduction of evidence relating to Plaintiff's past medical history that pre-dated the subject automobile collision by at least six months. In response to such objection, defense counsel engaged in what could be characterized as "misconduct" by indicating that her "IME" doctor, Dr. Cofelt would provide the hook of relevancy permitting for the admission of such evidence. Such representation ultimately turned out to be erroneous and misleading. It is doubted without such representations, the Trial Court would have allowed a foray into Plaintiff's pre-accident medical history.

As discussed ad nauseam during the course of trial, the Supreme Court in the case of *Harris v. Drake*, 157 Wn. 2d 493-494, upheld the exclusion of evidence relating to asymptomatic, pre-existing conditions in automobile accident cases. The *Harris v. Drake* opinion provides at the above referenced pages the following:

Drake argues that the Trial Court erred in granting a directed verdict on the issue of causation. A Trial Court should grant a motion for directed verdict if, as a matter of law, no competent evidence or reasonable inference exists to sustain a a verdict for the non-moving party. Drake argues that there was evidence at trial that made causation reasonably debatable. An MRI (Magnetic Resonance Imaging) performed one month after the accident showed Harris' shoulder was normal; Harris' shoulder problems appeared later after he resumed his painting job. Also, Harris' surgeon testified that painters often have impingement symptom problems caused by their professions. **However, there was no evidence of a shoulder problem prior to trial. Even allowing for the possibility of a pre-existing condition, the defense fails to show that such condition was symptomatic prior to the accident. When an accident lights up and makes active a pre-existing condition that was dormant and asymptomatic immediately prior to the accident,**

the pre-existing condition is not a proximate cause of the resulting damages. (Citation omitted).

The evidentiary aspect of the *Harris v. Drake* decision is perhaps better stated in the Court of Appeals opinion in that case. The Court of Appeals decision can be found at 116 Wn. App. 261, 55 P. 3d 350 (2003). At page 288-89 of the Court of Appeals opinion in *Harris v. Drake*, the Court of Appeals provided the following with respect to the exclusion of such evidence:

We agree with the Trial Court's ruling. When an accident lights up and makes active a pre-existing condition that was dormant and asymptomatic immediately prior to the accident, the pre-existing condition is not a proximate cause of the resulting damages. Even assuming that Harris had some sort of pre-existing condition in his left shoulder, the only reasonable inference from Drake's offer of proof was that such condition was dormant and asymptomatic just prior to the accident. **The offer of proof had no tendency to prove a fact of consequence to the action and the Trial Court correctly ruled that it was irrelevant.** (Emphasis Added). (Footnotes omitted).

The rule set forth in *Harris v. Drake* is certainly not new and has existed within the State of Washington at least since the year 1952. See *Reeder v. Sears Roebuck and Co.*, 41 Wn. 2d 550, 250 P. 518 (1952). In *Reeder*, the Court provided the following:

There is no doubt that Respondent had a back which was congenitally weak or in which there was a degenerative process taking place. There was no evidence that he suffered prior to his fall any disability or pain in his back because of any pre-existing condition or defect. The undisputed testimony relative to the Boeing accident showed that he had completely recovered from it.

Appellant's own medical experts testified that a person with a weak back such as Respondent had was more likely to be injured by a fall than would be a person with a normal back. Appellant's medical witnesses also testified that a fall often precipitated or lighted up an arthritic condition in the spine which, prior to the fall, had been inactive or latent. There was also expert testimony that Respondent might have gone indefinitely without any active symptoms of arthritis unless and until something occurred to light it up.

the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause; the one that necessarily sets the other cause in motion.

The Trial Court in the present case, by its instruction No. 10, charged the jury substantially to the same effect.

Appellant has not assigned as error the giving of instruction No. 10.

1. We have consistently reaffirmed the rule embodied in the instruction given in the Jordan case, supra; *Frye v. Jensen*, 144 Wash. 553, 258 Pac. 497, and cases cited; *McCormick v. Jones*, supra; *Loveless v. Red Top Cab Co.*, 158 Wash. 474, 291 Pac. 344, 79 A. L. R. 347. It is in accord with the weight of authority. *McCormick* on Damages (1935 ed.) 269, § 76; 15 Am. Jur. 488, Damages, § 80; 25 C. J. S. 478, Damages, § 21.

We have read all the instructions given by the court and are of the opinion that, taken as a whole, they could not have misled the jury as to the proper basis for awarding damages to respondent. In view of the undisputed evidence that, prior to the time of his fall on the ramp, respondent was

suffering no pain or disability in his back as the result of any prior injury or defective physical condition, it was not error to refuse the requested instruction.

This straight forward rule of justice was further re-affirmed in the case of *Greenwood v. The Olympic, Inc.* 51 Wn. 2d 18, 351 P. 2d 295 (1957). Initially in *Greenwood*, the Court approved the grant of a new trial based on an erroneous jury instruction which allowed the jury to speculate about prior physical ailments or disability concerning which there was no appropriate testimony. The Court characterized the jury instruction at issue in that case as being misleading to the jury.

As in the *Greenwood* case, the submission of pre-existing condition evidence without a corresponding aggravation of a pre-existing condition instruction (which would not have been appropriate under the facts of this case) allowed the jury to speculate that Plaintiff's asymptomatic pre-existing conditions had some relationship to his ongoing symptomology following an

accident. In the instant case as in *Greenwood*, the ability to engage in such speculation in all probability substantially contributed to a small amount of general damages. In *Greenwood*, the Court looked to a small amount of general damages (even though damages were awarded), and made a determination that it was an appropriate consideration for the Trial Court to consider when making a determination as to whether or not to grant a new trial.

Finally, the rule clarified and re-announced in *Harris v. Drake* was addressed in the case of *Bennett v. Messick*, 76 Wn. 2d 474, 475 P. 609 (1969). In *Bennett*, the defense claimed it was error for the Trial Court to allow the jury to award damages for a permanent ankle injury when the Plaintiff's physician was unable to allocate a percentage of disability between the accident related injury and a dormant pre-existing arthritic condition. In response to such an argument, the Supreme Court forcefully reiterated at page 478 the following:

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 damages as a direct result of the accident. (Citations omitted).

As with the above referenced cases, the dormant, asymptomatic pre-existing conditions that Plaintiff may have suffered had no relationship to any issue relevant in the instant case. It had no relevancy to damages, because regardless of the existence of the dormant pre-existing condition, the Defendant was/is fully accountable for all damages from the accident, including both the lighting up or the creation of new injuries. In addition, it has no relationship to the issue of proximate cause under the above referenced authority. As with the Greenwood case, this is a clear situation where the submission of such erroneous evidence does justify the grant of a new trial and the Court can look to the low general damage verdict as being a

substantial or a persuasive indicia that in fact the submission of such tainted evidence had a significant, detrimental, and prejudicial impact on Plaintiff's attempt to receive justice.

Further, the submission of such evidence was predicated on what could be characterized as misconduct on the part of Defendant's counsel. That misconduct may have been motivated, for lack of better terms, by wishful thinking, as to what her "IME" doctor would say, however, there was simply no payoff with respect to the representations being made by defense counsel regarding the ability to connect up the asymptomatic, pre-existing conditions to any symptoms suffered after the accident at issue.

It is noted that the misconduct of counsel can be a predicate for a grant of a new trial. It is suggested that it is not necessary that the Court find or determine that there was a bad or evil motive. It is very clear however, Ms. Jensen interjected irrelevant evidence into this case, based on what turned out to be misleading

representations to the Court, that only became clear at completion or near completion of the case.

In addition, under CR 59 (a)(5), a new trial should be granted because the verdict simply was not within the range of proven damages. See *James v. Roebuck*, 70 Wn. 2d 864, 870-71, 490 P. 2d 878 (1971). When a verdict is so low as to unmistakably indicate passion or prejudice, a new trial should be ordered. *Wooldridge*, 92 Wn. 2d at 668. Additionally, CR 59 (a)(7) allows the Court to set aside a verdict and grant a new trial when there is no substantial evidence or reasonable inference from the evidence justifying the verdict or decision.

As previously noted, the verdict appears to be, “inconsistent”, given the fact that the jury awarded Mr. Hoskins essentially all of his past medical bills and an extremely low amount of general damages. If, in fact, the medical treatment provided to Mr. Hoskins up to date of trial was reasonable and necessary and worthy of award, then also the corresponding pain

and suffering during that time period should have been properly awarded as well. Although pain and suffering damages are subjective and the assessment of such damages is a subjective determination by the jury, the size of the award, given the un-rebutted evidence presented at time of trial should shock the judicial conscience.

According to Mr. Hoskins proof presented at time of trial, he was in excruciating pain for an extraordinary long period of time and the accident related injury to his neck impacted him at a fundamental level. According to Mr. Hoskins, he could not sleep or function and had to go through painful medical treatment that left him, “crying like a baby”.

All the affirmative proof in this case indicated that Mr. Hoskins suffered continuously from the date of the accident to the date of trial. Any proof to the contrary would be based upon mere speculation and conjecture, given the fact that a number of witnesses testified under oath regarding such pain and suffering

and it was consistently documented within Mr. Hoskins' medical records. Although there was a break in treatment that was troubling in this case, it is noted that at the time Mr. Hoskins left his initial phase of treatment, all medical providers involved believed that he was continuing to suffer and in fact was getting worse.

In addition, if one looks at the entirety of this case and the result herein, one could walk away with a simple conclusion that substantial justice was not done. See CR 59 (a)(9).

VI. CONCLUSION

For the reasons stated above, it is respectfully and humbly submitted that there were multiple grounds for the trial court to award a new trial in this matter. It was simply erroneous for the trial court not to grant new trial on a mistrial when it became apparent that evidence regarding asymptomatic pre-existing conditions had been erroneously introduced during the course of

this personal injury trial. For those reasons and for the reasons stated above, it is respectfully suggested that the appellate court find that the trial court erroneously admitted such evidence, and grant a plenary hearing new trial. In other words, plaintiff respectfully requests that the decision of the trial court be subject to reversal and that this matter be remanded for a new trial.

DATED this 5TH day of April, 2007.



Paul Lindenmuth, WSBA #15817
Of Attorneys for Appellant

COURT OF APPEALS
DIVISION II

07 APR -6 AM 9:33

STATE OF WASHINGTON
BY _____
DEPUTY

No. 35150-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MICHAEL D. HOSKINS,

Plaintiff/Appellant,

v

DEREK REICH and "JANE DOE" REICH,

Defendants/Respondents.

**THE HONORABLE DONALD THOMPSON,
PRO TEM**

**APPELLANT'S OPENING BRIEF
CERTIFICATE OF SERVICE**

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07 APR -6 AM 9:00
DIVISION II

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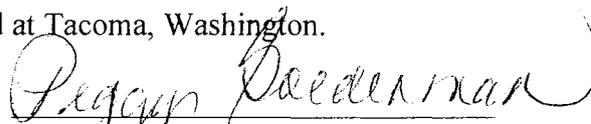
I, Peggy Goldenman, certify under penalty of perjury under the laws of the State of Washington, that I am a Paralegal at *The Law Offices of Ben F. Barcus* and that on April 6, 2007, I had delivered true and correct copies of the following:

- Appellant's Opening Brief; and
- Certificate of Service.

to the following:

- Attorney Beth A. Jensen
1021 Regents Blvd.
Fircrest, WA 98466
- Court of Appeals, Division II

DATED this 5th day of April, 2007, signed at Tacoma, Washington.


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