

NO. 497271-1-II

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

TENSAR INTERNATIONAL CORPORATION; and
JEFFREY and LORI MAIN,

Respondents,

v.

GERHARD J. SANDER and JANE DOE SANDER,

Appellants.

Appeal from the Superior Court for Kitsap County
Cause No. 12-2-01704-4

BRIEF OF CO-APPELLANT SANDER AS TO MAIN

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I. ASSIGNMENTS OF ERROR

- A. Standard of Review.**
- B. The Court Erred in Admitting Speculative Evidence related to Jeffrey Main’s Job Opportunities and Wage Loss Damages.**
- C. The Court Erred in Admitting Dr. Tay’s Testimony as to Diagnosis of Concussion and Causation.**
- D. The Record Lacks Substantial Evidence of Causation of Injuries and Diagnosis of Concussion.**
- E. The Court Erred in Excluding Evidence of Plaintiffs’ Counsel’s Communication with Experts.**
- F. The Court Erred in Admitting Evidence of Plaintiffs’ “Reliance on Faith.”**
- G. Plaintiffs’ Multiple Violations of the Court’s Orders on Motions in Limine Deprived Defendants of a Fair Trial.**

II. ISSUES PRESENTED

- A. Did the trial court err when it admitted speculative evidence related to Plaintiff Main’s job opportunities and wage loss damages, when the sole basis for the claim of wage loss was a purported job offer that had never been made, no terms had been agreed upon, no writing entered into, was purely speculative, and was the sole basis for expert testimony as to lost wages?**
- B. Did the trial court err in admitting Dr. Tay’s testimony as to diagnosis of concussion and causation of that concussion, when his testimony was conclusory,**

contradictory of his own examination and findings, lacked foundation, was based ultimately upon inadmissible historical statements, and when Dr. Tay found that his own examination, tests and observations “showed no evidence of brain injury?”

- C. Was there substantial evidence of a diagnosis of concussion and causation of that concussion when no treating medical doctor was capable of testifying, on a medically more probable than not basis, that Plaintiff suffered a concussion caused by the Accident?**
- D. Did the trial court err in excluding evidence related to Dr. Knowles bias including emails from Plaintiffs’ counsel?**
- E. Did the court err when it admitted prejudicial evidence of the Plaintiffs’ religious affiliations and activities in violation of Orders on Motions in Limine and ER 610?**
- F. Did Plaintiffs’ witnesses’ violations of the orders on motion motions in limine prejudice the Defendants when there were numerous violations over several days of testimony?**

III. STATEMENT OF THE CASE

This is an admitted liability, personal injury action arising from a motor vehicle accident that occurred on April 25, 2011. At approximately 2:50 pm that afternoon, Defendant Gerhard Sander’s vehicle rear-ended the vehicle being driven by Plaintiff Jeffrey Main (the “Accident”). [CP 103-105.] At the time of the Accident, Mr. Sander was acting under the scope of his employment with Defendant Tensar International Corporation

(“Tensar”). [CP 437-440.] However, Defendant Sander and Defendant Tensar have always maintained separate counsel.

Plaintiffs filed their lawsuit on August 6, 2012. [CP 3-7.] Following some initial discovery, Plaintiffs amended their complaint to add Tensar as a Defendant, alleging Tensar was liable for Plaintiffs’ damages arising from the Accident under the *respondeat superior* doctrine. Plaintiffs’ Amended Complaint was filed on October 28, 2013. [CP 18-24.] Plaintiff claims to have suffered a concussion and resulting brain damage caused by the Accident.

Trial of this matter was continued several times for a number of reasons, including the late addition of Tensar as a Defendant and the court’s scheduling conflicts. Motions in limine in this matter were argued on January 26, 2016, January 27, 2016 and May 9, 2016. [MIL Hr’g Tr. Vol. I, Jan. 26, 2016, Vol. II, Jan. 27, 2016 and Vol. III, May 9, 2016.]

This matter was tried before a jury of twelve in Kitsap County Superior Court, starting on August 8, 2016. On August 26, 2016, the jury issued a verdict in favor of the Plaintiffs in the amount of \$900,000.00. [CP 464-465.] Judgement was entered on September 30, 2016 in the amount of \$901,813.96. [CP 466-469.]

Defendant Tensar, Mr. Sander’s employer, filed a Notice of Appeal on October 14, 2016. Defendant Sander filed his Notice of Appeal

on October 17, 2016 to preserve certain issues for review should the Court grant either Appellant Tensar's or Cross Appellant Main's requested relief to remand, or seek further review in the Washington State Supreme Court. This Court need not address these issues should it reject the requested relief of both Appellant Tensar and Cross-Appellant Main.

IV. ARGUMENT

A. Standard of Review.

1. Evidentiary Rulings.

A ruling that admits or excludes evidence may constitute appealable error if a substantial right of a party is affected and a timely and specific objection is made, or, in the case the ruling is one excluding evidence, the substance of the evidence was made known to the court, or was apparent from the context. ER 103. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Grigsby v. City of Seattle*, 12 Wn. App. 453, 454, 529 P.2d 1167, 1169 (1975). When the trial court has made a number of relatively minor, nonreversible errors, the cumulative effect of the errors

may still be sufficient to justify a reversal and new trial. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 992 (1998).

2. Sufficiency of the Evidence.

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest. *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

When reviewing a motion for judgment notwithstanding the verdict (judgment as a matter of law), this Court applies the same standard as the trial court. *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995), see also, *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250, 254 (2001).

B. Evidence of a Speculative Job at Denali and Speculative Wage Loss Testimony Should have been Excluded.

Plaintiffs claimed that but-for the motor vehicle accident, Mr. Main would have had a permanent position at Denali Advanced Integration (“Denali”) making approximately \$170,000.00 annually. At trial, this alleged lost job opportunity was the basis for Plaintiff’s wage loss claim. However, there was no competent evidence to suggest that the job was anything other than the product of pure speculation of Mr. Main and his friend, Mr. Updegrove.

Prior to trial, Defendant Tensar brought a motion in limine to exclude evidence of this speculative job opportunity. [CP 558-561.] Defendant Sander joined in that motion. [CP 750.] The court denied the motion in limine, ruling that Mr. Updegrove was permitted to testify about this speculative job opportunity and that Plaintiff’s forensic economist expert could rely upon Mr. Updegrove’s declaration regarding the same. [MIL Hr’g Tr. Vol. I, 150-161, Jan. 26, 2016.] Plaintiff should have been precluded from presenting speculative testimony regarding a conjectural job opportunity at Denali. The trial court abused its discretion when it permitted such speculative testimony from both lay and expert witnesses.

At the time this Accident occurred, Mr. Main worked as an independent contractor, working on a project for Denali. Mr. Main was

providing Denali with his services on an hourly basis and his engagement with Denali was expected to end upon completion of the project. [CP 633-634.] Approximately five months after the Accident, Mr. Main stopped working with Denali. [J. Main 159, Aug. 10 and 11, 2016.] Mr. Main claims that he was asked to leave as a result of the injuries he sustained in the Accident.

Mr. Main claimed that, but-for the accident, Denali would have hired Mr. Main into a fulltime employee role. The position Mr. Main claims he would have filled at Denali was purportedly a new position, created specifically for him. However, Mr. Main never had a contract with Denali to become a fulltime employee. [J. Main 163-164, Aug. 10 and 11, 2016.] There is no written agreement or other writing that even alludes to this new position for Mr. Main. [J. Main 171, Aug. 10 and 11, 2016.] Mr. Main's alleged job opportunity was based solely on the declaration of his co-worker and friend, Sean Updegrave. [CP 633-634.]

Mr. Updegrave did not have hiring authority at Denali. Even if the position for Mr. Main was a reality, which is not supported by any evidence, Mr. Updegrave did not have personal knowledge to testify as to this alleged job. At best, Mr. Updegrave could put in a good word for Mr. Main, but he had no foundation to testify that Mr. Main would have had this job, as Mr. Updegrave was not capable of hiring Mr. Main. [CP 639.]

In fact, the CEO of Denali, Majdi Daher, would have had to approve this alleged job for Mr. Main. However, Mr. Daher was never even presented with a proposal that Mr. Main be hired on fulltime. [CP 641-642.]

Further, in Mr. Updegrove's declaration, he claimed that the position meant for Mr. Main was ultimately given to another employee, Nathan Appleton. However, Mr. Appleton provided a declaration wherein he explains that he was hired into his position in February of 2011 – two months *before* Mr. Main was even in the Accident. [CP 636.] Therefore, assuming the position did exist, it was already given to Mr. Appleton, over Jeffrey Main, months before he was in the Accident.

Despite his lack of personal knowledge on this issue, Mr. Updegrove provided Plaintiffs with a declaration, which was then provided to Plaintiff's forensic economist, Dr. David Knowles, to support his testimony that but-for the Accident, Mr. Main would have been making \$170,000 annually for the rest of his career. [CP 558, 618-628.] Dr. Knowles' testimony about this speculative job opportunity should not have been presented to the jury.

This type of speculative testimony is inadmissible under ER 402 and ER 701 and is an improper basis for expert testimony under ER 703. “[S]peculative testimony is not rendered less speculative or of more consequence to the jury's determination simply because it comes from an

expert.” *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786, 797 (2007). “[T]here is no value in an opinion that is wholly lacking some factual basis...Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.” *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102–03, 882 P.2d 703, 731 (1994), *as amended* (Sept. 29, 1994), *as clarified on denial of reconsideration* (Mar. 22, 1995). “An expert opinion must be based on facts, not speculation or conjecture.” *Time Oil Co. v. City of Port Angeles*, 42 Wn. App. 473, 480, 712 P.2d 311, 315 (1985). “The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.” *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761–62, 27 P.3d 246, 248 (2001) (internal citations removed).

Before introducing Dr. Knowles’ testimony regarding this lost earning opportunity, the Plaintiff was required to show that the injury suffered by the plaintiff is an injury that, *in fact*, diminished the ability of the plaintiff to earn money. *Bartlett v. Hantover*, 9 Wn. App. 614, 619–20,

513 P.2d 844, 848 (1973), rev'd, 84 Wn. 2d 426, 526 P.2d 1217 (1974).

Plaintiffs did not and could not lay this foundation.

Mr. Updegrove's declaration and/or testimony should not have been the basis of any lost wage calculations. After making the declaration, Mr. Updegrove admitted under oath that the final decision with regard to hiring for the position was not his, but rather belonged to the President and founder of Denali, Majdi Daher. [CP 638-639.] According to Mr. Daher, Mr. Updegrove never presented him with a request to hire Jeff Main as a W-2 employee. [CP 641-642.] Moreover, even if Mr. Main was, at one time, a potential candidate for the job, he lost out on the position before the April 2011 motor vehicle Accident, because Mr. Appleton had already been hired for that position. [CP 636.]

There is no basis in fact for wage loss calculations premised upon the notion that "but for" the April 2011 MVA, Mr. Main would have had full time W-2 employment at Denali, earning a base salary of \$150,000 and annual bonus of \$20,000 for the remainder of his work life. Dr. Knowles' testimony in this regard was reliant completely on speculative testimony of Mr. Updegrove which was demonstrably false.

Evidence about future employment at Denali should not have been permitted, as it was completely speculative and conclusory. There is no competent evidence to suggest that this job was ever actually offered to

Mr. Main, that Mr. Main was being considered for the job or what the terms of his employment would be. In fact, the evidence before the court clearly showed that Mr. Main was not considered for this position by the person with hiring authority, that the compensation for the position was never determined, and the job was given to another employee prior to Mr. Main ever having been in the Accident.

This issue should have been resolved prior to trial and the speculative testimony of Dr. Knowles and Mr. Updegrave should never have been presented to the jury. Furthermore, on August 23, 2016, after all testimony at trial had concluded, Defendant Tensar moved to dismiss any claim of loss related to the Denali job on the basis that there was not an offer, there was not a job, and those claims for damages based on the purported offer were far too speculative. Defendant Sander joined in the motion, citing *Bakotich v Swanson*, 91 Wn. App. 311, 957 P.2d 275 (1998) as authority. [Hr'g Tr. 22-30, Aug., 23, 2016.]

In *Bakotich*, the Plaintiff sought damages for breach of contract when he was not given a job that had allegedly been promised to him. The court ruled that even if Bakotich had a colorable cause of action, because he did not have an employment contract and had not yet earned any wages at this alleged new job, his damages claim was too speculative and was properly excluded. *Bakotich* at 316-317. In making this ruling the

Bakotich court relied upon *McNaulty v Snohomish School Dist. No. 201*, 9 Wn. App. 834, 515 P.2d 523 (1973) which held that even where an employment contract exists, a discharged teacher could not recover wages for wrongful termination into the indefinite future, as the mere expectancy of employment is not sufficient to support an award of damages for the distant future. *McNaulty* at 838.

However, despite the lack of evidence to support the speculative job opportunity and speculative wage loss damages in this case, the court denied Defendants' motion and allowed the issue to be presented to the jury. [Hr'g Tr. 22-30, Aug., 23, 2016.]

For the reasons set forth above, it was error for the Court to admit the speculative testimony and error not to dismiss these claims and error to submit the speculative claim for damages to the jury based on the evidence as presented.

C. The Court Erred in Admitting Dr. Tay's Testimony as to Diagnosis of Concussion and Causation.

Dr. Tay's purported diagnosis of concussion lacked foundation and was not based upon competent or admissible evidence. Further, Dr. Tay was not qualified to opine as to what caused Mr. Main's alleged concussion and his testimony regarding causation should have been excluded.

In reviewing a trial court's exclusion of expert testimony under the rules of evidence, the standard is abuse of discretion. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008). To be admissible, expert witness testimony must be relevant and helpful to the trier of fact. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011). Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). When ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert. *Miller*, 109 Wn. App. at 148, 34 P.3d 835. *See also, Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764, 767 (2012).

Dr. Tay's "diagnosis" and opinion as to causation were both conclusory and lacked foundation. Dr. Tay made no diagnosis himself, but rather relied impermissibly on purely subjective reporting from Mr. Main, or prior providers who in fact similarly made no such diagnosis themselves. [Tay 73-75, 77-78, August 16, 2016.] [Prethram 22, 24 and 31, August 15, 2016.]

Dr. Tay completed his examination of Mr. Main and all of Tay's test results came back normal, and in some of the tests ... perfect. [Tay 47,

57- 59, and 68-69, August 16, 2016.] Dr. Tay testified that all of his observations and tests of Mr. Main “showed no evidence of brain injury.” [Tay 67, August 16, 2016.]

A doctor’s assertion as to the existence of a particular medical condition, or its cause, must be supported by substantial evidence. Dr. Tay’s testimony was not only inadmissible, even if admitted, it fails to support either the diagnosis of concussion or the purported cause of Mr. Main’s alleged concussion.

When faced with similar facts, Division I of the Court of Appeals found that a treating physician’s testimony, with even more factual support than Dr. Tay’s, was ‘too thin’ to satisfy the claimant’s burden.

“We give special consideration to Dr. Keifer's testimony as Potter's treating physician. Nonetheless, the testimony of medical experts “must have established that it was more probable than not that her exposure to chemicals” in the office caused Potter's occupational disease. Dr. Keifer's testimony is too thin to meet this test. He said all of Potter's tests came back grossly normal, with the possible but minor exception of a high pulse reading and a one-time unexplained drop in blood oxygen saturation from 97 to 93. Although Dr. Keifer recommended Potter undergo neuropsychological testing, this had not occurred by the time of the Board hearing. *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 312, 289 P.3d 727, 732–33 (2012) (citations omitted).

Plaintiff attempted to provide an offer of proof as to Dr. Tay’s foundation to testify as to a diagnosis of concussion and causation. [Tay, 3-30, Aug. 16, 2016.] This offer of proof failed. Dr. Tay testified that none of the tests

that he himself conducted were consistent with Jeff Main suffering a concussion. [Tay, 14, Aug. 16, 2016.] Simply put, Dr. Tay's testimony could not have formed the basis for a differential diagnosis and was woefully insufficient to supply the necessary foundation to establish causation on a reasonable degree of medical certainty on a more probable than not basis.

D. The Record Lacks Substantial Evidence of Causation of Injuries and Diagnosis of Concussion.

Based on the error in admitting the Tay diagnosis and causation testimony, coupled with the lack of any admissible diagnosis or causation opinion from any other qualified expert, Plaintiff has failed to establish substantial evidence in the record to satisfy his burden as to either necessary element of his claim for concussion related damages.

The chain of Main's purported diagnosis of concussion begins with Dr. Prethram, Plaintiffs' treating chiropractor, who admitted under oath that he neither diagnosed Mr. Main with a concussion, nor was capable of doing so. [Prethram 22, 24 and 31, Aug. 15, 2016.] The next link in this tenuous chain is Nancy Adams, a nurse practitioner. However, Ms. Adams did not testify, and it is clear from the chart notes that were referenced in the record that she relied on Mr. Main incorrectly telling her that his chiropractor, Dr. Prethram, had diagnosed him with a concussion. [Tay

66-67, Aug. 16, 2016; Pethram 22, Aug. 15, 2016, and J. Main 200, Aug. 10 and 11, 2016.] Of course, this was false according to Prethram, but the chain simply continued to grow based on its weakest links and resulted in the word “concussion” showing up in medical records, even though it was never properly, adequately or admissibly diagnosed in the first place.

No competent, and certainly no substantial, evidence exists to establish Plaintiff’s claimed diagnosis or causation once the erroneous admission of Dr. Tay’s testimony is remedied. The Court abused its discretion in allowing Dr. Tay to offer diagnosis and causation testimony that was simply ‘too thin’ to be admissible.

E. The Court Erred in Excluding Evidence of Plaintiffs’ Counsel’s Email Communication with Experts.

Plaintiff brought a motion in limine to exclude his email with Plaintiff’s forensic economic expert, Dr. Knowles, wherein Plaintiff’s counsel, Jed Powell, asked Dr. Knowles to “[p]lease delete this email.” [CP 675-676.] Both Defendants opposed this motion, arguing the comment to Dr. Knowles is relevant to show bias and to support Defendants’ theory of the case – namely that Plaintiff’s counsel, rather than the historical facts or reality - was orchestrating the alleged damages in this case. [CP 736-737, 744, MIL Hr’g Tr. Vol. I, 76-79, Jan. 26, 2016.] The court granted Plaintiff’s motion and the comment by Mr. Powell was

excluded. [MIL Hr'g Tr. Vol. II, 203-205, Jan. 27, 2016; CP 895-896.]

The Court erred in excluding this relevant evidence.

Significant evidence indicated that the injuries and damages alleged by Plaintiffs in this matter were greatly influenced by the orchestration of their counsel. Before hiring counsel, Plaintiff did not seek treatment with a neurologist or neuropsychologist. [Tay 54-55, 72, 74 and 77, Aug. 16, 2016.] It was only after Mr. Main's attorneys recommended it, that Mr. Main sought evaluation by Dr. Tay, a neurologist. [Id.] Dr. Tay completed his examination and all of Tay's test results came back normal, and in some of the tests ... perfect. [Tay 57-59, and 68-69, Aug.16, 2016.] Dr. Tay testified that all of his observations and tests of Mr. Main "showed no evidence of brain injury." [Tay 67, Aug. 16, 2016.] However, based on the referral from Main's counsel, Dr. Tay sent Mr. Main to see neuropsychologist, Dr. Ferguson. [Tay 86-87, Aug. 16, 2016.] Dr. Ferguson again found that Mr. Main suffered from no cognitive impairment and that Main was functioning very well intellectually and cognitively and recommended no further treatment, aside from getting regular sleep and reducing stress. [J. Main 233-235, Aug. 10 and 11, 2016.] After attempting to enlist Mr. Main's treating providers failed, his counsel hired San Francisco neuropsychologist, Dr. Richard Perrillo. [J. Main 112, Aug. 10 and 11, 2016.]

Similarly, the Mains' financial position had not been damaged by this Accident. In fact, even Mr. Main testified that he made "about the same" income after this accident as he did before the accident. [J. Main 218, Aug. 10 and 11, 2016.] Contrary to this reality, Main's "team of attorneys" hired forensic economist, Dr. David Knowles. [J. Main 211, Aug. 10 and 11, 2016.] Thereafter, Mr. Powell gave Dr. Knowles the calculations and theories upon which to calculate economic damages.

Other than the testimony of the experts hired by Main's "team of attorneys," the evidence in this case did not support Plaintiffs' injury or economic loss claims. This was a theory of the case that the Defendants planned to argue at trial. The excluded email from Mr. Main's attorney to Dr. Knowles, wherein Mr. Powell asked Dr. Knowles to "[p]lease delete this email" is evidence clearly supporting that theory.

Plaintiffs argued that the comment was made in jest and, therefore, was more prejudicial than probative. However, even if the comment was a joke, it shows acknowledgement that the content of the email would not be well taken by a jury. Moreover, even if it is assumed that Mr. Powell was joking, the comment shows undue familiarity with this economic expert, and it was something that Defendants should have been able to present to the jury.

A party has the right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome of the case. *Alston v. Blythe*, 88 Wn. App. 26, 41, 943 P.2d 692, 700 (1997). The excluded comment was clearly relevant to show this witness' bias. The comment tends to show that Dr. Knowles was asked to rely upon counsels' communication, rather than facts, to formulate his opinion. As the excluded comment indicates – this was not a favorable fact for the Plaintiffs. Further, the excluded comment shows a close relationship between counsel and the expert. Because the comment had a tendency to show Dr. Knowles' bias in this case, it was relevant and should not have been excluded.

In addition to showing bias, the comment was relevant as part of the basis for this expert's opinions in this case. "Rule 705 allows the cross-examiner to probe the knowledge of the witness and the facts and elements relating to the witness's opinion." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn. 2d 50, 103, 882 P.2d 703, 731 (1994), *as amended* (Sept. 29, 1994), *as clarified on denial of reconsideration* (Mar. 22, 1995), *citing* 5A K. Tegland, § 313, at 489. Furthermore, "[i]t is improper for a trial court to determine in a pretrial order, that potential evidence is irrelevant, without having called for an offer of proof or its equivalent. This would be deciding the relevancy of evidence upon the

basis of conjecture.” *Wilson v. Lund*, 74 Wn. 2d 945, 949, 447 P.2d 718, 720 (1968).

Defendants should have been permitted to question Dr. Knowles about the comment “[p]lease delete this email” on cross examination to show his potential bias and to make the jury fully aware of the true basis of Dr. Knowles’ opinions, which was instruction of counsel.

F. The Court Erred in Admitting Evidence of Plaintiffs’ “Reliance on Faith.”

Defendant Sander brought a motion in limine to exclude references to Plaintiffs’ religious affiliations. [CP 528.] Defendant argued that Plaintiffs’ religious affiliation and/or practices are completely irrelevant to the alleged damages and would only tempt a jury to make decisions based on emotion or sympathy. [MIL Hr’g Tr. Vol. II, 206-214, Jan. 27, 2016.] Nonetheless, the court ruled that Plaintiffs were allowed to testify as to pastoral counseling and/or that they have relied upon their “faith.” [CP 909.] Allowing Plaintiffs to testify as to pastoral care and that they “relied on faith” was clear error.

Washington Evidence Rule 610 states that “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.” There exists no justification for allowing religious

“faith” or pastoral care to be admitted in testimony or any other form of evidence in a personal injury action. No exception exists in this case and the evidence should have been excluded pursuant to Defendant Sander’s Motion in Limine. [CP 527-538.]

G. Plaintiffs’ Multiple Violations of the Court’s Orders on Motions in Limine Deprived Defendants of a Fair Trial.

1. References to Insurance.

Washington Evidence Rule 411 states, “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...” Pursuant to that rule, Defendant Tensar brought a motion in limine to preclude any evidence of insurance at trial. [CP 544.] Defendant Sander joined in that motion. [CP 750.] Plaintiff also brought motions in limine to preclude evidence related to insurance. [CP 666, 669.] There was no justifiable purpose for the introduction of evidence related to insurance. All motions requesting exclusion of evidence related to insurance were granted. [CP 894-895, 900.]

Despite the court’s very clear ruling that references to insurance of any kind were to be excluded, Plaintiff Jeffrey Main brought up insurance on at least four occasions during his testimony. [J. Main 73, 82, 97, and

265, Aug. 10 and 11, 2016.] Mr. Main even brought up insurance *after* being reminded by the court that he was not to testify as to insurance. [J. Main 102-104, and 265, Aug. 10 and 11, 2016.] The jury clearly took notice of the insurance issue, as evidenced by the several proposed written questions to Dr. Perrillo relating to payment and insurance. [Perrillo 96-197, Aug. 17, 2016.]

Jeffrey Main's repeated references to insurance coverage clearly prejudiced the Defendants in this matter. It is questionable whether these violations of the order on motions in limine were purposefully, given the number of times this witness mentioned insurance – even after being reminded by the Judge that he was not to bring up insurance. [J. Main 102-104, and 265, Aug. 10 and 11, 2016.]

“We have for many years said that the injection of this matter into a trial of personal injury actions is one which will not be countenanced, and that when it is deliberately done the penalty is the setting aside of the verdict partly secured thereby, and that the error is so flagrant that it cannot be cured by instructions of the court to disregard it, for such cautionary admonitions cannot uproot the plant, which proceeds to bear its desired and usual fruit...‘If it be apparent that counsel deliberately sets about, although in an indirect way, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial.’...‘The striking of the answers conveying such information and the instructing of the jury not to consider it will not save the error.’ *Lucchesi v. Reynolds*, 125 Wn. 352, 356–57, 216 P. 12, 13–14 (1923) (internal citations omitted).

The Defendants were prejudiced by Jeffrey Main's repeated violations of the order in limine that all mention of insurance be excluded completely from trial. Defendants are therefore entitled to a new trial.

2. Experts Reference to Work with Veterans.

Tensor brought a motion in limine to exclude testimony by Plaintiff's experts about their work with veterans or members of the military. [CP 565.] Defendant Sander joined in that motion. [CP 750.] The court ruled the experts' experience with veterans or military members was irrelevant. The court ordered that the experts were only permitted to testify as to their previous patients' injuries, not their personal characteristics, such as being a veteran. [CP 905-906, MIL Hr'g Tr. Vol. I, 185-191, Jan. 26, 2016.] Nonetheless, Dr. Perrillo referenced his work with veterans on several occasions. [Perrillo 8, Aug. 11, 2016; Perrillo 163-176, Aug. 17, 2016.]

This violation of the order on motions in limine was prejudicial to the Defendants. There is a naval base in Kitsap County, and therefore many residents, and jurors, of Kitsap County have a close relationship to the military or members of the military. This testimony had no relevance to Mr. Main's injuries and was injected only to unfairly gain sympathy and support from the members of the jury.

V. CONCLUSION

For the reasons set forth above, should Appellant Tensor or Cross Appellant Main prevail on appeal, then a new trial should be granted for all parties on all issues.

Respectfully submitted,

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s/ Michael P. Scruggs

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Goetz Fick & Scruggs, P.L.L.C.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On June 9, 2017, I served the foregoing BRIEF OF CO-APPELLANTS AS TO MAIN on the following parties via the method indicated:

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June 09, 2017 - 1:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49727-1
Appellate Court Case Title: Jeffrey and Lori Main, Respondents v Gerhard J. Sander and Tensar Int'l Corp, Appellants
Superior Court Case Number: 12-2-01704-4

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