

Case No.: 35163-7

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III**

STEVE MILLER and LETICIA MILLER, husband and wife,

Plaintiffs-Appellees,

v.

DREW DALTON, individually, as a representative of the marital
community, and as Partner/Member of Ford Law Offices; and FORD
LAW OFFICES, PS, a Washington corporation,

Defendants-Appellants.

APPELLANTS' OPENING BRIEF

Gregor A. Hensrude, Esq., Bar No. 45918
Anthony C. Soldato, Esq., Bar No. 46206
KLINEDINST PC
801 Second Avenue, Suite 1110
Seattle, Washington 98104
ghensrude@klinedinstlaw.com
asoldato@klinedinstlaw.com
PH: (206) 682-7701

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. FACTUAL BACKGROUND	3
A. Background to the Case	3
B. Pre-trial Motions and Rulings Correctly Eliminate Any Emotional Distress Component	5
C. The Trial Proceeds with Crying Family Members and Countless Pleas to Prevent the Millers from Becoming Homeless.....	6
D. The Millers’ Expert Continues the Theme, but Evidence of Correct Measure of Potential Damage is Admitted	9
E. The Court Refuses to Give Mitigation and Contributory Negligence Instructions Though Both Sides Argued Applicable Evidence	10
F. The Jury Returns an Impossible Verdict.....	12
G. Dalton Moves for a New Trial or Remittitur Because the Jury’s Verdict Was Impossible Under Existing Law.....	13
IV. THE JURY’S VERDICT RESULTED FROM A SERIES OF JUDICIAL ERRORS AND IMPROPER EVIDENCE	14
A. The Verdict is not Supportable Under any Interpretation of Existing Law	15
1. A legal malpractice plaintiff is entitled to damages Necessary to put him/her where he/she would have been absent the negligence.....	16

2.	The appropriate measure of damages must compare where the Millers would have been absent negligence with where they actually were at time of trial.....	17
3.	The jury’s own verdict fatally undermines itself by demonstrating the error	19
B.	The Miller Daughters’ Testimony and Closing Argument Should Have Been Excluded; Failure to Do So Tainted The Jury, and Was Reversible Error	21
C.	The Court Failed to Properly Instruct the Jury, and Indeed Even Set Up its Own Error With an Earlier-Sustained “Relevance” Objection.....	24
V.	CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Dalton</i> , 40 Wn.2d 894 (1952)	20
<i>Bingaman v. Grays Harbor Cmty. Hosp.</i> , 103 Wn.2d 831 (1985)	20
<i>Clements v. Blue Cross of Wash. & Alaska</i> , 37 Wn. App. 544	31
<i>Estate of De Laveaga</i> , 50 Cal.2d 480 [326 P.2d 129]	22
<i>Grimes v. Emp'rs Mut. Liab. Ins. Co.</i> , 73 F.R.D. 607 (D. Alaska 1977)	28
<i>Hill v. Gte Directories Sales Corp.</i> , 71 Wn.App. 132 (1993)	20, 25, 30
<i>Lockwood v. AC & Sons Inc.</i> , 109 Wn.2d 235 (1987)	26
Lockwood, <i>supra</i> , 109 Wn.2d at 257	26
<i>Matson v. Weidenkopf</i> , 101 Wn.App 472 (2000)	21
<i>Millies v. LandAmerica Transnation</i> , 185 Wn.2d 302 (2016)	20
<i>Munger v. Moore</i> , Cal.App.3d 1 (1970)	22
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664 (2010),	26
<i>Schmidt v. Coogan</i> , 181 Wn.2d 661 (2014)	21
<i>Shoemake v. Ferrer</i> , 168 Wn.2d 193 (2010)	21

Trevino v. Gates,
99 F.3d 911 (9th Cir. 1996) 28

STATUTES

Fed. R. Evid. 403 26
RCW 4.76.030 29

I.

INTRODUCTION

Our system of justice works, more often than not, when everyone does his or her respective job—the lawyers advocate, the judge enforces the rules of advocacy, the witnesses testify within those bounds and, ultimately, the jury decides the cause. When one fails, the result is in question. When two fail, an error becomes increasingly likely. And when the first three all fail, the likelihood of jury error is exceedingly high. This is that case—the judge erred, allowing the witnesses to testify outside the bounds of admissibility, and the lawyer then wove that improper testimony into an improper closing argument. Not surprisingly, the jury returned a verdict so incongruous as to be a literal impossibility.

The trial court made specific rulings on a number of evidentiary issues, but unfortunately erred so significantly on two of them as to preclude the trial result from ever being within the realm of reason. Whether that was because of the school-age witnesses who were completely uninvolved in the facts and circumstances of the case testifying about spending Christmas in their “dream” home, or counsel’s closing argument telling the jurors they must find for Steve and Leticia Miller or render the family “homeless” at Christmastime, the damage was done.

Rather than providing to the Millers the value of the lost home (which they had, and still have) minus encumbrances, the jury provided the Millers the value of a judgment against the home, which far exceeded its equity and could not, under any contortion of the law, constitute any harm caused them by their lawyers.

Prior to and during the trial, the court had multiple opportunities to prevent this result—Appellants’ motion in limine to exclude the young women’s testimony as irrelevant and unduly prejudicial, for example—and did not do so. And even after allowing the Millers to claim the value of the judgment as damages, the trial court refused to admit mitigation or contributory negligence evidence, the court then compounded its error by refusing to provide a jury instruction on mitigation because there was no evidence.

The end result is a verdict that is impossible on its face, and therefore must be overturned.

II.

ASSIGNMENTS OF ERROR

- (1) The trial court erred in refusing to grant new trial or remittitur based on the fact that the jury’s verdict was a legal impossibility. While the trial court conceded that Appellants

position was the logical one, it improperly deferred to the verdict anyway where it was plainly unlawful.

- (2) The trial court erred in admitting, over Appellants' motion in limine, purely emotional testimony of the Millers' children on the personal value of their home that had zero probative value and substantial likelihood of inflaming the jury.
- (3) The trial court erred in refusing to instruct the jury on contributory negligence and mitigation, and then erred again in excluding mitigation testimony, deeming it irrelevant.

III.

FACTUAL BACKGROUND

A. Background to the Case.

The central facts of the case are not in dispute—in 2006 the Millers built their “dream home,” and substantially completed it in 2008. They then refinanced their construction loan with a \$417,000 cash-out loan in October 2008, although they could not afford the \$2,400 monthly payment. [Report of Proceedings (RP) at Vol. III at 476:6-10; 478:6-20] Immediately realizing that, the Millers invested some of the cash from the loan into a stock purchase, thinking that would help create income. [RP, Vol. III at 476:11-477:6] At one point the stock purchase climbed above \$200,000, but they decided not to sell and use the proceeds to take care of

their debt. [RP, Vol. VI at 736:20-737:8] Instead, they attempted, just eight months after the loan issuance, to obtain a loan modification. [RP, Vol. III at 478:21-479:18] Over the next three years the Millers unsuccessfully attempted self-help, sought, received and rejected refinance offers, ducked foreclosure processes, and consulted with a lawyer. When all of that failed, and on the eve of foreclosure in April 2012, they retained attorney Drew Dalton of the Ford Law Office, PS (collectively, Dalton) to see if he could help them.

The crux of the case at bar—indeed the whole case—was a letter from SunTrust (then the mortgagee) offering a loan modification in May of 2012. [Ex. P11] That offer reiterated a 2009 offer, but the 2012 offer was unclear as to whether it included escrow amounts (property tax and insurance),¹ which the Millers believed were included in the 2009 offer. The central dispute at trial was whether Dalton had passed it on to the Millers and been asked to determine whether it was inclusive or not (as he testified to) or whether he had never passed it on at all (as the Millers contended). The Millers argued that if Dalton had passed it on, they would have accepted it—escrow included or not.

¹ The letter is not particularly unclear, as it stated the “permanent modification will be a fixed rate **non-escrowed** loan.” [Ex. P11 (emphasis added)] Much of Mr. Miller’s fight from 2009 to that time, however, was an attempt to take advantage of an (apparent) error by SunTrust that offered that payment *including* escrow. His years-long stand on the issue is not relevant for the purposes of this brief.

The Millers further alleged that if they had accepted the loan modification offer, the foreclosure never would have gone forward, and they never would have faced a judicial foreclosure judgment. The foreclosure judgment stated that the amount due the judgment creditor was \$513,626.91. [Ex. P56, cite at 3:23] It also specifically found that if the foreclosure did not satisfy the amount owing, *no deficiency judgment could be had*. [Ex. P56, cite at 4:13-17]

B. Pre-trial Motions and Rulings Correctly Eliminate Any Emotional Distress Component.

Prior to trial, Dalton moved for summary judgment arguing, based on well-established Washington law, that emotional distress damages are not allowed in a run-of-the-mill malpractice case. [Clerk's Papers ("CP") at 33-51] The trial court agreed, and struck them from the complaint. [CP at 581] Dalton then brought a motion in limine seeking exclusion of any argument of emotional distress at trial, which the trial court also granted. [CP at 502]

However, the court refused Dalton's motion to preclude testimony from the Millers' two daughters, Brianna and Alissa, even though they had no involvement or knowledge in the case, and instead were clearly going to be used to appeal to the passions of the jury. [RP, Vol. 1 at 152:7-13] The court's denial of that motion opened the door for Brianna and Alissa

(and their mother Leticia Miller, who was marginally involved in the loan modification but could now testify about the emotional component) to improperly appeal to the sympathy of the jurors. [RP, Vol. I at 152:7-154:21]

C. The Trial Proceeds with Crying Family Members and Countless Pleas to Prevent the Millers from Becoming Homeless.

And they did. Alisa, a college freshman [RP, Vol. IV at 23:4-25], testified as to nothing other than the difficulty of living in a trailer house, and her pure joy as a child when she learned that her parents were going to build a new house. [RP, Vol. IV at 385-393.] She includes the phrase that permeated the trial, saying twice in one answer that her parents tried everything to “save the house.” [RP, Vol. IV at 390:18-19.] Her testimony transparently attempted to appeal to the jury’s emotion through the words of a young woman who loved her house. But the testimony was irrelevant to any issue presented in the trial. Alisa’s 15-year-old sister² Briana provided identical testimony. [RP, Vol. IV at 393-396]

And the testimony of Leticia Miller was no better, though admittedly a few of the dozens of questions posed actually had the tendency to prove or disprove an issue in the case. After establishing the unfortunate but wholly irrelevant fact that she was battling breast cancer

² [Leticia Miller at RP, Vol. IV at 405:9-16]

[RP, Vol. IV at 398:3-20], Ms. Miller continued the same appeal to emotion that marked the Millers' entire case-in-chief. After presenting pictures of the dilapidated mobile home they lived in before building the "dream house" they could not afford [Exs. P58-P64], and detailing how hard life was in the trailer, Ms. Miller started crying and the court offered tissues. [RP, Vol. IV at 406:9-15] What did the mobile home have to do with the case? Nothing at all. Nor did the problems with the builder that ostensibly accelerated their financial problems. But those topics took up pages of the transcript. [RP, Vol. IV at 398-422] Ms. Miller discussed how the children loved the new house, detailing the family's first Christmas in the home [RP, Vol. IV at 418:1-9], and calling it her "dream home" innumerable times. She recounted the birthdays spent there, the "great memories," and, even though emotional distress damages were excluded, countless appeals to emotion:

All the stress that I (inaudible) cried, all this time the kids asking me, you know, "Mom, is everything going to be okay?" Me trying to -- to comfort them, knowing that, you know, we were going through all this. And I could not believe -- I could not believe that all that pain, all that stress—why? And it could have been -- all those years that were lost, all that peace that was taken, and it was just this letter, as simple as that, to say yes.

[RP, Vol. IV at 431:6-11] The theme continued in closing:

- “And I'm a dad. And my Number One job as a dad is to make sure my family has a safe place to live.” [RP, Vol. IX at 1115:23-24]
- “And you heard the testimony from Leticia and the girls and Steve about all the struggles and strife they went to to create this beautiful home.” [RP, Vol. IX at 1115:6-8]

Repeated appeals were made to prevent the Millers from becoming homeless:

As I said, the Millers are facing a real likelihood of becoming homeless. Think about that for a minute. You read, you saw the order that was entered. It was an order of foreclosure and sale. For then \$513,000. Now it's \$566,085 and some odd cents. And the order says, “If you do not pay this order, your home will be sold immediately.”

[RP, Vol. IX at 1121:25-1122:4]

Provide us the justice that the Miller family is entitled to so that we can be in the same situation that we were when we hired Mr. Dalton. And that was we would have had our home. And we would have been safely in our home today. And we would have enjoyed the Christmas holidays in our home today without worrying about it being sold and us being homeless.

[RP, Vol. IX at 1122:11-17]

- “[R]ight now the only thing that stands between the Miller family and the loss of their home is you.” [RP, Vol. IX at 1114:14-15]
- “Do justice in this case. That's all we're asking. Do justice in this case. Do the right thing. Protect the Miller family as Mr. Dalton did not do. Protect them from their potential loss of their home.” [RP, Vol. IX at 1122:24-1123:2]

And then counsel concluded the closing by inaccurately paraphrasing the jury instruction on damages: “Here's what the measure of damages are. Instruction No. 9. The Millers are entitled to an award that restores -- the language is slightly different than 9, but basically, that restores them to their home.” [RP, Vol. IX at 1135:21-24]

All we ask you in this case is to do the right thing. Is to do justice. Is to correct Mr. Dalton's mistake in the only way that it can be corrected and that is to award my clients enough money that they can save their home, that they can pay off this judgment that was there because of Mr. Dalton's malpractice. And that they then can go back to enjoying the peace and the quiet and the happiness of this season and the entire year. And that is to have a home to go home to and to not be homeless.

[RP, Vol. IX at 1139:7-15]

D. The Millers' Expert Continues the Theme, but Evidence of Correct Measure of Potential Damage is Admitted.

At trial, the Millers proffered an expert (Eric Knowles) to present what his “economic analysis is of what amount of money it’s going to take in order to avoid the Millers losing their home.” [RP, Vol. V at 540:21-23] Most of the remaining testimony was that there was no other way for the Millers to keep their home, but at one point Mr. Knowles opined that if he compared a mortgage to pay off the entirety of the judgment with the SunTrust mortgage they should have received absent the alleged

negligence, the difference over time was \$369,000. [RP, Vol. V at 545:2-547:10] He concluded by stating that if financing could not be obtained, “there’s no other options. They would lose their home.” [RP, Vol. V at 547:11-14]

Dalton’s expert, Neil Beaton, explained how the damages were calculated under the law. In short, if the Millers lost the house, they were losing equity of \$140,000. [RP, Vol. VIII at 1044:3-1045:22] Because of the theory pursued by the Millers, he also performed a calculation as if the foreclosure judgment itself was the damage. In that scenario, he calculated the present cost of the mortgage that they would have had if they had accepted the loan refinance (\$227,981), the payments they would have made on that modified note until trial (\$69,529), and subtracted that from the judgement they did have (\$566,086) to determine the actual loss caused by the inability to take advantage of the loan modification. [RP, Vol. VIII at 1045:23-1047:15] This number was \$268,666.³

E. The Court Refuses to Give Mitigation and Contributory Negligence Instructions Though Both Sides Argued Applicable Evidence.

Separately, the judge refused to instruct the jury on two issues Dalton requested, and argued: mitigation and contributory negligence. [RP, Vol. IX at 1091:22-1094:1] The rationale was that there was no

³ The mathematics suggests this number was probably intended to be \$268,576.

evidence of either in the record, but that is simply incorrect. Dalton's expert testified at length about decisions the Millers made that put themselves in that position, including whether they could even afford the mortgage in the first place and the fact that when SunTrust was not accepting the payments they were not setting the money aside, and that they were not paying the property taxes. [RP, Vol. VIII at 1028:22-1043:13]

When the defense attempted to adduce evidence demonstrating failure to mitigate, the court improperly refused to allow it:

QUESTION: Now the jury has heard there were other modification offers made to the Millers. Could those have reduced damages by -- could they have reduced their damages by accepting any of those kind of in the interim?

EXPERT: Well, there was clearly --

COUNSEL: Objection to the question, Your Honor. Relevance.

THE COURT: Sustained. This --

[RP, Vol. VIII at 1055:13-20]

The court later did allow Mr. Beaton to explain mitigation in the context of other loan modification offers, which provided more evidence of the theme Dalton was developing at trial. [RP, Vol. VIII at 1056:2-13]

In closing, the Millers conceded that the evidence of their contribution to their economic situation *was* presented:

And then Mr. -- well, although I think we had a little bit of a fuss back and forth, but this West Coast expert said, well, I said, 'Really, the 20-foot ladder is \$566,000.' 'Well, no, it really isn't.' 'Well, what do you mean no it really isn't?' 'Well, you know, let me tell you, you know, the Millers just weren't very good in spending the money.' And, you know, they went through all that stuff. So what? None of that matters.

[RP, Vol. IX at 1138: 6-13]

And indeed it didn't matter, because the jury had no instruction through which to evaluate that evidence.

F. The Jury Returns an Impossible Verdict.

The jury's verdict on the negligence claims awarded \$496,557 [CP at 823:8-9], the amount of the judgment plus interest (\$566,086), *minus the mortgage payments the Millers would have had to pay* from the date of the purported acceptance of the loan modification until trial (\$69,529).

In other words, the verdict would allow the Millers to avoid decades of loan payments that would have been owed had they accepted the SunTrust offer, and they would now own the house outright. If they had never met Dalton, however, and accepted the SunTrust modification, on the date of the judgment they (purportedly) would have paid the

\$69,259 in mortgage payments over the last several years, *and would have 448 months to go*. No evidence was presented of any theory whereby Dalton (or anyone for that matter) would have been able to obtain the house for the Millers with no loan on it.

G. Dalton Moves for a New Trial or Remittitur Because the Jury’s Verdict Was Impossible Under Existing Law.

Because the jury verdict was impossible, Dalton moved for a new trial or, alternatively, a remittitur to the maximum damages the Millers could have received if the jury believed everything they presented. [CP at 824-36.] Dalton argued both the impropriety of the emotional aspects of the case and the impossibility of the verdict.

The court ruled that the emotional evidence had “minimal logical relevance” under Evidence Rules (ER) 401 and 402 [RP (McMaster) at 14:16-16:2], conceded the emotional nature of the testimony, and did not address the ER 403 balancing test.

As to the impossibility of the verdict, the court called it a “much closer case,” opining that Dalton’s position “makes logical sense.” [RP (McMaster) at 16:3-5] The trial court went on to explain that it is “nearly unquestioned” that in the alternate scenario (*e.g.*, absent negligence) the house would have had a mortgage on it. [RP (McMaster) at 16:5-12] Specifically, the court held that “certainly” “had the offer been conveyed

and had the Millers accepted it, there would have been a mortgage for an amount of money...” [RP (McMaster) at 16:16-19] But, the court concluded that proximate cause was in the sole discretion of the jury, and it denied the motion for new trial or remittitur.⁴

IV.

THE JURY’S VERDICT RESULTED FROM A SERIES OF JUDICIAL ERRORS AND IMPROPER EVIDENCE

There is *literally no conceivable way* that a jury, following the law, could award the damages included in the verdict of this case. It is probable that the court’s refusal to exclude emotional pleas from the Millers’ young daughters, and counsel’s impassioned pleas to prevent the Millers from being “homeless,” influenced the misguided result. But whether the result was the product of passion or the jury was simply wrong, the fact remains—the jury’s verdict is not supportable under any view of the evidence presented at trial. Therefore, a new trial or remittitur is necessary.

It is well settled that “if a jury’s verdict is tainted by passion or prejudice, or is otherwise excessive, both the trial court and the appellate

⁴ Out of respect for the trial court, Dalton notes that the court admirably conceded that the decision may well be incorrect: “I acknowledge that I may well not have decided it correctly, but I suspect that the panel in Spokane will have another opportunity to do that.” [RP (McMaster) 18:15-18]

court have the power to reduce the award or order a new trial.” *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835 (1985).

Indeed, “it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence.” *Millies v. LandAmerica Transnation, et. al.*, 185 Wn.2d 302, 316-17 (2016). It is appropriate to reverse the verdict where it is “outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” *Bingaman, supra* 103 Wn.2d at 835; see also *Anderson v. Dalton*, 40 Wn.2d 894, 898 (1952) (reversing verdict where “damages have been regarded as excessive and as having been given under the influence of passion or prejudice.”) Here the verdict is entirely unsupported by the evidence and the law, and there is ample evidence that the error was occasioned by inflaming passion and prejudice. Indeed, the circumstances leading up to the latter themselves require reversal.

A. The Verdict is not Supportable Under any Interpretation of Existing Law.

If the verdict is outside the range of evidence presented, the trial court shall reduce it or order a new trial. *Hill v. Gte Directories Sales Corp.*, 71 Wn.App. 132, 138-39 (1993) (reversing economic damages verdict as outside the evidence). Here, the damages calculation is a simple

one, and the evidence was presented to allow it to be made, but the jury simply did not do so.

1. A legal malpractice plaintiff is entitled to damages necessary to put him/her where he/she would have been absent the negligence.

The law in this arena is neither novel nor in dispute—damages in a legal malpractice case are to put the plaintiff where he or she would have been but for the negligence. “Plaintiffs may recover only the amount that will make them whole (and not a windfall),” *Schmidt v. Coogan*, 181 Wn.2d 661, 666 (2014). The measure of damages is the “amount of loss actually sustained as a proximate result of the attorney’s conduct.”

Matson v. Weidenkopf, 101 Wn.App 472, 484 (2000).

The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation. ... Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act. The plaintiff should be made whole without conferring a windfall.

Shoemake v. Ferrer, 168 Wn.2d 193, 198 (2010) (citations omitted).

Consequently, the jury is tasked with determining what harm befell the plaintiff, and compensating him or her accordingly. As with all areas of law, a windfall is not permitted. In other words, a verdict putting a

plaintiff in a *better* position than he or she would have been absent negligence is never supportable.

The law of lost houses is also not ambiguous. The homeowner is compensated for the lost equity in the house.

In applying this measure it must be noted that the primary object of an award of damages in a civil action, and the fundamental theory or principle on which it is based is just compensation or indemnity for the loss or injury sustained by the plaintiff and no more. (Estate of De Laveaga, 50 Cal.2d 480, 488 [326 P.2d 129].) Accordingly, where a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property.

Munger v. Moore, 11 Cal.App.3d 1, 11 (1970).

2. *The appropriate measure of damages must compare where the Millers would have been absent negligence with where they actually were at time of trial.*

Against this backdrop, the analysis here is quite simple. The Millers allege that if Dalton would have presented them with the SunTrust offer, they would have accepted it. Assuming the jury correctly decided that was true, the Millers would have had a modified loan on the house. The trial court admitted this was “certainly” true and “nearly unquestioned” based upon the evidence presented at trial. [RP (McMaster) 16:3-19]

That hypothetical reality must then be compared with where the Millers *actually were* at time of trial. The foreclosure judgment was not a deficiency judgment, and so the first inquiry must be whether the house or the judgment was more valuable, as the Millers only had to pay one.⁵ Neil Beaton correctly opined first that the damages would be the loss of the house, not the judgment. If the house was worth \$520,000, as he opined [RP, Vol. VIII at 1044:10-1045:22],⁶ and the judgment was about \$566,000, it makes more economic sense to let the house go and save \$46,000. In that scenario, the house is lost along with its equity. The evidence was that the equity was \$140,000. [RP, Vol. VIII at 1044:3-1045:22] This was the correct verdict, before the entire trial was taken over by a misguided attempt to “save the house.” There is no Washington law allowing recovery for the cost of redeeming a house where it exceeds the value of the house. Such a rule would create an unworkable standard—what if the judgment had been for \$1 million? \$10 million? Would the damages still be the amount necessary to pay off the house if it was worth \$520,000?

⁵ If the value of the house was in excess of the judgment, the Millers would pay off the judgment and have the house. If the judgment was in excess of the value of the house, the Millers could simply let the creditor foreclose on the house, and the equity in the house would be their loss because the judgment did not allow deficiency collection.

⁶ The Millers expert did not opine as to the home value. He simply provided a range of values *if the home was complete*, with no testimony on how much it would cost to complete it.

Even assuming it was correct to look at the value of the judgment, and not the house, the jury's verdict is still unsupportable. In that scenario one compares where the Millers actually were at time of trial (facing a judgment of \$566,000) with where they would have been had Dalton not been negligent (with the house secured by a modified mortgage). Based on the testimony provided at trial, we know what the term, principal and interest of that loan would have been. So Mr. Beaton performed an analysis of the present value of that mortgage and determined that the Millers would have had a debt on the house, in present value, of \$227,981. Comparing that number (i.e., where the Millers would have been absent negligence) with the total judgment (i.e., where they allegedly were as a result of the negligence) yielded a difference of \$268,576, which he opined as the alternate damages model. [RP, Vol. VIII at 1045:23-1047:15]

3. The jury's own verdict fatally undermines itself by demonstrating the error.

Indeed, one decision by the jury illustrates the premise. The jury did not pay off the judgment as damages—they awarded the value of the judgment *minus the mortgage payments the Millers would have paid up to the date of the judgment*. Doing so was undoubtedly correct, but there is no rational reason to require that the mortgage payments be excluded from

the amount only up to the time of trial. The mortgage would not have been paid off that day—it is a wholly arbitrary day based on when the court tried the case.

Perhaps the jury did so because both experts agreed that the backward-looking payments were a necessary part of the calculation. The Millers' expert simply ignored the payments that would need to be made on the note going forward if the Millers were in the position they allege that they "should have been." But Dalton's expert did that calculation, and *it was not refuted* given that the Millers decided to try the case with the judgment being the sole measure of alleged damage. There is no conceivable way, and certainly none presented in this trial, that would support the jury's verdict as one that would put the Millers where they would have been absent negligence. Therefore, a new trial should be granted or a remittitur issued. *Hill, supra*, 71 Wn. App. 132 (1993) (affirming reduction of economic damages where outside the evidence).

The Court should reduce the negligence verdict by \$356,557 to \$140,000, which represents the undisputed calculation of the lost equity in this case.⁷

⁷ If the court believes there was some legal way to make the judgment the proper basis of calculation for the verdict, then the negligence verdict should be reduced to \$268,576, the unrefuted difference between the judgment and the present value of the mortgage that would have been on the house.

B. The Miller Daughters' Testimony and Closing Argument Should Have Been Excluded; Failure to Do So Tainted the Jury, and Was Reversible Error.

The court need not look far to determine the source of the error—the allowance of emotional testimony and argument unfairly prejudiced the jury against Dalton to the point where there is no reasonable possibility that this trial was fair.

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671 (2010), citing *State v. Powell*, 126 Wn.2d 244, 264 (1995).

Evidence Rule 403 provides that relevant testimony may be excluded “if its probative value is substantially outweighed by danger of unfair prejudice.” ER 403 (emphasis added). “[T]he term “unfair prejudice” as it is used in Rule 403 usually refers to prejudice that results from evidence that is more likely to cause an emotional response than a rational decision by the jury.”⁸ *Lockwood v. AC & Sons Inc.*, 109 Wn.2d 235, 257 (1987) (citing *5 K. Tegland*, § 106 at 249-50).

⁸ “According to the advisory committee’s notes on Fed. R. Evid. 403, which is identical to ER 403, ‘unfair prejudice’ means an ‘undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” *Lockwood, supra*, 109 Wn.2d at 257 (citing 1 J. Weinstein and M. Berger EVIDENCE ¶ 403 [03], at 403-33 (1985)).

Here, the testimony at issue was obviously going to create an emotional response, and it is dubious that it had *any* relevance to what the jury was deciding. The trial court never provided a colorable reason for allowing it in the face of this clear likelihood, other than allowing the plaintiff to tell a story: “The plaintiff can put on its case.” [RP, Vol. I at 154:12] And the description of the allowed testimony is no more helpful: “You know, this is how we grew up in a mobile home. We built the home, and it was great. We loved it very much.” [RP, Vol. I at 153:21-23] Indeed, in its analysis on the post-trial motions, the court did not even discuss the balancing test of ER 403, instead opining that the evidence was “at least of minimal logical relevance and, frankly, that’s all that Rule 402 requires.” [RP (McMaster) at 15:2-4] It may be all ER 402 requires, but ER 403 requires a much more careful balancing test, that was never done.

Counsel suggested how much the children loved the house was relevant to whether the Millers would have taken the loan modification, even if it required property taxes and insurance in addition to the monthly payment. [RP, Vol. I at 152:15-24] But if that was the court’s unstated rationale, it is disproven by one simple fact—nobody ever asked any of the witnesses if they ever told Mr. Miller how much they valued the house, which would allow him to weigh it in accepting the loan modification offer that might be far in excess of what he thought he was

entitled. And even if the evidence included a question somehow tying the young women's love of the house with the loan modification decision, the utility of having three crying individuals talk about how much they loved the house, and show pictures of the dilapidated mobile home, still has insufficient relevance to outweigh the obvious prejudice. Notably neither of the daughters even knew the loan modification was going on.

Courts repeatedly have held that exclusion of the kind of evidence at issue here is appropriate. *See, e.g., Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1996) (excluding testimony of child, even though plaintiff, because of emotional nature of testimony where the child had no knowledge of underlying facts); *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977) ("The scenes of the plaintiff with his daughter and with his quadriplegic brother serve little purpose other than to create sympathy for the plaintiff."). The *Trevino* court noted that the evidence at issue could have been introduced through other means, which is notable here where both parents provided identical testimony that was never refuted.

Judges must exercise discretion to adequately police the jury system we use, and allowing testimony that might whisper remote potential relevance, while its prejudicial value is screaming irrelevant directions at the jury, is not an exercise of appropriate discretion. Indeed,

Rule 403 was established to net far closer questions than this one. The testimony, particularly three times by two young ladies, with *literally no relevance* other than the weak link cited by the court, should never have been admitted.

Because it was admitted, improperly, and the jury's verdict clearly demonstrates that it was misused to the exact effect one would expect, a new trial shall be granted:

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...

RCW 4.76.030

C. The Court Failed to Properly Instruct the Jury, and Indeed Even Set Up its Own Error with an Earlier-Sustained "Relevance" Objection.

Assuming for a moment the "damage" was the foreclosure judgment against the Millers, and the jury was going to pay the entirety of the judgment in its verdict, it is more than reasonable that the jury would decide the extent to which the Millers contributed to the judgment, and the extent to which they could have avoided it by accepting a later loan modification from SunTrust. But the court refused to allow some

mitigation testimony, and then refused to instruct the jury on either contributory negligence or mitigation, even after allowing other related testimony and argument.

“A court must instruct the jury on a party's position if there is substantial evidence to support it...” *Hill, supra*, 71 Wn.App. at 143. Here, Dalton presented evidence that it was the Millers’ failure to pay the house payments and taxes, before and after the loan modification, that led to the judgment. [RP, Vol. VIII at 1028:22-1043:13] Indeed, Dalton’s expert calculated that the September, 2014 judgment would have been \$45,000 less if they had simply made the payments they thought they agreed to years before meeting Dalton. [RP, Vol. VIII at 1039:17-1040:15] The Millers’ own counsel asked about their purchase of a truck that cost \$50-60,000 that had been an issue in the underlying case. [RP, Vol. IV at 469:24-471:5] Mr. Miller also testified that he used some of the money from the refinance to buy stock in order to help them make the payment. [RP, Vol. IV at 476:11-477:6] Mr. Miller testified that the stock went over \$200,000 and he “should have” sold it to pay off the arrearages on the mortgage, but did not. [RP, Vol. VI at 736:20-737:8] There was also inquiry surrounding whether the Millers could have accepted another loan modification after that one, but the court refused to allow the question on relevance grounds. [RP, Vol. VIII at 1055:13-20]

Whether the evidence was conduct by the Millers before or after the alleged negligence that contributed to the adverse judgment being entered against them, or failures to mitigate the damage by accepting a different loan modification, there was evidence (and offered evidence that was excluded) of both kinds introduced in the trial. Therefore, the jury it was error to refuse to provide the contributory negligence and mitigation instructions:

There was substantial evidence presented to support defendants' position that Clements should have known to look for oncoming traffic even though she was legally in the crosswalk. It was error to refuse to instruct the jury on contributory negligence and to direct a verdict on liability.

Clements v. Blue Cross of Wash. & Alaska, 37 Wn. App. 544, 553 (reversing trial court). The failure to do so was improper, and without putting those questions to the jury it is impossible to determine what their verdict would have been on those issues. Accordingly, retrial is necessary.

V.

CONCLUSION

Whether the jury entered its verdict based upon the highly emotional testimony of uninvolved parties and the improper argument of counsel, or simply through error, is irrelevant. The fact is that under established law, the jury's verdict cannot stand because even contorting it

to the far edges of reason will not support the verdict as the damages caused by Dalton. Therefore, either a remittitur or a new trial are the only remaining options.

DATED: August 16, 2017

KLINEDINST PC

By: /s/ Gregor A. Hensrude
Gregor A. Hensrude, WSBA No. 45918
Anthony C. Soldato, WSBA No. 46206
Attorneys for Defendants-Appellants

PROOF OF SERVICE

I, Sharon K. Hendricks, certify that on August 16, 2017, I filed the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Court for the Washington State Court of Appeals, Division III, by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Sharon K. Hendricks

Sharon K. Hendricks, Legal Assistant

KLINEDINST PC

August 16, 2017 - 3:03 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35163-7
Appellate Court Case Title: Steve Miller, et ux v Drew Dalton, et al
Superior Court Case Number: 15-2-02547-8

The following documents have been uploaded:

- 351637_Briefs_20170816150130D3401209_3882.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Opening Brief.pdf

A copy of the uploaded files will be sent to:

- jbaker@jmlawps.com
- jmoberg@jmlawps.com
- lyndaha@foum.law
- pmoberg@jmlawps.com
- rumlauf@forsberg-umlauf.com
- smcintosh@forsberg-umlauf.com
- smenning@foum.law

Comments:

Sender Name: Sharon Hendricks - Email: shendricks@klinedinstlaw.com

Filing on Behalf of: Gregor Hensrude - Email: ghensrude@klinedinstlaw.com (Alternate Email: shendricks@klinedinstlaw.com)

Address:
801 2nd Ave.
Ste. 1110
Seattle, WA, 98104
Phone: (206) 682-7701

Note: The Filing Id is 20170816150130D3401209