

78247-4

No. 22811-8-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

PARDNER WYNN
Appellant

v.

JOLENE EARIN and JOHN DOE EARIN,
as Husband and Wife and Their Marital Community
Respondent

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY

THE HONORABLE KATHLEEN M. O'CONNOR, Trial Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR/ISSUES

Error: The trial court improperly deprived Plaintiff of his ability to argue damages by engaging in multiple procedural and instructional errors, impacting both statutory and negligence claims.

1. Claim Immunity: The trial court improperly excluded certain claims by granting Defendant immunity from those. Judicial policies for claim immunity were not implicated here, and immunity should not apply; further, immunity is contrary to state law in this instance.

2. Jury instructions: The trial court failed to properly instruct the jury on the continuum of statutory violations and negligence as causing one unified damage. The court improperly removed and segregated claims to the point of interference with Plaintiff's theory of the case. Plaintiff was entitled to instructions allowing him to argue his theory of the case. Specifically:

i) The trial court improperly removed an amended claim for jury consideration;

ii) The trial court improperly removed all actual damage determinations for demonstrated statutory violations from the jury, causing a constitutional deprivation of Plaintiff's right to a jury on those claims.

iii) The trial court improperly removed statutory violations from the jury to reserve the damage remedy to itself, then refused to determine the remedy.

3. Juror dismissal: The trial court improperly dismissed a juror following commencement of trial without challenge for cause by either party and without any showing of bias. Neither implied nor actual bias were present.

4. Inconsistent verdict: The trial court erred in failing to grant a judgment notwithstanding the verdict for a special damage verdict that was inconsistent with the jury's general damage verdict and a companion special damage verdict.

5. Statutory Attorney Fees: The trial court deprived Plaintiff of his entitlement to reasonable attorney fees and costs as a prevailing party on statutory claims by improperly reducing those fees.

i) Unitary claims under a public policy act are not properly segregated to reduce fees.

ii) Statutory fees are not properly reduced or segregated simply because those violations also proved negligence.

iii) Fees for successful claims are not properly segregated by reimbursing only pretrial discovery and "analyzing the information" for only one successful claim.

II. STATEMENT OF CASE

On January 31, 2003, Appellant, Pardner Wynn, (hereinafter “Wynn”) filed a complaint for damages against the Respondent/Defendant Jolene Earin (hereinafter “Earin”) for continuing violations of RCW 70.02, et seq., entitled the Health Care Information Access and Disclosure Act. (hereafter “The Act”). He claimed unauthorized disclosure of medical information under RCW 70.02.020, .030, and .060, committed by five different acts, *CP 35, at paras. 59-61*; failure to provide health records in accord with RCW 70.02.080, *CP 36, para. 63*; violation of reasonable safeguards for the security of healthcare information in violation of RCW 70.02.150 by both home storage and transport, *CP 36, para. 65*; and negligence attendant to the above as a whole. *CP 37, paras. 69, 70*.

The basis of the complaint was that Defendant Earin, a counselor, had provided individual counseling to Wynn from September 1997 to May 1998. *CP 28*. During a later divorce action between Wynn and his then wife, Earin improperly communicated private information from Wynn’s individual counseling sessions to a court appointed guardian ad litem, did so inaccurately, and did so with an agenda against Wynn. *CP 30, paras. 18-19*. In order to refute claims Earin was making, Wynn requested his medical records from Earin. *CP 30, paras. 20-22*. Earin failed to produce his records. Instead, she filed a knowingly false declaration under oath on

Wynn's ex-wife's behalf claiming that Wynn's records were "not readily accessible." *CP 31, paras. 23-27; 32-34*. After being ordered to produce the records by a Superior Court Commissioner, Earin then claimed Wynn's records had been stolen from her car. *CP 33, paras. 42-47*. Earin then testified for Wynn's wife against Wynn at his divorce trial. She did so without compulsory process or authorization. *CP 33-34, paras. 49-50*. There, she offered significant information about Wynn from his private counseling sessions, and did so far outside the scope of what was asked of her in questioning. *CP 34, paras. 50, 51, 54*.

Earin denied all violations, and denied negligence. *CP 423-25*.

Prior to trial, Earin moved for partial summary judgment in an effort to exclude claims related to her volunteering to testify at trial, and her testimony at trial. *CP 118, para. 2*. The trial court granted Earin immunity for both acts. *CP 906-07; RP 63, Ins. 11-13; RP 66, Ins. 3-4*.

Trial on the statutory and negligence claims lasted eight days.

The evidence

Plaintiff Pardner Wynn was 46 years old at the time of his testimony. *RP 357*. Wynn started individual counseling with Earin, believing that his wife would inevitably participate in joint counseling. *RP 367*.

During his individual counseling, Wynn discussed "all aspects of [his] marital life" with Earin, including his philosophy about life, his

relationship with family and non-family members, “pretty much everything.” *RP 370*. He considered these matters private. *RP 371*. Wynn engaged in approximately 24 individual counseling sessions with the Defendant from September 1997 to May 1998. *RP 792*. During his sessions, Wynn noticed Earin taking notes. She “always had a pad there.” When he would speak, “the pen would move.” *RP 373, Ins. 7–8*. Earin uses what are called “process notes,” which “very clearly walk through the whole session.” *RP 775–76*. She did this with Wynn. *RP 782*.

Wynn ultimately left counseling with Earin because he felt Earin was “pouring gasoline on the fire.” *RP 372*. He “had a very distinct impression” that Earin was no longer operating as his therapist, but was becoming more of an advocate for his ex-wife. *RP 374–75*.

Following the termination of counseling, Wynn became involved in a divorce proceeding with his wife. *RP 381*. During his divorce proceeding, Wynn had understood from the guardian ad litem that she would have no access to his individual counseling information with Earin. *RP 398*. Wynn then discovered that Earin had communicated parts of his private counseling information to a court appointed guardian ad litem without his authorization. *RP 392, 393–95*. The GAL’s written report was the first notice that his counseling communications were being disclosed. *RP 398*.

Wynn believed that Earin had conveyed inaccurate information in an

adversarial fashion. *RP 397*. To counter such information to the extent that it might bear on his custody right, Wynn subpoenaed his counseling records from Earin. *RP 397, 399*. Instead of providing those records, or communicating with him, Earin signed a prepared declaration for Wynn's estranged wife claiming that Wynn's records were "inaccessible" to her, and therefore could not be produced in response to compulsory process. *RP 402, citing Plaintiff's Exhibit 31, also located at CP 542*. At the time Earin conveyed this information to the ex-wife's attorney for use in a declaration, the records were in Earin's basement. *RP 888, 893*. At the time Earin signed the declaration several days later, she had moved Wynn's records to a briefcase located in her car. *RP 893*. Both her report to the ex-wife's lawyer and her signed declaration were false.

Earin was ordered to comply with the subpoena and produce Wynn's counseling records to him. *RP 406*. Earin thereupon wrote to Wynn through a retained lawyer advising him that she would not produce his counseling records, as they been "stolen about three nights ago." *RP 408, referencing Plaintiff's Exhibit 33 (also located at CP 548)*. The letter conveying this information was dated the same day the court ordered Earin to produce the records. *RP 408-09, and compare CP 548 with CP 546*.

Earin would later attest to how the records were allegedly stolen. She discussed driving back and forth from her office to her home with

Wynn's medical records in her vehicle. *RP 906-07*. Instead of putting her car in her garage, she parked her car in her driveway on a Thursday evening, remembering to take her purse, but leaving Wynn's medical records in the car. *RP 908-09*. She left the vehicle outside her garage overnight. *Id.* The following day, she entered her car to take another briefcase containing less sensitive information. She again left Wynn's records in the car. *RP 911-12*. She again failed to lock her car door. She rode into Spokane in a friend's car, leaving her unlocked vehicle in her driveway with Wynn's records inside. *RP 911-12; RP 913*. On this day, she signed her court declaration attesting that she didn't know where Wynn's records were. *RP 913-14*. That evening, she had friends over. *RP 916*. As one of her friends was leaving that evening, he pointed out to her that the car was unlocked. *RP 917*. She locked it, went into her home and went to sleep. *RP 918*. She didn't check the vehicle, or remove Wynn's records. *RP 918*.

Earin went on to discuss a litany of vandalism that had occurred at her home and against her specifically. From March 1999 to August 1999, when Wynn's records were stolen, numerous acts of vandalism had been occurring around Earin's home almost monthly, where entries had been attempted into her locked yard, home, and vehicle. *RP 928-32*. Wynn's records were stolen on August 11. *RP 932*.

Wynn discussed the impact of the loss. *RP 412, 420-27*. He attested

as to anxiety, retreat from business goals, rage, mood swings and sleepless nights. *RP 421–22*. He described a process of rumination and fear. *RP 424–25*. He stated “I just couldn’t make it seem like just one of those things that happen.” *RP 428*.

Dr. Paul Domitor, a clinical psychologist, testified on Wynn’s behalf. Domitor worked with Wynn in therapy from March 26, 2001 until July of 2002. *RP 326–27, 337*. In Domitor’s opinion, Wynn had experienced “adjustment disorder with anxiety features” related to the loss and theft of the medical records. *RP 340–41*. Domitor identified the source of Wynn’s emotions as Earin’s course of conduct. *RP 326, lns. 9–25, RP 331–32*. The concerns Wynn presented appeared sincere. *RP 325, 331, 341*. His reaction was also “a normal limits reaction that most people would have” to the situation at issue. *RP 331–32*.

Domitor attested that Wynn did well in therapy. His anxiety level diminished and his sleep improved. *RP 337–38*. Domitor attested that the treatment he provided was both reasonable and necessary to address the issues Wynn was presenting. *RP 341*.

Dr. Duane Green, a Ph.D. and licensed psychologist, testified as an expert on standard of care issues and requirements related to counselors in the myriad of acts at issue in this case. *See RP 118, 121, 130–31, 138 (failing to obtain a written release prior to disclosures); RP 139–40, 141 (obligation*

to honor subpoena for records); 143-44 (approaching another patient to offer assistance against a former patient); RP 143-44 (misrepresenting where a patient's records are to assist another patient); RP 144-45 (duty to lessen the harm to a patient, not take sides, and restraints on providing information beyond the minimal amount of information necessary to fulfill specific requests); RP 147-49 (transporting medical records).

Dr. Ronald Klein, also a psychologist, had been asked to evaluate Wynn from a damage perspective. *RP 234.* Dr. Klein also concluded that Wynn was demonstrating “an adjustment disorder with anxious moods and angry outbursts.” *RP 256.* Klein attested that Wynn suffered psychological damage and distress from the loss of his counseling records. *RP 256, 260.* Klein felt the “emotional peak of stress symptoms.... appeared to have been...really set off by his learning during the divorce process that the records were, in fact, not accounted for and not in a secure place so they seemed to have set this emotional surge in action.” *RP 261.* Klein attested that release of private counseling information and loss of those records “for the typical reasonable individual would be quite frightening, quite distressing, distracting, and something that one should not even need to worry about.” *RP 262.* He attested: “The expectation when you go to a mental healthcare provider is that not only will the information be kept private, it will be respected, that there is enough caring to take care of these records in

a competent and caring manner consistent with codes of conduct.” *RP 262*. Here, Wynn’s emotion came from a perception that this expected level of care did not exist. Wynn’s distress was sincere and was consistent. *RP 266*.

Directed verdicts

Following the close of evidence, the court directed verdicts in Wynn’s favor on Health Care Information Act claims relating to the disclosure of Wynn’s information without authorization, and the violation of the security of records claim. *CP 928, CP 1078*. The court additionally directed a verdict in Wynn’s favor on the issue of Earin’s negligence as to the record storage claim. *CP 928, inst. 17 at 3*.

The trial court then removed damage determinations from the jury related to the two statutory claims on which it had directed verdicts, reserving those damage determinations for itself.¹ *CP 1134, 1135, 1136, 1153-1154, CP 928 v. 923*. It then declined to instruct the jury on an amended statutory and negligence claim of Earin’s failure to provide Wynn his medical records under compulsory process. *RP 1116 (granting amendment to allow to conform to evidence); RP 1127, lns. 5-8 (refusing to instruct)*. No rationale was given.

The jury was asked to determine negligence and damage for one unauthorized disclosure of information (via phone), and damage from one

¹ The court concluded that under RCW 70.02.070, the trial court itself was required to address those damages post-trial.

directed verdict negligence finding (records loss). *CP 933*.

The jury

The jury returned its assigned negligence verdict in favor of Wynn, and found proximate causation for damage by Earin's negligence in losing Wynn's medical records. *CP 933*. The jury awarded the entirety of psychological expenses sustained by the Plaintiff in his therapy with Dr. Paul Domitor, Ph.D. *CP 933, verdict form, and RP 343 as to costs totaling \$2,790.*² The jury awarded \$0 for non-economic damages. *See CP 833, verdict form, p. 2.*

Post-trial

Following trial, Wynn requested that the trial court determine the actual damage issues from the statutory violations on which it had directed verdicts and reserved damages to itself. *CP 954*. The trial court declined to decide damages. *CP 1081, para. 12.*

Wynn requested attorney fees and costs pursuant to RCW 70.02 for prevailing on his Healthcare Information Access and Disclosure Act claims. *CP 954*. The court found that although Wynn was the prevailing party, only ten percent of total fees and costs expended would be reimbursed. *CP 1414, 1417, 1080, 1077 (\$11,943 of fees and \$1,100 of costs).*

² Domitor counseled Mr. Wynn related to these issues of anxiety and anger towards this counselor from March 26, 2001 until his release in July of 2002. *See RP 326-27, 337*. The total bill for all of this psychological intervention was \$2,790. *RP 343*.

Wynn also moved for judgment notwithstanding the verdict on the non economic damage issue, arguing that the jury's monetary verdict on the negligence violation was inconsistent as to damages. *CP 953, 949-52*. The court denied the motion. *CP 1083-84*.

Notice of Appeal in this case was filed on March 1, 2004.

III. ARGUMENT

Introduction

The Healthcare Information Access & Disclosure Act, RCW 70.02 *et seq.* regulates both the maintenance and the dissemination of healthcare information as a matter of public importance. *RCW 70.02.005*. In enacting protective provisions, the legislature emphasizes the importance of healthcare record privacy as critical to medical patient security, and to trust of the healthcare profession. *Id.*

Regulations are enforced through private party claims, allowing civil remedies for demonstrated violations. *RCW 70.02.170*. Remedies include specific performance, actual damages and mandatory attorney fees. *RCW 70.02.170(2)*.

Here, Plaintiff Wynn sought to enforce this state interest.

a. Claim Immunity: The trial court improperly excluded certain claims by granting Defendant immunity from those. Judicial policies for claim immunity were not implicated here, and immunity should not

apply; further, immunity is contrary to state law in this instance.

Standard of review: The determination of immunity from civil claims for witnesses is an issue of law. The standard of review is de novo. *Deatherage v. State of Wash., Examining Bd. of Psychology, 134 Wn.2d 131, 135, 948 P.2d 828, 829-30 (1997).*

Procedure involved: In a continuum of violative and negligent acts alleged by Wynn against Earin, two claims occurred whereby Earin improperly volunteered to testify against Wynn without any compulsory process on behalf of another patient, Wynn's ex-wife. Two additional claims occurred when Earin then took the witness stand on behalf of that ex-wife in Wynn's divorce trial and began disclosing Wynn's private counseling information to support the estranged wife. Wynn alleged that each act violated RCW 70.02.020 and was also negligent.

RCW 70.02.020 prevents disclosures of healthcare information without written release, unless an exception under RCW 70.02.050 applies. As applicable here, RCW 70.02.050 allows for disclosure without a written release only under compulsory process. Such process must be made in accordance with RCW 70.02.060. *Id.* Under RCW 70.02.060, compulsory process must issue to the healthcare provider requiring disclosure to allow for it.

It was uncontroverted that Earin received no compulsory process

from Wynn's ex-wife to release Wynn's information. *CP 462-63. See also, e.g. CP 509, Ins. 7-17.* Earin volunteered the release of that information regardless by offering to testify and then testifying against Wynn on another patient's behalf. *CP 466.* It is thus uncontroverted that Earin violated the statutory criteria.

The trial court excluded both statutory and negligence claims on the grounds of witness immunity. *CP 906-07; RP 62, 63, 66.* Defendant thereupon used the court's removal of the claims for which the court had granted immunity as a break in the causal chain for damages. *RP 1229, Ins. 11 - 22.*³ Excluding these claims was error.

Argument: *Bruce v. Bryne - Stephen & Associates, 113 Wn.2d, 123, 776 P.2d 666 (1989)* explains the immunity policy. The judicial policy purposes of granting civil claim immunity to witnesses as described in *Bruce* are not implicated in this case. First, there is no immunity available which might encompass an offer to testify. Immunity is, at best, for the substance of the testimony. Two claims were thus improperly excluded with no

³ In closing, Defense counsel argued: "Ms. Earin, when she is subpoenaed as a witness and when she signs a declaration and when she gives testimony in depositions and when she gives testimony in trial, cannot be held liable under our law for her statements or conduct as a witness. If there was any legal claim against Ms. Earin for her testimony as a witness in the custody trial,... then you would have been instructed about it by Judge O'Connor and you would consider and be charged with considering whether or not that was appropriate and what damages flowed from it. It is not part of the case. Ms. Schultz's straight line is, therefore, interrupted in an extremely substantial way because the outcome here would have been exactly the same." *RP 1229, Ins. 11-22.*

rationale. As those claims were part of Plaintiff's continuum of negligence, and were improperly removed, prejudice was caused. *See supra n. 3 (showing where defense argues for a break in the causal chain as a result).*

Second, as to the testimony itself, witness immunity is granted for two judicial purposes. First, immunity is proper to preserve the integrity of the judicial system by encouraging full and frank testimony. *Bruce, 113 Wn. 2d. at 126, 776 P.2d at 667.* The idea is to prevent "self censorship" by witnesses through apprehension of subsequent damage liability. *Id.* Such censorship may "deprive the finder of fact of candid, objective and undistorted evidence." *Id.* The rule in favor of immunity also rests on inherent safeguards against "false or inaccurate testimony which inure in the judicial process itself"—i.e. a witness's oath, prosecution for perjury and the hazard of cross examination. *Id.* Immunity is thus given for a reason, and the reason is to promote the integrity of the judicial process.

In *Bruce*, the state Supreme Court extended immunity to expert witnesses retained by a party to perform the job of testifying. *Id. at 131, 776 P.2d at 670.* The reason for this extension was because it served the identified judicial purposes of immunity within the process. *Id.* In dissent, Justice Pearson argued that the majority had taken a common law rule of immunity for defamation, and, with no legal authority, expanded it to encompass a shield for "otherwise actionable professional malpractice." *Id.*

at 138, 776 P.2d at 674.

Here, the trial court has expanded immunity even beyond that conceived of by Justice Pearson in *Bruce*, and has done so in a manner which does not promote either of the purposes of immunity as identified by the *Bruce* holding. As applied here, a judicial policy of encouraging health-care provider witnesses to come forward and give “candid and accurate testimony” directly opposes statutory law restricting medical professionals from providing such “candid” disclosure of protected patient information without proper releases from the patient. Thus, a judicially created impetus to disclose without penalty directly contravenes the enacted legislative intent of ensuring confidentiality of patient information *by* penalizing it.

Second, the safeguards of cross examination and threat of perjury to ensure accurate testimony is not at issue here. Cross examination showing the substance of a healthcare provider’s recall of confidential information to be inaccurate is irrelevant--the law against disclosure is violated when the healthcare provider witness *releases the information*. The issue in a wrongful information disclosure case is not the *accuracy* of the information disclosed, it is the fact that disclosure occurs *at all*. Here, judicial safeguards of oath and cross examination to motivate accuracy of testimony are irrelevant to preventing the improper disclosure itself.

Neither judicial purpose for immunity is implicated by a civil action

against a health care provider for improper release of medical information without authorization.

Moreover, public policy is created by the legislature. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014, 1019 (2001). In enacting RCW 70.02, the legislature has granted medical patients certain privacy rights enforced specifically through a statutory civil action with remedies for violation. Judicially created policies of witness immunity created to promote the integrity of the judicial system cannot trump statutorily granted actions just because the violator violated the law in the course of a judicial proceeding. This law does not except judicial proceedings. In fact, the Act encompasses proper processes for dealing with such proceedings. *See e.g. RCW 70.02.060 (compulsory process)*.

The trial court's expansion in this case of *Bruce* witness immunity to protect *both* the act of volunteering to release information and the subsequent act of releasing that information by testifying without proper authorization is unwarranted and contrary to law. Plaintiff was entitled to have claims under RCW 70.02.020, .030, and .060 and negligence tried pursuant to law. Deprivation of such was error.⁴

⁴ In *Deatherage*, the court held immunity improper to shield a professional from disciplinary proceedings based upon unprofessional conduct while testifying as an expert witness, distinguishing such a proceeding from a civil suit against the professional. 134 Wn.2d. at 141, 948 P.2d at 833. Here, a civil suit is against the professional, so the reasoning of *Bruce* is more on point. Moreover, this is not a case based on negligent

b. Jury instructions: The trial court failed to properly instruct the jury on the continuum of statutory violations and negligence as causing one unified damage. The court improperly removed and segregated claims to the point of interference with Plaintiff's theory of the case. Plaintiff was entitled to instructions allowing him to argue his theory of the case.

Standard of review: Error in jury instruction is subject to an abuse of discretion standard. See *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14, 16 (1998). If abuse of discretion exists, such an error requires reversal only if it is prejudicial. *Id.*, citing *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194, 201 (1996); *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586, 880 P.2d 539, 542 (1994). An error is prejudicial if it affects the outcome of a trial. *Id.*

Law on instructions: If there is evidence or reasonable inference therefrom to support Plaintiff's theories, he is entitled to have his theory of the case presented to the jury by appropriate instructions. See *Koker v. Armstrong Cork Inc.*, 60 Wn. App. 466, 481, 804 P.2d 659, 668 (1991); *Martin v Weyerhaeuser Co.*, 1 Wn. App. 463, 466, 462 P.2d 981, 983 (1969). "In general, [jury] instructions are sufficient if they permit a party to

formulation of an opinion by a retained expert—it is the case of a non expert who violates the law in testifying at all.

argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury on the applicable law.” *Boeing*, 93 Wn. App. at 186, 968 P.2d at 16-17. “But if the key issue in a case involves a theory that is not likely to be understood by a lay jury without a specific explanation by the judge, failing to give a correctly worded and particularized instruction may be error.” *Id.* at 186-87, 968 P.2d at 17. Each party is entitled to have his theories of law, and the court must instruct on all theories to which the facts pertain. *Harris v. Fiore*, 70 Wn.2d 357, 360, 423 P.2d 63, 65 (1967).

Professional negligence is often implicated by a continuing series of separate claims of malpractice. See e.g. *Webb v. Neuroeducation Inc.*, 121 Wn. App. 336, 340-42, 88 P.3d 417 (2004) (alleging multiple reasons why the psychologist’s treatment was negligent and breached a professional standard of care). See also *Am. Home Assurance Co. v. Cohen*, 124 Wn.2d 865, 869, 881 P.2d 1001, 1003-04 (1994) (alleging nine separate claims of malpractice). These claims are considered “course of professional treatment” claims. *Cohen*, 124 Wn.2d at 879, 881 P.2d at 1009. See also *Webb*, 121 Wn. App. at 343, 88 P.3d at 420. In effect, the negligence occurs over an entire course of treatment, rather than through discreet acts. *Webb*, 121 Wn. App. at 343, 88 P.3d at 420.

The Plaintiff is entitled to have the jury instructed on his theory of

negligence in a personal injury action. *Middleton v. Kelton*, 66 Wn.2d 309, 312, 402 P.2d 493, 496 (1965).

Procedure: In Wynn's case, the allegations were based on a continuing series of independently negligent actions which breached an overall standard of care owed to him as a former patient, and caused injury. CP 37, paras. 69, 70. The damage was caused from the entirety of negligence. CP 891, 897-98. The court agreed this was a "continuum of negligence case." RP 1145 at 3-12. The court ruled that there was no need to segregate statutory violations, because the issue was whether the statutory violations caused overall negligence. RP 1144, *Ins.* 16-25. The court noted that there were "many acts causing one injury." RP 1144, *Ins.* 8-15.

It is incumbent upon the party complaining to propose and request proper instructions correctly reflecting the law. See *Koker*, 160 Wn.App. at 483, 804 P.2d at 669. Wynn did so by proposing instructions and verdict forms which requested damage determinations from the entirety of the acts. CP [July 7, 2003 Plaintiff's Jury Instructions, original verdict form]; CP 891, 897-98 (amended instruction and verdict form). Plaintiff claimed "defendant's conduct was a proximate cause of injuries and actual damage to Plaintiff." *e.g.* CP 891.

Argument:

- i) The trial court improperly removed an amended claim for jury

consideration.

Wynn presented a claim against Earin under RCW 70.02.080, asserting that Earin violated his right to be provided his own medical records upon his request. RCW 70.02.080 requires a healthcare provider to produce medical information to a patient upon that patient's request within 15 days, unless certain scenarios exist. One such scenario allows for such disclosure not to occur if the provider informs the patient "if the information does not exist or cannot be found." *RCW 70.02.080(1)(b)*. Wynn alleged that Earin attempted to obstruct his statutory right to this disclosure by intentional misrepresentation in a court declaration.⁵

Wynn's claim sounded squarely under the policy section of RCW 70.02.005(2), which finds that patients may need access to their own healthcare information "*as a matter of fairness to enable them to...correct inaccurate or incomplete information about themselves.*" *Id.*

Plaintiff requested his original claim be submitted to the jury, *CP 891, 893, 897-98*, but the court decided that an amended claim under RCW 70.02.060 would be more appropriate. *RP 1109*. Amendment was granted following the close of evidence. *RP 1115-16*. The trial court then refused to instruct the jury on this amended claim. *RP 1127*. Wynn took

⁵ Dr. Duane Green had attested that misrepresentation to avoid compulsory process also sounded in negligence as being way below the standard of care expected of a medical counselor. *See RP, 143-44*.

exception to the court's refusal to include this claim in its jury instructions. *RP 1127, lns. 4-20*. The claim did not appear in the continuum of Plaintiff's claims at CP 915, nor in the directed verdict recitation, *CP 928*, nor in the jury's verdict form. *CP 933*.

This claim was supported by evidence and reasonable inference therefrom, or no basis to allow the amendment of the claim would have existed. No precedent allows such a claim to simply not be given to the jury. Wynn was entitled to have the jury instructed on this claim within his continuum of negligence. The trial court's refusal to allow the claim deprived Plaintiff of his right to determination of the claim, as a statutory claim itself and as negligence, and removed continuity in the causal chain for damage.

ii) The trial court improperly removed all damages for demonstrated statutory violations from the jury, causing a constitutional deprivation of Plaintiff's right to a jury on those claims.

Prior to submission of the case to the jury, the trial court also removed the issue of actual damages for demonstrated RCW 70.02.170(2) violations from the jury.⁶ The trial court allowed the jury to determine only the negligence claims and damages flowing in tort. The court reserved to itself the decision of actual damages for the statutory violations post-

⁶ Such an action had never been requested by defense prior to trial.

verdict. *RP 1153-54*. The court based this bifurcation decision on its reading of RCW 70.02.170(2): “The court may order the healthcare provider or other person to comply with this chapter.” This was error.

RCW 70.02.170(1) allows a person to maintain an action for the “relief provided in this section.” RCW 70.02.170(2) identifies three forms of available relief. The one cited by the court as the basis for its bifurcation is only one form of relief. Specifically, the “court” is directed to address any specific performance request. *Id.* The “court” is also assigned the third form of relief—reasonable attorney fees and other expenses.⁷ But the second form of relief—that of actual damages—is not premised with the phrase “the court.” Instead, it reads as follows: “Such relief may include actual damages, but shall not include consequential or incidental damages.” *Id.*

A party is constitutionally entitled to a jury in an action for the recovery of money. WASH. CONST. art. 1, § 21. The jury’s role is to determine damages and the constitution protects that role. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 771 P.2d 711, 716 (1989). See also *Nielsen v. Spanaway Gen. Med. Clinic, Inc.*, 85 Wn. App. 249, 255, 931 P.2d 931, 935 (1997). The court may not “add words or clauses to an unambiguous statute when the legislature has chosen not to include that

⁷ “The court” may order a healthcare provider or other person to comply with this chapter, and, “the court” shall award reasonable attorney fees and all other expenses reasonably incurred to the prevailing party. *RCW 70.02.170 (2)*.

language.” *Yousoufian v. Office of Ron Sims*, 98 P.3d 463, 471 (2004), citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). This should be particularly true where such an insertion by the court removes a constitutional guarantee.

Nothing in the language of RCW 70.02.170 allows for a trial court to remove the determination of actual damages from the jury after trial, but before deliberation. If the legislative intent were to direct “the court” alone to award actual damages, then the second sentence of RCW 70.02.170(2) would read as do the first and third forms of relief: “The court shall award actual damages...”

Wynn excepted the court’s failure to instruct the jury on damages for the statutory violations. *RP 1123–24; RP 1126–27*.

The removal of the damage determination from the jury on statutory violations was constitutionally improper.

Prejudice resulted. Removal of these claims deprived Wynn of the jury’s consideration of the claims in the determination of overall damages, and interfered with the causal chain. While the court provided an instruction on a unified concept of negligence, *CP 915*, the court’s verdict form gutted the entire continuum of acts on which damages were based. The court allowed damage consideration for negligence only for the first act in the continuous chain, and the last act of records loss. *CP 933, q. 2, 3*. The

court had already immunized four claims, removed a properly amended claim, and set aside the statutory violations altogether. *CP 928*⁸ The trial court thereupon truncated even the remaining negligence acts, requiring proximate cause and damage to flow only from each negligent act, and to do so independently instead of from the continuum of acts. *CP 933-34*.

The end result was that Plaintiff could not argue his theory of the case. He could not argue that all violations proven should be considered as a whole in determining negligence and damage. The verdict specifically required independent causation for each of only two specific acts, one at the start and one at the finish of the causal chain, with nothing in the middle, and without referencing damage from even the statutory violations found by directed verdict or his amended claim.⁹

“Instructions are prejudicial if they misstate the law in such a manner as to infringe upon a party’s ability to argue his or her theory of the case.” *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 616, 762 P.2d 1156, 1160 (1988). This truncated verdict form failed to recognize or allow for the continuum of acts causing damage, and specifically removed Plaintiff’s

⁸ The jury was even instructed: “If violations have occurred *of the law or the standard of care*, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.” *CP 929*.

⁹ This also allowed the defense to argue that negligence caused little damage, because, as to the phone call, information released in the phone call was ultimately released in any event. *See Defendant’s Closing at 1225, lns. 7 – 13, RP 1227, lns. 5 – 12 and lns. 22 – 25*.

ability to meaningfully argue for damages from violations caused. The determination of damages beyond the economic aspect must be redetermined.¹⁰

iii) After improperly removing the actual damages determination for demonstrated statutory violations from the jury to reserve the damage remedy to itself, the court then refused to determine the remedy.

While nothing in the statutory language authorizes the trial court to reserve the RCW 70.02.170(2) damage determination to itself, once it had done so, the court then refused to determine the damages it had reserved. *CP 1081, para. 12*. Wynn was thus wholly deprived by *both a jury and then the trial court* of the actual damage relief to which he was entitled after demonstrating statutory violations under RCW 70.02.170.

His right to actual damages remains unconsidered to this date. He is entitled to this remedial relief.

c. Juror dismissal: The trial court improperly dismissed a juror following commencement of trial without challenge for cause by either party and without any showing of bias. Neither implied nor actual bias were present.

¹⁰ The court's failure to understand the continuum instruction is also evidence from its removal of the "home storage" violation aspect of Earin's violation of RCW 70.02.150. The court found the home storage issue to be a "red herring" as there was "no loss until the records were stolen;" thus, it refused to consider the claim for a directed verdict and concluded it was irrelevant to the Plaintiff's case. *RP 1110, 1113, Ins. 15-22*.

Standard of review: A denial of a “challenge for cause is within the discretion of the trial court and such will not constitute reversible error absent a manifest abuse of discretion.” *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190, 195 (1991). “A trial court abuses its discretion if its decision is manifestly unreasonable, or if its discretion was exercised on untenable grounds, or for untenable reasons.” See *Boeing*, 93 Wn.App. at 186, 968 P.2d at 16.

In this case, there was no challenge for cause by either party, but the court dismissed a juror without it.

Procedure: Following the voir dire and swearing in of the jury panel, RP 95, and after preliminary instructions to the jury, a judicial assistant advised the court that a juror was having concerns over the nature of the case. RP 107, *Ins.* 11–14. Following the testimony of Plaintiff’s expert, Dr. Duane Green, the judicial assistant reported to the court that the juror had approached her again. RP 202. The judicial assistant was brought in to talk to counsel. RP 202, *Ins.* 16–18. Based on the report, Wynn’s counsel indicated that “all (the juror) is saying is that in hearing the evidence, she is reacting to it.” RP 202, *Ins.* 24–25, RP 203. Without challenge from either party, and without any evidence taken from the juror, the court dismissed the juror: “Basically she is saying I can’t be fair: I have made a decision; I have made up my mind....I think at this point I have no

choice but to excuse her because she made it perfectly clear.” *RP 203. Ins. 6-10.* The court again reiterated its dismissal of the juror; stating, “Now I really don’t have any choice...she has persisted in this, and she has made it clear that she doesn’t think she could be fair and she has made up her mind about this issue.” *RP 204.*

The court allowed counsel to talk to the juror on the record only to confirm bias for the record. *RP 204-05.* Following such, however, the court declined to ask for comment or exception from either counsel, and reiterated its earlier decision to dismiss the juror. *RP 213-14.*

Argument: i) A juror may not be dismissed without challenge for cause by a party after the jury has been selected.

Exclusion of jurors is controlled in part by RCW 2.36.110. A judge must excuse a juror if, “in the opinion of the judge, [a juror] has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.” *RCW 2.36.110.* The process of excusing a juror for bias is found at RCW 4.44 *et seq.* Therein, all relevant sections of RCW 4.44 necessitate a *challenge for cause* in order to remove a juror. Under RCW 4.44.120 and .130, either *party* may challenge a juror for cause, not the trial court. All RCW 4.44 sections allowing for removal of a juror for bias are premised on

challenges for cause by a party litigant. See RCW 4.44.120, (allowing challenges for cause during voir dire); RCW 4.44.130 (allowing either party to challenge the jurors); RCW 4.44.150 (defining challenge for cause); RCW 4.44.170 (setting forth particular challenges for cause); RCW 4.44.180 (defining a challenge for implied bias); RCW 4.44.190 (setting forth challenge for actual bias).

In *Ottis v. Stevenson-Carson Sch. Dist.*, implied bias actually existed, but plaintiff failed to challenge the juror in a proper and timely manner, or to state the grounds for the challenge. 61 Wn. App 747, 760-61, 812 P.2d 133, 140-41 (1991). Dismissal was improper. *Id.*

Here, following extensive questioning of the panel during voir dire, neither party challenged this juror for cause. Even after the juror was questioned, neither party challenged the juror for cause. RP 213. The court dismissed her anyway. RP 213, lns. 15-24. As no challenge for cause was made by either party, then RCW 4.44.120 and .130 were violated, and dismissal was improper.

If a material departure from statute exists, prejudice is presumed. *State v. Tingdale*, 117 Wn.2d 595, 602, 817 P.2d 850, 853 (1991), citing *W.E. Roche Fruit Co. v. N. Pac. Ry. Co.*, 18 Wn.2d 484, 487, 139 P.2d 714, 716 (1943). The court's dismissal of the juror violated statute, and reversal is proper.

ii) A juror's honest caution about her ability to be fair is insufficient to show bias.

Even had a challenge for cause occurred, under RCW 4.44.170, challenges for cause may be based only upon three criteria—physical unfitness, implied bias or actual bias.

i. Implied bias

Implied bias requires “interest on the part of the juror in the event of the action, or the principal question involved therein.” *RCW 4.44.180*. “Interest” is defined as whether the irregularity described is sufficient to cast a reasonable doubt as to whether a trial will be fair. ***Rowley v. Group Health Co-op of Puget Sound***, 16 *Wn. App.* 373, 376, 556 *P.2d* 250, 252-53 (1976).¹¹

Here, when the juror was brought in to testify, she indicated that, as to files being left in a vehicle, “Working in the business I have worked in, where I have always handled personnel and we have been audited, and I’ve worked as administrators for personnel in any business, those have to be locked. I mean there is no if’s and’s or but’s, and *I’m not even in a profession where it is a confidentiality issue.*” *RP 206, lns. 9-12, 18-23.*

Under questioning from Wynn’s counsel, the juror indicated she

¹¹ The facts must establish the definition of implied bias, such as relationship to a party litigant, or employment by that party. *RCW 4.44.180(1)(2)*; ***Ottis***, 61 *Wn.App.* at 757, 812 *P.2d* at 139.

would not disregard the law, “No, of course not. I have to go by what the law says, but it is just putting me in a very tough position right now.” *RP 210, lns. 13-20*. The juror noted that she didn’t know what would be asked at the end of trial, but reiterated that she would follow the law. *RP 210 ln. 24 - RP 211 ln. 9*.

The juror here thus described no personal connection to this case, no damage from similar acts, no similar employment, nor any connection which might factually establish “implied” bias under RCW 4.44.180.

ii. Actual Bias

Actual bias also requires a challenge for cause. *RCW 4.44.190*. Contrary to implied bias, which may be presumed upon a showing of facts sufficient to establish the bias, actual bias must be established by proof. *State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190, 195 (1991)*.

Noltie is on point here. In *Noltie*, a juror was selected to deliberate on a case that presented graphic evidence of child sexual abuse. *Id. at 833-35, 809 P.2d at 193-94*. The juror gave testimony of “interest” – she had experience which gave her a position on the issue, i.e. she had two granddaughters of her own, she attested that she might find it difficult to give the defendant a fair trial, she felt it would be unjust for the defendant to not have a fair trial, and she felt that if she were the defendant, she would not want a person like her on the jury. *Id. at 836, 809 P.2d at 194*.

She doubted that she could be fair and impartial. *Id.* at 836-37, 809 P.2d at 194-94. The trial court refused to release the juror, and that ruling was upheld on appeal. *Id.* at 840, 809 P.2d at 196. In contrast, in *City of Cheney v. Grunewald*, a trial court was improperly found to have refused to excuse a juror for cause when the juror not only believed the defendant would not get a fair trial from a juror with his frame of mind, but had also had a relative killed by the conduct at issue, and belonged to an organization opposing and advocating against the behavior. 55 Wn. App. 807, 78 P.2d 1332 (1989).

The *Noltie* court cited *Cheney* in making its point. It noted that retention of the *Cheney* juror was improper. *Noltie*, 116 Wn.2d at 838, 809 P.2d at 195. Actual bias existed because “one member of the juror’s family had actually been a victim of the same type of crime as that on which he was being asked to sit in judgment.” *Id.* Under *Noltie*, however sentiments regarding a concern a juror might have over their ability to be fair, were found to be “answers to questions which merely reflect honest caution” and not actual bias. *Id.* at 839-40, 809 P.2d at 196. This is insufficient for excusal. *Id.*

The *Noltie* court thus appears to define the “actual bias” necessary as not simply evidence that a person has strong feelings about the issue, because they were in a position to be harmed by the conduct at issue, i.e.

Noltie, but that the juror had actually been themselves harmed by similar conduct. See *Id.*, at 838-39, 809 P.2d at 195.

The court in *State v. Jackson* discusses another form of actual bias—racial bias. 75 Wn. App. 537, 879 P.2d 307 (1994). The ultimate outcome of the case turned on credibility, and thus a trial court was held to have erred by failing to at least conduct an evidentiary hearing prior to ruling on defendant's motion for new trial. *Id.* at 544, 879 P.2d at 312.

Here, no actual bias existed as defined. This juror was simply expressing an opinion on the rightness or wrongfulness of an uncontroverted fact. As in *Noltie*, this juror confirmed that she would not disregard the law or find Earin negligent if the law directed her to circumstances under which such an act would not have been negligent. *RP 210, lns. 13–16*. Her concern was: “yes...I just don’t see that, how they are going to make it look...I don’t know.” *RP 211, lns. 1–7*. In other words, this juror’s problem was not bias; she was simply having difficulty understanding how the defense could put up a legitimate defense for the acts that had occurred.

Not only does *Noltie* preclude such belief from constituting actual bias, but RCW 4.44.190 itself precludes this type of evidence from being considered actual bias. A juror’s “having formed or expressed an opinion upon what she may have heard” is insufficient to sustain even a proper

challenge for cause made by a party. *Noltie*, 116 Wn.2d at 544, 879 P.2d at 312.

In the Ninth Circuit decision of *United States v. Symington*, a juror's request for discharge emanated during deliberations. 195 F.3d 1080, 1083 (9th Cir. 1999). The court held that dismissal was improper if it was based upon the juror's doubts about the sufficiency of evidence. *Id.* at 1085, citing *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir.1987). "The reason for this prohibition is clear: To remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict." *Id.* at 1085, citing *United States v. Thomas*, 116 F.3d 606, 621 (2nd Cir.1997); see *Brown*, 823 F.2d at 596 (stating "if a court could discharge a juror on the basis of such a request, then the right to a unanimous verdict would be illusory.")

This is what occurred in Wynn's instance. The juror here was saying at the outset of the case that she could not see how the defendant was going to justify her conduct. But she agreed to follow the law. Ultimately, this trial court and jury both found that there were no legitimate justifications for that conduct. "Honest caution" is not actual bias as defined.¹²

¹² The court explained its dismissal as being for the juror's lack of comfort with the subject matter: "One of the things we are not here to do is put jurors in an uncomfortable

The court's decision to summarily dismiss this juror was improper, and contrary to statute.

iii) A juror may not be dismissed for cause upon the word of a judicial assistant.

Finally, the court dismissed this juror upon the report of a judicial assistant even prior to hearing from the juror herself. This is also reversible error.

In *State v. Tingdale*, the facts differed slightly, but in both cases, the trial court dismissed a juror without hearing from the juror herself. *117 Wn.2d 595, 817 P.2d 850 (1991)*. In *Tingdale*, a party discovered that prior to voir dire, the court clerk had excused three jurors for being acquainted with a party. *Id. at 597, 817 P.2d at 851*. In essence, the court dismissed these potential jurors on the basis of the clerks' reports as to the facts. *Id.* Such was held to be abuse of discretion, as the dismissal constituted a lack of substantial compliance with RCW 2.36.090. *Id. at 600, 817 P.2d at 852*.

The same exists here. Summary dismissal occurred. The

position and that is not our goal either...*I think she would follow the law, but, by the same token, I don't feel its appropriate for the court or necessary for the court to set up moral dilemmas for people, and in this particular case you have made it clear what your position is, and I respect that, so I will go ahead and excuse you.*" *RP 213, Ins. 15-24*.

evidentiary process was only to allow the attorneys to make a record. *RP 204-05, 213-14*. The trial court thus materially departed from RCW 4.44's criteria in its dismissal, and prejudice is presumed. *Tingdale, 117 Wn.2d at 603*. Plaintiff asserts that the dismissal of this juror requires retrial on damages.

The basis for this position is that, when it came to determining damage from records disclosure, this juror understood the essence of the case. *RP 206, lns. 18-23*. The quality of being able to isolate the professional violation of confidentiality would have been critical for Wynn in this trial. Earin committed all of her violations while supporting Wynn's ex-wife in a custody battle and divorce, and attempted to reduce damages against herself at trial by casting Wynn as a bad husband to his wife. Earin argued, as examples, that Wynn "wasn't serious about working on the marriage." *RP 1240, lns. 8-13*. Defense counsel argued that he, as defense counsel, would never have left his family or his spouse for the holiday, and yet Wynn had done so. *RP 1240-41*. Defense counsel argued that Wynn's claims constituted nothing more than a "vendetta... a "quest for vengeance." *RP 1241, lns. 22-23*. Defense counsel argued that the jury should send a message to Wynn that "We believe that you should get over this and focus on the things that someone with your talents and your ability can do and should do...go do something productive." *RP 1241-42*.

The presence of a juror whose reactions were essentially similar to those of Plaintiff himself – i.e. that Wynn’s conduct as a husband was not at issue – the confidentiality of records was at issue – had the probability of being beneficial to Wynn in the jury room in discussing damages. That juror understood the essence of the Act itself, and its importance per se. The trial court’s dismissal of this juror thus impacted not necessarily liability, as liability was found regardless, but damages. Retrial of the damage element is proper.

d. Inconsistent verdict: The trial court erred in failing to grant a judgment notwithstanding the verdict for a special damage verdict that was inconsistent with the jury’s general damage verdict and a companion special damage verdict.

Procedure: Upon a finding of negligence, the jury was specifically directed to award damages. *CP 929*. The jury found in its general verdict that Wynn had been emotionally damaged by the defendant’s professional negligence. *CP 933, q. 3*. It consistently found in a special verdict, thus supporting its general verdict, that Wynn should be awarded his entire claim for psychological costs attendant to that distress. But in its “companion” special verdict, it awarded \$0 for the distress itself.

Wynn moved for CR 60 relief post trial for an inconsistent verdict, and was denied that relief. *CP 1083-84*.

Standard of review: A motion for a judgment notwithstanding the verdict is reviewed by the appellate court in applying the same standard as the trial court. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.2d 250, 254 (2001). A trial court has wide discretion on ruling a motion for new trial, “however the rule that such an order will not be disturbed in the absence of a manifest abuse of discretion applies only where contravened questions of fact are involved in the trial court’s determination.” *State v. Gobin*, 73 Wn.2d 206, 208, 437 P.2d 389, 390 (1968). The appellate court is not as restricted in its view where questions of law are involved. *Id.*

The 9th Circuit appears to have reviewed an inconsistent verdict in a manner consistent with review as an issue of law. “If a jury answers special interrogatories inconsistently and the answers cannot be reconciled, a new trial must be granted.” *Tanno v. S.S. President Madison Ves*, 830 F.2d 991, 992 (9th Cir. 1994), citing *Borque v. Diamond M. Drilling Co.*, 623 F.2d 351, 353 (5th Cir. 1980).

Argument: In *Tanno*, the court reviewed a jury verdict which awarded a plaintiff emotional damages for pain for a period of six days. 830 F.2d at 993. However, the jury also found that the Plaintiff was unable to work for 18 months. *Id.* The court noted, “Although there is no formal contradiction between the two findings, there is an implicit contradiction: It is unlikely in the extreme that one would be unable to work for 18 months

[but] have no pain.” *Id.* The court did not reverse, however, as the question was not “entirely free from doubt.” *Id.* There was an actual award for pain and suffering. *Id.* Thus, the pain and suffering award could have been a figure meant to compensate Tanno not only for his six days at sea, but also for the pain felt after surgery. *Id.* Such an award for pain over 18 months was “on the low side, but not so low as to shock the conscience” as the plaintiff had “produced no evidence of experiencing substantial pain after the operation....” *Id.*

In contrast, in *Gilmartin v. Stevens Inv. Co.*, the court found a general award of nominal damages to be inconsistent with a special verdict that substantial damage had occurred. 43 *Wn.2d* 289, 296-99, 261 *P.2d* 73, 78-79 (1953). The court found this inconsistency to violate “the principle that a judgment must accord with the findings.” *Id.* at 298, 261 *P.2d* at 79.

Under the reasoning of both cases, Wynn’s verdicts cannot be reconciled. One cannot have necessary lost medical expense from a year of psychological intervention to address emotional distress without having underlying emotional distress. The jury’s award of \$0 noneconomic damages, *CP 934*, was thus inconsistent both with its general verdict which identified Wynn as being damaged by Earin’s acts, *CP 933, q. 3*, and likewise inconsistent with its companion special verdict form, which awarded over a year of psychological treatment for his emotional damage.

CP 934, *economic damage*. The specific award of \$0 for the emotional damage is thus inconsistent as a matter of law with the more general and specific awards of full damages.

The seventh amendment requires courts to respect a jury's special verdict whenever "there is a view of the case that makes the jury's answers to special interrogatories consistent," *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1059 (9th Cir. 2003), citing *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). See also *Grosvenor Prop., Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1151 (9th Cir. 1990) (stating "we must reconcile the jury's verdict responses by the use of any reasonable theory consistent with the evidence"). This verdict is inconsistent.

A conflict between a finding of fact, as stated in the answer to an interrogatory and a general verdict, means the jurors did not properly apply the law and the instructions as given by the trial court when they were rendering their general verdict. See *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 746, 887 P.2d 496 (1995). If a special verdict is inconsistent, then a trial court "will harmonize the verdict to the extent possible." *Herring v. Dept. of Social & Health Serv.*, 81 Wn. App. 1, 16, 914 P.2d 67, 77 (1996). See also *Guijosa v. Wal-Mart Stores Inc.*, 101 Wn. App. 777, 799-800, 6 P.3d 583 (2000) (stating that inconsistencies in special verdicts require the court's intervention). Here, the jury did not properly apply the law and instructions

as given to the issue of noneconomic damage.

The court's denial of the Motion for Judgment Notwithstanding the Verdict should be reversed. Wynn is entitled to a new trial on the value of his emotional damages.

e. Statutory Attorney Fees: The trial court deprived Plaintiff of his entitlement to reasonable attorney fees and costs as a prevailing party on statutory claims by improperly reducing those fees.

Standard of review: The actual amount of attorney fees granted pursuant to statutory authority are reviewed under an abuse of discretion standard. See e.g. *Ermine v. City of Spokane*, 143 Wn.2d 636, 641, 23 P.3d 492, 494-95 (2001). However, error in the application of the law is reviewed de novo. *Henderson v. Kittitas County*, 100 P.3d 842 (2004).

Procedure: Following two weeks of trial, directed verdicts in favor of the Plaintiff on both statutory and negligence claims, the jury's affirmation of two negligence claims, and award of full medical damages, Wynn requested attorney fees and costs pursuant to RCW 70.02.170. CP 954. He presented a detailed cost bill of over \$130,000 of fees and \$11,000 of costs, including expert fees, accrued over two years of litigation and trial, where defense fees were \$50,000. CP 1414, 1417. The court concluded that "public policy concerns require the calculation of a fee that is fair and compensatory for the work involved regardless of the monetary outcome,"

but, it went on, “the fee, however must bear a reasonable relationship to the work needing to be done to bring about the result.” *CP 1080, para. 7.*

The court held that it had “difficulty segregating work on the statutory violations from work performed on other claims.” *CP 1080, para. 6.* It selected a figure of 10 percent to reflect work “allocated to discovery regarding theft of the medical records and analyzing them in the context of the statutory violations.” *CP 1080 para. 8.*

Plaintiff received \$11,900 for fees – the equivalent of about five days of legal work-- and only \$1,100 of over \$11,000 in actual costs.

i) Unitary claims under a public policy act are not properly segregated to reduce fees.

Mandatory fee provisions tend to occur in actions which are consistent with “private attorney general” theories. *See e.g. Fahn v. Civil Serv. Comm’n of Cowlitz County, 95 Wn.2d 679, 684-85, 628 P.2d 813 (1981); see Martinez v. City of Tacoma, 81 Wn. App. 228, 235, 914 P.2d 86 (1996).* The purpose of fee statutes is to enforce a legislative goal, and to make it financially feasible for private individuals to litigate these sorts of violations. *See Martinez, 81 Wn. App. at 235, 914 P.2d at 90.* In such areas, “liberal instruction of attorney fee entitlement” is called for in order to encourage private enforcement. *Id. See Blair v. Wash. State Univ., 108 Wn.2d 558, 570, 740 P.2d 1379, 1385 (1987)(noting that remedial*

provisions are to be construed liberally to encourage private enforcement of the law). The point of liberal construction in public policy matters is to put aggrieved parties in as good a position as if the other party had performed. See e.g. **Eagle Point Condo. Owners Ass'n.**, 102 Wn. App. 697, 9 P.3d 898 (2000). Indeed, in matters of public policy, lodestar methods are universally used as a starting point for determining the amount of a reasonable fee, i.e. the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. See **Bowers v. Transamerica Title Ins. Co.**, 100 Wn.2d 581, 597-99, 675 P.2d 193, 203-04 (1983).

In **Brand v. Dept. of Labor & Ind.**, the court held that worker's compensation claims under the Industrial Insurance Act formed a "unitary nature" of claims. 139 Wn.2d 659, 673, 989 P.2d 1111, 1118 (1999). The statutory chapter is a "self-contained system that provides specific procedures and remedies for injured workers." *Id.* at 668, 989 P.2d at 1115. The degree of overall recovery is inconsequential. *Id.* at 670, 989 P.2d at 1116.

Claims brought under statutory acts are different from discrete, unrelated claims, such as those at issue in **Hensley v. Eckerhart**, 461 U.S. 424 (1983). Statutorily based claims often "deal with one set of facts and related issues." **Brand**, 139 Wn.2d at 673, 989 P.2d at 1118. On such closely related claims, an attorney's work on each theory is work "expended

in pursuit of the ultimate result achieved.” *Id.*, quoting *Hensley*, 461 U.S. at 435. Such claims are not to be segregated in terms of successful and unsuccessful claims for the purpose of calculating fees. This interpretation is consistent with the purpose of the Industrial Insurance Act as a whole. *Id.*

This reasoning is directly on point. Plaintiff’s claims were brought under the Health Care Information Access and Disclosure Act’s provisions. The Act serves a state interest. *RCW 70.02.005*. It is a “self contained system” of violations and remedies to promote a public policy. The trial court agreed that The Act involves public policy issues. *CP 1080, para. 7*. It agreed that segregation of statutory violations and negligence was improper because these were many acts causing one injury. *RP 1144-45*. These were thus “unitary claims,” based on one set of facts and related legal issues under one act. Unauthorized disclosure was found in Earin’s acts of releasing information to a GAL without authorization and by her act of losing Wynn’s records. Improper record retention was also found as a statutory violation in the transport of records.¹³ Thus, segregating acts which caused those claims, or even segregating the “claims” themselves from other acts or claims for the purpose of calculating fees, is contrary to the purpose of the Act as a whole.

¹³ In fact, the only “acts” resulting in “unsuccessful” claims were those not determined based on immunity, and an amended claim for violation of Wynn’s rights to his records under compulsory process as both a statutory and a negligence claim, where the court itself granted the amendment, but then did not allow the claim to be determined. *See p. 1 above identifying claims and CP 1078*.

ii) Statutory fees are not properly reduced or segregated simply because those violations also proved negligence.

Per Plaintiff's complaint itself, the evidence obtained and used for the demonstrated statutory violations was the very same evidence used to demonstrate negligence. *CP 37, para. 69, 70.* The trial court itself noted this intertwining in its discussion on bifurcating statutory damages from negligence damages: "...it is one injury, and the totality of the circumstance... the violation of the act is the lynch pin of what constitutes a violation of the standard of care." *RP 1144, lns. 16–25.* The court further noted, "The negligence, the violation of the standard of care, and of the violation of the statute is, *they are inextricably entwined.*" *RP 1146, lns. 14–16.* There were many acts but only one injury, *see RP 1144, lns. 8–15.*

It was thus error of law for the court to segregate negligence proof from proof of statutory violations in an effort to reduce fees.

iii) Fees for successful claims are not properly segregated by reimbursing only pretrial discovery and "analyzing the information" for only one successful claim.

This trial court went far beyond the above claim segregation and nature of claim segregation—it segregated the fees and costs required for even one successful statutory claim. The court here awarded only "10%" of fees, concluding that that was all it took for "discovery regarding theft of

medical records and analyzing them in the context of statutory violations.” *CP 1080, para. 8*. This thus compensated Wynn for only one part of his trial preparation for that claim. It awarded no fees for work in pre-filing investigation, preparation for filing, filing, preparation for trial, securing and working with experts, plaintiff production of discovery, trial preparation, or trial, for even one of the successful claims. This was both error of law and abuse of discretion.

Earin conceded nothing here, admitted to nothing, and even presented an expert to attest that her storage of medical records was proper. *See Dr. Scott Mabee RP 660–62; 664–65*. The court’s award for “discovery” and “analyzing” the theft of medical records only is one act in the global litigation. Plaintiff was required to go through 8 days of trial to demonstrate even this one violation. The court’s award contained no *trial* fees at all, nor costs. The court improperly segregated, not just claims and claim nature, but even work performed on one successful claim, failing to award even trial fees for the necessity of showing that violation and its damage.

Wynn is entitled to his full fees under RCW 70.02.170.

IV. ATTORNEY FEES ON APPEAL—RAP 18.1.

RAP 18.1(a) grants a party the right to recover reasonable attorney fees or expenses on review if applicable law grants such. RCW 70.02.170

grants actual damages and fees to a party who demonstrates a violation of the Healthcare Information Act. The Plaintiff has done so. He now seeks statutorily granted remedial relief for such violations. The Plaintiff should receive fees for the necessity of this appeal. *See also Brand, 139 Wn.2d at 674-75, 989 P.2d at 1118.*

V. RELIEF REQUESTED

“Collateral estoppel, or issue preclusion, bars re-litigation of an issue in a subsequent proceeding involving the same parties.” *Christensen v. Grant County Hosp. Dist., 152 Wn.2d 299, 306, 96 P.3d 957, 960 (2004).* Earin has not appealed from any liability determination, or from the economic damage award. As the court and the jury resolved issues of liability in Wynn’s favor, then retrial on the issues of liability are not required. *Kasparian v. Old Nat’l Bank, 6 Wn. App. 514, 518–19, 494 P.2d 505, 509 (1972)(reinstating the verdict of a jury on liability and granting a new trial on the issue of damages only).* As the jury resolved issues of damage in Wynn’s favor, as to the existence of damage and full economic damage, then remand for these damage determinations is not required. *Keller v. City of Spokane, 104 Wn. App. 545, 559, 17 P.3d 661, 668 (2001) (failing to assign error to the amount of damages and remanding for retrial on the issue of liability only).* What remains for retrial are noneconomic damages, based upon *all* proper statutory and

negligence claims, presented as a continuum which must be considered in that determination.

Wynn remains entitled to prevailing party fees from the first trial in a proper amount. Absent appeal by Earin, Wynn has already prevailed on demonstrating the violations of The Act, and is entitled to said fees per RCW 70.02.170(2) and *Brand*.

VI. CONCLUSION

Plaintiff Pardner Wynn succeeded on demonstrating to both the trial court and to a jury multiple acts of negligence and statutory violations committed against him by his former healthcare provider, in spite of truncation of his claims and damages to the point of inconsistent relief. His case falls squarely under the purposes and policies of RCW 70.02. He is entitled to full relief for his claims, and redetermination of the non-economic damage, which remains to be determined, along with all fees in prevailing on his statutory claims.

DATED this 29 day of December, 2004.

Respectfully Submitted,

MARY SCHULTZ & ASSOCIATES, P.S.,

Mary Schultz by Shanna Leoner
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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 10 day of December, 2004, she served a copy of the Opening Brief of Appellant to the person hereinafter named at the place of address stated below which is the last known address via hand delivery.

**Mr. James King
Attorney for Respondent
601 W. Main, Suite 1102
Spokane, WA 99201**



DELLA ROBERTS

SUBSCRIBED AND SWORN to before me this 7th day of December, 2004





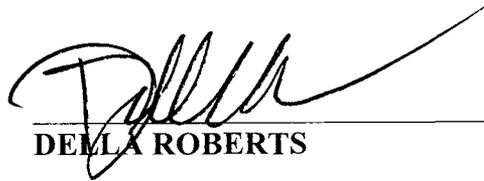
NOTARY PUBLIC in and for the
State of Washington, residing in
Spokane.
Commission Expires: 7/1/2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 29th day of December, 2004, she served a copy of the amended pages of the Opening Brief of Appellant to the person hereinafter named at the place of address stated below which is the last known address via hand delivery.

**Mr. James King
Attorney for Respondent
601 W. Main, Suite 1102
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DELLA ROBERTS

SUBSCRIBED AND SWORN to before me this 29th day of December, 2004.




NOTARY PUBLIC in and for the
State of Washington, residing in
Commission Expires: 5/5/08