WITH Appendices

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STATE OF WASHINGTON
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Division Two No. 41279-9-II
Supreme Court No. 88460-9

SUPREME COURT

OF THE STATE OF WASHINGTON

TERESA SCHMIDT,

Respondent/Cross-Appellant,

vs.

TIMOTHY P. and JANE DOE COOGAN and the martial community comprised thereof, and THE LAW OFFICES OF TIMOTHY PATRICK COOGAN and all partners thereof,

Appellant/Cross-Respondent.

PETITIONER'S SUPPLEMENTAL BRIEFING

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I. OVERVIEW

This Court has framed the issue for review thusly:

> Whether in a legal malpractice action based on an attorney's mishandling of a personal injury action,[1] the plaintiff must prove that the underlying action was collectible in order to establish damages.

The answer to that question is no. To answer that question "yes" requires affirming an incorrect premise. It wrongly assumes the only damage a client sustains by "an attorney's mishandling of a personal injury action" is the underlying value of the claim. To find that requires minimizing the attorney-client relationship to be only about money.

A plaintiff who loses their claim because of their attorney's negligence is damaged beyond the value of the lost claim. The client sustains substantial general damages concurrent with the attorney's breach of trust for which a client is not made whole by simply providing them years later, the value of the underlying claim. Mr. Coogan's misconduct is a stark example of that damage ranging from his constant swearing at his client when she asked him if the case would be filed on time, to his concealing his negligence once he finally violated the statute of limitations, to his finally trying to shift the blame to his former client once she found out – which was not even from him.

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[1] It is suggested this statement by the Court identifies the issue too narrowly. The considerations involved are no less applicable to any number of other claims.

Considering "collectability" a prima facie element creates an immunity for attorneys that does not exist for any other segment of society because it makes recovery of all of the other damage attorney negligence causes contingent on whether the third party could pay for their own liability. It effectively immunizes attorneys from all the various and sundry damage negligently inflicted on their clients by the lucky happenstance that the third party may have been broke.

Thus, to answer the question posed by the Court "yes" minimizes the trust clients place in their attorneys; it reduces the way the public views both the process and the law to mere dollars; it diminishes the law and the profession.

II. ARGUMENT

A. This Court Should Not Only Reconcile The Conflict Between Divisions On The Question Of Collectability – It Should Provide This State Its Only Opinion Squarely Addressing The Full Scope Of Remedy For Attorney Negligence And Burdens Of Proof

This Court could narrowly decide this case on either Mr. Coogan's failure to assign error to the issue reversal was granted on or the issue of which element "collectability" is better described as. Division Two erred on both and reversal on either is dispositive in favor of Ms. Schmidt.

However, this Court has discretion to resolve other issues raised by a case if in the public interest and sufficiently briefed by the parties. It is

in the public interest for this Court to speak with ultimate authority on the full scope, elements, burdens, and damages presented by such claims. The matters have been amply briefed by both parties, Ms. Schmidt has preserved the record (VRP, August 20, pages 29-30, 39-41) and Mr. Coogan briefed his response. It is suggested to be an omission of our jurisprudence to not have case law on these issues. Limited by the issues presented, no past Washington case has address the scope of the claim. Ms. Schmidt respectfully submits that now is the time.

Washington views malpractice claims liberally. Hizey v. Carpenter, 119 Wn.2d 251, 264 (1992). Their purpose is to fully compensate the injured client and to return them to the position they would have occupied but for the malpractice. Shoemake v. Ferrer, 143 Wn. App. 819, 825 (2008). To that end, the courts must assure that injured clients are fully compensated:

> ...[W]ashington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice...

Id. at 829. As discussed below, other states considering this issue find merely giving the client, much later, sthe value of the lost claim is not full compensation. It does not return them to their original position. It ignores the distress caused by the loss, the attorney's conduct, and the attendant delay.

General damages for malpractice is consistent with the breach of the special relationship between attorney and client:

> [The "special relationship"] is not merely economic, and a reasonable person standing in the defendant's shoes would easily foresee that its breach is likely to cause significant emotional distress. It will support emotional distress damages without proof of physical impact or objective symptomatology.

Price v. State, 114 Wn. App. 65, 73 (2002). General damages are consistent with general damages for insurance bad faith, which similarly does not require objective symptomatology or a medical diagnosis for them to be awarded. Id. at 72. The breach of the special relationship makes general damages foreseeable. See also, St. Paul Fire and Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130 (2008); and Anderson v. State Farm, 101 Wn. App. 323, 333 (Div. 1, 2000) ("Because bad faith is a tort, a plaintiff is not limited to economic damages. Anderson alleges she and her husband suffered emotional distress due to the financial difficulties"). The insurance relationship is a mere "quasi-fiduciary" duty but the breach of even a "quasi-fiduciary" duty gives rise to foreseeable general damages. Coventry Assoc v. Am. States Ins. Co., 136 Wn.2d 269 (1998). See also American Manufacturer's Mutual Ins. Co. v. Osborn, 104 Wn. App. 686, 698 (2001). The attorney-client relationship is a higher one; it is based on an actual fiduciary duty and trust. Liebergesell v. Evans, 93 Wn.2d 881, 889 (1980).

The case was originally tried without objection to general damages being available for the act of malpractice itself, e.g., the emotional distress and upset arising not only out of the negligent loss of the underlying claim

but also the abhorrent behavior Mr. Coogan inflicted on his client while doing so. Those matters are well briefed and of record.

Here, not only was Ms. Schmidt thrown into a situation of having her case lost by Mr. Coogan suing the wrong party, (App. 60:17-20) he concealed from her he did so, agreed to a dismissal of her case without her permission, concealed from her that he agreed to the dismissal, and upon Ms. Schmidt learning Mr. Coogan did those things and she confronted him about it, his response was it was her fault the case was filed incorrectly in the first place. (App. 80:13-84:21)

And as if that was not enough, for several years before that happened, many times along the way Ms. Schmidt pled with Mr. Coogan to take action on the case. Not only did he not do so, he harassed, belittled, swore at and insulted her for even asking. (App. 45:2-49:21, 51:2-16, 55:2-56:12) No doubt Mr. Coogan will protest over this characterization. It is the undisputed evidence in the case; he elected to not testify at either trial. Ms. Schmidt's testimony from the original trial remains unrebutted. (App. p. 1-86)

In every other professional relationship, the professional that did those things would be liable for their conduct. In the first trial here, Judge Berschauer allowed that evidence to be admitted and for the jury to consider those damages as a part of its award. At the second trial, and for

no reason in law Ms. Schmidt can discern, the more recently assigned judge did not.

For reasons never explained much less the subject of a proper opinion, some among the bench and bar simply assume or take for granted the only damage available for attorney malpractice is the value of the lost claim. Not only is there no authority for that, it is contrary to and inconsistent with general damages in similar relationships. Supra.

The notion a victim of malpractice is made whole simply by the negligent attorney handing over what he lost defies common sense. The client suffers the shock and distress over loosing the claim. The client suffers the uncertainty and suspicion over the breached relationship. In the case here, Ms. Schmidt was put to endure 10 years of waiting and yet still has no redress, to say nothing of the humiliation and abuse inflicted by Mr. Coogan in the course of his negligence itself.

The full scope of these issues were briefed in great detail by Ms. Schmidt in both the Trial Court and the Court of Appeals. Based on that authority, she asks this Court to adopt what she submits is the national rule; and if not the majority rule as to every aspect, it is as to most and a large number as to the balance:

1. The attorney-client relationship is a "special relationship."
2. Attorneys are no less liable for a breach of their special

relationship as any other special relationship; they are liable for:

a. All general damage flowing from the breach including the emotional upset over the loss of the claim which includes the conduct of the attorney during the relationship that impacted that damage (good or bad);

b. All special damage flowing from the breach including the value of the underlying claim plus the cost to recover those damages from the attorney as consequential damages.

3. "Collectability" is an element of proximate cause that the attorney bears the burden of disproving. Effectively, whether the Court deems it an affirmative defense consistent with mitigation or simply an element of proof is of no import. Collectability in some amount should be presumed (hence the defendant attorney likely would not have brought the case in the first place) that may be rebutted by evidence presented by the defendant regarding what extent it would not have been collectable.

Ms. Schmidt presented at Trial and to the Court of Appeals ample national authority in support of general damages for malpractice including Betts v. Allstate Ins. Co., 154 Cal.App. 688, 697 (1994) ("the shock of the substantial damage judgment alone [against plaintiff, who lost in the underlying auto accident action where she was the defendant] would be sufficient to uphold a verdict for nervousness, shock, humiliation, chagrin, worry, etc."); and Gore v. Rains & Block, 189 Mich. App. 729, 740 (1991) (Attorneys should be liable for the emotional distress caused by their negligence, explaining it should not matter what the "source of the

mental distress and anguish is...").

Maine has acknowledged these damages. See Salley v. Childs, 541 A.2d 1297, 1300 (Me. 1988) as has Pennsylvania, see Jackson v. Wessel, 92 B.R. 987 (1988) and Bangert v. Harris, 553 F.Supp. 235 (Pa. 1982), Alabama, Oliver v. Towns, 770 So.2d 1059, 1061 (Ala. 2000), and Arizona, Cecala v. Newman, 532 F.Supp.2d. 1118, 1134-38 (Ariz. 2007).

Ms. Schmidt raised general damages throughout the proceedings: (CP 2118 – 2154), (CP 2205 – 2206), (CP 2245 – 2256), (CP 2311 – 2318), (CP 2299 – 2310), (CP 2277 – 2298) and VRP 700.

Ms. Schmidt slipped and fell in 1995. It is now 2011. It would be absurd for Mr. Coogan to suggest that simply giving her in 2011, that which he lost shortly after 1995, somehow makes her whole. She endured the distress of the relationship and Mr. Coogan's abuse while the malpractice was taking place, the shock and loss of the case being barred and the mental distress of not being able to pay her medical bills, and the ongoing uncertainty and humiliation over the process and how he treated her. Mr. Coogan owed her a fiduciary relationship which he breached. When this state holds every other professional in a special relationship to foresee the emotional consequences of breach and concurrent misconduct, it is a violation of Due Process, Equal Protection, and inconsistent with Washington law to give attorneys a free pass. The trial court erred by not instructing on general damages.

Such a rule is in the public interest.

Holding attorneys responsible for general damages not merely for the loss of the claim itself but their treatment of their clients accompanying their malpractice, fulfills important public policy considerations and protects both attorneys and clients.

An attorney that commits malpractice but is professional, forthright, and takes steps to mitigate the damage he/she caused will inherently cause less emotional distress damage than an attorney that does not. Such an attorney will still have liability but it will be exponentially less than the attorney that is brought into court kicking, denying their responsibility, and spewing epitaphs at their client as Mr. Coogan did here. Finding that extent of liability as for example Michigan does (Gore), would encourage attorneys to mitigate the damage they perpetrated. It would in some respects, properly reward and incentivize attorneys to take responsibility for their actions.

Indeed, in that instance, it may well be that it is the attorney that wants to introduce evidence of their very good and professional behavior to mitigate their own liability: they were open with their client, they fully informed their client of the status of the case, when the attorney caused damage he/she properly stepped in to cure it in order to lessen the blow to the client. Not only would evidence of such conduct minimize the client's

general damage and thus the attorney's liability, it would incentivize and encourage that type of laudable conduct and may well minimize malpractice litigation altogether.

Holding attorneys liable for the emotional distress their actions cause has an appropriate deterrent effect against that type of misconduct. The deterrent effect of civil liability is a legitimate goal of the civil litigation process. See Martin v. Goodyear Tire & Rubber Co., 114 Wn.App. 823, 835 (2003).

The position urged by Mr. Coogan below, and by default upheld by Division Two, is the worse of the two options. Limiting an injured client's damages to only the amount of the underlying claim provides an incentive for negligent attorneys to conceal their negligence, brow beat their clients into believing their claim was not worth anything anyway, and to hide or conceal evidence in their file of their negligence. It also is a weak disincentive from malpractice in the first place. If, as Mr. Coogan asserts, his worse case scenario is paying the judgment of a case he claims is not worth anything anyway, by his analysis his worse case civil scenario for his misconduct is nothing. And lest it is suggested there are some things better addressed by the bar and a bar complaint, such remedies are no consolation to injured clients; that form of deterrence is not adequate as demonstrated by the very facts of this case. A potential ethics

entanglement did not deter Mr. Coogan here.

Further, awarding consequential damages including the cost to recover the malpractice award should be found. It is plainly within the scope of foreseeability that a client will incur additional legal fees, expert fees, and other costs when an attorney loses a case by malpractice. This is not a fee shifting mechanism. It is simply the acknowledgment that when a professional causes damage, it may require litigation and extra costs to recover for the loss of it. This is consistent with the general concept of consequential damages:

> *Black's Law Dictionary* offers the following definition: "Losses that do not flow directly and immediately from an injurious act, the party, but that result indirectly from the act."

Park Avenue Condominium Owners Ass'n v. Buchan Developments, L.L.C., 117 Wn.App. 369, 389 (2003).

In regard to proof collectability and which party should bear that burden, public policy dictates it should be the attorney.

It is only the conduct of the attorney that puts the injured client in the position of having to prove "two cases" in the first place. In cases arising out of a failure to timely prefect a claim, which is suggested is likely the greatest cause of malpractice at least among personal injury cases, there is only a malpractice case to begin with because the defendant

attorney delayed. Even assuming the client is quick and files suit against their first attorney within a year, they are still being put to take discovery on a matter (now of a third person party) no less than four years after the fact, and as this case presents, even longer than that.[2]

Thus, not placing the burden of proof of collectability on the defendant attorney would incentivize the defendant attorney to conceal their violation of the statute of limitations and seek continuances and delay of the case against them in order to make it that much more difficult for the client to find evidence on an element that is at issue only because of the attorney's antecedent misconduct in the first place. [3] This is why the growing trend is that where collectability is considered an issue in the case, the burden falls on the defendant attorney to disprove it, and not the converse:

> To require the plaintiff to prove collectability of damages would result in placing an unfair burden on the plaintiff.

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[2] This provides another example of why this case presents a perfect storm of facts for this Court to definitively resolve all issues of attorney negligence. As demonstrated in the original trial and record on appeal, Mr. Coogan sued the wrong party, and apparently, because between the time he took the case on and three years later when the case was filed on the last day before the statue was to expire, the grocery store had been sold. Thus, not only would Ms. Schmidt have been put to prove something (collectability) that is/was now 10 years distant, the person/company doing business did not even exist anymore. As discussed above, the party that better bears the difficulty of that burden is not the innocent client; it is the negligent attorney whose delay made demonstrating the issue that much more difficult in the first place.

[3] The Trial Court commented collectibility should have been raised earlier in the case. The Trial Court thus likely considered the prejudice to Ms, Schmidt to litigate an issue and find evidence on it so late in the proceedings that were only necessary because of Mr. Coogan's negligence in the first place.

> This is particularly true when a legal malpractice suit is brought years after the underlying events and when the delay by the plaintiff in bringing such a suit is because of the defendant-lawyer's failure to act in a timely manner in the first place.

Carbone v. Tierney, 151 N.H. 521, 533, 864 A.2d 308, 318 - 319 (2004) (internal citations omitted).

Placing the burden of proof on collectability on the defendant attorney is easily reconciled with existing case law. A plaintiff client must still prove proximate cause: that but for the defendant's negligence, they would not have been injured; that they would have won their case and its value. However, consistent with collectability being a concept of proximate cause, if an attorney believes the underlying judgment would not have been collectible, they have the ability to prove that. Their argument would precisely what Mr. Coogan in fact argued to the Trial Court: that their negligence was not the proximate of cause of damage because the cause was not collectible. It is suggested that rule makes more sense for two independent reasons.

First, it serves no purpose to put a plaintiff to prove collectability as a prima facie element when it is not genuinely in dispute. For instance, in a products liability case it serves no purpose to require a hypothetical plaintiff to prove Ford Motor Company could pay a $2 million personal injury verdict lost because the defendant attorney did not perfect the claim

in time. Yet, if considered a prima facie burden of the plaintiff, a defendant would be entitled to judgment as a matter of law unless the plaintiff presented evidence of Ford's insurance policy or that it had free assets to seize to satisfy the judgment. In the vast majority of cases, collectability will never be an issue and based on the defendant attorney's prior involvement in the case, they will likely know that. Thus, simply from a practical standpoint, although an injured plaintiff should not be entitled to receive a windfall and have their negligent attorney pay for a judgment that would never have been collectible, it is more reasonable to put the onus on the defendant attorney to raise as a defense if he or she has a good faith belief that it is even an issue in the first place.[4]

Second, placing this as a proximate cause burden of proof on the attorney is more consistent with a recovery for general damages. It may be that a judgment negligently lost was not collectible. However, the civil litigation process serves a higher purpose than simply money. An injured party, perhaps disfigured, the victim of rape, or a person defamed who is

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[4] In anticipation of a response that this problem could be addressed by a request for admission with the remedy being that a wrongly made denial should result in the cost to prove up the admission, respectfully, in practice that is not workable and does not address the problem. The rule on requests for admission and costs is not per se. In the undersigned's experience, he has never obtained costs for a denied admission and candidly, when he has denied them has never had them awarded against a client. That is simply because costs under the rule are not issued if the denial is in good faith. CR 37(c) and shifting fees for a denial does nothing to address the burden of proof and unfairness of shifting it to the injured, plaintiff client, it merely sets the price to unfairly shift the burden back on the already injured client.

looking more for civil vindication than a check and who loses the ability to proceed in court and obtain a judgment of at least civil fault, still has a qualitative meaningful loss even if they do not have a monetary one.

As illustration, the Goldman family has collected little to nothing from OJ Simpson by way of their civil verdict. However, who would assert their having at least a civil finding that Mr. Simpson murdered their daughter is without value. The same result exists in defamation cases where those are more often than not uninsured claims but the plaintiff seeks and has the right to civil vindication on the merits of the claim. The same result exists in battery cases, trespass cases, etc., etc.

Indeed, given that judgments may be recorded for up to 10 years or more, particularly when the defendant is an individual, simply because the defendant may be insolvent on the day the jury returns the verdict does not mean they will be 5 years later. As illustration and argument only, the undersigned has had at least one, if not two, "uncollectable" judgments become "collectable" many years later when the defendant sought to satisfy the judgment that was of record despite it being allegedly "uncollectable" for years.

Thus, the value of the underlying judgment is only one aspect of an injured client's damage. It is therefore more consistent to consider collectability as an element of proximate cause and more fair as a

consideration of public policy, to put the burden on the defendant attorney to demonstrate his misconduct was not the cause in fact to the loss of value of the underlying claim because it was not collectable – in whole or in part. The plaintiff may well still be damaged even if the underlying claim had no value.

Thus, as framed by this Court, a plaintiff should not be held to prove the underlying case was collectable because (1) collectability is not the raison d'etre of substantial civil litigation in the first place and (2) such a rule completely immunizes attorneys from the general damage their negligence causes independent of the value of the lost claim.

This case is uniquely situated with a full evidentiary record from the first trial on these issues. The legal issue has been briefed extensively by the parties both before and after the second trial. This court should utilize RAP 13.4(b)(4) to issue an opinion on attorney negligence that will not only provide a long needed road map in this state, but serve as a strong example that when this Court in Shoemake v. Ferrer, 143 Wn. App. 819 (2008) said "...[W]ashington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice..." that it really meant it. Id. at 829.

B. Division Two's Denial Of Reconsideration Was Error

The issues relating to Ms. Schmidt's petition for review arising out

Division Two's denial of her motion reconsideration as they relate to attorney malpractice are amply set forth in her Court of Appeals briefing and petition to this Court. However, the issue of the Court of Appeal's affirming the denial of her motion to amend bears brief amplification.

Ms. Schmidt fully litigated the issue of general damages at the original trial – without objection from Mr. Coogan. Thus, not only has he always known that Ms. Schmidt's emotional distress arising out of his misconduct was at issue in the case, the parties have indeed already tried those issues to their conclusion on their merits.

Ms. Schmidt's counsel, not based on anything overt but simply a sense based on comments made by Mr. Coogan's new attorneys, believed Mr. Coogan was going to object to the issue of general damages for attorney negligence at the second trial.

Therefore, Ms. Schmidt brought a motion to amend the complaint to add a cause of action for outrage arising out of Mr. Coogan's – it is submitted – patently outrageous behavior toward his client Ms. Schmidt. CP 1970 – 1991. New no events, transactions, nor anything else was to be put at issue. There was only to be the addition of a legal theory. The only difference would have been instructional as to the jury.

Mr. Coogan protested that amendment was asserting a new issue he had no notice of and did not have time to prepare for. The Trial Court

agreed and denied Ms. Schmidt's motion. Division Two upheld holding that it was seeking to add a new issue over 10 years since the complaint was filed.

However, the issue was plainly not "new" and for Mr. Coogan to even assert that was, to put it mildly, disingenuous. This was not something raised for the first time 10 years later as the Trial Court ostensibly concluded and Division Two affirmed. General damages for attorney malpractice were pled in the original Complaint. (CP 1 – 4, paras. 2.10 and 3.1). Evidence was presented, argument made, and the matter fully tried to a jury at the first trial.

Asserting a new legal theory was simply to ensure a legal pathway toward the recovery of those damages that were tried at the first trial in the event the new Judge, unlike Judge Berschauer, did not allow evidence and thus a recovery for those general damages arising out of Mr. Coogan's negligence. None of the facts changed. None of the parties changed. All of the witnesses were the same. All of the testimony would have been the same. There was simply nothing "new" other than an additional instruction.

It was error for the trial court to deny Ms. Schmidt's motion to amend and error for Division Two to affirm that decision; both principally and on reconsideration. Motions to amend must be freely granted and

should be denied only when the adverse party is unable to respond through no fault of their own. See Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, 100 Wn.2d 343, 670 P.2d 240 (1983). In that context, even inexcusble delay is not a proper basis to deny a motion to amend. Id.

This issue also illustrates the unfair double standard employed by Division Two. While on the one hand Division Two found Ms. Schmidt's proposed amendment on an issue of damage that was pled in the original complaint and already tried once to a jury was too new and thus unfair to Mr. Coogan to raise, it found it was apparently completely fair to allow Mr. Coogan to raise something he had not only had never raised a single time for 10 years, but was something he expressly denied he was raising during motions and limine but only asserted mid-way through the second trial (to say nothing of raising it on the wrong element – proximate cause not damage – and not assigning error to it).

For completeness, a possible outrage remedy is not a proper substitute for general damages for attorney negligence consistent with every other professional's liability in the state. Here, Mr. Coogan's conduct was indeed outrageous. However, not every instance of attorney malpractice will be albeit they may still cause general damages. Obviously, there cannot be a double recovery for the same damage but the

availability of general damages for outrage given the facts of this case does not obviate either the legal or public policy need for general damages arising out of attorney negligence in general.

III. RELIEF REQUESTED

Ms. Schmidt asks this Court to:

1. Reverse Division Two's finding collectability is an issue of damage as opposed to proximate cause as both not being preserved as error and contrary to the law;

2. Reverse Division Two's affirming the Trial Court's denial of Ms. Schmidt's motion to amend her complaint and Division Two's denial of her motion for reconsideration on that issue;

3. To remand for a trial on the quantum of Ms. Schmidt's damage caused by Mr. Coogan's malpractice with a concurrent finding that collectability is the affirmative obligation of the defendant to demonstrate but which was properly rejected at the second trial and not to be at issue at a third trial.

4. At the very least, to reverse and remand for a new trial on the case insofar as Ms. Schmidt was ordered to not present evidence of collectability by virtue of Mr. Coogan's own motion in limine.

DATED this 26th day of August, 2013.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: #44636 for
Dan L W. Bridges, WSBA #24179
Attorney for Petitioner Teresa Schmidt

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TERESA SCHMIDT, Plaintiff,	)	
vs.	)	Superior Court No. 00-2-12941-1
TIMOTHY P. COOGAN, Defendant.	)	Court of Appeals No. 32840-2-II

VERBATIM REPORT OF PROCEEDINGS
VOLUME 2 PAGES 57-275

BE IT REMEMBERED that on the 18th day of November, 2003, the following proceedings were held before the Honorable DANIEL BERSCHAUER, Visiting Judge of the Superior Court of the State of Washington, in and for the County of Thurston, sitting in Department 11.

The Plaintiff was represented by her attorney, DAN'L BRIDGES;

The Defendant was represented by his attorney, JOHN P. JENSEN;

WHEREUPON, the following proceedings were had, to wit:

COPY

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1 PROCEEDINGS
2 NOVEMBER 18, 2003
3 THE COURT: Good morning, members of the
4 jury. Again, I want to apologize. As you've already
5 understood, there was an unavoidable delay. As I told
6 the jurors, I was barely able to get here because of a
7 traffic accident back in my home town. But we are all
8 ready to continue the trial, I believe.
9 Mr. Bridges, are you prepared to call your next
10 witness?
11 MR. BRIDGES: Yes, Your Honor.
12 THE COURT: You may do so.
13 MR. BRIDGES: Teresa Schmidt, Your Honor.
14 TERESA SCHMIDT,
15 called as a witness by the Plaintiff, was sworn and
16 testified as follows:
17 THE COURT: Members of the jury, at any
18 time you cannot hear a witness, your duty is to let me
19 know immediately by raising your hand, if I am looking
20 at you. If I am not looking at you, say, "We can't
21 hear." Don't be embarrassed. It's your duty to do so,
22 not just a privilege to do so. It's your duty.
23 Don't do what one juror did to me years ago:
24 "Judge, I haven't been able to hear the last half hour
25 of testimony." That is not appropriate for a juror.

1 You have to be able to hear.
2 Same thing goes if things are being shown to you,
3 some exhibit is being shown to you and you can't see
4 it, just let me know.
5 DIRECT EXAMINATION
6 BY MR. BRIDGES:
7 Q Ms. Schmidt, would you please for the record and for
8 the purpose of the jury, so they can know who you are,
9 introduce yourself and tell us where you live?
10 A Teresa Schmidt. I live in Tacoma, Washington. My
11 address?
12 Q Yes.
13 A 1610 South Stevens, Tacoma, 98405.
14 Q Ms. Schmidt, how long have you lived in Tacoma?
15 A All my life, with the exception of birth.
16 Q Where were you born?
17 A Longview, Washington.
18 Q Do you have family here?
19 A Yes.
20 Q. Do you have any children?
21 A Yes.
22 Q And how old is he?
23 A He is now 12.
24 Q What is his name?
25 A Nicholas. Nicholas Edward Schmidt.

1 Q Are you the sole provider for your child?
2 A Yes.
3 Q Are you presently employed?
4 A Yes.
5 Q What do you do?
6 A I have a day spa. I answer phones. Hair salon.
7 Q Do you own and manage that, or are you like an employee
8 of it?
9 A I own and manage it now.
10 Q How long have you been doing that?
11 A Since January of this year.
12 Q Where did you go to school?
13 A Foss High School.
14 Q Do you have any degrees or education beyond that?
15 A Yes, I went to Bates, accounting program.
16 Q Do you have a certificate in accounting from Bates?
17 A Yes.
18 Q Before you started your day spa, did you do work as, I
19 don't want to say an accountant like a CPA, but did you
20 do book work for businesses?
21 A Yes, I did.
22 Q How long had you done that?
23 A Well, I have been doing it since high school but since
24 I have graduated. But since -- off and on, since
25 graduation.

1 Q When did you graduate from high school?
2 A 1985.
3 Q And how old are you now?
4 A Thirty-six.
5 Q Ms. Schmidt, I'd like to turn our attention directly to
6 why we are here, which is something that happened on
7 December 23, 1995. And I'd like to ask you, sort of
8 wind back the time machine, put yourself back in
9 December 23, 1995, and tell the jury what your plan was
10 for that day.
11 A Finalize gifts, packages for family and to get little
12 odds and end things for Christmas.
13 Q Did you have any plans to meet up with any family
14 members that day?
15 A Yes, my sister Pam Miller.
16 Q What was your plan to do with your sister?
17 A We were going to meet up at Grocery Outlet around
18 lunchtime to pick up last-minute items that my other
19 sister and I had told us Grocery Outlet was a great
20 place to pick things up for.
21 MR. BRIDGES: Your Honor, may I approach
22 the witness?
23 THE COURT: You may.
24 MR. BRIDGES: It might help. We have a
25 microphone here. A little bit of ambient helps

1 everyone's hearing. Thank you.
2 Q (By Mr. Bridges) Had you been to the Grocery Outlet
3 before?
4 A No.
5 Q How did you and your sister decide to go to the Grocery
6 Outlet?
7 A Our younger sister had been there before and told us
8 about it.
9 Q Did you drive there by yourself, or did you go with
10 someone?
11 A I drove there by myself and met my sister there, Pam.
12 Q Okay. We are not going to take too long, but at this
13 point I want us to slow down a little bit and take this
14 bit by bit. Let's put you in the parking lot at the
15 Grocery Outlet. Tell us what you did.
16 A I waited for my sister to get there, and then when she
17 got there, we went inside the store.
18 Q Can you describe for the jury what type of store the
19 Grocery Outlet is?
20 A I want to think it's kind of like a Costco because
21 there is stuff from the floor all the way to the top,
22 and it's kind of like a maze when you go through it.
23 Q Is it a what might be called a general merchandise
24 store? Is it grocery store? What type of things do
25 they sell there?

1 A They sell all kinds of things, everything. They have
2 stuff from, you know, body to -- they have some food
3 items there.
4 Q When you walked into the door of the Grocery Outlet,
5 what did you see? Can you describe what the conditions
6 were? You already said this was December 23. Give us
7 a sense of the type of the number of people in there,
8 the type of activity that was going on.
9 A It was two days before Christmas, so it was pretty
10 busy. When you walk in, there was lines -- when you
11 first walked in, there is the registers, and there is
12 all kinds of -- you know, their lines are there. And
13 then you walk around the right and then you kind of go
14 through it.
15 Q I'd like you to, if you could -- let's see here. I'll
16 hand you the exhibit book. I want to direct your
17 attention to some pictures.
18 A Okay.
19 Q If you could please turn to Exhibit 13. Are you there?
20 A Yes.
21 Q What is that?
22 A That's the grocery store. That's the area where I
23 fell.
24 Q We will get to the area where you fell in a second, but
25 just so the jury has a sense of the general layout of

1 the grocery store.
2 MR. JENSEN: Your Honor, I'm not going to
3 be -- I don't want to be obnoxious here, but I think I
4 have to object until these pictures have been admitted
5 into evidence, probably qualified before she describes
6 what's in them.
7 THE COURT: I thought he was trying to lay
8 a foundation for admission. I'll overrule your
9 objection.
10 MR. BRIDGES: That's exactly what I am
11 trying to do. Thank you, Your Honor.
12 Q (By Mr. Bridges) Do those pictures, in terms of the
13 general layout of the grocery store, represent a fair
14 and accurate depiction of the grocery store as it
15 existed in 1995?
16 A Yes.
17 MR. BRIDGES: Move to admit Exhibit 13,
18 Your Honor.
19 THE COURT: Mr. Jensen?
20 MR. JENSEN: No objection.
21 THE COURT: Thirteen is admitted.
22 (Exhibit No. 13 admitted
23 into evidence.)
24 MR. BRIDGES: Your Honor, I have actual
25 color photographs. The Exhibit 13 are photocopies.

1 I'd like permission to publish the color photographs to
2 the jury so they can have a sense of what we are
3 looking at.
4 MR. JENSEN: May I look at them, please?
5 MR. BRIDGES: They are the exact same
6 pictures you have there on the photocopies.
7 MR. JENSEN: No objection.
8 THE COURT: Members of the jury, when a
9 lawyer indicates he wants to publish a photograph to
10 the jury, that simply means show it to you. Please do
11 so understanding that the formal exhibit will be back
12 with you during deliberations. So this is simply an
13 opportunity so that you understand the testimony of the
14 witness, not so that you can examine it in detail. And
15 don't let it disrupt you listening to the rest of the
16 testimony.
17 I assume you're going to go ahead and --
18 MR. BRIDGES: I was going to ask for ten
19 quick seconds just so they can circulate them around
20 real quickly.
21 THE COURT: Okay. Circulate them quickly,
22 members of the jury.
23 MR. BRIDGES: Okay. I think our last juror
24 has seen them.
25 THE COURT: Okay.

1 Q (By Mr. Bridges) Ms. Schmidt, in terms of the
2 infrastructure now, we now have photographs of that,
3 I'd like you to focus your attention on the staffing of
4 the store when you went in there.
5 Can you describe for the jury when you walked in if
6 you saw any employees of the store, and if so, what
7 they were doing?
8 A All the employees that I saw were at the register
9 helping customers. The lines were pretty long. There
10 wasn't any that I saw anywhere else.
11 Q Did you see any employee at all of the Grocery Outlet,
12 for example, walking the aisles, checking for problems
13 or doing anything on the floor at all?
14 A No.
15 Q In terms of the number of customers that were on the
16 actual floor, now, you already described the lines, but
17 can you give the jury a sense of how many people were
18 actually in the store aisle shopping?
19 A There was -- there was quite a few people in there.
20 The exact number, I can't give you, but there were
21 quite a few people in there.
22 Q Okay. I want to put you now in our time machine at the
23 time you fell and wind the clock about 60 seconds
24 before that, all right? And if you could, please, tell
25 the jury what happened up to the time that you fell?

1 A Well, we had walked in and discussed if we were going
2 to shop because she was on a time frame because of
3 the -- you know, it was kind of busy, and we said,
4 "Well, we can do this pretty quick." Because, you
5 know, we know what we want. We were going in there.
6 So she grabbed a cart, and we started walking over.
7 And when I glanced over, right from where you walk
8 in at the registers, you look over and you could see
9 the shampoo was right there. And I go, "Well, that's
10 what I want anyway, so let's go there."
11 Q What happened next?
12 A Well, I saw the shampoo. And when I was walking over
13 to -- and then I was like, "There it is." And I walked
14 over. And it was, I mean, hard to explain, like kind
15 of like -- it was like a cartoon. You just kind of
16 went up. My feet flew up. I came back, and I landed
17 on my rear. And I tried to catch myself from falling,
18 and I went back on my arm like this, and that shot pain
19 up here, and I fell back and hit my head.
20 Q For the record, Ms. Schmidt, which arm are you
21 referring to?
22 A My left arm. Sorry.
23 Q This is a hard question to ask, harder to answer. But
24 how long did that take? You're walking, and then you
25 say you slipped on something. How long did that take?

1 A I couldn't give you a time frame. It felt like it was
2 forever flying, but it was just -- it went so fast. I
3 just -- I mean, I don't know how long it took the total
4 time.
5 MR. BRIDGES: Your Honor, if I could ask
6 the witness to maybe step down from the stand for a
7 second?
8 Q (By Mr. Bridges) What I'd like to ask you to do,
9 Ms. Schmidt, without falling, if you could show the
10 jury basically what happened in terms of slipping.
11 A Well, I was walking like this, and I went like this,
12 and both of my feet flew up; one, you know, obviously
13 kind of like this, and I fell back like this, kind of
14 like on right here. And I fell back like -- I am
15 left-handed, and so I use my left hand. I am assuming
16 that's why it went back first. And it went like this,
17 and then it shot back and then I went back and hit
18 right here on my head, the back of my head.
19 Q Go ahead and take the stand again. Were you being
20 careless? Were you not paying attention to where you
21 were walking?
22 A No.
23 Q Why did you slip?
24 A There was a -- there was a puddle of shampoo on the
25 ground. It wasn't large enough that I noticed it, but

1 when I smelled it, it smelled fragrancy, so it had to
2 have been shampoo or something of weird consistency.
3 Q Now, when you were -- after you fell, and so presumably
4 you are sitting on the floor, how wet was your
5 backside?
6 A About this big of my body, about right in here.
7 Q And the record should reflect the witness is making a
8 circle approximately five inches in diameter,
9 six inches in diameter.
10 Okay. What was your sister doing at that time?
11 Where was she?
12 A She was following behind me because she had grabbed the
13 cart and was pushing it behind me.
14 Q How did it feel when you fell? What part of your body
15 did you hit? You've already told us generally what
16 part of your body was hit. But in terms of the
17 physical sensation, can you please describe that to the
18 jury?
19 A At first -- my first sensation was the shooting up my
20 next neck. It was like -- I mean, my bottom hurt, but
21 it was more the shooting up here, and it shot up like
22 here and up into my eyes. It was just -- it was -- I
23 can't really describe the extent, I mean, of it, but it
24 was -- and then --
25 Q Did your sister approach you? And if so, what happened

1 next?
2 A Yeah, she came -- she came up to me right away. She
3 goes, "Oh, my gosh. Are you okay?"
4 MR. JENSEN: I am going to object. Move to
5 strike; hearsay.
6 THE COURT: Objection overruled. Members
7 of the jury, a lot of things are said, and a witness
8 can tell what somebody else said, if it's not offered
9 to the truth of the matters asserted. This is simply
10 part of the overall events of that day. It's not
11 important that we believe or disbelieve what somebody
12 else said, her sister in this case.
13 Q (By Mr. Bridges) Go ahead, Ms. Schmidt.
14 A And then there was another lady that was shopping there
15 that came over, and she said, "Are you okay?" And I
16 think that there was even something that she had said.
17 But she had given me her name and her number. And she
18 said, "If you need anything, if you need somebody just
19 to --" I said, "No, I think I will be okay." I said,
20 "I am just a little embarrassed right now."
21 Q Did you get up?
22 A Yeah, they helped me up.
23 Q Did you report this incident to any employee of the
24 Grocery Outlet?
25 A Well, the first one I saw was the lady at the register

1 when we went through because you kind of have to go
2 through to finish the thing, and I did to the cashier.
3 Q Okay. I want to take this very slowly, and I'd like
4 you to please tell the jury what you did in terms of
5 making a report; what that lady's response was in terms
6 of your making a report, and what she did in regard to
7 interacting with you in terms of the store's
8 responsiveness to the condition on the floor.
9 A Well, when we got up to the register, to the lady, she
10 was talking to another gal. And I excused myself and
11 let her know that there -- that I'd just fallen over on
12 the shampoo aisle. And she said --
13 Q Did you tell her you had fallen on the shampoo on the
14 floor?
15 A Yes, I did. And she said, "Oh, I am sorry."
16 Q I said, "Well, is there --"
17 MR. JENSEN: Your Honor, I am going to
18 object. This goes to the truth of the matter asserted
19 in terms of the underlying case; hearsay.
20 THE COURT: "Oh, I am sorry," that's your
21 objection?
22 MR. JENSEN: Yes, hearsay as to what
23 anybody else said, store employee.
24 THE COURT: Until I hear further testimony,
25 I am not sure, because this clearly, "Oh, I am sorry,"

1 has nothing to do other than, again, members of the
2 jury, not offered for the truth of the matters
3 asserted. Simply something was said. So the objection
4 is overruled, but you may make another objection if you
5 think further hearsay testimony is going to come out.
6 MR. JENSEN: I hope the witness understands
7 what the problem is here.
8 MR. BRIDGES: I think witness needs to not
9 worry about what defense counsel says and needs to
10 listen to Her Honor -- His Honor.
11 Q (By Mr. Bridges) What happened next?
12 A She said -- where did I leave off?
13 Q She said she was sorry.
14 A Right, sorry. She went back to talking. I said,
15 "Well, is there anybody that can clean it up because I
16 don't want somebody else to fall as well?" And she
17 says -- and I had asked, "You know, is there a manager
18 here or somebody that can help because obviously you
19 guys are busy?" She's like, "Well, he is not in right
20 now." And she went back to talking to this lady. And
21 I was like, okay. And then I waited for her to finish
22 with her.
23 And then when I got up there, I talked to her a
24 little more about it. I said, "It's right over there.
25 You can see it." And you could see at that point the

1 floor was -- you know, where it was at. And I said,
2 "You might want to send somebody over there because you
3 don't want somebody else to fall because somebody is
4 going to get hurt." And she goes --
5 MR. JENSEN: Objection; hearsay. I mean, I
6 don't know what she's gonna say because we have a
7 narrative. We don't have a question pending. This is
8 getting way beyond control of hearsay and the truth of
9 the matter asserted.
10 THE COURT: Your objection is hearsay. I
11 understand it.
12 MR. BRIDGES: In the context of what we are
13 doing here, this is a statement of a party opponent in
14 terms of this case within a case issue. I could go on
15 at side-bar, but this is --
16 THE COURT: I am going to overrule the
17 objection and allow it.
18 Q (By Mr. Bridges) Please continue.
19 MR. JENSEN: Excuse me, Your Honor. Before
20 we proceed, are we going to allow the witness to
21 continue with a narrative here and say whatever she
22 wants? Because there is no question pending.
23 THE COURT: Objection is well noted. You
24 need to ask her a question.
25 Q (By Mr. Bridges) My question was, what happened next in

1 this transaction, Ms. Schmidt?
2 A We waited for a few minutes to see if something would
3 happen.
4 Q But you skipped something. Counsel -- you were going
5 to tell us what the lady said, then counsel objected.
6 What did the lady say in response to that last comment
7 by you?
8 A She said she will get to it when she has time.
9 Q What happened next?
10 A Well, we waited for our stuff, and I just kind of
11 waited, and I was just like in disbelief that she
12 wasn't going to clean it. And then my sister said, "I
13 have to go back to work." And then we left.
14 Q At any time when you were standing there waiting for
15 the other customers, waiting for your groceries to be
16 taken care of, be rung out, leave the store, did you
17 ever hear anything over the intercom that we might
18 euphemistically refer to as "Cleanup on Aisle 5," or
19 anything to that effect?
20 A No.
21 Q Did you see -- as you said, you can see the shampoo
22 from where you were standing. Did you see anyone go
23 over there and clean up the shampoo?
24 A No.
25 Q And you left the store?

1 A Yes.
2 Q Will you please turn to Exhibit 14? What is exhibit
3 14?
4 A That's the check that I wrote that day.
5 Q And the date of the check is what?
6 A 12-23-1995.
7 Q And is the copy immediately below the check the back of
8 the check showing that it was negotiated?
9 A That is correct.
10 Q Who is the check made out to?
11 A Grocery Outlet.
12 Q Is that the check that you used on that day when you
13 fell?
14 A Yes.
15 MR. BRIDGES: Move to admit Exhibit 14,
16 Your Honor.
17 MR. JENSEN: I haven't -- unfortunately,
18 counsel didn't tab mine. If I can find it in my
19 exhibits, I'll take a look at it. I've got it. No
20 objection.
21 THE COURT: Exhibit 14 is admitted.
22 (Exhibit No. 14 admitted
23 into evidence.)
24 MR. BRIDGES: Thank you, Your Honor.
25 Q (By Mr. Bridges) Ms. Schmidt, what did you do with the

1 rest of your day after you fell?
2 A I went home and took some Aleve because I had had a
3 really bad headache and decided just to take it easy
4 the rest of the day so that I would feel better because
5 Christmas was coming.
6 Q The next day was Christmas Eve?
7 A Uh-huh. (Witness answers affirmatively.)
8 Q How did you feel on Christmas Eve?
9 A The next day I completely kind of -- woke up the next
10 morning and I couldn't move. I just -- I couldn't get
11 out of bed at all. I just started crying. And I had
12 to roll to get out.
13 And I was really upset because I had to go to a
14 Christmas event on Christmas Eve, and this was the
15 first time I was going to be around all these people.
16 And I couldn't move, and my son and I had to get ready.
17 Q Can you please describe for the jury, in terms of the
18 physical sensations you were having on Christmas Eve,
19 what they were?
20 A Severe headaches, numbness down, completely down my
21 arm.
22 Q Which arm?
23 A My left arm, sorry. I couldn't move it from this
24 extent at all. It was just glued to my side. My whole
25 back from -- you know, my lower back hurt. It was

1 tender from the fall. My -- from this whole side of my
2 body -- my neck, I couldn't turn my neck at all.
3 Q You're referring to your left side?
4 A Yes.
5 Q I want to be very, very clear about something,
6 Ms. Schmidt. Before December 23, 1995, the day you
7 fell, had you ever had any of the types of shooting
8 pains in your left arm or up around your head as you've
9 described?
10 A No.
11 Q Before December 23, 1995, had you ever had the type of
12 back pain that you've just described?
13 A No.
14 Q Do you recall who the first health care provider was
15 you saw after you fell?
16 A Yes.
17 Q Who was that?
18 A Rick Raymond from Leone Chiropractic.
19 Q And why did you go to a chiropractor?
20 A Because when I was younger I worked for chiropractic
21 and they said they could get rid of any of the pains
22 and stuff. So I was hoping he could adjust me and I'd
23 be better.
24 Q And how -- approximately -- I don't need a date. The
25 records will be talked about by the orthopedic doctor.

1 Approximately, how long after you fell did you go to
2 see the chiropractor?
3 A Probably within the week, as soon as I could get in.
4 Q Now, I want to rewind the clock again a second and take
5 us to Christmas. You said your son is 12 now?
6 A (Witness nods head affirmatively.)
7 Q And this was eight years ago. So he was four and a
8 half, five?
9 A Four and a half.
10 Q How was Christmas that year after you fell?
11 A It was really, really bad. It was tough because I
12 couldn't do anything. He didn't understand. You know,
13 he is a four-and-a-half-year-old kid and he wanted
14 mommy to be there and be happy and to hold him, and I
15 couldn't have him even touch me; it hurt too bad.
16 Q The chiropractor you saw, when you started going to him
17 initially, did it give you any relief?
18 A No. Actually, he said that I was -- that I was too
19 inflamed, and he recommended me to go to a doctor.
20 Q And who was that doctor?
21 A McNaughton's office, Petrich McNaughton.
22 Q Is that a medical doctor?
23 A Yes, he is.
24 Q Do you recall about when -- actually, let me rephrase
25 the question.

1 This is eight years ago. I don't want to ask you a
2 date. Let me ask you the terms of a time frame.
3 Do you recall about how long after you first saw the
4 chiropractor you went to go see the medical doctor?
5 A Within two weeks at the most, a week to two weeks.
6 Q When you went to go see the medical doctor, how were
7 you feeling? Were you feeling better?
8 A No. I actually got a little worse. It hurt more when
9 I went to see him.
10 Q In terms of all the symptoms you are feeling now at
11 this point -- so now it sounds like we are about three
12 weeks after you fell -- can you describe for the jury,
13 please, using, if this is possible on a scale of one to
14 ten, the level of pain? And since you've had a child,
15 why don't we use -- I hear it's a ten. I wouldn't
16 know. But why don't we use that as the high base. And
17 then describe for the jury, if you could, how you were
18 feeling on that scale.
19 A Well, nothing compares to child birth, but an eight,
20 definitely a strong eight.
21 Q So you went to the medical doctor two or three weeks
22 after you fell. What was the treatment plan at that
23 point for you?
24 A He gave me anti-inflammatories, muscle relax -- I am
25 not sure the exact name of them, pain pills and muscle

1 relaxers, and he wanted me to ice it and come back to
2 see him. And then he sent me to a physical therapist.
3 Q Is the physical -- rather, was the physical therapist
4 located in Tacoma?
5 A Yes.
6 Q Again, you know, the dates aren't so important. The
7 orthopedic surgeon has the records. But in terms of a
8 time frame, approximately how long after you saw the
9 medical doctor did you go to the physical therapist?
10 A As soon as the -- I mean, within a week or two,
11 whenever they could get me in. I don't remember the
12 exact date at this point.
13 Q So at this point when you are going to the -- when you
14 first went to the physical therapist, are you still
15 seeing the medical doctor for follow-ups?
16 A Yes.
17 Q Have you stopped going to the chiropractor at this
18 point?
19 A Yes. He actually told me not to come back. He could
20 not work on me. The chiropractor did.
21 Q In terms of your body, what was your understanding as
22 to why you couldn't have chiropractic treatment at that
23 time?
24 A He said I was too inflamed; that I was spazzing.
25 Q Let's stop for a second. What is your understanding of

1 a muscle spasm?
2 A I could tell you what it felt like. My whole body was
3 going like this, moving. You could see it on my back.
4 Q Like a twitch?
5 A Yeah, like a twitch.
6 Q Okay. So now you are going to physical therapy. What
7 was the plan for you at physical therapy?
8 A They wanted me to do some exercises at home, and they
9 worked on me, massaged me and put electronic shocks on
10 my body.
11 Q Electric shock, is that call a tens unit, perhaps?
12 A Maybe. I don't know the correct name of it. But
13 that's what it felt like, shocking me.
14 Q Did they do any traction?
15 A They tried.
16 Q Can you describe to the jury what that process was?
17 A They lay you down and then they put this thing on your
18 neck and it stretches you to, what they described to
19 me, was to open your spinal cord up.
20 Q Did it help?
21 A Oh, they put it on. Within five seconds, my eyes just
22 shot -- fought with tears because it shot pain so
23 severe up.
24 Q Were they able to continue that type of treatment after
25 that time?

1 A Later on in time, they were able to do it for some
2 time.
3 Q Okay. I want to stop for a second, and it sounds like
4 basically from what you are telling us right now you
5 are about two or three months post the accident. You
6 are now in physical therapy.
7 In terms of the symptoms you've described so far,
8 let's take them quickly, but one by one. The numbness
9 in your arm, how often is that occurring? We are
10 talking three months after the accident.
11 A That didn't go away for a while. That was there for an
12 extended amount of time. There was burning and
13 tingling real bad in these fingers really bad.
14 Q The record should reflect your pinky and your ring
15 finger on your left hand?
16 A Yeah.
17 Q In terms of the back pain, and we are talking three
18 months now after the accident, how often was that
19 present? Was that constant?
20 A The lower back, no, but the upper back, yes,
21 constantly. I couldn't sleep. I couldn't lay back at
22 all. I had to prop up my shoulder.
23 Q And now let's move on to -- you talked about your arm
24 and your back. Let's talk about your neck and
25 headaches.

1 Just three months after the accident now, how
2 present were those?
3 A Strong. Those were still really bad.
4 Q Were these interfering with your daily activities,
5 these issues?
6 A Yes, very much so.
7 Q Now, I want to stop for a second and sort of wind the
8 clock back again. Before the accident in December of
9 '95, now, of course, it's raining in December of '95,
10 so you probably weren't playing baseball in December,
11 but can you give the jury a general sense of the type
12 of activities you did before the accident?
13 A Yes. I used to play baseball on a league and played
14 soccer since I was five years old. I was pretty
15 athletic. I played a lot with my son and with kids.
16 Q Did you have a job for your mom at the time you fell?
17 A Yeah, I worked at the day-care.
18 Q Did she run a business day-care?
19 A Yes, she did, Mother's Choice.
20 Q Can you give the jury a sense of the types of things
21 you would do at the day-care before you fell?
22 A Yeah, I watched the babies, so I did a lot of lifting,
23 getting down. I'd play with them on the ground. I
24 mean, it's a job. And play with them, pick them up,
25 change their diapers, feed them.

1 Q After the accident, were you able -- let's take the
2 first two months after the accident. Were you able to
3 do those types of activities?
4 A Not at all.
5 Q Did you try?
6 A I did like the second month because, you know, I am a
7 single mom, and I had to go back to work. And when I
8 realized that I was carrying one of the babies, trying
9 to carry it, and I almost dropped a baby is when I
10 realized I couldn't do it until my arm got better.
11 Q Sounds like a scary thing. Did you have any sense that
12 was going to happen before you tried?
13 A No. No, I figured I could still because I could lift
14 my arm up. I just didn't have any feeling in them, so
15 I didn't think I would drop something, especially a
16 child. And if my -- the other coworker hadn't caught
17 the baby, the baby could have been hurt, and that was
18 scary. So that's when I thought that I better not do
19 that.
20 Q Okay. Now moving on. We are three months after the
21 accident. Can you give the jury a sense of how
22 physical therapy went for you?
23 A Three months? It was still very painful, but -- and
24 they sent me exercises at home. And at one time, I
25 think during that time, actually, he had me stop doing

1 them because I was just getting worse.
2 Q You said several times now they gave you exercises at
3 home. Were you doing the exercises at home that they
4 gave you?
5 A Yes.
6 Q Can you please describe to the jury what it was you
7 were doing at home?
8 A They were having me move my neck and then do my
9 shoulder twists forward and back. And I am trying to
10 remember all this eight years ago, lifting my arms.
11 Q Did those exercises help?
12 A At first, no.
13 Q Did you continue to do them?
14 A I did them until he asked me not to do them for a
15 while.
16 Q Did he have you do anything with a towel on your back?
17 A Yes, I still do that.
18 Q And what is that?
19 A Roll a towel up, a hand towel, and put it under my neck
20 here and a bigger towel and put it under my bottom.
21 Q How would you lay the towel, like perpendicular to your
22 body?
23 A Right, yeah. One here and one here. I don't know how
24 to reflect that.
25 Q You say you still do that now?

1 A I still do that now.
2 Q What is your understanding as to why you are doing
3 that?
4 A It helps open the spine to relieve some pressure.
5 Q Have you been doing that for the last eight years?
6 A Yeah.
7 Q Did you ever have to do that before December 23, 1995?
8 A No.
9 Q Let's put you now six months after you fell, so we are
10 Juneish, 1996. Were you still having some numbness and
11 tingling in your left arm?
12 A Yes. It wasn't as severe, but yes.
13 Q Were you told in the spring of 1996, in March, to go to
14 an MRI?
15 A Yes.
16 Q I am not asking you for a medical opinion, but can you
17 please describe for the jury what -- and I am sure
18 everyone in the room probably knows, but just to be
19 sure -- what the MRI process was?
20 A The machinery?
21 Q Right.
22 A They put you in a tube, and they stick you in this
23 coffin. They slide you in, and they take a picture of
24 your bones.
25 Q What was your understanding as to why you were going

1 for an MRI?
2 A To find out why my arm was still numb and why I am
3 having headaches.
4 Q Around the same time, did you go to something called an
5 EMG?
6 A Yes.
7 Q And again, not a medical opinion, but can you please
8 tell the jury what the process of an EMG is?
9 A A lot of needles being poked in you and shooting waves
10 or something.
11 Q Was it like electrical?
12 A Yeah.
13 Q What was your understanding as to why you were going
14 for an EMG?
15 A To find out where a blockage or what was going wrong,
16 where the damage was on me.
17 Q How long did the EMG last?
18 A Forever. Probably a half an hour, maybe. I don't
19 know. You know, when you are getting that shooting
20 pain in you, it seems like forever, but I am not sure.
21 Q And again, I'm not asking you for a medical opinion,
22 but what is your understanding -- it's your body -- of
23 why you are having these shooting pains in your arm?
24 A I messed something up in my body. I know where it
25 hurts, right in --

1 Q That's fine.
2 A And I must have hit it when I went down or something.
3 I have never had problems before, so I am not sure. I
4 can only tell you what the doctor said, not what I
5 know.
6 Q Right. Let's take you, as you sit here today, or maybe
7 even better the last week, now in November 2003. Do
8 you still have the condition of numbness in your arm or
9 shooting pains in your arm?
10 A If I do too much or just sitting a lot, I get
11 aggravated. It hurts. But if I just don't do
12 anything, then I can -- then like just for example
13 right now sitting here, right here, is almost spazzing.
14 You can probably almost see it through my clothes.
15 Q On the back of your biceps or triceps.
16 A So --
17 Q Do you have to limit your activities now to avoid
18 having pain from your neck?
19 A If I don't want to hurt, yes.
20 Q Now, you said you are a single mom and you work. Are
21 you able to just to sit still and do nothing all day so
22 you don't have pain?
23 A No. I have a child.
24 Q Do you have days when you have pain?
25 A Yes.

1 Q When do those typically happen?
2 A If I have done something, if I have moved something
3 wrong, if I have my son, you know, hangs on me, hugs me
4 wrong. If I pick something up, you know, higher, up
5 like this above my head.
6 Q Is this a daily issue with you where you have to watch
7 what you are doing so you don't get the shooting pain?
8 A Yes.
9 Q And I don't want to belabor the point, and I certainly
10 don't want to sound melodramatic, but can you give the
11 jury a sense of what that's been like over the last
12 eight years having to deal with that?
13 MR. JENSEN: I'm sorry. I didn't hear the
14 question.
15 THE COURT: What has it been like the last
16 eight years that she has been having to do that.
17 THE WITNESS: It's been definitely a change
18 in my life-style. It's -- some days are good, and some
19 days are not. It just all depends on the day.
20 Q (By Mr. Bridges) When it's a bad day, how bad is it?
21 A I try to hide out.
22 Q What does that mean?
23 A I go in my room and hide because I don't want to be
24 around anybody because it makes me kind of -- I am
25 irritable because I am hurting, or I cry on my son, and

1 he doesn't understand why I'm crying. And then he
2 wants to make me feel better, which wants to hug me
3 which makes me worse, so it's just easier not to be
4 around him.
5 Q Ms. Schmidt, will you please turn to Exhibit No. 15.
6 Is that a summary of the medical bills you incurred for
7 treating after the slip-and-fall in December 1995?
8 MR. JENSEN: Objection, Your Honor. I
9 don't know this witness is competent to testify to
10 that. And secondly, we don't have any proper
11 foundation for Exhibit 15.
12 THE COURT: He is asking if it's a summary.
13 I guess she can yes or no. It's not being offered at
14 this point.
15 MR. BRIDGES: That's the only question I am
16 asking right now.
17 MR. JENSEN: Can I voir dire the witness?
18 THE COURT: I am going to allow him to ask
19 the question and get a yes or no.
20 THE WITNESS: Yes.
21 Q (By Mr. Bridges) Thank you. Would you please turn to
22 Page 16 -- I am sorry -- Exhibit 16. What is Exhibit
23 16?
24 A It's prescriptions from the doctors that I have taken
25 in or from the place where I had them filled.

1 Q Are these receipts for the prescriptions you bought
2 over the counter and for the prescriptions themselves?
3 A Some, yes.
4 Q Are there more?
5 A I didn't obviously keep -- wasn't able to keep all of
6 them with everything going on in my life at that time,
7 but yes, it is.
8 Q Are these all prescriptions or over-the-counter
9 medications you bought for the symptoms you've been
10 describing for the last 20 minutes as recommended by
11 your physicians?
12 A Yes.
13 Q All right, Ms. Schmidt. I'd like to change gears a
14 little bit now. When did you first meet Mr. Tim
15 Coogan?
16 A Well, how many years ago? Just --
17 Q Not expecting a day.
18 A Nine years ago. He was a friend of John McMonagle's.
19 Q And at the time, who was John McMonagle?
20 A My fiance.
21 Q And what was the event that you met Mr. Coogan at?
22 A I want to think when I first met him, he came to our
23 house at the time. And I don't remember exactly where,
24 but --
25 Q Did you ultimately retain Mr. Coogan as your attorney

1 to represent you in the December 23, 1995, accident you
2 had that you've described?
3 A Yes.
4 Q And how did you come to decide to retain Mr. Coogan?
5 A John McMonagle suggested that we retain him; that I
6 retain him for it.
7 Q Did you meet with Mr. Coogan first to decide if you
8 actually wanted to do that?
9 A Yes.
10 Q Where did you meet with him?
11 A In his office.
12 Q Where is his office located?
13 A Tacoma. I think I remember the address, 107 Tacoma
14 Avenue North.
15 Q Did he have any other attorneys working for him in the
16 office at the time?
17 A Yes.
18 Q Who were they?
19 A Mitch Greene.
20 Q Did he have any staff?
21 A Yes.
22 Q Who was his staff at the time?
23 A Randy Sharpton was his paralegal, and there was a gal,
24 a receptionist gal, that answered the phones and did
25 some other stuff. I don't remember her name.

1 Q Do you know whether Mr. Coogan had any contract lawyers
2 working for him at the time?
3 A At that time, I did not know for sure.
4 Q And I think you already said you met with Mr. Coogan in
5 his office. What was the subject of the meeting?
6 A Regards to my slip-and-fall.
7 Q How long did the meeting last?
8 A It could have lasted an hour or so. They were also
9 friends, so we talked --
10 Q Who?
11 A John McMonagle and Mr. Coogan were friends, so we
12 talked about that and about Huskies and stuff.
13 Q Did you explain to Mr. Coogan how you felt?
14 A Yes, I did.
15 Q Did you explain to him the conditions in the store when
16 you fell?
17 A Yes.
18 Q I could take you through step by step again how you
19 fell, but that would be redundant, so let me see if I
20 could save us some time.
21 Did you tell Mr. Coogan in his office before you
22 retained him all the facts and circumstances in regard
23 to your fall that you've testified to already to the
24 jury?
25 A Yes.

1 Q Did Mr. Coogan ask you any questions about how you
2 fell?
3 A He asked me some of the basic questions that you've
4 asked me and that we have answered.
5 Q Okay. Did he tell you what he was going to do for you,
6 or did he tell you how he would represent you in the
7 case?
8 A Yes.
9 Q What did he tell you?
10 A He said there is nothing that can really be done for a
11 year, year and a half, two years because of treatment,
12 but it should be pretty easy. He can get some
13 information from Ben Barcus, but it would be okay.
14 Q Can you please turn to Exhibit No. 2? If you'd look at
15 both pages there for me, what is Exhibit No. 2?
16 A It's the fee agreement.
17 Q The fee agreement that's Exhibit No. 2, is this your
18 fee agreement with Mr. Coogan?
19 A Yes, it is.
20 Q Is that Mr. Coogan's handwriting on the front?
21 A Yes.
22 Q Is that --
23 MR. JENSEN: Are you talking about No. 10?
24 Excuse me.
25 MR. BRIDGES: Two.

1 MR. JENSEN: Oh, No. 2?
2 THE COURT: It's called the Contingency Fee
3 Agreement.
4 Q (By Mr. Bridges) Is that your signature on the back?
5 MR. JENSEN: Can I just have a moment,
6 please, to find it?
7 MR. BRIDGES: Sure.
8 MR. JENSEN: Okay. Sorry.
9 Q (By Mr. Bridges) Is that Mr. Coogan's signature on the
10 back?
11 A Yes.
12 Q Did you see Mr. Coogan complete this in front of you?
13 A I did.
14 Q What was your understanding, as the client, as to what
15 Mr. Coogan was promising to do for you when you and he
16 entered into this attorney-client agreement?
17 A That he would represent me in this case.
18 Q At that time, did you have any legal training at all?
19 A No.
20 Q Were you a lawyer?
21 A No.
22 Q Did you have any idea as to the specifics of what would
23 need to be done to, as you say, represent you in this
24 case?
25 A No.

1 Q Why did you go to a lawyer at all instead of handling
2 it yourself?
3 A Because John suggested that I do so because I was still
4 hurting.
5 Q When you went to Mr. Coogan at the time anyway, did he
6 represent himself to you as someone that you could
7 trust to do this right?
8 A Yes.
9 Q And were you relying on him to properly represent you
10 in this claim?
11 A Yes.
12 MR. BRIDGES: Move to admit No. 2, Your
13 Honor?
14 MR. JENSEN: No objection.
15 THE COURT: Exhibit No. 2 is admitted.
16 (Exhibit No. 2 admitted
17 into evidence.)
18 THE COURT: Members of the jury, this is a
19 good time if you want to stretch, you can. You can
20 stretch, too. I try to give stretch breaks before we
21 take a formal recess.
22 (Off the record.)
23 THE COURT: Go back on the record.
24 Q (By Mr. Bridges) To digress for a second, Ms. Schmidt,
25 I noticed you were doing some things when we were

1 stretching, and I meant to ask you earlier. Are there
2 any things that you have to do now in terms of your
3 neck or your arm to alleviate pain?
4 A My hands will go numb, and so I just kind of -- I pop
5 it and it relieves the pressure. And my neck, same
6 thing. There is a knot here which is there forever
7 now. It seems to be anyway. And if I just pop it, I
8 can relieve it so that it doesn't hurt as bad.
9 Q You say it pops. Can you actually hear the popping?
10 A Yeah, I just did it. I don't know if I can do it
11 again. It will. I'll do it again when I am sitting
12 here. I am trying not to because it's annoying, and it
13 bothers people, but --
14 Q Is that something you ever had to do before
15 December 23, 1995?
16 A No.
17 Q Is it something you are still having to do now, eight
18 years later?
19 A Yes.
20 Q Okay. Going back to this meeting with Mr. Coogan. I
21 think you said at the time Mr. John McMonagle was your
22 fiance?
23 A Correct.
24 Q Can you take a look at Exhibit No. 2? Have you seen
25 Exhibit No. 2 before today, your fee agreement? Your

1 signature is on there?
2 A Oh, yeah. Yes.
3 Q Is there any provision in this fee agreement where
4 Mr. McMonagle is agreeing to represent you in that
5 case?
6 A No.
7 Q Is there provision in that agreement that says that if
8 Mr. Coogan retains another lawyer, be it --
9 MR. JENSEN: I am going to object, Your
10 Honor. The exhibit speaks for itself.
11 THE COURT: Objection sustained.
12 Q (By Mr. Bridges) Did Mr. Coogan tell you, when he was
13 meeting with you in his office, that if he had another
14 lawyer help him with the case, that he would expect you
15 to relieve him of his attorney duties and look to the
16 other new lawyer?
17 A No.
18 MR. JENSEN: Objection; leading.
19 THE COURT: She has answered the question,
20 but it was a leading question. The answer will stand
21 members of the jury.
22 Q (By Mr. Bridges) If that's the case, what was the
23 answer?
24 A No.
25 Q After you fell, was there a time when you -- I think

1 you already said there was a time you couldn't work
2 anymore at your mother's day-care. Was there a time
3 when you went to work somewhere else?
4 A Yes.
5 Q Where was that?
6 A Mr. Coogan's office.
7 Q How did that come about?
8 A His receptionist, gal that was answering the phones,
9 was leaving. She -- I think she was stationed in the
10 military, her husband or something. She was leaving,
11 and he needed somebody. And I needed work, so it
12 worked it worked out fine because it's something that I
13 can do, and it wouldn't be too much. Answering phones
14 and helping out a little bit here and there I could
15 handle.
16 Q Did you also help him with his books?
17 A Later on, yes.
18 Q Now, when you went to work with Mr. Coogan, did he tell
19 you that your now coming there as an employee changed
20 in any way that fee agreement which is Exhibit No. 2?
21 A No.
22 Q Did you have any understanding that because you were
23 working for him as a receptionist, that he then owed
24 you any different duty in terms of representing you in
25 that case?

1 A No.
2 Q I want to fast forward a little bit. And again, I
3 don't need a date. But was there a point in time,
4 you're in your treatment, where you felt at least to
5 yourself that it was time to turn the attention to the
6 case and see about either settling it or getting it
7 filed as a lawsuit?
8 MR. JENSEN: Objection; leading.
9 THE COURT: I will allow it.
10 MR. BRIDGES: Do you remember the question?
11 THE COURT: You can answer it.
12 THE WITNESS: Yes.
13 Q (By Mr. Bridges) And approximately when was that?
14 A Probably a year and a half, two years. I figured that
15 my body was about where it was going to get because it
16 wasn't really changing better at that point, so I
17 figured I was just going to live with it.
18 Q What did you do?
19 A I asked Mr. Coogan what was going on with my case.
20 Q What did he say?
21 A Excuse me.
22 MR. JENSEN: Objection. It's vague as to
23 time and place.
24 THE COURT: Would you ask a few foundation
25 questions?

1 MR. BRIDGES: We are talking about this
2 first time she went to -- time to turn attention to the
3 case as a lawsuit.
4 THE COURT: He's objected because it's
5 vague as to time and place. She may not be able to
6 establish the exact time, but she can be asked where it
7 occurred.
8 Q (By Mr. Bridges) Where did this conversation occur,
9 Ms. Schmidt?
10 A First time was probably in his office.
11 Q And I think you've already said this was about a year
12 and a half after the accident?
13 A (Witness nods head affirmatively.)
14 THE COURT: Was your answer yes?
15 THE WITNESS: Yes. Sorry.
16 Q (By Mr. Bridges) That being the case, did you go to
17 Mr. Coogan and talk with him about your case?
18 A Yes.
19 Q And if there is any language that is perhaps not the
20 most pleasant, I need you to go ahead and use it and
21 everyone will understand. But can you please tell us
22 what Mr. Coogan said in response?
23 A He said, "I am the fucking attorney. You need to leave
24 the file alone and get back to work."
25 Q Did you say anything in reply?

1 A I said, "I was just wanting to know what was going on."
2 He said, "I went to school. I am the attorney." And I
3 was like -- so I just went back to my desk.
4 Q How much time -- let me rephrase the question. At some
5 point after that, did you go back to Mr. Coogan again
6 to ask about your case?
7 A Several times.
8 Q About how much time after that first time elapsed
9 before you went back to him the second time, just
10 ballpark?
11 A Probably a few months, a month, two.
12 Q And where did that conversation take place?
13 A Johnny's Dock.
14 Q What is Johnny's Dock?
15 A Tim's second office. It's a -- there is a bar down
16 there, and he meets down there. I carry files down
17 there for him.
18 Q You sort of anticipated my next question. What was the
19 occasion of your being at Johnny's Dock with
20 Mr. Coogan?
21 A To bring his files. That's where he -- I met him a lot
22 there. I took a lot of his files there. He'd meet a
23 lot of other attorneys there.
24 Q What time of day was it, approximately? Let me ask the
25 question differently. Was that during business hours?

1 A Yes.
2 Q Had he -- did you go down there because he called you,
3 or did you just go down there spontaneously?
4 A He called me.
5 Q What did he want?
6 A Other files for the day and for tomorrow's day.
7 Q What files did you bring down to him?
8 A The files he wanted, plus occasionally, I'd bring mine.
9 Q When you brought these files down to Mr. Coogan at the
10 bar, when you brought your file down to him at the bar,
11 what was his reply?
12 A Fucking file back on the corner of his desk; he is got
13 it handled.
14 Q What would you do?
15 A I took it back to the desk. He is the attorney. I
16 figured he had it handled. I just didn't know what was
17 going on. I hadn't seen it move.
18 Q Were there times after that that you went back to speak
19 with Mr. Coogan again in his office?
20 A Yes.
21 Q In terms of how Mr. Coogan treated you at that point,
22 was it different than when you met him the first time
23 when you signed that fee agreement?
24 A Yes.
25 Q In what way?

1 A Fee agreement, when we went inside, he was so positive
2 about how it was going to go and all of that, so I was
3 all excited; okay, great; I won't have to worry about
4 it; he is got it handled.
5 And then from that point on, we could never get an
6 answer, and depending on his day, depending on what he
7 was doing.
8 Q When you would talk with him in the office, and now we
9 are about two years after the accident, what was his
10 demeanor toward you in the office?
11 A Well, when I'd go in his office, there would be wine,
12 he'd be drinking wine. And further on in the day, the
13 more he had, the more angry he would -- upset he'd get
14 and more verbiage.
15 So it just depends on how much he had had to drink
16 in the office before I could really talk to him. I
17 knew -- I kind of played it by knowing where he was at
18 after the day.
19 Q What is that?
20 A If he didn't have as much wine in him, then I could
21 talk to him easier; otherwise, he was more verbal.
22 Q Now, at this point, let's say about two years after you
23 fell, how many lawyers did he have working for him?
24 A Mitch Greene was there, and he left. And then Mike
25 Sheehan came in, and he had a Rule 9, Jay Corn, but he

1 had contract attorneys come in for tickets and stuff
2 and different things. Usually it was tickets he had
3 them do.
4 Q Do you know what a contract attorney is?
5 A He just paid them to do the ticket.
6 Q And I wanted to ask you to explain to the jury. People
7 may not know what the term "contract lawyer" is. What
8 is your understanding of a contract lawyer?
9 MR. JENSEN: Your Honor, I am going to
10 object. I don't think the witness is competent, unless
11 there's a foundation laid.
12 THE COURT: Objection is overruled.
13 Members of the jury, she's not offering a legal
14 conclusion or anything other than her own understanding
15 what this term means.
16 THE WITNESS: They were not employed by
17 Mr. Coogan. He just gave them money to cover the case.
18 Q (By Mr. Bridges) And at that period of time you were
19 working in his office, can you describe what his
20 practice was, generally? What types of cases did he
21 take?
22 A Criminal. We had family law, personal injury and lots
23 and lots of tickets.
24 Q Traffic tickets?
25 A Traffic tickets or DUIs, all of them, driving while

1 license suspended. He did it all.
2 Q All right. We are now about 1997. Was there a point
3 in time, let's say about six months before
4 December 1998, where your attempts to go to Mr. Coogan
5 to ask him about your case were heightened?
6 A Yes.
7 Q Can you describe that for the jury, please?
8 A Well, there was a couple other cases that were leaving
9 the office because they weren't getting worked on. And
10 I started getting nervous about mine because I knew
11 that there was -- the date was coming up that had to be
12 filed on it. It's on the front of the file.
13 And I didn't know what had to be done or how long it
14 takes to do that because I don't know -- I didn't know
15 that part of it. And so I started going into him a
16 little more frequent and asking him.
17 MR. BRIDGES: Your Honor, I don't know if I
18 ought to have this marked for illustrative purposes.
19 Exhibit No. 1 is a copy of the cover, and I am not
20 going to offer this into evidence, per se, to go back
21 with the jury, but I would like to use this for
22 illustrative purposes.
23 MR. JENSEN: When you say "illustrative
24 purposes," I'm not clear -- you can mark anything you
25 want any time you want.

1 THE COURT: He's just simply going to show
2 it to the witness, I believe. He is not going to have
3 her go through it.
4 MR. JENSEN: I don't have any problem with
5 that, no.
6 THE COURT: You can use it for illustrative
7 purposes. We are not going to mark it.
8 MR. BRIDGES: Thank you, Your Honor.
9 Q (By Mr. Bridges) Is this your file?
10 A Yes.
11 Q Now, we are going to get to your picking up the file in
12 a bit. When you picked up the file in Mr. Coogan's
13 office, was that the condition it was in?
14 A It looks a little neater, yes.
15 Q When you were employed at Mr. Coogan's office, did he
16 ever tell that you had responsibility for working on
17 your file?
18 A I wasn't allowed to touch my file.
19 Q Did he tell you that?
20 A Yes.
21 Q Will you please turn to Exhibit No. 1 in the binder?
22 What is Exhibit No. 1?
23 A That's showing the date of loss and the date of the --
24 MR. JENSEN: Your Honor, I am gonna object
25 to this. This is not for illustrative purposes. She's

1 describing what's in the file.
2 THE COURT: She's going to Exhibit No. 1,
3 which has been marked as an exhibit.
4 MR. JENSEN: I am sorry. I couldn't see
5 around counsel. Sorry.
6 MR. BRIDGES: Move to admit Exhibit No. 1,
7 Your Honor.
8 THE COURT: Any objection as to Exhibit No.
9 1?
10 MR. JENSEN: Is he moving for admission on
11 Exhibit No. 1?
12 THE COURT: That's what he just did.
13 MR. JENSEN: I didn't hear what her
14 explanation was that this is.
15 THE COURT: She didn't give one.
16 MR. JENSEN: Then I would have to object;
17 no foundation.
18 THE COURT: Counsel, I didn't hear what she
19 said it was.
20 MR. BRIDGES: Maybe we lost it in the paper
21 shuffle. I thought I did.
22 Q (By Mr. Bridges) What is Exhibit No. 1?
23 A It's the front of the file that shows the date of loss
24 and the date it has to be filed by.
25 MR. BRIDGES: Move for its admission, Your

1 Honor.
2 MR. JENSEN: And this is on the file that
3 was marked for illustrative purposes?
4 THE COURT: It has been marked. It's just
5 was something --
6 MR. JENSEN: I don't have any objection.
7 THE COURT: Exhibit No. 1 is admitted.
8 (Exhibit No. 1 admitted
9 into evidence.)
10 MR. BRIDGES: I would like to publish this
11 informally to the jury, since it's the same document.
12 THE COURT: You want to show the front of
13 the file?
14 MR. BRIDGES: That's all I want to do.
15 MR. JENSEN: I don't have any objection.
16 You are not gonna hand it around, right?
17 MR. BRIDGES: No.
18 Q (By Mr. Bridges) And based on your knowledge being in
19 the office, approximately how long were these dates
20 written on the front of the file?
21 A Probably at least a year, six months to a year.
22 Q All right. So we digressed there for a second. We
23 started by asking, was there a time when your efforts
24 to go to Mr. Coogan were heightened, and you've told
25 the jury why they were. Now I want to ask you what you

1 did.
2 When you went to Mr. Coogan, let's say about six
3 months before the statute of limitation ran, can you
4 give the jury a sense of the types of things you were
5 telling him or asking him?
6 A I was asking him what needed to be done, what could I
7 do; could I do something for it; can anybody do
8 anything.
9 Q What was his reply?
10 A He's got it handled.
11 Q I'll ask you kind of a tough question. Why didn't you
12 fire him?
13 A I trusted him.
14 Q As the days went by, let's put you now in December.
15 Based on your knowledge in speaking with Mr. Coogan in
16 December of 1998, do you know whether he was going out
17 of town for the holidays?
18 A Yes.
19 Q Was there a point in time the week of December 23,
20 1998, that he had in fact left the office for the
21 holidays but was still in town?
22 A Yes.
23 Q At that point, based on your understanding of your
24 file, by the time he had left the office for the
25 holidays and was gone, had he yet filed a summons and

1 complaint on your behalf for this fall?
2 A No.
3 Q What did you do, let's say, two days before
4 December 23, 1998, with Mr. Coogan in your lawsuit?
5 A I called him down at Johnny's Dock upset because it
6 hadn't been filed and he was leaving. His bags were
7 being picked up from the office to meet -- go pick him
8 up and he was going to be leaving town.
9 Q What did he say to you?
10 A He said, "Don't worry about it," and he hung up on me.
11 And then I called Mr. McMonagle crying on him, because
12 I know he is an attorney, if he could help me.
13 Q Earlier you said that Mr. McMonagle was your fiance
14 when you first met Mr. Coogan. Was he your fiance at
15 that point in time?
16 A No.
17 Q Were you still friends?
18 A Yes.
19 Q So he hung up on you, Mr. Coogan. What happened next?
20 A I don't remember if Mr. Coogan called John first or I
21 did, but John -- when I talked to him, he said -- no.
22 Excuse me. John did -- John said he talked to Tim and
23 he is going to stop by on his way to golf, but he
24 didn't have very long.
25 Q I don't understand what that means, stop by on his way

1 to golf?
2 A He was going golfing. He's retired, basically, and he
3 was on his way golfing to hit balls. I don't golf,
4 but -- and he had about 20 minutes that he could help
5 get started, but -- and he told Tim this, and Tim was
6 going to have to come back to the office and finish it.
7 Q Were you at the office at that time?
8 A Yes.
9 Q At that point, on that day, the same day Mr. Coogan
10 hung up on you on the phone, did Mr. McMonagle come to
11 the office?
12 A He did.
13 Q What did you see happen?
14 A He called Mr. Barcus's office. They faxed over --
15 Q Whose office?
16 A Ben Barcus. He's another attorney that is also a
17 friend of all of theirs. And he faxed over a basic
18 demand, I guess was the correct name, and then John
19 just made some changes, as he told Tim he would, and he
20 called Tim a couple times telling him what he was
21 doing. But he had to come by the office. John was not
22 going to file it or complete it.
23 Q At any point on that day, did Mr. Coogan come back to
24 the office and check the complaint?
25 A No.

1 Q And did Mr. McMonagle use the information in your file
2 to draft the complaint?
3 MR. JENSEN: Objection, Your Honor. I
4 don't think she is competent.
5 THE COURT: Objection; sustained.
6 Q (By Mr. Bridges) Did you see Mr. McMonagle look at the
7 file when he was drafting your complaint?
8 A He tried to look through it and find when he could,
9 yes.
10 Q Will you please turn to Exhibit 3? Do you have an
11 understanding as to whether the first complaint in
12 Exhibit 3 was the complaint that was filed on your
13 behalf on December 21, 1998?
14 A Yes.
15 Q And is that your signature on Page 4 of the complaint?
16 A Yes.
17 Q What was your understanding as to why you were signing
18 that?
19 A Because it had to be done, and Mr. Coogan didn't come
20 in. He sent Mr. Greene in.
21 Q Hang on a second. On Page 4 on your verification?
22 A Oh, I am sorry. Stating that the injuries that I am
23 claimed in here and what happened are true.
24 Q Did you think that in signing that you were becoming a
25 lawyer and checking to be sure that what needed to be

1 done legally in this complaint was being done?
2 A No.
3 Q Is this Mr. Coogan's signature on Page 3 of the
4 complaint, where the lawyer's signature is?
5 A I want to think he -- that might be Mitch Greene's
6 signature for Tim, which is very common for Tim.
7 Q Well, let me ask you this. Did you see Mr. Coogan back
8 in the office that day?
9 A No, and this did not leave the office until it was
10 filed. But Mitch came back in the office.
11 Q Based on what you know right now, the defendant in this
12 complaint that you are looking at, is that the right
13 defendant?
14 A No.
15 Q Will you please turn to the next page in the exhibit?
16 It's the next complaint.
17 MR. JENSEN: I am sorry. Where are we?
18 MR. BRIDGES: Same exhibit, next complaint.
19 Q (By Mr. Bridges) The amended complaint for personal
20 injuries, do you know whether, based on your knowledge
21 of your own case, whether this second complaint was
22 filed on your behalf by Mr. Coogan's office?
23 A Why it was filed?
24 Q No. Do you know if it was filed on your behalf?
25 A Yes.

1 Q On Page 4 of that complaint, there is a similar
2 verification signed by you.
3 A Yes.
4 Q Did you understand when you signed that that you were
5 acting as a lawyer to be sure that what needed to
6 legally be said in this complaint was being said in
7 this complaint?
8 A No, I wasn't.
9 Q What did you think you were doing when you signed that
10 verification?
11 A Just agreeing that what happened, happened and that I
12 was signing it because I was agreeing what I -- what
13 happened to me.
14 Q Now, turning back to Page 3 on that complaint, is that
15 Mr. Coogan's signature?
16 A That looks like his signature.
17 Q Okay. Now, based on what you know now, the facts of
18 your own case, in this second complaint, is that the
19 right defendant who's named by Mr. Coogan's office?
20 A No.
21 Q Now, finally, to keep on turning in the same exhibit,
22 there is a second, yet another amended complaint.
23 A Yes, right here.
24 Q Was that filed March 18, 1999?
25 A Yes.

1 MR. BRIDGES: Your Honor, I'd move to admit
2 Exhibit No. 3.
3 MR. JENSEN: These are all public records,
4 Your Honor. I don't have any objection.
5 THE COURT: Exhibit 3 is admitted.
6 (Exhibit No. 3 admitted
7 into evidence.)
8 Q (By Mr. Bridges) Ms. Schmidt, would you please turn to
9 Exhibit 5? Have you seen that before?
10 A Yes.
11 Q What is that?
12 A That's the notes that Mr. Coogan took.
13 Q Do you recognize that as his handwriting?
14 A Yes.
15 Q Do you recognize and from your reading of that to be
16 his understanding of what the facts were in your case
17 against the grocery store?
18 A Yes.
19 MR. BRIDGES: Move to admit No. 5, Your
20 Honor.
21 MR. JENSEN: You're moving for admission?
22 Is that what you are doing? Can I voir dire the
23 witness on this, Your Honor?
24 THE COURT: You may.
25 ////

1 VOIR DIRE EXAMINATION
2 BY MR. JENSEN:
3 Q Ms. Schmidt, what is this note, Exhibit 5?
4 A When I met with Mr. Coogan, that's the notes he took.
5 Q When you met with him when?
6 A At his office, the day we signed the fee agreement with
7 Mr. McMonagle.
8 Q And how do you know this is a note that he took the day
9 that you met with him in the office? This is for the
10 first time, right?
11 A Sure.
12 Q How do you know that?
13 A Because I was with him and I watched him write it.
14 Q What was the date of that when you first met him?
15 A I don't know the exact date. Can I look at the fee
16 agreement? January 8th, I think it says, 1996.
17 MR. JENSEN: I don't have any problem with
18 it.
19 THE COURT: Exhibit 5 is admitted.
20 (Exhibit No. 5 admitted
21 into evidence.)
22 DIRECT EXAMINATION CONTINUING
23 BY MR. BRIDGES:
24 Q Will you please turn to Exhibit 6, Ms. Schmidt? I
25 don't want you to tell me what it says just yet. We

1 will get to that. But do you recognize that document?
2 A I do.
3 Q And again, without referencing the content, per se, can
4 you tell us what that document is?
5 A It's a letter to me explaining that the wrong person
6 was filed against, and telling me that what needs to be
7 done; basically giving me -- telling me that I can have
8 another attorney to it.
9 Q And what is the date of that letter, Ms. Schmidt?
10 A March 20th, 2000.
11 Q Is that is a letter on Mr. Coogan's letterhead?
12 A Yes.
13 Q Who is that letter from?
14 A Michael Sheehan for Tim Coogan.
15 MR. BRIDGES: Move to admit No. 6, Your
16 Honor.
17 MR. JENSEN: Well, you know, we will allow
18 it.
19 THE COURT: Exhibit 6 is admitted.
20 (Exhibit No. 6 admitted
21 into evidence.)
22 MR. BRIDGES: Your Honor, just so the jury
23 can have some illustration, may I just -- I am not
24 going to publish it formally by passing it around. May
25 I just hold it up to the jury so they can have a sense

1 of what we're talking about now that it's been
2 admitted?
3 THE COURT: You're just going to hold it
4 up. I guess you're not going to ask them to read it.
5 MR. BRIDGES: I want them to understand
6 this is a letter from Mr. Coogan's office on his
7 letterhead. And they will have the exhibit.
8 Q (By Mr. Bridges) Will you please turn to Exhibit 7,
9 Ms. Schmidt. Exhibit 7 is four pages. Have you seen
10 that before?
11 A Yes.
12 Q Is that a settlement demand Mr. Coogan's office
13 prepared on your behalf relative to your falling at the
14 grocery store?
15 A Yes.
16 Q Is it on his letterhead?
17 A Yes.
18 MR. BRIDGES: Move to admit No. 7, Your
19 Honor?
20 MR. JENSEN: Objection. ER 408, settlement
21 negotiations, are not admissible.
22 THE COURT: Objection is overruled because
23 in settlement, we are talking about settlement as
24 between the parties here, not settlement as to somebody
25 else.

1 MR. JENSEN: We have to have the underlying
2 case. We are talking about the underlying case now,
3 Your Honor. Can I take a moment to look at 408?
4 THE COURT: No. I am going to rule that it
5 is not inadmissible, but I will hear outside the
6 presence of the jury at some point and allow you to
7 complete your argument.
8 Members of the jury, I am going to allow the
9 exhibit, but if I change my mind, I will withdraw it
10 and tell you that under some evidence rule it's not
11 admissible.
12 Q (By Mr. Bridges) Ms. Schmidt, will you please turn to
13 Exhibit No. 8? What is that?
14 A That's a note from the insurance investigator from
15 Grocery Outlet, from Janelle English or Ingall or
16 something.
17 Q Was this note in your file?
18 A Yes.
19 Q The file that Mr. Coogan had on your behalf in his
20 office?
21 A Yes.
22 Q Is this a note taken by someone -- let me rephrase the
23 question. Was this a note taken by an attorney in his
24 office working on your behalf at Mr. Coogan's
25 direction?

1 A Yes.
2 MR. BRIDGES: Move to admit Exhibit No. 8,
3 Your Honor.
4 Q (By Mr. Bridges) Oh, the date of the note, ma'am, is
5 what?
6 A October 28, 1996.
7 MR. BRIDGES: Move to admit, Your Honor.
8 MR. JENSEN: Can I voir dire the witness on
9 this, Your Honor?
10 THE COURT: You may.
11 VOIR DIRE EXAMINATION
12 BY MR. JENSEN:
13 Q You don't know who took this note?
14 A Yes.
15 Q Who took it?
16 A Mitch Greene.
17 Q How do you know that Mitch Greene took this note?
18 A I was there.
19 Q Where was he when he took the note?
20 A In his office.
21 MR. JENSEN: No objection.
22 THE COURT: Exhibit 8 is admitted.
23 (Exhibit No. 8 admitted
24 into evidence.)
25 ////

1 DIRECT EXAMINATION CONTINUING
2 BY MR. BRIDGES:
3 Q Ms. Schmidt, I want to ask you some questions about
4 this document. Will you please read the note that's
5 Exhibit No. 8?
6 A "Talked with Janelle Ingall, insurance advisor.
7 Advised update: Teresa working here as receptionist.
8 Can't do day-care and bookkeeping. In pain and still
9 treating. Back pain plus arm numbness. Will work on
10 demand at advice within weeks."
11 Q I want to turn our attention just for a second to your
12 working in Mr. Coogan's office. Can you describe for
13 the jury what -- you already said you were a
14 receptionist and later you did the books.
15 Can you describe to the jury the physicality of that
16 job? What were the types of things you were having to
17 do in the office?
18 A During which point?
19 Q When you were working for Mr. Coogan.
20 A Okay. At first, it was answering phones. Then it was
21 notice of appearances. Did his books.
22 Q Right. I guess what I want to understand is, were you
23 sitting at a desk?
24 A Yes.
25 Q Were you using a computer?

1 A Yes, some, light.
2 Q How many hours a day were you working at Mr. Coogan's
3 office?
4 A Eight.
5 Q When you were using the computer, did it have any
6 effect on your arm numbness?
7 A Yes, it did. I was able to get up and move around in
8 his office.
9 Q Can you describe for the jury whether the typing or the
10 desk work had an adverse effect on your arm numbness?
11 And if so, what?
12 A Yes, I would type -- I was able to do so much, then it
13 would go numb. There was one point where I couldn't
14 type.
15 Q That was my next question. Was there a point when you
16 felt that could you no longer do those duties because
17 of the arm numbness and such?
18 A Yes.
19 Q Did you go to Mr. Coogan and ask for time off so you
20 could get past this hump in your injuries?
21 A Well, actually, I took a doctor's note to Mr. Coogan,
22 but yes, I did.
23 Q What did you tell Mr. Coogan in terms of asking for
24 time off?
25 A That I needed to let the -- well, my understanding at

1 that point, inflammation, the swelling go down because
2 I couldn't use my arm, and I couldn't work, type with
3 it. And any movement I did or anything I did with my
4 arm was not letting it go down. I just had to
5 completely not use it.
6 Q What was the response to your asking for time off for
7 this injury that Mr. Coogan was representing you on?
8 A Well, I got a call after -- I mean, I had taken some
9 time off. Then I got a call from Mr. Sheehan.
10 Q Who is Mr. Sheehan?
11 A He was, at the time, his associate. He took Mitch
12 Greene's place.
13 Q An associate is a lawyer working in his office?
14 A Yes, he was hired by Mr. Coogan.
15 Q What did Mr. Sheehan tell you on behalf of Mr. Coogan?
16 MR. JENSEN: Objection; hearsay.
17 MR. BRIDGES: Party opponent. He is an
18 agent of Mr. Coogan.
19 THE COURT: How is this relevant?
20 MR. BRIDGES: Wage loss.
21 MR. JENSEN: We are getting into the issue
22 of truth of the matter asserted, damages, symptomatic
23 symptoms.
24 THE COURT: You know, this is putting me at
25 a disadvantage. I don't know what she is going to say

1 and why it's being offered. At this point I have to
2 allow it and tell the members of the jury, as far as I
3 have been able to determine, not knowing what she is
4 going to say, this isn't offered for the truth.
5 I assume it is offered because certain things
6 happened as a result of what she was told, and that's
7 all I can assume without hearing it outside the
8 presence of the jury, which I'm not prepared to do.
9 Q (By Mr. Bridges) What did Mr. Sheehan tell you on
10 behalf of Mr. Coogan?
11 A If I was not back to work the next day --
12 MR. JENSEN: I have to object to this, Your
13 Honor. I have to object to this. This is rank
14 hearsay.
15 THE COURT: Okay.
16 MR. JENSEN: And she is trying to say what
17 Mr. Sheehan said what Mr. Coogan said, and it's rank,
18 and it's prejudicial, the whole thing.
19 THE COURT: I have to say I never heard the
20 objection as rank, but nonetheless, at this point, I
21 will excuse the jury. Members of the jury, it's time
22 for the recess anyway. Please obey all my previous
23 instructions. There will be times when I forget to
24 tell you don't talk about the case; don't be your own
25 investigator, you know, the things that I've said

1 throughout this trial. They apply every time you leave
2 the courtroom, including the times you go to lunch and
3 the times you go home.
4 I suspect that we are going to have probably about
5 five more minutes in court. I won't have it any more
6 than five more minutes, and that means that we will be
7 in recess, for you, 20 minutes; for us, 15. You can go
8 back to the jury room.
9 (Jury exits.)
10 THE COURT: Back on the record.
11 MR. BRIDGES: Why don't I just make an
12 offer.
13 THE COURT: Yes, please, make an offer of
14 proof and then I can hear argument.
15 MR. BRIDGES: Best way is just to describe
16 it and I can take some testimony, if you'd like. Here
17 is the bottom line: She was working with Mr. Coogan
18 for I think $1,800 a month or so. She needed some time
19 off to get over her injuries. Coogan told her, "Get
20 back here the next day or you're fired." She couldn't
21 do it, so she didn't come back.
22 Sheehan was an attorney working in his office, who
23 Sheehan told Ms. Schmidt in the course of that phone
24 call, basically to the effect, "Tim told me to call you
25 and tell you if you're not back here tomorrow, you're

1 fired."

2 Now, Sheehan is an attorney. He's working as

3 Mr. Coogan's agent. If Mr. Coogan said it, that's

4 certainly a statement of a party opponent. And

5 Mr. Sheehan is simply acting as Mr. Coogan's agent,

6 that's no different. I mean, you're right, it is

7 hearsay perhaps in a law school sense, but it's a

8 hearsay exception, or it's excepted from hearsay

9 because it's a statement of a party opponent, and it's

10 going to her wage loss.

11 THE COURT: In what way, the fact that she

12 felt that she was no longer employed?

13 MR. BRIDGES: She had an injury. She could

14 not fulfill the role of her job and she had to quit.

15 Now, if they were against -- if she were working at

16 Costco and this is not an issue of working in

17 Mr. Coogan's office, she would still be able, I submit,

18 to testify that, "Costco told me, 'I am not going to

19 give you any time off; you can either do your job or

20 not,'" so she had to leave her job because of her

21 injuries, and that establishes the wage loss. It's

22 just happenstance here that she was working for

23 Mr. Coogan.

24 It's not because we are trying to character

25 assassinate Mr. Coogan, per se.

1 MR. COOGAN: God forbid.
2 THE COURT: Mr. Coogan, you are a lawyer
3 and a party, but you're not allowed to speak at this
4 point.
5 MR. COOGAN: Not even two words the entire
6 time?
7 THE COURT: Mr. Coogan, you have a lawyer.
8 MR. COOGAN: I have a Notice of Appearance
9 in, Your Honor, also.
10 THE COURT: Your lawyer is the one that's
11 handling this witness. He has made the objections.
12 You are not allowed to speak. You know the rules.
13 Please.
14 MR. BRIDGES: Now, the defendant can always
15 argue, "Well, Costco was being unreasonable. You
16 should have asked for accommodation or the ADA or what
17 have you." But any plaintiff is allowed to take the
18 stand and say, "I couldn't do the functions of my job,
19 and the boss wouldn't give me any time off." That's
20 what this is.
21 MR. JENSEN: Your Honor, first of all, this
22 is exactly what he is trying to do, engage in character
23 assassination. Secondly, the way the question was
24 framed, he said, well, regarding the injuries you
25 sustained in the accident for the slip-and-fall. This

1 in the interim, between December 25 or 23rd, 1995, and
2 this time frame, we had the other car accident. I
3 mean, she's had a lot of bad times, a lot of bad
4 injuries she sustained in that and had to take a lot of
5 time off of work. We are getting into a situation,
6 one, where he is talking about one incident that
7 overlaps into another incident where she really
8 sustained a lot of bad injuries, granted.
9 Now he's framing the question that Mr. Coogan
10 wouldn't let her off because of the injuries she
11 sustained in 1995 in the case that he is handling for
12 her.
13 Secondly, the way the questions are being framed and
14 put to the witness, she can go anywhere she wants to
15 with it. First of all, they are in the nature of
16 leading. They assume -- he assumes the answer already
17 in the form of the question.
18 And secondly, we are talking about rank hearsay. We
19 are talking about she can say anything she wants to
20 about what Mr. Sheehan said; that you can say
21 Mr. Sheehan told me that Mr. Coogan said you were blah,
22 blah, blah and whatever he wants to say, and I have no
23 control over it because Mr. Sheehan is not a witness.
24 He is not going to be called. I can't cross-examine
25 him, and it's rank hearsay. And it could or could not

1 go to the truth of the matter asserted, but it gives
2 her a carte blanche to say anything she wants to. And
3 I am sure that she has discussed the answer with
4 Mr. Bridges in advance to answering the question. It's
5 rank hearsay, and I object. I have to object.
6 I'm not trying to be unreasonable about this thing.
7 But the way this whole line of questioning is being put
8 to the witness, he knows that the answer is going to
9 be. I don't even know what the characterization of the
10 question is.
11 THE COURT: What period of time are we
12 talking about here?
13 MR. BRIDGES: Well, frankly, I will
14 probably only ask the jury for a couple of months. I
15 mean, a fool would try to say she has that wage loss.
16 Now she has already told the jury she is working. We
17 are not certainly not going to go --
18 THE COURT: No, you misunderstood my
19 question. What period of time are we talking about
20 when this conversation allegedly occurred.
21 MR. BRIDGES: I am sorry. Ms. Schmidt?
22 THE COURT: When was it? After your '97
23 accident or before?
24 THE WITNESS: It was after.
25 MR. BRIDGES: Was it after?

1 MR. COOGAN: Yes.
2 MR. JENSEN: Yes.
3 THE WITNESS: Just at the very end of this.
4 MR. BRIDGES: Well, that still doesn't
5 change anything. If she testifies that the symptoms
6 that she was asking time off for and she already has,
7 is the numbness coming down her arm. And the medical
8 testimony, that was only caused by the slip-and-fall.
9 That doesn't change anything.
10 Again, this is a great argument the defendant could
11 have made, possibly, if he would have taken the time to
12 get a medical expert which is his right to do. I mean,
13 the foundation is there.
14 I realize there are some issues that you've excluded
15 that may look it to be gray, but the reason why we have
16 evidentiary rulings is we have already determined that
17 there is no medical testimony to tie up that MVA as
18 causing anything.
19 THE COURT: I am going to be very brief.
20 If I allow it, you know what is going to happen? Then
21 we are going to get into the '97 accident because all
22 of this becomes so wrapped up into what her time loss
23 is, why she needs to be off work. That's why I asked
24 her, was it before or after the '97 accident? And I
25 think she said it was after.

1 MR. BRIDGES: She did. If that's the scope
2 of your ruling, let me ask you one question, just so I
3 understand.
4 If she testifies the symptoms she was asking time
5 off for were the numbness in her arm and her neck,
6 which she has, and the doctor has testified that was
7 solely caused by the slip-and-fall, does that then --
8 would that not then change Your Honor's consideration
9 of that?
10 I mean, if she said that it was because of
11 generalized back pain or whatever, and that had some
12 implications to the '97 MVA, I see perfectly what Your
13 Honor is saying.
14 THE COURT: I have a solution. I think we
15 are going to open up too many cans of worms. I am
16 going to simply sustain the objection at this point.
17 You're talking, as you said, about a short period of
18 time. We're not talking about a huge wage loss. But
19 there's too many complicating factors about what
20 Mr. Sheehan says. That, to me, is potentially hearsay.
21 I appreciate there is an exception perhaps, if you can
22 establish agency, a speaking agent, and all of that.
23 But it opens up a whole bunch of other issues.
24 This isn't the typical time loss issue. We are not
25 talking about somebody saying, you know, "I need time

1 off because" -- strike that. "I can't work because."
2 We are talking about somebody who is saying, "Can I
3 have some time off?" And allegedly, somebody says she
4 can't, and therefore, you are claiming wage loss.
5 I think too many bridges to cross with too many
6 problems, and potentially, I am warning you, is that if
7 I ever allow this, I think, without question, I'd have
8 to open then the '97 accident.
9 MR. BRIDGES: I understand what you are
10 saying, Your Honor. May I have your indulgence for 20
11 seconds to make a quick record in terms of preserving
12 the record?
13 MR. JENSEN: I'd like to take a break
14 myself.
15 THE COURT: You made your offer of proof.
16 What was the rest of the offer of proof?
17 MR. BRIDGES: I just wanted to be very
18 clear that the point I am making here, and I don't
19 mean -- I apologize if I am being duplicative, but
20 being on appeal, you look at those records and say,
21 "Gosh darn it. Why didn't he just say this other word
22 here?" I just want to be very sure in terms of my
23 record that I say that the only medical testimony in
24 this case is that the numbness in her arm was caused by
25 the slip-and-fall, and that is all.

1 Ms. Schmidt has already testified, and will testify
2 again, that the reason why she was asking for time off
3 of work was due to the numbness in her arm.
4 That being the case, I submit in terms of saving the
5 record, that the '97 MVA is out of the picture, and
6 that those are segregable issues. This is just in
7 terms of making my record. I am not trying to argue
8 with Your Honor.
9 THE COURT: Okay. You've made your record.
10 Let me ask one more question. What are we talking
11 about? If you made your record, are we talking about a
12 couple weeks of wage loss? Is that what we're talking
13 about?
14 MR. BRIDGES: Couple months.
15 MR. JENSEN: Could I just make a record of
16 this too, Your Honor, as long as we are making records?
17 THE COURT: Okay.
18 MR. JENSEN: As Your Honor may recall, and
19 this is one of my problems I am having so far with the
20 evidentiary rulings, and I am not saying this
21 disparagingly.
22 THE COURT: Oh, I'm not going to let you
23 make a further record. I have sustained your
24 objection.
25 MR. JENSEN: I understand. As far as

1 numbness in her arms and those symptoms, Your Honor,
2 may recall --
3 THE COURT: Counsel? Counsel, no. That's
4 not a proper place to make a record. I have ruled
5 previously a long time ago. I've sustained your
6 objection. There's no need to make a further record by
7 you. Court is at recess.
8 (Brief recess.)
9 (Jury enters.)
10 THE COURT: Ms. Schmidt, I will remind you
11 you are still under oath. Mr. Bridges, you may
12 continue your examination.
13 MR. BRIDGES: Thank you, Your Honor.
14 Q (By Mr. Bridges) Okay. Ms. Schmidt, was there some
15 point when you were still working in Mr. Coogan's
16 office that you learned that the wrong person had been
17 sued?
18 A Yes.
19 Q How did you learn that?
20 A We received a phone call from the party that was served
21 stating that it was the wrong person served, and he
22 would not give a name.
23 Q Did Mr. Coogan, after that phone call came in, come and
24 talk with you about what that meant to your case?
25 A No.

1 Q Did any lawyer working for Mr. Coogan come to you and
2 talk to you and say, "Teresa, we sued the wrong
3 person"?
4 A No.
5 Q What is, if you know, the next event that happened in
6 the case against the grocery company, grocery store?
7 A It was refiled against another party, and there was --
8 after that was filed, there was a deposition taken.
9 Q Where did the deposition take place?
10 A Tim's office.
11 Q At this time, were you working as a receptionist and
12 bookkeeper, I think you said?
13 A Yeah, I did a lot of things in the office.
14 Q Where would you sit physically in the office?
15 A In the front of the office.
16 Q Were part of your duties to take in the messenger
17 material?
18 A Yes.
19 Q At some point after the deposition, did something
20 arrive by messenger relative to the case against the
21 grocery store?
22 MR. JENSEN: Objection; leading.
23 THE COURT: Overruled. You may answer.
24 THE WITNESS: Yes, I received a notice
25 saying that the case has been dismissed.

1 Q (By Mr. Bridges) Before you got the notice saying the
2 case had been dismissed, had anyone from Mr. Coogan's
3 office, either Mr. Coogan or any of his associates,
4 come and tell you that the case was going to be
5 dismissed?
6 A No, I still thought the case was going.
7 Q Do you have any understanding as to how that dismissal
8 came about?
9 A Yes. Actually, when I got it, I had called Mr. Coogan
10 and asked him on the phone what had happened. He
11 wasn't in the office. And he told me that the wrong
12 person was served, and the case was not going to be any
13 good; there is nothing we can do about it at this time.
14 Q Did he apologize?
15 A No. He didn't seem to care. He was just like it was a
16 no-good case anyway, so it couldn't have gotten
17 anywhere. So I called --
18 Q What was your reaction to that?
19 A I called Mr. McMonagle crying and asked him if he could
20 help me; I don't know what is going on.
21 Q Do you know whether any -- whether Mr. Coogan made any
22 subsequent efforts to, although now we know it wouldn't
23 have worked, to save the case?
24 MR. JENSEN: I am going to object to the
25 form of the question as vague.

1 THE COURT: Would you rephrase the
2 question, please?
3 MR. BRIDGES: Happy to, Your Honor.
4 Q (By Mr. Bridges) After you had this conversation with
5 Mr. Coogan, did you talk with him again about what he
6 was going to do about your case?
7 A There was three filed, three -- the right one was filed
8 to the right guy, but it was too late. They did a
9 deposition after that on the guy. That was done --
10 MR. JENSEN: Objection; nonresponsive.
11 THE COURT: Sustained.
12 Q (By Mr. Bridges) Okay. I just want to focus on what
13 Mr. Coogan basically told you right now, Ms. Schmidt.
14 After Mr. Coogan told you it was a no-good case anyway,
15 did you ever go to him to seek any, I don't want to say
16 relief, but to figure out what was going on with the
17 situation; how was it going to end?
18 He agreed to represent you three and a half years
19 previous, and now he is telling you that not only can
20 he not do anything, but now he's saying your case
21 wasn't any good to begin with.
22 MR. JENSEN: Objection; irrelevant.
23 THE COURT: Overruled.
24 Q (By Mr. Bridges) What happened next? What did he say
25 he was going to do for you, if anything?

1 A Nothing. He said there was nothing he can do.
2 Q How did that --
3 A I called him on his phone.
4 MR. JENSEN: Objection; volunteering.
5 THE COURT: Sustained.
6 Q (By Mr. Bridges) Let me ask you a question.
7 A I am sorry.
8 Q I was going to ask you what you did next, but you need
9 to let me ask you that.
10 How did that hit you, him telling you, "The case
11 isn't worth anything anyway; I am not going to do
12 anything"?
13 A I was devastated.
14 Q Why?
15 A I had all this stuff going on with my body. I thought
16 I could maybe possibly get better, get it fixed or at
17 least get my medical bills -- you know, they were
18 building up. And then when I called him and he told me
19 he's not going to do a fucking thing and stop bothering
20 him and hung up on me, I was just like upset. I was
21 mortified.
22 Q Were you -- let me rephrase the question. Did you have
23 any medical insurance to pay for those bills?
24 MR. JENSEN: Objection, Your Honor.
25 THE COURT: Can I see counsel at side-bar?

1 Members of the jury, if you'd like to stretch, you can
2 do so, but please talk to each other.
3 (Side-bar conference held.)
4 THE COURT: Court will go back to order.
5 You may ask your question.
6 MR. BRIDGES: Thank you, Your Honor.
7 Q (By Mr. Bridges) To get us back on the same page, the
8 question I asked you was, did you have any medical
9 insurance to pay these bills that you had incurred
10 because of falling at the grocery store?
11 A No, I didn't.
12 Q Were you counting on the money that Mr. Coogan -- let
13 me strike that. Let me rephrase the question.
14 Were you counting on the money from resolving your
15 case against the grocery store to repay those medical
16 bills?
17 A Yes, I was.
18 Q Had you told Mr. Coogan that at any point during his
19 representation of you?
20 A Yes, several times.
21 Q Have you tried to make any payments on the medical
22 bills to date?
23 A I have been making payments on them.
24 Q Are they paid off now?
25 A No.

1 Q Ms. Schmidt, I really only have one last question to
2 ask of you, and it is this: You are now sitting in a
3 courtroom eight years after you fell at the grocery
4 store and pretty well still eight years after you met
5 Mr. Coogan and he promised to represent you in the case
6 against the grocery store, in terms of the injuries you
7 sustained in the fall and now what you've had to go
8 through with Mr. Coogan, how has this impacted you?
9 A I am sorry. How has it impacted me in eight years now?
10 Q Right. How has this affected Teresa Schmidt? You are
11 now eight years after you fell, and you are still
12 arguing about falling in a grocery store.
13 A I never thought I'd be here eight years later. It's
14 hard. It's emotionally draining. I don't know if
15 people have been through this, but something you
16 thought would be easy done, trust somebody and somebody
17 that you actually really liked and cared about because
18 I think everybody knows Tim was, and I still think he's
19 a good guy. He was a friend. And to have this happen
20 to you, it has been hard on me.
21 MR. BRIDGES: Thank you, Ms. Schmidt.
22 That's all the questions I have, Your Honor.
23 THE COURT: Mr. Jensen, you may
24 cross-examine.
25 ////