

71955-6

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NO. 71955-6I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PAULA TERRELL,
Respondent

vs.

GORDON HAMILTON,
Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary I. Yu, Judge

BRIEF OF RESPONDENT

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I. NATURE OF THE CASE

Defendant Gordon Hamilton and his domestic partner, Plaintiff Paula Terrell, were driving home one evening on a snowy road. Hamilton lost control of the truck and hit a tree. Ms. Terrell was seriously injured. The jury found Mr. Hamilton negligent and awarded Ms. Terrell damages. Mr. Hamilton filed a motion for a new trial or remittitur, complaining that the trial court had erred in giving a preliminary instruction and in declining to give defendant's proposed instruction about "mere skidding", and because of alleged misconduct by plaintiff's counsel. The trial judge, the Honorable Mary Yu, denied the motion for new trial and remittitur. In doing so, she held that the court's preliminary instruction was required because defense counsel had raised the issue of insurance during jury selection, and that plaintiff's counsel had done nothing wrong. Mr. Hamilton now appeals, raising the same complaints that the trial judge already rejected.

II. RESPONDENT'S STATEMENT OF ISSUES

A. Whether Judge Yu abused her discretion by declining to give defendant's proposed instruction about "mere skidding", or by giving the jury a preliminary instruction clarifying the parties' relationship and instructing the jury to disregard evidence of insurance;

B. Whether Judge Yu abused her discretion by denying a new trial or remittitur;

C. Whether Ms. Terrell should be awarded her fees on appeal.

III. COUNTERSTATEMENT OF THE CASE

In every trial, lawyers make numerous tactical choices. Sometimes these choices succeed and counsel wins the case. Sometimes these choices do not succeed and counsel loses the case. In this case, defense counsel took a “high risk” approach to the trial. That approach failed and counsel lost decisively. But it is not the role of the trial court nor of this Court of Appeals to rescue lawyers from the consequences of their own tactical choices by giving them a “do over”.

Defense counsel’s choices in this trial included:

- Not settling the case at mediation (RP 24);
- Trying this case to a jury instead of a judge (RP 28, 31);
- Bringing liability insurance into the case (RP 54-57, 205-207, 266);
- Denying liability for the collision instead of taking responsibility for it, even though his client the defendant admitted he was responsible for it (RP 47, 51, 267, 289, 290-291, 1298, 1300);
- Attacking the plaintiff and her doctors, and calling her a liar, when even his client the defendant admitted that plaintiff was seriously injured (RP 265-267, 274-276, 281, 289-314);
- Humiliating his own client by contradicting his testimony in opening and in closing, and by asking him embarrassing personal questions (RP 319-320).

When the defense quotes from the trial court record in its opening brief, it frequently omits important portions, takes statements out of context, or misrepresents the import of what was said. It attributes to and blames **plaintiff's counsel** for things that were said and done by **defense counsel**. Moreover, the defense engages in circular, self-serving record-creating: after the verdict, disgruntled defense counsel filed a declaration making unsupported allegations about the trial and about plaintiff's counsel; these allegations were rejected by the trial judge, who denied the defense motion for a new trial, CP 533-562, CP 598-599.¹ The defense nevertheless now cites its own declaration, **rather than some actual event during the trial**, as "support" for crucial factual allegations in its appellate brief. Appendix A has a listing of some of the most material misrepresentations in defendant's opening brief.

In this case, there were only two issues for the jury to resolve: whether defendant Mr. Hamilton negligently caused this one-car collision,

¹ The trial court's order stated (emphasis added):

Denied. The court instructed the jury **after defense counsel raised the issue in jury selection and insisting on impeaching the plaintiff with a statement to the insurance claim adjuster**. The issue of insurance remained central to the case and the only way to address the question was through an instruction.

While the court was aware of the conflicts between counsel, the court does not find the plaintiff's counsel was engaged in any misconduct.

and if so, the nature and extent of the injuries which the collision caused to plaintiff Ms. Terrell. RP 247. Plaintiff proved at trial that the collision was caused by the defendant's negligent driving, and that plaintiff was seriously and permanently injured. The jury delivered an appropriate verdict. The trial court appropriately denied the defendant's motion for a new trial or remittitur.

A. GORDON HAMILTON CRASHED BECAUSE HE WAS DRIVING TOO FAST FOR CONDITIONS.²

On December 14, 2008, Mr. Hamilton was driving himself and Ms. Terrell home on a wet and snowy road. RP 331, 1115-6, 1159, 1220. He was driving faster than other cars, and was passing other cars, when he lost control. RP 1111. Their truck spun off the road and hit a tree, injuring them both severely.³ RP 296-298, 316, 407-8, 336. They had to be extracted by emergency responders. RP 1139. Mr. Hamilton admitted during his testimony that he was at fault for causing the collision. RP 289.

Defense counsel claimed at trial, and claims on appeal, that this

² One of the defense's bases for appeal is its displeasure with the trial court for giving one liability instruction, and for declining to give another. Plaintiff provides this brief summary of the facts of the collision so this Court will see that the trial judge's decisions were in fact both correct and well within her discretion.

³ Mr. Hamilton testified that he did not remember the collision, but he did remember that they had left early that day because there was a report of snow. RP 296.

collision was unavoidable, the result of “invisible black ice”.⁴ RP 51. During oral argument on the motions in limine, defense counsel assured the court that there would be evidence of “black ice”.⁵ RP 51. The defense told the jurors in opening statement that this was a case of “black ice”. RP 267. In appellant’s opening brief, at p. 3, the defense falsely claims that Ms. Terrell made a statement to “her” insurance company⁶ that the couple had skidded on black ice. *See* CP 406, Terrell Deposition, Exhibit 2.⁷ In truth, Ms. Terrell gave a statement to defendant’s insurance company, State Farm, and her statement said nothing about black ice. RP 402, CP 406. The only person in the courtroom who ever asserted that there was black ice the night of the collision was defense counsel, and of

⁴ The Washington Department of Transportation defines black ice as “Popular term for a very thin coating of clear, bubble-free, homogeneous ice which forms on a pavement with a temperature at or slightly above 32° F when the temperature of the air in contact with the ground is below the freezing-point of water and small slightly super cooled water droplets deposit on the surface and coalesce (flow together) before freezing.” www.wsdot.wa.gov/NR/rdonlyres/C56C6B11-1F6B-4F56-5FBDE720F4E19/0/Chapter6.pdf, p. 6-2. Note that DOT does not state, nor is it true as the defense claims, that black ice is always “invisible”. For example, it can appear as a shiny surface on the road.

⁵ During the motions in limine, the court asked defense counsel if the evidence of black ice was made up and counsel said “Wouldn’t matter if it was made up or not...” RP 51. The court asked if there was testimony which would support his black ice theory and defense counsel said “Absolutely. I mean, I’d be a fool to stand in front of the jury if there wasn’t, and say so.” RP 52.

⁶ The defense refers to Ms. Terrell’s statement as a statement made to “her” insurance company,” on p. 3 and p. 9 of appellant’s opening brief, but the only insurance company involved here is the defendant’s insurance company, State Farm.

⁷ Defense counsel continues to assert there was black ice in appellant’s opening brief, at p. 24.

course his statements are not evidence. WPI 1.01.

Mr. Hamilton testified that he could not recall the collision itself, but he did testify that driving conditions that night were not right for black ice.⁸ He also testified that “that’s not the way black ice works”, RP 321, and that if he had thought there was black ice on the road, he would have been going “a hell of a lot slower.” RP 321. Ms. Terrell testified that she had no way of knowing what was on the road, RP 1115, but that it was snowing, and that Mr. Hamilton was driving faster than other cars and was passing them. RP 1160-61.

On cross examination of Ms. Terrell and of at least one of her doctors, the defense used a medical record that mentioned black ice, to try to convince the jury that Ms. Terrell had told someone that there was black ice, but Ms. Terrell testified that she did not know where that information came from.⁹ The medical records to which defense counsel referred, which allegedly contained the words black ice, were not admitted into evidence. CP 430-433.

⁸ Mr. Hamilton testified that he did not believe there was black ice, because it was rain turning to snow, and “you wouldn’t be getting black ice”, RP 328. He also testified that “I eliminated black ice very early on.” RP 329.

⁹ Defense counsel, during cross examination, stated to Ms. Terrell in the presence of the jury that a medical record said, “quote, hit black ice...unquote”, implying that the record’s author was quoting Ms. Terrell. In truth there were no quote marks on this medical record. Plaintiff’s counsel objected and the court sustained the objection. Defense counsel then acknowledged that what he had just said was misleading. RP 1179-80.

At trial, the defense argued that WPI 12.06, the “duty to see” instruction, should not be given because black ice “isn’t there to be seen.” RP 1224. This argument was flawed because there really was no admissible evidence of black ice, nor any evidence that if it were present, it was “invisible”.

B. PAULA TERRELL FACES A LIFETIME OF PAIN.¹⁰

Ms. Terrell has permanent injuries to her brain, her shoulder and her spine. At age 50, she faces a lifetime of pain, disability, and disfigurement. Dr. Christopher Pepin, her primary care physician, had been Ms. Terrell’s doctor for 12 years. RP 355. Dr. Pepin provided Ms. Terrell’s “baseline”, including lack of prior shoulder pain, RP 356, lack of prior neck pain, RP 357, and her high pre-collision activity level including running, yoga, and working, RP 356. Dr. Pepin testified Ms. Terrell was active, fit, and “probably in better shape than I was” before the collision, RP 357.

Dr. Pepin referred Ms. Terrell to pain specialist Dr. Ren, who gave her epidural steroid injections in an attempt to control her pain. RP 366. When these were ineffective, Dr. Ren referred Ms. Terrell to spine specialist Dr. Richard Seroussi, RP 372, and to orthopedic surgeon and

¹⁰ One of defendant’s allegations on appeal is that the jury verdict was excessive. Plaintiffs therefore provide this brief summary of Ms. Terrell’s injuries and of the evidence therefore, so this Court can see that the jury’s verdict was in fact reasonable.

shoulder specialist Dr. Carl Basamania. RP 371.

Dr. Basamania performed surgery on Ms. Terrell's shoulder. RP 962. He testified that Ms. Terrell had "extensive cartilage damage", caused by the collision, RP 962-64; specifically, the damage occurred when the head of her humerus bone was driven into its socket by the collision. RP 966. Dr. Basamania also testified that he was "disturbed" by how much Ms. Terrell's shoulder had deteriorated over the past 3 years, RP 1071, and he opined that Ms. Terrell more probably than not would need shoulder replacement surgery in the future, RP 1070-72, which was more probably than made necessary by this collision. RP 1089.

Dr. Seroussi, a physiatrist and specialist in rehabilitative medicine and pain management, testified that he tried unsuccessfully to control Ms. Terrell's pain with epidural injections, and then sent her for a spinal neurotomy, RP 419-20, an extreme treatment analogous to "a root canal of the spine". RP 420. The neurotomy was done by Dr. Baker. RP 668. Unfortunately, the neurotomy did not help and Ms. Terrell became worse. RP 424, 669. Dr. Seroussi also sent Ms. Terrell for an evaluation with neurosurgeons Dr. Lazar, RP 425, and Dr. Nora, RP 672; Dr. Nora brought Ms. Terrell's unusually difficult case before the Seattle Science Spine Conference. RP 672.

Dr. Seroussi testified to how hard Ms. Terrell worked to get well,

undergoing major medical procedures, RP 432, but that as a result of her injuries from this collision, Ms. Terrell had suffered “a significant loss of functioning”, RP 432. Dr. Pepin testified that Ms. Terrell is still in pain. RP 418. Dr. Seroussi testified that Ms. Terrell is still in pain and would have to either live with her pain or perhaps undergo more surgery, RP 445-46, and that she was now the victim of chronic pain, which can spread and worsen over time. RP 446-47.

The jurors saw with their own eyes the disfigurement of Ms. Terrell’s spine – the permanent deformity on her back which had not been there before the collision. RP 314-16. They saw the brace that Dr. Seroussi had had custom made, to accommodate the deformity in Ms. Terrell’s back. RP 430.

Dr. Seroussi also referred Ms. Terrell to neuropsychologist Dr. David White for an evaluation. RP 576-7. Dr. White testified that Ms. Terrell had suffered a traumatic brain injury, RP 484-85, and post-traumatic stress disorder, and chronic pain, all as a result of the collision. RP 502. He testified that the traumatic brain injury “significantly affected” Ms. Terrell, including her memory and her ability to organize her life and remember conversations. Ms. Terrell “is not the very sharp, intelligent person that she was before this accident”. RP 517.

Jurors also heard testimony from physical therapist Karen L.

Greeley. Ms. Greeley, who has been in practice for over 30 years, RP 855, testified that she had never seen a back with bony lumps such as Ms. Terrell's. RP 875. Ms. Greeley also testified that she saw Ms. Terrell's spine worsen, and saw the protrusions on her back getting bigger even during the course of her physical therapy. RP 876.

The defense called three doctors, all of whom sought to minimize Ms. Terrell's injuries. Dr. Russell Vandenberg, psychiatrist, claimed that Ms. Terrell had no evidence of head injury, and that he is "board certified in 'crazy' and that she was not crazy." RP 602.

Dr. Theresa McFarland, a part-time orthopedic surgeon, RP 692, testified that Ms. Terrell's shoulder problems were not caused by the collision, and that Dr. Basamania's opinions were wrong. RP 757. She had seen the protrusion on Ms. Terrell's back and didn't know what it was, RP 759-60, but opined that all the doctors who believed Ms. Terrell's present symptoms were caused by the collision were wrong. RP 758.

Dr. J. Greg Zoltani, neurologist, examined Ms. Terrell for 4½ minutes. RP 842-843. He claimed that this was enough time for him to perform a "complete" neurological examination, in which he evaluated both whether she had head injuries or spinal injuries. RP 843-45. Dr. Zoltani told the jury that any injuries Ms. Terrell had sustained in the collision would have healed within 6 months, and that any medical providers who

testified otherwise were wrong. RP 844-46.

Mr. Hamilton testified that the collision has affected Ms. Terrell's ability to do household chores. RP 308. Her memory is erratic. RP 298. She has a hard time sleeping, RP 299, she no longer goes for walks, which she used to do "religiously", RP 304, she gets pain and headaches, RP 304-05, and she has stopped gardening, which she used to "absolutely enjoy". RP 311.

Ms. Terrell testified that before the collision she used to walk, jog, cycle, play tennis and sometimes even volleyball. RP 1119-1122. She had no lumps on her spine before the collision, nor any shoulder problems. RP 1122. Now she has shoulder pain every day, RP 1137, and can no longer sit, stand, jog, or bicycle as she used to. RP 1140.

Dr. C. Frederick DeKay, a forensic economist, testified to the cost of Ms. Terrell's past and future medical expenses, based upon her need for more medical treatment, including future shoulder replacement surgery, physical therapy, massage therapy, and psychological care; he took into consideration her life expectancy. RP 930, 942. Ms. Terrell was age 50 at the time of trial, with a life expectancy of 32.69 years. Instruction 14, CP 426.

As the Court instructed the jurors in Instruction No. 3, CP 414, it was for them to assess the credibility of the witnesses. Apparently the

jurors did not find portions of the defense doctors' testimony to be as credible as that of the plaintiff's treating doctors. However, the jurors did accept part of the defense's evidence, and awarded only some, but not all, of the future medical bills plaintiff had claimed. *Compare* CP 407 (Verdict Form) with RP 930 (Dr. DeKay's economic damages summary).

C. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL OR REMITTITUR.

Plaintiff asked the jury for \$615,117 for economic damages and \$4,609,220 for noneconomic damages. RP 942, 1288. After about 8 hours of deliberation, the jury awarded \$240,000 in economic damages, and noneconomic damages of \$1,214,000. CP 407-08. Defendant moved for a new trial or remittitur, raising every issue now raised in this appeal. CP 535. The trial judge exercised her discretion, rejected the defense allegations of lawyer misconduct, and denied the motion in its entirety. CP 598 (Appendix B). This appeal followed.

D. THE COURT GAVE A PRELIMINARY INSTRUCTION AFTER DEFENSE COUNSEL INSERTED INSURANCE INTO THE CASE.

Defense Counsel Insisted on Bringing Insurance Into the Case.

On the first day of trial, the court heard argument on motions in limine. RP 43. Plaintiff moved to exclude a written statement Ms. Terrell had made. RP 54. The statement was given to an adjuster for Mr. Hamil-

ton's liability insurer, State Farm, CP 402.¹¹ Defense counsel resisted that motion, RP 47-51. He apparently had made the tactical decision that using this statement was more important to his case than would be trying to keep out evidence of defendant's liability insurance. Indeed, he agreed that the statement would "open the door" to admit evidence of liability insurance. RP 56-57. He also admitted that the jury probably would know there was insurance anyway, because "it's a marital couple, if you will, suing each other." RP 56.

The Court denied plaintiff's motion to exclude the statement, but ruled that plaintiff could explain the circumstances under which she made the statement, including the fact that the statement was given to defendant's insurance company.¹² RP 56-57, 72. Just before Ms. Terrell's testimony, the court reiterated that Ms. Terrell would be allowed to explain the statement's circumstances on direct. RP 1101. Other than during the discussion of the preliminary instruction, defendant did not seek any

¹¹ The statement itself is Exhibit 2 to Ms. Terrell's deposition, CP 312-406, which defendant "published" during the trial.

¹² The defense misrepresents the trial court's ruling, on page 8 of appellant's opening brief, where defendant claims Judge Yu precluded plaintiff from introducing evidence of insurance on Ms. Terrell's direct. What Judge Yu ruled was that the amount of insurance was inadmissible, RP 56, but that plaintiff's counsel was in no way precluded from asking to whom Ms. Terrell made the statement. Since defense counsel had decided he would use the statement, the court allowed Ms. Terrell to explain it in her direct testimony. In any event, defense counsel talked about this statement in his opening, RP 265-66, so the door already was opened, long before Ms. Terrell ever took the stand.

limiting instruction regarding evidence of insurance, either before or during Ms. Terrell's testimony. *See*, RP 239.

Defense Counsel Asked Jurors About Insurance In Voir Dire.

We live in an era when insurance is common, and is commonly discussed, in the media as well as in private conversations. Plaintiff's counsel did not raise the subject of insurance during voir dire, but during voir dire several potential jurors *sua sponte* did so. Jurors described insurance situations, including an insurance company paying a fraudulent claim, a witness changing his story because of a lack of insurance, a defense verdict in an insurance case, and a relative who received only the amount of insurance coverage for his claim, which the juror felt was inadequate. RP 159-164, 180-81. Clearly, insurance was in the minds of some of the jurors, and after they raised the issue in open court, it was in the minds of all the jurors.

Plaintiff did voir dire regarding the sensitive subject of lawsuits between spouses. RP 181-84. Some of the potential jurors expressed confusion and concern about a person suing her own spouse. One juror wondered how one spouse could possibly sue the other, since the parties are "inseparable" and "two became one". This juror asked how a person could take legal action against "essentially yourself". RP 182. Other juror comments included not having a problem with suing your spouse, but not

sure how it would be pursued, RP 183; not expecting the wife to seek compensation because the husband already was financially responsible for her bills, and if the couple couldn't afford to pay the wife's medical bills, then "they can't pay them". RP 183. Concerns and confusion about intra-family lawsuits were in the minds of some of the jurors, and after those jurors raised these concerns and confusions in open court, all the jurors shared them.

The lawyer who asked openly talked about insurance in voir dire was defense counsel, starting at RP 205.¹³ Recall that defense counsel already had told the judge during motions in limine that he believed some of the jurors would know there was insurance because one spouse was suing another, RP 56-57. So in his voir dire, he asked jurors about insurance:

MR. LOCKNER: All right. Here's something that I want to talk a little bit about, and the judge will give you an instruction on this, but **I want to talk about just insurance generally. How many people think as triers of fact that they'd like to know if there's insurance or not?** How many people think that's important to know? It's okay. Be fair, be honest.

RP 205 (emphasis added).¹⁴

¹³ Judge Yu confirmed this in her ruling on the Motion for New Trial. CP 598-99, copy in Appendix B.

¹⁴ One potential juror then illustrated a lay person's confusion between liability insurance and medical insurance, and also a lay person's lack of knowledge of subrogation: "If

Defense counsel asked jurors whether insurance should affect how they decided the case, at RP 206-7 (emphasis added):

MR. LOCKNER: **And then with respect to the issue of insurance**, imagine it's a close call. It's 50/50 on what you're being asked to decide, *i.e.*, is something related to something or not, okay? **You can't decide, but then somebody says, "But there is or isn't insurance." Should that affect your decision making process?**

JUROR: Probably not.

MR. LOCKNER: Does anybody think it should?

JUROR: Should or might? I mean, it's a fine line, right?

MR. LOCKNER: Well, it is. But is that a piece of evidence that actually helps you resolve whatever the disputed issue of fact is? Or are you now making an emotional decision?

JUROR: I guess I'm not sure. I guess depending on the situation.

With this hanging in the air, counsel changed the subject. RP 207.

Judge Yu Gave A Preliminary Clarifying Instruction.

After the jurors had left for the day, Judge Yu told counsel that she was very concerned about "the gap of information that's floating out there now" regarding intra-family lawsuits and insurance. RP 219-20. She noted that, although she had dealt with intra-marital lawsuits in the past,

someone has insurance, they don't need to seek compensation for medical bills if they have some sort of medical insurance that'll cover most of it, if not all." RP 205. Another seemed to be thinking about employer-provided medical insurance, or possibly disability insurance, saying that if someone didn't have a job or insurance, it "might be important for them to seek out some sort of compensation." RP 205.

the subject had not previously come up in jury selection in such a way as to leave the jurors so thoroughly confused. RP 226. Defense counsel said that his voir dire on insurance was “trying to explain to the jury it doesn’t matter and it shouldn’t matter,” RP 220, and that he was trying to “enforce what’s going to be a probable instruction given to the jury.” RP 222.

The Court, having heard the voir dire, having seen the jurors’ demeanors and tones of voice, concluded that, under the facts of this case, the **combination** of intra-family lawsuit and defense counsel’s voir dire about insurance mandated an advance instruction to explain matters to the jury. RP 220-21. **Defendant agreed, and made no objection to the idea of such an instruction,** RP 221-22 (emphasis added):

THE COURT: I would give an instruction, the standard one. That’s really almost a second point. The primary point I’m making is the fact that she is in this litigation with her significant other because of insurance.

MR. LOCKNER: I’m with you.

The trial judge found that her “sense of justice and duty to do what’s right” mandated giving not only the standard WPI 2.13 at the end of the case but something else “right up front” to make the lawsuit’s context clear.¹⁵ RP 223. She concluded that WPI 2.13 alone would not be

¹⁵ At the end of the trial, the court gave WPI 2.13, the standard insurance instruction, slightly modified, CP 429 (Instruction #16) with no objection or exception to it. RP 1235-1236, 1257.

sufficient because it deals only with insurance, not with an intra-family lawsuit, at RP 223:

THE COURT: Using the language you and I use doesn't make it clear for people, who are saying, "I don't understand this, because if you're a community, why are you suing yourself and it's a community? It doesn't make sense." And it was never resolved and never addressed. But I would rather be forthright and instruct them that because there's insurance, doesn't necessarily mean that they can't decide this, based upon the evidence.

The court directed counsel to propose a neutral instruction that advised the jurors there was a third party payor with whom Ms. Terrell had to litigate, and that the existence of the third party payor did not change the proper amount of the damages. **Again, defendant made no objection to this direction**, saying at RP 226, "We'll give it our best shot, Your Honor."

The next morning, February 26, 2014, the court explained her reasoning in more detail, at RP 235-36 (emphasis added):

THE COURT: I'm giving an oral instruction on an issue that came up in jury selection because of the confusion and what I believe might be a great injustice that potentially exists in this case. Ordinarily, we would not instruct on any collateral benefits or third party and yet the fact of insurance comes up in many cases. We instruct to cure any prejudice and we instruct on the law that we presume the jurors will follow. In this particular case, there will be evidence of statements made to insurance representatives that this court is allowing as evidence for impeachment purposes. **Given the unique set of facts and circumstances and the complicated nature of the case, there's a significant risk of misleading the jury and allowing a great injustice to occur if I don't give this instruction.**

I want this jury to focus on the facts and the evidence, and I believe an instruction is necessary to remove actually the taint of insurance or a third payer. At the risk of error I'm orally instructing the jury and will instruct them at the end of the case, as well, that the fact that there is insurance shall not be considered in making or declining to make an award. But I believe from the very get-go I need to provide an instruction. And that's the reason why we've been in discussions, that's the reason why I've given you something to take a look at.

Judge Yu gave the parties a draft instruction to review.¹⁶ RP 236; CP 560; Appendix C. At first, defense counsel took exception to this preliminary instruction and argued that WPI 2.13 would be sufficient, RP 237.¹⁷ But defense counsel also said the instruction was "fair", RP 237, and he requested that the word "insurance" be used instead of the more neutral phrase "third party payor", RP 239:

MR. LOCKNER: I think it would be cleaner to say the only way Ms. Terrell can access insurance is through this case.

The Court adopted defendant's suggestions, using the word "insurance" as requested, and holding that the instruction was necessary to make sure that the jurors understood and focused on the evidence, not on the relationship between the plaintiff and the defendant, given that an intra-family lawsuit "seemed so crazy" to the lay jurors. RP 243, CP 560, Appendix C.

¹⁶ The preliminary instruction was given to the jurors only orally. RP 246.

¹⁷ Defendant had requested WPI 2.13 in pre-trial proposed jury instructions. CP 91.

After the jury was called into court, the Judge began reading the introductory instructions, including the defense-modified instruction now at issue, RP 247 (emphasis added):

THE COURT: As you heard in jury selection, Ms. Paula Terrell and Mr. Gordon Hamilton, the plaintiff and the defendant, are domestic partners. There was some discussion about litigating against your own marital community. Because your sole focus will be the factual issues that this court gives to you for consideration, I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case. The fact that there is insurance shall not be considered in any way in the way that you view the facts and shall not be considered in any award of damages, if any are awarded. I will provide you with additional instructions on this issue at the end of the case. It's simply to explain the discussion that occurred in jury selection.

The court then went on to read standard WPI and other basic introductory oral instructions. The instruction at issue here took up less than 1 page of the record, RP 247; the Court's complete introductory instructions consumed about 13 pages. RP 245-258.

Defense counsel referred to Ms. Terrell's insurance statement in opening, during Ms. Terrell's testimony, and in closing.

In opening, defense counsel told the jurors that Ms. Terrell had admitted to making a false statement about the accident.¹⁸ RP 265-266. In his cross-examination of Ms. Terrell, he used the insurance statement to

¹⁸ Ms. Terrell explained during her direct exam that she had written the statement to the insurance adjuster, because State Farm told her it would not pay medical bills without the statement. RP 1106.

try to impeach her. RP 1157-1159. In closing, it was defense counsel who talked about insurance and the insurance instructions.¹⁹ RP 1292-93:

MR. LOCKNER: And you were told something in this case that you're normally not told, and that is that there's insurance, and that that was told to you for the sole purpose of understanding why Ms. Terrell would bring a lawsuit against somebody that she entered into a domestic partnership with approximately a year and a half after this accident occurred.

But if you'd be so kind as to turn your attention to Instruction No. 16. Number 16, the Judge just read it to you, but I want to tell you something. We talked about this in voir dire. I brought this up for a reason. The reason you're given this instruction is you don't know what has or hasn't happened prior to this case coming to court. You don't know and you're not supposed to know and you're not going to know because that would violate your oath and responsibility to resolve the two big issues in this case: Whose fault is it and what is it worth?

And I'm going to submit to you that in that language the reason it's in there is to make sure you follow your oath as jurors because if you don't, there may be unintended consequences that you can't even foresee. We talked about in voir dire what if it's 50/50, but if you know that there's insurance, does that make it easier to make a decision? You can't do that. It's a violation of your oath. It's a violation of your role as a trier of fact.

The defense claims that plaintiff's counsel used insurance "as a tactic", but defendant's citations to the trial record on this point are citations to **defense counsel's own words.**²⁰ Plaintiff's counsel did not refer

¹⁹ Defendant counsel took no exception to Jury instruction #16, the modified WPI 2.13. RP 1257.

²⁰ For instance, on p. 15 of the opening brief, defendant cites defense counsel's closing at RP 1292, yet claims: "Terrell's counsel also reminded the jury about the insurance

to insurance in the jury's presence, except for asking Ms. Terrell about the statement defense counsel had talked about in his opening, RP 1105-06, and then only as Judge Yu had allowed. RP 56-57, 72, 1101.

E. THE COURT PROPERLY DECLINED TO GIVE THE “MERE SKIDDING” INSTRUCTION PROPOSED BY DEFENDANT.

After testimony was closed, the court discussed the jury instructions and took formal exceptions. RP 1246. Defendant took exception to only two of the final instructions – the denial of his proposed “mere skidding” instruction, RP 1249, and the inclusion of the “duty to see” Instruction #10. RP 1251. However, defendant did not assign error to the giving of Instruction #10, Brief of Appellant p. 1, so any claim that that instruction was error has been abandoned. RAP 10.3(g).²¹

instruction one last time.”

Similarly, on pp. 15, 17, 18, and 21, defendant cites defense counsel's declaration at CP 552-53, to claim that “Terrell set up Hamilton's insurance company as the defendant,” that “Terrell's counsel made the issue of insurance a significant tactical point throughout trial,” that “Hamilton's counsel observed Terrell's counsel instructing Hamilton at trial to sit with or near plaintiff's counsel table,” that “[t]he parties were forced to address the issue in opening and closing statements and adjust tactics throughout the trial.” However, the defense fails to cite to anything in the actual record where plaintiff's counsel did any of these things.

For further examples of materially inaccurate reporting, see Appendix A.

²¹ The trial judge ruled that there was conflicting testimony about what was there to be seen: “snow, ice, or black ice, it could have been anything”, and defense counsel agreed. RP 1224-25. The defense argued below that the duty to see instruction was improper because there is no way to see black ice, and that this “over emphasized plaintiff's case.” RP 1249-51. However, as the driver, defendant Hamilton did in fact have the duty to see

With respect to the defense's proposed non-WPI "mere skidding" instruction, Judge Yu ruled that *Rickert v. Geppart*, 64 Wn.2d 350, 391 P.2d 964 (1964), the case cited by defendant in support of its proposed "mere skidding" instruction, was so different and distinguishable on its facts that it did not apply to the instant case. RP 1230-1232. Defense counsel agreed that the driver in *Rickert* was trying to operate prudently under the circumstances, and had already reduced his speed because of weather conditions when he encountered the ice. RP 1253. The judge ruled defendant could still make his "no negligence" arguments, RP 1255, but declined the defense's mere skidding instruction, at RP 1255:

COURT: I'm not going to include it because I frankly think it would be over-instructing and frankly misleading the jury on facts here. I don't want to get close to commenting on evidence or suggesting that this is a fact in this case.

F. DEFENSE COUNSEL'S PROBLEMS WITH HIS CLIENT EXISTED LONG BEFORE TRIAL BEGAN.

Defense counsel's difficulties with his client obviously existed well before the trial even started. Mr. Hamilton had complained to the Bar Association about Mr. Lockner 3 times, RP 15-16; Mr. Hamilton believed that Mr. Lockner represented State Farm Insurance, and not him. RP

such hazards on the road as could be seen, so the instruction was proper. *See, Hammel v. Rife*, 37 Wn. App. 577, 682 P.2d 949 (1984).

238²². Mr. Hamilton had even hired his own attorney to represent him, before the trial. RP 6. And perhaps Mr. Lockner did not want Mr. Hamilton present at the trial, because he had not delivered plaintiff's trial subpoena to Mr. Hamilton's other lawyer, Ms. Hepburn. RP 19. The trial court had to order defense counsel to have it delivered to Mr. Hamilton, at the defense's expense. RP 27-28.

It is perhaps not surprising that Mr. Hamilton disapproved of his defense lawyer, whose argument to the jury focused on discrediting Mr. Hamilton's partner Ms. Terrell, and on contradicting Mr. Hamilton. Mr. Lockner accused Ms. Terrell of lying, RP 265-66, and he told the jury that she had no significant injuries, RP 274-76, 279. He also told the jury that the collision was not Mr. Hamilton's fault. RP 266-68. But when Mr. Hamilton did show up for trial, he testified to the severity of some of Ms. Terrell's injuries, *supra*, p. 11, and he admitted from the witness stand that he was at fault for the collision, RP 289.

The jury heard defense counsel ask Mr. Hamilton whether he was of sound mind during the time period he had entered his domestic partnership with Ms. Terrell, RP 318-19, and, for some strange reason, whether

²² Mr. Lockner was of course insurance defense counsel, retained by State Farm, to defend Mr. Hamilton in this lawsuit.

the couple were physically intimate, RP 319-20.²³ That question led to embarrassing testimony by Mr. Hamilton about his prostate. RP 320. When Mr. Hamilton stopped sitting at Mr. Lockner's table and moved to the back of the courtroom, defense counsel made no record, nor any objection, and he sought no corrective order or jury instruction.

IV. SUMMARY OF ARGUMENT

Judge Yu's decisions about jury instructions were correct and were wholly within her discretion. The preliminary instruction was given after defense counsel insisted that insurance would be made part of the case, and also asked jurors about insurance during voir dire. The trial court concluded that the instruction was necessary to avoid confusion about the parties' relationship to each other. But the instruction expressly told the jury not to consider information about insurance in deciding liability or damages, and jurors are presumed to follow the instructions.

The "mere skidding" instruction was not supported by the facts in the case, was argumentative, and would have been a comment on the evidence. The jury verdict was within the range of the evidence, and the trial court rejected the motion for new trial, finding it to be without merit.

Appellant's arguments for reversal misrepresent the record and ig-

²³ Mr. Hamilton was not a plaintiff and there was no claim of lost consortium in this case.

nore the law. Appellant’s brief attributes to **plaintiff’s counsel** statements that actually were made by **defense counsel**. This Court should consider awarding Ms. Terrell fees under RAP 18.9 for having to answer this appeal, which the defense has attempted to support with inaccurate and misleading factual allegations.

V. ARGUMENT

A. THE TRIAL COURT’S DECISIONS ON JURY INSTRUCTIONS WERE BOTH PROPER AND WITHIN THE TRIAL COURT’S DISCRETION.

1. THE STANDARD OF REVIEW REGARDING JURY INSTRUCTIONS.

The defense states at p. 11 of its opening brief that “jury instructions are reviewed de novo”, but as this Court surely knows, that is an oversimplification. The issue of whether a jury instruction on the law is a correct statement of that law is indeed an issue of law that is reviewed de novo. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.2d 542 (2002), *cert. denied* 538 U.S. 945 (2003).

But the advance instruction from which defendant appeals was in the nature of preliminary background information, analogous to WPI 1.01.03, “Summary of Claims”, or WPI 1.01, whose “Note on Use” states: “This is not one of the written instructions on the law.” Indeed, the trial judge read the complained-of language in the midst of reading WPI 1.01 to the jury. Decisions about how to word an instruction, and about whe-

ther to give a particular instruction, are addressed to the considerable discretion of the trial court. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991); *Leeper v. Dep't of Labor & Industries*, 127 Wn.2d 803, 809, 872 P.2d 507 (1994) (“The number and specific language of the instructions are matters left to the trial court’s discretion.”)

Under the particular facts of this case, the trial court’s decision to give the disputed preliminary instruction was a discretionary judgment about the effect upon the jury of events that had occurred during voir dire. There may be no decision-making arena in which the trial court is entitled to more deference than this one. “When a trial court evaluates occurrences during trial and their impact on the jury, great deference is afforded the trial court’s decision.” *Dickerson v. Chadwell*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992). The Court of Appeals “must accord considerable deference” to the trial court’s assessment of the effect on the jury of events occurring during the trial. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 831, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985).

A trial judge’s decisions on jury instructions will be upheld if they permit each party to argue its theory of the case, are not misleading, and if when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*, 146 Wn.3d 237, 250, 44 P.3d 845 (2002). Even

if an instruction is misleading, the verdict will be upheld unless the appellant shows prejudice. *Id.* Indeed, even an error of law in a jury instruction, such as mis-allocation of the burden of proof, will not result in reversal if the error was not prejudicial, and “[e]rror is not prejudicial ‘unless it affects, or presumptively affects, the outcome of the trial.’” *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529-30, 730 P.2d 1299, *cert. denied* 484 U.S. 815 (1987).

In determining whether error did, in fact, affect the outcome of the trial, “Washington courts have, for years, firmly presumed that jurors follow the court’s instructions.” *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). *Diaz* was a medical malpractice case in which the trial court had admitted evidence of a settlement with previous defendants. The jury found no liability and returned a defense verdict. Plaintiff appealed, and the Supreme Court held that the evidence had been erroneously admitted, but that the error was harmless because the jury “was specifically instructed not to consider settlement evidence in determining liability”, and the Supreme Court conclusively presumed that the jurors had followed that instruction. *Id.* In the instant case, the trial court expressly instructed the jury not to consider any information about insurance in determining either liability or damages, and this Court should follow the Supreme Court’s lead and presume that the jurors followed that instruction. So long as the

jurors followed the instruction, the instruction could not possibly have caused any harm to the defense.

As for the trial court's decision not to give the "mere skidding" instruction, the standard of review for the decision to decline to give an instruction is abuse of discretion, because the trial court had discretion in deciding whether to give the particular instruction. *Douglas, supra*.

Furthermore, defendant proposed some of the very language now criticized in the preliminary instruction, and therefore, to the extent there was error, it was invited error and cannot be the basis for an appeal. *Davis v. Globe Machine Manf.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) ("A party cannot properly seek review of an alleged error which the party invited."). And to the extent that defendant failed to ask for its own limiting instruction regarding the insurance evidence, any objection to that evidence was waived and not preserved for appeal. *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988).

2. THE TRIAL JUDGE PROPERLY EXERCISED DISCRETION IN DECLINING THE DEFENSE INSTRUCTION ON "MERE SKIDDING".

The defense's argument that it was reversible error not to give its proposed "skidding" instruction rests upon *Rickert v. Geppert*, 64 Wn.2d 350, 391 P.2d 964 (1964), a case in which the defense verdict was reversed, not because of some skidding issue but because the trial court had im-

properly instructed the jury on assumption of risk. *Id.*, at 354. The Court held that the assumption of risk instruction was a correct statement of the law, which in those days was that any assumption of risk completely barred the claim. But the Court held that, under the facts of that case, it was error to instruct on assumption of risk.

Having already ordered a new trial, the Court then addressed some other issues in dicta, one of which was a “skidding instruction”. The Court’s opinion did not quote from the actual instruction, so we do not know exactly what it was the Justices were upholding, but the Court did state at 355 that the instruction stated “in substance, the mere skidding of an automobile, alone, is not evidence of negligence” and that the instruction (not the Court’s paraphrasing of it) was a correct statement of the law and was applicable to that case.

That 50-year-old dicta, which approved an unquoted jury instruction written in the era of contributory fault, is hardly a basis to require that a trial court quote that dicta to the jury in a case where the defendant already has testified that he was at fault for the collision. “That [the Supreme Court] may have used certain language in an opinion does not mean that it can be properly incorporated into a jury instruction.” *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967). As the Supreme Court held in *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d

494 (1968), “language used by this court in the course of an opinion is not ordinarily designed or intended as a model for jury instructions.”

In *Watson v. Hockett*, 107 Wn.2d 158, 161-64, 727 P.2d 669 (1986), the Court expressly recognized that times have changed, and that jury instructions which are a correct statement of the law can nevertheless be inappropriately biased. The Court was discussing the use of the following instruction in a medical malpractice case: “A physician or surgeon is not liable for an honest error of judgment...” The Court held that this was a correct statement of the law, but still disapproved of the word “honest” in the instruction. “In the light of modern jury instruction practice, however, which is aimed at avoiding slanted or argumentative instructions, these instructions should be phrased differently anytime they are used in the future.” *Id.*, at 161. Specifically, the Court held that the word “honest” was inappropriate “because the use of the word ‘honest’ imparts an argumentative aspect into the instruction...” *Id.* at 165.²⁴

Similarly, the use of the word “mere” in defendant’s proposed instruction is argumentative, because it would have placed the imprimatur of the trial judge upon the pro-defense notion that, under the facts of this

²⁴ While *Watson* permitted a jury instruction defining what negligence is not, it certainly did not make giving such an instruction mandatory. Indeed, the official comments to WPI 105.08 emphasize that “appellate courts repeatedly urged caution in [this instruction’s] use”, such that the WPI committee eventually wound up approaching the issue with entirely different language.

case, “skidding was unimportant”.²⁵ If the trial court had given defendant’s proposed instruction, it would have been argumentative and would have constituted an improper comment on the evidence.

Furthermore, the instruction defendant proposed only told the jurors what negligence is not. This is a problematic area for instructions, because there are literally millions of things that negligence is not; if trial court judges were required to give all such requested instructions in all negligence cases, just reading the instructions could take days. What the judge did in this case, which is what trial judges usually do, was to tell the jurors what negligence is, and to let the lawyers argue from the evidence whether negligence in fact occurred.

Defense counsel was free to argue, and did argue, that the collision was not Mr. Hamilton’s fault because the collision was caused by unexpected black ice. The jury had every right to disagree with that analysis, either because there was little or no evidence that black ice was present, or because they concluded that Mr. Hamilton should have anticipated black ice, or because they decided that Mr. Hamilton was driving too fast for the conditions that he certainly did know about, since he was passing other cars on a snowy road.

²⁵ “Mere’ – adj. Used to say that something or someone is small, unimportant, etc.” *Miriam-Webster Dictionary* (2014).

The jury's verdict should not be overturned because the trial court rejected an improper and argumentative instruction. Further, any instructional error on liability was harmless, since the defendant admitted on the witness stand that he was at fault for the collision. Did the defense really expect to win the case on liability in the light of such an admission?

3. THE PRELIMINARY INSTRUCTION WAS PROPER AND WAS MADE NECESSARY BY DEFENSE COUNSEL.

a. The Preliminary Instruction Was Proper and Within The Trial Court's Discretion.

Although not taken from any specific WPI, the court's preliminary instruction is wholly in accord with the recommendations therein. The WPI recommends giving instructions when needed, to help jurors understand the significance of evidence being presented, to increase their ability to focus on and remember the relevant evidence, and to improve their adherence to the judge's instructions. WPI 1.01.03, Comment, citing the Washington State Jury Commission's Report to the Board for Judicial Administration, Recommendation 27 (July 2000). There is no WPI that deals with intra-family lawsuits, and it was for the trial judge in her discretion to address the issues that she saw.

Defense counsel brought insurance into this case when he insisted on using the statement Ms. Terrell had made to State Farm to impeach her,

and when he asked the jurors about insurance in voir dire. He also was the one who convinced the trial judge to use the word “insurance” in part of the complained-of preliminary instruction, instead of the words “third party payor” that the trial judge had proposed. Defense counsel even admitted during oral argument on the motion in limine that some of the jurors would know there was insurance in the case anyway, because it was an intra-family lawsuit.

Thus, defendant’s complaint to this Court is not that insurance came into the case, but rather that the defense is unhappy with the way the trial judge chose to deal with insurance, once defense counsel chose to bring it into the case. The WPI recommends giving an instruction about insurance if the court is concerned that jurors may speculate about insurance: “Because jurors sometimes speculate about insurance even when the issue has not been directly raised during trial, the instruction was changed in 2002 to allow the court to address the issue **whenever the court deems it appropriate**.” WPI 2.13, Comments (emphasis added).

Judge Yu “deemed it appropriate”. She gave the preliminary instruction to clarify, to have the jurors focus on the facts, and to eliminate juror speculation. She properly instructed the jurors that insurance was immaterial to their decision. The instruction specifically addressed the interaction between an intra-family lawsuit and insurance, and very clearly

told the jurors to disregard these matters in making their decisions.

The defense attempts to cling to an anachronistic view of the role of insurance in the courtroom, a view that has been overtaken and superseded by the facts and the law. It is possible at some point in the distant past, when liability insurance was rare, that jurors might automatically faint upon hearing the word “insurance”, and upon awakening might find liability and award big damages because the word “insurance” had crept into the courtroom. But if those days ever existed, they exist no longer.

Liability insurance only became mandatory in Washington in 1989, so previous generations of drivers may or may not have carried it or even been aware of it. *See, RCW 46.30 et seq.* But that was 25 years ago, and more and more drivers (and jurors) have come of age in this era when at age 16 one not only gets one’s driver’s license, but also has to get or have or be covered by the family’s liability insurance.

Over the past decade or so, it became so common for jurors to raise issues of insurance in voir dire or during their questions to witnesses, that some trial judges began giving jury instructions on insurance. Eventually the WPI committee began providing pattern instructions on the issue

Furthermore, insurance companies often are sued under their own names. The liability insurers of taxis, buses, limo services, and other transports-for-hire are subject to direct-action lawsuits for the negligence

of their insureds. RCW 46.72.060. Fire and other subrogation claims often are brought by the insurer in its own name. Underinsured motorist (UIM) insurers are routinely sued for breach of contract under their own names; indeed, almost every UIM insurer doing business in Washington now states within its UIM policy that the insured must sue the insurance company if a dispute arises over the amount payable under the policy. *See, e.g., Evans v. Mercado & Metropolitan*, No. 71390-6-I (Division I, 11/17/2014); triers of fact in these UIM cases wind up deciding issues of liability, causation, and damages in exactly the same manner that they would in a case against an insured tortfeasor. In 2007, the State Legislature and then the voters (via the Referendum process) passed the Insurance Fair Conduct Act (IFCA), RCW 48.30.015. This law gave rise to yet another set of damages lawsuits brought directly against insurance companies, in their own names, lawsuits that are now tried by juries throughout the state.

In all these types of cases, our trial courts have for many years been successfully managing situations where insurance not only “appears in the case” but even where an insurance company is a named party to the lawsuit. The wheels of justice have not run amuck and Superior Court juries do not cease to dispense justice merely because the word “insurance” enters the courtroom.

b. Neither ER 411 Nor Case Law Requires A New Trial When Evidence Of Liability Insurance Is Admitted At The Instigation Of Defendant.

ER 411 specifically allows evidence of insurance provided it is not offered to prove liability (emphasis added):

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. **This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.**²⁶

Note that the use of the words “such as” means that the listed items are examples, part of a non-exclusive list of reasons why information about liability insurance may be admissible.

Directly on point is *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 531, 143 P. 99 (1914). In this car-pedestrian collision case, the Court explained the background thus:

Here the appellant, through its assistant manager, and the casualty company, through its claim agent, had plied the injured man, while he was in the hospital, with carefully written questions, and the claim agent was thereafter produced by the appellant as a witness for the purpose of discrediting the respondent’s testimony. The claim agent also interviewed one of the respondent’s witnesses, and took the stand for the purpose of discrediting his testimony. **In pursuing this course, the appellant was acting entirely within its rights, but it thereby waived the immunity from inquiry as**

²⁶ The quotation of ER 411 at p. 13 of defendant’s opening brief omits the second sentence, which explicitly allows admission of evidence of insurance.

to its liability insurance.

Moy Quon, supra, at 531 (emphasis added). As the Supreme Court held: “When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility.” *Id.*, at 530. Indeed, “In the case here, it was not only proper, but necessary, that the jury be advised of the relation of the witness and his consequent interest in the suit, as a matter clearly bearing upon the credibility and weight of his testimony.” *Id.*, at 532.

The law is the same in 2014 as it was in 1914. In *Evans v. Mercado & Metropolitan, supra*, this Court of Appeals very recently rejected the argument that ER 411 somehow bans the trier of fact from knowing there is liability insurance. Rather, ER 411 only precludes such evidence to prove liability. In *Evans*, as in the instant case, insurance was admissible for other reasons – and in the instant case, the other reason was the insistence of defense counsel. But here, the trial court expressly told the jurors not to consider insurance when determining liability. RP 247. Therefore, evidence of insurance was not admitted to prove liability, and ER 411 supports, not counters, its admissibility.

The cases cited by the defense provide no precedent for preclusion of insurance evidence as used here, nor for a new trial. In *Lyster v. Metzger*, 68 Wn.2d 216, 412 P.2d 340 (1966), the plaintiff had introduced

evidence of insurance in his testimony, but because it was inadvertent, it was not a basis for a new trial. *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 670 P.2d 1086 (1983), is about judgment, subrogation and joinder, not about jury instructions. Indeed, in that garnishment-type action, the Court of Appeals held that ER 411 would in no way preclude joining as a party the insurance company that had controlled the underlying lawsuit. *Id.*, at 907-08.

Similarly, in *Rowe v. Dixon*, 31 Wn.2d 173, 187-88, 196 P.2d 327 (1948), the trial court admitted into evidence a contract whose terms were in dispute, though the contract made reference to liability insurance. The trial court instructed the jury to disregard the insurance information, and the Supreme Court affirmed, holding “The portion of the instruction relating to the matter of insurance was direct and positive, and it should be assumed that the jury regarded the same and followed the court’s directions contained therein.”

In the instant case, during voir dire some jurors openly raised the possibility that insurance might influence a person’s testimony, or might be the basis for a claim. Some jurors were confused about how and why and with what effect a person might sue her spouse. These jurors would be tasked with weighing the credibility of the parties and their witnesses, and yet were confused by and incorrectly focusing on the role of insurance

in intra-family lawsuits. These factors should have been legally irrelevant to their decisions, and Judge Yu concluded it was necessary that she do something to remove the “taint of insurance,” and to make sure that the jurors “understood and focused on the evidence, not on the relationship”.

Judge Yu’s intent clearly was to get the jurors to stop worrying about what was legally irrelevant – insurance and the relationship – and to stay focused on the evidence and the applicable law. So she explained the situation to the jurors and then “directly and positively” instructed them that insurance was not to be considered in any way in their decisions. RP 246-47. Indeed, in his closing argument, defense counsel acknowledged that the court gave the preliminary instruction for “the sole purpose of clarifying why Ms. Terrell brought the suit.” RP 1292.

Defendant has cited no case involving either an intra-family lawsuit or a defendant who chooses to inject liability insurance into the courtroom. In the instant case, the defense insisted upon offering Ms. Terrell’s statement to impeach her. The trial court was perfectly correct in holding that the plaintiff could explain the circumstances under which she gave that statement to defendant’s insurance company. Proof of relationship and bias are expressly allowed under ER 411, and that is particularly relevant because the jury, as the finder of fact and weigher of credibility, has historically been entitled to assess all the evidence which might bear on

the accuracy and truth of a witness's testimony. *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469 (1984).

c. If The Court's Instruction Was Error, It Was Invited, and the Defense Waived Any Error.

A party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). A court may not vacate a verdict for an error of law if the party seeking vacation invited the error. *Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996). This Court will deem an error waived if the party asserting the error materially contributed to it. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984).

Defendant raised the fact of insurance, and thereby has waived any claim to error for its admission. *Mitchell v. Lantry*, 69 Wn.2d 796, 798, 420 P.2d 345 (1966). Defendant failed to properly request a limiting instruction, and thereby waived any error in the limiting instruction the trial court did give. *See, State v. Newbern*, 95 Wn. App. 277, 295-96, 975 P.2d 1041, *rev. denied* 138 Wn.2d 1018 (1999). Defendant brought insurance into this trial and forced the instruction it now complains about, acquiesced in the instruction, chose key portions of the wording of the instruction, and cannot now complain that it was error.

d. If The Court's Instruction Was Error, It Was Harmless Error. The Defense Has Not Met Its

Burden of Proving the Instruction Harmful.

The jury only had to decide two issues: liability and damages. Any error in instructions regarding liability is harmless because defendant admitted on the witness stand that he was at fault for causing the collision. (As a passenger, Ms. Terrell obviously was without fault). As for damages, the jury and the trial judge both found the verdict to be within the range of the evidence.

Nor can this Court assume, without any evidence, that this instruction prejudiced the defense. It is just as likely that it prejudiced Ms. Terrell, because jurors might have discounted her and Mr. Hamilton's testimony as some sort of collusion. Indeed, it might be seen as a situation where a person deceitfully changed testimony about an injury claim because of the fact of insurance, **a situation one of the jurors had related during voir dire.** RP 159-161.

The jury instruction did not mislead the jury, and did not prevent counsel from arguing their theories of the case. No more is required. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000); *Leeper v. Dep't of Labor & Industries*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994). Defense counsel could and did present all his theories in closing. He argued that black ice caused the collision, RP 1296, and that the collision was not Mr. Hamilton's fault, RP 1299-1300. He also argued that Ms. Terrell was not

credible, RP 1301-02, and that she was not injured, RP 1310-11.

The jury did not agree. The verdict in Ms. Terrell's favor is not evidence of passion or prejudice, but is evidence of a jury paying attention. It was a reasonable verdict for a woman who has irreparable injury to her brain, shoulder and spine, and who faces a lifetime of pain and disability.

The defense continues to claim that plaintiff counsel "exploited and reinforced" the preliminary instruction. However, the defense has utterly failed to cite any support in the record for this argument.²⁷ The trial court heard this argument and rejected it, finding that there was no misconduct. CP 598-599.

The defense now complains on p. 21 of its opening brief that the court's WPI 2.13 instruction, Instruction #16, was "ineffectual," and that it "confused the jury." But defense counsel made no objection and took no exception to this instruction at trial. RP 1257. Where no objection was made and no proper exception was taken, error based upon this instruction is not even properly before this Court. RAP 2.5.

The defense has offered no evidence for its claim of prejudice from

²⁷ As noted above, Ms. Terrell's counsel did not make or elicit any reference to insurance at any time, except as the court had expressly allowed in ruling on the motion in limine pertaining to plaintiff's statement to the insurance company. The defense cites to **defense counsel's** own statements to blame **plaintiff's counsel** for words she never said, claiming that plaintiff counsel used the instruction throughout the trial. (See Appendix A).

the complained of instruction, except defense counsel's personal opinion that the verdict was somehow "too large". That personal opinion is not evidence, and, as discussed *infra* at pp. 44-47, this Court should not disturb the jury's decision.

The issue before this Court is not the injection of insurance into this case – defense counsel chose to do that. The issue is not what some other judge, not even the judges of this honorable Court might have done, if they had presided over this trial. The issue is whether the trial judge's steps taken in dealing with these issues were within the range of her discretion. The trial judge properly exercised her discretion in giving the instruction, and this Court should so hold.

B. THE JUDGE DID NOT ABUSE HER DISCRETION BY DENYING A NEW TRIAL OR REMITTITUR.

A new trial is not a matter of right. *Getzendaner v. United Pac. Ins. Co.*, 52 Wn.2d 61, 322 P.2d 1089 (1958). The trial court has wide discretion in granting or denying motion for new trial, and an appellate court will not interfere unless there has been a manifest abuse of that discretion. *Coats v. Lee & Eastes Inc.*, 51 Wn 2d 542, 320 P.2d 292 (1958). The Court presumes the jury's verdict is correct, *Sofie v. Fibre-board Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989), and is obliged to presume that the damages awarded by the jury are correct

and “shall prevail” unless the damages are so excessive as to indicate the verdict must have been the result of passion or prejudice. RCW 4.76.030.

The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). In *James*, the Supreme Court reversed the trial court’s remittitur (which had been upheld by the Court of Appeals): “Whether substantial justice was done depends in a large degree on whether the verdict was so excessive or inadequate as unmistakably to indicate passion and prejudice.” (emphasis added). The trial judge is in a “favored position” on motions for remittitur because he or she saw the evidence and heard the witnesses and counsel. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (reversing the Court of Appeals, which had overruled the trial court and ordered remittitur). If substantial evidence is presented on both sides of an issue, the finding of the jury is final. *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 675 P.2d 239 (1983).

1. The Verdict Was Supported by Substantial Evidence.

An appellate court should not disturb an award of damages made by a jury “unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” *Bunch v. King County Dept.*

of Youth Services, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005). “Passion and prejudice must be ‘unmistakable’ before they [can be presumed to] affect the jury’s award.” *Id.* “The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.” *Bingaman, supra*.

Damages do not have to be proven with mathematical certainty, but only need be supported by competent evidence. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530-31, 544 P.2d 1041 (1976). Here, the verdict reflected the evidence of several of Ms. Terrell’s treating doctors, all of whom testified to her injuries that were caused by the collision, and several of whom opined that that she faced life-long pain, and a worsening condition as she aged. These were treating providers, some of whom had seen her for years, and who knew her condition well. There was expert and lay witness evidence that Ms. Terrell’s life had been severely affected by her injuries. There were hundreds of thousands of dollars in medical treatment bills presented.

The jury did not give plaintiff more than she asked for, or even the amount that she asked for, in either economic or noneconomic damages. Obviously, the jury weighed the evidence and chose which parts to believe

and which to disbelieve, as was their right and duty. The trial court held that the verdict was within the range of the evidence, because she denied the motion for remittitur. This court should give great deference to the jury and to the trial court on damages issues, and should uphold their verdict.

2. The Instructions Were Proper, Within the Court's Discretion, and Did Not Warrant a New Trial.

The trial court's preliminary instruction to the jury was necessary, for "justice and the duty to do what's right" and was only given after defense counsel asked the jurors if they wanted to know about insurance. Judge Yu thoughtfully considered how to address the jurors' confusion and speculation, and recorded her reasoning. Appellant has not addressed that reasoning. The judge directed the jury to disregard the fact of insurance, which the jury is presumed to have done. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Her omission of the "mere skidding" instruction was proper because it was not supported by the evidence and it was argumentative and a comment on the evidence. Defense counsel was not precluded from arguing his theory of black ice, skidding and unavoidable accident, and he did so. RP 1298. The trial court heard the complaint about plaintiff's counsel and rejected it, finding no evidence of misconduct.

This court should not substitute its judgment for that of the trial court.

Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). The trial court was in the best position to notice such things as alleged misconduct, and any effect the lawyers may have had upon the jury. The “wedge” between defense counsel and defendant was already present, as defense counsel admitted. His failure to complain about alleged misconduct by plaintiff’s counsel until weeks after the trial was further evidence that whatever happened was insufficiently prejudicial to be the basis for a new trial. *Mulka v. Keyes*, 41 Wn.2d 427, 437, 249 P.2d 972 (1952).

C. MS. TERRELL SHOULD RECOVER HER FEES.

Attorney fees are available as a sanction against a party pursuing a frivolous appeal or abusing the court rules and procedures. RAP 18.9; CR 11; *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, *rev. denied*, 96 Wn.2d 1002 (1981); *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992). An appeal is frivolous if there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court’s decision. *Matheson v. Gregoire*, 139 Wn. App. 624, 639, 161 P.3d 486 (2007). RAP 18.9 also authorizes an award of fees where a party’s violation of the Rules of Appellate Procedure needlessly increases the cost of litigation. *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P.2d 1377 (1996). In addition,

the sanctions of CR 11 in the trial court are applicable to appeals under RAP 18.7. *Bryant, supra; Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83 (1989).

Defendant has provided no evidence or argument that Judge Yu's rulings were a manifest abuse of her discretion. The defense fails to address or counter the trial court's detailed explanations for the decisions now being appealed.

Furthermore, appellant tries to mislead this Court by blaming **plaintiff's counsel** for things said and done by **defense counsel**. Appellant cites to his own closing argument and to his own declaration in support of his motion for a new trial, instead of to actual events in the trial record. This deliberate attempt to mislead the Court and delay resolution of this case warrants the imposition of sanctions and an award of attorney fees to the respondent.

The Court should award Ms. Terrell her fees on appeal under RAP 18.9 and CR 11.

VI. CONCLUSION

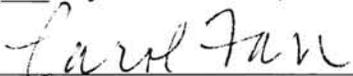
The trial court was in the best position to determine what jury instructions were necessary to provide a fair trial. The instructions did not misstate the law, were not prejudicial, were wholly within the trial court's discretion, and allowed each side to argue its theory of the case. Judge Yu

carefully explained her reasoning for giving the complained-of preliminary instruction. The trial judge clearly believed that there was ample evidence in the record to support the verdict, because she denied a new trial or remittitur.

Appellant misrepresented the law and twisted the evidence, including carelessly attributing **defense counsel's** arguments to **plaintiff's counsel**. The Court should consider this appeal frivolous and made solely for the purpose of delay, and should award Ms. Terrell fees on appeal for having to respond to it.

In this case, defense counsel took a "high risk" approach to the case. If he had succeeded, there would have been either a small damage award or a complete defense verdict. But the high risk approach failed. What the defense really wants now is a do-over, another bite of the apple, in which to try the case again in a different manner and perhaps obtain a result more to defense counsel's liking. The trial court rejected this request, and so should this honorable Court.

Respectfully submitted this 4th day of December, 2014.

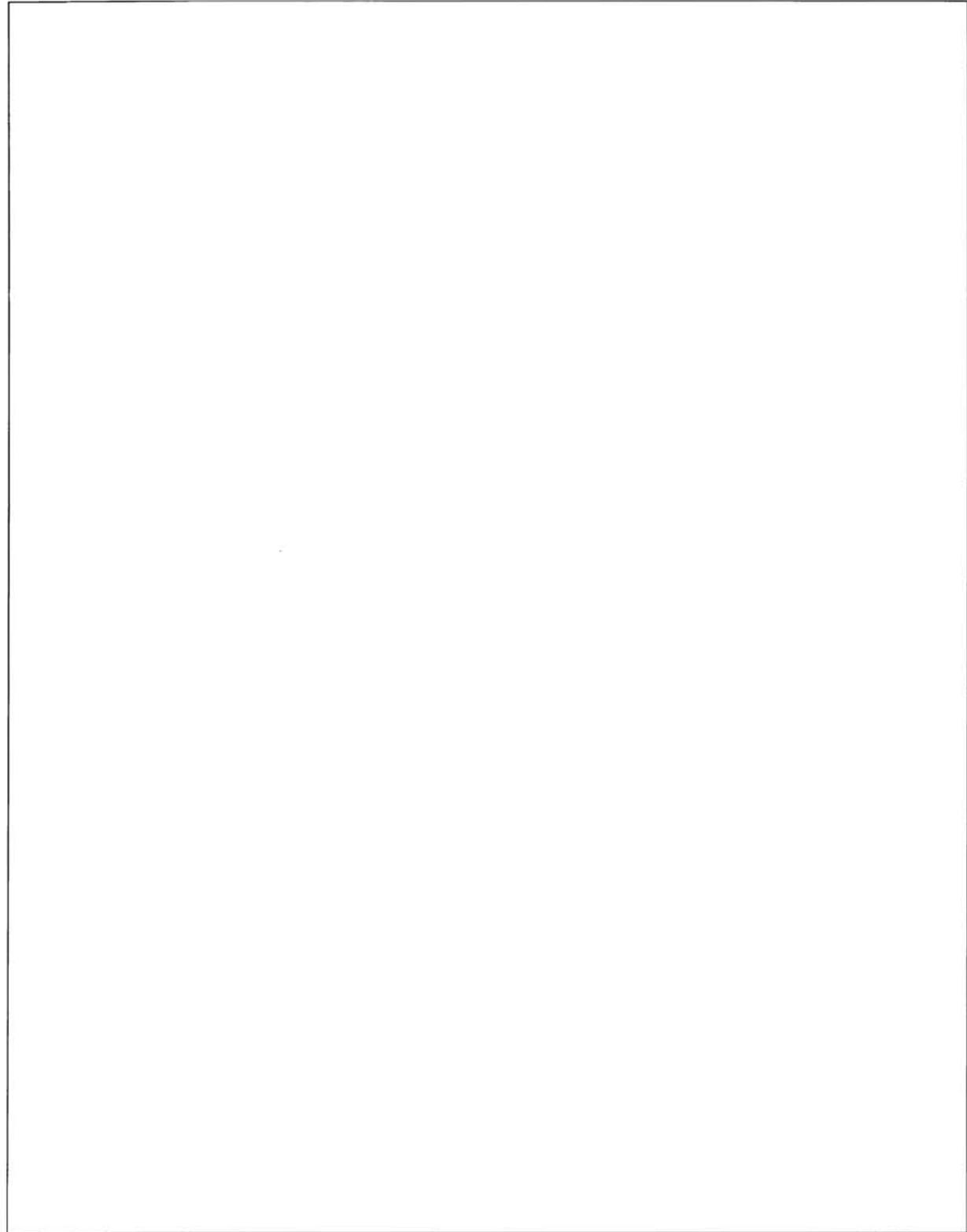


Carol Farr, WSBA #27470

HELLER LAW FIRM, PLLC



David S. Heller, WSBA # 12699



Appendix A

**MATERIAL FACTUAL MISREPRESENTATIONS AND CIRCULAR RECORD-
CREATION IN APPELLANT'S OPENING BRIEF**

Appellant attributes to *plaintiff's counsel* statements made by *defense counsel*:

On page 15, appellant cited to RP 1292 to claim: "Terrell's counsel also reminded the jury about the insurance instruction one last time. RP 1292 is in truth **Hamilton's** closing argument.

Appellant's counsel files a declaration weeks after the trial, and then cites it instead of actual events during the trial as "evidence in the record":

On page 15, appellant cited to CP 553 to claim: "Terrell set up Hamilton's insurance company as the defendant, and attacked this case as if it were a bad faith case directly against the insurance company." CP 553 is Mr. Lockner's own declaration in support of a new trial, filed weeks after the verdict.

On page 17, appellant cited to CP 552 to claim "Terrell's counsel made the issue of insurance a significant tactical point throughout trial." *But*, CP 552 is Mr. Lockner's declaration.

On page 18, appellant cited to CP 552 to claim "Hamilton's counsel observed Terrell's counsel instructing Hamilton at trial to sit with or near plaintiff's counsel table and at all times when the jury entered the room." CP 552 is Mr. Lockner's declaration.

On page 21, appellant cited to CP 552 to claim "The parties were forced to address the issue in opening and closing statements and adjust tactics throughout the trial." *But*, CP 552 is Mr. Lockner's declaration. In truth was only defendant who addressed insurance in opening and closing.

Appellant attributes to *plaintiff* statements made by *defense counsel*:

On page 9, appellant cites to RP 1111 to claim that Ms. Terrell testified that Mr. Hamilton was speeding: "**at her deposition** she indicated he was speeding. (RP 1111)." *But*, RP 1111 cites to a **question from defense counsel** which Ms. Terrell disputed, and which is contrary to her deposition. RP 1111, CP 391-392.

Appellant *misrepresents many other material facts* in this record.

On page 3, appellant misrepresents Ms. Terrell's statement: "Ms. Terrell wrote a statement "to **her** insurance representative about skidding on black ice." *Terrell wrote the statement for **defendant's** insurance company, State Farm, and the statement said nothing about black ice. RP 1106, CP 406.*

On page 3, appellant misrepresents the court's ruling in limine regarding the statement: "The court noted that **if** defense counsel inquired about the statement plaintiff's counsel could question Terrell about it being a statement to insurance company representative (RP 56-7)." *The court put no such limitation on plaintiff counsel: "Ms. Sargent you're not going to be precluded if it doesn't come out in any way to go ahead and ask the question, 'Who did you make the statement to?'"* RP 57. Furthermore, defense counsel talked about the statement in his opening, thereby placing it before the jury and opening the door. RP yy

On page 4, appellant wrote "neither potential juror expressed concerns with that scenario. (RP 183-84)," about jurors having no problem with a party suing his/her spouse). *The record does not distinguish jurors, AND, appellant failed to quote the other jurors who wondered how it was possible to "sue yourself," or who said if they could not pay medical bills, then "we can't pay."* RP 182, 183.

On page 8, appellant misleads when he writes "Defense counsel objected to the instruction for the record," (right after he quoted the court's comments at the end of the first day of trial). RP 225. *Defense counsel did not object for the record or otherwise when the court decided the instruction was necessary (RP 225-226. The next day he took exception, RP 237, but also helped draft the instruction the trial court gave. RP yy.*

On page 8, appellant misrepresents Judge Yu's ruling when he claims "Plaintiff's counsel was specifically instructed that she could not elicit insurance information from Hamilton on direct examination. (RP 244)". The court ruled that counsel could **not elicit information about insurance**, but had already made clear that counsel **could elicit the circumstances of Ms. Terrell's statement, (including who she made it to)**: "Ms. Sargent you're not going to be precluded if it doesn't come out in any way to go ahead and ask the question, and ask the question, 'Who did you make the statement to?'" RP 57. And the court re-confirmed, before Ms. Terrell's testimony, that plaintiff's counsel could inquire about the circumstances of the statement on direct. RP 1101.

On page 8, appellant failed to mention that the court used the word "insurance" in the preliminary instruction at **defense counsel's request**. RP 239.

On page 9, appellant falsely states that Ms. Terrell wrote the insurance statement "**to her insurance company**". Terrell's statement was made to defendant's insurance company, State Farm. RP 1106.

Appellant also falsely claims of Ms. Terrell that "**at her deposition she indicated he was speeding**. (RP 1111)." The cite for the claim to speeding is **to a question from defense counsel** which Ms. Terrell disputed. RP 1111, RP 391-392.

On page 9, appellant claims medical records that referenced "black ice," but fails to mention that there was **no record stating "black ice" was admitted, and** that Ms. Terrell did not know who wrote those records or why. CP 430-433, RP 1180, 1120.

On page 10, appellant claims that the court denied the instruction because she made a distinction between “skidding” and “sliding,” but failed to address the court’s actual explanation, that **the issue was was not merely skidding, but driving too fast**; appellant also omits that defense counsel admitted that **the driver in the Rickert case was driving prudently**, and that the trial court herein told defense counsel he would be allowed to make his accident argument to the jury. RP 1253, 54.

On page 11, appellant quotes just the first finding of the court’s order denying a new trial, and omits the second finding, that plaintiff’s counsel “**was not engaged in any misconduct.**” CP 598-99.

On page 13, appellant claims that it was the **trial court** that injected insurance into the case ignores the findings in the order denying a new trial, ignores that was defense counsel injected insurance into the case through using Ms. Terrell’s statement to impeach her and when he asked the jurors about insurance during voir dire. CP 598, 599, RP 205.

On page 15, appellant cites RP 73 and CP 285 to claim that the trial court “initially excluded evidence of insurance,” but this is untrue. At RP 73, the court said that “insurance is not relevant other than in the way that we’ve already described that would permit it,” which was that Ms. Terrell could to explain the circumstances of making the statement to the insurer. RP 57, 72.

On page 15, appellant claims misconduct by **plaintiff’s counsel**, but cites to **defense counsel’s closing** argument at RP 1292. CP 598-9.

On page 15, 17, 18, 21, 22, appellant claims misconduct by **plaintiff’s counsel**, but cites to **defendant counsel** Mr. Lockner’s declaration at CP 552, CP 553.

On page 15, appellant complains that plaintiff’s counsel “exploited and reinforced” insurance during the trial, but cites to his own arguments and ignores the court’s finding that plaintiff’s counsel engaged in no misconduct. CP 598, 599.

On page 18, appellant claims that plaintiff counsel had “explored” the issue of insurance in voir dire, but plaintiff counsel did not mention insurance in voir dire; some jurors related stories about their experiences with collisions and insurance. RP 16-164, 180.

On page 22, appellant claims that plaintiff’s counsel “reminded the jury repeatedly” (about insurance). In this entire record, plaintiff never mentions insurance in front of the jury, and only elicited a reference to insurance when she asked Ms. Terrell about the statement defense counsel talked about in his opening (at RP 265), exactly as the court had allowed. RP 1101, RP 1106.

On page 23, appellant says “the car skidded on an unseen icy patch,” but no one testified to ice on the road; Ms. Terrell testified she did not know and did not get out to look at the road, and there was no evidence that the ice was unseen. RP 1179-1180.

On page 24, appellant argues the accident was caused by “the combination of black ice...” but there was no evidence of black ice, and Ms. Terrell testified she did not know about ice. RP 1179-80.

Appellant misrepresents ER 411 by omitting the second sentence of ER 411

On page 13, appellant quotes ER 411 to support the argument that evidence of insurance is not admissible at trial, but leaves off the second sentence of ER 411, which says that it is admissible when used for purposes other than to prove liability.

COPY RECEIVED
MAY 08 2014
VONDA M. SARGENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PAULA TERRELL, an individual;
Plaintiff,

vs.

GORDON HAMILTON, an individual,
Defendants.

Case No.: 11-2-38179-0 SEA
[PROPOSED] *[Signature]*
ORDER ON DEFENDANT'S MOTION
FOR NEW TRIAL *(Motion Denied)*

THIS MATTER having come on regularly for hearing before the Court on May 2, 2014, upon the Defendant's Motion for New Trial having been given notice of this hearing; Plaintiff appearing through counsel, The Law Offices of Vonda M. Sargent. The Defendant appearing through counsel.

The Court having fully reviewed all of the files and records herein and the Court being fully advised; NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion for New Trial or remittitur is hereby: *Denied. The ct. instructed the jury after*

Defense counsel Raised the issue in jury selection and insisting on impeaching the Plaintiff with a statement to the insurance claim adjuster. The issue of insurance remained central to the case and the only way to address the question was through an instruction

Order for New Trial

THE LAW OFFICE OF VONDA M. SARGENT
119 1st Ave. S., Suite 500
Seattle, WA 98104
206.838.4970

1 DONE IN OPEN COURT this 6 day of May 2014

2
3 *Mary Yu*
4 THE HONORABLE MARY YU

5 Presented by:

6 THE LAW OFFICES OF VONDA M. SARGENT

7
8 Vonda M. Sargent, WSBA No. 24552

9 Approved as to Form and
10 Notice of Presentation Waived

11
12 Michael Budelsky, WSBA #35212

*While the Ct was aware of the conflicts between counsel,
* The Ct. does not find that Plaintiff's counsel was engaged in any misconduct.*

As you heard in jury selection, Plaintiff Paula Terrell and defendant Gordon Hamilton are domestic partners. There was some discussion about litigating against your own marital community.

Mr Hamilton is insured.

Because your sole focus will be factual issues that this court gives to you for consideration, I wish to advise you that ~~there is a third party, specifically their insurance company, involved in this case~~. The only way Ms. Terrell can access ~~the third party payor~~ insurance is through this case.

The fact that there is a ~~third party payor~~ ^{insurer} shall not be considered in the way you view the facts and shall not be considered in any award of damages.

I will provide you an additional instruction on this issue at the end of the case.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I caused to be served a true and correct copy of the Brief of Respondent, by hand delivery, on December 4, 2014, to the following:

Michael N. Budelesky
Reed McClure
1215 Fourth Ave., Suite 1700
Seattle, WA 98161-1087

Richard Lockner
Krilich LaPorte West & Lockner, PS
524 Tacoma Avenue South
Tacoma WA 98402-5416

Dated this 4th day of December, 2014.



Diane M. Henderson
Paralegal
Heller Law Firm, PLLC
860 SW 143rd Street
Seattle, WA 98166