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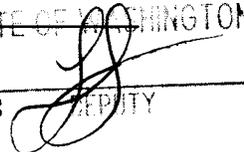
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COURT OF APPEALS
DIVISION III

No. 64039-9-I

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STATE OF WASHINGTON

DIVISION I OF THE COURT OF APPEALS

BY  DEPUTY

FOR THE STATE OF WASHINGTON

PEI EN WU,

Appellant,

vs.

KEITH MATHEWS,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR I COUNTY

Cause No. 06-2-40509-9KNT

BRIEF OF APPELLANT

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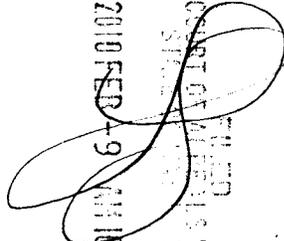
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I. INTRODUCTION

This case involved a vehicle-pedestrian collision during the summer of 2006. Plaintiff now appeals the defense verdict. Specifically, Plaintiff appeals on grounds of misconduct during closing argument, and the court's failure to instruct the jury using Plaintiff's proposed instruction 19.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it overruled Plaintiff's objection to defense counsel's conduct during closing argument.

2. The trial court erred when it refused to instruct the jury using Plaintiff's proposed instruction number 19.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether defense counsel engaged in misconduct during closing argument? (Assignments of Error 1).

2. Whether defense counsel's conduct during closing argument warrants a new trial? (Assignments of Error 1).

3. Whether the trial court erred when it failed to instruct the jury using Plaintiffs proposed instruction number 19? (Assignments of Error 2).

4. Whether the court's refusal to instruct the jury using Plaintiff's proposed instruction number 19 requires a new trial? (Assignments of Error 2).

IV. STATEMENT OF THE CASE

A. Procedural History

This case centers around a vehicle/pedestrian collision that occurred on August 27, 2006.

Following discovery and pre-trial motions, the matter went to trial in King County Superior Court. RP 6/29/2009, 1. The Honorable John P. Erlick presided over the case. RP 6/29/2009, 1.

The jury trial lasted through July 7, 2009. RP 7/7/2009, 1. The jury returned a defense verdict, finding no liability, on July 8, 2009. RP 7/8/2009, 4-8.

B. Facts

On Sunday morning, August 27, 2006, 74 year old Pei En Wu attempted to meet her friends for a ride to church. CP 204-205 (Plaintiff's Trial Brief is cited for brief factual case statement), RP 6/29/2009, 77, 80. She walked along the shoulder of Starlake Rd. Id. at 85. As she walked to meet her ride, Mr. Mathews, the defendant, noticed Ms. Wu's presence on the pedestrian side of the shoulder in the distance. RP 7/2/2009, 155-156. Nevertheless, Mr. Mathews divided his attention to an oncoming vehicle and

drove his new Ford F-150 pickup truck and struck Ms. Wu's face with his mirror. RP 7/2/2009, 172, 178. This knocked Ms. Wu unconscious, blinded Ms. Wu's right eye, and sent her to the Harborview ICU, where she was hospitalized for over two months. RP 6/29/2009, 92.

Medical aid arrived on-scene. RP 7/2/2009, 159. Ms. Wu was transported to Harborview. Police secured the scene. Detectives were summoned and processed the scene using a total-station. RP 6/30/2009, 122-136.

In addition to Ms. Wu's testimony, and several damages witnesses, the Plaintiff's case was assisted by accident analyst and reconstructionist, Chuck Lewis. RP 7/2/2009, 6. Mr. Lewis offered the expert opinion that the accident was a result of Mr. Mathews driving his vehicle on or over the fog-line, and thus causing the vehicle's mirror to contact Ms. Wu. RP 7/2/2009, 61.

Defense expert Paul Olson offered his opinion that Ms. Wu was the one who travelled by foot on or over the fog line. His opinion offered a range of possibilities, including that Ms. Wu's foot

travel was on the roadway, and not on the shoulder. RP 7/6/2009, 98, 114, 118-119.

During closing argument, defense counsel inserted his attorney-client relationship into the trial. Counsel told the jury that he had instructed his client, Mr. Mathews, to speak to the jury from his heart while testifying. RP 7/7/2009, 92. Plaintiff's counsel objected. RP 7/7/2009, 92. The court overruled the objection. Id.

When the court instructed the jury, it was without Plaintiff's Proposed Instruction Number 19. RP 7/7/2009, 28. Plaintiff took exception. RP 7/7/2009, 20; RP 7/6/2009, 200.

The jury returned a defense verdict.

This timely appeal followed.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT OVERRULED PLAINTIFF'S OBJECTION TO THE CONTENT OF DEFENSE COUNSEL'S CLOSING ARGUMENT BECAUSE MS. WU'S SUBSTANTIAL RIGHT TO A FAIR TRIAL WAS MATERIALLY AFFECTED AND DEFENSE COUNSEL'S CONDUCT CONSTITUTED MISCONDUCT AND WITNESS VOUCHING.

The court should grant a new trial because defense counsel engaged in misconduct during closing argument. Counsel argued facts that were

not part of the record, and did so in a way that constituted witness vouching. Specifically, during closing defense counsel shared with the jury, "You know what I told Mr. Mathew [?], I said, when you get in front of 13 people you don't know and they're deciding something very important to you, you need to talk to them from your heart. You need to let them know the truth from your heart. I said they're an x-ray machine." RP 7/7/2009, 92.

Upon objection by Plaintiff's counsel, the court offered the following ruling, "I'll - I'm going to allow its argument. Court - the jury's been instructed to disregard any argument not supported by the facts or by the law." Id. at 92-93.

Misconduct of a party is grounds for a new trial if the misconduct materially affects the substantial rights of the moving party. Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539, 998 P.2d 856 (2000). In order to be granted a new trial under this provision, the moving party "must establish that the conduct complained of constitutes misconduct (and not mere

aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . .'" Alcoa, 140 Wn.2d at 539 (quoting 12 James W. Moore, *Moore's Federal Practice* § 5913[2][c][I][A], at 5948, 58-49 (Daniel R. Coquillette et al. eds., 3d ed. 1999)). In addition, the moving party must object to the misconduct at trial and the misconduct must not have been cured by court instructions. Alcoa, 140 Wn.2d at 539. Where no motion for a mistrial or objection was made, the necessary inquiry is whether the incidents of misconduct referred to were so flagrant that no instruction of the court or admonition to disregard could suffice to remove the harm caused thereby. Carabba v. Anacortes Sch. Dist., 103, 72 Wn.2d 939, 954, 435 P.2d 936 (1967).

In the present case, Plaintiff's counsel engaged in misconduct. He inserted himself into the trial as an unsworn witness. The Plaintiff properly objected to defense counsel's misconduct during closing. See, RP 7/7/2009, 92.

Counsel may comment on a witness' veracity only if he does not express it as a personal

opinion and does not argue facts beyond the record. State v. Papadopoulos, 34 Wn.App. 397, 400, 662 P.2d 59 (1983), (citing State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963)); State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955), holding Counsel, in his closing argument to the jury, cannot make prejudicial statements not sustained by the record. Id., (citing State v. Heaton, 149 Wash. 452, 271 Pac. 89 (1928)); Rogers v. Kangley Tbr. Co., 74 Wash. 48, 132 Pac. 731 (1913)). As the court indicated in Rose, supra, the question to address is,

... Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.' "

State v. Rose, 62 Wn.2d at 312, (citing State v. Buttry, 199 Wash. 228, 251, 90 P.(2d) 1026 (1939), quoting with approval Sullivan v. State, 47 Ariz. 224, 55 P.(2d) 312).

In the instant case, defense counsel called to the jury's attention a matter which the jury was not justified hearing. It was inappropriate and objectionable for counsel to cause the jury to

consider conversations between counsel and his client. It was equally inappropriate for counsel to cause the jury to consider subject matter for which there was no supporting trial testimony. And given the fact that the court overruled Plaintiff's objection to the subject being outside the evidence in the case, it must be said that the jury was "probably influenced by [the] remarks". Quoting Rose, supra. See RP 7/7/2009, 92.

In the instant case, counsel's misconduct also constituted witness vouching. Obviously, counsel was not a witness in the case. An examination of the trial record of defendant Mathew's testimony reveals no references to his trial preparation nor to conversations he had with defense counsel in anticipation of trial. See RP 7/2/2009, 140-195, testimony of Defendant, Keith Mathews. Yet, during closing argument to the jury, counsel deliberately stated he told Mathews to "you need to talk to them from your heart. You need to let them know the truth from your heart." RP 7/7/2009, 92.

Improper vouching occurs when "it is 'clear and unmistakable' that counsel is expressing a

personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

In the instant case, counsel's words constitute per se witness credibility vouching. The content of counsel's claim is synonymous with counsel stating his opinion, i.e., that because he instructed Mathews to testify honestly, he, in fact, testified honestly. Because Mathews made claims Plaintiff disputed, counsel vouching for his veracity was a material act of misconduct.

Furthermore, counsel's words implicate defense counsel as a witness - a concept fundamentally contrary to the Civil Rules and contrary to centuries of American civil jurisprudence. See CR 43. (Because counsel's conduct occurred at the end of counsel's closing argument, Plaintiff was not able to argue defense not be allowed to argue the case under CR 43 - it was simply too late.)

Also fundamental to American jurisprudence is the fact that communications between counsel and client are privileged. See ER 501, RCW 5.60.060(2)(a). "RCW 5.60.060(2) provides that

the attorney-client privilege applies to communication and advise between attorney and client." Kammerer v. W. Gear Corp., 96 Wn.2d 416, 426, 635 P.2d 708 (1981). Plaintiff's counsel, accordingly, was prohibited from inquiring into such privileged and confidential communications between attorney and client. Thus, defense counsel's actions at closing put the Plaintiff at an inherently unfair disadvantage by virtue of the fact that no one would have considered inquiring into attorney-client communications during discovery.

In the present case the trial court received Plaintiff's objection. RP 7/7/2009, 92-93. Yet while overruling the objection did orally mention to the jury that at summation counsel's comments are argument. Id. The court's attempt to cure the situation, however, completely ignored the witness vouching that went along with defense counsel's calculated effort to bolster his client's credibility and counsel's opinion as to the Defendant's credibility. The objection should have been sustained; and Plaintiff should now be granted a new trial.

B. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE PLAINTIFF'S PROPOSED JURY INSTRUCTION NUMBER 19 BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR A JURY TO DETERMINE THAT MS. WU WAS IN THE ROADWAY.

The Plaintiff proposed several jury instructions. See CP 171-202. Included was Plaintiff's proposed Jury Instruction 19. CP 194. That proposed instruction read in relevant part as follows,

A statute provides that:

Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary.

Id., citing WPI 60.01, RCW 46.61.245 (modified).

Despite Plaintiff's request, the court denied use of the instruction. RP 7/7/2009, 20-28. Plaintiff appropriately took exception to the court failing to instruct the jury on Plaintiff's proposed instruction 19. RP 7/7/2009, 20.

Expert testimony was the evidence used in this case to provide the jury with evidence of Ms.

Wu's location at the time she was struck by Mathews' vehicle.¹

The Defense introduced the expert testimony of accident reconstructionist Paul Olson. See RP 7/6/2009, 25-184. Mr. Olson was asked for his expert opinion of where he believed contact occurred between Mr. Mathews truck and Ms. Wu. Id. at 97. In relevant part, his opinion in response to that question was articulated as follows: "...I believe the impact itself was on or very near, which I said early on, the fog line. So it could be a little bit to either side." Id. at 98. When asked on cross examination as to his opinion, he again agreed the impact occurred either on the fog line or on either side of it. Id. at 114. Mr. Olson certainly refused to specify the distances his opinion imagined. See, RP 7/6/2009, at 118-122. But, as indicated above, Olson's testimony certainly included testimony that Ms. Wu's position could have been on the roadway. Supra.

¹ The instant case included no eye witness testimony to Ms. Wu's exact location on or near the roadway at the instant she was struck by Mr. Mathews' vehicle.

The court allowed formal argument with regard to Plaintiff's proposed instruction 19. RP 7/6/2009, 200-205. And the court ruled it would not be giving the instruction. Id. at 205. As mentioned, during formal exception to the Court's Instruction, Plaintiff noted the exception. RP 7/7/2009, 20. This preserved the matter for this court.

The court reviews jury instruction issues such as this *de novo*. In Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266-267, 96 P.3d 386 (2004). The Barrett, court held,

This court reviews *de novo* the alleged errors of law in a trial court's instructions to the jury. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. Bell v. State, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)). As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be "reversible error where it prejudices a party." Hue, 127 Wn.2d at 92. If a party proposes an instruction setting forth the language of a statute, the instruction will be

"appropriate only if the statute is applicable, reasonably clear, and not misleading." Bell, 147 Wn.2d at 177.

Id. at 266-267.

The defense expert postulated a theory that included factual possibilities. As indicated, his opinion included facts potentially placing Ms. Wu on the road. When the court failed to instruct the jury as to proposed instruction 19, it excluded an important instruction as to that issue and prevented the Plaintiff from arguing that Mr. Mathews, under the circumstances of the case, was required to give warning by sounding the horn. (Mr. Mathews did not honk his horn." See RP 7/2/2009, 140-195).

This reversible error entitles Plaintiff to a new trial, under Barrett, supra.

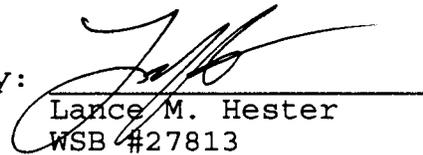
VI. CONCLUSION

For the reasons cited above and the authority included herein, the court should reverse the court's judgment and the jury's verdict, and remand the matter for a new trial.

RESPECTFULLY SUBMITTED this 5th day of
February, 2010.

HESTER LAW GROUP, INC. P.S.
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By:


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CERTIFICATE OF SERVICE

Lee Ann Mathews hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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BY _____
DEPUTY

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Signed at Tacoma, Washington this 5th day of February, 2010.


Lee Ann Mathews