

No. 68511-2-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

Snohomish County No. 11-1-00589-0

STATE OF WASHINGTON,

Respondent,

v.

GARRETT TURSKI,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in excluding evidence that the State's key witness, Leanne Floyd, was seeking hundreds of thousands of dollars to compensate her personally for her daughter's death in a car accident where the only issue was whether the daughter or the defendant was driving the car at the time of the accident.

2. The trial court erred in denying defendant's motion for a new trial where the State's key witness, Leanne Floyd, emphatically and unequivocally denied, in her sworn testimony, that she had hired attorneys "to get a large sum of money out of the tragic death of [her] daughter," answering: "Incorrect. That is not true whatsoever"; and where she denied that her "attorneys were demanding hundreds of thousands of dollars from the Turski family," then filed suit, less than two weeks after the verdict (and eight days before sentencing), personally seeking insurance limits of \$250,000, which have now been paid to her.

3. Whether Ms. Floyd's personal injury attorneys, who were present in court throughout the trial, who witnessed her commit perjury about her civil suit, then served and filed a complaint against the Turski family on her behalf two weeks later, had an ethical duty under RPC 3.3,

“Candor to the Tribunal” and other Rules of Professional Conduct, to prevent or correct Ms. Floyd’s denial under oath that she had any financial incentive to have the Defendant convicted.

B. Issues Pertaining to Assignment of Error

1. Whether a critical witness’ financial incentive to see the Defendant convicted is admissible, under the Confrontation Clause, to discredit the witness’ credibility or objectivity. (Assignment of Error 1.)

2. Whether the improper exclusion of a key witness’ financial incentive to see the Defendant convicted, where that witness’ testimony was critical to the State’s case to prove the Defendant was driving a vehicle at the time of an accident that resulted in the death of his passenger, is material to the outcome of the trial. (Assignment of Error 1.)

3. Whether letters written by the key witness’ attorneys to the Defendant and his family shortly after the accident, demanding to know insurance limits and documenting the fact they were representing the witness, should have been admissible to prove the witness’ financial incentive to provide testimony that would result in the Defendant’s conviction. (Assignment of Error 1.)

4. Whether a key witness’ deliberate perjury in her testimony denying that she was seeking any financial gain from the death of her

daughter, constitutes a basis for granting a new trial. (Assignment of Error 2.)

5. Whether the filing of a civil complaint on behalf of a key State's witness less than two weeks following trial, and a year after the accident, constitutes newly discovered evidence material for the Defendant, which the Defendant could not have discovered with reasonable diligence and produced at trial due to the fact that the witness lied about any financial interest in the trial's outcome. (Assignment of Error 2.)

6. Whether "substantial justice has not been done," within the meaning of CrR 7.5(a) where the State's key witness committed perjury about her financial incentive to see the Defendant convicted. (Assignment of Error 2.)

7. Whether the acquiescence or active involvement of personal injury attorneys in the perjury of their client when she testified as the key witness in this criminal trial constitutes grounds for a new trial. (Assignment of Error 3.)

8. Whether the attorneys representing a client in a personal injury claim based upon the same fatality accident at issue in a vehicular homicide case have a duty, under various provisions of the Rules of Professional Conduct, to advise the court of their client's commission of

perjury in the criminal trial when they are present in court to witness their client committing perjury. (Assignment of Error 3.)

9. Whether there is substantial evidence of the complicity, or at least the acquiescence, of personal injury attorneys in the perjury of their client committed in the course of a criminal prosecution, where the attorneys and the client have a strong financial incentive to see the Defendant convicted, sufficient to violate the Rules of Professional Conduct, and whether this misconduct mandates a new trial when the perjury is revealed through the filing of a civil suit shortly after the verdict. (Assignment of Error 3.)

II. PROCEDURAL BACKGROUND

On March 30, 2011, the Defendant, Garrett Turski, was charged with one count of Vehicular Homicide in violation of RCW 46.61.520. CP 216-219. That charge was based on a single car accident that occurred nearly a year earlier, on April 10, 2010, shortly after 4:00 a.m., and resulted in the death of Ellen Floyd. *Id.*

The case proceeded to trial on February 6, 2012, where the only issue was the identity of the driver of the vehicle since both occupants, the Defendant and the deceased, were ejected from the driver and passenger seats in the course of the accident.

The State's first and primary witness to prove that the deceased could not be driving was her mother, Leanne Floyd, who testified that her daughter was totally incapable of driving a manual shift vehicle, such as the one involved in this accident. She was cross-examined in detail about the fact that she had hired a personal injury law firm within days of her daughter's death, and that her attorneys were present with her during the defense interview of her in the prosecutor's office, and that they were also present in court through the trial. However, she adamantly denied that she had any financial interest in the trial or was seeking any monetary gain from her daughter's death other than the modest cost of burial. Then, less than two weeks after the verdict, her attorneys filed a complaint naming her as the personal representative of her daughter's estate and individual plaintiff, resulting in a recovery of \$250,000 from the Defendant's insurance.

Based upon the fact that this witness committed obvious perjury in denying any financial interest in the case, the defense filed a motion for new trial. CP 112-164. The judge determined that Leanne Floyd's perjury was "just a factor that the jury could – or just a piece of evidence that the jury could evaluate, and perhaps did, or did not; but there was plenty at their disposal, as I have pointed out." Accordingly, the judge denied the motion for new trial. RP 858; CP 111.

On March 7, 2012, the Defendant was sentenced to 36 months imprisonment. CP 14-24. An Order of Indigency was signed that same day (CP 26-27) and a timely Notice of Appeal was filed on March 19, 2012. CP 1-13. The State filed a cross-appeal on March 22, 2012.

III. FACTUAL BACKGROUND

The Defendant, Garrett Turski, started dating Charlene Beardsley when he was 19 years old and his involvement with her and her friends dramatically changed his lifestyle. Several witnesses testified that Ms. Beardsley was a bad influence on anyone who spent time with her and, certainly, Garrett Turski's dating relationship with Charlene and her best friend Ellen Floyd had this effect. RP 704. He started drinking regularly for the first time in his life, he was staying out very late despite his parents' disapproval, and he was attending parties with Charlene where she and the deceased, Ellen Floyd, would disrobe in front of other people and parade around the room. RP 110.

According to the Affidavit of Probable Cause, the evening before the accident, the Defendant and a number of friends drove to Seattle "to attempt to join a fraternity party" and began drinking. CP 16-26; RP 108. The Defendant's girlfriend, Charlene Beardsley and her best friend, Ellen Floyd, accompanied him along with other friends, but they were "expelled

from the party” because of Beardsley’s flirtatious conduct. RP 109. All of them were under the age of 21. *Id.* CP 217.

The group returned to a house where Beardsley lived with her uncle “in the Stanwood area close to I-5” where “music and dancing ensued. CP 217. Floyd had been consuming alcohol and was dressed only in her underwear.” CP 217; RP 110. Garrett Turski and his girlfriend, Charlene Beardsley “began to argue” when she invited some old boyfriends to the party, so Garrett left with Ellen Floyd to buy cigarettes at a nearby Shell Gasoline Station and mini-mart. CP 217. “The gas station video shows the defendant purchasing cigarettes at 4:12 a.m.” *Id.* Just “moments later” Charlene Cairns, the driver of a car traveling toward the Shell station on “Old Highway 99” observed the Defendant’s Mustang convertible “travelling 100 miles per hour” in the opposite direction. It failed to negotiate a curve and crashed. Ms. Cairns rushed to the scene and arrived within “five to ten seconds” while “the Mustang was still smoking and was extensively damaged,” but she could not find anyone in or around the vehicle. *Id.*

Ms. Cairns called 911 and was present when numerous aid car and law enforcement officers arrived, but they could not find anyone. “After searching for about 15 minutes, deputies heard a muffled cry for help,” so they opened the trunk of the Mustang and

found the defendant in the fetal position with some fabric wrapped over him. He was directly underneath the gap between the back seat and the edge of the trunk lid. His pants were pulled down to his ankles. He denied being the driver.

Id. At the hospital, Garrett Turski

said he got in the back seat of his vehicle and may have passed out. He admitted he was intoxicated. He said he did not know who was driving but later said he thought it was Ellen. About two hours after the collision Detective Goffin found Ellen Floyd's body in some bushes adjacent to where the Mustang impacted some trees. She was deceased. She was in bare feet and was wearing only a bra, underwear and sweatpants.

Id., at 3. Ellen had died from "severe and instantly fatal injuries of the midbrain and brainstem" so the Medical Examiner "classified her death as 'accident (traffic)'.*" Id.*

The Defendant suffered a fractured sternum and traumatic brain injury. He had no memory of the accident, nor of much about his hospitalization for several days. According to the defense expert, Dr. Steven Mitchell, who is director of the Emergency Room at Harborview hospital, memory loss is typical of traumatic head injury. RP 514.

Thus, the only issue in the trial of this case concerned the identity of the driver of the vehicle at the time of the accident that occurred on April 10, 2010, and resulted in the death of Ellen Floyd.

In support of its argument that Ellen Floyd could not have been driving, the State relied primarily on the testimony of her mother, Leanne Floyd. Ellen lived with Leanne, who testified that her daughter was unable to drive cars much less a car with a manual transmission. On direct examination, she testified that she owned a Kia Sophia, which “had a five speed manual transmission.” RP 85. When asked by the prosecutor “how many times did you try to teach Ellie to drive it?” she answered “just the one.” RP 86. When asked to explain, Leanne Floyd testified: “She couldn’t drive it. She kangarooed it. She couldn’t drive, because she couldn’t get it in motion.” *Id.* She explained: “We didn’t get out of the driveway” and she never tried to teach Ellen again because it was Leanne’s “only car to get to work, and she was going to wreck the clutch or something.” *Id.* This occurred more than a year before the accident. RP 87.

The prosecutor also asked her about a “Toyota MR2” stick shift vehicle that was given to Ellen, but Leanne claimed: “It was mechanically unsound. Its clutch ended up going, and the motor didn’t run,” and she insisted that Ellen never drove it. RP 87-88. On cross-examination, she admitted that the Toyota was given to Ellen by “a friend of the family” a year before the accident, and she reluctantly admitted “I suppose so” when asked if Ellie “wanted to learn to drive that car even though it had a

manual transmission.” RP 94. When asked how the car got to Leanne Floyd’s house, she admitted it had been driven to her house, claiming “it limped in,” which contradicted her claim that the car was inoperable. RP 94. The Defendant testified that Ellen Floyd had asked to drive his car in the past. RP 718.

During Leanne Floyd’s cross-examination, the defense elicited testimony that she had several personal injury attorneys present in court. RP 98. Throughout the trial they met with her during recesses. Two members of the Adler Giersch law firm were even present with her when defense counsel interviewed her in the prosecutor’s office a week earlier. *Id.* However, she adamantly and unequivocally denied that she had hired these attorneys to seek financial compensation for her daughter’s death:

Q. The reason you hired them is to get a large sum of money out of the tragic death of your daughter; is that correct?

A: Incorrect. That is not true whatsoever.

Q: Are you aware –

A: I hired them so that I could be heard, so that I could have somebody stand up and take accountability for the death of my daughter.

Q: Do you deny that your attorneys are demanding hundreds of thousands of dollars from the Turski family?

A: Yes, I do.

Q: Do you deny that?

A: Yes, because we have not asked them for any money. The only finances I asked for was money to help bury my child.

Q: How are they being paid?

A: How is who being paid?

Q: Your attorneys, Adler Giersch?

A: I don't know.

Q: It's on a contingent fee basis isn't it; they get a percentage of the money collected?

A: From the car insurance?

Q: From the insurance, and from the Turskis personally.

A: Not that I know of, sir.

Q: You didn't sign a fee agreement?

A: I did.

Q: You don't remember what it says?

A: No.

RP 98:13-99:13.

After Leanne Floyd testified, the defense again argued for the admissibility of a letter

written by the Adler Giersch Law Firm to my client's insurance adjuster, with a copy to Garrett Turski,

demanding to know insurance limits, dated October 26, 2010 -- that is 16 days after the accident -- talking about, if necessary, filing a lawsuit to get the insurance limits.

RP 157. This letter demanded to know if there was “enough insurance to cover our lawsuit. Clearly, this contradicts what Leanne Floyd said on the witness stand yesterday.” *Id.*¹

The letter was marked as Exhibit 110, and a copy is attached to this brief as Appendix 1. The defense argued for the admissibility of this exhibit because “it goes to prove that [Leanne Floyd] was not being candid and truthful because she clearly said, in a very emotional way, ‘this is not about money.’” *Id.* at 159. “It’s very clearly about a lot of money, and she got lawyers involved within two weeks of her daughter’s death. I think the jury needs to know that.” RP 160. The defense argued “that this demand letter flatly contradicts an affirmative statement that she made yesterday that is very material to this case” because Exhibit 110 “contradicts what she said very affirmatively under oath yesterday: ‘This is not about money.’” RP 161.

The prosecution argued that Leanne Floyd did not “know what her attorney has been up to” so the letter was “not relevant,” but the defense responded: “Your Honor, an attorney cannot ethically make a demand

¹ The Defendant’s father, Ken Turski, had “signed an authorization to release insurance limits, which are \$250,000, which has made him a witness now; because of this surprise

without the consent of a client. I think that's fairly basic." RP 160-61. The defense pointed out language from the letter indicating that the attorneys "will file a lawsuit, if necessary, to get disclosure of the insurance limits." Yet Leanne Floyd testified that "her involvement of these attorneys was not about money. I think it's very relevant to her credibility." RP 163.

The court ruled: "I'm not going to permit 110 to be used for the purpose of contradicting or impeaching Ellie's mother." RP 165. The defense then offered to have his client and his client's parents testify about another letter sent to them by their insurer Safeco in March of 2011, a year before trial, advising them that their insurance limits of "\$250,000 had been offered," and that the insurance company was "trying to settle within that limit." *Id.* The court denied this request as well when the prosecutor objected. RP 166.

Then on Sunday, March 4, 2012, just 17 days after the verdict and three days before sentencing, the Turskis were served with a Summons and Complaint for Damages in a case captioned:

testimony, I need to put this in evidence for when we get to the defense case." RP 157-

IN THE SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

*LEANNE FLOYD, Individually and as
Personal Representative of the Estate of
ELLEN R. FLOYD,* NO. 12-2-03268-6

Plaintiffs,

v.

*ARTHUR MANTEI, Individually;
CHARLENE BEARDSLEY, Individually;
GARRETT TURSKI, Individually; KENNETH
TURSKI; and RHONDA TURSKI, Husband
and Wife and the Marital Community
Comprised Thereof,*

Defendants.

The Summons and Complaint was signed by Richard H. Adler, Arthur Leritz, and Melissa Carter of the Adler Giersch law firm, on February 28, 2012, less than two weeks after the verdict. CP 125-162, Exhibit 4. Richard Adler, Arthur Leritz, and Melissa Carter were all present in court for Leanne Floyd's cross-examination.

This Complaint, which runs 12 pages in length, contains four paragraphs that specifically allege Ms. Floyd was seeking money for herself:

Plaintiff Leanne Floyd has suffered loss of consortium by the destruction of the mother-daughter relationship she had with Ellen Floyd, and she is entitled to such damages for this loss and at such amounts as will be proven at trial; and she experienced financial and emotional damages as permitted under RCW 4.24.010, 4.20.010, 4.20.046 and 4.20.060 for compensation for pecuniary loss suffered by her and for loss of companionship, love, affect, support, care and society, including the destruction of the mother-daughter relationship.

Id., ¶ 34 at p. 7; ¶ 41 at p. 8; ¶ 47 at p. 9; ¶ 56 at p. 11. The Complaint concludes with a prayer

for judgment against the Defendants, and each of them, in such sums as will fully and fairly compensate them for the losses caused by the death of Ellen Floyd, including but not limited to: . . .

2. For Plaintiff Leanne Floyd's damages in an amount to be proven at trial; . . .

Id., Exhibit 4 at p. 12.

The defense filed a motion for a new trial based on the fact that Leanne Floyd had lied under oath about her reason for hiring attorneys a few days after her daughter's death, and about her own financial incentive for the jury to convict Mr. Turski. CP 112-164. Even the prosecutor conceded that his first, and primary witness had lied in her testimony:

It is true that she denied that they were seeking money damages. That, obviously, from the transcript is true; but the simple fact of the matter is that any juror, any sensible juror, would understand that a lawsuit was coming after this. Civil attorneys don't just sit around to spectate in

court and see how the criminal process is working. It was obvious that this was forthcoming.

RP 848:16-848:25. His argument that the jury would speculate “that a lawsuit was coming” assumes that the jury would disregard Leanne Floyd’s sworn testimony and ignores the fact that the judge denied defense counsel’s attempt to admit a letter sent by the attorneys to the Turskis’ insurer, demanding to know insurance limits, within a month of the accident.

Thus, it is indisputable from the filing of this detailed, 12 page Complaint for Damages on February 28, 2012, less than three weeks after her courtroom testimony, and less than two weeks after the verdict, that Leanne Floyd deceived the jury in order to bolster her credibility. Again, her credibility was critical to the State’s theory that Ellen Floyd was incapable of driving a manual transmission vehicle, which was the only disputed issue in the case. The Defendant’s conviction was also essential to Leanne Floyd’s recovery of the \$250,000 in insurance limits she has now been paid, since if the jury believed that her daughter Ellen was driving at the time of the accident, Leanne Floyd would need to prove liability at a costly civil trial.

It is equally disturbing that two of Leanne Floyd’s attorneys accompanied her to the defense pretrial interview in the prosecutor’s

office, and her attorneys were present throughout the trial, including her perjured testimony. Like Ms. Floyd, the attorneys had a direct financial interest in the jury convicting Mr. Turski since they were presumably paid at least a third of the \$250,000 in insurance money, which provided a strong incentive for them to take no corrective action while their client lied under oath, as clearly required by the Rules of Professional Conduct. Their presence even raises concern that they were actively involved in suborning the perjury; it is at least obvious that they sat passively by knowing their client was lying.

The trial judge denied the motion for a new trial by drawing a meaningless distinction by reasoning that Ms. Floyd's perjured testimony was "collateral" to the issues in the case:

"Even if she were the most masterful driver of standard transmissions ever, it would not ultimately answer the question [of whether Ellen Floyd was driving the vehicle when it spun off the road]. It really isn't crucial. It is just a factor that the jury could - - or just a piece of evidence that the jury could evaluate, and perhaps did, or did not; but there was plenty at their disposal, as I have pointed out."

RP 856.

IV. DISCUSSION

A. The Standard for a New Trial Based on Newly Discovered Evidence of Deception by a Key Witness.

The grounds for a new trial under CrR 7.5(a) include the following:

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

* * *

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

A defendant is entitled to a new trial, based upon newly discovered evidence, where the new evidence “(1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Sate v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1995). In determining whether newly discovered evidence would probably change the result of the trial, the trial court must determine the credibility, significance, and cogency of the evidence. *State v. Goforth*, 33 Wn.App. 405, 409, 655 P.2d 714 (1982).

Our courts have specifically held that newly discovered evidence that a key witness lied or misled the jury is a sufficiently material fact to require a new trial. *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds by Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). Newly discovered evidence is not “merely impeaching” if it undercuts the credibility of a key witness. *In Re Spencer*, 152 Wn.App. 698, 218 P.3d 924 (2009). *Accord: United States v. Davis*, 960 F.2d 820 (9th Cir. 1992).

In *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (1996), *overruled in part on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the court upheld the granting of a new trial based upon newly discovered evidence of telephone records which would have impeached one of the state’s witnesses, reasoning “that impeaching evidence can warrant a new trial if it devastates a witness’s uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching but critical.” *Id.* at 838 (footnotes omitted).

B. The Materiality of the Newly Discovered Evidence

Clearly, the Summons and Complaint filed on behalf of Leanne Floyd is indisputable evidence that she lied to the jury about her personal motivation and financial interest in seeing Garrett Turski convicted. This

evidence would have cast serious doubts about her critical testimony that her daughter could not possibly drive a manual transmission vehicle.

The record makes clear that the defense anticipated from the outset of the case that Ellen Floyd's ability to drive a manual transmission car was critical to the outcome of the trial. In a pretrial motion, the defense argued for the admissibility of "evidence of financial motivation with regard to Leanne Floyd. Within about ten days of her daughter's death, she retained the Giersch Law Firm, and they have been actively involved ever since." RP 35. The defense argued for the admissibility of a letter sent by the Adler Giersch Law Firm to the Turskis shortly after the accident. RP 36-37. That letter and others were marked as Exhibit 110 and 111, they have been transmitted to this Court and copies are attached as Appendices 1 and 2 to this brief. Defense counsel made the following argument and offer of proof to the trial judge:

[T]here was another witness, Suzanna Parker, I think her name is, who was interviewed by the police and testified that Ellen Floyd had tried several times to learn to drive a manual transmission. But that witness died about a month and a half before trial, so she was unavailable.

RP 847:21-848:1. Without the benefit of Ms. Parker's testimony, the defense sought to admit two letters from their insurance company, Safeco, advising them that Leanne Floyd's attorneys had demanded to know their limits of \$250,000. *See* Ex. 110. Then a few months later, the Turskis

received another letter advising them that a full limits demand had been rejected and stating them that their coverage was limited to \$250,000. *See* Exhibit 111 and Appendix 2 to this brief. That letter also advised the Turskis that Safeco “will continue to attempt to resolve this claim within your policy limits, but it also warned them: “If this matter goes to trial, any award in excess of these limits is your responsibility.” *Id.*

In closing argument, the prosecutor urged the jury to reject the defense argument “that Ellie was the driver,” stating it must have been “an experienced driver behind the wheel of the vehicle. In this case, that could only be the defendant.” RP 801-802. Later, he again argued about “Ellie’s inability to drive a motor vehicle . . . Ellie didn’t suddenly get behind the wheel unexpectedly for the first time in her life.” RP 805. Yet a third time he argued that the defense wanted the jury to “[i]gnore the fact that Ellie doesn’t have any driving experience . . . That’s a bunch of nonsense.” RP 828.²

² He also discussed this in opening statement:

One of the things that is important to keep in mind in this case is that Ellen was not an experienced driver. She did not have a driver’s license. She had an instructional permit. To the best of everyone’s knowledge, she hadn’t driven manual transmissions. Her mother, Leanne, has a family car with a manual transmission. She had taken Ellie out on one occasion to try to drive it; but the grinding of the gears was so bad that she was a little worried that it was going to break the car, and it was her only vehicle; so she discontinued those lessons. Ellie had taken Driver’s Ed at Stanwood High School; but she had, again, as far as is known, no manual driving experience.

RP 71.

But after the obvious perjury of his first witness came to light after the verdict, the prosecutor did an about face, arguing in opposition to the new trial motion that Leanne Floyd's claim that her daughter could not drive a car with a manual transmission was insignificant:

Well, your Honor, in particular, I take issue with defense's statement that Leanne Floyd's testimony was, quote, crucial to the State's theory, end quote. The primary basis of the State's case - - nothing could be further from the truth. This case would have proceeded with or without her. The key facts were provided by Detective Goffin's reconstruction analysis and Detective Cummings' exhaustive seat belt analysis.

RP 848:19-849:1.

However, the testimony of both Detective Goffin and Detective Cummings had been discredited on cross-examination. Det. Goffin conceded that his reconstruction of the accident was physically impossible, and that the location of Ellen Floyd's body was consistent with her driving the car:

- Q. But it doesn't make any sense that her body could penetrate through the car to get over here, either does it? I mean, she can't go through the car, correct, to get from the right side to the left side; that can't happen; right?
- A. Well, it is possible, but not in this situation.
- Q. Highly unlikely?
- A. Highly unlikely.

RP 462:25-463:6.

* * *

- Q. The car stops its movement very abruptly in this direction, along this vector, when it hits the tree; right?
- A. Right.
- Q. And does a very sudden change in movement, like this?
- A. Correct.
- Q. During that process, if her body is right there, airborne, next to the car, it's going to be like, you know, hitting a home run out of the field; the car is going to strike her and knock her body in a different direction, just like the car is going in a different direction, out toward the roadway?
- A. That's a possibility. I didn't find any other strikes on there; but given your scenario, that's certainly a possibility.
- Q. But it's not a possibility for her to have gotten from the right side of the car to the left side of the car where you found her body, is it?
- A. No.

RP 464:24-465:15.

* * *

- Q. Let's assume that Ellen is the driver, and she's not strapped in. When the car hits this tree, what is the direction of the force that's going to be applied to her body?
- A. When it hits the first large tree?
- Q. Yeah. It's going to be this direction; right?
- A. Yeah. It's going to be, let's say about - - well, through the driver's door.
- Q. So if she went out the driver's door at that point, her body would end up over here where you found it; correct?
- A. I'd go with that, yes.

RP 465:18-466:2.

Although a reluctant and evasive witness, Det. Cummins finally conceded that dirt located on the lap belt some 17.3 inches from the insert, proved that someone was wearing it *in the passenger seat* at the time of the accident as the defense claimed:

- Q. So you did observe dirt on both the lap belt and the shoulder belt of the passenger side?
- A. Correct.
- Q. And you normally associate that with an accident, don't you, because there was a lot of dirt involved in this case with the car hitting the embankment. You did find dirt throughout the passenger compartment didn't you?
- A. Yes.
- Q. And that would indicate that the seatbelt was in use when the collision occurred, the passenger side, since you found dirt on the part that had been retracted.
- A. I found dirt on the exposed section of the belt.
- Q. But on the retracted part, too, I thought.
- A. There was a little bit, but nothing compared to the driver's side, where it had been used by the tow company.

RP 602:2-602:16.

* * *

- Q. And [the soiled area of the lap belt] would be retracted into the retractor if the belt were not in use; correct?
- A. If it had retracted fully. But, like I said, there was a bit extended that did not retract, because the retractor had wound itself with as much as webbing as it could hold; so there was a little bit of excess that was hanging out.
- Q. But not 44 centimeters.
- A. I didn't actually measure that part that was exposed; no, I did not. So I can't say for sure if it was 44 centimeters or not.

RP 603:15-603:24.

This totally supported the testimony of defense expert Steven Mitchell, M.D., head of the Harborview Emergency Room Department, who concluded to a certainty of 80-90% that the abrasions on the defendant's right shoulder and waist, along with his fractured sternum,

proved he was wearing the *passenger side seatbelt* when the accident occurred:

Q. How probable is it, when you consider all the evidence we have been talking about there, the shoulder injury and the sternal fracture, how probable is it, when you put that together, that this was caused by a seat belt?

A. With the shoulder and the sternum, there's not an exact scientific way to quantify that; but in my thinking about it, I would say between a 75 and 80 percent chance. With the injury to the waist, I think it makes it actually much more likely than that.

Q. Higher than 75 or 80 percent?

A. Yes. I'd put it close to between 80 and 90 percent.

Q. Is there any other cause that you are aware of, from what you know about this accident, that could have caused that combination of injuries, all three?

A. The forces that are generating these types of crashes are hard to predict, and there's a lot going on; but I can't imagine too many situations where you would have the shoulder, the area of contusion on the waist, as well as the sternal fracture. To me, as a treating doctor, it tells me that this guy definitely had a seat belt on.

Q. And that would be the passenger side seat belt?

A. That's correct, sir.

RP 510:8-511:4.

C. **The Constitutional Right to Cross-Examine a Witness About Her Financial Interest in the Outcome of the Trial**

In *State v. Johnson*, 90 Wn.App. 54, 950 P.2d 981 (1998), the court recognized the constitutional dimensions of the right to cross-examination:

A defendant's right to impeach a prosecution witness with evidence of bias or prior inconsistent statement is

guaranteed by the constitutional right to confront witnesses. *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974); *State v. Dickenson*, 48 Wn.App. 457, 469, 740 P.2d 312 (1987). Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis*, 415 U.S. at 318; *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980); *Dickenson*, 48 Wn.App. at 470.

Id. at 69. In *State v. Smits*, 58 Wn.App. 333, 338, 792 P.2d 565 (1990), the court held that “preclusion of any inquiry into possible suit or financial interest was error” and reversed the defendant’s conviction.

In *State v. Whyde*, 30 Wn.App. 162, 167, 632 P.2d 913 (1981), the court extended this rule even to potential litigation in a rape case and reversed the defendant’s conviction because the trial court limited cross-examination about a contemplated civil suit. The court reasoned:

Bias and interest are relevant to the credibility of a witness. This is of special significance here because the entire State’s case depended on the credibility of one witness . . .

Whether the victim intends to commence a civil action for money damages is a proper subject for impeachment.

* * *

The question of a possible lawsuit related directly to the bias, prejudice and interest of S [the complainant]; the trial court’s ruling prevented the defense from making a factual record on which to base its contention that S. fabricated the rape story for her own financial benefit, and was erroneous. It was also error to exclude this issue from S’s cross-

examination. To call these errors harmless would inevitably presume the truth of S's testimony and thereby begs the question.

Id. at 166-67 (citations omitted). *Accord: State v. Roberts*, 25 Wn.App. 830, 834 (1980) (a witness' credibility or motive must be subject to close scrutiny); *State v. Smith*, 130 Wn.2d 215, 922 P.2d 811 (1996) (defendant is entitled to test the limits of a witness' recollection).

D. Application of Rules of Professional Conduct 3.3, Requiring "Candor Toward the Tribunal".

Even more troubling, the presence of her personal injury attorneys during her courtroom testimony, and during the defense interview of Ms. Floyd in the prosecutor's office, raises disturbing questions about their complicity in Ms. Floyd's perjury, or at least their duty of candor to the court.

At a minimum, they failed to rectify Ms. Floyd's false statement made under oath as they are ethically required to do under RPC 3.3. This rule, entitled "Candor Toward the Tribunal," specifically states:

(a) A lawyer shall not knowingly:

* * *

(2) fail to disclose a material fact to a tribunal where disclosure is necessary to avoid assisting a criminal or

fraudulent act by the client unless such disclosure is prohibited by Rule 1.6; . . .³

In *Yurtis v. Phipps*, 143 Wn.App. 680, 691, 181 P.3d 849 (2008),

the Court interpreted RPC 3.3(a)(2) broadly as follows:

Specifically, RPC 3.3(a)(2) prohibits an attorney from failing to disclose a material fact to a tribunal “when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”

And in the case of *In re Stroh*, 97 Wn.2d 289, 644 P.2d 1161 (1982), the Supreme Court ordered disbarment of an attorney convicted of tampering with a witness where the attorney “attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding. . . .” *Id.* at 296. The Court noted that “tampering with a witness strikes at the very core of the judicial system and therefore necessarily involves moral turpitude.” *Id.* at 295.⁴ The Court concluded:

In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, “For an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible.”

Id. at 296, citing *In re Allen*, 52 Cal.2d 762, 768, 344 P.2d 609 (1959).

³ RPC 1.6, entitled “Confidentiality of Information,” would not apply to this situation, however, because of the crime fraud exception discussed below. See discussion of the crime-fraud exception to the attorney-client privilege, *infra* at 29.

⁴ The Rules of Professional Conduct deem “any act involving moral turpitude” to be “professional misconduct.” RPC 8.4(i).

It is clear from the record in this case that the Law Firm of Adler, Giersch was actively representing Leanne Floyd, its attorneys were present in court when she committed perjury and were aware she was lying under oath, yet they took no corrective action. Accordingly, these attorneys violated the prohibition of *Yurtis v. Phipps, supra*, which prohibits “an attorney from failing to disclose a material fact to a tribunal ‘when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.’” 143 Wn.App. at 691-692.

As aptly noted in the *Stroh* case, “for an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible.” 97 Wn.2d at 296 (emphasis added). At minimum, the attorneys in this case knowingly countenanced the commission of perjury by a client they were actively representing. It is also apparent that they prepared for her testimony as evidenced by the fact that two of these attorneys were present during the defense interview of Leanne Floyd in the prosecutor’s office and during Leanne Floyd’s testimony.

Other Rules of Professional Conduct similarly prohibit attorneys from passively allowing or encouraging perjury by a client. A more general rule, RPC 8.4, defines professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” RPC 8.4(c). Another subsection of that rule defines

professional misconduct to prohibit a lawyer from engaging “in conduct that is prejudicial to the administration of justice.” RPC 8.4(d).

In *State v. Berrysmith*, 87 Wn.App. 268, 944 P.2d 397 (1997), the Court held:

RPC 1.15 requires that, except as otherwise noted by the court, a lawyer shall withdraw from the representation of a client if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent. Perjury is both a criminal act and a fraud upon the court. Thus, a lawyer who reasonably believes that his or her client intends to commit perjury and cannot be dissuaded from that course is ethically bound to withdraw unless the court, after being so advised, refuses to permit withdrawal. The question for the court, therefore, is whether the lawyer *reasonably believes* that the client intends to commit perjury and cannot be dissuaded, and not whether the client in fact intends to commit perjury and cannot be dissuaded.

Id. at 275-76. *Accord: Deutscher v. Gabel*, 149 Wn.App. 119, 202 P.3d 355 (2009) (upholding the imposition of sanctions on an attorney who falsely stated to the court that a witness was newly discovered).

E. The Attorney-Client Privilege and Crime Fraud Exception

In *Escalante v. Century Ins. Co.*, 49 Wn.App. 375, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), *overruled on other grounds by Lyellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), the court held that privileged communications between an attorney and a client may be discoverable if there is a *prima*

facie showing of deception or civil fraud. *Id.*, 49 Wn.App. at 394. As noted in *Stephens v. Gillispie*, 126 Wn.App. 375, 108 P.3d 1230 (2005), the “purpose of the attorney-client privilege is to encourage free and full discussion with an attorney,” but “it cannot be asserted to perpetuate a fraud, even civil fraud.” *Id.* at 382 (citations omitted).

In *Whetstone v. Olson*, 46 Wn.App. 308, 732 P.2d 159 (1986), the court specifically held that the crime fraud exception applied to a situation where an attorney and employee coached a witness in support of a civil fraud, entitling the employer to *in camera* inspection of a transcript of an otherwise privileged conversation. In that case, the Court of Appeals affirmed a trial court ruling “that a sufficient inference had been created that this communication related to the furtherance of a contemplated fraud so as to defeat the privilege and render an *in camera* review appropriate.” *Id.* at 309.

This exception applies to civil claims as well as criminal conduct. *Id.* at 310 (citing *State v. Metcalf*, 14 Wn.App. 232, 540 P.2d 459 (1975)). “The rationale for excluding such communications from the attorney/client privilege is that the policies supporting the existence of the privilege are inapplicable where the advice and aid sought refers to future wrongdoing rather than prior misconduct.” *Id.* (citing 8 Wigmore, *Evidence* § 2298 (McNaughton Rev. 1961)).

Moreover, even if the attorneys in this case were ignorant of their client's untruthful testimony (a claim that would be simply unbelievable), the crime fraud exception would still apply:

It does not matter that the attorney was unaware of his client's purpose for seeking the advice. His knowledge or participation is not necessary to application of the exception.

Id. (citing *State v. Metcalf*, 14 Wn.App. at 240, *McCormick, supra*). The threshold showing necessary to trigger this exception to the attorney/client privilege is quite low, requiring that “an *in camera* inspection of the communication itself is warranted upon a showing of a factual basis adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the crime or fraud exception to the privilege has occurred.” *Id.* at 311-312.

In her testimony, Leanne Floyd admitted that she had signed a fee agreement with the Adler Giersch law firm but professed to have no recollection of what it provided, or how the attorneys were being paid.⁵ She was specifically asked about a “contingent fee agreement” but claimed to have no knowledge of this. She adamantly insisted she was seeking no compensation beyond a few hundred dollars to cover burial costs. The defense urges this Court to reverse Defendant's conviction, and

⁵ In general, fee agreements are not even protected by the attorney-client privilege. *State v. Sheppard*, 52 Wn.App. 707, 711, 763 P.2d 1232 (1988).

also to order the production of this fee agreement and any related correspondence between Leanne Floyd and the Adler Giersch law firm pursuant to the “crime fraud” exception to the attorney client privilege.

V. CONCLUSION

This Court should be deeply troubled by the deliberate deception by Leanne Floyd in the presence of her attorneys committed against a Superior Court. She emphatically and unequivocally denied, in her sworn testimony, that she had hired attorneys “to get a large sum of money out of the tragic death of [her] daughter,” answering: “Incorrect. That is not true whatsoever”; then she denied that her “attorneys were demanding hundreds of thousands of dollars from the Turski family.” RP 98. She then filed suit, less than two weeks after the verdict (and eight days before sentencing), personally seeking insurance limits of \$250,000, which have now been paid to her.

This deliberate deception was clearly intended to bolster Leanne Floyd’s credibility as the State’s most critical witness to establish that her daughter Ellen did not know how to drive a car, much less a manual transmission vehicle. The resulting conviction established civil liability, as a matter of law, against Garrett Turski and his family, and created a huge financial advantage for Leanne Floyd *and her attorneys*.

It is even more troubling that her attorneys were present at the defense interview and throughout the trial, and that they met with Leanne Floyd during court recesses. If the jury had known these facts it would

have discounted her credibility and the outcome of the trial would likely have been an acquittal.

Accordingly, the Court should reverse this conviction and remand the case for a new trial, with specific direction to allow defense investigation of the perjured testimony of Leanne Floyd, and the involvement of her civil attorneys in perpetrating a fraud on the court. This discovery could provide a basis for dismissal of the case and other collateral proceedings that would invalidate the payment of a quarter million dollars.

RESPECTFULLY SUBMITTED this 31st day of July, 2012.

A handwritten signature in black ink, appearing to read 'R. Hansen', is written over a horizontal line.

RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 31st day of July, 2012, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Snohomish County Prosecuting Attorney
Attention: Appeals
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

And mailed to Appellant:

Garrett Turski

DATED at Seattle, Washington this 31st day of July, 2012.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUL 31 PM 4:25

APPENDIX 1

RICHARD H. ADLER
JOHN R. ALEXANDER
BETSYLEW R. MIALE-GIX
JANET THOMAN GREEN
E. PAUL GIERSCH, OF COUNSEL



SEATTLE
BELLEVUE
EVERETT
KENT

Wade Clutter
Safeco Insurance Company
PO Box 515097
Los Angeles, CA 90051

April 26, 2010

Faxed to Expedite Request
888-268-8840

RE: Our Client: Ellen Rose Floyd (minor, deceased)
Our File No.: 211600
Your Insured: Garrett Turski
Your Claim No.: 567564924020
Date of Injury: 04/10/2010

Dear Mr. Clutter:

As you are aware, we represent Ellen Floyd for fatal injuries sustained from the motor vehicle collision on 04/10/2010 with your insured driver.

As our client has significant and fatal injuries, we are concerned your insured may not have sufficient liability insurance coverage to satisfy our client's losses. It is our demand you disclose the amount of your insurer's liability insurance policy limits promptly.

Please note in *Smith vs. Safeco*, 150 Wn.2d 478 (2003), the Washington Supreme Court held an insurer's failure to disclose liability policy limits when requested by the plaintiff's attorney prior to litigation can result in a bad faith claim against the insurer when those limits are obtained following litigation. Moreover, as you are aware, we are entitled to this information if a lawsuit is filed in this case. It is not our intention to file a lawsuit, but we are prepared to do so if you and your insured refuse to disclose this information to us now.

I trust you will contact your insured upon receipt of this letter to advise them of our legal right to this information should you make it necessary for us to file a lawsuit. If you decide not to disclose this information to us now, we request you advise your insured to consult a private and independent attorney to discuss whether your refusal to provide us liability policy limits information is in their best financial and personal interest.

I look forward to your prompt response to this demand for information.

Sincerely,

ADLER GIERSCH, PS


Richard H. Adler
Attorney at Law

cc: Garrett Turski

Sincerely,

Wade D. Clutter

Wade Clutter, CPCU AIC
Spokane Service Office
Safeco Insurance Company of Illinois
(800) 332-3226
(509) 944-2613 Fax: (888) 268-8840
wade.clutter@safeco.com

I hereby authorize Safeco Insurance Company of Illinois to disclose the amount of my policy limits for a claim occurring on April 10, 2010.

Signed (05/02/2010) *Kenneth Turcki*

APPENDIX 2



Member of Liberty Mutual Group

Safeco Insurance Company of Illinois
Spokane Service Office
22425 E. Appleway
Liberty Lake, WA 99019

Mailing Address:
PO Box 515097
Los Angeles, CA 90051-5097

Phone: (800) 332-3226
(509) 944-2613
Fax: (888) 268-8840

December 2, 2010

Garrett Turski
C/O Allen, Hansen & Maybrow, P.S
One Union Square
600 University Street Suite 3020
Seattle, WA 98101

ALLEN, HANSEN & MAYBROWN

DEC 06 2010

COPY RECEIVED

Insured Name: Kenneth Turski
Policy Number: H1820387
Loss Date: April 10, 2010
Claim Number: 567564924020

Dear Mr. Turski:

Attached is a copy of my December 2, 2010 correspondence to the attorney for Ellen Floyd (deceased). As you can see, with proper documentation of Ms. Floyd's heirs, we will be willing to settle this claim for your liability policy limit. Your policy provides liability coverage up to \$250,000 per person and \$500,000 per occurrence.

We will continue to attempt to resolve this claim within your policy limit. If this matter goes to trial, any award in excess of these limits is your responsibility.

We invite you to ask any questions you may have or provide any input on how you would like us to respond to Ellen Floyd counsel.

Sincerely,

Wade Clutter, CPCU AIC
Spokane Service Office
Safeco Insurance Company of Illinois
(800) 332-3226 Ext: 522613
(509) 944-2613 Fax: (888) 268-8840
wade.clutter@safeco.com



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Mailing Address:
PO Box 515097
Los Angeles, CA 90051-5097

Phone: (800) 332-3226
(509) 944-2613
Fax: (888) 268-8840

December 2, 2010

Adler-Giersch
14710 Se 36th Street
Bellevue, WA 98006

Insured Name: Kenneth Turski
Policy Number: H1820387
Loss Date: April 10, 2010
Claim Number: 567564924020

Dear Mr. Leritz:

In regard to the claim of your client Ellen Rose Floyd (minor deceased) we have previously notified your office that our insured's have a \$250,000.00 liability policy limit.

Please formally identify the personal representative of Ms. Floyd's estate and all of her heirs. Once we have the heir information and a minimal amount of documentation on Ms. Floyd, we would look favorably on a policy limit demand on behalf of Ms. Floyd's heirs.

If you have any questions or concerns, please do not hesitate to call me.

Sincerely,

Wade Clutter, CPCU AIC
Spokane Service Office
Safeco Insurance Company of Illinois
(800) 332-3226 Ext: 522613
(509) 944-2613 Fax: (888) 268-8840
wade.clutter@safeco.com



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Mailing Address:
PO Box 515097
Los Angeles, CA 90051-5097

Phone: (800) 332-3226
(509) 944-2613
Fax: (888) 268-8840

March 14, 2011

Garrett Turski
C/O Allen, Hansen & Maybrow, P.S.
1 Union Square, Ste 3020
600 University St
Seattle, WA 98101

ALLEN, HANSEN & MAYBROWN
MAR 15 2011
COPY RECEIVED

Insured Name: Kenneth Turski
Policy Number: H1820387
Loss Date: April 10, 2010
Claim Number: 567564924020

Dear Mr. Turski:

We are continuing to attempt settlement with the heirs of Ellen Floyd for your policy limit. We have not, however, received the demand for the limits we have been requesting of the Floyd's attorney.

Your policy provides liability coverage up to \$250,000 per person and \$500,000 per occurrence. We will continue to attempt to resolve this claim within your policy limit. If this matter goes to trial, any award in excess of these limits is your responsibility.

We invite you to ask any questions you may have or provide any input on how you would like us to respond to Ellen Floyd's counsel.

Sincerely,

Wade Clutter, CPCU AIC
Spokane Service Office
Safeco Insurance Company of Illinois
(800) 332-3226 Ext: 522613
(509) 944-2613 Fax: (888) 268-8840
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Mailing Address:
PO Box 515097
Los Angeles, CA 90051-5097

Phone: (800) 332-3226
(509) 944-8370
Fax: (888) 268-8840

May 4, 2012

Kenneth Turski, Rhonda Turski
Garrett Turski
1009 Kerria Ln
Camano Island, WA 98282-6627

Insured Name: Kenneth Turski
Policy Number: H1820387
Loss Date: April 10, 2010
Claim Number: 567564924020

Dear Garrett and Mr. & Mrs. Turski:

We are in receipt of a demand to tender the \$250,000 policy limit by the attorneys for Leanne Floyd and the estate of Ellen Floyd. Your policy provides coverage up to \$250,000 per person and \$500,000 per occurrence. I have enclosed a copy of this demand.

We intend to accept this demand in exchange for a full release of all liability. We will continue our effort on your behalf to resolve this claim within your policy limits.

In the event this case cannot be resolved within your policy limits, you will be responsible for any verdict in excess of those limits. Due to this potential financial exposure, you may wish to retain personal legal counsel, at your own expense, to advise you on this matter.

We invite you to ask any questions you may have or provide any input on how you would like us to respond to Leanne Floyd and the estate of Ellen Floyd

If you have any questions or concerns regarding this claim, please feel free to contact us.

Sincerely,

A handwritten signature in black ink that reads "Wade D. Clutter". The signature is written in a cursive style.

Wade Clutter, CPCU AIC
Spokane Service Office
Safeco Insurance Company of Illinois
(800) 332-3226

Page 2
Kenneth Turski
May 4, 2012

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wade.clutter@safeco.com