

68511-2

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NO. 68511-2-1

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

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STATE OF WASHINGTON

Respondent

v.

GARRETT M. TURSKI,

Appellant

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BRIEF OF RESPONDENT

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## I. ISSUES

1. The defendant sought to admit exhibits consisting of a letter written by a witness's attorney to the defendant's insurance adjustor and a letter written by the insurance adjustor to the defendant's parent to impeach the witness. The trial court excluded those exhibits.

a. Did the trial court abuse its discretion when it excluded those letters?

b. If the exhibits should have been admitted and the defendant permitted to cross-examine the witness on those exhibits, was the error harmless?

2. At sentencing the defense moved for a new trial on the basis that the witness had filed a lawsuit against the defendant and others after the verdict was rendered. Did the trial court err in denying the motion for new trial?

3. The witnesses' civil attorneys were present during her testimony during trial.

a. Has the defendant shown the civil attorneys violated any of the Rules for Professional Conduct?

b. If the civil attorneys were in violations of the Rule for Professional Conduct, has the defendant shown that is a basis for granting him a new trial?

c. Should this Court order production of communications between the witness and her attorneys?

## **II. STATEMENT OF THE CASE**

On April 9, 2010 the defendant, Garrett Turski, picked Ellen Floyd up from her home to go out for the night. Ellen<sup>1</sup> told her mother that she was going to Birch Bay with the defendant and his family. In reality she intended to spend the night with her friend Charlene Beardsley, a young woman Ellen's mother, Leanne Floyd, did not want Ellen to spend time with. RP 88-91, 129-30, 132-34.

The girls, the defendant, and the defendant's friend, Ryan Hogan went to the University of Washington where they went to one or more parties on Greek Row. Before going down there they bought some alcohol. After awhile they left and returned to Ms. Beardsley's home around 12:30 a.m. RP 105-09, 135-138.

Once at Ms. Beardsley's home the girls took off some of their clothes and tanned in a tanning bed in their underwear. The defendant had been drinking alcohol. Mr. Hogan took the

defendant's car keys away from him and put them on a dresser as a reminder not to drive after having drunk alcohol. RP 110-11, 121, 138.

At around 4:00 a.m. the defendant and Ellen left to go to the store. Ellen was not wearing any shoes so the defendant piggy backed her across the parking lot and put her in the passenger side of his car. RP 112, 139-41, 292.

A little after 4 a.m. on April 10 Charlene Carius was travelling on Old Highway 99 approaching 300<sup>th</sup> street when she saw a car driving at high speed. She estimated the car was going 100 m.p.h. Her fear that the car would not make the curve ahead was justified when a few seconds after she saw the car pass she came upon the scene where the car crashed. She did not see anyone running away from the scene. Nor did she see anyone in or around the car. She ran to a pay phone located about 100' from the crash and called for help. The fire department showed up about one minute later. RP 170-75.

When fire and sheriff's personnel arrived they saw the defendant's car had been mangled. They looked around for the

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<sup>1</sup> Leanne Floyd is Ellen Floyd's mother. To avoid confusion the State will refer to Ellen Floyd by her first name. No disrespect is intended.

occupants but did not find anyone at first. After a short period of time later Deputy Peckham heard a muffled cry for help coming from the trunk. She and Deputy Dusevoir opened the trunk and found the defendant lying in the fetal position under some debris inside. RP 186-90, 222, 309.

The defendant spoke to fire and sheriff personnel both at the scene and after he was removed from the trunk and transported to the hospital. The defendant gave conflicting accounts of who was driving and if there was anyone else in the area. At first he said that he did not know what happened, and that he was not driving. He also said there was no one else in the car. Then he said two of his friends were in the car and left him after the crash. At one point he said that his friend Ryan had been driving but had run off and left him there. Later he said Ryan was at home. He also said that he was lying in the back seat when the car crashed. He said that Ellen and Ms. Beardsley had been in the car at some point, and one of them had been driving, but he was not sure which of the two it was. Fire personnel noted that the defendant was very coherent at the scene, and did not exhibit any sign of head trauma or brain injury. He was not diagnosed with any kind of concussion at the

hospital. RP 191-94, 233-36, 247-48, 255, 261-63, 270, 281-82, 310-11, 316, 524.

Fire and Sheriff's officers noted the defendant appeared to have been drinking. He admitted that he had been drinking and was intoxicated. His blood was drawn and later analyzed. The analysis showed the defendant had a blood alcohol content of .11 g/100 ml. RP 237, 264-65, 282-83, 288-89, 305, 402.

Police continued to look for any other occupant of the car. At 6:18 a.m. they found Ellen 15 to 20 feet from the car in the bushes lying face down. She was wearing a bra and sweatpants. She was not wearing any shirt or shoes. She suffered an approximately 2" laceration on her mouth and a clump of hair had been ripped off her head. She had multiple bilateral rib fractures and other blunt force injuries to her chest and abdomen. She had multiple head fractures. Her brain stem had been torn, which caused her death instantly. RP 194-95, 272-73, 352, 395, 398-99, 624-32.

The Collision Investigation Unit of the Sheriff's Office investigated the collision. Deputy Cummings is trained as an accident reconstructionist and has an expertise in seatbelts. The appearance of a seatbelt can change after an accident if it has

been used. The deputy conducted an eight hour examination of the seat belt in the defendant's car. He began by determining whether the seatbelts were in proper working order. He concluded based on an examination of the seatbelts that they were not worn by either the driver or passenger at the time of the collision. RP 545, 549-62.

Deputy Goffin is also an accident reconstructionist with 17 years of experience. He had the accident scene diagrammed using a total station. The tire marks and damage to an embankment and trees in the area were recorded. The damage to the vehicle was also noted. The deputy noted that a clump of hair that was found in the passenger side window and door frame. The hair was confirmed to be Ellen's from a DNA analysis. There was also hair consistent with Ellen's found in a damaged sapling that was in the path between the crash scene and where Ellen's body was found. There was dirt and debris in the damaged portion of the passenger side of the vehicle that corresponded to damage on a dirt embankment. There was tree bark that corresponded with damage to trees on the side of the road located in the damaged portion of the driver's side front fender. RP 331-37, 393, 455-56, 466, 664-65.

Deputy Goffin analyzed all of this evidence and concluded the car had rotated counter clockwise striking the embankment on the passenger side causing the passenger side door to open. The car continued in its rotation hitting the saplings and then the larger trees on the driver's side of the car. The impact on the trees threw the car back onto the road where it came to rest. Using the laws of physics as applied to the evidence found on the car and at the scene and based on the relative locations of the defendant and Ellen, Deputy Goffin concluded that the defendant was driving and Ellen was in the front passenger seat when the collision occurred. He calculated the minimum speed of the car at the time it left the road as 98 m.p.h. RP 341-59, 381-82, 406-07, 410-11, 429, 455, 460, 477-82, 489-91.

As part of the investigation Detective Goffin arranged to have a woman Ellen's height sit in the car, a man the defendant's height sit in the car. The defendant's car was a manual transmission vehicle. Ellen was about 5' tall. The defendant is 5'11". The seat was adjusted so that the woman could only touch the peddles of the car with the tips of her toes. She was not able to depress the pedal. The woman would not have been able to have

operated the car. The man however was able to operate the car. RP 269, 321, 437, 534-37, 579-80, 623.

The defendant was charged with one count of vehicular homicide. 2 CP 220-21. In addition to the facts outlined above the State presented evidence that Ellen had little experience driving a car, and that she did not drive. RP 85-86, 131. The defendant testified and admitted that he had never let Ellen drive his car before. RP 740. He was convicted after a jury trial. 1 CP 14, 185.

### **III. ARGUMENT**

#### **A. THE PROPOSED EXHIBITS WERE NOT RELEVANT TO AN ISSUE AT TRIAL.**

As part of the State's case in chief the State called Leann Floyd, Ellen's mother as a witness. Ms. Floyd testified to the circumstances leading up to her daughter leaving home on April 9, her daughter's physical stature, and her daughter's ability to drive. RP 82-92.

The day after Ms. Floyd testified the defense sought to permit introduction of a letter written by the Alder Giersch law firm to the defendant's insurance adjuster. The letter sought to know the limits of the defendant's insurance policy. It listed Ellen Rose Floyd as their client. The defense also sought to introduce a letter from the insurance adjuster to the defendant setting out his policy

limits. The proposed evidence was offered to attack Ms. Floyd's credibility by showing that she was biased and not truthful when she testified on cross examination that she did not employ attorneys in order to get money. RP 157-60 162-63, 165-67; Ex. 110, 111.

The State objected on the grounds that the testimony and the documents were not relevant, arguing the letter did not contradict the witness's testimony. The Court rejected the evidence on the basis that the demand letter from the attorney's office was not relevant to establish her bias. The court reasoned that the letter did not say what the amount of the claim was, and thus the jury would have to speculate as to whether it was a demand for more than Ms. Floyd had testified to. Additionally, the date of the letter, while it may have contradicted Ms. Floyd's testimony that she did not remember when she hired the attorneys, did not establish her bias. The court rejected evidence of the letter from the insurance adjustor to the defendant on the basis that it was not relevant because there was no evidence Ms. Floyd was aware of it, and therefore it did not tend to impeach her testimony. RP 160-65, 167-169. The defendant assigns error to these rulings. BOA at 1.

The decision to admit or exclude evidence lies within the discretion of the trial court and will be overturned only for an abuse of that discretion. State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id.

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of a matter more or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, but evidence that is not relevant is not admissible. ER 402.

Here the trial court acted within its discretion when it rejected the evidence in exhibits 110 and 111. Ms. Floyd testified that her attorneys were demanding “hundreds of thousands of dollars from the Turski family.” She did admit that “[t]he only finances I asked for was money to help bury my child.” RP 98. The letter from Adler Giersch (1) demanded to know the policy limits, and (2) stated that they did not intend to file a lawsuit but would be prepared to do so if the policy limits were not disclosed. EX 110. It did not state that the attorneys were seeking any particular amount of money. It

therefore did not contradict Ms. Floyd's testimony regarding what she was seeking financially from the defendant.

The March 14, 2011 letter<sup>2</sup> from the defendant's insurance adjuster to the Turski family gives no indication that Ms. Floyd read or was aware of the contents of that letter. At most it states the adjuster has been in contact with the attorneys hired by Ms. Floyd. Whether the attorneys communicated every detail of their dealings with the insurance adjuster is speculative. A court does not err when disallows cross examination where the circumstances only remotely tend to show the witnesses' bias, or where the evidence is vague or merely speculative. State v. Robert, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

Additionally, there was no evidence to establish the foundation which would have made the letter relevant. If Ms. Floyd was not aware of the contents of the letter it would not impeach her. ER 602. The trial court properly excluded the letter from the insurance adjuster to the Turskis.

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<sup>2</sup> The defendant has included two letters dated December 2, 2010, a letter dated March 14, 2011, and a letter dated May 4, 2012 from Wade Clutter, the insurance adjuster, to the Turski family as appendix 2 to his brief. Only the letter dated March 14, 2011 was offered as Exhibit 111. By separate motion the State asks the Court to strike the letters that were not before the trial court.

The defendant argues that his right to confrontation was violated when he was not permitted to present evidence that Ms. Floyd made an insurance claim. A criminal defendant does have a constitutional right to present evidence in his defense and to confront and cross-examine witness under the Sixth Amendment and Article 1, § 22 of the Washington constitution. However, he does not have the right “constitutional or otherwise, to have irrelevant evidence admitted” in his defense. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002). Because the evidence was not relevant, the defendant's right of confrontation was not violated. Id.

The cases cited by the defendant do not change this result. In each of the cases cited by the defendant the proposed evidence was within the knowledge of the witness. State v. Johnson, 90 Wn App. 54, 950 P.2d 981 (1998) (the defendant was precluded from introducing evidence refuting the witnesses' testimony that he would be paid money if the defendant were convicted), State v. Smits, 58 Wn. App. 333, 792 P.2d 565 (1990), (the defendant was precluded from cross examining the victim of an assault about his intention to file a civil suit for monetary damages), State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981) (same), Robert, supra (The

complaining witness in a rape case admitted in a defense interview she got in trouble with her parents for not cooperating with earlier defense interview. The defendant was precluded from cross examining her about that.), State v. Smith, 130 Wn.2d 215, 922 P.2d 811 (1996) (The defendant was precluded from cross examining a trooper about a PBT result that the trooper failed to preserve in a DUI prosecution). Here the defendant did not produce evidence of what Ms. Floyd actually knew about any demands made by her attorneys.

Additionally, in each of those cases the defense was completely precluded from cross examining or introducing any evidence in regard to the subject matter intended to impeach the witness. Here the defense was not restricted from cross examining Ms. Floyd about her financial interest in the outcome of the case. He was permitted to cross examine Ms. Floyd about hiring attorneys, that one of her attorneys was present in court while she testified and during a defense interview, and that there was a fee agreement with those attorneys. RP 97-99.

In Johnson, Smits, and Whyde testimony from the complaining witness was the sole evidence relied on by the State to prove the charges. The witnesses' credibility was of paramount

concern to both parties. Here the State's case was based largely on the physical evidence, the State's expert witnesses interpretation of that evidence, and on circumstantial evidence that supported that interpretation. Ms. Floyd's testimony regarding Ellen's ability to drive a manual transmission car and her physical stature was corroborated by other evidence.

Even if this Court finds the trial court erred in precluding the evidence it was harmless. An error of constitutional magnitude is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986). Ms. Floyd testified to the circumstances surrounding her daughter leaving home on the night she died, her daughter's relationship with Charlene Beardsley and Ms. Floyd's feelings about that relationship, her daughter's physical appearance, and her daughter's ability to drive a car. The first four facts were not contested. The last fact was corroborated by Ms. Beardsley. RP 131. Additionally, the State's case was not dependant on Ms. Floyd's testimony. The State relied primarily on the physical evidence and the expert's interpretation of that evidence to

establish the defendant had been driving when Ellen Floyd was thrown from the car and killed.

**B. THE CIVIL ATTORNEY'S CONDUCT IS NOT A BASIS FOR A NEW TRIAL.**

The defendant characterizes as "troubling" the presence of Ms. Floyd's attorneys during her courtroom testimony and defense interview. The defendant argues that Ms. Floyd committed perjury or a fraud, that her lawyers knew that she had done so, and that the lawyers' failure to correct that testimony was a violation of the Rules of Professional Conduct. He thus urges the Court to reverse his conviction and order production of their fee agreement and related correspondence between Ms. Floyd and the Adler Giersch law firm.

Ms. Floyd had a statutory right to have an advocate or other support person of her choosing present at the defense interview and trial. RCW 7.69.030(10). The civil attorneys had a constitutional right to attend court and hear the testimony of their client. Washington Constitution Art. 1, § 10.<sup>3</sup> Their presence is not at all troubling. To the contrary, it is an unremarkable exercise of those people's rights under the law. That is so even if the civil

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<sup>3</sup> "Justice in all cases shall be administered openly, and without unnecessary delay."

attorneys may have also been evaluating the strength of a potential civil claim at the same time.

The defendant's claim that Ms. Floyd committed perjury or fraud is not supported by the record. To commit perjury Ms. Floyd must have made a "materially false statement" which she knew to be false under oath. RCW 9A.72.020, RCW 9A.72.030. A "materially false statement" is defined as "any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding." RCW 9A.72.010(1). The statements relied on by the defendant to show Ms. Floyd committed perjury are not materially false statements.

As argued elsewhere in this brief, nothing Ms. Floyd said had the ability to affect the course or outcome of the proceeding. Whether she hired attorneys and the reason therefore after her daughter's death did not answer the one contested issue at trial; was the defendant driving when the car crashed? That evidence was designed to impeach her credibility. But what she did substantively testify to was either not contested, or was corroborated by other evidence. The portion of her testimony bearing on the contested issue was only one circumstance of

several that corroborated the detectives' analysis of the physical evidence at the crime scene that led to the conclusion the defendant had been driving.

Further there is nothing in the record that establishes that she knowingly testified falsely. The defendant points to Ms. Floyd's statement that she was seeking no compensation beyond funds to pay for burial expenses and that she did not recall what her fee agreement with the civil firm was. The specific testimony was that she did not remember when she hired the attorneys. Her motivation for hiring the attorneys was so she could be heard and have someone take accountability for the death of her daughter. She said at the time of trial "we have not asked them for any money." The "only finances I asked for was money to help bury my child." She did sign a fee agreement with the attorneys, but she did not remember what it said. RP 97-99.

The defendant argues this testimony was false because after trial she did file a lawsuit against the defendant. That fact does not mean that at the time she was testifying she remembered the terms of the fee agreement and falsely testified that she did not. Nor does it mean that her motivation when she hired the attorneys was anything different from what she testified it was. To the extent

that there is a record of what was happening with the civil attorneys it supports her testimony. Mr. Clutter, the insurance adjustor told the Turskis in a letter that Ms. Floyd's attorney had not provided a demand for the limits of their policy. Ex. 111. They had therefore not "asked them for any money" more than perhaps the burial expenses. At best filing a lawsuit after the verdict in a criminal trial suggests what Ms. Floyd's motivation was at the time the suit was filed.

The defendant argues the civil attorneys had a duty under RPC 3.3(a)(2) and RPC 8.4(d) to tell the court that their client was not telling the truth. But for the same reasons that Ms. Floyd was not committing perjury, the defense has not shown that the civil attorneys violated any duty under the Rules of Professional Conduct. What communications occurred between Ms. Floyd and the attorneys was confidential. RPC 1.6(a). The defendant has not shown beyond mere speculation that any one of the exceptions set out in RPC 1.6(b) exist which would permit the civil attorneys to breach that confidence.

Similarly the defendant's request to discover those privileged communications should be denied. The defendant did not ask the court to conduct an in camera review of the attorney client

communications between Ms. Floyd and the civil attorneys at the trial court level. He has not argued that his failure to do so is a manifest error affecting his constitutional right which would excuse his failure to preserve this issue at the trial court. RAP 2.5(a)(3). Nor has he cited any authority for this Court to order production of discovery.

Neither Ms. Floyd nor her attorneys were a party to the criminal actions. The defendant cites no authority for the proposition that the alleged misconduct of a non-party to an action or her attorney should be the basis for a new trial or for production of confidential communications. Nor does the authority he cites support the proposition that the attorney client privilege that exists between Ms. Floyd and her attorneys is inapplicable in this case.

In addition to the attorney's ethical obligation not to disclose confidential communications between the attorney and his client, the client has a statutory privilege protecting disclosure of those communications. RCW 5.60.060. That privilege does not extend to communications designed to aid the client in carrying out an illegal or fraudulent scheme. Whetstone v. Olson, 46 Wn App. 308, 310, 732 P.2d 159 (1986), State v. Metcalf, 14 Wn. App. 232, 239-40, 540 P.2d 459 (1975), review denied, 87 Wn.2d 1009 (1976). In

order to obtain disclosure of confidential communications on this basis the party seeking disclosure bears the burden to prove the exception applies. Whetstone, 46 Wn. App. at 311. The party must make 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.

In Whetstone the plaintiff brought a sexual harassment suit against her former employer and a co-worker. A consultation between the plaintiff and an attorney who represented her before trial had been transcribed. The Court held that evidence that the claims of alleged harassment occurred after the consultation, and that the plaintiff sought to impute the harassment to her employer only after that date was not sufficient to establish the exception. Id. at 311. The exception was established when the defendant produced evidence that one of the plaintiff's witnesses had been coached with the assistance of the plaintiff and her former attorney. Id.

The defendant here relies on the timing of the lawsuit filed by Ms. Floyd and speculation in regard to the communications between her and her attorneys before that date to support his claim

that the exception to the attorney client privilege exists. That evidence is less persuasive than the evidence the Court in Whetstone held was insufficient to invoke the exception.

Finally, the defendant does not present any reason to believe that the fee agreement, or Ms. Floyd's communications with her attorneys about that agreement, would tend to prove that she committed any kind of fraud on the court. She admitted she had a fee agreement with her attorneys. There is no reason to believe that she did not testify truthfully when she said at that moment she did not remember the terms of the agreement, when the question came at the end of intense cross examination during testimony concerning the death of her daughter which no doubt was a highly difficult and emotional experience for her.

**C. THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED.**

The defendant assigned error to the trial court's decision denying his motion for a new trial. The new evidence was a lawsuit filed by Ms. Floyd against the defendant, his parents and others. He argues the motion should have been granted because the new evidence was material to the outcome of the case.

A motion for new trial may be granted if it affirmatively appears that a substantial right of the defendant was materially

affected due to newly discovered evidence. CrR 7.5(a)(3). A defendant seeking a new trial on this basis must prove that the evidence “(1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. A new trial may be denied if any one of these factors is absent.” State v. Mullen, 171 Wn.2d 881, 906, 295 P.3d 158 (2011). The grant or denial of a motion for new trial is reviewed for an abuse of discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). When exercising that discretion the trial court may not weigh the evidence and substitute its judgment for that of the jury. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Larson, 160 Wn. App. 577, 586, 249 P.3d 669, review denied, 172 Wn.2d 1002 (2011).

The trial court reasoned that the proffered new evidence would not likely have changed the outcome of the trial, was not material, and was both cumulative and impeaching. RP 852-57. The record supports the trial court’s analysis.

**1. The Newly Discovered Evidence Was Merely Impeaching And Was Cumulative To Evidence Already Adduced On Cross-Examination.**

Ms. Floyd testified to Ellen's ability to drive a motor vehicle. Specifically she testified that Ellen had tried to learn to drive a manual transmission car, but was not able to do that. Ellen got around mostly by getting rides from family and friends or she walked. RP 85-87. The defense sought to impeach Ms. Floyd in part by showing she was biased. The bias came from her alleged financial interest in the outcome of a criminal trial. Ms. Floyd admitted that she hired attorneys sometime after the accident. However, she denied that the reason she hired lawyers was to "get a large sum of money out of the tragic death" of her daughter. Instead she explained that she hired attorneys to be heard and to ensure that someone was held accountable for her daughter's death. RP 97-99.

The defendant asserted that evidence she in fact did file a civil suit against the Turskis proves that she had a financial interest in the outcome of the criminal trial. Even if that were true, it would merely be impeachment evidence. The trial court did not err in denying the motion on this basis.

This Court adopted one exception for newly discovered impeachment evidence as a basis for a new trial in State v. Savaria, 82 Wn. App. 832, 919 P.2d 263 (1996), overruled on other grounds, State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003). In Savaria the defendant was convicted of felony harassment alleged to have occurred over the telephone. The trial court denied a motion for new trial based on newly discovered phone records offered to impeach the complaining witness. This Court adopted the reasoning of courts in other jurisdictions finding a new trial is warranted if the impeaching evidence “devastates a witness’s uncorroborated testimony establishing an element of the offense” This court reasoned that under those circumstances the evidence is not “merely impeaching, but critical.” Id at 838.

The proposed evidence in this case does not fall within the exception adopted in Savaria. Ms. Floyd’s did not testify her daughter was not driving. As the trial court recognized Ms. Floyd was not present that night, and had no first-hand knowledge of who was driving. Her testimony was circumstantial evidence that constituted a factor the jury could weigh in deciding who was driving. Ms. Floyd’ testimony alone therefore did not establish an element of the offense.

Nor was her testimony uncorroborated. The uncontested evidence showed Charlene Beardsley was Ellen's good friend. Ms. Beardsley stated she never saw Ellen drive and she never let Ellen driver her car. Ms. Beardsley testified that Ellen got around by getting rides from others. RP 88, 130-31. Even the evidence proffered by the defendant in his motion for new trial corroborated Ms. Floyd's testimony. Suzanna Parker told Detective Goffin that Ellen did not drive and that she did not know how to drive a manual transmission car. 1 CP 141.

The evidence Ms. Floyd filed a lawsuit would not have devastated her testimony. As the trial court remarked, defense counsel had established that Ms. Floyd had hired attorneys who were taking an active interest in the criminal proceedings and those lawyers had a fee agreement of some kind with her. RP 97-99, 857. It is fairly common for family members to seek the assistance of counsel and file lawsuits when someone has been killed in an auto accident. Taking those actions is consistent with seeking to ensure her daughter death was not ignored, and that someone was held responsible for her death. The monetary aspect of a civil action in a wrongful death suit is simply the nature of the way those goals

can be achieved by that method. It does not mean that the family member is motivated by the prospect of a large monetary award.

In addition, evidence that Ms. Floyd did file a lawsuit is cumulative of the evidence the defense brought out on cross examination. "Cumulative evidence is additional evidence of the same kind to the same point." Williams, 98 Wn.2d at 224, quoting, Roe v. Snyder, 100 Wash. 311, 314, 170 P. 1027 (1918). Ms. Floyd admitted she had hired some attorneys in connection with her daughter's death, that they were represented in court during her testimony, and that she had a fee agreement with them. The lawsuit is one of several possible results of those actions. The implication from that evidence is that Ms. Floyd may seek monetary damages from the defendant.

**2. The Newly Discovered Evidence Would Not Have Likely Changed The Outcome Of The Trial And Was Not Material.**

The trial court also had a tenable reason for denying the motion for new trial because evidence Ms. Floyd filed a lawsuit would not likely have changed the outcome of the case. When assessing whether newly discovered evidence meets this factor the court considers the credibility, significance, and cogency of the proffered evidence. Larson, 160 Wn. App. at 587

The credibility of the lawsuit is not contested; Ms. Floyd did file a lawsuit. The fact of the lawsuit is neither significant nor particularly compelling. Ms. Floyd's testimony was limited to establishing circumstantial facts which taken together with reasonable inferences suggested that Ellen was not the driver of the defendant's car when it crashed, causing her death. Ms. Floyd not only testified about Ellen's inability to drive a stick shift car, but she also testified to Ellen's size, her relationship with Ms. Beardsley and the defendant, the facts leading to her daughter leaving home the night she was killed, and her conversation with the defendant after the accident. RP 84-93. She was not present at the time Ellen went to the Shell station with the defendant, and therefore could provide no information about who actually drove upon leaving the station.

Instead the State relied on the testimony of Detectives Goffin and Cummings, experts in accident reconstruction and seat belts respectively. In a careful, methodical manner the witnesses examined the evidence on the roadway and in the car. Detective Cummings concluded the seatbelts were not in use when the car crashed. Detective Goffin concluded that based on the tire marks, injuries, the location of Ellen's hair, and Ellen and the defendant's

ultimate resting place that Ellen had been a passenger when the defendant drove the car and caused the accident.

The defendant's attempt to discredit the detective's testimony does not alter the conclusion that the State's case largely hinged on the detective's expert analysis of the accident scene, and the defendant's car. The detective's testimony was supported by circumstantial evidence, not the other way around. That evidence included the driver's seat location vis a vis the relative height of the defendant and Ellen, and evidence Ellen generally did not drive and was at best a bad driver on the few occasions she was known to drive, and that she had never driven the defendant's car. Because the proffered newly discovered evidence only related to some of that circumstantial evidence, and other circumstantial evidence supported the detectives' conclusions, it was not significant to the outcome of the case.

In addition, the detectives' testimony was not discredited by the cross examination. The defendant points to three exchanges in cross examination where Detective Goffin agreed with the defense theory. BOA at 22-23. However the defense theory did not take into account all of the evidence the detective relied on in forming his opinion regarding Ellen and the defendant's relative positions.

The detective's conclusions were based on his analysis of the car's direction of travel and the movements of the bodies in the vehicles as it hit an embankment and some trees. He discerned those facts from the physical evidence; tire marks on the road, the dirt and debris in the passenger side door and inner door frame and corresponding divot in the embankment, the wood bark on the dent in the front driver's side fender and corresponding damage to trees, the damage to the interior of the car, and Ellen's hair on the top of the passenger side door and door well. Detective Goffin made it clear that while he agreed with the defense theory given the facts *as presented by the defense*, he did not agree that the defense theory was supported by the evidence found on the car and at the scene. RP 342-356, 379, 410-11, 438, 455, 461--66, 473-78, 482, 490-91.

Similarly, Deputy Cumming's opinion was not undermined by cross-examination. The deputy was a collision reconstructionist who was also a seatbelt expert. He conducted an exhaustive inspection of the seatbelts, concluding they worked, and were not in use at the time of the accident. Based on his training and experience, marks found on the defendant's posterior waist or shoulder was not consistent with him wearing a seat belt at the time

of the accident. The discussion regarding the amount of dirt on the lap portion of the belt did not change any of the other findings. As the deputy explained whether it was evidence the belt had been in use depended on how much dirt was found on the belt. Some of the belt had been spooled into the retractor. He did not find a large amount of dirt or mud on the retracted area of the belt. RP 545, 548-49, 552, 555, 559-62, 575, 578-79, 602, 607-08.

Dr. Mitchell, the defense expert, gave no opinion about whether Ellen was wearing a seat belt during the crash. His opinion that the defendant was sitting in the front passenger seat wearing a seat belt was not supported by other evidence. Dr. Mitchell admitted that if the seatbelt were working properly the passenger would still be in the seat at the end of the collision. But the defendant was not in the seat at the end of the crash. Although it was more common for seatbelt injuries to go across the chest, the defendant did not have that type of injury. He admitted that the defendant's fractured sternum and the cut to the defendant's shoulder was not specific to a seatbelt injury. He agreed there was no evidence of injury to his abdomen where the lap belt would have impacted him. RP 518-23.

For many of the same reasons the evidence was not material. New evidence is material if it creates a reasonable doubt that did not otherwise exist without the evidence. Williams, 98 Wn.2d at 229. The lawsuit filed by Ms. Floyd did not refute any of the evidence that showed the defendant was driving at the time of the accident. Even if she in fact was motivated by the prospect of a large amount of money it would not have changed the accident reconstruction, the seatbelt analysis, or any of the circumstantial evidence that supported the conclusion that it was the defendant, and not Ellen, who had been driving. It therefore could not create a reasonable doubt as to that evidence. The trial court correctly determined the new evidence was not material to the outcome of the case.

**IV. CONCLUSION**

For the foregoing reasons the State asks the Court to affirm the defendant's conviction for vehicular homicide.

Respectfully submitted on October 17, 2012.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
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Deputy Prosecuting Attorney  
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October 17, 2012

Richard D. Johnson, Court Administrator/Clerk  
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**Re: STATE v. GARRETT M. TURSKI  
COURT OF APPEALS NO. 68511-2-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

*Kathleen Webber*

KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney

cc: Richard Hansen  
Appellant's attorney

I, the undersigned, a properly licensed attorney  
do hereby certify for the defendant that  
a copy of this document  
has been filed with the clerk of the  
Court of Appeals and that this is true.  
Snohomish County Prosecutors Office  
*[Handwritten signatures and initials]*

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

THE STATE OF WASHINGTON,

Respondent.

v.

GARRETT M. TURSKI,

Appellant.

No. 68511-2-1

AFFIDAVIT OF MAILING

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COURT OF APPEALS  
STATE OF WASHINGTON  


AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17<sup>th</sup> day of October, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

RICHARD HANSEN  
ATTORNEY AT LAW  
600 UNIVERSITY STREET, SUITE 3020  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 7<sup>th</sup> day of October, 2012.



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DIANE K. KREMENICH  
Legal Assistant/Appeals Unit