

NO. 71955-6-I

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

PAULA TERRELL, an individual,

Respondent,

vs.

GORDON HAMILTON, an individual,

Appellant.

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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court's primary error in this case was instructing the jury that the plaintiff needed to sue the defendant so she could gain access to his insurance policy proceeds. Terrell's opposition brief fails to adequately address the specific language of that instruction, its implications, and the obvious effect on the jury as reflected in an excessive award. Because of the court's errors, Hamilton is entitled to a new trial.

II. ARGUMENT

A. STANDARD OF REVIEW.

The parties agree that this Court should review the alleged error relating to the *Rickert* instruction and the denial of the motion for remittitur or a new trial for an abuse of discretion. (Respondent's Brief 29, 44) However, Terrell argues that Hamilton's first alleged error (instructing the jury at the start of trial that Hamilton was insured and the only way for Terrell to collect the insurance money was to sue her domestic partner) should also be reviewed for abuse of discretion. (Respondent's Brief 26-27) That is not the correct standard of review for the trial court's legal error. The court reviews de novo the alleged errors of law in a trial court's instructions to the jury. *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). An incorrect or misleading

instruction is reviewed de novo and will be reversed if it is prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *See Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002).

The trial court's instruction was not a correct statement of the law. There is no precedent in statute, standard jury instructions, or caselaw to justify the instruction.¹ The court did not simply err in whether to give or how to word a correct instruction – the actual substance of its instruction was improper.² (Respondent's Brief 26-27) The court concocted an entirely improper, unprecedented, and highly prejudicial instruction that purported to inform the jury about the existence of insurance and insurance's role in Terrell's decision to sue Hamilton. In essence, it

¹ The instruction is not "analogous to" or "in the nature of" WPI 1.01.03 or 1.01. (Respondent's Brief 26) While WPI 1.01 provides instructions that a court may give the jury at the outset of a case (before and after voir dire), it does not address insurance, and it certainly does not contemplate the unusual instruction given by the court. Similarly, WPI 1.01.03 is an instruction to outline the elements of the claims and defenses. The fact that Terrell had to sue Hamilton to access his insurance proceeds is not an element of any claim in the case.

² The case of *Dickerson v. Chadwell*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *rev. denied*, 118 Wn.2d 1011 (1992), does not apply to this case. (Respondent's Brief, 27) *Dickerson* deals with an evidentiary decision at trial (not voir dire), and the court's decision to grant a new trial (not give an improper instruction to the jury).

amounted to an impermissible comment on the evidence. A de novo review is necessary.³

Terrell also argues that because Hamilton proposed some of the language in the instruction, it was invited error. (Respondent's Brief 29) In fact, the trial court instructed the parties to formulate proposed instructions for its review. (RP 221-26) After determining what language it would use, the court specifically invited the parties to register objections to preserve the issue for appeal. (RP 236). Hamilton's counsel opposed the instruction throughout the process, and specifically objected for the record. (RP 220-26, 237). The error was properly preserved and should be reviewed de novo.

B. THE COURT'S INSTRUCTION REGARDING INSURANCE WAS ERRONEOUS.

The instruction given to the jury at the outset of the case has no foundation in the rules, statutes or caselaw:

. . . I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case.

(RP 247)

³ Even if the Court reviews the instruction under the more deferential abuse of discretion standard, a new trial is still warranted. The decision to instruct the jury at the outset that Terrell had to sue Hamilton to access insurance is so misleading, improper, and prejudicial that it constitutes reversible error under either standard.

1. The Instruction Has No Basis in Washington Law.

Contrary to Terrell's assertions, WPI 1.01.03 does not provide a justification for this instruction. (Respondent's Brief 33) The instruction did not set forth the elements of the claim or help the jurors understand evidence they would encounter. *See* comments to WPI 1.01.03. 6 WASH. PRACTICE, *Washington Pattern Jury Instructions*, at 21-22 (6th ed. 2012) Further, the instruction in no way helped the jury focus or remember relevant evidence. *Id.* The fact that there is not a WPI dealing with intra-family lawsuits and how they effect accessability to insurance proceeds did not give the court free rein to make one up on its own, particularly when the instruction was so obviously prejudicial. (Respondent's Brief 33) The court's instruction, while perhaps well-intentioned, was improper and grossly prejudiced Hamilton.

Respondent also incorrectly argues that defense counsel brought insurance into the case when he insisted on using the statement Terrell made to an insurance representative to impeach her. (Respondent's Brief 33) In fact, the court instructed the jury about Terrell suing Hamilton to get at his insurance money before the case had begun. Hamilton's counsel had not impeached Terrell or referenced it in opening statements because the court's instruction was given immediately after the jury was empaneled.

Further, it was defense counsel's prerogative to make that tactical choice (whether to impeach plaintiff with statements to an insurance representative) if he determined it to be a worthy strategy during trial. (CP 551) Before voir dire, the court ruled on a motion in limine that Hamilton's counsel could ask Terrell about her prior statements regarding black ice, and Terrell's counsel could inquire as to whom the statements were made (*i.e.*, the insurance representative). (RP 52-57) After the potential jurors discussed insurance during voir dire by plaintiff's counsel, Hamilton's counsel followed up with several insurance-related questions, but he made no mention of impeaching Terrell with the statement to the insurance representative. (RP 160-61, 164, 180-81, 205-06) Because of the timing and nature of the court's instruction, Hamilton's counsel had no opportunity to decide whether or not to impeach Terrell – the decision of whether to introduce insurance was made for him by the court.

Finally, Terrell incorrectly argues that Hamilton's counsel was involved in the formulation of the instruction and cannot now complain about it.⁴ (Respondent's Brief 29, 34) The record reflects that Hamilton

⁴ Terrell argues that it was Hamilton's counsel who "convinced" the trial judge to use the word "insurance" instead of "third party payor" in an attempt to suggest that Hamilton supported the instruction. (Respondent's Brief 34) In fact, the instruction proposed by Terrell and the language intended for use by the court already included references to insurance, and Hamilton merely proposed eliminating the language "third party payor." (CP 556, 558, 560) Defense counsel's attempt to work with the court to mitigate the

disagreed with the court's assertion that an instruction was necessary, opposed the need for any instruction beyond the standard WPI statement not to consider insurance, and clearly objected to the final instruction before it was given to the jury. (RP 219-26, 235-40)

2. Insurance Had No Proper Role in This Case.

In an attempt to justify the unusual and prejudicial instruction, Terrell engages in a lengthy discussion about how, from her perspective, insurance and its role in litigation have changed over the years. (Respondent's Brief 35) Unfortunately, Terrell fails to cite a single statute, case, or study to support her assertions. Further, Terrell's discussions about insurers being sued in their own names in cases involving breach of contract, UIM benefits, and bad faith only serve to underscore the fact that none of those situations existed in this case. (Respondent's Brief 35-36) Hamilton's insurance company was not a party to the case, and it had no business being brought into the fray. The instruction given by the court injected the insurance company into the case, such that the lawsuit effectively became a bad faith case against the insurance company.

disastrous instruction should be commended, not viewed as acceptance of, or involvement in, the error. (RP 237-40) Indeed, the insurance company would have been even more drawn into the case and Hamilton even more prejudiced if the jurors were told that the insurance company was a "party" to the case.

Terrell argues that jurors no longer “faint” if they heard the word insurance at trial, but the court’s instruction was so much more harmful than the sort of passing reference Terrell contemplates. (Respondent’s Brief 35) First, it was not an offhand reference to insurance by an attorney or witness. The jury was specifically instructed by the court as the first order of business at the start of trial. Jurors know that the attorneys are partisans, but they attach special significance to instructions from the court. *See State v. Jackson*, 83 Wash. 514, 523, 145 P. 470 (1915). Also, the instruction not only unequivocally informed the jury that Hamilton had insurance, but also that Terrell had to bring this lawsuit in order to get that insurance money. This implied both that Terrell was entitled to the money and that the insurance company had not given the money to her, thus forcing her to sue her partner. In the kinds of breach of contract, UIM, and bad faith cases discussed by Terrell, insurance companies are named in the suit because their potential liability is predicated on their own actions. (Respondent’s Brief 36) Hamilton’s insurer had no liability in this case, but the court’s instruction turned the insurer into a virtual party.

Terrell notes that ER 411 allows evidence of insurance for certain purposes, but not for proving liability. (Respondent’s Brief 37) This may be true, but none of the examples given in ER 411 address the circumstances in this case. Further, the language of the instruction in this

case did not just inject insurance into this case, it also injected the insurance company as a virtual party to the case. Again, the clear implication from the instruction is that Terrell only had to sue Hamilton because the insurance company was not allowing her to “access” the money otherwise. This case does not present a situation in which the existence of insurance (and most pointedly, the fact that Terrell had to sue Hamilton to access that insurance) had any bearing on the issues in the case such that an instruction from the court was appropriate.⁵

3. There Was No Jury Confusion Necessitating an Instruction.

Terrell, like the trial court, clings to the notion that the instruction was necessary because the jurors were profoundly confused about why a person was suing her spouse. (Respondent’s Brief 15, 17, 39) In fact, a review of the voir dire conducted by Terrell’s counsel demonstrates that there was a brief discussion of the topic, but no real confusion. (RP 181-84). Two prospective jurors (who may not even have become part of the

⁵ The case cited by Terrell, *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 P. 99 (1914), involved cross-examination of a defense witness who had testified on direct about his conversations with the plaintiff in the hospital. (Respondent’s Brief 37-38) The *Moy Quon* Court allowed testimony that the witness was an insurance representative to show bias. *Id.* at 530. There is no similar issue in this case. The court’s instruction was not remedial, was not needed to address witness bias, and had nothing to do with any testimony in the case. Similarly, *Evans v. Mercado*, ___ Wn. App. ___, 338 P.3d 285 (2014) is irrelevant because that case involved a suit against plaintiff’s insurer for UIM benefits where the insurer was a party. (Respondent’s Brief, p. 36, 38)

panel), answered questions from Terrell’s counsel, but both concluded that they were fine with the scenario of one spouse suing the other. (RP 183-84) The prospective jurors were not “incorrectly focusing on the role of insurance in intra-family lawsuits.” (Respondent’s Brief 39-40) First, the prospective jurors were simply responding to direct questions from Terrell’s counsel. Second, insurance and intra-family lawsuits were two separate discussions (although both were moderated by Terrell’s counsel). The two issues never became conflated until the judge brought up the perceived need to give the instruction.

Perhaps it would have been acceptable for the court to give a WPI 2.13 instruction (that the jury should not consider insurance) and another similar instruction that the jury should not consider the spousal relationship in determining issues of liability and damages. Instead, the court wrapped insurance and spouses into one toxic instruction that told the jury Terrell needed to sue Hamilton in order to get the insurance money. The trial judge’s intent is clear from her statements throughout the process – she was concerned about confusion of one spouse suing another, and not the fact that insurance had been mentioned in voir dire.⁶

⁶ The court’s suggestion in its order denying a new trial that the instruction was due to insurance comments by defense counsel is directly refuted by her comments throughout the process of formulating the instruction. (CP 598; RP 220, 223, 225-26, 240)

(CP 598; RP 220, 223, 225-26, 240) Again, regardless of whether the instruction was well-intentioned, it constituted a highly prejudicial error. The instruction is so outrageous that it is not surprising that neither party is able to cite to a case involving a similar instruction. (Respondent's Brief 40)

4. The Instruction Was Prejudicial.

Terrell largely avoids addressing the implications of the instruction and its prejudice on the defense. Instead, Terrell actually suggests that the instruction may have prejudiced her because it may have alerted the jury to possible collusion. (Respondent's Brief 42) Terrell's novel argument actually draws attention to another reason why the instruction was so prejudicial to Hamilton. The court's instruction specifically sanctioned the lawsuit brought by Terrell against Hamilton by explaining why she brought the suit. Even if the jury harbored concerns that the parties were colluding, the court's instruction eliminated any chance that the jury would find Terrell not credible by informing them that this lawsuit was the only way for her to properly collect insurance proceeds. Implicit in the instruction is the idea that suing a partner to access insurance is an appropriate legal action.

The prejudice caused by the instruction is unavoidable. First, prejudice is presumed if the instruction contains a misstatement of the law.

See Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). The court's instruction about suing a spouse to access insurance is a misstatement of the law and an otherwise impermissible instruction. In essence, the court's instruction amounted to an improper comment on the evidence by the court because it either expressed or implied an improper attitude towards the case. *See State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Judicial comments are presumed to be prejudicial. *Id.* at 723.

In addition, the instruction prevented the defense from making decisions about what arguments (*i.e.*, tactical choices) to make in its case. *See Cox v. Spangler*, 141 Wn.2d 431, 442-45, 5 P.3d 1265 (2000). After the instruction, defense counsel no longer had any real option of whether or not to impeach Terrell with evidence of her statement to an insurance representative. That bell could not be unrung. Terrell argues that the jury verdict was "evidence of a jury paying attention." (Respondent's Brief 43) In fact, the jury likely paid attention to the court's instruction about the reason for the suit, resulting in it punishing Hamilton's insurance company with a punitively-large general damages verdict against the defense.

The instruction also misled the jury away from the true issues of the case by making the insurance company a virtual defendant. Terrell's

counsel exploited the instruction throughout the trial and helped further what the instruction started – turning the case into one against Hamilton’s insurance company. It started during voir dire when Terrell’s counsel challenged the jurors whether a lawyer had an absolute duty to do as his client requests. (RP 184-85) Terrell’s counsel followed up with questions during Hamilton’s cross-examination about whether he agreed with hiring defense experts and whether he wanted to be at trial. (RP 289-91) Terrell’s counsel similarly challenged one of Hamilton’s experts about whether he had ever met Hamilton. (RP 616-17) Terrell’s counsel also engaged in subtle actions that further enforced the instruction such as instructing Hamilton to sit near plaintiff’s table when the jury entered or exited.⁷ (CP 552) All of these actions continued to drive a wedge between Hamilton and his lawyer and to reinforce the notion – first given in the court’s instruction – that the insurance company was the true target.⁸

Finally, Terrell’s assertion that the instruction was invited error misapprehends the record in this case and the law regarding invited error.⁹

⁷ In his initial Brief, Hamilton mistakenly attributed a comment about the insurance instruction made during closing arguments by Hamilton’s counsel to Terrell’s counsel. (Appellant’s Brief 17)

⁸ The portion of Terrell’s Brief devoted to “difficulties” between defense counsel and Hamilton is irrelevant to the issues on appeal and these arguments should be stricken and disregarded by the Court. (Respondent’s Brief 23-25)

⁹ The cases cited by Terrell do not support her argument that Hamilton invited error. *Mitchell v. Lantry*, 69 Wn.2d 796, 420 P.2d 345 (1966), involves a waiver of claimed

(Respondent’s Brief 41) The goal of the invited error doctrine is to prevent a party from setting up an error (for example, to create a test case) and then complaining about it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). Hamilton opposed the inclusion of the instruction, and he certainly did not intentionally seek to have the instruction given. Unlike the defendant in *Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996), Hamilton did not propose the instruction or argue that it should be included. Although Hamilton reluctantly participated in the formulation of the instruction as ordered by the court, he repeatedly objected to the need for it and the language included. (RP 219-26, 235-40) He also specifically objected to it when the court allowed. (RP 237) There is no basis to argue that Hamilton worked to set up this error on appeal such that the invited error doctrine applies.

C. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE RICKERT CASE.

Terrell asserts that the the “dicta” from the *Rickert* case was properly excluded. (Respondent’s Brief 30) In fact, the proposed

error where defendant also testified about insurance. In our case, the issue is with the instruction before any testimony. Further, there certainly was no testimony by Hamilton that Terrell had to sue him so she could access his insurance necessitating a remedial instruction. In *State v. Newbern*, 95 Wn. App. 277, 975 P.2d 1041, *rev. denied* 138 Wn.2d 1018 (1999), a criminal defendant failed to ask for a limiting instruction after potentially-harmful testimony was admitted. In our case, there was no testimony about which to request a limiting instruction. There is no basis in Washington law to suggest that Hamilton should have requested a limiting instruction to another instruction given by the court.

instruction was a correct statement of the law from *Rickert*, and there was evidence at trial to support its inclusion. See *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287 (2009). In *Rickert*, the Washington Supreme Court upheld a jury instruction which stated that the mere skidding of an automobile, alone, is not evidence of negligence. *Rickert v. Geppert*, 64 Wn.2d 350, 355, 391 P.2d 964 (1964). In other words, according to the *Rickert* Court, a driver has not automatically created an unreasonable risk of harm to others if his car skids on slippery pavement. *Id.* In *Rickert*, the car skidded on an unseen icy patch of road in foggy conditions. *Id.* at 351-52. Terrell does not appear to dispute that the factual circumstances in which the instruction were appropriate in *Rickert* are closely mirrored by the factual circumstances in this case. Hamilton's car slid on an unseen icy patch while driving in snowy conditions and on wet pavement. (RP 321, 395, 1030, 1110, 1115-16, 1152) The additional fact that Hamilton had no recollection of how the accident occurred makes this requested instruction all the more important.¹⁰ (RP 296)

Without the instruction, the jury was only given an instruction on negligence that a driver must see what a reasonable person would see.

¹⁰ The fact that Hamilton had no memory of how the accident occurred also defeats Terrell's arguments that he admitted liability. (Respondent's Brief, 4, 24, 33) A person cannot admit he was wrong if he has no recollection of anything that he did to be in the wrong. Liability was a factual issue for the jury to determine.

(Instruction No. 10) (RP 1267; CP 421) The defense was unable to effectively argue its theory of the case, namely that Hamilton was not automatically liable simply because he did not see black ice and skidded on the road. Although Terrell may be correct that a jury could disagree with that argument and theory, the jury should have been instructed by the court that it was a legitimate legal theory in light of the facts. (Respondent's Brief 32) Terrell asserts that the court was correct in failing to give this instruction because it was merely an example of what would not constitute negligence and "there are literally millions of things that negligence is not." (Respondent's Brief 32) (emphasis in original) In truth, however, there were not millions of related exclusions to negligence which applied to this case. Based on the specific facts presented, there was only one particular instruction needed to clarify the issue of negligence for the jury.

Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *See State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). Hamilton was prejudiced because the failure to give the instruction affected his argument of the defense legal theory and ultimately the outcome of the case. *See Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). The jury lacked an important component for its liability analysis. Without the

instruction, liability was a forgone conclusion. The jury was able to conclude that Hamilton was at fault simply because he was driving when the car slipped off the road and into a tree. Proper instruction on this important point – considering the evidence of the road conditions and the lack of clarity about how the accident occurred – could very well have allowed the jury to return a defense verdict.

D. THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL.

The error in the trial court's failure to grant a new trial is rooted in its errors in giving the insurance instruction and failing to give the *Rickert* instruction. These reversible irregularities had a profound effect on the jury's verdict to Hamilton's prejudice. See *Morris v. Nowotny*, 68 Wn.2d 670, 415 P.2d 4 (1966). The jury should have been fully instructed on the issue of negligence in the case based on the facts surrounding the accident (particularly testimony regarding black ice and Hamilton's inability to recall how the accident occurred). The court should have given the jury the requested instruction based on the *Rickert* case. Also, the jury should not have been informed – by the court in its very first instruction at the start of trial – that Hamilton was insured and Terrell had to sue him in order to access the insurance proceeds. This prejudicial statement and the reasonable inferences that are necessarily drawn from it were unfairly damaging to the defense.

The excessive award, particularly the noneconomic damages award, also warranted a new trial. First, the award was grossly excessive in comparison to the economic damages, as it was over five times that amount. Second, the unduly-large award demonstrates that Hamilton was prejudiced by the erroneous jury instruction on insurance. Such a large award is a clear attempt by the jury to punish Hamilton's insurance company. *See Ryan v. Westgard*, 12 Wn. App. 500, 530 P.2d 687 (1975). The court instructed the jury that the reason for the lawsuit was to allow Terrell to collect from Hamilton's insurance policy. Implicit in this instruction is the idea that Terrell was only forced to sue her domestic partner because the insurance company failed in its duty to pay. Based on this instruction, and the efforts by Terrell's counsel to drive a wedge between Hamilton and his lawyer (and by extension, the insurance company), it is not surprising that the jury sought to punish the insurance company that was "responsible" for the lawsuit. The court's errors, evidenced in the unduly-large damages award, warrant a new trial.

E. ATTORNEY FEES ON APPEAL ARE NOT APPROPRIATE.

Terrell has requested attorney fees on this appeal. (Respondent's Brief 48-49) In fact, this appeal presents debatable issues on which reasonable minds differed. *See Matheson v. Gregoire*, 139 Wn. App. 624, 639, 161 P.3d 486 (2007), *rev. denied*, 163 Wn.2d 1020, *cert. denied*, 555

U.S. 881 (2008). Indeed, the trial court was careful to make a complete record, and it specifically allowed the parties to articulate objections, recognizing that the Court of Appeals may review the instruction. (RP 237) Although Terrell disagrees with Hamilton's arguments and citations, they are well-grounded in law and the facts of this case. Hamilton's appeal is not frivolous, and Terrell has no basis for attorney fees on appeal.

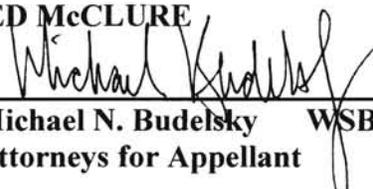
III. CONCLUSION

Terrell's discussions about "high risk" trial strategies and other missives launched at defense counsel miss the issues at the heart of this appeal. (Respondent's Brief 2, 50) Hamilton asks this Court to look beyond the contentious nature of the trial and closely examine the trial court's decisions in this case, particularly the decision at the start of trial to inform the jury that Terrell needed to sue Hamilton in order to collect his insurance money. This instruction was a serious legal error that tainted the trial and resulted in the punitive verdict. Hamilton is entitled to a new trial.

DATED this 5th day of January, 2015.

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