

FILED
COURT OF APPEALS
DIVISION II

08 JUN 25 AM 10:19

STATE OF WASHINGTON
BY am
DEPUTY

No. 37158-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

JOLEE MERCER

v.

RICKY BIRCH, et al.

REPLY BRIEF OF APPELLANT

JENNIFER K. SNIDER
Of Attorneys for Jolee Mercer
Petitioner on Review
201 NE Park Plaza Dr., Suite 248
Vancouver, WA 98684
(360) 696-1526

TABLE OF CONTENTS

1.	Table of Authorities	ii
	Case Law	ii
	Rules	ii
2.	Inaccuracies in PRP Statement of the Case.	1
3.	Response to PRP Argument Re Photographs	3
4.	Response to PRP Argument Re Dr. Tesar	8
5.	Prejudice to Jolee	13
6.	Conclusion	15

TABLE OF AUTHORITIES

Table of Cases

ALCO vs. Aetna Cas & Surety Co., 140 Wn.2d 517 (2000)13, 14

Cady v. Department of Labor & Industries, 23 Wn.2d 851 (1945) . . . 7

Davis v. Sill, 55 Wn.2d 477 (1960) 12

Fenimore v. Drake, 87 Wn.2d. 85 (1976) 5

Kadmiri v. Claasen, 103 Wn. App. (2000)7

Kramer v. Portland - Seattle Auto Freight, Inc., 43 Wn.2d 386 (1953).7

Moore v. Smith, 89 Wn.2d 932, 942, (1978) 14

Murray v. Mossman, 52 Wash.2d 885, (1958)4, 8

Slattery v. City of Seattle, 169 Wn. 144, 148, (1932) 14

State v. Clemons, 56 Wn. App. 57, 62, (1989)15

State v. Lord, 117 Wn.2d 829 at 855 (1991). 15

Taylor v. Spokane P& S, 72 Wash. 378 (1913) 8

Regulations and Rules

CR 35 12

CR 35(b)12

ER 403 3

A. Inaccuracies in PRP's Statement of the Case

PRP's statement of the case contains several misleading and in some instances, false, statements. Specifically, PRP seems to suggest that Jolee was somehow derelict because Dr. Tesar's initial discovery deposition took place less than a month before trial. Jolee did not *decide* to take Dr. Tesar's deposition one (1) month prior to the initial trial date. Jolee requested dates from PRP on February 26, 2007 and that date was selected. CP 30-32. Jolee did not limit the time for the deposition, Dr. Tesar's office did. Just prior to the deposition, Jolee had to request a protective order because the doctor wanted \$1330 for an hour of time. Id. While it is true that Jolee's counsel indicated at the conclusion of the April 12, 2007 deposition that no additional time was needed, this was AFTER Dr. Tesar had already testified that his opinions were contained in his June 22, 2006 report. CP 47.

PRP suggests that *all* Kaiser Permanente records regarding Jolee were sent to Dr. Tesar in advance of his June 22, 2006 medical examination and report because the transmittal letter indicated there were records from Kaiser Permanente. This is false. At Dr. Tesar's June 21, 2007 deposition he acknowledged receipt of a four and a half to five inch stack of records from PRP counsel on April 16, 2007, four (4) days

AFTER the first discovery deposition. CP 125. Dr. Tesar indicated that the records he received from Kaiser Permanente prior to his June 22, 2006 examination of Jolee were very few and that he had no records for the time period 4/5/02 - 4/22/022 (just following collision). Id. In addition, the following exchange occurred at Dr. Tesar's April 19, 2007 perpetuation deposition:

Ms. Snider: I'm going to object because it's very apparent at this point that you've provided Dr. Tesar with a significant amount of information since last Thursday; is that correct?

Mr. Klug: I believe we have, yes.

Ms. Snider: Okay. And so if he's –

Mr. Klug: Wait. First, counsel, I would not necessarily say – characterize it as a significant amount. What we provided to him were copies of records from your client from Kaiser Permanente. CP 123, Page 21, Lines 11-21.

PRP suggests that Jolee had three (3) opportunities to depose Dr. Tesar. This is not accurate. The April 19, 2007 deposition was a *perpetuation* deposition scheduled by PRP counsel. He did not finish his direct examination of Dr. Tesar, and Jolee did not begin cross examination. CP 123.

B. Response to PRP Argument Regarding Use of Photographs

In her opening brief, Jolee asserted four (4) separate bases for the Court to determine that the photographs should not have been shown to the jury: 1) they were not relevant; 2) they did not meet the standard for use of illustrative exhibits; 3) they were prejudicial under ER 403; and 4) they were used improperly by PRP counsel following specific instruction by the trial court.

PRP completely fails to dispute Jolee's assertions that it was the intent of PRP to present the photographs to the jury to allow them to speculate and makes no attempt to explain the excerpts from the record. Instead, PRP claims that Jolee may have objected to the photographs under ER 403 because of the need for expert testimony to relate the photographs to injury. (PRP Brief, Page 12). Actually, one of Jolee's objections to the photographs was that there would be no testimony from any witness, expert or lay, tying the photographs to injuries claimed by Jolee. RP 27, Lines 26-28. The trial court had properly limited any attempt to link the damages to the vehicle to the damages sustained by Jolee with a pre trial *motion in limine*. CP 95,96 and 132.

In the paragraph in the PRP brief discussing ER 403, PRP

attributes a direct quote to *Murray v. Mossman*, 52 Wash.2d 885, (1958) to support the proposition that no expert testimony is necessary. (PRP Brief, Page 12) The quote attributed to *Murray* is not found within *Murray*, but rather a later unpublished opinion. In addition, although *Murray v. Mossman* has been referred to in some 28 published cases in Washington since it was decided in 1958, **none** of those cases involve use of photographs. In short, PRP has failed to address, yet alone rebut, Jolee's assertions regarding PRP's intent to use the photographs to allow the jury to speculate.

Similarly, PRP did not respond at all to assertions that the photographs were used improperly against court instruction. The record speaks for itself on that issue.

In claiming that Judge Nichols ruled that the photographs were relevant, PRP cites to CP 27. CP 27 was not designated by either party in this appeal. Judge Nichols did remark on relevancy. RP 27. But he had previously stated that the photographs were **not** relevant. RP 19. The Court contradicted itself, which supports Jolee's position regarding prejudice. In addition, even if the Court determined the photographs relevant, that doesn't automatically allow them to be used. As indicated in

Jolee's opening brief, relevant evidence can, and should be excluded, under ER 403 if it is being submitted to mislead the jury or invite speculation. As previously stated, PRP failed to address the issue of prejudice, speculation and attempts to mislead the jury in its brief to this court.

PRP suggests that the photographs were properly admitted for illustrative purposes because they supported PRP's theory of the case. PRP cites to *Fenimore v. Drake*, 87 Wn.2d. 85 (1976) to support the idea that facts which tend to establish a party's theory are relevant and therefore admissible. There are two (2) important distinctions between *Fenimore* and the case at bar. First, in *Fenimore*, the jury was being asked to determine duty and breach, which was admitted here. Second, the theory being proposed regarding negligence in *Fenimore*, was not prohibited by a pre-trial motion in limine, as it was here. PRP states that their theory was that "the impact between the Respondents' semi-truck and the Appellant's sports utility vehicle was a light collision." *Brief of Respondent, Page 6*. Although not stated directly, the second implied portion of the theory is clear: "Because it's a light collision, Jolee could not have sustained the injuries claimed".

This “theory” is replete with problems. First, it was prohibited by Judge Nichols in a pre-trial motion in limine. CP 95, 96 and 132. Even with that prohibition, PRP counsel stayed with the theory at trial and continues to state it in the brief to this court. His statements and suggestions are not evidence and should not have been considered as such. There was no *evidence* presented at trial to support this stated theory of the case. No one testified that the collision was “light”. There were no admitted exhibits related to the collision being “light”.

Photographs of the vehicles taken *after* the collision has taken place, cannot demonstrate whether the collision was light or substantial, nor can they demonstrate what injuries the occupant sustained. The court ordered that the photographs could be used to cross examine Jolee about what she said happened in this collision and to show the scene of the accident, not with regard to impact and connecting that to the injuries. RP 36, Lines 9-12. The trial court properly disallowed any attempts to relate the photographs of the vehicles to injury sustained by Jolee. However, as stated by PRP counsel on multiple occasions, this was the exact reason PRP wanted the photos shown to the jury. What else can be meant by “pictures say a thousand words”? RP 180, Line 19-20.

Both parties acknowledged that the use of photographs is encouraged where it will aid the jury. As anticipated, PRP argued that the photographs could assist the jury to understand causation which PRP claims was “vigorously disputed”. PRP continues to miss the point. Causation was not vigorously disputed at the trial court level. There was no question that Jolee was injured in the collision - that the collision *caused* damage. The question the jury was asked to decide was to what extent was Jolee damaged. Contrary to PRP’s claim that the “severity of the impact between the vehicles was highly relevant to that issue”(extent of damages) (PRP Brief, Page 10), the severity of the impact was irrelevant to determining damages in this case because no witness could tie impact to injury.

The cases PRP relies on to support use of photographs, are not factually similar to the case at bar. *Kramer v. Portland - Seattle Auto Freight, Inc.*, 43 Wn.2d 386 (1953) is a wrongful death case where speed and damage to the vehicle were in issue. Neither were issues in the case at bar. *Cady v. Department of Labor & Industries*, 23 Wn.2d 851 (1945) deals with a hand injury while logging trees. *Kadmiri v. Claasen*, 103 Wn. App. (2000) involved a rear end motor vehicle collision with admitted

liability. Use of photographs was not a claimed error that the appellate court reviewed in the case. *Taylor v. Spokane P&S*, 72 Wash. 378 (1913) involved a collision between a train and a vehicle where a photograph of the crushed car was admitted on the issue of causation. In the case at bar, there was no dispute that the collision between Jolee's SUV and PRP's 18 wheel flat bed *caused* injury to Jolee. In addition to the misstatements attributed to *Murray v. Mossman*, 52 Wn.2d 885 (1958) above, the photographs in Murray case were used to clarify the testimony of witnesses, which was not the case here.

The photographs were irrelevant, did not meet illustrative requirements, were prejudicial and were used improperly by PRP. Their use invited and encouraged the jury to speculate, without a basis in evidence, that Jolee's injuries could not have been caused by the collision they depicted. Failure to mitigate the effects of their use and the improper argument put forth by PRP with a curative instruction, requires a new trial in this case.

C. Response to PRP Argument Regarding Dr. Tesar's Testimony.

Jolee assigned error to Dr. Tesar being permitted to testify at trial to opinions not contained in his report. This issue was preserved well in

advance of trial when Dr. Tesar interjected opinions at his perpetuation deposition which were not contained in his report. In addition, Jolee assigned error to Dr. Tesar being permitted to testify at trial to opinions not contained in his report or in his subsequent depositions as **ordered** and limited by the trial court. CP 95, 96 and 132. Dr. Tesar's opinions at trial were not the opinions contained in his report, nor were they the opinions he stated in his first discovery deposition of April 12, 2007 or his second discovery deposition of June 21, 2007. CP 124 and 125 . The majority of the "opinions" stated in his perpetuation deposition of April 19 2007 were prohibited by the court via a motion in limine and following an offer of proof because they dealt with other issues unrelated to this collision. CP 95, 96 and 132 and RP 87-125.

PRP states Jolee had an opportunity to question Dr. Tesar during a perpetuation deposition several months before the rescheduled trial date. (PRP brief, Page 14) This is false. PRP counsel did not finish direct examination of Dr. Tesar in the perpetuation deposition of April 19, 2007, and Jolee asked no questions of him. CP 123.

Similarly, PRP's suggestion that Dr. Tesar had *all* Kaiser Permanente Records in advance of his June 22, 2006 examination/report

contradicts Dr. Tesar's own testimony where he states the Kaiser records he had were few, and acknowledges receipt of several inches of records from PRP counsel after his first discovery deposition and prior to the perpetuation deposition. CP 125.

The trial court allowed Jolee to depose Dr. Tesar a second time and continued the trial date *because* Dr. Tesar received records 10 months after he wrote his report and 4 days after he was deposed by Jolee, and *because* it was obvious in his April 19, 2007 perpetuation deposition that he intended to testify to opinions that he had never before disclosed. CP 45, 46, 47 and 69.

PRP does not dispute case law supporting a request for a new trial where a motion in limine has been violated. PRP simply denies that it was violated and claims that Jolee has failed to show where Dr. Tesar testified outside the scope of his report and his deposition testimony. At the same time, PRP points out the differences between the opinions contained in Dr. Tesar's report, deposition testimony and trial testimony. (PRP Brief pages 17-18). Jolee pointed out the differences and stated as follows in her opening brief: Specifically, Dr. Tesar's testimony at trial violated the *in limine* order when he called an October 2002 incident a "new injury"; a

December 2002 MVA a “new injury”, and an August 30, 2005 MVA a “new injury”. RP 125-142. Prior to trial, he referred to the October 2002 incident as a “flare up”; the December 25, 2002 MVA as an “aggravation” or “increase” in symptoms; and the August 30, 2005 MVA as “increased” her symptoms. CP 145 and 147.

The use of the word “new” versus the words “aggravation”, “increase in symptoms” and “flare-up” is not just a question of semantics as urged by PRP. Dr. Tesar acknowledged that prior to his trial testimony, he had never used the word “new” to describe subsequent injury sustained by Jolee. RP 125-142. He admitted that the statement “increase in symptoms” implied that there was something there to begin with. RP 129. If there is something there to begin with, i.e. back pain, it is not “new”. This testimony violated the *order in limine*.

Had PRP followed the *in limine* order, Dr. Tesar’s testimony would have been limited to his report and subsequent depositions, and he would have testified that the subsequent MVA’s and other incidents were “flare-ups” or “aggravations” or “increase in symptoms”. This would have indicated to the jury that underlying back pain was present when these other incidents took place. The jury did not hear any evidence of pre-

existing back pain.

PRP places much significance on the fact that Dr. Tesar's report was completed in June 2006 and trial did not begin until July 23, 2007. The problem with this argument is that Dr. Tesar did not testify to the opinions contained in his report. Jolee could have had the report in her possession for 10 years prior to the trial date and it wouldn't have mattered. Additionally, the case relied upon by PRP, *Davis v. Sill*, 55 Wn.2d 477 (1960) predates the current version of CR 35, originally enacted in 1967, and amended in 1972, 1993 and 2001.

The *Davis* version of CR 35 stated that the court *may* require a report be written and *may* exclude testimony if there is no report. *Davis* at 479. The current version of CR 35 requires a report stating the party causing examination "shall deliver" a detailed written report, and requires that the report contain "the examiner's findings, including results of all tests made, diagnosis and conclusions..." CR 35(b). If there is no report, the court *shall* exclude the testimony unless good cause is shown. *Id.* There is no good cause for Dr. Tesar having opinions that were not contained in his initial report.

When deposed April 12, 2006, Dr. Tesar indicated he had added a

handwritten opinion to his report. CP 124 . This opinion was related to mental health issues and was disallowed by the court on Jolee's request following an offer of proof. RP 87-125. At no time in the April 12, 2007 deposition did Dr. Tesar indicate that he had additional opinions about subsequent injuries sustained by Jolee. CP 124 . He admitted he made those statements for the first time at trial under cross examination. RP 127-130.

D. Jolee Was Prejudiced by the Use of Photographs and Dr. Tesar's Testimony.

PRP correctly indicates that the appellate court should not substitute its judgment for that of the jury. PRP spends several pages of its brief discussing how the jury could have evaluated the evidence but doesn't discuss the prejudicial use of the photos or Dr. Tesar's testimony. PRP argues on page 24 that the jury could have believed there was a pre-existing back injury, but there was no evidence of a pre-existing back injury in this case. Additionally, PRP cites to CP 131 on page 23 of their brief attributing statements about a pre-collision MRI to Dr. Tesar. CP 131 was not designated by either party, and is the deposition of another witness. RP 131 does not discuss any MRI films. In fact, pre-collision imaging studies were prohibited by pre-trial motions in limine. RP 123-

124 and CP 95, 96 and 132.

PRP cites *ALCO vs. Aetna Cas & Surety Co.*, 140 Wn.2d 517 (2000) for the proposition that Jolee must show prejudice on appeal. Actually, Jolee must show that the trial court abused its discretion in refusing a new trial on grounds related to the photographs and/or Dr. Tesar's testimony. The question is "Has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?" *Moore v. Smith*, 89 Wn.2d 932, 942, (1978) (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, (1932)).

Here, the prejudice to Jolee is obvious. Photographs were shown to the jury where liability was admitted. Because of that admission, the circumstances of the collision were irrelevant. Both medical experts agreed injury had been sustained in the collision, yet there was no testimony tying the photographs to injury sustained. In fact, such testimony was specifically prohibited by the trial court. CP 95, 96 and 132.

PRP wanted the photos to be used so that the jury could speculate. Jolee set forth multiple excerpts from the record indicating as much, and PRP failed to address or rebut any of them. A determination that the

photos were prejudicial and or designed to mislead the jury and/or allow them to speculate warrants a new trial. The failure to give a limiting instruction about the photographs also greatly prejudiced Jolee. That warrants a new trial. *State v. Lord*, 117 Wn.2d 829 at 855 (1991).

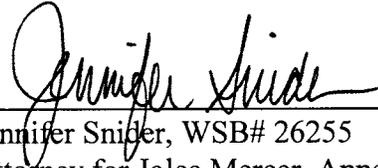
Additionally, PRP counsel used the photos improperly and in violation of court instruction. Statements of counsel about the significance of the photos were extremely prejudicial to Jolee. PRP failed to address allegations related to the improper statements of counsel in any way. Lastly, the trial testimony of Dr. Tesar exceeded his report and subsequent depositions and violated the pre-trial motion *in limine* which specifically addressed his testimony. CP 95, 96 and 132. The violation of an *in limine* order may warrant a new trial. *State v. Clemons*, 56 Wn. App. 57, 62, (1989). Individually and in their totality, these circumstances prohibited Jolee from having a fair trial.

E. Conclusion

Jolee should receive a new trial in this case due to error related to

the photographs and Dr. Tesar's testimony.

Submitted this 24th day of June, 2008.

A handwritten signature in cursive script, reading "Jennifer Snider". The signature is written in black ink and is positioned above a horizontal line.

Jennifer Snider, WSB# 26255
Attorney for Jolee Mercer, Appellant

FILED
COURT OF APPEALS
DIVISION II

08 JUN 25 AM 10:19

STATE OF WASHINGTON

BY _____
DEPUTY

No. 37158-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

JOLEE MERCER

v.

RICKY BIRCH, et al.

AFFIDAVIT OF SERVICE
REPLY BRIEF/SUPPLEMENTAL CLERK'S PAPERS

JENNIFER K. SNIDER
Of Attorneys for Jolee Mercer
Petitioner on Review
201 NE Park Plaza Dr., Suite 248
Vancouver, WA 98684
(360) 696-1526

