

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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TERESA SCHMIDT,

Respondent/Cross-Appellant,

vs.

TIMOTHY P. and JANE DOE COOGAN and the martial community  
comprised thereof, and THE LAW OFFICES OF TIMOTHY PATRICK  
COOGAN and all partners thereof,

Appellant/Cross-Respondent.

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TERESA SCHMIDT'S OPENING BRIEF

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ORIGINAL

## TABLE OF CONTENTS

A.	Cross-Assignments Of Error.....	1
B.	Issues Related To Cross-Assignments Of Error.....	1
C.	Overview.....	1
D.	Response To Mr. Coogan’s Appellate Issues.....	3
1.	Standards Of Review.....	4
2.	The Trial Court Did Not Err By Denying Mr. Coogan’s Attempt To Retry The Element Of Proximate Cause.....	6
3.	There Was No Error Arising Out Of Damages Or The Trial Court’s Instructions On Damages.....	9
a.	Mr. Coogan’s Arguments Regarding The Extent Of Ms. Schmidt’s Injury Have Been Raised, Determined, And Rejected On Appeal Before – He Cannot Raise Them A Second Time.....	10
b.	Mr. Coogan’s Arguments Rest On The Fallacy That “Permanency” Of Injury Had Anything To Do With Trial.....	12
c.	On The Merits Mr. Coogan’s Arguments Based On Medical Testimony, The Sufficiency Of Evidence, And Instructions Fail.....	14
i.	Mr. Coogan’s Arguments Are Simply That The Jury Should Have Sided With Him.....	15
ii.	This Court Has Already Rejected The Premise of Mr. Coogan’s Argument By Affirming Ms. Schmidt Was Injured Well Past 2006.....	15
iii.	Mr. Coogan’s Argument Relies On His Ignoring The Evidence.....	16
A.	Authority.....	16

	B.	Evidence Offered At Trial.....	19
	C.	The Verdict Was Not Against The Weight Of The Evidence.....	23
4.		There Was No Misconduct And No Basis For A New Trial Based On It.....	25
	a.	Mr. Coogan Put At Issue Ms. Schmidt’s Own Lack Of Medical Insurance.....	25
		i. Overview.....	25
		ii. Facts.....	27
		iii. Authority and Argument.....	34
	b.	Mr. McMonagle’s Lack Of Attendance Does Not Merit A New Trial.....	39
	c.	The Testimony Of Tina Edwards Does Not Warrant A New Trial.....	45
	d.	Ms Schmidt’s Discovery Answers Do Not Warrant A New Trial.....	46
5.		There Was No Abuse Of Discretion For Not Granting A New Trial Based on Mr. Coogan’s Ex Parte Jury Declarations.....	49
6.		There Was No Error Much Less Cumulative Error.....	59
E.		Ms. Schmidt’s Cross Appeal.....	60
	1.	It Was Error To Not Instruct The Jury On General Damages Arising Out Of Malpractice.....	60
	2.	The Trial Court Erred In Not Allowing Ms. Schmidt To Amend Her Complaint.....	64
F.		Request For Relief.....	66

## TABLE OF AUTHORITIES

### A. Table of Cases

#### Washington Cases

##### *SUPREME COURT*

<u>McCoy v. Kent Nursery,</u> ___ P.3d ___, 2011 WL 4036138 (2011) .....	50
<u>State v. Aguirre,</u> 156 Wn.2d 350 (2010).....	5, 6
<u>St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.,</u> 165 Wn.2d 122 (2008) .....	61
<u>Schmidt v. Coogan,</u> 162 Wn.2d 488 (2007) .....	8
<u>State v. Thomas,</u> 150 Wn.2d 821 (2004) .....	48
<u>Breckenridge v. Valley Gen. Hosp.,</u> 15- Wn.2d 197 (2003) .....	53
<u>Hertog, ex rel. SAH v. City of Seattle,</u> 138 Wn.2d 265 (1999).....	7
<u>Adkins v. Aluminum Co. of American,</u> 110 Wn.2d 128 (1998) .....	58
<u>Hizey v. Carpenter,</u> 119 Wn.2d 251 (1992).....	60
<u>Ayers v. Johnson and Johnson,</u> 117 Wn.2d 747 (1991).....	52
<u>Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffers, Warehouseman and Helpers of America,</u> 100 Wn.2d 343, P.2d 240 (1983).....	65
<u>Liebergessell v. Evans,</u> 93 Wn.2d 881 (1980).....	62
<u>Rasor v. Retail Credit Co.,</u> 87 Wn.2d 516 (1976).....	52
<u>Halverson v. Anderson,</u> 82 Wn.2d 746 (1973) .....	55, 56, 57
<u>Church v. West,</u> 75 Wn.2d 502 (1969) .....	33, 34
<u>Moyer v. Clark,</u> 75 Wn.2d 800 (1969).....	5, 6
<u>Adamson v. Taylor,</u> 66 Wn.2d 338 (1965) .....	8, 11, 12, 16

<u>Gardner v. Malone</u> , 60 Wn.2d 836 (1963).....	55, 56
<u>Jones v. Hogan</u> , 56 Wn.2d 23 (1960).....	34
<u>Boyle v. Clark</u> , 47 Wn.2d 418 (1955).....	25
<u>King v. Star</u> , 43 Wn.2d 115 (1953).....	34
<u>Olson v. Weitz</u> , 37 Wn.2d 70 (1950).....	17
<u>Nollmeyer v. Tacoma Rail and Power Company</u> , 95 Wn. 593 (1917).....	34
<u>State v. Parker</u> , 25 Wash. 405 (1901) .....	55
<i>COURTS OF APPEAL</i>	
<u>State v. Hathaway</u> , 161 Wn.App. 634 (2011) .....	14
<u>Anfinson v. FedEx Ground Package System, Inc.</u> , 159 Wn.App. 35 (2010) .....	4, 6
<u>Jaeger v. Cleaver Const., Inc.</u> , 148 Wn.App. 698 (2009).....	35, 36, 38
<u>Shoemake v. Ferrer</u> , 143 Wn. App. 819 (Div. 1, 2008).....	60
<u>Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC</u> , 138 Wn.App. 443 (2007).....	5
<u>Ramey v. Knorr</u> , 130 Wn.App. 672 (2005).....	4
<u>Loeffelhotz v. Citizens for Leaders With Ethics and Accountability Now</u> , 119 Wn.App. 665 (2004)....	56, 57
<u>Ma'ele v. Arrington</u> , 111 Wn.App. 557 (2002).....	37, 38, 48
<u>Price v. State</u> , 114 Wn. App. 65 (Div. 2, 2002).....	61
<u>American Manufacturer's Mutual Ins. Co. v. Osborn</u> , 104 Wn. App. 686 (2001).....	62
<u>Lian v. Stalick</u> , 106 Wn.App. 811 (2001).....	24
<u>Anderson v. State Farm</u> , 101 Wn. App. 323 (Div. 1, 2000).....	55, 61
<u>Matson v. Weidenkopf</u> , 101 Wn.App. 472 (2000).....	7

<u>Coleman v. Ernst Home Ctr., Inc.</u> , Wn.App. 213 (1993).....	4, 5
<u>Cox v. General Motors Corp.</u> , 64 Wn.App. 823 (1992).....	4, 39
<u>Miller v. Yates</u> , 67 Wn.App. 120 (1992).....	24
<u>State v. Harper</u> , 64 Wn.App. 283 (1992).....	49
<u>Richards v. Overlake Hosp. Medical Center</u> , 59 Wn.App. 266 (1990).....	50, 54, 55
<u>M/V La Conte, Inc. v. Leisure</u> , 55 Wn.App 396 (1989).....	49
<u>Leak v. Rubber Co.</u> , 9 Wn.App. 98 (1978).....	12, 13
<u>Hendrickson v. Konopaski</u> , 14 Wn.App. 390 (1975).....	51
<u>Cramer v. Van Parys</u> , 7 Wn.App. 584 (1972).....	34

**Foreign Cases**

<u>Cecala v. Newman</u> , 532 F.Supp.2d. 1118 (Ariz. 2007).....	63
<u>Oliver v. Towns</u> , 770 So.2d 1059 (Ala. 2000).....	63
<u>Betts v. Allstate Ins. Co.</u> , 154 Cal.App. 688 (1994).....	62
<u>Gore v. Rains &amp; Block</u> , 189 Mich. App. 729 (1991).....	63
<u>Jackson v. Wessel</u> , 92 B.R. 987 (1988).....	63
<u>Bangert v. Harris</u> , 553 F.Supp. 235 (Pa. 1982).....	63
<u>Salley v. Childs</u> , 541 A.2d 1297 (Me. 1988).....	63

**B. Table of Court Rules**

**Washington Court Rules**

CR 11.....	20, 26, 27, 39, 44, 66
------------	------------------------

**C. Table of Statutes**

RCW 4.76.030 .....	24
--------------------	----

#### D. Other Authorities

WPI 30.01.01 .....	13
WPI 30.01.05 .....	13
WPI 30.01.06 .....	13
<u>Schmidt v. Coogan</u> , 2008 WL 5752059, 3 (2008) .....	8
<u>Schmidt v. Coogan</u> , 2006 WL 2556633, 1 (2006).....	11

**A. Cross-Assignments Of Error**

1. Whether the Trial Court erred by failing to instruct the jury that general damages were available for appellant Coogan's legal malpractice;
2. Whether the Trial Court erred by denying cross-appellant Schmidt's motion to amend her complaint.

**B. Issues Related To Cross-Assignments Of Error**

1. Whether the Trial Court erred in denying plaintiff's motion for summary judgment, subsequent pre-trial motions, and refusal to instruct the jury that general damages are available for attorney malpractice.
2. Whether the Trial Court erred in denying plaintiff's motion to amend her complaint to add causes of action for general damages arising out of appellant Coogan's malpractice when the issue had been in the case for years, the first trial was tried with an instruction on them without objection, and the defendant had years of notice of the evidence that supported the claims.

**C. Overview**

Mr. Coogan's detailed visitation to the history of the first trial is of no import and easily seen for the attempt to create the appearance of error that it is. The only legal issue the history of this case is relevant for is to frame the sole issue for which the case was mandated for retrial: damages.

There was no remand to allow Mr. Coogan a second bite at the apple to contest an element (proximate cause) he conceded at the first trial and upon which no new trial was ordered.

Mr. Coogan's revisiting evidence rulings made at the first trial are similarly of no import. A new trial is precisely that: a new trial. Despite that, substantially half of Mr. Coogan's arguments rely on elevating the prior evidentiary decisions of Judge Bershauer to be on par as binding findings of an appellate court so Mr. Coogan may argue that any deviation from them is error requiring a retrial. The new Judge properly exercised her discretion. Her decisions must rise or fall on their own merit.

In regard to Ms. Schmidt's cross-appeal, at the first trial the jury was instructed without objection from Mr. Coogan to consider Ms. Schmidt's general damages arising out Mr. Coogan's malpractice. Despite thrice having the opportunity to reverse that issue and Mr. Coogan raising it as an issue to be reversed, no appellate court did so.

Many states allow such a recovery as necessary to provide full compensation to injured clients. That is particularly true in a case such as the one at bar where Ms. Schmidt pleaded with Mr. Coogan repeatedly to file her case on time and each time he berated, belittled, swore at, and intimidated her to leave him alone. When he finally let the statute expire, he concealed his malpractice and when she later found out on her own, told her the case was "not worth anything" to cover his tracks and then blamed her for the mistake to bully her into dropping the matter entirely. She went from having a claim he told her was worth at least \$50,000 thinking she could pay her medical bills, to

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having nothing but the uncertainty of years having the matter open. What was worse, once sued he aggressively denied his fault.

To not allow general damages in this case, (nor any case) is to inherently under compensate the injured client because simply giving them that which they should have had (the original money judgment) if the attorney did not commit malpractice will never make them whole: (1) The injured client will have lost the benefit of their recovery in the intervening time it took to recover it from the negligent attorney, (2) in a personal injury case the injured client typically has unpaid medical bills and is left to deal with the stress of a grossly delayed recovery and grossly delayed ability to pay those bills and all of the adverse credit, finance charges, and problems that arise from that, (3) the injured client suffered a fundamental breach of trust with the attorney and endures the undisputed emotional upset and uncertainty over having “lost” a just claim over the attorney’s failure to adhere to standards of practice.

Even if general damages are not available for such a claim, the Trial Court erred by not allowing Ms. Schmidt to amend her complaint to add independent theories for emotional distress.

**D. Response To Mr. Coogan’s Appellate Issues**

Despite Mr. Coogan’s breaking up his various “arguments” for reversal or a new trial as 13 independent assignments of error, they raise 8 issues. Ms. Schmidt will set forth facts in the context of Mr. Coogan’s specific arguments.

## 1. STANDARDS OF REVIEW

The denial of Mr. Coogan's motions for a new trial based on alleged evidentiary error is reviewed for "a clear abuse of discretion," Cox v. General Motors Corp., 64 Wn.App. 823, 826 (1992), or as explained by Ramey v. Knorr, 130 Wn.App. 672 (2005) "a manifest abuse of discretion." Id. at 686.

Further, the decision to give or not give an instruction is reviewed for an abuse of discretion:

...[A] trial court's decision whether to give a particular instruction to the jury is a matter that we review only for abuse of discretion. The abuse of discretion standard also applies to questions about the number of instructions and the specific wording of instructions.

Anfinson v. FedEx Ground Package System, Inc., 159 Wn.App. 35, 44 (2010).

That standard is exceedingly high:

Refusal to give a particular instruction is an abuse of discretion only if the decision was manifestly unreasonable, or the court's discretion was exercised on untenable grounds, or for untenable reasons. If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error.

Id. at 44-45.

A Trial Court's decision to submit a question or claim to the jury, or said differently, a Trial Court's decision to deny a motion for directed verdict and submit it to the jury, is reviewed de novo. Coleman v. Ernst Home Ctr.,

Inc., 70 Wn.App. 213, 219 (1993). However, that review as is the Trial Court's original consideration is strictly circumscribed:

A challenge to the sufficiency of the evidence, a motion for involuntary nonsuit, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict, admits, for the purpose of ruling on the motion, the truth of the nonmoving party's evidence and all reasonable inferences drawn therefrom. The motion requires that all evidence be interpreted in the light most favorable to the party against whom the motion is made and most strongly against the moving party. No element of discretion is vested in the trial court in ruling upon the motion. If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court.

Moyer v. Clark, 75 Wn.2d 800, 803 (1969) (internal citations omitted) (underline added).

Any "justifiable inference" is sufficient to submit a question to the jury. Moyer makes it clear it is not for the bench to second guess the result. In that context, there must merely be sufficient evidence "to persuade a fair-minded, rational person of the truth of the declared premise." Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC, 138 Wn.App. 443, 454 (2007).

Finally, the standard of review for the admission or exclusion of evidence is of course a "manifest abuse of discretion." See State v. Aguirre, 156 Wn.2d 350, 361 (2010). However, even a finding of abuse of that discretion shall not result in reversal unless there is "a reasonable possibility that the testimony would have changed the outcome of trial." Id.

To tie these various, interrelated standards of review together yields the following.

The Trial Court's admission of evidence is reviewed for a "manifest abuse of discretion" but even if an abuse is found no new trial may be ordered unless it is "reasonably likely" to have changed the outcome of trial. Aguirre. The same standard of review applies to the Trial Court's instructions to the jury and therefore any argument for directed verdict, JNOV or new trial based on them. Anfinson.

The Trial Court's decision to deny Mr. Coogan's motions for directed verdict, new trial, and JNOV based on the evidence are arguably reviewed de novo however all facts and inferences must be drawn in Ms. Schmidt's favor and "most strongly against" Mr. Coogan. Moyer. Furthermore, the Court cannot use that standard to second guess the jury, provided any inferences exist "the question is for the jury, not for the court." Id.

**2. THE TRIAL COURT DID NOT ERR BY DENYING MR. COOGAN'S ATTEMPT TO RETRY THE ELEMENT OF PROXIMATE CAUSE**

Mr. Coogan argues the Trial Court erred by denying his motion for directed verdict, new trial, and JNOV on the subject of his new defense that Ms. Schmidt's claim he negligently let expire was not collectible. As a matter of law, that argument was no longer available for a variety of independent reasons. As Mr. Coogan's brief concedes, "collectability" is an argument of

proximate cause. See Matson v. Weidenkopf, 101 Wn.App. 472, 484 (2000).

First, Mr. Coogan errs by ignoring the limited scope of the new trial granted in the original order. As prepared and proposed by Mr. Coogan himself, the order only granted a new trial on the element of damage. Finding 1.4 which has not been modified or reversed by any of the three appellate opinions in this case found:

... The Court finds that there was sufficient evidence on the issue professional negligence.

(CP 23-28, finding 1.4). Negligence is a term of art; a finding of negligence is inherently a finding of each of the four elements: duty, breach, proximate cause, and damage. See Hertog, ex rel. SAH v. City of Seattle, 138 Wn.2d 265, 275 (1999).

When the new trial was originally granted it was only on the element of damage; from Conclusion of Law 2.3:

The Court specifically concludes that a new trial on the issue of damages only is warranted...

(CP 23-28, Conclusion of Law 2.3). And from the Order itself:

ORDEREED, ADJUDGED AND DECREED that Defendant's Motion for a new trial on the issues of Damages Only is hereby GRANTED...

(CP 23-28, Order) (Caps in "Damages Only" in original)

This Court in 135 Wn.App. 605 (2006) reversed the Trial Court's granting of a new trial and remanded for dismissal holding Ms. Schmidt did not

prove the case-within-the-case against the store where she fell. The Supreme Court unanimously reversed, Schmidt v. Coogan, 162 Wn.2d 488 (2007), and remanded “for consideration on the remaining issues.”

On that remand, this Court was very clear; the only issue left to try was damage:

We affirm the trial court's denial of Coogan's motion to dismiss and its grant of a new trial on damages.

Schmidt v. Coogan, 2008 WL 5752059, 3 (2008). This Court did not leave it open for Mr. Coogan to relitigate any other element.

Based on the foregoing, five points arise.

First, Mr. Coogan’s arguments ignore the scope of the new trial originally granted. The new trial was only ever granted as to the singular element of damage: “Damages Only.”

Second, authority need not be cited for the proposition that the Trial Court on the second trial is bound to follow the appellate decisions in this case. A Trial Court may try only the issues remanded for trial and in that this Court’s most recent holding was clear. As explained by Adamson v. Taylor, 66 Wn.2d 338, 339 (1965):

...[Q]uestions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.

Id.

Third, even if the Trial Court erred that does not result in reversal, it results only in a new trial because being told by the Trial Court the element of proximate cause (collectability) was not at issue Ms. Schmidt was not simply not bound, but precluded from, producing evidence on it. It is not at all appropriate, but illustrative of the gross overreaching by Mr. Coogan in the entirety of his brief, to suggest the appropriate relief could ever be dismissal.

Fourth, there was substantial evidence that the judgment was collectable. Ms. Schmidt testified the grocery store was a large, busy going concern. She produced pictures admitted into evidence of shelves overflowing with inventory. There was clearly property and inventory to seize and collect on.

Fifth, the argument itself is an attempt by Mr. Coogan to take advantage of his own malpractice. By letting the statute of limitations expire and then concealing it from his client, he made it that much harder for Ms. Schmidt to demonstrate “collectability” assuming it was ever timely put at issue. He is estopped by his own misdeeds.

**3. THERE WAS NO ERROR ARISING OUT OF DAMAGES OR THE TRIAL COURT’S INSTRUCTIONS ON DAMAGES**

This relates to Mr. Coogan’s assignments of error numbers 2 – 6. The gist of his argument is the Trial Court should have ordered as a matter of law Ms. Schmidt sustained no injury beyond 1996. And because it did not,

everything the Trial Court did that allowed damages past that (from instructions, to not granting his summary judgment motion during trial, his motion for JNOV) were error. Mr. Coogan ignores this Court already found Ms. Schmidt had symptoms from the slip and fall for at least 7 years longer.

a. **Mr. Coogan's Arguments Regarding The Extent Of Ms. Schmidt's Injury Have Been Raised, Determined, And Rejected On Appeal Before – He Cannot Raise Them A Second Time**

This court may not consider any of Mr. Coogan's arguments on these issues. The lynchpin of all of his damage and instructional arguments contained in this present appeal rely on the conclusion that Ms. Schmidt did not present sufficient testimony to prove her injuries at all, and his fall back is not past 1995, and therefore the Court should have granted directed verdict.

Mr. Coogan raised all of those same arguments in his prior appeal. This Court by its most recent opinion rejected those arguments. Having done so once, Mr. Coogan may not raise them again.

If Mr. Coogan's argument that Ms. Schmidt did not present sufficient medical testimony had any merit, this Court's opinion upon remand from the Supreme Court would have had to have been to again reverse the Trial Court because her failure to prove her physical injury would have been yet a different failure of her prima facie case.

Instead, this Court did not order another reversal but only that the

amount of special damages awarded required a new trial and remanded for a new trial on Damages Only.

Thus, not only does this Court's remand in 2008 make clear this Court found Mr. Coogan's argument that Ms. Schmidt presented insufficient medical testimony was lacking, this Court explicitly took note of the – if not permanency – very long lasting nature of Ms. Schmidt's injuries in its original 2006 opinion:

Afterward, Schmidt suffered pain and numbness in her arm, migraines, and back spasms. These symptoms prevented her from engaging in her usual activities, such as playing with her child and playing softball. At the trial eight years later, Schmidt still had many of the symptoms.

Schmidt v. Coogan 2006 WL 2556633, 1 (2006) (underline added).

Adamson cited above holds that “if there is no substantial change in the evidence at a second determination of the cause,” Adamson, 66 Wn.2d at 339, and the issue either “might have” or was presented on appeal before, it will not be considered on appeal a second time. Id. It is fundamentally inconsistent and simply precluded in light of Adamson for Mr. Coogan to argue the Trial Court erred in not finding Ms. Schmidt was not injured past 1996 when this Court has already found she proved she had symptoms to at least 2003; “8 years after” she fell.

Furthermore, in this case, the medical evidence is identical to that presented at the first trial because at retrial Ms. Schmidt utilized the same,

preserved testimony of Dr. Brobeck she did at the first trial. If Mr. Coogan is correct now, arguing a second time Dr. Brobeck's testimony was not sufficient, he was correct the first time he made that argument. In that event, this Court not simply could have, but was required, to have reversed the Trial Court's decision a second time after remand from the Supreme Court because that would have been yet a different failure of her prima facie case. But this Court did not. And not having done so, Mr. Coogan may not raise it a second time and this Court may not revisit it a second time. Adamson.

The preclusion of this issue moots every single one of Mr. Coogan's issues relating to damages and instructional matters because the lynchpin to all of those arguments is the supposition that Dr. Brobeck's testimony was not sufficient to prove Ms. Schmidt's injuries. The removal of that lynchpin removes all support for his various other arguments.

b. **Mr. Coogan's Arguments Rest On The Fallacy That "Permanency" Of Injury Had Anything To Do With Trial**

Mr. Coogan's argument, ignoring for the moment the lack of evidence for it, is the Trial Court in error instructed the jury and permitted it to consider whether Ms. Schmidt's injuries were permanent. (Coogan opening memo, page 8). He postulates that because Ms. Schmidt supposedly only experienced symptoms up to 1996 the Trial Court's instructions were therefore error.

That precise argument was made in Leak v. US Rubber Co., 9

Wn.App. 98 (1978) and rejected.

In this case, the Trial Court properly used pattern instructions. In regard to damages, the Trial Court's instruction 7 utilized WPI 30.01.01, .05, and 06; the Court instructed the jury "to consider":

The disability, pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future, the nature and extent of the injuries, emotional distress, and the loss of enjoyment of life experience with reasonable probability to be experienced in the future.

(CP 1315). The word "permanency" is notably absent.

In Leak, precisely as in the case at bar, the defendant argued the plaintiff did not present "sufficient evidence to submit to the jury the issue of permanent injury" and therefore the Trial Court's jury instruction that "could" allow the jury to award damages into the future was error. Leak, 9 Wn.App. at 101. However, in Leak as in the case at bar the Trial Court did not instruct the jury to consider whether the plaintiff's damages were permanent. Instead, the Trial Court merely told the jury that if there was evidence of future pain the jury could, but was not bound to, consider it:

Plaintiff answers this argument by pointing out that the instruction on damages makes no reference to permanent injury and therefore it is not necessary to establish Permanency to recover for Future damages for any of the elements referred to by plaintiff.

Id. at 102.

It is well settled that provided the Court's instruction allows a party to present and argue their theory of the case, the instruction is sufficient and will not be disturbed. See State v. Hathaway, 161 Wn.App. 634, 647 (2011).

The Trial Court's Instruction 7 allowed Mr. Coogan to argue his theory (albeit doing so ignored this Court's prior opinion that her pain symptoms continued to 2003) that Ms. Schmidt's injury lasted only until 1996 because the jury was to consider only pain and suffering, present and into the future, proven with a "reasonable certainty." The pattern instruction did not instruct the jury that Ms. Schmidt's injury was permanent or even to consider permanency.

Ultimately, Mr. Coogan's arguments on instructions and the sufficiency of the evidence are simply a back door way of arguing his mid-trial motion for summary judgment on damages should have been granted. Here, he makes the same argument but now complains it was error for the Court to not instruct the jury to limit Ms. Schmidt's damages to 1996. His attempt to obtain summary judgment was late and without merit; his subterfuge here portraying it as an instructional issue has no more merit.

c. **On The Merits Mr. Coogan's Arguments Based On Medical Testimony, The Sufficiency Of Evidence, And Instructions Fail**

Again, the graveman of Mr. Coogan's argument is that Ms. Schmidt's evidence only demonstrated an injury up to 1996. According to him, because he argued there were other possible causes of injury after 1996 the only

possible conclusion as a matter of law was that those other possible causes were the only and sole cause of Ms. Schmidt's pain after 1996.

That argument is flawed for a number of reasons.

i. **MR. COOGAN'S ARGUMENTS ARE SIMPLY THAT THE JURY SHOULD HAVE SIDED WITH HIM**

Preliminarily it must be noted that Mr. Coogan really had no compelling or substantial evidence of "other injuries." Instead, through inappropriate innuendo Mr. Coogan read to witnesses medical records under the guise of "refreshing their recollection." The witnesses indicated they did not recall injuries of any import and Ms. Schmidt indicated that although she had a few events since 1995 that certainly caused her some degree of pain, they were all short lived and she returned right back to the same pain baseline she had since the 1995 slip and fall. VRP 339, 342-348, 383, 418 - 419.

It is not error, and neither the Trial Court nor appellate court, may intercede simply because the jury found more credible one party's version of events over the adverse party's. Yet, that is all Mr. Coogan's arguments of error are: because he had innuendo of other accidents, it was error for the Trial Court to not grant a new trial. That proposition is without support of law.

ii. **THIS COURT HAS ALREADY REJECTED THE PREMISE OF MR. COOGAN'S ARGUMENT BY AFFIRMING MS. SCHMIDT WAS INJURED PAST 2006**

Mr. Coogan’s argument that Ms. Schmidt’s evidence of injury stopped at 1996 has already been rejected by this Court. As a basic issue of the law of the case he may not make that argument because, as cited above, this Court in 2006 affirmed Ms. Schmidt had significant pain and “many of the symptoms” from the slip and fall “at the trial eight years later.” See Adamson, supra.

Even as to the snapshot already observed by this court of 8 years of pain symptoms, the jury’s general damage verdict is imminently reasonable and cannot be said to “shock the conscious.” That she has continued to have pain to the date of the second trial makes the issue that much more clear.

iii. **MR. COOGAN’S ARGUMENT RELIES ON IGNORING THE EVIDENCE**

A. **AUTHORITY**

Mr. Coogan’s argument that Ms. Schmidt presented no evidence of injury past 1996 fundamentally requires him to ignore her evidence. This Court should decline Mr. Coogan’s invitation to do so as well.

First, it is critical to bear in mind that Ms. Schmidt need not have proved her injury was “permanent” for her to recover non-economic damages – either past 1996 or into the future. This Court already found she suffered pain and injury through the first trial in 2003.

Second, although a clear “I think the plaintiff’s injury is permanent” or “will continue into the future,” said by a doctor may be the gold standard, Mr.

Coogan's argument ignores the law does not require it.

Olson v. Weitz, 37 Wn.2d 70 (1950) considered the same argument Mr. Coogan makes herein; albeit, the defendant's argument in Olson had much stronger facts to make.

In Olson the plaintiff sued for medical malpractice relating to the setting of a fractured wrist. Id. at 72. Defendant presented evidence that "there was no permanent injury." Id. at 76. The plaintiff's evidence was of a different doctor that examined her before trial who also said "he felt there was no permanent disability or injury." Id. at 75. Plaintiff's doctor, Adams, testified he "could find no objective evidence to explain" plaintiff's pain but he did not testify that she was not having it. Id. at 75.

In addition to Dr. Adams' testimony, plaintiff presented her own testimony and that of others regarding the ongoing state of her pain. Id. at 76.

As a basic rule regarding damages, the Supreme Court noted:

The rule in this court, particularly in an injury of this character, is that where the testimony shows that the plaintiff still suffers at the time of the trial, the court is justified in submitting to the jury the matter of future pain and suffering.

Id. at 76. The Court continued, noting a plaintiff does not need an expert to utter the words "permanent injury" or future pain for a jury to consider pain and suffering going forward after trial if there is lay testimony about pain at the time of trial regarding an injury that has been demonstrated:

It is also claimed that the court erred in submitting to the jury the question of permanent injuries, and in giving instructions in regard thereto, for the reason that there was no testimony tending to show permanent injuries. The weakness of this contention lies in the fact that there was some testimony tending to prove permanent injury. It is true that the testimony of the physicians called as expert witnesses probably did not sustain this contention; but the testimony of the plaintiff... and her co-respondent, her husband..., Thomas Payne, and the testimony of other of the plaintiffs' witnesses, does sustain it. The testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all the witnesses, experts and otherwise...

Id. at 76-77 (internal citations omitted) (underline added).

As explained below, Ms. Schmidt had strong medical testimony establishing she had a congenitally very narrow spinal canal and the slip and fall lit up three degenerative herniations that were undisputed to have been asymptomatic before she fell in the store. Her medical testimony established that once lit up, symptomatic disc herniations do not spontaneously get better. Her medical testimony clearly indicated her reported symptoms were consistent with and on a medically more likely than not basis caused by those lit up disc herniations. And finally, she had ample lay testimony providing a consistent link of pain symptoms from the date of the accident to the time of trial.

Ms. Schmidt need not prove a “permanent” injury as Mr. Coogan complains she failed to do. She merely needed to present some evidence of some pain going into the future. She clearly did.

## **B. EVIDENCE OFFERED AT TRIAL**

Alan Brobeck, M.D., is an orthopedic surgeon. Dep. 3.<sup>1</sup> He testified that he conducted a physical examination of Ms. Schmidt and a review of her medical records. Dep. 6 – 9, 10.

Dr. Brobeck testified “there was no history of preexisting pain in either the neck or the left arm” of Ms. Schmidt before the subject accident. Dep. 12.

In terms of objective findings, Dr. Brobeck noted that an MRI dated March 11, 1996 showed three bulging discs at C4-5, C5-6, and C6-7 which although were small, “were significant given the small AP diameter of the bony canal.” Dep. 15.

He testified that a “large percentage” of the population over 30 or 40” have “disc bulges which are asymptomatic.” Dep. 16. He explained to the jury the physical process of a disc bulge and its affect when it impinges a nerve. Dep. 16 – 18. His opinion as to Ms. Schmidt was:

She had degenerative changes within the disc, at least three of them, and they’re in her neck area. They were asymptomatic before this injury, but the injury irritated them, and then they became painful...

---

<sup>1</sup> Dr. Brobeck’s testimony was given by videotape. The Clerk’s Papers as transmitted by the Clerk did not assign page numbers to his testimony. Therefore, all citations to those depositions will be to the page number of the deposition transcript. If it appears this section is very similar to the same section in her brief from 2006 and 2008 it is because it is. That is because Mr. Coogan has raised the same arguments serially since 2006; all of which this Court rejected each time.

Dep. 18. He indicated Ms. Schmidt's fall "lit up" the existing non-painful condition. Dep. 18 – 19. He also indicated that Ms. Schmidt – in addition to her lit up disc herniations - had a "cervical/dorsal sprain/strain," all related to the accident. Dep. 19.

It is suggested to be frivolous and to violate CR 11 for Mr. Coogan to blindly argue to this Court Dr. Brobeck testified Ms. Schmidt 'only' had a cervical strain and to ignore his clear and unequivocal testimony that the slip and fall also lit up 3, significant disc herniations that were asymptomatic.

Dr. Brobeck testified that the mechanism of Ms. Schmidt falling was sufficient to cause her spinal disc change and cervical sprain. Dep. 19.

Dr. Brobeck testified that Ms. Schmidt's subjective complaints were consistent with his physical examination and the radiologic findings described above. Dep. 23.

Dr. Brobeck testified he did not believe those problems were going to get any better. Dep. 23 – 24. According to him, once there is a degenerative change to a disc such as the bulges he opined at pages 18 – 19 were lit up by the fall, they stay that way. Dep. 23 – 24. Rarely, and for reasons not understood, they can be reabsorbed "to some extent" but he found no evidence of that here. Id. at 23 – 24.

That is consistent with Ms. Schmidt's testimony. She clearly traced the symptoms Dr. Brobeck opined as being caused by the accident as continuing

through trial in a more or less unrelenting pattern since she fell. VRP 339, 342-348, 383, 418 - 419. She candidly admitted that after a time, the symptoms diminished. However, once they plateaued they remained the same to date. Infra. That is consistent with what this Court already found in its 2006 opinion.

Finally, Mr. Coogan takes out of context Dr. Brobeck's testimony about the 1997 motor vehicle accident. In his brief, Mr. Coogan argues Dr. Brobeck "could not say whether or not her symptoms were a result of either the 1995 slip and fall event or the 1997 the motor vehicle collision" and argues that Dr. Brobeck's testimony was that he was unable to differentiate between the symptoms.

First, that argument entirely ignores all of Dr. Brobeck's testimony as to what he did find Ms. Schmidt's pain symptoms related to the slip and fall were. Dep. 18-19, 23.

Second, it takes only a momentary review of the actual testimony to see that was not the question asked. Instead, the question as actually asked and answered was counsel for Mr. Coogan asking Dr. Brobeck to clarify a portion of his report; whether that portion of the report as written was referring to the slip and fall or an MVA with Dr. Brobeck conceding he could not clarify what was intended by that specific paragraph:

Q: \* \* \* Now, and that particular paragraph that I just read into the record, does that slip refer to the result of both injuries or the result of the injuries -- or your

examination, or just what does that refer to?

A: I'm not sure. It could be either/or. I'm not sure.

Q: So you can't say with specificity whether that (referring to a paragraph of the report, and not his opinions as expressed in his testimony) refers to post a slip and fall or post slip and fall and post automobile accident?

A: No.

(Dep. pgs 38-39) (underline added).

The question was impossible to follow. But what is clear is that Mr. Coogan's counsel did not ask Dr. Brobeck whether Ms. Schmidt's pain complaints were caused by "either/or" the slip and fall or the MVA – which would be a very simple question to have asked. He only asked him to clarify what was written in the report. While it is appreciated that may be a fine distinction, it is not one without significance. Mr. Coogan cannot clearly not ask a particular question and then argue here that the question he asked was something other than what it actually was. That is particularly so in light of what Dr. Brobeck did clearly say:

A; ...She had degenerative changes within the disk, at least three of them, and they're in her neck area. They were asymptomatic before the injury, but the injury then irritated them, and they then became painful. Whether it's from the disc or the joints or the nerves is hard to say.

\* \* \*

Q: Based on the history you've described and this radiologic finding we're looking at -- looking at, does

not seem more likely (than not) to you this slip and fall lit up this condition in this Schmidt?

A: In my opinion, that would be a reasonable assumption, yes.

(Dep pgs. 18-19)

Ultimately, what this comes down to is incomplete cross-examination by Mr. Coogan. Dr. Brobeck clearly indicated that the symptoms Ms. Schmidt was complaining of were caused by the slip and fall. (Dep. pg 23). That testimony is particularly important as Dr. Brobeck testified Ms. Schmidt made him aware of the MVA at the time of his examination, (dep. pg. 25) and that he reviewed records from it. (dep. pg. 26-27). And with that knowledge, he still related Ms. Schmidt's fall to the lighting up of her 3, asymptomatic herniated discs and that her pain complaints in that regard were consistent with his clinical observations and findings.

### **C. THE VERDICT WAS NOT AGAINST THE EVIDENCE**

This largely inheres in the foregoing. However, it is folly for Mr. Coogan to simply ignore Dr. Brobeck's clear testimony that Ms. Schmidt's three, asymptomatic disc herniations were lit up by her fall in the store and that once lit up such conditions do not get better.

Furthermore, Ms. Schmidt and her other lay witnesses demonstrated a clear line of pain and impairment from the date of her accident through trial.

Infra. Those symptoms and limitations were precisely the same Dr. Brobeck testified were caused by the slip and fall.

The Trial Court's instruction did not tell the jury to consider "permanency." Thus, Mr. Coogan's argument fails both factually and legally: permanency was not the issue (only some amount of future pain) and even assuming it was, Dr. Brobeck's testimony was sufficient to establish it.

Placing aside the lack of factual basis for his argument, Mr. Coogan does not account for the exceedingly high standard to second guess a jury's determination of damages in a personal injury case:

Neither the trial court nor any appellate court should substitute its judgment for that of the jury as to the amount of damages. The jury is the appropriate assessor of damages, and its determination should be overturned only in the most extraordinary circumstances.

Miller v. Yates, 67 Wn.App. 120, 124 (1992). A verdict must be accorded a strong presumption of validity. RCW 4.76.030.

The Court must consider the largest possible range of damage based on the evidence and may not grant a new trial even if the result is outside of what might be considered a reasonable range.

The amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience. And the passion or prejudice must be of such manifest clarity as to make it unmistakable.

Lian v. Stalick, 106 Wn.App. 811, 824 (2001) (internal citations omitted). See

also Boyle v. Clark, 47 Wn.2d 418, 425-426 (1955).

The medical evidence and lay testimony identified immediately above are clear. Ms. Schmidt had three entirely asymptomatic disc herniations that were lit up by the slip and fall. This Court in its 2006 opinion remarked that “eight years” later Ms. Schmidt “still had many of the symptoms” such as “pain and numbness in her arm, migraines, and spasms [that]... prevented her from engaging in her usual activities, such as playing with her child and playing softball.”

Simply taking that snapshot of eight years when this Court last reviewed the record, it can hardly be said the \$80,000 the jury awarded for general damages is so excessively outside of the range of reason as to require a new trial. When the Court considers the additional time between trials and Ms. Schmidt’s testimony of continued pain, the total result is a mere \$5,000 a year.

**4. THERE WAS NO MISCONDUCT AND NO BASIS FOR A NEW TRIAL BASED ON IT**

**A. Mr. Coogan Put At Issue Ms. Schmidt’s Own Lack Of Medical Insurance**

**i. OVERVIEW**

As an overview, Ms. Schmidt never made a plea of poverty nor argued the relative wealth of the parties.

Instead, only after permission had been given by the Trial Court and only after the Trial Court found Mr. Coogan’s arguments and evidence that Ms.

Schmidt's lack of additional treatment was itself evidence she was not injured put the matter at issue and opened the door, Ms. Schmidt said only that she did not seek additional treatment because she had no medical insurance. No comment was made regarding Mr. Coogan's insurance or lack thereof nor her own "poverty" nor that she could not have paid for the treatment herself. Mr. Coogan's arguments to this Court that Ms. Schmidt made "pleas of poverty" and disregarded the Trial Court's order are simply false and violate CR 11.

Mr. Coogan, at every opportunity, injected medical insurance Ms. Schmidt had intermittently by constantly injecting her "Group Health Records" (an HMO) and the treatment she did have later (once she had insurance for it) and argued that her lack of treatment could only be because she was not hurt. Ms. Schmidt, in defense of the innuendo, tried to explain that she had Group health at one point, lost it for a long period of time, and only more recently obtained it again. VRP 397.

Despite that, Mr. Barcus for Mr. Coogan gratuitously raised the issue of insurance no less than 6 times when asking Ms. Schmidt questions, calling out Group Health by name and waiving around her "Group Health" records when he could have simply asked if she "saw a doctor on X date." VRP 387, 308, 389, 410, and 420. It appears Mr. Coogan's IME doctor injected treatment at "Group Health" no less than 30 times in his testimony. VRP 509- 582. Again, when simply mentioning "treatment" would have sufficed.

By that construct, Mr. Coogan tactically created a false set of facts that Ms. Schmidt had medical insurance all along, and therefore her lack of earlier treatment was only because she was not hurt. The Trial Court, seeing Mr. Coogan's false construct, properly allowed Ms. Schmidt to rebut it.

There was patently neither "misconduct" nor a "flagrant disregard" of the Trial Court's instruction and that Mr. Coogan and his counsel must portray the issue in that fashion in order to confabulate an issue for appeal not only requires a sanction, it says more about the lack of merit to the argument than anything Ms. Schmidt can say. CR 11 sanctions are warranted for such a "flagrant" misstatement of the record.

Indeed, it is novel Mr. Coogan thinks it necessary to cite a case defining "chutzpa" as though that has any play in the facts of this case. But, by that definition, it is indeed "chutzpa" for counsel to think he can create a false construct at trial that Ms. Schmidt had insurance the entire time, to use it as a weapon to argue her lack of treatment earlier was only because of a lack of injury, and expect the law to tie an injured plaintiff's hands from defending herself from the false impression thus created.

## **ii. FACTS**

The issue of health insurance was raised pretrial and Mr. Coogan very clearly indicated he intended on pursuing the tactic that gaps in Ms. Schmidt's treatment and the fact she did not obtain even more treatment were illustrative

of the fact she did not sustain a very significant injury. VRP, 84 – 85. Mr. Coogan’s counsel outlined his arguments proceeding his “short” answer.

In light of that, and completely contrary to how Mr. Coogan represents the record, the Trial Court did not issue a blanket statement of inadmissibility regarding insurance – it did precisely the opposite. The Trial Court clearly warned Mr. Coogan that his pursuing that theory would open the door to Ms. Schmidt explaining why she did not seek additional treatment:

With regard to insurance, I feel that that is a somewhat different matter. If the defendant opens the door to talking about a (lapse) in treatment or talking about some evidence that certain treatment did not occur within a certain period of time, the Court believes that that would open the door to a -- to evidence that Ms. Schmidt did not have coverage for that treatment and therefore waited until she could -- she was insured or that procedure was insured.

I understand that that is a very unusual type of situation and I only feel that it would be justified in bringing up if, again, first of defense -- the defendants attorneys or defendants witnesses to bring this point up first.

VRP 87.

Mr. Coogan clung tightly to that argument throughout trial. Indeed, he clung to it so tightly that he clings to it still and relies on it heavily in his brief to this Court, notably at page 38 of his opening brief where he argues the jury’s verdict was excessive because (or so he argues) it is disproportionate to the amount of her medical bills.

Throughout trial, in opening VRP 140-143, 146, and during the course

of examining witnesses, infra, at every opportunity he asked questions, insinuated, and argued that Ms. Schmidt was not very injured because she did not seek very much treatment. VRP 754.

That Mr. Coogan was successful in injecting the issue was more than amply demonstrated by the fact one of the jurors picked up on the thread and asked Ms. Schmidt's mother why she did not suggest that she (Ms. Schmidt) go to the emergency room. VRP 204, 301. The reason: she knew she had no coverage to pay for it. VRP 292 – 293.

There came a point in the trial where Ms. Schmidt asked the court to clarify that Mr. Coogan had opened the door so she could explain why she did not seek more treatment. VRP 246-248. That issue was discussed in great detail. VRP 255-262.

The Trial Court acknowledged Mr. Coogan made precisely the argument the Court said would open the door to explain why Ms. Schmidt did not have additional treatment (the lack of insurance), "I think that has been put forth very clearly by the defendant ..." VRP 262. However, in candor to this Court, the Trial Court also indicated that she wanted to hear slightly more. Id. Counsel for Ms. Schmidt repeatedly sought clarification from the Trial Court as to what types of questions would be appropriate. Id. There was a clear effort to not inject any aspect of insurance until the Trial Court indicated such was appropriate. Id. at 263.

Despite the Trial Court's warnings, counsel for Mr. Coogan were unrelenting in arguing through cross-examination that Ms. Schmidt's lack of additional treatment meant she was not injured while at the same time highlighting her later insurance with Group Health. For instance, counsel asked Ms. Schmidt's mother whether Ms. Schmidt went to the emergency room after she fell – he already knew the answer was no. Despite that, he asked the question anyway to highlight, again, her lack of treatment as being indicative of a lack of injury. VRP 292 - 293. The reason she did not go was because she knew she had no coverage to pay for an expensive ER visit. Id.

Thus, once Ms. Schmidt was on the stand and in order to respond to Mr. Coogan's opening argument and the innuendo raised through every witness, counsel for Ms. Schmidt again raised the issue outside the presence of the jury. VRP 301-302. It was also pointed out Ms. Schmidt's medical records from the time of her original injury demonstrated substantial additional treatment was recommended because of the slip and fall but Ms. Schmidt was unable to follow through; the reason again: she had no insurance. Id.

When the issue was at a head, counsel for Ms. Schmidt stopped the questioning and explicitly asked the Trial Court if he could "inquire further and ask another question on this line," VRP 337, which in light of the many sidebars to that point was a signal the insurance issue had finally reached a head. The court understood and asked if a side bar would be appropriate. Id.

The sidebar was memorialized the following morning. VRP 365-366.

After the side bar, in a fairly unique but very illustrative demonstration that what was going on was approved of by the Trial Court, with Ms. Schmidt and counsel being very careful not to overstep what the Trial Court ordered, the following exchange took place:

Q: I'm going to ask you one question and I'm going to ask you not to go beyond the one question. You just got done saying that you wanted to go back for more chiropractic treatment. Why didn't you go back? Why did(n't) you go back for further treatment with the chiropractor?

A: I'm not sure how to answer that with all the other stuff that you guys said I couldn't – it's very confusing, Your Honor.

MR. BRIDGES: (To the court) We've got a red light right now, Your Honor.

THE COURT: I understand. Ladies and gentlemen, if you'd just stand and stretch for a minute while Mr. Bridges approaches the witness.

MR. BRIDGES: Thank you, Your Honor.

(Counsel conferring with the witness.)

MR. BRIDGES: Sorry.

Q: Why didn't you go back for more treatment?

A: Because I didn't have insurance.

VRP 337-338. The "red light" green light was code between counsel and the Court. The Court, seeing Ms. Schmidt was being 'too careful' to not say the

wrong thing, told counsel to tell her it was permissible to say she did not have medical insurance.

The record thus amply demonstrates Mr. Coogan's assertion that there was misconduct or that either counsel or Ms. Schmidt flaunted the Court's order is patently false. Indeed, counsel and Ms. Schmidt were so careful that at one point counsel started to specifically instruct Ms. Schmidt to "wait for an objection" before even asking questions, to ensure counsel for Mr. Coogan could object and the Court would rule first. VRP 340-345.

In closing argument, and what Mr. Coogan refers to as "misconduct," counsel for Ms. Schmidt only mentioned the evidence that was admitted – not a plea of poverty, but the evidence the Court found Mr. Coogan had opened the door to; simply that she "didn't have health insurance" as the reason she did not seek yet further treatment. VRP 734.

Despite that merely being a reference to evidence that was admitted, the Trial Court sustained Mr. Coogan's objection to the reference. Id.

However, the record also reflects a side bar whereupon counsel for Ms. Schmidt moved on, only indicating the jury "heard the evidence in this case as to why Ms. Schmidt did not have more treatment. You can figure out why..." Again, counsel for Mr. Coogan objected. VRP 734. That time the Trial Court overruled the objection. VRP 735. Obviously, what was said in closing after the sidebar was consistent with what the Court instructed at the sidebar.

In retrospect, it appears that in closing the Trial Court was trying to balance the fact Mr. Coogan had so clearly and repetitively put the matter at issue, and the right and need for Ms. Schmidt to have an opportunity to respond, with not wanting to call too much more attention to it. The sidebar was later memorialized at VRP 744-745.

After Ms. Schmidt's closing, Mr. Coogan asked for a "curative instruction" on the issue of insurance. VRP 742. He argued that the Trial Court's Instruction Number 5 contradicted the fact Ms. Schmidt was allowed to mention the lack of her own medical insurance. *Id.* Ms. Schmidt replied there was no conflict because Instruction Number 5 merely told the jury it was not to "increase or decrease" its award by speculation as to whether there was insurance to pay for any verdict. VRP 742-743. The Trial Court denied Mr. Coogan's request because the instruction he offered was not related to the evidence actually admitted. VRP 743.

All of that said, Ms. Schmidt's mom did premature blurt out the issue of insurance. The record demonstrates the absence of "misconduct" by Ms. Schmidt and counsel; to even suggest it was a part of a plan when such care was being taken via sidebars defies the record. Her misstep is not the basis for a new trial. *See Church v. West*, 75 Wn.2d 502, 506 (1969) (involving a defendant's liability insurance, which is actually a much more prejudicial statement for a defendant than Ms. Schmidt's medical insurance at issue here).

Regardless, as the fact was ultimately admitted anyway, Ms. Schmidt's mother's premature mention of it is moot. Had the mother been called later in the trial, for instance in rebuttal, the objection would have been overruled. Mentioning it earlier and having it stricken is only a prejudice to Ms. Schmidt, not Mr. Coogan.

### iii. AUTHORITY AND ARGUMENT

As a preliminary matter, two points must be noted.

First, none of the cases cited by Mr. Coogan are on point to the question before the court. They either address: (1) whether mentioning the defendant's lack liability insurance as a reason to make a smaller verdict is proper, for example see King v. Star, 43 Wn.2d 115 (1953), Church v. West, 75 Wn.2d 502, 506 (1969) or (2) have nothing to do with medical insurance at all but address direct arguments by the plaintiff of poverty, see Nollmeyer v. Tacoma Rail and Power Company, 95 Wn. 593 (1917), Cramer v. Van Parys, 7 Wn.App. 584 (1972), Jones v. Hogan, 56 Wn.2d 23 (1960) (when plaintiff was asked if she had read her deposition transcript she said "we couldn't afford it").

In regard to Jones, Mr. Coogan makes a striking false statement about its holding; Mr. Coogan argues at page 40 his brief that Jones held "the prohibition against **insurance** evidence as a plea of poverty makes no distinction as to whether or not it is the plaintiff or the defendant that is **injecting the issue of lack of insurance.**" (bold added) A word search reveals

the word “insurance” is not mentioned once in the case. The case has nothing to do with insurance. It deals with direct pleas of poverty.

Mr. Coogan argues at page 41 of his brief that Jaeger v. Cleaver Const., Inc., 148 Wn.App. 698 (2009) held “lack of insurance not relevant, even if ER 404 is not directly applicable. Lack of insurance is not relevant to the issue of mitigation of damages.” Again, the mischaracterization of the case law is striking. Jaeger explicitly held a plaintiff’s own lack of insurance is relevant; it simply was not in that case.

In Jaeger, the plaintiffs experienced a substantial landslide they alleged was caused by the defendant. 148 Wn.App. at 701. The jury awarded \$400,000 in damages but apportioned 85 percent fault to plaintiffs for comparative negligence and a failure to mitigate. Id. There was evidence of a wide range of possible mitigation, including a more expensive method of building a large retaining wall. Id. at 708. Plaintiffs wanted to admit evidence that their homeowner’s insurance would not cover the cost of the retaining wall to rebut the mitigation defense. Id.

The Trial Court excluded that evidence, not because as Mr. Coogan claims evidence of insurance is never relevant and never admissible, but because “respondents did not argue that the Jaegers should have built an expensive retaining wall; rather, they argued that the Jaegers should have found a cheaper way to stabilize the ground.” Id. at 719.

More importantly, when this Court (Division Two) upheld that decision it could have very easily disposed of the question by saying: a plaintiff's lack of insurance is never relevant and never admissible. This Court, despite having both the opportunity and **duty** to do so if that is the law, did not do that. It had the **duty** to do that, because if such a black letter rule existed, that would be the only proper way to dispose of the issue: it is never relevant and admissible and therefore not admissible in Jaeger. Anything else would digress into dicta.

Instead, this court engaged in an extended ER 403 weighing of relevance which it could only do if the rule is the plaintiff's own lack of insurance is relevant and admissible depending on the facts of the case. In Jaeger, this Court noted defendants "presented no evidence" that the plaintiffs could have afforded a retaining wall, and what was more, that they did not even assert the more expensive retaining wall was necessary. Id. In other words, the defendants never put it at issue. Further, that the Trial Court actually did allow plaintiffs to present evidence their insurance policy was cancelled after the slide. Id. This Court indicated, "thus, nothing in the record suggests that the Jaegers had insurance coverage for a retaining wall" that necessitated the need for them to offer evidence they had no insurance to rebut. Id. That is entirely unlike the case at bar where Mr. Coogan explicitly argued and made reference to Ms. Schmidt's Group Health insurance she obtained only later.

Mr. Coogan's citation at pages 41 - 42 to authority regarding L&I

benefits on the issue of “malingering” is such a non-sequitor that no response is needed.

Finally, Ma’ele v. Arrington, 111 Wn.App. 557 (2002) is on point. Mr. Coogan attempts to minimize this Court’s (Division Two’s) analysis as dicta. Even if correct, it is still this Court’s dicta and it can hardly be said the Trial Court abused its discretion in taking guidance from it. However, it is not dicta.

Ms. Schmidt agrees with Mr. Coogan that the Trial Court in Ma’ele did not admit evidence of the plaintiff’s lack of health insurance. However, that was not because of a per se rule of exclusion as Mr. Coogan urges but simply because to raise the issue in that case would create a “tangle of explanations” ranging from the availability of care through the military to plaintiff’s desire to not have the treatment show on his military record. Id. at 561.

So yet again, when this Court had both the opportunity and indeed duty to simply say “a plaintiff’s lack of health insurance is not admissible,” it instead engaged in an ER 403 analysis.

Clearly, there is no per se rule of inadmissibility. Having had the issue raised twice and both times not finding it, this Court has made that clear. Indeed, in Ma’ele, completely contrary to Mr. Coogan’s argument, this Court found that this type of evidence is squarely relevant:

That Ma’ele could not afford medical care when he moved is potentially relevant. Without this explanation, the jury could infer that he did not seek care because he did not need it.

Id. at 565. That is precisely the inference Mr. Coogan created.

Finally it is unclear why Mr. Coogan believes this Court's discussion on relevance is "dicta." This court was required to consider the relevance of such evidence to determine if the Trial Court abused its discretion in excluding it in that specific case. That was not dicta, it was squarely required for this Court's analysis that, despite its being relevant, the Trial Court did not abuse its discretion in excluding it because of the myriad of other "entanglements" – none of which are present in the case at bar – would raise.

Mr. Coogan has not cited a single case demonstrating a per se rule of inadmissibility of the lack of a plaintiff's own medical insurance. The only two cases discussing it have both found it is relevant. Jaeger and Ma'ele. However, under the facts of those specific cases in one it simply was not put at issue nor relevant given the subject matter (Jaeger) and in the other its relevance was outweighed by prejudicial matters not at issue herein. (Ma'ele).

But as required in both Jaeger and Ma'ele the defendant here did put the matter at issue. Not only did he repeatedly argue and imply that the mere lack of additional treatment was itself evidence of a lack of injury, he falsely implied she had medical insurance throughout by repetitively referring to her "Group Health" records to create the impression she had medical insurance all along. The Trial Court provided Mr. Coogan repeated warnings that he was

opening the door to the issue but he continued unabated. As a matter of the standard of review, it simply cannot be said the Trial Court abused its discretion in the very limited admission of this evidence.

As a final note, Ms. Schmidt explicitly moves for CR 11 costs and a sanction for Mr. Coogan's and counsels' argumentation on this issue. Not only do they not cite any portion of the record demonstrating a "flaunting" of the Trial Court in the introduction of this evidence, the record objectively demonstrates it was admitted and discussed with the explicit approval of the Trial Court. Mr. Coogan's use of that type of ad hominem tactic, throughout his brief and Ms. Schmidt's need to respond, has lengthened Ms. Schmidt's response and the time required to prepare it by at least 30 percent to say nothing of the inappropriateness of the ad hominem arguments in the first place. As the Court can see in the trial briefing, counsel for Mr. Coogan are simply incapable of raising a single legal issue without somehow twisting it into an allegation of "misconduct." That type of rhetoric has no place here and this Court's failure to take note of it and respond will only serve to endorse it.

**B. Mr. McMonagle's Lack Of Attendance Does Not Merit A New Trial**

The standard of review on this question is "a clear abuse of discretion." Cox, 64 Wn.App. at 826. This represents the denial of a motion for a new trial that is based not on an instruction of law, but instead the admission (or lack

thereof) of evidence.

Without a single citation to the record – not clerk’s papers nor the transcript - yet again Mr. Coogan without any evidence resorts to asserting this is “misconduct” by Ms. Schmidt and counsel in order to confabulate an appealable issue.

The Trial Court explicitly found, based on the various declarations of the parties including Mr. McMonagle’s own, that there was no “bad faith or any negative activity on the part of anyone involved in the trial” regarding Mr. McMonagle’s lack of attendance. VRP 254. The Court indicated no reason to doubt Ms. Schmidt wanted Mr. McMonagle present at trial herself. VRP 153.

Mr. McMonagle made it clear in all of his declarations and when he ultimately did appear post trial that his decisions were his own, and that he had his own attorney with whom he was consulting and obtaining advice, a Mr. Robert Spajic. CP 1853 - 1855 and (October 1, 2010 proceedings, pages 10-11). Mr. McMonagle was clear that he “wrote his declaration” that was originally sent to the Court and that counsel for Ms. Schmidt “made clear that he was not giving me legal advice and I understood and agreed.” Id.

Mr. Coogan cites no authority that would entitle to him to a new trial in this circumstance. Instead, he repeats over and over that Ms. Schmidt’s counsel had no right to even say anything on the issue.

First, even if true that does not get him a new trial.

Second, Ms. Schmidt's counsel was pulled into this by both Mr. Barcus and Mr. McMonagle because, as the record demonstrates, when Mr. Barcus was less than responsive to Mr. McMonagle, he called Ms. Schmidt's attorney who then related what Mr. McMonagle told him, to the court. CP 1832-1833, Proceedings of August 20, 2010, p. 3-4, 5, VRP 25-27, 93-101, 153-154

Third, Ms. Schmidt had an actually greater interest in Mr. McMonagle appearing as he was such a key witness at the first trial and wanted his testimony more than the defense did. Id.

Finally fourth, and as discussed below, it was patently clear the defense was engaged in a subterfuge to fabricate an issue to argue for a new trial and even if only to demonstrate to the Trial Court the misconduct of the defense in doing so, Ms. Schmidt had the right to bring those facts to the attention of the Trial Court. To say that Ms. Schmidt had no "right" to speak on the issue when it was clear the defense was angling for a way to have a free swing and create an issue for appeal, is absurd. She had the right to protect her trial.

The forgoing is sufficient. Even if Mr. McMonagle was in the wrong, it was through no fault of Ms. Schmidt. There is no concept of law, and Mr. Coogan cites none, that would endorse penalizing Ms. Schmidt to go through yet a third trial because one of Mr. Coogan's witnesses did not appear. If Mr. Coogan has a Complaint it is against Mr. McMonagle. However, Mr. Coogan did not assign error to the Trial Court's denial of Mr. Coogan's post-trial

contempt motion against Mr. McMonagle.

The record was clear and not disputed that when the defense originally subpoenaed Mr. McMonagle, he (McMonagle) contacted Mr. Barcus, advised him that his pending wedding and honeymoon that had been planned for over a year conflicted with the trial, and offered to present himself early to have his testimony perpetuated by videotape. (October 1, 2010 proceedings, pages 10 – 11). Mr. Barcus admitted Mr. McMonagle timely contacted him and did not deny that he offered to be available for a videotape preservation. Id. at 13.

Despite that, the defense demanded that nothing short of his physical appearance would be adequate. Id.

Without any evidence, Mr. Coogan asserts Mr. McMonagle would have been a critical witness in his favor when Mr. McMonagle's testimony at the first trial was very adverse to Mr. Coogan on the issue of Ms. Schmidt's injury. But if his testimony was anticipated to have been so helpful and this was not the ruse it clearly was, counsel for Mr. Coogan should have at least preserved his testimony as a back-up and could have still sought to enforce the subpoena. Instead, counsel for Mr. Coogan knew Mr. McMonagle's testimony was not simply not helpful, it was actually harmful, and had no interest in having it – live or on videotape. Mr. McMonagle confirmed to the Court (after trial) that all of the myriad of things Mr. Coogan wanted to call him as a witness on, he either disagreed with or had no memory of and that he told Mr.

Barcus that before trial. Id. at 16 – 17.

To bottom line the issue, and the transcript makes this clear throughout, Mr. Coogan, Mr. Lindenmuth, Mr. Barcus, Ms. Schmidt, and Mr. McMonagle were once all good and fast friends – so much so they all went on extended football trips together. CP 521. That connection was so strong that Mr. Barcus asked Ms. Schmidt to refrain from calling him by his first name (she had not to that point, but the past friendship made the familiarity so clear to Mr. Barcus he felt moved to proactively address it). VRP 375.

Despite the passage of time, counsel for Mr. Coogan were obviously still socially wired into the same circle of people and knew Mr. McMonagle was going to be away on his honeymoon during trial. This is borne out by the fact that when Mr. Barcus had him served, although he did not bother to give him the requisite witness fee Mr. Barcus admits he had the process server give Mr. McMonagle two champagne glasses (August 4, 2010 transcript, p. 4, 8). A playground taunt; whether to rub in the fact they were going to make him miss his honeymoon or simply to let Mr. McMonagle know, that they knew, he was going to be away - it is of no import to Ms. Schmidt but it does reveal the thought process of counsel. For Mr. Barcus to later assert it was a good faith gift to a friend is rather novel in light of his refusal to preserve his testimony and later make motion to hold him in contempt. As the saying goes; with friends like that...

Although this Court need not resolve this per se, this was obviously an elaborate scheme to confabulate precisely the issue for appeal Mr. Coogan now relies on. Id. at 111-13.

In any event, Ms. Schmidt does not condone any witness disregarding a subpoena regardless of the motivation behind sending it. However, for Mr. Coogan's counsel to have received Mr. McMonagle's call ahead of trial advising him of the issue and offering to preserve his testimony by videotape, for Mr. Coogan to refuse to do so is seen for what it is.

Ultimately, based on the offers of proof as to what Mr. McMonagle's testimony would have been at the second trial if presented, and what his testimony was from the first trial, the Trial Court exercised its discretion and determined there was neither a factual nor legal basis for a new trial. The Trial Court found Ms. Schmidt was no less prejudiced by Mr. McMonagle's non-attendance than Mr. Coogan (assuming Mr. Coogan was prejudiced, his offers of proof do not bear that out). VRP 617.

That was uniquely a decision for the Trial Court on its evaluation of the evidence and it cannot be said to have been a "clear abuse of discretion" to have done so.

Finally on this point, Ms. Schmidt explicitly moves pursuant to CR 11 for a sanction. If not said in a pleading, Mr. Coogan's and his counsel's remarks that Ms. Schmidt's counsel "aided and abetted" Mr. McMonagle's

non-attendance, and to go even further and represent that counsel “tampered with witnesses,” is libelous and if learned to have been repeated outside the warm immunity of a court pleading, relief will be sought. However, that it was said in a pleading only changes the nature of the remedy. A sanction is merited. Deterrence is clearly needed.

**C. The Testimony Of Tina Edwards Does Not Warrant A New Trial**

The issue of Tina Edwards is entirely wrapped up in the issue of Mr. McMonagle. As the record demonstrates, it was more of a surprise to counsel for Ms. Schmidt than counsel for Mr. Coogan that Mr. McMonagle would not be present. Supra, see also VRP 27. When the Trial Court would not allow Ms. Schmidt to use his prior testimony as an unavailable witness, which ER 804 clearly allows particularly as even Mr. Coogan agreed Mr. McMonagle was not appearing in response to a subpoena, she asked to call a different witness to fill the gap. VRP 27.

Counsel for Mr. Coogan admitted on the record that Ms. Edwards was disclosed in discovery as a witness, along with a telephone contact number. VRP 472. She was made available to defense counsel and the Trial Court indicated it would even consider ordering a deposition during trial if the defense was not able to reach her and speak with her. VRP 28-32. Ultimately, defense counsel did speak with her at length and she testified. VRP 171-175.

This is hardly an issue for Mr. Coogan to complain of. Over Ms. Schmidt's objection, the Trial Court allowed Mr. Coogan to call an entirely new, and never before disclosed witness; Zimmerman. VRP 470-476.

The standard of review for the Trial Court's denying Mr. Coogan's motion for a new trial on this issue is a "clear abuse of discretion," as it rests upon the admission of evidence. One witness no-showed for both sides, the Trial Court allowed another that was timely disclosed in discovery to be called, gave the defense the opportunity to interview her and if need be depose her, and the trial went on. There is nothing remarkable about that much less an abuse of discretion. As the Trial Court noted on this issue, "things have changed, things continue to change, and this is the way that it goes." VRP 30. And that is, indeed, the nature of trial.

**D. Ms. Schmidt's Discovery Answers Do Not Warrant A New Trial**

Again, this is reviewed for a "clear abuse of discretion" as it is a denial of a new trial based on an evidentiary matter.

Fundamentally Mr. Coogan has no record to even make this argument. He has not identified as error any denial of a motion to compel nor any other actual ruling of the Trial Court other than the penultimate decision to deny his motion for a new trial. But that too was lacking a sufficient record.

On the merits, he argues that Ms. Schmidt's omission in discovery of

one of her medical providers and her failure to identify a 15 year old felony issue warranted a new trial. They do not.

On the medical records, Mr. Coogan argues without any support of the record that Ms. Schmidt treated actively with Group Health between 1995 and 2005 in order to exaggerate the oversight. That is false. What is true is she had a few treatments at Group Health in 1995, as Ms. Schmidt testified she then lost her health insurance (Group Health) and then she later had treatment at Group Health.. VRP 397. However second, it is entirely moot because Mr. Coogan admits he ultimately obtained all of the records before trial. (Cogan memo, page 52). He may be unhappy over when he received them, but he had them and by his own argument he concedes her omission had no impact on trial. He did not identify any. To complain that not being granted a new trial was error over the omission of a health care provider in an interrogatory answer when she later *volunteered* the identity at an IME and the defense had time to secure the records before trial is frivolous.

In regard to the conviction, this is wrapped up in the decision to exclude the evidence itself. The cut to the chase, as a very broad and general statement it is agreed that if a person lies in discovery about an otherwise stale conviction, the more recent lie may be relevant and may make the otherwise stale conviction admissible – not because of the conviction itself but because of the more recent lie about it.

However, like any evidentiary ruling, a Trial Court's decision on the admissibility of evidence will be disturbed only for a clear abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856 (2004). "...[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." Id.

Here, Ms. Schmidt did have a very old conviction; 15 years old. And, she neglected to identify it in her interrogatory answers. However, she also explained the circumstances of both the conviction (Mr. Barcus recommended that she plead guilty) and why she forgot it. (She felt she was pleading guilty to protect a family member and subjectively, 15 years later, when asked in discovery about prior convictions of hers, it did not trigger as an act of hers). CP 250 – 253. It is understood Mr. Coogan finds that unbelievable, but it would be her testimony and it makes sense. And because it is not the prior conviction that is the issue but instead why she forgot to identify it in her more recent discovery answers, the why of why she forgot it is also relevant. And that would bring in the "entanglement" (in the words of Ma'ele) of Mr. Barcus's advice and everything else.

Because of the staleness of the conviction, the plausibility of her explanation of why she forgot to mention it, and the entanglement caused by explaining why she pled guilty, the Trial Court exercised its discretion to exclude the evidence. As the Trial Court explained and was conceded by Mr.

Coogan, the only possible purpose of the evidence was to impeach her credibility. This matter involved an undisputed liability with admitted (at least to some extent) damages which diminished the efficacy of impeachment. And although admittedly “relevant” in some esoteric sense, the prejudicial nature of it outweighed its minor probative value. (VRP 14-19, 47).

As with the medical records, Mr. Coogan argues Mr. Schmidt’s failure to identify this issue in discovery justifies a new trial. However, as Mr. Coogan was clearly aware of the conviction before trial, he articulates neither fact or law as to why an incorrect discovery answer justifies a new trial when despite the incorrect answer he still had the information in time for trial. His argument is nonsensical. Even if he had not discovered the information until after trial, that would not justify a new trial as he would have to meet the very high burden of demonstrating, among other things, that the “results (of trial) will probably change” because of the new evidence, and the evidence “cannot be merely cumulative or impeaching.” State v. Harper, 64 Wn.App. 283, 292 (1992).

At page 53 of his memo Mr. Coogan cites M/V La Conte, Inc. v. Leisure, 55 Wn.App. 396 (1989). That case excluded an expert for not disclosing him until trial. It has nothing to do with the case at bar.

**5. THERE WAS NO ABUSE OF DISCRETION FOR NOT GRANTING A NEW TRIAL BASED ON MR. COOGAN’S EX PARTE JURY DECLARATIONS**

The Trial Court’s denial of a new trial on this basis is reviewed for an

abuse of discretion. McCoy v. Kent Nursery, \_\_\_ P.3d \_\_\_, 2011 WL 4036138 (2011). Albeit, in candor to this Court it later stated it would review written submissions de novo. Id. at para. 26.

It is well settled that "a strong, affirmative showing of juror misconduct is required to impeach a verdict." Richards v. Overlake Hosp. Medical Center, 59 Wn.App. 266, 272 (1990). "Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct" unless the moving party can demonstrate the high showing of not only objective misconduct, but also that it was so great as to conclude it did "affect the verdict." Id. The rule does not appear to be "may" have affected the verdict. The Court in Richards did not condition that requirement on "may." Id. Mr. Coogan's arguments, most notably at page 60 of his brief that "there is a rebuttable presumption that a new trial is required, and the opposing party has the burden of showing beyond a reasonable doubt that extrinsic evidence did not venture to the verdict" is plainly and obviously not the law.

Mr. Coogan argues that because he obtained declarations from jurors asserting they considered a possible statute of limitations for Ms. Schmidt's claims and one gave thought to a wage loss issue, that mandated a new trial.

As a matter of law, a party may not attempt to collaterally attack a verdict by obtaining ex parte, unvetted, and untested by cross-examination declarations prepared by the party that came out on the losing end of trial

In Hendrickson v. Konopaski, 14 Wn.App. 390 (1975) the appellate court reversed the granting of a new trial. In Hendrickson, the trial court ordered a remitter or in the alternative a new trial if the plaintiff did not accept remitter. Id. at 391. The plaintiff refused remitter, the court ordered a new trial, and the plaintiff appealed. Id. Defendant submitted declarations from jurors in support of its motion for a new trial, indicating they considered items of damage not in evidence, and included such items in their verdict. Those declarations were described by the court as follows:

The second asserted error of law concerns the trial court's consideration of post-trial affidavits of 3 jurors in which the jurors itemized specific sums which they allowed in arriving at the total verdict. Two of those sums, namely, \$16,150 for attorney's fees and \$52,000 for college expenses and family support, had no support in the evidence.

Id. at 393.

The court ruled both (1) that a trial court cannot even consider such declarations and (2) a new trial cannot be granted on issues that “inhere in the verdict,” finding that a juror's mental process – good, bad, or even if ostensibly without basis in the evidence - inheres in the verdict:

We do not think these affidavits (as described above) should have been considered, as their substance pertains to matters which inhere in the verdict.

\* \* \*

...[T]hose affidavits which purport to divulge what considerations entered into a juror's deliberation or controlled his action in arriving at the verdict are inadmissible to impeach the verdict. While the distinction between acceptable and

unacceptable verdict impeachment by juror affidavit is often obscure, the rule is clear that any attempt to probe a juror's mental process to determine what specific items the juror considered in arriving at a general verdict falls within the prohibited category and may not be considered.

Id. at 393-394. (emphasis added).

This is consistent with Rasor v. Retail Credit Co., 87 Wn.2d 516 (1976) holding juror declarations may not even be considered on issues such as the jury did not understand the instructions, how or “what considerations entered into (the juror’s) deliberations or controlled his actions in arriving at a verdict,” etc. Id. at 532.

The Supreme Court in Ayers v. Johnson & Johnson, 117 Wn.2d 747 (1991) went even further, holding that juror declarations stating that they or other jurors flat out “fail[ed] to follow the court’s instructions” may not even be considered because such “inheres in the verdict. And affidavits relating to such alleged misconduct may not be considered.” Id. at 769.

This Court only one month ago in McCoy issued a 21 page opinion on new trials and alleged juror misconduct wherein it reversed the Trial Court’s granting of a new trial on a record many times more detailed and “stronger” than that presented herein.

The Trial Court in McCoy made at least 8 findings of fact that two jurors allegedly introduced matters into the jury’s deliberations that were outside of the evidence and based on their personal subjective opinions and

beliefs. Id. at para. 19. One aspect of the case involved allegations that jurors did not answer voir dire questions completely. That is not at issue herein.

However, precisely as in the case at bar, it was alleged jurors considered evidence and matters outside of the evidence justifying a new trial. This Court was clear that jury declarations can only be considered to evaluate objective actions, not thought processes or discussions within the jury room itself:

... [T]he trial court abused its discretion in considering juror 10's declaration to support the McCoys' motion for a new trial based on juror misconduct that interjected extrinsic evidence into deliberations. The trial court's findings of fact 5, 6, 7, and 8, that extrinsic evidence was interjected into deliberations, are not supported by admissible evidence.

Id. at para. 46. The reason was simple; a juror's mere statement of their belief of facts or even their impressions of law are not extrinsic evidence. They are an inherent part of the mental thought process that may not be gainsayed by after the fact declarations. Citing Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197 (2003) where a juror's statements during deliberations about his personal experience as a physician, those of his wife that also suffered migraines, etc. were not "extrinsic evidence" but instead were mental thought process:

...[O]ur Supreme Court reasoned that these statements from Temple's declaration explained Corson's reasons for weighing the evidence in the case the way that he did and for believing that Nowak was not negligent in his diagnosis and treatment of Breckenridge. Thus, it held that the trial court abused its

discretion in granting a new trial because these statements inhered in the verdict.

McCoy, para. 43.

Mr. Coogan's analysis is thus based on a fundamental error. "Extrinsic evidence" in the context of juror misconduct does not consist of a juror expressing their belief of facts, issues, law, etc. "Extrinsic evidence" must rise to the penultimate level of going outside of the trial process, gathering evidence, or otherwise stating facts and evidence and injecting them into the deliberation. See id. Anything else is simply a juror expressing their personal opinions and beliefs – even if wrong – that inhere in the jury process itself.

None of the juror declarations reveal the overt act of bringing extrinsic evidence from outside the trial, into the jury room. Instead, they all merely describe, allegedly, the jurors' mental thought process in regard to how they reached their final decision. The Trial Court properly did not even consider the declarations. Further, to the extent Mr. Coogan attempted to use various juror declarations to allege what different jurors said or did, that is not admissible even if the declaration could be considered. Id.

Mr. Coogan cites a litany of cases but none hold contrary to the foregoing analysis. At page 59 he cites Richards, supra., for the proposition that it is misconduct to "interject extrinsic evidence" and that extrinsic evidence is all "information that is outside all the evidence submitted at trial..."

However, Mr. Coogan ignores the clear warning of Richards that a declaration may not even be considered to the extent a juror attempts to “say what effect the (allegedly extrinsic) remarks may have had upon his verdict.” Richards, 59 Wn.App. at 272. And yet, that is essentially the totality of those declarations. Instead, “is for the court to say whether the remarks made by the juror... probably had a prejudicial effect...” Id.

In Richards, the act of the juror (who had medical training and was an occupational therapist) went so far as to read the medical records admitted into evidence and provided her own, independent medical opinion based on the records. Id. at 273. Plaintiffs argued that was the introduction of extrinsic evidence and misconduct. The Court disagreed, explaining her thought process was “something she naturally brought in with her to the deliberations.” Id. at 274. It was not extrinsic evidence.

Instead, extrinsic evidence is in the nature of that discussed in Halverson v. Anderson, 82 Wn.2d 746 (1973) which, citing two cases, State v. Parker, 25 Wash. 405 (1901) and Gardner v. Malone, 60 Wn.2d 836 (1963) explained: in one, “some members of the jury made an unauthorized visit to the accident scene...” and in the other, “a juror told the other jurors that he knew the defendant was guilty” because “he was a member of a gang and was implicated in another killing.” Halverson, 82 Wn.2d at 750.

Indeed, Division Two in Loeffelhotz v. Citizens for Leaders With Ethics and Accountability Now, 119 Wn.App. 665 (2004) explicitly noted that the Supreme Court in Gardner, supra., intended that a “verdict cannot be affected by an improper remark of a fellow juror.” 119 Wn.App. at fn. 36. At best, that is what Mr. Coogan asserts here.

To not adhere to that as the rule would create an impossible situation. It would require the equivalent of a “hall monitor,” present in every jury deliberation, to ensure no juror utters any subjective impression outside of the words uttered during trial nor even a subjectively “wrong” statement of personal impression because that surely takes place at some point in every jury’s deliberations. Jury decisions would be rendered pointless as in that case, all it would take is a single, biasedly written declaration by counsel for the loosing party quickly stuck under the nose of a disgruntled juror, to throw the entire process out. If that is the standard for a new trial, no verdict will be safe.

The only exception, again as noted by this court in Loeffelhotz, is Halverson: “Halverson, however, seems to have modified Gardner in cases in which a juror injects unsupported information concerning the claimant’s loss of earning capacity.” Id. Thus, it appears that the injection of specific wage information, outside of the evidence, might be considered extrinsic evidence when wages have been awarded.

However, that is categorically not what happened in this case. Unlike both Halverson and Loeffehloz, the jury did not award any special damages for wages which could be said to have been outside of the evidence. In this case, the verdict form already had the specific amount of special damages to be awarded filled out by the court with the approval of the defendant. The jury only awarded general damages.

Thus, the allegation that jurors allegedly considered whether Mr. Schmidt lost wages while injured comes down to two points.

First, it is not extrinsic evidence within the context of extrinsic evidence. Extrinsic evidence based on the case law above is the injection of a specific fact, such as that pilots for TWA make \$2,000 a month as was injected in Halverson or “public servants” such as Loeffelholz can make an “average salary at \$30,000.” In this case, Ms. Schmidt testified to substantial physical limitations. The jurors commenting simply that Ms. Schmidt likely lost wages is not the same as the injection of specific extrinsic evidence, such as in Loeffelholz, that the plaintiff could have made “\$30,000 a year” as a “public servant” and then, as the opinion indicates, “multiplied that average... by the number of years the suit ha(d) been going on” and then award that as special damages. Loeffelholz, 119 Wn.App. at 679.

Second, there is no admissible, competent showing that it probably had an effect on the verdict even assuming it was extrinsic evidence. For instance,

it is completely appropriate to consider whether a person lost wages, had a diminished earning capacity, and did not make as much money when considering that as a component of their emotional distress from the injury itself. Not having money coming in because of an injury, is part of the distress of the injury. In this case, Ms. Schmidt testified she had a daycare job when she fell that she was unable to resume. The jury did not award lost wages as special damages; that is clear. And the amount of general damages is not at all inconsistent with the pain and suffering experienced since 1995 after having three asymptomatic disc herniations lit up.

Mr. Coogan at page 64 argues that allegedly considering the statute of limitations was the equivalent of “consult(ing) the law books while deliberating” which has been found to justify a new trial. The cases he cites are completely inapposite. In Adkins v. Aluminum Co. of American, 110 Wn.2d 128 (1998) during deliberations the bailiff provided the jury a law dictionary to consider the definition of negligence. The trial court instructed the jury on negligence. To give the jury a dictionary so they could come up with their own jury instruction obviously required a new trial and has nothing to do with the facts at issue here.

Here, and this is an entirely impressible reading of tea-leaves of the minds of the jurors, but what it appears they did was look for some way to get their collective heads around the very long period of time that has elapsed since

Mr. Coogan's malpractice. There is no meaningful showing (again, the parties and the Court should not even be having this discussion) that the juror's increased the gross award because of any statute of limitations consideration or that the verdict would have been lower had they not discussed it. They determined her general damages, mentally used various years as mile posts to consider it, and made an award that is not simply reasonable but actually low in light of consistent pain since 1995 caused by 3 lit up disc herniations.

Finally, Mr. Coogan made no showing to the Trial Court and feigns no argument here as to how, assuming the declarations could even be considered, the verdict was against the evidence and the matters at issue more probably than not altered the verdict. If anything, the declarations demonstrate the jurors artificially limited Ms. Schmidt's damages by what (allegedly) they believed the statute of limitations for her personal injury claim to be. Ms. Schmidt was entitled to all of her pain and suffering, from the date of the slip fall to the present provided it was supported by evidence. If any party has been affected, it is Ms. Schmidt.

**6. THERE WAS NO ERROR MUCH LESS CUMULATIVE ERROR**

There was no error below, much less cumulative error. This argument by Mr. Coogan is not a basis for a new trial.

**E. Ms. Schmidt's Cross Appeal**

**1. It Was Error To Not Instruct The Jury On General Damages Arising Out Of Malpractice**

This is an issue of first impression in Washington. However, Washington law indicates general damages should be available for victims of attorney negligence. To not allow it is to create a special immunity for the bar. It is inconsistent with basic tort principles and is materially adverse to the public's perception of both the bar and the judiciary as it creates the impression the law is "protecting its own."

Historically, Washington has taken a liberal view to malpractice claims. Hizey v. Carpenter, 119 Wn.2d 251, 264 (1992). The purpose of such claims is to fully compensate the injured client and to return them to the position they would have occupied but for the malpractice. Shoemake v. Ferrer, 143 Wn. App. 819, 825 (2008). To that end, the courts must assure that injured clients are fully compensated:

...[W]ashington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice...

Id. at 829. It is well established that when a special relationship is breached, general damages are available:

[The "special relationship"] is not merely economic, and a reasonable person standing in the defendant's shoes would easily foresee that its breach is likely to cause significant

emotional distress. It will support emotional distress damages without proof of physical impact or objective symptomatology.

Price v. State, 114 Wn. App. 65, 73 (2002). Price indicated general damages must be made available for the violation of the special relationship that existed between DSHS and mere prospective parents in an adoption setting. Id. at 66. They are available merely upon the breach of the duty, with no higher showing of objective symptomatology or medical diagnosis. Id. at 71.

This is consistent with the availability of general damages for insurance bad faith; which similarly does not require objective symptomatology or a medical diagnosis for general damages to be awarded. Id. at 72. See also, St. Paul Fire and Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130 (2008); and Anderson v. State Farm, 101 Wn. App. 323, 333 (Div. 1, 2000) (“Because bad faith is a tort, a plaintiff is not limited to economic damages. Anderson alleges she and her husband suffered emotional distress due to the financial difficulties”).

It is suggested to be a double standard without reason or logic, as well as to give rise to a violation of Equal Protection, to create a special immunity for attorneys to not allow general damages for the breach of that relationship, but to allow them in every other special relationship particularly as the Supreme Court has already found the attorney-client relationship is of the same

character, based on a fiduciary duty and trust. Liebergesell v. Evans, 93 Wn.2d 881, 889 (1980).

This state imposes general damages on insurance companies that merely have “quasi-fiduciary” duty because the breach of even a “quasi-fiduciary” duty gives rise to foreseeable general damages. Coventry. See also American Manufacturer’s Mutual Ins. Co. v. Osborn, 104 Wn. App. 686, 698 (2001). Attorneys owe an actual fiduciary relationship to their clients. Liebergesell.

Other states asked this question have resolved it in favor of awarding general damages. In Betts v. Allstate Ins. Co., 154 Cal.App. 688 (1994) the court upheld the jury award of \$500,000 in general damages joint and severally against the insurance carrier and its attorneys for emotional distress resulting from a combination of the insurer’s bad faith and the attorney’s negligent handling of the defense. Id. at 697. The court held that “the shock of the substantial damage judgment alone (against plaintiff, who lost in the underlying auto accident action where she was the defendant) would be sufficient to uphold a verdict for nervousness, shock, humiliation, chagrin, worry, etc.” In addition to being upset by the bad results itself, the Court acknowledge the client was put through several years of unnecessary harassment and emotional distress as a result of the various lawyers’ conduct. Id.

For much the same reasons, Michigan has also acknowledged general damages arising out of attorney malpractice. See Gore v. Rains & Block, 189 Mich. App. 729, 734 (1991) holding that to ignore it, would be to create an artificial distinction in the law explaining that juries are routinely expected to evaluate "mental states, such as shame, mortification, humiliation and dignity." Id. at 740. It should not matter what the "source of the mental distress and anguish is..." Id.

Maine has acknowledged these damages. See Salley v. Childs, 541 A.2d 1297, 1300 (Me. 1988) as has Pennsylvania, see Jackson v. Wessel, 92 B.R. 987 (1988) and Bangert v. Harris, 553 F.Supp. 235 (Pa. 1982), Alabama, Oliver v. Towns, 770 So.2d 1059, 1061 (Ala. 2000), and Arizona, Cecala v. Newman, 532 F.Supp.2d. 1118, 1134-38 (Ariz. 2007).

In this case, as amply commented by this court in previous appellate opinions, Mr. Coogan subjected Ms. Schmidt to horrible mistreatment, concealing the nature of his malpractice, berating, swearing and intimidating her while she was pleading with him not to allow her statute of limitations to expire, and ultimately blaming her for his own shortcomings once his malpractice came to light.

Ms. Schmidt slipped and fell in 1995. It is now 2011. It would be absurd for Mr. Coogan to suggest that simply giving her in 2011, that which he lost in 1998, somehow makes her whole. She endured the distress of the

relationship and Mr. Coogan's abuse while the malpractice was taking place, the shock and loss of the case being barred and the mental distress of not being able to pay her medical bills, and the ongoing uncertainty and humiliation over the process and how he treated her. Mr. Coogan owed her a fiduciary relationship which he breached. When this state holds every other professional in the shoes of a special relationship to foresee the emotional consequences of breach, it is a violation of Due Process, Equal Protection, and inconsistent with Washington law to give attorneys a free pass. The trial court erred in not instructing on general damages.

Ms. Schmidt raised this repeatedly and clearly both made and preserved the record. She sought determination by summary judgment (CP 2118 – 2154) which was denied (CP 2205 – 2206). She raised it again in motions in limine (CP 2245 – 2256) which was denied (CP 2311 – 2318) and she filed a motion for reconsideration of that Order (CP 2299 – 2310) which was denied. And she offered jury instructions to that effect (CP 2277 – 2298) which were not issued. Ms. Schmidt preserved that instructional issue in instruction exceptions. VRP 700.

**2. The Trial Court Erred In Not Allowing Ms. Schmidt To Amend Her Complaint**

The first trial went forward with general damages for malpractice without objection from Mr. Coogan. However, because of comments made by

Mr. Coogan's attorney as the second trial approached, in an abundance of caution and paranoia, Ms. Schmidt sought to amend her complaint to add independent emotional distress causes of action. CP 1970 – 1991. That motion was denied.

The Trial Court denied those motions with the justification that they were made too late. It will be admitted, the amendments were made well after the original filing however that itself is not the standard.

Motions to amend must be granted freely and should be denied only when doing so will prejudice the adverse party, in every real sense ambushing them, depriving them of an ability to respond. Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, 100 Wn.2d 343, 670 P.2d 240 (1983). In that context, even an unexcusable delay is not a reason to deny the motion. Id.

In this matter, Ms. Schmidt did not originally plead those additional cause of actions based on her good faith belief that general damages were available for malpractice in light of the analysis and case law cited in the immediately preceding section. However, that was always at issue, it was tried at the first trial without objection, and despite the case being reviewed three separate times by appellate courts, not a single court disturbed those general damage instructions. It was always at issue in the case. Ms. Schmidt's proposed amendments added nothing new. They merely provided additional

theories of relief but were based on entirely the same set of facts. Not only was there no prejudice to Mr. Coogan in the context that the amendment did not add a new element for trial, if it did the motion was made sufficiently in advance of trial to allow him to respond.

**F. Request For Relief**

The Trial Court's denial of Mr. Coogan's various motions must be affirmed. The jury verdict is proper and should stand.

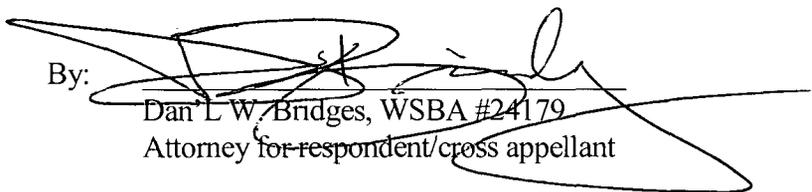
However, this court should reverse the Trial Court's refusal to instruct the jury on general damages arising out of Mr. Coogan's malpractice and the Trial Court's refusal to allow Ms. Schmidt to amend her complaint. The matter should be remanded for, not a "new trial" per se, but an additional trial on those matters.

Mr. Schmidt is entitled, at the very least, to her statutory costs and attorney's fees. It is suggest that this Court should consider additional CR 11 relief in light of the many improperly certified arguments and salacious accusations made by Mr. Coogan and counsel.

DATED this 11<sup>th</sup> day of October, 2011.

McGAUGHEY BRIDGES DUNLAP

By:

  
Dan L.W. Bridges, WSBA #24179  
Attorney for respondent/cross appellant

**CERTIFICATE OF SERVICE**

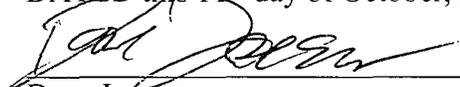
I certify that on October 11, 2011, I caused the foregoing **Teresa Schmidt's Opening Brief** to be served on the following by the methods indicated:

Paul A. Lindemuth  
Law Offices of Ben Barcus & Associates  
4303 Ruston Way  
Tacoma, WA 98402

- Via hand delivery by Legal Messenger
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via Email
- Other: \_\_\_\_\_

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of October, 2011.

  
\_\_\_\_\_  
Dave Loeser

**CERTIFICATE OF SERVICE**

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DATED this 11<sup>th</sup> day of October, 2011.

  
\_\_\_\_\_  
Dave Loeser

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