

No. 41279-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

TIMOTHY P. COOGAN, et al.

Appellants,

vs.

TERESA SCHMIDT,

Respondent.

11 JUN 15 PM 3:57
COURT OF APPEALS
BY [Signature]

APPELLANTS' AMENDED AND CORRECTED OPENING BRIEF

BEN F. BARCUS, WSBA# 15576
PAUL A. LINDENMUTH, WSBA #15817
*LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES, P.L.L.C.*
Attorney for Appellant
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444

ORIGINAL

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I. INTRODUCTION

This case has a lengthy and relatively complex legal history. This matter was initially filed on November 3, 2000. (CP 1). Within the complaint, plaintiff, Teresa Schmidt, complained that her former lawyer, and former employer, Timothy Coogan failed to perfect a personal injury lawsuit arising out of a December 23, 1995 slip and fall incident which occurred at a business, (known as The Grocery Outlet), located within Tacoma, Washington. According to Ms. Schmidt's complaint she was contending, *inter alia*, that Mr. Coogan had engaged in legal malpractice by failing to properly perfect her lawsuit relating to her 1995 slip and fall. (Id). This case languished within the Pierce County Superior Court System for nearly three years prior to being brought to trial. Finally, commencing on November 17, 2003 the first trial in this matter was held with Thurston County Superior Court Judge Daniel J. Bershauer, as a visiting judge. The first trial in this case concluded on November 20, 2003 with the jury entering a verdict against Mr. Coogan for \$32,000.00 in past economic damages, plus \$180,500.00 for non-economic damages. *Schmidt v. Coogan*, 145 Wn. App. 1030 (unpublished, p. 1).

On or about December 1, 2003 defendant Coogan by and through his counsel filed a motion for judgment as a matter of law and/or for a new trial. Within the motion defendant Coogan contended that the Trial Court should have directed a verdict in the defendant's favor because, among other things, the plaintiff failed to establish under "case within a case" principles,

that the owner of the premises where Ms. Schmidt suffered her slip and fall had engaged in any actions that could be characterized as "negligent", and due to the absence of any expert testimony establishing that Mr. Coogan's actions fell below the standard of care applicable to attorneys within the State of Washington. Additionally, plaintiffs sought a new trial based on the impermissibly toxic and inflammatory closing argument of plaintiff's counsel, as well as the fact that the past economic damages Award of \$32,000.00 was unsupported by the evidence, given that at time of trial Ms. Schmidt only presented medical bills in the amount of \$3,840.00, and no other evidence of past economic damages. **Significant to this appeal, the defendant asserted that the Trial Court also erred in permitting Ms. Schmidt to testify, over defense objections, that she lacked insurance to pay her medical bills.**

On January 9, 2004 Judge Bershauer ruled on defendant Coogan's motion for judgment as a matter of law and for a new trial. Judge Bershauer denied judgment as a matter of law, finding the facts presented at trial sufficient to establish the negligence of the third party premises where Ms. Schmidt was injured under "case within a case principles", and found that expert testimony was unnecessary to establish such a claim under the circumstances of this case.

However, Judge Bershauer ordered a new trial limited to damages, and found compelling the defense arguments that the plaintiff's counsel had engaged in flagrant misconduct during the course of his closing argument, justifying a new trial. Additionally, the Trial Court found that the past

economic damages portion of the verdict was unsupported by the evidence. Also, within the finding of facts and conclusions of law, the Trial Court provided:

1.10 In addition, during the course of trial evidence was submitted by the plaintiff that the plaintiff lacked medical insurance to pay her medical bills, and that she had been subject to finance charges. In hindsight, the allowance of such evidence was error. The financial condition of the plaintiff is irrelevant. (CP 23-29); (CP 1407). (Emphasis added) (Appendix No. 1)

On February 2, 2005 plaintiff filed a Notice of Appeal. (CP 22). Shortly thereafter on February 4, 2005 the defendant filed a Notice of Cross-Appeal.

On September 6, 2006 the Court of Appeals, Division II, filed its first opinion on this matter.¹ See *Schmidt v. Coogan*, 135 Wn. App. 605, 145 P. 3d 1216 (2006). Within that opinion, the Court provided relief under the cross-appeal, and determined that under “case within a case” principles, the plaintiff had failed to prove the underlying claim, thus the matter was reversed and remanded for dismissal.

In response, plaintiff Schmidt filed a petition for review to the Washington State Supreme Court, which was granted. On December 13, 2007, without the benefit of supplemental briefing, or oral argument, the Supreme Court in a *per curiam* opinion reversed the decision of the Court of Appeals, determining that there were sufficient facts to support all the elements of the underlying claim against the third party business where

¹ On October 31, 2006 an Order publishing the opinion was entered.

Ms. Schmidt had suffered her "slip and fall." See, *Schmidt v. Coogan*, 162 Wn. 2d 488, 173 P. 3d 273 (2007). Within that opinion the Supreme Court remanded to the Court of Appeals to consider the remaining issues contained within the parties' briefing.

On July 2, 2008 the Court of Appeals Division II, by way of an unpublished opinion affirmed the Trial Court's denial of Mr. Coogan's motion to dismiss, and its grant of a new trial on the issue of damages. The Court of Appeals within its unpublished opinion found dispositive the fact that the verdict for \$32,000.00 for past economic damages was unsupported by the evidence, thus justifying the grant of a new trial pursuant to CR 59(a)(7). The Court of Appeals, based on such a ruling, found it unnecessary to review the questions of whether or not Judge Bershauer was warranted in granting a new trial due to the flagrant misconduct of plaintiff's counsel during the course of closing argument and the improperly introduced insurance evidence.

The plaintiff, unsatisfied with the Court of Appeals' determination, filed yet another petition for review which was denied by the Supreme Court on March 3, 2009. See *Schmidt v. Coogan*, 165 Wn. 2d 1030, 203 P. 3d 379 (2009) (Order denying petition for review).

Thus, on March 19, 2009 a final mandate issued and was filed with the Pierce County Superior Court. (CP 33-38).

Ultimately, the case was assigned to The Honorable Carol Murphy, Thurston County Superior Court Judge for a retrial. The trial effectively

commenced on August 20, 2010 with a hearing on the parties' motions in limine. (RP 8-20-10 P. 3-54). A jury was selected on August 23, 2010 and the case concluded with a jury verdict's awarding Ms. Schmidt damages on August 27, 2010.

As discussed below, this appeal addresses a number of issues that occurred during the course of retrial, including the Trial Court's failure to direct a verdict/grant judgment as a matter of law for the defendant, given the plaintiff's total failure to prove the essential element of "collectability" at any time during the course of trial.

Once again, a number of untoward events occurred during the course of trial, inclusive of evidentiary errors and abuses of discretion. **Once again, the Trial Court allowed Ms. Schmidt to testify regarding her absence of insurance, (despite Judge Bershauer's previous findings). Another error was the Trial Court's failures to recognize plaintiff's counsel's misconduct by interfering with defendant's properly served subpoena to an attorney-witness, (former fiancé of plaintiff Schmidt), named John McMonagle, and juror misconduct inclusive of the juror's determining Ms. Schmidt should be awarded damages for a five-year time period based on its erroneous belief that the statute of limitations applicable to the underlying claim was five years, even though the evidence conclusively established that as a result of the underlying slip and fall injury, Ms. Schmidt, based on her own medical records was symptomatic for a relatively short period of time and fully recovered prior to a 1997**

motor vehicle accident. (CP 26A)

As discussed in detail below, the Trial Court erred by instructing the jury in a manner which permitted the plaintiff to argue that she was entitled to an Award of non-economic damages up to the date of trial and into the future, based on her forensic examiner's deposition, which was taken in the year 2003, wherein it was never opined that she had suffered a permanent injury and the undisputed evidence clearly established that since the slip and fall at issue, she had been involved in two motor vehicle accidents, and a number of falls in her home which resulted in an unrelated significant neck surgery. (CP 1124-1237).

Such issues were raised and presented before trial, during trial, and within defendant's motion for judgment as a matter of law and/or for a new trial, (CP 1329-1369).

Once again Mr. Coogan did not receive a fair trial.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in failing to grant the defendant's motion for judgment as a matter of law at the close of plaintiff's case in chief, and after the jury's verdict in this case, when the plaintiff, in this legal malpractice case, relating to the failure to perfect a personal injury lawsuit, failed to establish the essential element that any judgment in the underlying case, had it been properly perfected, would have been "collectible."

2. The Trial Court erred by failing to grant judgment as a matter of law on issues relating to damages, when there was **no evidence** supporting

a jury instruction on future non-economic damages or damages beyond the end of the year 1996.

3. The Trial Court erred in failing to limit testimony, and arguments relating to damages, when the undisputed facts establish that as a result of the slip and fall involved in the underlying case, the plaintiff received a sprain/strain injury which undisputably resolved within a relatively short period of time, and there was **no medical testimony** establishing any causal link between any alleged ongoing symptoms and the underlying slip and fall accident.

4. The Trial Court erred in permitting the jury to consider any injury or damages suffered by the plaintiff as a result of the slip and fall at issue in the underlying case, when there is **no evidence** that plaintiff continued to suffer accident-related injuries beyond the end of the year in 1996, (or shortly thereafter), when the limited medical testimony she submitted within her case did not support any contention that she suffered any form of a permanent injury, and the undisputed evidence established that she had two subsequent motor vehicle accidents where she claimed injury to the same parts of her body, multiple falls in her home, which resulted in a 2006 neck surgery, and there was an absence of a factual basis that there were any relationship between her alleged ongoing symptoms, and the comparatively minor slip and fall she suffered in 1995.

5. The Trial Court erred in giving to the jury Court's Instruction No. 6, which instructed the jury that plaintiff was liable for the full extent of

plaintiff's injury arising out of her personal injuries sustained on December 23, 1995, when such an instruction fails to take into consideration that the defendant could only be held responsible for those damages for which Ms. Schmidt actually would have been able to collect upon, given the absence of any evidence presented in this case on the question of collectability. (Appendix No. 2).

6. The Trial Court erred in giving Court's Instruction No. 7, the damages instruction, which failed to limit any award of general damages to the time frame supported by the *limited medical testimony* provided in this case, which permitted the jury to consider future non-economic damages, when there was **no medical testimony** presented during trial which would support the proposition that plaintiff suffered any form of permanent injury, and in the interim years suffered several other similar injuries. (Appendix No. 3).

7. The Trial Court erred in failing to grant defendant's motion for a new trial when over the vehement objections of defense counsel, Ms. Schmidt was able to testify regarding her lack of medical insurance in contradiction to the well-established legal principles that insurance evidence is irrelevant in a personal injury case and that evidence regarding lack of insurance constitutes an impermissible and prejudicial plea of poverty.

8. The Trial Court erred by failing to grant plaintiff's motion for a new trial, when it is undisputed that plaintiff's counsel inappropriately interjected himself, and interfered with defense counsel's effort to subpoena

a recalcitrant witness, who ultimately failed to attend trial, despite being admittedly served with defendant's trial subpoena.

9. The Trial Court erred, and abused its discretion, by failing to permit defendants to impeach plaintiff Schmidt regarding a felony first degree theft conviction, when the prosecution regarding such conviction was within the time frame of plaintiff's alleged slip and fall injuries and related treatment, and when it was undisputed that in both her original and supplemental answers to defendant's interrogatories, Ms. Schmidt failed to reveal such conviction and provided false answers regarding her criminal history, as well as the identify of one of her primary healthcare providers. (Appendix No. 4).

10. The Trial Court erred, and abused its discretion by failing to grant plaintiff's motion for a new trial, when it was undisputed that there was juror misconduct, because the jurors, when assessing and calculating damages against the defendant, used the extraneous evidence, and erroneous view, that a five-year statute of limitation was applicable to the underlying claim, and used such an erroneous view in calculating damages. (Appendix No. 5).

11. The Trial Court abused its discretion when it failed to enforce defendant's subpoena against recalcitrant attorney witness John McMonagle, who willfully refused to appear in court to testify in compliance with defendant's subpoena, and who at a minimum should have been held in contempt for his actions.

12. The Trial Court erred in failing to grant a new trial due to the plaintiff's springing on the defense a "surprise" witness, Tina Edwards.

13. The Trial Court erred by entering a final judgment in this case in favor of plaintiff.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err, as a matter of law, in failing to dismiss Plaintiff's case following completion of Plaintiff's case in chief or by failing to grant Defendant's Motion for Judgment as a Matter of Law, when the undisputed facts show that the Plaintiff, in this legal malpractice case, relating to the failure to properly perfect a personal injury lawsuit, failed to establish the essential element that any settlement or judgment in the underlying case could have been "collected"?

2. Did the Trial Court err by failing to grant partial judgment as a matter of law on issues relating to the Plaintiff's damages, when there was no medical testimony supporting any causal link between any injuries and/or symptoms suffered by the Plaintiff after the end of the year 1996, particularly considering that following the accident at issue in this case, there had been a number of intervening accidents, including two motor vehicle accidents and a number of falls within her home, where Plaintiff suffered injury to the identical parts of her body?

3. Did the Trial Court err in submitting to the jury instructions which allowed them to award non-economic damages past the end of the year

1996 and future damages after the date of the August, 2010 trial in this case, when the limited medical testimony presented by the Plaintiff in this case, only served to establish that she suffered a sprain/strain injury that was not symptomatic after the end of the year 1996, and there was no testimony that as a byproduct of the slip and fall at issue, she suffered any permanent injury?

4. Did the Trial Court err and abuse its discretion by failing to grant Defendant's Motion For A New Trial, when the Trial Court clearly erred by not limiting Plaintiff's damage claims to the medical proof presented at trial, and by permitting the jury to award Plaintiff future non-economic damages unsupported by medical evidence, and when a number of untoward events occurred at time of trial, including, but not limited to:

- i. Over the objection of defense counsel, lack of insurance/plea of poverty evidence was presented to the jury;
- ii. Plaintiff's counsel interfered with the defendant's ability to subpoena a critical trial witness;
- iii. The Trial Court permitted a "surprise witness" to testify in the case;
- iv. Clear, unequivocal and unimpeachable evidence presented to the Trial Court that there was juror misconduct in the method and manner in which the jury went about arriving at its verdict;
- v. When the Trial Court erred in refusing to allow the defendant to impeach Plaintiff Schmidt regarding a contemporaneous felony conviction, and with respect to her false answers to interrogatories with

respect to the existence of such conviction, and false and/or the misleading statements made by the Plaintiff, trying to explain away her false interrogatory answers?

5. Should the Court of Appeals reverse the judgment of the Trial Court, and remand this matter for a new trial due to cumulative error?

IV. STATEMENT OF FACTS

A. Factual Background of Ms. Schmidt's Medical History

Given the current procedural posture of this case, it no longer can be disputed that on or about December 23, 1995 Teresa Schmidt suffered a slip and fall injury at a grocery store called the "Grocery Outlet" located on Sixth Avenue within Tacoma Washington.²

During the course of trial Ms. Schmidt relied on the medical records that she viewed to be accident- related and the testimony from a forensic evaluator, Dr. Alan G. Brobeck. Upon review of Ms. Schmidt's medical records, it appears that she first sought out any form of healthcare treatment on December 28, 1995, following the December 23, 1995 slip and fall accident. At that time she sought out chiropractor, Richard Raymond, who noted complaints of headache pain, stiffness, mid back pain, irritability,

² Unfortunately, the fact that at around the time of this alleged event Ms. Schmidt was under prosecution for felony theft from a former employer, was unavailable during the course of earlier proceedings in this case. As such it is emphasized that given the procedural posture of this case the defendant is compelled to acknowledge that the facts of the accident have to be taken as true. As shown below, there are significant issues regarding plaintiff's credibility.

sleeping problems and numbness within Ms. Schmidt's fingers. He prescribed a course of chiropractic care, but, did not feel it necessary to place any work restrictions upon Ms. Schmidt, and it was noted that "temporary disability is not needed at this time". (Exhibit 26A).

Ms. Schmidt followed her initial chiropractic treatment with visits to Dr. Loren Bettridge, MD, who prescribed to Ms. Schmidt physical therapy. Ms. Schmidt by January 19, 1996 was reporting to her chiropractor that she had had 50 percent improvement in her cervical range of motion, the primary area of her slip and fall-related complaints. There was also a second round of physical therapy prescribed for Ms. Schmidt in the summer of 1996, but she failed to complete the recommended course of physical therapy, cancelling her final appointments. The last medical record relating to Ms. Schmidt's slip and fall submitted by her during the course of trial indicates that she was last seen by Dr. Bettridge on or about November 14, 1996. (Id.). There was **no evidence** within the medical records of Ms. Schmidt that she had suffered any form of a permanent injury as a byproduct of the slip and fall event of December 1995. Indeed, all evidence suggested that Ms. Schmidt although injured, was having a slow but steady recovery.

At time of trial it was established that on April 1, 1997 Ms. Schmidt was involved in a significant, (at fault), motor vehicle collision from which she was also claiming injury. (Exhibit No. 14). What medical records could be gathered from that time frame, indicated that Ms. Schmidt after April 1,

1997 was representing to her healthcare providers that she was injured in the 1997 accident and that all her symptoms after that date were relating to that accident.³ Indeed according to Dr. Robert Klien (deceased) Ms. Schmidt's primary treating physician regarding the 1997 MVA accident the "etiology" of her problems after April 1997 where "an MVA". (CP 1461-70). Indeed, own medical records revealed that on March 20, 1998 Ms. Schmidt was evaluated by neurosurgeon Richard Wohns, MD regarding her then complaints of headache and neck pain. At that time Ms. Schmidt provided Dr. Wohns the following history:

"In December 1995 she fell on the cement floor in a store, and noted neck pain and headache. She was treated conservatively and had an MRI scan three months later. She improved and had not had any cervical pain for months prior to the MVA). (Appendix No. 6). (Exhibit No. 3) (CP 1400).

Thereafter, by January 1999 Ms. Schmidt in her medical records was referencing that her general state of health was "excellent", and she was

³ Efforts to gather Ms. Schmidt's medical records after the last mandate was issued were extremely problematic because of their vintage. Robert Klien, one of her 1997 treatment providers, had since passed away and the plaintiff was only able to produce a portion of his records, which perhaps not coincidentally, were missing as soon as the 1995 accident-related injuries were the subject of discussion. (CP 1461). Additionally, although Dr. Brobeck had been retained by the plaintiff to conduct a forensic records review and examination, and was not a treating healthcare provider, the plaintiff despite repeated demands never produced a copy of Dr. Brobeck's report, which was repeatedly referenced during the course of the 2003 preservation deposition which was played to the jury, as the plaintiff's sole medical evidence in the August 2010 retrial of this case. It is also noted that it was discovered on the eve of trial that Ms. Schmidt was also involved in a 1993 motor vehicle accident, wherein, according to the police report, she was claiming injury to her neck. (Exhibit No. 16) (Appendix No. 7). Ms. Schmidt never revealed the existence of such an accident in response to specific inquiries within defendant's interrogatories propounded to her as the plaintiff. (CP 404-514). Defendants in limine moved to exclude Dr. Brobeck's depositions in its entirety as obsolete, and thus misleading. (CP 254-302). (CP 734-844).

assessed as being someone who suffered hypothyroidism, but was an “otherwise healthy adult female”.

Unfortunately for Ms. Schmidt, she suffered from a number of unrelated difficulties relating to the area which had been previously injured, (but healed), in her 1995 slip and fall. In July 2001 she was complaining about neck and wrist pain following a fall that she had in “the bathroom”.⁴ At that time it was determined that she had several nodules in her neck that was causing her neck discomfort. (Exhibit 2A, 2B, 2C, 13, A, 13B).

By 2005, unfortunately, Ms. Schmidt suffered a number of other injuries to her neck. Ms. Schmidt’s medical records clearly establish that in 2005 she suffered a number of falls in her home where she apparently passed out. These falls were described as “a couple of falls down the stairs”. As a result, Ms. Schmidt suffered cervical and thoracic back pain. Ms. Schmidt’s treatment relating to these unfortunate falls culminated in a December 5, 2006 C3-T1 posterior decompression laminectomy, medial facetectomy and foramina decompression. Id.

Finally, and significantly, Ms. Schmidt was involved in yet another motor vehicle collision on December 7, 2009, where once again she claims to have suffered from neck injury inclusive of bilateral neck pain, shoulder, upper back, mid back pain, and “tension”, which was accompanied a

⁴ At around the time of the subject slip and fall Ms. Schmidt also was complaining of left wrist pain which was ultimately diagnosed to be carpal tunnel syndrome. Dr. Brobeck, her forensic examiner, could not relate her wrist difficulties to the slip and fall accident of 1995.

headache, along with low back and hip pain.⁵ (CP 1427).

The above medical history is significant considering what actual medical testimony was presented at time of trial in this case. Below Ms. Schmidt submitted some medical records, none of which pre-dated January 1, 1997. In addition, she presented the deposition testimony of Dr. Brobeck, who conducted a forensic examination of Ms. Schmidt in 2001, some 5 plus years after the slip and fall accident. The preservation deposition itself was conducted in 2003.

During the course of that preservation deposition Dr. Brobeck opined on a more probable than not basis that Ms. Schmidt suffered a cervical dorsal sprain/strain as a byproduct of the December 23, 1995 slip and fall. (Dep of Brobeck, P. 33-34). With respect to any ongoing symptomology she may have been suffering at the time of the examination, Dr. Brobeck indicated that he could not say on a more probable than not basis, that any symptoms subsequent to the 1997 collision, were a byproduct of either the 1995 slip or fall, or a result of the 1997 collision. (*Id.*, P. 38-39).

Dr. Brobeck never opined based on reasonable medical probability that Ms. Schmidt suffered a permanent condition, or expressed any opinions as to whether or not, as of 2001, she was suffering from and ongoing symptoms related to the 1995 slip and fall accident. Following the playing of Dr. Brobeck's deposition, the defense moved to exclude any testimony

⁵ The status of Ms. Schmidt's claim regarding this third motor vehicle collision is currently unclear.

regarding injuries outside the scope of the testimony of the plaintiff's sole medical witness: (RP Vol. 2, p. 170-171).

But nonetheless, during the trial, the Trial Court permitted Ms. Schmidt to testify that she believed that she had suffered a permanent injury, and that all of her complaints and problems referenced within her medical records were somehow a byproduct of the 1995 slip and fall, despite a multitude of intervening events, which, according to her own medical records, produced injuries in the same parts of her body. The Trial Court went so far as to deny defendant's motion in limine on the issue, and written and oral motion for a directed verdict and judgment as a matter of law regarding plaintiff's failure to establish medical causation relating to conditions existing past November 1996, and in no way limited, by instructions, or otherwise, the time frame in which Ms. Schmidt could recover for her 1995 slip and fall-related damages. (CP 1124-1237). The Trial Court, over defense objections and exceptions, instructed the jury that Ms. Schmidt, in the year 2010, could, based on the 1995 slip and fall accident, collect future non-economic damages. (CP 1306-1320). The propriety of such action shall be discussed in detail below.

B. Events That Occurred During The Course Of Trial

As indicated, the trial commenced on August 20, 2010 with a hearing on the parties' motions in limine. (RP 8-20-10, P. 1-56). Both parties sought in limine to exclude any reference to "insurance" evidence. Both parties'

motions were granted.⁶ Pretrial, defendant sought a court subpoena for Ms. Schmidt's booking records on her felony theft conviction, and explained her duplicity in answering defense interrogatories regarding such a conviction. (CP 206-232); (CP 404-514). The defense also sought a ruling from the Trial Court as to whether or not Ms. Schmidt's 1996 first degree felony theft conviction could be brought before the jury, given that it occurred contemporaneous with the events at issue, and had significant impeachment value, given that Ms. Schmidt had repeatedly, and falsely, failed to disclose the existence of such conviction, (twice), in response to defendant's clear and unambiguous interrogatory questions. (Appendix No. 4); (CP 1426-1459). (Specific notice pursuant to ER 609 was filed and served). (CP 180-186)). The Trial Court, relying solely on ER 609, made a determination that the probative value of such evidence was outweighed by the prejudicial effect, despite its clear impeachment value, as it related to Ms. Schmidt's failure to disclose evidence, and the incredibly strained declaration which she submitted to the Court, trying to justify such non-disclosure and falsehoods. (RP 8120110, P. 47); (RP Vol. 1, P. 13-19).

During the course of argument regarding the motions in limine, for the first time plaintiff's counsel brought to the Court's and defense counsel's attention that witness John McMonagle, Ms. Schmidt's former paramour, (during the relevant time frame), was contending that he had not been

⁶ Defendant also sought to exclude any evidence that could be characterized as "a plea of poverty" as part of the "insurance" motion in limine. As noted, such a motion in limine was initially granted.

properly served a subpoena for attendance at trial. (CP 1122-1123); (CP 1107-1121); (RP 8120110, P. 3-8). It is noted that within the pleadings submitted by plaintiff, Mr. McMonagle admitted that he was served a copy of defendant's trial subpoena, but tried to justify his intent to avoid trial attendance, based on an erroneous view that he had to be served a witness fee and mileage, (despite the fact that he never demanded fees or mileage reimbursement at the time of service). (CP 1031-1036).

Plaintiff's counsel prior to trial became aware that one of the defense witnesses in this case intended not to comply with a duly served and lawful subpoena, and engaged in efforts to aid and abet the recalcitrant defense witness, as an effort to justify the use of his former testimony from the prior trial, and went so far as to advocate on behalf of the witness that the subpoena should be quashed. (*Id.*, P. 6). Initially the Trial Court declined to provide any form of a ruling regarding such issues, but following additional briefing, declined to permit the plaintiff to use Mr. McMonagle's prior testimony, because despite plaintiff's contention he would be a good witness for plaintiff; plaintiff had made no effort to subpoena him herself. (CP 1097-1106), (RP 8120111, P. 7) (RP Vol. 1, P. 26).⁷

⁷ During the course of trial defense counsel offered to have Mr. McMonagle testify telephonically, but plaintiff's counsel, who had contact with Mr. McMonagle during trial, and who repeatedly asserted that it was his position that Mr. McMonagle would be a good witness for the plaintiff, refused to cooperate in that regard. (RP Vol. 1, P. 25). Ultimately defendant's motion to exclude the use of Mr. McMonagle's former trial testimony, due an inadequate foundation of unavailability was granted. (RP). If one actually examines the pleadings on this issue, it is very apparent that plaintiff's counsel was playing substantial "games" with this witness in order to try to keep him from the courtroom, and in order to utilize prior trial testimony from a former trial where the prior trial's evidentiary rulings substantially restricted the evidence with regard to a full and

Trial commenced on August 23, 2010. During the course of trial plaintiff called herself as a witness, her mother Judy Schmidt and a late disclosed lay witness on the issue of damages, a Tina Edwards, and the previously mentioned 2003 preservation deposition of Dr. Brobeck. .⁸

During the course of Ms. Schmidt's testimony, inexplicably the trial court reversed its prior ruling on motions in limine and permitted Ms. Schmidt to testify that the reason she did not have additional healthcare treatment relating to her 1995 slip and fall was because she lacked insurance. The first interjection of insurance evidence in this case occurred in the context of the testimony of plaintiff's mother Judy Schmidt. Following the lunch break on August 24, 2010 counsel and the Court had a long colloquy as to whether or not Ms. Schmidt would be permitted to interject evidence in the case that she did not seek additional medical treatment because of lack of insurance, i.e., she could not afford to pay for it. Ultimately the Court determined that "the door had not been opened" with respect to such testimony.⁹ (RP Vol. 2, P. 246-262).

Immediately, following such colloquy, plaintiff's mother Judy Schmidt took the stand, who had been present in court during the colloquy.

complete exploration of Ms. Schmidt's post-accident medical condition.

⁸ Witness Tina Edwards was a late disclosed witness who was not named in any of the plaintiff's prior pretrial witness disclosures. (RP Vol. 1, P. 20) Despite defense objections, the Trial Court nevertheless permitted her to testify. (RP Vol. 2, P. 174). The defense was forced to interview this witness late one evening during trial.

⁹ The Trial Court had the erroneous view that lack of insurance could be submitted into evidence should it be established that the plaintiff failed to follow a course of treatment that was recommended by a healthcare provider. (RP Vol., II. 82-87).

(RP 2 Page 263). Despite a clear ruling by the Trial Court that no insurance evidence was to be admitted, on cross-examination Judy Schmidt blurted out, in a manner non-responsive to the question before her, “I thought there was an insurance problem that she want to go”. (RP Volume 2 Page 280). Immediately counsel for the defense moved to strike the last non-responsive answer of the witness. The Trial Court struck the answer. Despite the fact that this answer was stricken by the Court, a few minutes later Judy Schmidt testified once again in a non-responsive manner “she did not have insurance”. (RP Volume 2 Page 293).

During a subsequent break, there was more colloquy between counsel and the court regarding insurance evidence. (Id. P. 293). At that time, counsel for the plaintiff admitted that he told the witness “strongly” not to reference insurance during her testimony. (Id., P. 300). Upon the jury returning, the Court sustained the objection, and instructed the jury to disregard Ms. Schmidt’s last answer regarding lack of insurance. (Id., P. 304).

Despite the Court’s ruling on the parties’ essentially agreed motions in limine regarding insurance, and the Court’s prior sustaining of objections regarding insurance during the course of Teresa Schmidt’s own testimony, the Court permitted her to testify that she **had no insurance**. See RP Vol. 2, Page 338).

The following morning, defendants submitted a written motion for a mistrial, as well as a motion for a directed verdict judgment/judgment as a matter of law with respect to the lack of medical causation regarding any

conditions existing beyond November 1996. (CP 1238); (CP 11024-1237).

At the close of plaintiff's case in chief on August 25, 2010 the court heard defendant's motion for a directed verdict regarding medical causation issues. See RP Vol. 3 Page 493-503) The Trial Court ultimately declined to rule of the motion, indicating that it was ultimately an instructional issue. In addition, the defense sought a directed verdict on the issue of "proximate cause", because nowhere within the plaintiff's case in chief was there any evidence presented regarding the issue of "collectability". (See RP Vol. 3; Page 503-508). The Trial Court denied such a motion on the grounds that such issue should have been addressed during the course of the first trial. (Id.).

On August 25, the defendant presented his case in chief, which included testimony by Independent Medical Examiner Robert Colfelt, MD, neurologist. (RP Vol. 3, P. 509-584). Dr. Colfelt opined that none of Ms. Schmidt's current complaints had any relationship to her 1995 slip and fall. (RP Vol. 3, Page 515). According to Dr. Colfelt, Ms. Schmidt received a sprain/strain injury that resolved, and was of short duration. Dr. Colfelt was the only medical provider to provide an opinion regarding permanency, and according to Dr. Colfelt clearly Ms. Schmidt did not receive any form of a permanent injury as a result of the slip and fall accident in 1995. (Id. Page 528). With respect to subsequent complaints and medical care, Dr. Colfelt opined that medical treatment subsequent to 1996 were for unrelated events and conditions, and had no relationship to any injuries she

suffered in the 1995 slip and fall. (Id. Page 529). Thus, the only competent medical testimony presented in this case, is that Ms. Schmidt suffered a sprain/strain type injury and it could not be said that past April 1997, any of her subsequent symptoms had any relationship to the 1995 slip and fall event.

Following Dr. Colfelt's testimony the defense presented additional witnesses (4), including former boyfriends and acquaintances of Ms. Schmidt, who were familiar with her physical condition at or around the time of the alleged events. (RP Vol. 3, P. 585; Vol 4, P. 630-659). According to these witnesses, Ms. Schmidt had no apparent signs of injury or disability. In response the defense presented a short rebuttal case inclusive of the testimony of the plaintiff, who denied the assertions of plaintiff's multiple lay witnesses. (RP Vol. 4, P. 659-662).

Following the close of the evidence there was colloquy and exceptions regarding instructions. Despite the Court's response to defendant's motion for a directed verdict regarding medical causation, no limiting instruction was provided consistent with the medical proof that was presented at time of trial. Indeed, the court went so far as to actually instruct the jury on future non-economic damages, despite the fact that there was simply no medical evidence on such issues.

Within formal exceptions, defendant took exception to the Court's failure to provide a damage instruction which was proposed, and which provided for a specific date cutting off any claim for damages, that were otherwise not supported by the medical testimony presented at time of trial,

versus the giving of instruction No. 7 which had no such cut-off. (RP Vol, 4, P. 701-702). (Appendix No. 8). (CP 1304). In addition, the defense took the exception regarding the failure to give proposed Instruction No. 28 addressing the need to establish damages based on “reasonable medical probability”, as opposed to speculation. (Appendix No. 9). (CP 1301). (RP 4 Page 701 and 703). During the course of exceptions, defendant renewed the defense motion for a directed verdict on the issue of “collectability”, explaining to the Trial Court that the actual damages in a legal malpractice claim is what the aggrieved client actually could have received, and not the actual value of the underlying claim. (Id. P. 734-35); (RP Vol. 4, P. 702-703).

Finally, by way of factual background relating to this appeal, it is noted that during the course of the plaintiff’s closing argument insurance once again was referenced, subject to objections which were both overruled and sustained. Following the opening portion of plaintiff’s closing argument, defense counsel requested a curative instruction regarding insurance, which was denied.¹⁰ (Id. P. 741-45).

On or about August 27, 2010, the jury returned a verdict awarding Ms. Schmidt the agreed past economic damages of \$3,733.16 and non-economic damages for the amount of \$80,000.00. (CP 1312).

Subsequently it was discovered that the jurors, in reaching such a result, utilized within its non-economic damage calculations an erroneous

¹⁰ It is noted that court’s Instruction No. 5 was an insurance instruction which told the jurors to disregard any insurance evidence and essentially the plaintiff’s argument to the jury ran contrary to the court’s already given instructions to the jury.

belief that the statute of limitation applicable to the underlying claim was five-years, and determined that Mr. Coogan failed to act within that five-year time frame. Specifically, as part of plaintiff's motion for JNOV/judgment as a matter of law and motion for a new trial, multiple juror affidavits were submitted to the trial court indicating the extraneous consideration of a statute of limitation of "five-years" was a substantial factor in the non-economic award. Indeed, juror Gary Gosselin indicated that during deliberations, that the jurors determined to award damages based on a time frame that had nothing to do with the actual physical injuries suffered by Ms. Schmidt. Juror Gosselin also revealed the damage award included an award of "lost wages", when no evidence of lost wages had been presented during the course of trial. (CP 1324-1327).

Another juror-Lorlai Burger, Juror No. 10 indicated that the utilization of the five-year time frame was for the purposes of punishing Mr. Coogan for not filing Ms. Schmidt's lawsuit on time, and that the non-economic damages award had nothing to do with plaintiff's actual physical injuries. (CP 1493-1511).

On September 7, 2010 plaintiff filed a motion for judgment as a matter of law and/or for a new trial raising the above-referenced issues and the aforementioned juror misconduct. (CP 1514-1679). Following oral argument on September 27, 2010, Judge Murphy denied the defense motion in its entirety. Subsequent to such motion efforts were made to have the Court find attorney John McMonagle in contempt for non-compliance with

the defense subpoena, which had been admittedly served personally upon him. The trial court also denied that motion. (CP 1962)(RP 10-1-10, P. 17). This appeal followed. (CP 22-32); (CP 1682-1703); (CP 1704-1714); (CP 1829).

V. ARGUMENT

A. Standard of Review for Judgments as a Matter of Law

Judgment as a matter of law is appropriate where “a party has been fully heard on the issue during a jury trial and the Court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on a specific issue.” See, CR 50(a). See also, *Anderson v. Liberty Lobby*, 47 U.S. 242, 251 (1986) (a court need not submit an issue to the jury when there is no evidence “upon which a jury could properly proceed to find a verdict for the party producing it, on whom the onus of proof is imposed”), (citations omitted). When “there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict.” *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381, 1387 (9th Cir. 1984). A mere scintilla of evidence is not sufficient to present a question for the jury. See, *Westinghouse Electrical Corp. v. CX Processing Labs, Inc.*, 523 F.2d 668, 673 (9th Cir. 1975) (affirming granted judgment as a matter of law and stating “substantial evidence is more than a mere scintilla”). The quantum of evidence necessary is defined in *Hojem v. Kelly*, 93 Wn.2d 143 (1980) which provides as follows:

There must be substantial evidence as distinguished from a mere scintilla of

evidence to support the verdict, i.e., evidence of a character: 'which would convince an unprejudiced, thinking mind of the truth of the fact in which the evidence is directed.' A verdict cannot be founded upon mere theory or speculation.

A motion for judgment as a matter of law is considered under the same principles as a summary judgment. *Bratton v. Calkins*, 73 Wn. App. 492 (1994).

The Washington Supreme Court explained the standard of review on a motion for judgment as a matter of law following a jury verdict in *Goodman v. Goodman*, 128 Wn.2d 366, 371 (1995); (Internal citations omitted), see also, *Ayers v. Johnson & Johnson*, 117 Wn.2d 474 (1991); *Lecy v. Bayliner Marine Corp.*, 94 Wn. App. 949 (1999); *Mathis v. Ammons*, 84 Wn. App. 411 (1997); *Hill v. BCTI Income Fund*, 144 Wn.2d 172 (2001); and *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916 (2000).

1. **Defendant's Motion for Judgment as a Matter of Law Should Have Been Granted as the Plaintiff Failed to Establish the Essential Element of Collectability, Which Is an Element of a Plaintiff's Damage Claim When Legal Malpractice Is at Issue.**

In this appeal, significant to defendant's Motion for Judgment as a Matter of Law/JNOV is the absence of evidence on a specific proposition. As early as defendant's response to plaintiff's Motion for Summary Judgment Regarding the Availability of Emotional Distress Damages for "Malpractice," the defense was citing to and discussing the Washington cases relating to the essential element in a legal malpractice case that the underlying judgment

would have been "collectable" had the attorney properly performed his or her job.¹¹ Yet, in this case, plaintiff failed to submit any evidence on that element of her claim.

On the issue of collectability, the relevant evidence, is the absence of any evidence submitted by the plaintiff on that issue. **There was no evidence submitted regarding the financial wherewithal of the owner of The Grocery Outlet Store at the time of Ms. Schmidt's slip and fall. There was no evidence regarding what insurances were in place at the time in question, and it simply would be rank speculation just to assume that The Grocery Outlet, a discount store, which apparently had changed hands a number of times between the years 1995 and 1998, necessarily had any available insurance coverages in place.**

The absence of such evidence in this case is dispositive on the issue of damages. The Washington appellate courts first considered "collectability," as an essential element of a plaintiff's claim for attorney malpractice in the case of *Tilly v. Doe*, 49 Wn. App. 727, 732-33, 746 P.2d 323 (1988). In *Tilly*, the court provided the following at page 732-33:

Washington courts have not yet addressed the issue of collectability in attorney malpractice

¹¹ It is noted that in response to defendant's Motion for a Directed Verdict on this issue at the close of plaintiff's case-in-chief, the plaintiff's only real response to the issue was "that they were being sandbagged" because the issue had not been raised earlier. In addition, attached to Defendant's Reply to Plaintiff's Opposition to Defendant's Motion in Limine was a lengthy COA article wherein the elements of legal malpractice cases are discussed in detail with annotated citations. (CP734-744). Section 35 of that article under the heading "Plaintiff's Proof – Satisfaction of Judgment" provides an extensive discussion regarding the need for a plaintiff to prove "collectability." Thus, the defense did more than what was necessary to put the plaintiff on notice that "collectability" is an essential element of her damage claim. The need to prove a collectable loss was even referred to during argument on motions in limine. (RP 8-20-11, P. 21).

actions. However, most jurisdictions require proof of collectability in order to establish 'the amount of loss actually sustained as a proximate result of the conduct of the attorney.' Thus, since collectability is essentially an extension of proximate cause analysis, and since the plaintiff normally has the burden of proving proximate cause in a legal malpractice action, we hold that the trial court did not err in requiring proof of collectability, and the evidence relevant to collectability was properly admitted on the issue of proximate cause.

(Citations omitted.)

The issue of collectability was next considered in detail in the case of *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). The Court in *Matson* provided the following at page 848:

The measure of damages for legal malpractice, the amount of loss actually sustained is a proximate result of the attorney's conduct. Courts consider collectability of the underlying judgment to prevent a plaintiff from receiving a windfall: 'It would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party.'

(Citations omitted.)

See also, *Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 161 (2006) (adopting the rationale of the *Lavigne* opinion).

Thus, clearly within the State of Washington, the plaintiff has an affirmative burden in a legal malpractice case to prove that the underlying claim would have been "collectable." The analysis simply does not change

because the underlying claim involves a claim for personal injury. See, *McKenna v. Forsyth and Forsyth*, 280 A.D.2d 79, 83-84, 720 N.Y.S.2d 654, 658-58 (2001) (collecting cases); See also, *Paterek v. Petersen and Ibold*, 118 Ohio St. 3d 503, 890 N.E.2d 36 (2008) (plaintiff in legal malpractice case, where the underlying issue was a personal injury claim, had the obligation to prove collectability and the court in that case looked to available insurance coverages as proof on that issue).

In this case, clearly Ms. Schmidt received a “windfall” that is forbidden under the above-referenced Washington case law. There has simply been no indication that even had Mr. Coogan been successful in the prosecution of her claims against The Grocery Outlet Store, that she would ever have collected on any judgment amount. Thus, as a matter of law, the plaintiff’s case must be dismissed in its entirety due to the failure to prove this essential element. This is not something that can be subject to cure. It is an essential element of the plaintiff’s case, that should have been proved at time of trial, and it was not.

In sum, as a matter of law the plaintiff in this matter failed to prove an essential element of her damage claim against Mr. Coogan, and now has received a windfall judgment that must be reversed as a matter of law, with direction that this case be dismissed.

2. **Defendant's Renewed Motion for Judgment as a Matter of Law Regarding Medical Causation Should Have Been Granted, as There Was No Legally Sufficient Basis for a Reasonable Jury to Have Found That Plaintiff's Injuries**

**Continued Beyond the End of 1996, Given the Limited
Medical Testimony Submitted by the Plaintiff in this
Case.**

On August 25, 2010 the defendant in this matter filed a Motion for a Directed Verdict/Judgment as a Matter of Law regarding plaintiff's failure to establish medical causation relating to conditions existing past November 1996. Within that motion the defendant argued that the 2003 deposition testimony of Dr. Brobeck was insufficient on its face to support any arguments and/or allegations "based on reasonable medical probability" that Ms. Schmidt's current condition had any relationship to the 1995 slip and fall. Factually, such arguments were exceptionally compelling given the fact that Ms. Schmidt suffered an injury-producing automobile collision in 1997, multiple falls in her home in the years 2001 and 2005, that resulted in a 2006 surgery, as well as another December 2009 automobile collision where Ms. Schmidt once again is claiming injury.

Although during the course of trial the plaintiff in this matter tried to bolster the absence of any cogent medical testimony with the lay testimony of the plaintiff, her mother and a friend, that testimony in and of itself was insufficient to establish causation, because to establish causation between an event and injury, expert medical testimony is mandatory. Although the plaintiff's counsel passionately argued that Ms. Schmidt after the 1995 slip and fall reached a "plateau" or had "a new normal" which was not symptom-free after the 1995 slip and fall accident, such allegations were pure argument unsupported by any medical testimony provided on behalf of the plaintiff in

this case, and contrary to her medical records.¹²

Indeed, the only evidence presented during the course of trial about the permanency, or lack thereof, of Ms. Schmidt's condition, was presented by defendant's forensic Examiner Dr. Colfelt, who opined that Ms. Schmidt suffered a cervical dorsal sprain/strain type injury that resolved sometime between November 1996 and her subsequent motor vehicle accident of April 1, 1997. That is the only competent evidence in this case regarding permanency, or the lack thereof.

Plaintiff's forensic evaluator, Dr. Brobeck, indicated that his diagnosis of sprain/strain related only to the 1995 slip and fall, and not the 1997 motor vehicle collision; he was uncertain regarding what current symptoms (in 2001) were a result of the 1995 slip and fall or the 1997 motor vehicle accident. (See, pages 33 and 34 of Deposition of Brobeck). Dr. Brobeck in fact testified, at pages 38 and 39, that with regard to Ms. Schmidt's then-current condition (2001), that he could not say whether or not her symptoms were a result of either the 1995 slip-and-fall event or the 1997 motor vehicle collision.

What is telling, is that Dr. Brobeck within his deposition testimony provides no opinions based upon reasonable medical probability that Ms. Schmidt suffered a permanent condition, or expresses any opinion as to whether or not, even as of 2001, that she was then suffering from any

¹² In fact, such proposition is refuted by the plaintiff's own medical records and subjective history, excerpts of which were submitted during the course of trial in this case. (See, Trial Exhibits Nos. 2A - 13B).

symptoms relating to the 1995 slip-and-fall accident. In fact, Dr. Brobeck, when asked to relate what Ms. Schmidt reported to be her then current symptoms as of 2001, he expressly stated in his testimony that he could not say whether or not such symptomatology, or symptom pattern, was a result of the 1995 slip and fall or from the 1997 motor vehicle accident.

3. Standards of Proof for Medical Causation

In order to establish causation between a liability producing situation and a claimed injury or subsequent condition, medical testimony must reasonably exclude as a probability, every hypothesis other than the one relied on to remove it from the realm of speculation or conjecture, and must be sufficient to establish the injury producing situation “probably” or more likely than not caused the subsequent condition, rather than the accident injury “might have,” “could have” or “possibly” did cause the subsequent condition. See, *Merriman v. Toothaker*, 9 Wn. App. 810, 814-15, 55 P.2d 509 (1973), citing to *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

The case of *Torno v. Hjyek*, 133 Wn. App. 244, 135 P.3d 536 (2006), illustrates the point that the defense is trying to make. In *Torno*, the court upheld the exclusion of a medical expert because they could not provide an opinion based on a more-probable-than-not basis regarding the claimant’s current condition. The court reasoned that given such an absence of knowledge regarding the claimant’s current condition, there was simply no foundation for the testimony as it related to current conditions. Further, absent very specific medical support for the proposition that a specific

condition and/or symptoms are related to a particular event, a plaintiff nor their lay witnesses can testify, even if their testimony was to be believed, that a condition was caused by a specific accident-producing event because such lay testimony “could not establish the medical causal relationship in terms of reasonable medical probability,” See, *Carlos v. Cain*, 4 Wn. App. 475, 477, 481 P.2d 945 (1971). See also, *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961). (Simply because an accident “might” or “could” cause a problem is insufficient in and of itself to establish the necessary medical causal link).

In this case, Dr. Brobeck’s testimony only establishes that Ms. Schmidt as a result of the 1995 slip and fall, suffered a cervical dorsal sprain/strain. In addition, his testimony establishes that a certain amount of treatment was performed that was related to such an injury. Beyond that, his testimony establishes **nothing more**. Dr. Brobeck never provided an opinion that Ms. Schmidt had a permanent condition, nor did he provide any specific testimony that any particular treatment occurring after November, 1996, (even given the limited records that he was provided), had any relationship to her 1995 slip-and-fall accident. In fact, when one closely examines Dr. Brobeck’s testimony, he simply could not say whether or not Ms. Schmidt’s then-existing current symptoms [in 2001] were caused by either the 1995 slip and fall or the 1997 motor vehicle collision. In other words, the plaintiff simply failed to provide any proof that the condition that she was complaining of even as late as 2001, had any relationship to any matter at issue in this case.

Matters become even more strained when one tries to examine the proof that the plaintiff in this case attempted to present through lay witnesses, which are clearly incompetent to provide an appropriate causal link between an accident and a physical condition. There is **no** competent medical evidence that Ms. Schmidt, as a result of this 1995 slip and fall, has a permanent condition, or that such a condition in any way has contributed to the last decade of her alleged pain and suffering particularly with a plethora of intervening injuries. Indeed, all available evidence beyond Ms. Schmidt and her family and friends' self-serving position to the contrary leads to the exact opposite conclusion. Thus, given the lack of **any** competent medical testimony providing any link between the rather ancient slip and fall of 1995, and Ms. Schmidt's alleged 15 years of problems thereafter, such claims should have been dismissed, as a matter of law, as being unproven due to an insufficient foundation through appropriate medical testimony regarding causation.

B. Standards Applicable To The Grant Of A New Trial.

The grant or denial of a new trial is a matter in the trial court's discretion. See, *Kuehn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010) (where the appellate court affirmed the trial court's decision to grant a new trial where juror's non-disclosure constituted misconduct, where there was an injection of extrinsic evidence into jury deliberation, and where the trial court found defense counsel committed misconduct during closing argument), (citing to *State v. Jackman*, 113 Wn. 2d 772, 777, 783 P.2d 580 (1989)). The

court decision will be disturbed only for a clear abuse of that discretion, or where it is predicated on an erroneous interpretation of the law. *Id.* (A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.) See also, *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 2004, 750 P.3d 944 (2003) (citing to *State Ex Rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Greater deference is owed to the decision to grant a new trial than the decision to deny a new trial. *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 271, 796, P.2d 737 (1990).

The trial court in passing upon a motion for a new trial based on the grounds that a verdict of the jury is inadequate or excessive, will consider the evidence, and, if the court is of the opinion that substantial justice has not been done, it will, in the exercise of its discretion, grant a new trial. *Brammer v. Lappenbusch*, 176 Wn. 625, 631, 30 P.2d 937 (1934); see also, CR50(c).

1. **Defendant Is Entitled to a New Trial Because the Verdict Was Against the Great Weight of the Evidence And Due To Instructional Error Regarding Damages.**

CR59(a)(1) allows the court to grant a new trial where there was an irregularity in the proceedings of the court, the jury or adverse party, or any order of the court, or abuse of discretion, by which a party was prevented from having a fair trial. CR59(a)(3) allows a new trial when surprise or accident arises, which ordinary prudence could not have been guarded against

occurs. CR59(a)(7) allows a new trial to be granted when there is no evidence or reasonable inference from the evidence to justify the verdict or decision, or that it is contrary to law. CR59(a)(9) allows a new trial where substantial justice has not been done. The court examines the record to determine whether the Award is contrary to the evidence. *Palmer v. Jensen*, 132 Wn. 2d 193, 197, 937 P.2d 597 (1997).

Here, as discussed in detail above, there is simply no medical evidence supporting any claim of damages and/or injury by the plaintiff beyond late 1996, or at least, early 1997. Yet the jury was allowed to consider under the instructions of the Trial Court ,damages not only to the present date but also into the future, despite the fact that there were substantial intervening injuries. Because the grounds listed under CR59(a)(1)(3)(7) and (9) are present, which materially affected the substantial rights of the defendant in this case and produced a verdict against the great weight of the evidence, a new trial is warranted on this basis.

It is well recognized that when a jury is instructed on an issue for which there is no supporting evidence, it is reversible error and grounds for a new trial. *Olpinski v. Clement*, 73 Wn. 2d. 944, 950-51 442 P. 2d 260 (1968) (affirming grant of a new trial due to giving an instruction unsupported by evidence, even in the absence of a motion for a directed verdict, or exception to the instructions.). When the record discloses an erroneous instruction in favor of the party whose favor the verdict was rendered, it is presumed to be prejudicial and grounds for a reversal.

Anfinson v. Fedex, 159 Wn. App. 35, m 44, 244 P.3d 32 (2010).

Here, Ms. Schmidt had under \$4,000.00 in medical bills, limited symptoms of a little more than a year, but received \$80,000.00 in non-economic damages, inclusive of insupportable future non-economic damages. Clearly, there is nothing to overcome the presumption of prejudice.

2. Misconduct of Counsel and Plaintiff's Witnesses Re: Pleas of Poverty

Under the clear case law authority within the State of Washington, the interjection of insurance, and/or lack thereof is prejudicial error, that can be cured by an instruction to disregard. However, in the end, efforts on the part of defense counsel to acquire such an instruction in this case were rejected. At the conclusion of plaintiff's closing argument, defense counsel requested that the Court provide a curative instruction, advising the jury to disregard any absence of insurance by Ms. Schmidt, and to disregard the comments during closing argument of plaintiff's counsel relating to that issue. Such an instruction was refused by the Trial Court.

It has long been recognized in the State of Washington that in a civil case, neither party can place before the jury what would be known as a "plea of poverty". Such a plea is an irrelevant appeal to sympathy that has no relation or relevance to issues in the case, and is an appeal to passion and prejudice that is clearly prejudicial to the opposing party, unless appropriately cured. The case of *Nollmeyer v. Tacoma Rail and Power Company*, 95 Wn. 595, 603, 164 P. 229 (1917) is directly on point on the issue presented in this

case. In *Nollmeyer*, plaintiff was claiming personal injury against the Street Railroad Company and testified that he had been advised by a physician that an operation for a hernia would be necessary for his injuries. Thereafter his counsel asked the following question: "Have you got the money to have the operation performed?" To which the plaintiff answered: "No, sir."

Counsel for the defense in the case objected to the testimony as being incompetent, irrelevant and immaterial, but requested no curative instruction. The court ultimately ruled that it was immaterial, but did not provide a curative instruction. None had been requested. Nevertheless the Supreme Court found the request to be harmless because no curative instruction was requested but nevertheless held: "while the question was **improper, and should not have been asked, it was not such misconduct as could not have been cured by instruction to disregard...**" *Id.*

Similarly in the case of *King v. Starr*, 43 Wn. 2d 115, 260 P.2d 351 (1953) the attorney for a defendant in a personal injury case in opening statement specifically argued and told the jury "defendants have no insurance here." *Id.*, at p. 117. At that time an objection was made and the court twice stated the remark was objectionable and instructed the jury to disregard the statement of counsel. Thereafter there was no repetition of such statement. Immediately thereafter, plaintiff's counsel moved for a mistrial on the grounds that respondent's counsel mentioned to the jury that the defendant was not covered by insurance and under the circumstances the remark was improper, prejudicial and could not be cured by an instruction to disregard.

Ultimately, while the trial judge reiterated the impropriety of the insurance reference, he did not declare a mistrial because he had promptly admonished the jury to disregard such statement and it was his opinion that the jury would do so.

The Supreme Court in *King v. Starr* reversed. In *King*, the court held that when an attorney or witness in connection with a case, "deliberately, willfully or collusively" interjects the fact of no insurance into the case in the presence of the jury, generally it is grounds for reversal. The reasoning why it is considered misconduct is because it is nothing more than an appeal to passion and prejudice, or an "inadmissible plea of poverty."

Thus, whether plaintiff or defendant is making such a plea is simply immaterial. See also, *Jones v. Hogan*, 56 Wn.2d 23, 26, 351 P.2d 153 (1960) (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).

Under the *Nollmeyer* case, the inability to pay for recommended treatment is treated the same, i.e. it is an impermissible plea of poverty that is "improper." See also, *Cramer v. Van Parys*, 7 Wn. App. 584, 500 P.2d 1255 (1972), (evidence of financial circumstances of the parties in an action is ordinarily immaterial and irrelevant).

Generally how the interjection of insurance evidence in front of a jury is treated depends on the intentions of the party who interjects such evidence into the case. See, *Church v. West*, 75 Wn. App. 502, 506, 452 P.2d 265

(1969). Typically, the Supreme Court has held that when the issue of liability insurance is injected in the case inadvertently or innocently, such a revelation is not grounds for a mistrial, if a curative instruction is given. However, if the deliberate or flagrant injection of insurance (or lack thereof), is for the purposes of prejudicing the jury, it is then grounds for a mistrial. *Id.*, citing to *Todd v. Harr, Inc.*, 69 Wn. 2d 166, 417 P.2d 945 (1966); *Miller v. Staton*, 64 Wn. 2d 837, 394 P.2d 799 (1964), see also, *Jaeger v. Cleaver Construction, Inc.*, 148 Wn. App. 698, 178-19, 201 P.3rd 1028 (2009) (Lack of insurance is not relevant, even if the ER 411 is not directly applicable. Lack of insurance is not relevant to the issue of mitigation of damages.)

It is humbly noted that the prohibition against insurance evidence as a "plea of poverty" is "a bright line rule." Simply because some justification, such as "I did not seek further treatment because ...," may exist, is simply insufficient to overcome such a bright line prohibition. As indicated by the case law, there is simply no instance where such insurance evidence as an explanation for the inability to acquire follow-up medical care, has ever been permitted in the State of Washington. In fact, the *Nollmeyer* case discussed above, is directly on point and indicates that such questions are obviously "improper."

It is respectfully suggested that the prohibition against interjecting "plea of poverty," or lack of insurance evidence into a case should be treated the same as efforts to interject "collateral source" information such as the availability of L & I benefits, even though arguably the existence of such

benefits could be relevant to some issues, such as whether or not the claimant/plaintiff is a "malinger." See, *Cox v. Spangler*, 141 Wn. 2d 431, 439-40, 5 P.3d 1265 (2000). See also, *Johnson v. Weyerhaeuser, Co.*, 134 Wn. 2d 795, 798, 953 P.2d 800 (1998). Under such circumstances, even if it can be argued that the lack of insurance has some marginal relevancy to an issue, such as the failure to acquire recommended care, its prejudicial impact is so severe that under no circumstances should it ever be admitted in a case as a "plea of poverty." Clearly plaintiff's counsel in this case made a purposeful effort to interject lack of insurance, flagrantly and deliberately in front of the jury, and made substantial efforts to lead the Court astray with regard to the propriety of doing so.

As indicated above, the *Nollmeyer* opinion is an opinion of the Washington State Supreme Court, and obviously trumps any opinion of the intermediate appellate court within the state, including but not limited to the opinion relied on by the plaintiff; *Ma'ele v. Arrington*, 111 Wn. App. 557, 562, 45 P.3rd 557 (2002), which in fact upheld the Trial Court's exclusion of evidence regarding lack of insurance, as a method of trying to explain away a "gap in treatment". In *Ma'ele* the appellate court held that the trial court's refusal to admit such evidence was consistent with the rules set forth within *Cramer v. Van Parys*, supra, that "evidence of plaintiff's financial circumstance is usually irrelevant and immaterial." While in dicta in *Ma'ele* the appellate court pondered whether or not such evidence of not being able to afford medical care could be "potentially relevant," it ultimately ruled that

it was not. As suggested by *Ma'ele*, part of the concern is that once such a door is open, it creates substantial concerns about "a tangle of explanations that would lead to collateral issues, such as insurance coverage and Ma'ele's finances."

Here, as noted above, plaintiff's mother twice blurted out that her daughter had no insurance, despite the grant of a pre-trial motion in limine on the issue. While doing it one time arguably could possibly be inadvertent, the second violation, after a sustained objection and colloquy in Mrs. Schmidt's presence, establishes she had a willful agenda to place such irrelevant matters before the jury. See, *Gephart V. Stout*, 11 Wn.2d 187, 194, 118 P.2d 801 (1941); *Williams v. Hofer*, 30 Wn.2d 253, 191 P.2d 306 (1948).

Thus, the misconduct of plaintiff's counsel, and plaintiff's witness in interjecting such lack of insurance evidence before the jury constitutes an impropriety and an irregularity in the proceedings that under applicable case law warranted the grant of a new trial. This is particularly so in light of the fact that defense counsel urged particularly following plaintiff's closing, that a curative instruction be provided and such curative instruction was refused. Under such circumstances, any error regarding this issue has been properly preserved.

In addition, it is noted that under the terms of the Court's Instruction No. 5 (insurance instruction) which verbatim was the former instruction set forth at WPI 2.13, the jurors were instructed that "in your deliberations, do not discuss any matters such as insurance coverages, or other possible sources

of funding for any party. You are to consider only those questions that are given to you to decide in this case." When an attorney argues to a jury in a manner contrary to the jury instructions or impliedly inviting the jurors to disregard the court's instructions, it is deemed to be misconduct, worthy of the grant of a new trial. See, *Kuhn v. Schnall*, 155 Wn. App. at 577.

Thus, a new trial should have been granted because of plaintiff's counsel's, and her witnesses, which not only were flagrant efforts to interject a plea of poverty and/or the absence of insurance into this case, but such efforts were compounded by plaintiff's counsel's closing argument, which invited the jury to disregard the instruction on insurance which the plaintiff stipulated to. In other words, plaintiff's counsel's argument was contrary to the law which was given to the jury, and was absolutely prejudicial.

3. **It Was Misconduct Of Plaintiff's Counsel To Aid And Abet/Facilitate, The Non-Attendance Of John McMonagle Who Had Been Properly Subpoenaed By The Defense To Be A Witness In This Case**

The defense caused to be personally served on John McMonagle a subpoena for attendance at trial. The affidavit of service of attorney John McMonagle by process server Angel Suarez was filed in open court during the course of trial. The defense made a significant effort to serve Mr. McMonagle with a subpoena **early in this case** and in fact, had properly completed service by July 30, 2010, several weeks prior to the commencement of trial of this case. Nevertheless, despite the fact that

Mr. McMonagle was duly served with a subpoena for trial, he failed to attend trial and involved plaintiff's counsel in his efforts towards non-attendance. On August 20, 2010 plaintiff submitted a "Notice Regarding Unavailability of Witness and Use of Trial Transcript" which included a Declaration by Mr. McMonagle, [drafted on plaintiff's counsel's pleading paper], justifying his intended failure to honor the subpoena issued by the defense in this case. Clearly such efforts on the part of the plaintiff was disingenuous, and a deliberate attempt to interfere with the defense subpoena, and to procure Mr. McMonagle's non-attendance at trial. According to the plaintiff, no attempt was made by the plaintiff's counsel to contact Mr. McMonagle until August 16, 2010 (just days before the start of trial), wherein Mr. McMonagle apparently protested that he intended to be on a pre-planned sailing trip at the time of his proposed testimony. In a rather twisted attempt at logic, according to the plaintiff because Mr. McMonagle intended not to honor **the defense subpoena**, the plaintiff was not only entitled to read Mr. McMonagle's former incomplete trial testimony into the record, but also utilized his absence as a justification for calling an additional witness, Tina Edwards at the time of trial, even though previously the plaintiff's counsel had clearly stated that he intended to call no other witnesses than those who had been called in the prior trial in this case, and the defense relied upon this representation.

Likely based on misadvice provided by plaintiff's counsel, Mr. McMonagle stated as following in his August 19, 2010 declaration which

was procured by plaintiff's counsel:

I ask Your Honor to accept the steps I have taken as fulfilling my duty to the court. Finally, it is my understanding that without my statutory witness fee and mileage which were not included in the paperwork with which I was served, I have not been properly served and as I have attempted to offer myself for testimony by videotape, I am unsure what more is required of me.
(Emphasis added).

Based on such mis-information, plaintiff's counsel argued to the court at both the motions in limine hearing on August 20, 2010, and at trial, that Mr. McMonagle was not properly served, and as a result he was entitled to read Mr. McMonagle's trial testimony, which failed to include any testimony about Ms. Schmidt's subsequent recovery and subsequent collision in a car owned by Mr. McMonagle.

Naturally, defense counsel objected and noted that there had been no effort to quash Mr. McMonagle's subpoena, and that he had been appropriately served under the terms of the court rules and statute, RCW 5.56.010, which expressly provides that a subpoena is properly served without a witness and mileage fee unless "such fees be demanded by any witness residing with the same county where such court of record, judge, commissioner, or referee is located, or within 20 miles of place where such court is located, at the time of service of the subpoena" (emphasis added). Further, it had been noted that when a party fails to demand a witness fee at the time of service, then subsequent attempts to utilize such an excuse (no

witness fee), as grounds for refusing to attend or to testify at trial, is inadequate, and the noncompliant person nevertheless may be subject to the contempt powers of the court, even though no such fee has been paid. See, *State v. Superior Court in and for King County*, 154 Wn. 144, 148, 281, P. 335 (1920). Mr. McMonagle was provided a witness fee at his residence before trial as soon as it was discovered that he was demanding it.

Thus, the position taken by the plaintiff regarding Mr. McMonagle's service was erroneous, and more likely than not taking such a position served to encourage and abet Mr. McMonagle in his non-attendance at the time of trial.

The court can take note that Mr. McMonagle's response to the defense subpoena in this case was a matter which was and is **none of the business of plaintiff's counsel**. The fact that he tried to utilize Mr. McMonagle's position as a vehicle from which to utilize his trial testimony "due to unavailability" is the kind of sharp practice, and interference with the defense case which alone should have been deemed to be misconduct of counsel worthy of the grant of a new trial pursuant to CR 59(a)(2).

Plaintiff's counsel simply had no business involving himself into Mr. McMonagle's compliance with the defense subpoena which was properly served upon him in this case. Further, it is clear that plaintiff's counsel interjected himself into such an issue in order to try to procure a procedural advantage at trial by using former incomplete testimony, without proper cross-examination given **the Trial Court's** pretrial rulings which increased

the subject matters upon which Mr. McMonagle otherwise would have been competent to testify, as opposed to his first * trial testimony.

In this instance, plaintiff's counsel's encouragement of contempt of this court's subpoena, and his involvement in Mr. McMonagle's non-attendance at the time of trial, very well could constitute "obstruction of justice" and/or "tampering with a witness." "Witness tampering" by definition is an effort to induce a witness to either testify falsely or to withhold any testimony." See, *State v. Williamson*, 131 Wn.App.1, 6, 86 P.3d 1221 (2004). See also, RCW 9A.72.120(1)(a). Further, attempts to influence a witness to absent themselves from trial, necessarily would have an obstruction of justice purpose. See, *State v. Sanders*, 66 Wn.App. 878, 884, 833 P.2d 452 (1992).

What is evident is that the plaintiff in this case "aided and abetted" Mr. McMonagle's non-attendance, and facilitated such non-attendance by, as opposed to subpoenaing Mr. McMonagle on behalf of the plaintiff, facilitated Mr. McMonagle's communications to the court trying to justify his non-attendance, thus emboldening Mr. McMonagle to act in a contemptuous manner. For the plaintiff then to try to utilize the non-attendance of Mr. McMonagle, which it facilitated for its own procedural advantage by trying to utilize his prior trial testimony, thus denying the defense an opportunity at cross-examination, is a classic example of what can be characterized as "chutzpa," as defined in *Embury v. King*, 361 F.3d 562, 566 n. 22 (9th Cir. 2004) "the classic definition of chutzpa is of course this:

chutzpa is the quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan". Citing to *Leo Rosten, The Joys of Yiddish*, 94 (1971).

Here, it is reiterated that it was simply misconduct of plaintiff's counsel to in any way involve himself in Mr. McMonagle's contemptuous conduct and non-compliance with the defense subpoena in this case. Having had such involvement, it should have been deemed sufficient misconduct of a prevailing party as to warrant a grant of a new trial under CR 59.

Finally, given the fact that plaintiff's counsel repeatedly represented to the defense, that he intended to rely on the exact same witnesses and evidence as submitted in the previous trial with utilization of Mr. McMonagle's absence as a vehicle for interjecting a new witness, Tina Edwards, in this case without affording the defense an opportunity to take her deposition and conduct proper discovery, constitutes "surprise" also warranting the grant of a new trial pursuant to CR 59(a)(3). Generally, the decision to grant or deny a new trial based on "surprise" is a matter within the trial court's discretion, because the trial court can only assess the impact of "surprise evidence." See, *Kramer v. J. I. Case Manufacturing Company*, 62 Wn.App. 544, 561-62, 815 P.2d 798 (1991). In making such an assessment, clearly the court can be mindful as to whether or not such a "surprise" was based on disingenuous trial tactics. See, *Kramer v. J. I. Case Manufacturing Company*, 62 Wn.App. at P. 553 n.6. Once surprise evidence has been submitted, it is within the trial court's discretion to order a new trial

as a proper remedy to correct the error. See, *Lockwood v. AC and S, Inc*, 44 Wn.App. 330, 363-64, 772 P.2d 826 (1986).

In this case, having procured the non-attendance of Mr. McMonagle, or at least facilitating the same, the plaintiff should not have been allowed to call a "surprise witness" i.e. Tina Edwards. The defendant had the right to rely on Mr. Bridges' representation with respect to what evidence he was presenting at the time of trial, and he should have been held to his word. As defense was entitled to rely on plaintiff's counsel's word, this was simply not the kind of surprise in which reasonable prudence could have guarded against.

4. **A New Trial Should Have Been Granted Based On The Plaintiff's Failure To Properly Answer Interrogatories And Based On The Fact The Plaintiff Clearly Misrepresented The Truth In Her Response To Plaintiff's Interrogatories**

A trial court has discretion to order a new trial for failure of "substantial justice." See, CR 59(a)(9), see also, *Olpinski v. Clement*, 73 Wn.2d 94, 442 P.2d 260 (1968); see also, *Berry v. Coleman Systems Company*, 23 Wn.App. 622, 624-25, 596 P.2d 1365 (1975). As indicated in the *Berry* opinion at pages 624-25, citing to *Olpinski*, when addressing whether or not "substantial justice" has been done, the court ultimately must make a determination as to whether or not the losing party received "a fair

trial." *Id.* In making such a determination, the court can look to whether or not the losing party received honest responses in discovery, and if it is determined that answers to interrogatories were false and/or undertaken in "bad faith", a new trial can be ordered to cure and remedy the prejudicial harm. *Id.*

In this case that is exactly what happened. As the court file reflects, plaintiff issued interrogatories to defendant Teresa Schmidt in February, 2010. Ms. Schmidt reluctantly provided answers despite repeated CR 26(i) conferences encouraging her to do so in a full and complete manner. With respect to plaintiff's interrogatory No. 3 which requested: "if you have ever been convicted of a crime including misdemeanor traffic offenses, state the [sic]: a. the date and nature of the offense; b. the name and address of the court where the proceedings took place; c. the county and state in which you were convicted; d. the date of conviction; and e. sentence imposed, Ms. Schmidt initially answered: "**no.**". That answer proved to be inaccurate, and Ms. Schmidt's efforts to conceal her past conviction for felony theft in the first degree was further compounded by her supplemental answer to plaintiff's interrogatories which provided in response to interrogatory No. 3: "**I have not been charged with any criminal offense in my life.**"

Such answers to defendant's interrogatories by the plaintiff were unequivocal and blatant falsehoods. In July 1996, Ms. Schmidt was convicted of a felony in the first degree relating to stealing and fraudulently negotiating checks from a former employer.

Ms. Schmidt's bad faith in respect to answering her interrogatories was not limited to her repeated false answers to defendant's interrogatory No. 3. In response to defendant's interrogatory No. 20 Ms. Schmidt indicated that she had "no prior accidents" yet, it was learned on the eve of trial, that in 1993 she was also involved in another motor vehicle collision wherein the police report she indicated she was complaining of neck pain and headache. Because Ms. Schmidt failed to honestly answer plaintiff's interrogatory No. 20, any opportunity for discovery regarding any medical records relating to any injury sustained from the pre slip and fall 1993 automobile collision was lost to the defense in this case.

And, there is more. Throughout defendant's interrogatories, queries were asked regarding Ms. Schmidt's medical history, and efforts were made to identify her healthcare providers. In Ms. Schmidt's interrogatory answers, at no time was "Group Health" ever listed as one of her providers. It was only once Dr. Colfelt, the defense forensic examiner reviewed Ms. Schmidt's records, that it was learned that she had been treated at Group Health. Late efforts were made to acquire the Group Health records, which ultimately totaled 422 pages of documentation. Such records were not received until the eve of trial in this matter, and any effort and/or suggestion by Ms. Schmidt that she simply forgot this provider would be substantially disingenuous since she treated with Group Health from 1987 until 2005 - over 18/19 years!

Thus plaintiff's failure to properly provide non-evasive, honest, non-boilerplate, and complete responses to defendant's discovery is worthy of

sanction pursuant to CR 37, and also a violation of CR 26(g). See, *Carlson v. Lake Chelan Community Hospital*, 116 Wn.App. 718, 738, 75 P.3d 533 (2003).

In this case clearly the plaintiff failed to comply with CR 26(g) by not honestly responding to defendant's interrogatories. The failures on the part of the plaintiff in this case were material in that she failed to reveal her criminal history, failed to reveal a prior motor vehicle collision, which could have been explored prior to trial, and only belatedly was it revealed that she was treated by Group Health for an extended period of time - 18-19 years.

When considering whether or not such misconduct is sufficient to warrant the grant of a new trial, it is suggested that the court should be mindful of the teaching set forth in the case of *Deutscher v. Gabel*, 149 Wn.App. 119, 202 P.3d 355 (2009). In that case the appellate court upheld the exclusion of a witness and imposition of sanctions on an attorney when it was found that the attorney had made a misleading statement to the trial court.

When considering what if any sanctions to award for the failure of a party to properly respond to interrogatories, is an issue for the court, and whether or not there has been substantial prejudice to the opposing party. See, *M/V La Conte, Inc. v. Leisure*, 55 Wn.App. 396, 402, 77 P.2d 1061 (1989); see also *Allied Financial Services Inc v. Mangum*, 70 Wn.App. 164, 871 P.2d 1075 (1994).

In this case clearly the defense was prejudiced by Ms. Schmidt's

incomplete, tardy and/or blatantly false responses to discovery. The defense was denied an opportunity to explore in detail what if any injuries were sustained by Ms. Schmidt in the 1993 collision, and were denied a full opportunity to develop an understanding of her medical history which was not completely revealed until literally on the eve of trial. Naturally, such efforts on the part of the plaintiff impeded and/or impaired the defense's trial preparation, and should not be rewarded by an unjustifiably inflated verdict in this case which otherwise is unsupported by the evidence. Ultimately the question for the court is whether or not the defense received a "fair trial," given the plaintiff's discovery abuse in this case, and it is suggested that based on reasonable and objective standards, clearly the defense did not.

Thus the plaintiff's discovery abuse standing alone in and of itself warranted the grant of a new trial.

5. The Trial Court Committed Reversible Error by Failing to Admit into Evidence Plaintiff's First Degree Theft Conviction

Given the fact that she had provided false answers in her interrogatories regarding the existence of such conviction, and further compounded by her dishonesty in stating in her supplemental responses to interrogatories: "I have not been charged with any criminal offense in my life." (Appendix No. 4). Further compounding that act of dishonesty, once caught in her falsehoods, Ms. Schmidt had the temerity to try to explain away her false interrogatory answers by stating that she "forgot" (her only felony

conviction) and to try to cast blame towards a cousin who allegedly was the actual perpetrator of her criminal offenses. It is suggested that Ms. Schmidt's effort to explain away her felony conviction in and of itself draws into question in a significant manner her lack of credibility. Either in 1996 when she pled guilty to the crime she was not honestly telling the Court that she committed the crime and was aiding and abetting the actual criminal, or her subsequent statements to this court trying to explain away her conviction, are false. Ms. Schmidt simply cannot and could not have it both ways.

While it is noted that Ms. Schmidt's conviction in and of itself is well-seasoned and not necessarily per se admissible due to the passage of time under ER 609, that simply does not end the inquiry. What is at issue is her willingness **in this case**, to falsely answer interrogatories and to make substantial efforts to try to explain away a crime of dishonesty upon which she pleaded guilty. Both call into question her credibility and should have been fertile ground for impeachment during the time of trial. As discussed in *In Re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 10 P.3d 1034 (2000) when one falsely responds under oath in interrogatories, that is grounds from which the witness and/or party can be impeached. *Id.*, page 776, n. 6. As discussed in Footnote 6 of the *Pearsall-Stipek* opinion, case law establishes the general principle that extrinsic evidence may normally be used to impeach a witness only with respect to material, as opposed to collateral matters. However, even if a matter is deemed "collateral" and if a witness lies about a collateral matter, "the opposing party may cross-examine the witness as to

this point, but if the witness adheres to the fabricated testimony, the inquiry must end".

The use of a party's falsehoods for impeachment purposes on cross-examination is discussed in detail in the case of *Crisp v. Nursing Homes, Inc.*, 15 Wn.App. 599, 550 P.2d 718 (1976). As discussed below according to the *Crisp* case, should a party be inappropriately denied the opportunity to cross-examine a party based on their false statements for the purposes of challenging their credibility, it can be deemed reversible error.

In *Crisp*, at page 604-05, the Appellate Court provided the following analysis as to why a party should be permitted on cross-examination to question the credibility of an opposing party when they have previously provided inconsistent and/or false testimony under oath:

Further, the cross-examination was admissible on the question of plaintiff's credibility. In 3 J. Wgmore, Evidence § 957, the writer states: 'A willingness to swear falsely is, beyond any question, admissible as negating the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence. In Pullman Co. v. Hall, 55 F.2d 139 (4th Cir. 1932), the Court stated at 141: 'The rule is that for the purposes of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness; the qualification of the rule being that the party questioning him is bound by his answers it may contradict him with regard thereto' (citing authorities). It is said that it was within the discretion of the trial court judge whether questions would be permitted as to acts of misconduct affecting credibility. We think, however, that the matter resting within the discretion of the judge is merely the extent to which such examination may be pursued. To refuse the right to examine at all with

respect to such matters is reversible error. (Citations omitted) (Emphasis added).

Thus, in this case the Court committed reversible error by precluding the defense, by way of its ruling in limine, from cross-examining Ms. Schmidt with respect to her false interrogatory answers, and her contradictory statements encompassed by her efforts to explain away her serious felony conviction, which allegedly she "forgot." It is suggested that Ms. Schmidt's efforts in that regard which occurred under oath, not only strained credulity, but are an offense to our justice system.

The failure to permit the defendant to utilize such critical impeachment evidence in cross-examining Ms. Schmidt in and of itself was reversible error warranting the grant of a new trial.

6. Cumulative Error Warrants the Grant of a New Trial

It has long been recognized that pursuant to CR 59 (a)(9) a new trial can be granted due to cumulative trial error. See, *Storey v. Storey*, 21 Wn.App. 370, 585 P.2d 183 (1978). The *Storey* opinion provides at page 374 the following:

The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not (Citations omitted).

See also, *Rowe v. Vaagen Brothers Lumber Inc.*, 100 Wn.App. 268, 996 P.2d 1103 (2000).

In this case, despite the trial court's best efforts, due to the conduct of plaintiff's counsel, and plaintiff's witnesses, the defendant was denied a fair trial. The errors at trial were multiple and cumulative. As discussed above,

the jurors were allowed to speculate about a causal link between plaintiff's current complaints and her 1995 slip and fall without a scintilla of supporting medical testimony. Efforts were also made to undermine the defendant's ability to call a very material witness, John McMonagle, who was a critical witness for the defense given his firsthand knowledge of Ms. Schmidt's medical condition during the relevant time frame. Lack of insurance testimony was elicited and submitted into evidence, and a plaintiff witness blurted out Ms. Schmidt's lack of insurance in a manner that appeared contrived, and for the obvious purpose of violating the Court's pretrial, as well as trial rulings. The argument of plaintiff's counsel was tainted by an appeal to the passion and prejudice of the jury, and the case was infected with a number of discovery violations that on reasoned analysis frankly are "shocking."

It is respectfully suggested that Mr. Coogan simply did not receive a fair trial under the totality of the circumstances and a new trial should have been ordered by the Trial Court.

C. A New Trial Should Be Granted Due to Juror Misconduct

A party is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial, if there is a **reasonable possibility that the extrinsic evidence could have affected the verdict,**" (Emphasis added), see, *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998). This principle applies with equal force in civil cases. *Rinker v. City of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (per curiam), (reliance on

criminal cases is appropriate because the "integrity of the jury system is no less to be desired in civil cases") (quotations and citations omitted). This court must conduct an objective inquiry, but "need not ascertain whether the extrinsic evidence actually influenced any specific juror." See, *Keating* at 902. As the juror declarations filed herewith indicate, even though the court need not ascertain whether the extrinsic evidence actually had influence, there is simply no doubt **that it did**.

Extrinsic evidence is "information that is outside all the evidence submitted at trial, either orally or by document." *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), reviewed denied, 116 Wn.2d 1014, 807 P.2d 883 (1991); see also, *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). It is jury misconduct for jurors to interject extrinsic evidence into the jury's deliberations, as such evidence is not subject to objection, cross examination, explanation or rebuttal. *Balisok*, 123 Wn.2d at 118. Jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. *Richards*, 59 Wn. App. at 274.

In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts must examine whether the comments impact the kind of specialized knowledge that generally is provided by experts at the time of trial. See, *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991); *State v. Briggs*, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989).

Evidence outside the realm of a typical juror's general life experience should not be introduced into jury deliberations. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973) (new trial order where juror misconduct consisted of telling fellow jurors that the salaries of airline pilots and surveyors in an action wherein the plaintiff had not claimed lost wages, but had shown an inclination to enter those professions, but had failed to introduce evidence regarding salaries in those professions); see also, *Fritsch v. J. J. Newberry's, Inc.*, 43 Wn. App. 904, 907, 720 P.2d 845 (1986) (juror's extraneous remarks regarding the value of damages was in the nature of expert testimony that should have been subject to cross examination, and thus was prejudicial).

It is also not permissible for jurors to consider any other extraneous facts as long as they are not facts about the defendant or the plaintiff. See, *State v. Rinkes*, 770 Wn.2d 854, 862, 425 P.2d 658 (1967) (impermissible for jury to consider newspaper editorial and cartoon about liberal court decisions in deliberations within a criminal prosecution).

When jurors introduce extrinsic evidence into deliberation, the verdict cannot stand unless the court is satisfied that the evidence had no effect upon the verdict. If the court has **any doubt**, it must order a new trial. *Halverson v. Anderson*, 82 Wn.2d at 749-50. (Emphasis added). Thus, 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 the extrinsic evidence did not contribute to the verdict. See, *United States v. Keating*, 147 F.3d at

902-03. (Listing factors courts consider in determining whether party has met its burden under the "reasonable possibility" standard).

As the declaration of Juror Gary Gosselin indicates, and a representative sample of his fellow jurors' also attest, in this case the jurors during the course of their deliberations brought into play the extrinsic consideration of what it believed to be the statute of limitation applicable to Ms. Schmidt's claim against The Grocery Outlet.

The declarations submitted below by the other jurors, verify in fact that the notion that there was a "five-year" statute of limitation applicable to Ms. Schmidt's claim, was utilized during the course of deliberations, and a material part of the formulation of the jurors' damages award in this case.

As is self-evident, there was no jury instruction in this case regarding the statute of limitation which generally, if relevant, would have been submitted to the jury as an instruction as a matter of law. Further, it is noted that the statute of limitation to the extent that it is not an issue of law, is a question and/or a matter which was well outside the scope of the record in this case, thus should be deemed to constitute "extrinsic evidence." What is or is not a statute of limitation applicable to a legal claim is a matter which requires a level of legal expertise well beyond the basic understanding of a typical juror. Thus, clearly such considerations were "extrinsic" and were not a matter for this jury to consider when rendering its damage award.

In addition, and what is perhaps more troubling, had the jury actually been instructed on that statute of limitation, they would have been informed

that the statute of limitation applicable to Ms. Schmidt's underlying claim against The Grocery Outlet had a three-year statute of limitation under RCW 4.16.080(2). See also, *Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993) (statute of limitation applicable to personal injury claims is three years plus the 90-day tolling otherwise provided under RCW 4.16.170). The maximum statute of limitation under any conceivable notion, would be 3 years plus 90 days applicable to Ms. Schmidt's claims. Thus, not only did the jury inappropriately indicate an extrinsic consideration in its deliberations, i.e., the statute of limitations, but they got it wrong.

Had it even been appropriate to instruct the jury on an applicable statute of limitation, it is noted that at least then both the plaintiff and the defendant would have had an opportunity to explain its meaning, argue as to its application, and would have provided an effort to explain to the jury that simply because the statute of limitation extended for a specific period of time, that in and of itself has no relationship (whatsoever), as to what Ms. Schmidt's damages were as a result of her 1995 slip and fall.

Further, it is noted that the jury improperly considered the statute of limitations i.e. the period of time in which Mr. Coogan should have acted, in enhancing their damage award, indicates that the jury's verdict at least in part was intended for the purposes of punishing Mr. Coogan for not acting in a timely manner. (CP 1493-1511). (Appendix No. 5). Otherwise, it simply makes no sense for this jury, based on the evidence presented at the time of trial, to provide Ms. Schmidt any kind of enhanced damages during that five-

year time frame unrelated to any specific claim of injury that she may have suffered as a result of the 1995 slip and fall. As it is, Ms. Schmidt's medical evidence was woefully deficient to extend the damages period in this case beyond generally a year and perhaps a few months. (Id.).

The consideration of the statute of limitations simply created a punitive result, which is simply unauthorized under the laws of the State of Washington. (Id.).

Juror Gosselin's declaration goes on to provide that the jurors in this case also impermissibly considered "wage loss" when assessing Ms. Schmidt's damages. In this case there is no evidence as to any lost wages incurred by Ms. Schmidt as a result of her slip-and-fall accident. (CP 1324-1327)

The Court can take note that on review of the jury instructions in this case, the jury was not instructed to award Ms. Schmidt any economic damages relating to wage loss, loss of earning capacity, and the like. Thus, such considerations were also extrinsic to the evidence in this case, and thus should not have been considered by the jury; their consideration of such matters constitutes misconduct.

On that specific consideration, the case of *Loeffelholz v. CLEAN*, 119 Wn.App. 665, 82 P.3d 1199 (2004) is directly on point. The *Loeffelholz* case involved a defamation action in which there was no claim for damages for "lost earning capacity" and it was found that a new trial was warranted when it was learned that one juror estimated the plaintiff's probable earning

capacity and the jury used that estimated amount to determine damages.

In *Loeffelholz*, the appellate court found that such extrinsic evidence did not "inhere in the verdict because it did not involve merely a more critical examination of the information produced in court, but actually put the jury 'in possession of material facts which should have been supported by evidence... which was not offered'." See, *Loeffelholz* at 681.

The same is true here. There is no evidence presented at the time of trial that Ms. Schmidt had lost any wages as a result of her 1995 slip-and-fall-related injuries. Thus, the jurors' consideration of such matters clearly constitutes misconduct.

In sum, whether based on the jurors' legal research, or simply an erroneous understanding of the law, the jurors inappropriately considered the statute of limitations applicable to Ms. Schmidt's underlying claim when assessing damages. It is noted that it has long been recognized that it is error for the jury to consider, or consult "the law books" while deliberating on their verdict, and such error is so prejudicial that it requires a new trial. See, *Bouton-Perkins Lumber Company v. Huston*, 81 Wn. 678, 682, 143 P. 146 (1914). See also, *Atkins v. Aluminum Company of America*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988) ("Jury misconduct also results where a juror provides the jury with erroneous statements of law").

Thus, whether or not the jurors consulted "the law books" or simply the jurors were provided by one of their members "an erroneous statement of the law" simply makes no difference. Such efforts constitute jury misconduct

which fully warrant the grant of a new trial.

Under such circumstances, and given the fact that all jurors concede that such an erroneous consideration of the law impacted their verdict, it simply will be impossible for the plaintiff in this case to show that such actions were not erroneous. In addition, as noted above, it was simply erroneous for the jurors to consider wage loss when rendering its verdict and this in and of itself is a separate and independent basis that warranted the grant for a new trial.

CONCLUSION

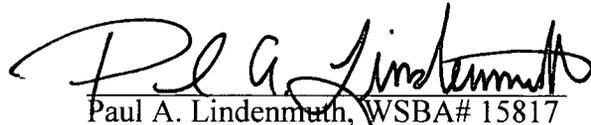
For the reasons stated above, defendant is entitled to relief from the jury verdict entered in this case. As noted, this case should be dismissed in its entirety because plaintiff failed to prove the essential element of "collectability" at the time of trial. That in and of itself is fatal to the verdict in this case.

In addition, JNOV should be granted as to the nature of extent of the plaintiff's damages because there has been no competent medical proof establishing that Ms. Schmidt's damages relating to the subject slip and fall had any relationship to the slip and fall beyond April 1, 1997. As such, a verdict should be directed in that regard, and it will necessitate a new trial on the further limited issue of damages.

In addition as discussed above under CR 59 there are numerous and cumulative reasons for the grant of a new trial in this matter that simply cannot be ignored, including clear evidence of jury misconduct. The

judgment of the Trial Court should be reversed, and this matter remanded with direction to dismiss. Alternatively, an Order should be issued, once again granting defendant a new trial.

DATED this 13 day of June, 2011.


Paul A. Lindenmuth, WSBA# 15817
Attorney for Defendant Coogan