FILED

AUG 31 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 95827-1

No. 346714

In The Court Of Appeals
The State Of Washington
Division III

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT AND NATURAL GUARDIAN OF BRAYAN MARTINEZ, A MINOR,

Appellant/Plaintiff,

v.

CONSUELO PRIETO MARISCAL,

Respondent/Defendant.

APPELLANT'S RESPONSE TO BRIEF OF RESPONDENT

Brian J. Anderson WSBA#39061
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

Ned Stratton WSBA #42299
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

Attorneys for Appellant

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 2

Standard of Review 2

A. The Trial Court Committed Reversible Error When It Admitted a First Party Insurance Application, "Exhibit 101," Containing Inadmissible, Speculative Hearsay 3

B. The Trial Court Erred in Allowing Defense Counsel's Numerous References to Hearsay Contained in Medical Records At Trial, Unfairly Prejudicing Appellant and Preventing Him From Having a Fair Trial... 6

C. The Trial Court Erred by Allowing Reference to and Admission of the Police Report Into Evidence When It Was Hearsay, Lacked Foundation for Its Admission, and When It Was Based on a Witness's Speculation and Not on Personal Knowledge 9

D. The Trial Court Erred in Allowing Defense Expert, Eric Hunter's, To Present Unfounded Speculative Scenarios to the Jury 10

E. The Trial Court Should Have Granted a New Trial, Given the Cumulative Errors at Trial 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 998 P.2d 856 (2000) 3
Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980) 4, 5
Cofer v. County of Pierce, 8 Wn.App. 258, 505 P.2d 476 (1973) 5
Davis v. Cox, 180 Wn. App. 514, 325 P.3d 255 (Div. 1 2014) 5
Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 422 P.2d 496 (1967) 4
Lockwood v. AC & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) 4, 5
Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (Div. 1 2001) 11
Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 817 P.2d 861 (Div. 1 1991) 10
State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) 13
State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) 13
State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) 3
State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (Div. 2 2003) 10
State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 3
State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002) 3
State v. White, 72 Wn.2d 524, 433 P.2d 682, 686-87 (1967) 9

Rules

ER 702 11
ER 703 11
ER 801 4
ER 803 8
ER 901 10

SUMMARY OF ARGUMENT

Respondent's Brief does not substantively address the many errors regarding hearsay and the unfair prejudice to Appellant's case at trial as recited in Appellant's Brief. Appellant will briefly counter Respondent's arguments and outline Respondent's non-responsiveness.

Although Respondent points to and argues about factual issues decided at trial, the factual determinations are not the crux of the issue. Rather, Appellant is concerned with evidentiary errors by the Trial Court. At trial, Appellant objected primarily to hearsay in the collision report, hearsay in the medical records, hearsay in a first-party personal injury protection (PIP) application, and speculative scenarios put forth by Defendant, Defendant's witness, and Defendant's expert. The erroneous admission of this evidence throughout the trial tainted the trial and was so pervasive that it prevented Appellant from having a fair trial.

The Trial Court erred in allowing hearsay testimony and reference to hearsay evidence contrary to the rules of evidence. There was no firsthand knowledge of how 8-year-old Brayan Martinez was run over from any witness, aside from appellant Brayan Martinez. The narrative in the police report is hearsay not based on his testimony or anyone's firsthand knowledge, but was taken from an unknown person's guess of what may have happened. The vague statements in the medical records are also

hearsay because they are not based on firsthand knowledge, and there is no indication as to who the historians were. And the first-party PIP application completed by Appellant's attorney's office prior to any material discovery was taken almost word for word from the police report narrative, which was based on speculative hearsay. Impermissible hearsay evidence was present throughout the trial, and tainted the proceedings from opening statement to closing statement to jury deliberations.

ARGUMENT

Standard of Review

The interpretation of an evidentiary rule is a question of law, which is reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)). However, when a trial court correctly interprets the evidentiary rule, the trial court's decision to admit the evidence under the rule is reviewed for an abuse of discretion. Id. (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) and State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

On appeal, this Court applies the same standard as the Trial Court in reviewing a motion for judgment notwithstanding the verdict (JNOV). Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529,

998 P.2d 856 (2000) (citations omitted). The standard of review for an order denying a motion for a new trial is abuse of discretion. Aluminum Co. of America, 140 Wn.2d at 537.

A. The Trial Court Committed Reversible Error When It Admitted a First-Party Insurance Application, "Exhibit 101," Containing Inadmissible, Speculative Hearsay

The trial court erred when it admitted the first-party PIP application as an admission by a party opponent under ER 801(d)(2). The rules of evidence provide that:

> A statement is not hearsay if... (2)... the statement is offered against a party and is (i) the party's own statement, in either an individual or representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by his agent or servant acting within the scope of his authority to make the statement for the party...

ER 801(d)(2). However, courts have held that in order for statements to satisfy the requirements under ER 801(d)(2), "the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party." Lockwood v. AC & S, Inc., 109 Wn.2d 235, 262, 744 P.2d 605 (1987) (citing Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 163, 422 P.2d 496 (1967) and Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980)).

Further, courts have had occasion to apply this specifically to legal counsel holding that:

> Plaintiff could not use the affidavit of her counsel to create an issue of material fact because the attorney's affidavit was based upon hearsay and upon information and belief. If the attorney's affidavit had been based upon testimonial knowledge it would have been admissible to create an issue of material fact.

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980) (quoting Cofer v. County of Pierce, 8 Wn. App. 258, 262, 505 P.2d 476 (1973)). The Court did not agree that ER 801(d)(2) turned hearsay statements into substantive evidence when those making the statements were not authorized to make the particular statement. See id. Courts have held that "when a person does not have specific express authority to make statements on behalf of a party, the overall nature of his authority to act for the party may determine if he is a speaking agent." Lockwood v. AC & S, Inc., 109 Wn.2d at 262. When parties provide no evidence that a declarant was authorized to speak on behalf of a party, ER 801(d)(2) does not exempt that testimony from application of the hearsay rules. Davis v. Cox, 180 Wn. App. 514, 537-38, 325 P.3d 255 (Div. 1 2014), reversed on other grounds, 183 Wn.2d 269, 351 P.3d 862 (2015).

Respondent has provided no legal authority or argument that the statements contained the PIP application, "Exhibit 101," fall under the hearsay exception outlined in ER 801(d)(2). Respondent has not provided

legal authority or argument to suggest that Appellants' attorneys made the statements in a representative capacity, nor that they had authority to make the statements in the PIP application, nor to indicate that they were "speaking agents," much less to suggest that the statements in the PIP application were those of Appellant Brayan Martinez, nor that the statements were ever adopted. Appellant Brayan Martinez never made, nor reviewed, the statements made in the PIP application. The statements in the PIP application were not adopted by Appellant, as they were hearsay repeated from the police report, and were not intended as a precise admission of how the collision occurred.

Respondent disregards that, although Appellant Brayan Martinez may have told his mother how the incident occurred, Appellant's mother testified that she did not relay this information to Appellants' attorney's office prior to the submission of the PIP application, and Respondent also disregards that fact that she testified that she disagreed with the narrative in the police report. See VRP 299. Moreover, the PIP application was just a reiteration of the narrative contained within the police report, which was speculative hearsay, and was a non-witness's version of events. Despite all of this, the statement in the PIP application was used extensively by Respondent at trial, unfairly and detrimentally prejudicing Appellant.

Additionally, as in Heidibrink v. Moriwaki and Harris v. Drake, Appellant was contractually required to provide a statement to avail himself of first-party PIP benefits, long before any real discovery had been conducted and potential witnesses interviewed, and had a reasonable expectation that it would be kept confidential. It is only when insurance is taken into account that it is clear that the PIP application was prepared in anticipation of litigation, at least from Respondent's insurance company's point of view, because they were already preparing to deny Plaintiff's third-party claim.

B. The Trial Court Erred in Allowing Defense Counsel's Numerous References to Hearsay Contained in Medical Records At Trial, Unfairly Prejudicing Appellant and Preventing Him From Having a Fair Trial

Respondent alleges that "[Appellant]'s counsel opened the door relative to the accident information in the medical records by asking Johnson about Brayan's version of the accident," ignoring the fact that Respondent's counsel had previously referred to speculative injury-causing scenarios and hearsay statements in a PIP application in opening statements, and had "opened the door" then. Respondent's counsel had already rung the bell and Appellant's counsel could not un-ring the bell, even after Appellant's counsel was forced to ask witnesses about the injury causing

scenario and consistency with the injuries caused. However, Respondent's counsel did not limit their cross-examination to the subject of injury causing scenarios consistent with the injuries, but rather, Respondent's counsel asked about specific speculative scenarios. See VRP 60-61, 64-68, 71, 74, 75-77. Respondent's counsel also asked about speculative, and vague, scenarios in other medical providers' medical records, which was not a subject of Appellant's counsel's inquiry. See VRP 71, 74, 75-77. Respondent's counsel blatantly read aloud speculative scenarios in medical records to put them in front of the jury, even when the witness indicated never having reviewed the medical record:

> Q. Didn't you receive a copy of the physical therapist's report?
> A. Not that I recall.
> Q. Okay. And isn't it true that the physical therapist recorded, quote, "Brayan was riding his bike and was struck by a vehicle?"
> A. I don't know.

VRP 71-74.

The Trial Court should not have allowed Respondent's reading of Appellant's medical records when Respondent's only use of the records seemed to be to get impermissible hearsay into the record at trial, which highly prejudiced Appellant's trial and prevented him from having a fair trial. The exception for hearsay in medical records requires that the statements be made for "purposes of medical diagnosis or treatment...

insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). The Supreme Court has held that hearsay in medical records is not admissible at all in some circumstances, and warn that

> If, however, the hearsay contents goes to the heart of an issue on trial so that when believed by a jury it could logically be regarded as proof of the affirmative or negative of an issue, the hearsay should be rejected or expunged, even if in doing so the records must necessarily be mutilated or rendered incoherent.

State v. White, 72 Wn.2d 524, 530, 433 P.2d 682, 686-87 (1967). If hearsay statements in medical records go to the heart of liability, without a hearsay exception, the hearsay statements in the records should not be admitted.

Any of Plaintiff's medical records which contained statements about how Plaintiff was purportedly injured should not have been allowed into evidence. If the statements were not for the purposes of medical treatment or diagnosis, then there is no hearsay exception. The records were being offered by defendant for no other reason than to prove the heart of an issue—liability, and the hearsay statements in the medical records should have been rejected or expunged. The Trial Court allowed defense counsel to read into the record, at trial, vague hearsay narratives in the medical records which purported to explain how Brayan Martinez was injured, and the statements in the medical records were not actually used for medical treatment or diagnosis. This error unfairly prejudiced Brayan Martinez, and prevented him from having a fair trial.

C. The Trial Court Erred by Allowing Reference to and Admission of the Police Report Into Evidence When It Was Hearsay, Lacked Foundation for Its Admission, and When It Was Based on a Witness's Speculation and Not on Personal Knowledge

Although experts reasonably rely on police reports, if an expert knows there is no personal knowledge or factual basis for the statements in a police report, he or she cannot reasonably rely on it. Even though experts may rely on inadmissible evidence, "every opinion must be based on knowledge." State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (Div. 2 2003) (citations omitted). Testimonial evidence has to be based on knowledge; "[p]roper lay opinion is based on personal knowledge[;] [p]roper expert opinion is based on scientific, technical, or specialized knowledge." Id. Courts have specifically held that "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." Miller v. Likins, 109 Wn. App. at 148 (citing Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (Div. 1 1991)). Further, statements in police reports are an additional level of hearsay and each level of hearsay must meet an exception to the hearsay rule. Id. (citing ER 805).

Whether the police report was formally introduced into evidence, or simply referred to throughout trial by Respondent's counsel and

Respondent's expert, it does not change that it had a detrimental and prejudicial effect on Appellant's case and prevented a fair trial. The police officer was not a testifying witness, and there was no testimony as to what the police officer observed, who he talked to, and as to the substance of the statements that were given to him, or who the historian was. However, Respondent's counsel and defense expert relied heavily on the police report, without corroboration from any source, prejudicing the jury by indicating reliance on the report and by reading the contents of the report aloud. See VRP 164-66, 391-92. The vague, speculative narrative in the police report unfairly prejudiced Appellant and prevented him from having a fair trial.

D. The Trial Court Erred in Allowing Defense Expert, Eric Hunter's, To Present Unfounded Speculative Scenarios to the Jury

Defense expert Eric Hunter's testimony was already limited by the Court's instruction not to reference any speculative scenario as to how appellant Brayan Martinez may have been injured—but he did just that. Trial courts have wide discretion in allowing or excluding expert testimony, but may exclude it for conclusory or speculative opinions lacking foundation. See Miller v. Likins, 109 Wn. App. 140, 147-48, 34 P.3d 835 (Div. 1 2001); see also ER 702, ER 703.

During argument about Plaintiff's Motion in Limine prior to trial the Court limited Defense Expert's testimony to Perception Reaction time only,

with instructions not to bring up speculative scenarios. However during Defense Expert's testimony he was asked and allowed to testify about multiple speculative scenarios including the hearsay in the police report. Defense expert Eric Hunter's very limited testimony was to be about perception reaction time, and it was wholly based on the unfounded and speculative narrative in the police report:

> MR. CRONIN: Yes. The expert's name is Eric Hunter. His opinions are extremely limited, Your Honor. His opinion is that, based upon information provided at the time of his report, including the police report, that if Brayan pedaled his bicycle out in front of this orange pickup truck parked on the side of the street, that Miss Prieto, the defendant, would only have approximately one second to react before impact to the guardian child.... But Mr. Hunter, the defense's expert, is not gonna testify as to which version he believes. He's gonna testify and bring the expertise of the perception and reaction time of an average driver 1.6 seconds....
> THE COURT: Based on?
> MR. CRONIN: Based on the police report.

VRP 18-19. The speculative scenarios, both from the police report and from defense expert, unfairly prejudiced Plaintiff and prevented him from having a fair trial.

E. The Trial Court Should Have Granted a New Trial, Given the Cumulative Errors at Trial

The cumulative error doctrine warrants reversal when several errors prevent a party from having a fair trial, even if each error standing alone may not be sufficient to justify reversal. See, e.g., State v. Coe, 101 Wn.2d

772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal).

Here, cumulative errors prevented Appellant from having a fair trial, even if each error on its own may not have warranted reversal. Taken together, the 1) hearsay statements in the PIP application (Exhibit 101), 2) unfounded and speculative hearsay narrative in the police report, 3) hearsay statements in the medical records, 4) speculative scenarios offered by defense's expert, and 5) speculative scenarios offered by defense counsel, there was cumulative error sufficient to unfairly prejudice Appellant at trial, which warranted granting of a new trial.

The cumulative effect of all of the inadmissible evidence presented was unfairly prejudicial to Plaintiff's case and trial and now warrants reversal.

CONCLUSION

Appellant Brayan Martinez requests that this court reverse the trial court and remand this case for a new trial for all of Appellant's claims, and for a determination of the extent of Appellant's damages, to include attorneys' fees and costs.

Dated this 29 day of August, 2017.

Respectfully submitted,

Ned Stratton WSBA #42299

Attorney for Appellant
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

CERTIFICATE OF SERVICE

I certify that on the 29 day of August, 2017, I caused a true and correct copy of BRIEF OF APPELLANTS to be served on the following in the manner indicated below:

Counsel for Respondents	via	(X) U.S. Mail
Steven M. Cronin, WSBA #14602		( ) Hand Delivery
MULLIN, CRONIN, CASEY & BLAIR, PS		( ) Express Mail
Third Floor, Jockey Club Building		( ) E-Mail
N. 115 Washington		( ) Fax to (509) 455-8327
Spokane, WA 99201		

Dated this 29 day of August, 2017.

Brian Anderson