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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.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error 1

The Trial Court erred in allowing entry of Appellant's first-party no-fault Personal Injury Protection (PIP) application into evidence for the purpose of proving the truth of the hearsay narrative contained within. The Trial Court allowed reading of Appellant's PIP application into the record at trial even though it contained multiple levels of hearsay evidence and was a privileged document protected by work product rules.

Assignment of Error 2

The Trial Court erred when it did not grant Plaintiff a new trial due to irregularity and misconduct in the proceedings, when it allowed defense counsel to reference and read unsubstantiated hearsay testimony contained in medical records into the record at trial.

Assignment of Error 3

The Trial Court further erred when it allowed the police report to be read into the record and into evidence which contained hearsay witness statements not based on personal knowledge.

Assignment of Error 4

The Trial Court erred when it allowed defense expert to testify because his testimony was based entirely on speculation and hearsay, and

because in his testimony he referenced multiple speculative scenarios including the narrative in the police report.

Assignment of Error 5

Finally, the Trial Court erred in denying Plaintiffs an order for Judgment Notwithstanding the Verdict (JNOV) or new trial pursuant to CR 50 and CR 59, on June 6, 2016, after the jury disregarded the evidence and found in its verdict that Defendant Consuelo Prieto Mariscal was not negligent in causing injuries to Plaintiff Brayan Martinez, despite Ms. Prieto Mariscal's admission that she did not see Brayan Martinez in the street ahead of her before she ran over his leg with her van. Additionally, the Trial Court also erred in denying Plaintiff a new trial because the jury's verdict was contrary to law.

Assignment of Error 6

Although each of the above assignments of error may be adequate on its own to show unfair prejudice to plaintiff, the cumulative effect of the errors prevented plaintiff from having a fair trial.

Issues Pertaining to Assignment of Error 1

Whether a statement in a first-party Personal Injury Protection (PIP) application, containing multiple levels of hearsay, written by a legal

assistant, copied from hearsay contained in a police report, should have been read to the jury and considered an admission under ER 801(d)(2).

Whether a Plaintiff's PIP application completed by a Plaintiff's attorney's office is privileged and/or work product.

Whether defense counsel's reference to and reading of Plaintiff's PIP application into the record at trial prejudiced Plaintiff at trial and is reversible error.

Whether Plaintiff should have been granted a new trial or judgment notwithstanding the verdict based on the use of hearsay in a PIP application by defense counsel to prove how a collision occurred.

Issues Pertaining to Assignment of Error 2

Whether narratives in medical records, lacking indication as to the source of the narratives, are considered hearsay.

Whether the reading of the narratives within the medical records by defense counsel was impermissible hearsay and reversible error.

Issues Pertaining to Assignment of Error 3

Whether a police report narrative which was not based on a witness's personal knowledge is considered hearsay.

Whether the reading and referring to a police report narrative without adequate foundation is reversible error.

Issues Pertaining to Assignment of Error 4

Whether a defense expert's reference to speculative scenarios, contrary to the Court's order, was reversible error.

Whether allowing a defense expert to rely on and reference a police report based on a witness's speculation is reversible error.

Whether the defense expert's introduction and reference to speculative collision scenarios and reference to the speculative scenario in the police report unfairly prejudiced Plaintiff at trial.

Issues Pertaining to Assignment of Error 5

Whether the Trial Court may sustain a jury verdict when the verdict is contrary to law and not supported by the evidence presented at trial, or whether it must grant a motion for judgment notwithstanding the verdict (JNOV) pursuant to CR 50 and CR 59.

Whether as a matter of law it is negligent to drive a vehicle and not see what is there to be seen and run over a boy who was stationary in the road.

Issues Pertaining to Assignment of Error 6

Whether the cumulative error doctrine applies and warrants reversal when there have been several trial errors that combined denied Plaintiff a fair trial.

STATEMENT OF FACTS

This appeal arises from a claim for injuries and damages caused by a motor vehicle collision in which Respondent, Consuelo Prieto Mariscal, failed to see Appellant's son, Brayan Martinez, in the road ahead of her, and ran over his leg with her van. See Verbatim Report of Proceedings (VRP) 315, 371-72, 375. On October 30, 2013, Respondent Consuelo Prieto Mariscal drove south on North Cedar and admitted that she did not see Brayan Martinez in the roadway ahead of her before she felt a bump and ran over his leg. VRP 314-15, 371-72. After she felt the bump she then saw Brayan Martinez laying in the roadway in her rearview mirror. VRP 371-72, 375. Ms. Prieto Mariscal at one point during her testimony stated it this way "It hurt me to see the child that was suffering because I couldn't avoid it. I couldn't see that he was in the street." See VRP 374-75.

Police come to the scene and only spoke to Defendant Consuelo Prieto Mariscal and her daughter. See VRP 361-62, 365-66, 371-72, 374-77 (the police also likely spoke to a third person who Defendant alleged was a witness, however it was discovered later on during the suit that this third person came from her home after the collision and did not see the collision occur). It was established during discovery and at trial that neither defendant

nor her daughter actually saw anything and the version of events in the police report was based entirely on speculation. *Id.*

Brayan Martinez suffered a broken leg which took months to heal; however, other than the tire marks on his leg he had no other injury to his body, hands, head, or knees. VRP 82, 315, 321-22.

Procedural History

Brayan Martinez filed a Summons and Complaint in this case on May 6, 2014. CP 6-7. This case went to trial on Wednesday, June 1, 2016, and trial concluded on June 6, 2016. See VRP 1. Counsel for Plaintiff submitted a motion to the Trial Court to exclude hearsay testimony and reference to hearsay testimony at trial, and it was granted by the Trial Court on June 1, 2016. See VRP 15-25, 27, 31, 71-74. Plaintiff moved the Court for a directed verdict based on the evidence presented at trial, and the Court denied Plaintiff's motion. See VRP 511-12. At the conclusion of the trial, the jury's verdict was for the Defendant, finding that Ms. Prieto Mariscal was not negligent in running over Brayan Martinez's leg and causing his injuries. VRP 627. Plaintiff's counsel moved the Court for a mistrial on the basis of speculative scenarios and hearsay testimony presented during trial, despite a court order excluding such testimony, and the Court denied the motion. See VRP 632-33. Plaintiff also filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and For a New

Trial on July 1, 2016, and set to be heard on July 11, 2016, and the Trial Court denied the motion. Plaintiff filed a notice of appeal in this case on August 29, 2016. CP 601-06.

Errors at Trial

Prior to trial a Motion in Limine was made by plaintiff and order was granted by the court which excluded all testimony about speculative causes and Scenarios as to Plaintiff's Injuries. CP 234. However, in his opening, defense counsel made multiple references to speculative scenarios and events in violation of this motion and order. See Supplemental Verbatim Report of Proceedings (SVRP) 11-16, and VRP 119, 121, 136-137. During opening, defense counsel started injecting speculation into the trial when he mentioned that he hired an accident reconstructionist to offer an opinion on perception reaction time available to Defendant Prieto "when Brayan darted out from the front of that orange pickup truck." SVRP 11. He then went on to offer the expert's speculative opinion on reaction time at "just less than one second to perceive and react when Brayan darted out and, therefore, did not have enough time to avoid the impact." SVRP 11 (emphasis added). Also, during defense counsel's opening statement, defense counsel referenced hearsay statements made both in a PIP application and in a previous Complaint. SVRP 12-16.

At trial, defense counsel referenced and read into the record many speculative hearsay statements contained within medical records, the police report, and Plaintiff's PIP application. See SVRP 11-16, VRP 70-71, 74, 75, 77, 80, 102-04, 164, 170-73, 221-22, 299, 390-92, and 396. However, the PIP application was erroneously admitted by the Trial Court as an admission under ER 801(d)(2). See VRP 132-35. Ms. Diaz Barriga Figueroa had signed the PIP application, but did not write the statement contained within the PIP application, and had no personal knowledge of the injury causing event. See VRP 290-91, 299. The Court also granted Plaintiff's Motions in Limine to exclude speculative testimony from Defendant's expert and to exclude speculative testimony from Defendant herself. See VRP 22-25, 27. The Court reserved judgment on Plaintiff's Motion in Limine seeking to exclude speculative scenarios contained within medical records. See VRP 31. Despite the motion in limine and multiple objections by Plaintiff, during the direct examination of Aaron Johnson, defense counsel injected speculative hearsay scenarios into the record by reading aloud to the jury the speculative hearsay scenarios contained in multiple medical records. See VRP 70-80. These questions and interjections had nothing to do with medical treatment and there were no questions related to Plaintiff's diagnoses or treatment detailed in those medical records, instead the only purpose in referencing these statements

was to confuse the jury and to try to interject speculative hearsay scenarios of how the collision may have occurred. Id. Defense counsel began by asking general questions about the medical records reviewed, but specifically about the narratives as to how the injury causing incident occurred:

> Q: In fact, in all these records you've reviewed, there is nothing in any of those medical records about the shoe lace being tangled. Correct?
> A: Correct.

VRP 70. Defense counsel, however, goes further, reading aloud all of the speculative scenarios contained in the various medical records, without regard for personal knowledge, foundation, or hearsay, or even whether the witness had even seen the medical record before:

> 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. Defense counsel further referenced speculative hearsay scenarios contained in other medical records and continued to read them aloud during cross-examination:

> Q: Mr. Johnson, you testified that you reviewed the emergency room report from Lourdes?
> A: Yes, sir.
> Q: Okay. And isn't it true that the emergency room report states that, "The patient is an eight-year-old Hispanic male riding his bicycle. He was hit by a truck?"

> A: Yes, sir.
> Q: All right. Nowhere in there about kneeling on the ground, correct?
> A: No, sir.
> Q: Nothing in there about shoe lace being tangled, correct?
> A: No, sir.
> Q: You also relied upon Benton-Franklin Orthopedic Associates records, particularly that of Dr. Thiel, correct?
> A: Yes, sir.
> Q: Nothing in Dr. Thiel's orthopedist's office records about kneeling, correct?
> A: Yes, sir.
> Q: Nothing about the shoe lace being tangled in the chain, correct?
> A: No, sir.

VRP 74-75. Although Aaron Johnson was a medical expert witness, he was only asked minimally about the diagnoses or treatment in the medical records, most of the questions were related to hearsay, or speculative scenarios of how the collision could have happened. See id. Aaron Johnson was even asked about the accident reconstruction experts' reports and perception-reaction times:

> Q: Let me direct you to page two of Mr. Stadler's report. (Indicating). And I'll read it, slowly. Let me know if I read this correctly. "Brayan said that he would leave the sidewalk and do a quick U-turn type maneuver in the roadway in front of an orange pickup that was parked along the curb." Did I read that correctly?
> ...
> Q: Did you disagree with Mr. Hunter's conclusion that the average perception and reaction time for a driver is 1.6 seconds?

VRP 77-78. Plaintiff's medical expert Aaron Johnson was asked about accident reconstruction issues and Mr. Stadler's and Mr. Hunter's reports,

despite not having an expertise or knowledge in this area, and despite that these accident reconstruction experts would also be testifying. Finally, defense counsel even came up with his own speculative scenarios, not contained within any records:

> Q: Did you consider whether or not Brayan had bailed off that bike and his leg was extended?
> A: If he sustained injury to the trunk, he would have likely had injuries to his extremities, as well.
> Q: What if he laid the bicycle down?

VRP 80. Finally, during closing, defense counsel references these speculative scenarios again. VRP 613-16.

Defense expert's testimony should have been excluded, or limited per the Court's order. The Court ordered defense expert's testimony be limited to perception-reaction times in general, and defense expert was not to rely or comment on speculation. See VRP 22-25. However, defense expert relied on speculative hearsay testimony contained within the police report and the same hearsay contained in the PIP application. VRP 391-92, 396. Additionally, the defense expert was allowed to refer to the PIP application because it was erroneously admitted as an admission under ER 801(d)(2). See VRP 135. Defense expert then goes on to offer many speculative scenarios, contrary to Court order. VRP 432, 434, 439, 446-47. Defense expert even goes on to improperly reference and inject into the

record the idea that there was an eye-witness, contrary to the Court's previous order. VRP 36-37, 437; CP 234.

SUMMARY OF ARGUMENT

Although each error at trial, by itself, amounted to unfair prejudice to Plaintiff, all of the errors in the aggregate certainly had an unduly and unfairly prejudicial effect on Plaintiff's case.

The Trial Court erred in admitting and allowing reference to the PIP application completed by Plaintiff's attorney's office, given that it was based on impermissible hearsay and likely protected under attorney client privilege and attorney work product rules. The court did not allow Plaintiff to explain that this was an insurance application for no-fault coverage and that the narrative in the PIP application was not relevant to coverage, nor was there any reasonable expectation that this first-party PIP application would be turned over to defense counsel or that defense counsel would rely on this narrative in any way, or that first-party PIP and third party liability happened to both be State Farm in this case. See VRP 463.

The Trial Court also erred in allowing hearsay testimony and reference to hearsay evidence contrary to the rules of evidence. Given that there was no firsthand knowledge of the events prior to Defendant Consuelo Prieto Mariscal running over Brayan Martinez's leg, all

accounts, except for Brayan Martinez's account, are hearsay. The narrative in the police report is hearsay because it is not based on anyone's firsthand knowledge, and which was taken from Defendant's, her daughter's, or a non-witnesses speculative scenarios as to what could have occurred. The narratives in the medical records are not based on firsthand knowledge as to how Brayan Martinez was run over, there is no indication where those accounts came from, and those accounts are hearsay. The PIP application completed by Plaintiff's attorney's office is based on the police report narrative, and based on hearsay. Hearsay evidence is impermissible unless there is an exception to the hearsay rule for each level of hearsay.

Finally, the Trial Court erred in not granting Brayan Martinez's Motion for Judgment Notwithstanding the Verdict after the jury ignored the evidence and did not follow the law, finding in their verdict that Ms. Prieto Mariscal was not the least bit negligent in running over Brayan Martinez's leg and in causing the injuries to Brayan Martinez when she drove her vehicle without noticing Brayan Martinez ahead of her in the roadway. At trial, Ms. Prieto Mariscal admitted she ran over Brayan Martinez's leg with her van, but testified she did not see Brayan Martinez until after she ran over his leg. No reasonable juror with knowledge of the

evidence that was presented at trial should have completely absolved Ms. Prieto Mariscal of *all* negligence.

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). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." Id. (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) and State ex rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. Id. (citing State v. Neal, 114 Wn.2d 600, 609, 30 P.3d 1255 (2001) and State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996)).

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). A JNOV "is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party..." Wright v. Engum, 124 Wn.2d 343, 356, 878 P.2d 1198 (1994) (citing Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (quoting Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520, (1990))); see also Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856 (2000). In a motion for JNOV, "no element of discretion is involved." Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856 (2000) (citing Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963)). Therefore, the inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict and denial of a motion for JNOV is "inappropriate only when it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict." Wright v. Engum, 124 Wn.2d at 356.

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. In a case where the proponent of a new trial argues that the jury did not base its verdict on the evidence, the appellate courts look to the record to

determine whether there was sufficient evidence to support the verdict reached. Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997) (citations omitted). Moreover, it is abuse of discretion for a court not to order a new trial when the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d at 198, 203 (citations omitted).

A. The Trial Court Committed Reversible Error When It Allowed Entry of a PIP Application as an Admission Under ER 801(d)(2), Even Though the Statement Was Made by Someone Other Than Plaintiff Based on Hearsay in a Police Report

First, it would be helpful to understand where the statement in the PIP application likely originated and how it was used at trial. Plaintiff objected to the admission of the PIP application throughout trial. See VRP 119-123, 132, 478. At trial, the Court erred in admitting the PIP application on the basis that it was an admission by a party opponent under ER 801(d)(2). See VRP 135. This was a statement made by a non-witness, adopted by police, copied by a legal assistant onto a PIP application, signed by a non-English speaking mother of an injured minor child, and turned over to a first-party PIP insurance carrier (where the cause of the collision is not relevant to coverage), and was allowed as an admission by the Trial Court as an admission of the minor Plaintiff. Again, it is likely that the police obtained their speculative scenario from

Defendant, Defendant's daughter, or a non-witness resident of the area, given that they were the ones who spoke with police. See VRP 365-66, 374. However, again, Defendant and Defendant's daughter did not actually witness what happened or how Plaintiff was run over by the van. See VRP 361-62, 371-72, 374-77. Further, there is no way to trace the statement back to Plaintiff Brayan Martinez who was the only one who saw how this collision occurred. Defense counsel repeatedly referred back to the narrative in the PIP application. See VRP 221-22, 299, 396. Although admitted by the court under ER 801(d)(2) as an admission of Plaintiff Brian Martinez, this statement was not ever used against Brayan Martinez, who was not questioned about the contents of the PIP application, but instead it was used to prove how the collision occurred when defense was questioning Brayan's mother, who was not a witness to the collision and admitted that she had no personal knowledge as to how the collision occurred. Id.

Typically, a personal injury protection (PIP) application is utilized by insurance to open a claim for first-party medical benefits under the PIP coverage, and may be deemed work product subject to confidentiality. Courts in the past have deemed documents produced and held by the first-party PIP insurance work product subject to confidentiality. See Heidibrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985); see also Harris v. Drake, 152 Wn.2d 480, 99 P.3d 872 (2004). In Heidibrink, the

court reasoned that an insured who is contractually obligated to provide a statement about the injury causing incident reasonably expects that it will be kept confidential, and taking the statements creates a reasonable expectation that the statements "will not be revealed to the opposing party." Heidibrink v. Moriwaki, 104 Wn.2d at 400. For those reasons, the Court held that "a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)(3)." Id. at 401. The Court further reasoned that such statements can only be disclosed when there is a showing of "substantial need," however a party merely looking for damaging admissions, especially when the party is available to testify, does not meet that standard. See id. at 401-02. The Court in Harris v. Drake then extended this same expectation of confidentiality and work product protection from those who are "liability insured" to include those who are "PIP insured," reasoning that it is just as reasonable an expectation for a PIP insured to expect confidentiality as it is for a liability insured to expect confidentiality. See Harris v. Drake, 152 Wn.2d 480, 488, 99 P.3d 872 (2004).

Further, the law does not allow the admission of the PIP application, or the statements contained within it, 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) made 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).

First, in this case, Plaintiff's PIP application was admitted and used as evidence, despite being protected as confidential work product. Plaintiff is not sure how the attorney for Defendant obtained a copy of the first-party PIP application, however it seems that first-party PIP intentionally turned this PIP application over to Defense in order to defeat third party coverage under liability. The statement provided on the PIP application was merely a formality that contractually needed to be provided in order to obtain PIP benefits, and Plaintiff had a reasonable expectation that it would be kept confidential. As in Heidibrink v. Moriwaki and Harris v. Drake, Plaintiff was contractually required to provide a statement, and, as such, had the reasonable expectation that it would be kept confidential. Also, the PIP is no-fault coverage, so the accuracy of the facts of the

collision have no bearing on coverage. Because the PIP application is normally filled out very early in the process, and because the narrative does not affect coverage, the narrative in the PIP application is often copied directly from the hearsay narrative in the Police Report.

Plaintiff Brayan Martinez never reviewed the statements made in the PIP application, and it was provided by Plaintiff's attorney to the insurance company for purposes of no-fault, first-party PIP coverage. The statements in the PIP application were never intended to be adopted as they were hearsay statements in the police report, nor meant as an admission of how the collision occurred. Instead, the statements were taken from the collision report, since it was still early on in the discovery process. Aside from these issues, the statements made in the PIP application were always thought to be inconsequential, given that PIP is "no-fault insurance" and the statements were meant to remain confidential. The only reason for reading and admitting the PIP application into evidence was to try to show how the collision occurred using hearsay instead of evidence. The reading and admission of the PIP application into evidence was improper.

In this case, the PIP application was given to Defendant, without a showing of "substantial need" of the statement by Defendant. Moreover, the statement provided in the PIP application was just a reiteration of the

narrative contained within the police report, which was hearsay, and was a non-witnesses version of events. Despite all of this, the statement in the PIP application was used extensively by Defendant at trial, unfairly and detrimentally prejudicing Plaintiff at trial.

B. The Trial Court Should Have Granted Plaintiff's Motion for a New Trial, Because Allowing Defense Counsel's Numerous References to Hearsay Contained in Medical Records At Trial Unfairly Prejudiced Plaintiff and Prevented Him From Having a Fair Trial.

It is helpful to first go back to the scene of the injury causing incident to find out where the hearsay statements may have originated. When police arrived, the police spoke with Defendant and her daughter, Melissa Guzman, (and likely spoke to a neighbor who, although alleged to be an eye witness by Defendant, it was later discovered she did not see any part of the collision) to get accounts of what happened during the collision, even though none of these individuals actually saw what happened. See VRP 36-38, 360-62, 365-66, 371-72, 374-77, 437. These non-witness statements were represented to many as if they were actual eyewitness accounts of the collision and were not only relied upon by the police in writing the report, but were likely passed on to the paramedics at the scene, to the medical providers at the ER, to Plaintiff's parents, and others who, until discovery

several months later, would have had no reason to question what they thought to be witness accounts.

The police based the collision report on a speculative scenario which was later proved to be impossible, or extremely unlikely, and not based on firsthand knowledge or observation, and likely passed on this speculative scenario verbally and by report, which was relied upon by many others, likely including the paramedics, treating medical providers, parents, and others. While Defendant could not show where the narratives in the medical records came from, evidence showed that they likely did not come from Brayan Martinez, who was the only real witness to the events. However, despite this, the medical records were allowed into evidence over Plaintiff's objections. See VRP 31, 71-74, 76-79, 102-04.

The Trial Court should not have allowed the reading of impermissible hearsay in medical records into the trial record, as that was contrary to the rules of evidence and prevented Plaintiff from having a fair trial. A witness may not testify without firsthand knowledge. See ER 602. Hearsay is generally not admissible. See ER 802. However, there is an exception for statements made for "purposes of medical diagnosis or treatment… insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). Each level of hearsay must conform to an exception to the hearsay rule for it to be admissible. See ER 805. However, 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).

Any of Plaintiff's medical records which contained statements about how Plaintiff was purportedly injured should not have been allowed into evidence. First, the medical records gave no indication where the narrative about how the collision occurred came from. However, to the extent that they came from the police or the paramedics, it is likely that the basis of the narrative is the same account given by Defendant, Defendant's daughter, and another non-witness, which was not based on firsthand knowledge. See VRP 361-62, 365-66, 371-72, 374-77. These statements made at the scene by non-witnesses were the first level of hearsay. The police then adopting those statements and passed them on verbally or by report which is the second level of hearsay. The police or paramedics likely passed along that information to doctors at the hospital, which is another level of hearsay. The final level of hearsay is the narrative contained in the medical records. The major issue at trial was how the collision occurred and how Plaintiff sustained his injury, and given that

the hearsay narratives in the medical records contained many levels of hearsay and were being offered by defendant for no other reason than to prove the heart of the issue, the hearsay statements in the medical records should have been rejected or expunged.

The Washington Court of Appeals has taken up the issue of hearsay in medical records, and, in that case, when a parent described one child's mechanism of injury to doctors based on another child's account, there was double hearsay which was impermissible. See State v. Alvarez-Abrego, 154 Wn. App. 351, 225 P.3d 396 (Div. 2 2010). In that case, a mother sought medical treatment for her child, and although the mother did not personally witness how her child was injured, the mother told the doctor what a second child had said about how her child was injured, based on the second child's personal knowledge. See id. at 357-61. The Court held that the hearsay exception did not apply because it was a statement from an uninjured child to the parent, even if the second child had personal knowledge, it was double hearsay. See id. at 368-69. Medical records containing hearsay, especially several levels of hearsay, are inadmissible. See id.

Here, the Trial Court allowed defense counsel to refer to, and read into the record at trial, medical records which contained hearsay accounts of how Brayan Martinez was injured, and the Court should have declared

a mistrial on that basis alone. Similarly to the Alvarez-Abrego case, the account as to how Brayan Martinez was injured came from someone other than Brayan Martinez. However, unlike in that case, it is not clear here whether the account to doctors came from the parents, paramedics, a police officer, or someone else entirely, however it does seem clear that the original source was the defendant or other non-witness who did not actually witnessed the incident and these regurgitations were based on speculation, not based on personal knowledge.

Here, there is a potential for three layers of hearsay: 1) the Defendant or a speculative witness without personal knowledge giving the account to a police officer or paramedic, and 2) a police officer, paramedic, or even parents giving the account they heard at the scene to the treating hospital doctors, and 3) the treating hospital doctors reduced the speculative account down to writing in their medical records. Other treating medical providers then took the injury scenario in the hospital medical records and adopted that scenario in their own subsequent medical records. Given the multiple levels of hearsay, the Court should not have allowed defense counsel's multiple references to injury scenarios in medical records, and much less allowed the records into evidence. 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

The Trial Court erred in allowing a police report into evidence without adequate foundation and which included a narrative based on speculation, which highly prejudiced Plaintiff at trial. First, under the rules of evidence, a document such as a police report should be authenticated or identified before its admission. See ER 901. As to statements within a police report, a witness may not testify to a matter unless they have personal knowledge. See ER 602. In fact, "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 to be particularly careful about testimony by officials because "where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." Id. (citing State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (Div. 1 1985)).

However, Courts have decided that "police reports are a subjective summary of the officer's investigation, rendering them inadmissible." In re Detention of Coe, 175 Wn.2d 482, 505, 286 P.3d 329 (2012) (citations omitted). Additionally, 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).

Despite a motion and order in limine forbidding speculative and unfounded scenarios which would confuse the jury, Defense counsel first introduced the speculative scenario in the police report during his opening statement and continued to reference this speculative scenario without any foundation throughout the presentation of his case. See VRP 17-18, 22-25, 164-166, 390-92, 432, 434, 439, 446-47.

Here, we have a police report that was introduced into evidence without foundation, which had a detrimental and prejudicial effect on Plaintiff's case and prevented Plaintiff from having 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. However, the defense counsel and defense expert relied heavily on the police report, without corroboration from any source, and prejudiced the jury by indicating that he relied on the police report and by reading the contents of the police report. Introduction

of the police report narrative by defense counsel was improper, as it was simply read aloud to witnesses. See VRP 164-66, 391-92. The speculative scenarios from the police report unfairly prejudiced Plaintiff and prevented him from having a fair trial. Given that it was a report by a police officer, or "government official," it had the potential to highly influence and prejudice the jury into believing what was written in the report. The introduction of the police report into evidence at trial, and allowing defense expert to rely on it, was unfairly prejudicial and prevented Plaintiff from having a fair trial.

D. The Trial Court Erred by Allowing Defense Expert Testimony which Relied On and Reference Unfounded Hearsay Evidence In the Police Report and to present numerous unfounded speculative scenarios in an attempt to confuse the jury.

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. 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)). In Miller

v. Likins, the testimony of plaintiff's accident reconstructionist was properly refused when the accident reconstructionist acknowledged a lack of physical evidence, acknowledged that his opinion was largely based on the testimony of the plaintiff's friend, and admitted at a deposition that he had no way of determining where the point of impact occurred. See generally, Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (Div. 1 2001). Courts have reasoned that the court should consider whether the issue is of a nature that an expert could express a reasonable probability rather than mere conjecture and speculation, and have cautioned that "when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (Div. 1 1986) (citations omitted). Further, evidence may be excluded on the basis that it sounds more official than it actually is, because it may be unduly impressive to the jury. In re Detention of Pouncy, 144 Wn. App. 609, 184 P.3d 651 (Div. 1 2008), affirmed, 168 Wn.2d 382, 229 P.3d 678 (2010) (comments by a judge in an earlier case regarding the credibility of a witness in the present case were inadmissible). In addition, courts have noted that it is particularly prejudicial to allow testimony by government officials where

they have no personal knowledge. See State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (Div. 2 2003).

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 one in the police report.

The problem with allowing Defense expert to testify is highlighted in this statement made by Defense counsel during argument on the motions in limine:

> 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. Mr. Hunter was allowed to testify about perception and reaction time, based on the speculative version of events in the police report, a version of events that Mr. Hunter did not even believe to be likely

given the other evidence. Because Perception and reaction time must be based on some version of events it would have been impossible to testify about this without bringing in speculative scenarios and what the police thought happened.

At first the court tried to make it clear to defendant stating "I'm not allowing him to speculate on how that happened because I don't think he can, based on what you've put forth to the Court." VRP 32. However almost the first thing Defense did during opening statement was to tell the jury the speculative scenario that was contained in the police report. The next day the court again admonished Defense Counsel for violating the motion and order in limine and stated:

> So yesterday in opening, I want to make sure I addressed this, too, we had a side bar relative to defense expert's theory of this child running out in the street. And what I thought I had made clear in my motions and I want to make sure I do and I want to hear from counsel if you have any confusion -- that theory is not coming in through that witness. What's coming in is the reaction time a driver has when they see a person driving at a certain speed. That's it.

VRP 136-137

However the court than allowed Defense counsel to reference the narrative in the police report on numerous occasions. See VRP 164-66, 391-92. Defense expert relied on a police report at trial, despite knowing that the police report narrative and diagram did not conform to the

evidence, and despite knowing that no witness corroborated the version of events in the police report. Introduction of the police report narrative by defense counsel was improper. Further, despite a court order limiting his testimony to perception-reaction time only, and prohibiting him from referencing speculative scenarios in his testimony, the defense expert not only referenced the speculative scenario in the police report, but also referenced many other speculative scenarios aside from it. See VRP 17-18, 22-25, 390-92, 432, 434, 439, 446-47. 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 Plaintiff a Judgment Notwithstanding the Verdict or a New Trial When the Jury's Verdict Was Contrary to The Evidence.

A Trial Court should enter a judgment notwithstanding the verdict when there is not substantial evidence to support a jury's verdict. The court rules provide that:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against any party on any claim... that cannot under the controlling law be maintained without a favorable finding on that issue...

CR 50(a)(1). It is appropriate for a Trial Court to grant a motion for judgment as a matter of law "when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (citing Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

The Trial Court should have granted Plaintiff's motion for judgment notwithstanding the verdict or a new trial because there was no evidence to support the jury verdict and because the numerous violations of the motions in limine, the continued reference to speculative scenarios and hearsay statements, and allowing an expert to testify who had no opinion, worked to confuse the jury so that Plaintiff Brayan Martinez did not have a fair trial. The court may vacate the jury's verdict and grant a new trial for many enumerated reasons, including, irregularity in the proceedings, misconduct of prevailing party, when substantial justice has not been done, or when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." CR 59(a).

Plaintiff Brayan Martinez should have been granted his motion for judgment notwithstanding the verdict because the jury disregarded the law

and the evidence in formulating its verdict absolving Ms. Prieto Mariscal of all negligence. Plaintiff also should have been granted a new trial because the jury's verdict was tainted, and Plaintiff was unfairly prejudiced, by all of the speculative and impermissible hearsay evidence admitted at trial. Due to the unfairly prejudicial evidence allowed at trial and the resulting verdict, "substantial justice has not been done" in Brayan Martinez's case. CR 59(a)(9).

1. **The jury's verdict absolving Ms. Prieto Mariscal of all negligence was contrary to the law and evidence in this case, which showed that Ms. Prieto Mariscal negligently drove her vehicle without looking ahead of her and see what there was to be seen**

A Trial Court has no discretion and must grant a motion for judgment notwithstanding the verdict when there is not substantial evidence to support the verdict. In ruling on a motion for judgment notwithstanding the verdict, the Trial Court exercises no discretion. Douglas v. Freeman, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991). A Trial Court should grant a motion for judgment notwithstanding the verdict "if it concludes, as a matter of law, there is no evidence or reasonable inference to support a verdict in favor of a nonmoving party." Thomas v. Wilfac, Inc., 65 Wn. App. 255, 259, 828 P.2d 597 (Div. 3 1992). A JNOV

motion "can be granted when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d at 915 (citing State v. Hall, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). There is "substantial evidence" if it is "sufficient to persuade a fair-minded, rational person of the truth of the declared premise." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d at 915 (citing Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). A Trial Court must accept the truth of the nonmoving party's evidence and view all reasonable inferences in the light most favorable to the nonmoving party. Douglas v. Freeman, 117 Wn.2d at 247. Ultimately, an issue is a question for the jury "only when there is justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict." Douglas v. Freeman, 117 Wn.2d at 247. Finally, it is abuse of discretion for a court not to order a new trial when the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d at 203.

The Trial Court should have overturned the jury's verdict and found that the Defendant was negligent based on the facts presented. Evidence is substantial when it is enough to "convince an unprejudiced, thinking mind of the truth of the declared premise." Lian v. Stalick, 106 Wn. App. 811, 824, 25 P.3d 467 (2001) (quoting Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 486, 805 P.2d 800 (1991)). While negligence is

generally a question of fact for the jury, it may be decided as a matter of law by the Trial Court in certain instances. Thomas v. Wilfac, Inc., 65 Wn. App. at 261. Courts have held that an issue may be a question of law for the court "when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion." Mathers v. Stephens, 22 Wn.2d 364, 370, 156 P.2d 227 (1945). If the jury verdict is not supported by substantial evidence, then a Trial Court may withdraw the issue from the jury or grant a judgment notwithstanding the verdict. Tusnadi v. Frodle, 8 Wn. App. 239, 242, 505 P.2d 165 (Div. 1 1973) (Defendant's judgment notwithstanding the verdict on issue of Plaintiff's contributory negligence in her use of dimly lit stairs was reversed when it was not supported by substantial evidence); Elmer v. Vanderford, 74 Wn.2d 546, 550, 445 P.2d 612 (1968) (Remanded for a new trial after jury found no contributory negligence on Plaintiff's part, despite substantial evidence to suggest Plaintiff's motor scooter's brakes were faulty and other facts suggesting he was going faster than he claimed); see also Rockefeller v. Standard Oil Co. of California, 11 Wn. App. 520, 521, 523 P.2d 1207 (Div. 1 1974).

Ms. Prieto Mariscal was negligent in driving her vehicle without keeping a proper lookout ahead of her, as evidenced by her failure to notice Plaintiff in the roadway. A person is negligent when three elements

are met: 1) a legal duty owed by the defendant to the plaintiff, 2) breach of that duty, and 3) injury to the plaintiff proximately caused by the breach. Miller v. Likins, 109 Wn. App. 140, 144, 34 P.3d 835 (Div. 1 2001). The law further provides for duties and precautions to be taken when driving a vehicle, and Ms. Prieto Mariscal breached those duties. Those duties included "[e]very person has a duty to see what would be seen by a person exercising ordinary care." WPI 12.06. Also, when driving, a person must look forward in order to comply with the law, because the law provides that a "driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise property precaution upon observing any child... upon a roadway." RCW 46.61.245(1). Further, statutory violations may be considered by the trier of fact as proof of negligence. *See* RCW 5.40.050.

Here, given the facts presented at trial, it was abuse of discretion for the Trial Court to deny Brayan Martinez's motion for Judgment Notwithstanding the Verdict when there was insufficient evidence to support the verdict. Brayan Martinez presented evidence to support his contention that Ms. Prieto Mariscal was negligent in the manner in which she drove her vehicle without keeping a proper lookout. See VRP 371-72. Ms. Prieto Mariscal did not rebut this contention and admitted that she did

not see Brayan Martinez in the roadway ahead of her. VRP 371-72, 374-75. This caused Ms. Prieto Mariscal's vehicle to run over Brayan Martinez's leg and cause him injuries. See VRP 314-15, 321-22. According to the facts and evidence, Ms. Prieto Mariscal was negligent.

F. Although Each of The Above Assignments of Error May Be Adequate On Its Own To Show Unfair Prejudice To Plaintiff, The Cumulative Effect Of The Errors Prevented Plaintiff From Having A Fair Trial

The cumulative error doctrine warrants reversal when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. 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); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the

defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Here, even if each separate error at trial was insufficient to unfairly prejudice Plaintiff at trial, the cumulative errors considered in the aggregate certainly prevented Plaintiff from having a fair trial. Taking together 1) the hearsay statements in the PIP application incorrectly deemed an admission, 2) the unfounded hearsay narrative in the police report with an aura of being written by a government official, 3) the hearsay narratives as to how the collision may have occurred in the medical records, 4) the speculative scenarios offered by defense's expert, and 5) the speculative scenarios offered by defense counsel, it presented Plaintiff an insurmountable collection of error, too large to overcome, which unfairly prejudiced Plaintiff and prevented him from having a fair trial.

In this case a new trial is warranted based on the multiple irregularities and misconduct in this case. Plaintiff anticipated that Defendant was going to try to confuse the jury and introduce the police report, and other documents that seemed to copy the police report's version of events such as the PIP application, the narrative in the medical records, and their own expert's opinion. The motion to keep out all

speculative scenarios was granted. However, the court above the objection of plaintiff than proceeded to allow defendant to reference every one of these speculative scenarios, contrary to its prior ruling and contrary to the rules of evidence. All of these speculative scenarios were presented as authoritative because they were contained in such documents as police report, medical records, or a PIP application signed by the plaintiff's mother. These were presented to the jury even though all of these documents could be traced back through multiple levels of hearsay to a non-witnesses version of events, and none of the speculative scenarios in these documents had any supporting non-hearsay evidence.

The cumulative effect was prejudicial to Plaintiff's case denying him a fair trial and warrants reversal.

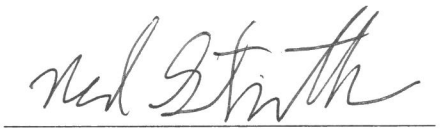
CONCLUSION

Brayan Martinez requests that this court reverse the trial court and remand this case for a new trial for all of Plaintiff's claims, and for a determination of the extent of Plaintiff's damages, to include attorneys' fees and costs. The Trial Court should have granted Plaintiff's Motion for Judgment Notwithstanding the Verdict and for a New Trial after the jury came back with a verdict absolving Ms. Prieto Mariscal of all negligence, contrary to the facts and contrary to law. Additionally, Plaintiff was highly prejudiced due to defense counsel' numerous references to

impermissible hearsay evidence. Finally, this Court should reverse the trial court's decision allowing the use of a PIP application when it was based on hearsay and likely protected by work product and reasonably subject to confidentiality.

Dated this 6 day of July, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 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 6th day of July, 2017.

Diane Foster, Litigation Paralegal