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Harper v. Drzayich Appellant's Reply Brief Dckt. 38521

IN THE SUPREME COURT OF THE STATE OF IDAHO

MATTHEW ANTHONY HARPER, APPELLANT/PLAINTIFF, vs. KRISTEN SEAMONS, APPELLEE/DEFENDANT.	Case No.: 38521 Trial Court Case No.: CV PI 2006-05377

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, for Ada County, Honorable Dennis Goff, Senior Judge/Judge Pro Tem, Presiding, acting for assigned Judge, the Honorable Richard Greenwood

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RULES AND STATUTES

This appeal challenges the illegal jury verdict, and the Judge's failure to grant a new trial, additur or JNOV. It also addresses the failure to require that Dr. Harper be provided the trial Record at public expense.

IMPORTANT COMMENTS REGARDING STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. Seamons attempts to side-step all of the arguments on appeal, using the circular reasoning that since Dr. Harper could not afford (and therefore did not provide) a transcript of the trial, all errors and injustices should be ignored. As discussed more fully elsewhere, most of the issues are actually clear merely from a look at the Clerk's Record, which *was* provided. Of course a primary issue on appeal is whether the trial court (and this one) should have ordered that the transcript be provided for Dr. Harper, an indigent under the applicable statute. However, there is also solid reason requiring reversal that does not even require an examination of the Record.

In their briefing the parties have continued to be in agreement that Ms. Seamons ran a red light, and T-boned Dr. Harper. She never accepted full responsibility for her negligence, so the matter had to be put to the jury. The jury found that she was at fault, and that Dr. Harper was without fault.

Although in her brief, for the first time, Ms. Seamons makes the awkward argument that maybe Dr. Harper had *no injury that caused him discomfort*, there is no serious issue or contention: both sides have always agreed (and did throughout trial) that he was injured in the car crash. They simply disagree about how much. Even "Independent" (read: defense hired) medical examiners Dr. Wilson and Dr. Greenwald did not claim he was uninjured in the collision. Ms. Seamons is left with the necessity, to survive the appeal, of asserting no pain or discomfort could have occurred.

Ms. Seamons, who makes much throughout her brief of the fact that there is no full trial transcript, makes a point of informing the Court that after the officer at the accident scene "questioned all the parties and did not issue any citations." *Respondent's Brief*, p. 3. Is she now challenging the jury's determination that, despite her failure to take responsibility, Ms. Seamons was solely at fault? There has been no cross appeal, so it is questionable at best that she would make a point out of the police officer issuing no citation. It is all the more ironic in light of her drumbeat of failure to provide a transcript, since this statement, like her others, is supported by no transcript. She has the same ability to provide a transcript as does Dr. Harper.

After several days of trial, the parties agree, the jury returned a special verdict, finding defendant 100% liable for the collision. R. 258-60. On the same verdict form, however, the jury awarded $4,100 for economic damages, ROA 9, and $0 for noneconomic damages, including pain and suffering. R. 258-60; ROA 9. The parties, of course, do not dispute this. See, e.g., *Respondent's Brief*, p. 2.

Dr. Harper's motions for new trial, JNOV, etc., were denied. So was his *Motion and Affidavit for Fee Waiver* for the cost of the transcript on appeal (the trial judge recommending denial and this Court following the recommendation).

Dr. Harper does not concede the accuracy of the Statement of Facts in *Respondent's Brief*. As acknowledged on page 3 of that Brief, the statement is merely a collection reciting Ms. Seamons' version of the facts. Judge Goff "adopt[ed]" Seamons' "analysis of the evidence," for "efficiency purposes." Id., p. 3; R. 335. He did not adopt her set of facts. And it would have been improper for him to have done so. If Ms. Seamons wishes to argue the facts, a new trial would be a perfect opportunity.

For some reason, as part of her Statement of Facts, Ms. Seamons states, "Plaintiff's Counsel failed to specifically request damages based upon pain and suffering or other noneconomic damages." *Respondent's Brief,* p. 6. On the contrary, there was extensive

argument in closing and throughout the trial regarding the pain, disabilities, surgery, depression, lost memory, tinnitus, hyperacusis, headache, weakness, drooping, difficulty singing, and more. There is no requirement that a dollar amount for noneconomic damages be requested in argument, and in fact it is within the jury's purview to put a dollar amount on pain, suffering, and the like.

As a final note, Ms. Seamons' "Statement of Facts," which covers pages 3 to 6 of *Respondent's Brief*, are unsupported by the Record. Respondent, represented as she is by an insurance company, can afford a transcript, and had the same opportunity to get one as did Dr. Harper. Interestingly, despite 4 pages, single-spaced of supposed "facts," the Court is not directed to *any* professional or other witness or piece of evidence to show that Dr. Harper suffered no injury, or suffered no pain, from the subject collision.

SUMMARY OF ARGUMENT

Now that Ms. Seamons has again shown her hand by her *Response Brief,* it is clear that she is saddled with defending a jury verdict that is invalid, internally inconsistent, and subject to mandatory reversal. This conclusion can be reached even without a transcript. Ms. Seamons' *Respondent's Brief* does *not even mention* I.R.C.P. 49(b) (much less distinguish or explain it), the controlling rule on Special Verdicts, and their need to be internally consistent. To remedy the flawed verdict, and the fact that damages are inadequate, the trial court should have granted a new trial, an additur, or JNOV as to damages, pursuant to I.R.C.P. 50(b), 59(a)(1), 59(a)(2), 59(a)(5), 59(a)(6), 59(a)(7), and 59.1 and 60.

Ms. Seamons is unable to justify admission of evidence not produced before trial, not admitted as an exhibit and not preserved in the Record, and to exclude certain medical evidence.

As an indigent person under the law, Dr. Harper should have been exempted from payment for the trial transcripts.

Dr. Harper will only respond to issues raised in *Respondent's Brief.* For brevity, items discussed in *Appellant's Opening Brief,* but not responded to in *Respondent's Brief,* may not be treated here. No waiver or withdrawal of points or arguments should be inferred.

ARGUMENT

1. The Jury's Verdict Form is Legally Invalid. As a verdict form with interrogatories, it is subject to I.R.C.P. 49(b). Its internal and facial inconsistency is contrary to the rules, and is a clear violation of the court's instructions. Ms. Seamons' response to the facial invalidity of the Verdict is very limited. See, *Respondent's Brief,* pp. 19-20. It does not cite to or explain the clear language of I.R.C.P. 49(b), which is perhaps the most specific language requiring reversal and retrial. I.R.C.P. 49 is *not even mentioned* in the *Respondent's Brief.* Yet I.R.C.P. 49(b) is the authority for special verdicts,[1] and provides the limitations on them.

> When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. **When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial.**

I.R.C.P. 49(b) (emphasis supplied). In this case, it is easy to see that the jury's answers to the court's interrogatories are not consistent: not with each other, and not with their instructions. They found that Ms. Seamons, through her fault, harmed Dr. Harper, and awarded special damages. They awarded no general damages.

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[1] "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict." I.R.C.P. 49(6).

2. **The *Baldwin* Case is Inapplicable.** Ms. Seamons' answer to the idea of an invalid verdict is to cite to a 1949 case in which the Court suggested that attacks on the verdict should be made when it is returned. *Baldwin v. Ewing,* 69 Idaho 176, 180, 204 P.2d 430, 432 (1949). That case is not at all applicable, for at least the following reasons:

- There the personal injury plaintiff was awarded no damages at all. Here there were damages awarded, but none for pain, suffering or other general damages.
- *Baldwin* was issued before the Idaho Rules of Civil Procedure were adopted. It arose during code pleading, and was based upon old statutory law.[2]
- There was no request for special findings. Here both parties request special interrogatories.
- Contributory negligence, which has been superseded in Idaho by comparative negligence, was a was an outcome determinative jury issue in that case.
- In *Baldwin*, the court noted that a finding of no damages was justifiable by contributory negligence law:

  > Though the negligence of a defendant may be a proximate cause of injuries to the plaintiff, *such plaintiff cannot recover* if the *evidence further shows his own negligence was also a proximate cause of such injuries.* No question has been raised as to the correctness of the above instruction, and under it, and the evidence bearing on the question, the jury was justified in its verdict denying any recovery by the plaintiff. The effect of granting a new trial in this case was to override the verdict of the jury which was supported by sufficient evidence, and authorized by the above instruction. The order of the court granting a new trial should, therefore, be vacated and set aside and the judgment reinstated.

[2] *Baldwin* states the following, which is at least as helpful to Dr. Harper as to Ms. Seamons: "A jury is only required to find as to ultimate facts; and if it finds that plaintiff is entitled to recover, to fix the amount of recovery. If the finding is that plaintiff is not entitled to recover, the verdict should be for defendant. Where, as here, the jury finds that *plaintiff* is entitled to recover "$ none," it is in fact and in law a finding for the defendant. Where, as here, the jury finds that *plaintiff* is entitled to recover "$ none," it is in fact and in law a finding for the defendant." *Baldwin, supra.*

Baldwin v. Ewing, 69 Idaho 176, 182, 204 P.2d 430, 434 (1949) (emphasis in original). The case has no application here.

Far from Dr. Harper having waived the challenge to the verdict, it is Ms. Seamons who has waived the issue. See, *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007), a motor vehicle personal injury case. After discussing the old *Baldwin* case, *supra*, the Court focused the fact that, like here, the respondent did not raise the issue of waiver for failure to object at the time the verdict was returned.

> More importantly, at the time the district court heard arguments on Crowley's motion for new trial, or in the alternative additur, Critchfield did not argue that the issue of an inconsistent verdict was waived when Crowley did not object to the verdict at the time it was returned. Since this Court has consistently held that we will not consider issues that were not presented to the district court, but rather are raised for the first time on appeal, **this Court will not consider Critchfield's argument that inconsistency in the verdict is not grounds for a new trial.**

*Crowley, supra,*145 Idaho 509, 512, 181 P.3d 435, 438 (2007) (emphasis supplied). The trial court's grant of a new trial, based primarily on failure to award general damages, was affirmed. This Court and the Court of Appeals recently confirmed that matters raised for the first time on appeal will not be considered. *Doe v. Doe,* 150 Idaho 432, 247 P.3d 659, 663 (2011); *Drinkall v. Drinkall,* 150 Idaho 606, 249 P.3d 405, 413 (Id. App. 2011).

3. *Cramer and Tiegs* support a new trial. Ms. Seamons claims that the case of *Cramer v. Slater,* 146 Idaho 868, 880-81, 204 P.3d 508, 520-21 (2009), supports her claim that the verdict may not be attacked. *Respondent's Brief,* p. 19. However, *Cramer* strongly favors reversal and new trial here. See discussion below.

Bottom line: Ms. Seamons has failed to explain just how a jury can find her entirely liable for injuries to Dr. Harper, and award him medical expense, but then award nothing for noneconomic losses. I.R.C.P. 49(b) is a separate, clear basis for reversing the trial court's failure

to order a new trial or JNOV. The jury having clearly erred, it was reversible error in turn for the trial judge to leave the verdict and its underlying form uncorrected and invalid. *Tiegs v. Robertson,* 149 Idaho 482, 236 P.3d 474, 478 (Idaho App. 2010).

Ms. Seamons claims that the *Tiegs* decision is unhelpful to Dr. Harper. She is mistaken. While the procedural status was slightly different in that case than in this one, both involved inconsistent verdict entries. The judge there found the jury's responses to the special interrogatory as to proximate cause were inconsistent with the apportionment of fault, and the damage award. *Tiegs* quoted the *Cramer* case as follows:

> This Court finds that the jury's verdict is inconsistent and beyond reasonable reconciliation. The jury contradicts itself throughout the findings. [Cramer] properly objected when the verdict was returned and asked the court to have the jury reconcile the verdict. The court declined to do so and this Court cannot reasonably reconcile the verdict. This Court reverses the judgment and grants [Cramer's] motion for a new trial.

Cramer v. Slater, 146 Idaho 868, 880-81, 204 P.3d 508, 520-21 (2009), quoted with approval in *Tiegs, supra,* 149 Idaho 482, 236 P.3d @ 480.

> In granting the motion for a new trial, the district court ruled that the findings by the jury that [defendants'] negligence were not proximate causes of Tiegs' death and injuries were inconsistent with the jury's apportionment of fault and money damages and since this inconsistency could not be reconciled, Tiegs was entitled to a new trial. We conclude that such a determination conforms to the applicable legal standards and was not an abuse of discretion. . . .
>
> [I]n this case, the contradictory findings by the jury can only lead to the conclusion that the verdict cannot be reasonably reconciled-thus granting the court discretion under IRCP 49(b) to grant a new trial. In addition, as in *Cramer,* the grant of a new trial was appropriate under I.R.C.P. 59(a)(6) because the verdict was "against the law" since proving liability for damages requires proof that the liable party was a proximate cause of the injury." Id.

Tiegs v. Robertson, 149 Idaho 482, 236 P.3d 474, 479 (Idaho App. 2010). Since the verdict conflicts with IRCP 49(6), it is "against the law" under I.R.C.P. 59(7).

Because Ms. Seamons claims that the *Cramer* and *Tiegs* cases do not help Dr. Harper, they are summarized as follows:

Tiegs v. Robertson. The Court affirmed the trial court's grant of a new trial based on an internally inconsistent verdict. In a comparative negligence wrongful death case, the jury had found that a defendant had been negligent in operating his vehicle, but the negligence was not a proximate cause of the death, and yet attributed a percentage of negligence to both sides, and awarded only $2,500. This was an invalid verdict. 149 Idaho 482, 236 P.3d 474, 479 (Idaho App. 2010).

Cramer v. Slater. Because of inconsistencies in the damages portion of the verdict form, a new trial was appropriate and the Court reversed the denial of a motion for a new trial. The verdict was irreconcilable, because it found liability in an agent, but found none in the master, and because the jury awarded economic damages and found that there had been emotional harm, but then awarded no general damages. 146 Idaho 868, 204 P.3d 508 (2009).

Ms. Seamons' rationale for *Cramer* being inapplicable to this case is weak enough that it underscores just how on point it is. See generally, *Respondent's Brief,* pp. 21-22. She merely points out, without relevance to this case, that *Cramer* notes that under the right circumstances, it is permissible for a jury to find that the jury failed to meet its burden as to non-economic damages. However, the quote is, with respect, cherry-picked. Placed in context, the *Cramer* court reasons as follows:

> The jury's **award of only economic damages is curious, troubling and potentially inconsistent. . . .** Although it is permissible for a jury to find that the Plaintiff failed to meet the burden of proving non-economic damages, it is curious how a jury could find negligent infliction of emotional distress and then not compensate [her] for any of the emotional distress she suffered. . . . This Court holds that the **inconsistencies in the verdict form and the jury's findings are irreconcilable and the motion for a new trial should have been granted.**

Cramer, supra, 146 Idaho @ 882, 204 P.3d @ 521 (emphasis added). Likewise, here it is troubling and inconsistent to find an injury, as the jury did here, but award nothing for it. A new trial was appropriate in *Cramer.* Id., 146 Idaho 880, 204 P.3d @ 520, quoted with approval by *Tiegs v. Robertson,* 149 Idaho 482, 236 P.3d 474 (Idaho App. 2010).

4. A new trial or JNOV was necessary. The trial court should have granted a new trial, judgment notwithstanding the verdict, pursuant to I.R.C.P. 50(b), based on the finding that

Ms. Seamons damaged Mr. Harper by her negligence, awarding an arbitrary $4,100 for special damages, and nothing for general damages.

To award special damages, the jury must necessarily (under law and the instructions) have found that at least $4,100 of the treatment was necessary and reasonable. For the jury to have determined that $4,100 (or any positive amount) was necessary and reasonable treatment arising out of Ms Seamons' negligence, which of necessity they did, means there was an injury requiring such treatment.

A decision to grant a new trial is within the trial judge's sound discretion. See, *Tiegs v. Robertson,* 149 Idaho 482, 236 P.3d 474 (Idaho App. 2010). In considering a new trial motion, the court is *not* required to view the evidence in favor of the non-moving party. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

5. Efforts to Prop Up or Justify the Verdict are Inadequate. In arguing that JNOV was not required, Ms. Seamons recites some of the jury instructions given. *Respondent's Brief*, pp. 12-13. This begs the point, since what the jury did here defied the jury instructions, in addition to logic.

In another shot at explaining away the inconsistent verdict, Ms. Seamons states that it is "clear" that the jury did not find Dr. Harper credible. *Respondent's Brief*, p. 13. However, as evidence for this she cites only (and oddly) to her own Statement of Facts. Id. Similarly, she argues that since at the scene of the collision he noted no symptoms, there could not have been injury. That is contrary to all medical witnesses who addressed the matter, on both sides. *Respondent's Brief*, p. 13.

Again trying to find a reason for the strange verdict, Ms. Seamons guesses that Dr. Harper may have hurt himself by engaging in injurious activities after the accident. The one example she uses, though, is "overworking" himself by carrying newspapers. *Respondent's*

Brief, p. 14. Likewise, she actually speculates that **while "all of the medical experts agreed that Appellant may have experienced a whiplash," that didn't mean that he necessarily had pain and suffering**. Id., @ 16 (emphasis supplied). A whiplash without pain or suffering? Yet, this is would have to be the conclusion to justify the verdict.

Of key interest in this case is *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). There the judge did not abuse his discretion in awarding a new trial or additur. The reasons for a new trial in *Crowley* are quite similar to the problems here. The personal injury plaintiff was awarded no pain and suffering damages. Like here, until the appeal the defendant did not claim there was no pain and suffering at all.

> **(1) Critchfield presented no evidence to dispute pain and suffering, (2) clearly, some pain and suffering was experienced, (3) Critchfield presented no evidence to support other causes of the injuries, and (4) the jury awarded an arbitrary amount in damages that failed to include any non-economic damages even though it is obvious from the record that at least some pain and suffering existed.**

Crowley, supra, 145 Idaho 509, 512, 181 P.3d 435 (emphasis supplied). The similarities to what the jury did in this case are striking.

Ms. Seamons alludes in somewhat of a "drive-by" manner, to a supposed failure to mitigate damages. *Respondent's Brief*, p. 13. This hasn't come up since her *Answer* was filed 5 years ago. Raising it now is apparently to provide an excuse for the jury's inconsistent verdict. However, there was absolutely no discussion or evidence on the matter of mitigation, or suggestion of how he failed to mitigate. In fact, as noted on pages 3 to 6 (Statement of Facts), if anything her claim has always been (and still is) that Dr. Harper sought too much care, not too little.

In yet another swipe at justifying the verdict, Ms. Seamons engages in rank speculation as to what the jury's intent in awarding special damages "could" be. *Respondent's Brief*, p. 15.

She supposes that it might be for diagnostics ($4,100 worth without any discomfort to indicate it?) which, without support, she states is "common" after an accident. Then she guesses that it might have been damages to repair the vehicle. Id. This is impossible, since repair of damage to the vehicle was never an issue at trial, and was not requested, having been long since handled by the insurer. In fact, medical expenses and costs were the only special damages argued or put into evidence.

Ms. Seamons cites to *Hei v. Holzer*, 145 Idaho 563, 191 P.3d 489 (2008) as supporting the award of no general damages. However, *Hei* (a case of consensual sexual conduct between a a high school student and a teacher) was distinct from this case in at least the following ways:

- It involved an award of *no* damages of any kind. Here there were special damages awarded (albeit in an arbitrary amount), and injury was found, but no general damages.
- In *Hei* there was no evidence of any special damages even offered in evidence.
- *Hei* offered no legal support for her claims that the verdict was invalid. *Hei, supra,* 191 Idaho @ 494.
- On the JNOV issue, her entire argument consisted just two sentences. Id.

Hei is extremely narrow, and neither helpful nor applicable. To apply it here would be an example of bad cases making bad law.

6. The Verdict is Based on Passion or Prejudice. Idaho Code 6-807 is also applicable, since the verdict here arises in a negligence case. It focuses on the option of an additur.

> (1) In all civil actions in which there has been an award of damages as herein defined, the trial judge may, in his discretion, and after considering all of the evidence, alter such portion of the award representing damages if the amount awarded; (a) is unsupported or unjustified by the clear weight of the evidence; or (b) is so **unreasonably disproportionate to the loss or damage suffered or to be suffered as to be unconscionable or so as to shock the conscience** of the court; **or** (c) is the product of a **legal error or mistake** during the presentation of the evidence or submission of the case to

> the trier of fact; or (d) is demonstrated to be **more likely than not the product of passion or prejudice on the part of the trier of fact**.
> (2) If the court finds that the award of **damages is unreasonably** great or **small** by reason of any one or more of the factors set forth above, then the district court may exercise its discretion to reduce or increase such award in order to make the same consistent with the losses as shown by the evidence. In the event that the court shall enter any such order, it shall make detailed findings of fact and conclusions of law explaining the reason for its action, the amount of any increase or reduction, and the basis therefore.

Idaho Code 6-807 (emphasis supplied). The trial court abused its discretion.

This is similar to I.R.C.P. 59(a)(5)'s system for granting a new trial. If the verdict is such that it appears that the award was rendered under the influence of passion or prejudice, then a new trial should be granted. *See, e.g., Dineen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979). Here the evidence does not justify the verdict.

> In this case, the district court found that 'the verdict shocked the conscience of the Court because the verdict was **excessively low** given the nature and extent of the Plaintiff's permanent and debilitating injuries.' No one factor is appropriate to award a new trial or an additur because 'how substantial the disparity must be differs with each factual context and with the trial judge's sense of fairness and justice.' *Collins*, 131 Idaho at 558, 961 P.2d at 649 (citing *Quick v. Crane*, 111 Idaho 759, 769, 727 P.2d 1187, 1197 (1986)). Moreover, Puckett **did not need to prove that passion or prejudice affected the jury's verdict; the appearance alone was sufficient** to justify a new trial or additur. *Dinneen v. Finch*, 100 Idaho 620, 625-6, 603 P.2d 575, 580-1 (1979). Regarding the amount of the damage award, the district court stated that the jury was unduly prejudiced by testimony of Puckett's prior abuse of prescription medication. . . . . We hold that the district court did not abuse its discretion in granting the motion for an additur or new trial.

Puckett v. Verska, 144 Idaho 161, 158 P.3d 937, (2007) (emphasis supplied). Although Dr. Harper's *Appellant's Opening Brief on Appeal* discussed *Puckett* as a case strongly in support of a new trial or additur, Ms. Seamons *does not mention this case* in her brief; much less try to distinguish it.

Ms. Seamons complains that Dr. Harper has not proved that there was passion or prejudice. However, as quoted above from *Verska,* I.R.C.P. 59.1 does not required that the Court (or trial court) determine what it was that inflamed passion or prejudice. It may be inferred from

miniscule medical expenses and zero general damages which the jury awarded. The party seeking relief from the judgment has no burden of proving the passion or prejudice.

7. Improperly Defaced Exhibits Contributed to Unfairness. In *Appellant's Opening Brief* Dr. Harper pointed out that medical records exhibits, offered as being true copies, actually contained the taint of added written information. Examination of the exhibits after trial reveals that the copies that went to the jury included Ms. Seamons' interpretation and desired highlights of the exhibits, with editorial comments. Exhibit 663, the description of which states, "Note Dr. Rupp refused to testify." Indeed Dr. Rupp did not testify at trial, but that was not something which should have been allowed to influence the jury. This is prejudicial and improper, especially as part of purported medical treatment records.

Ms. Seamons has made no effort to counter or explain this, and it is a separate reason for a new trial. When an attorney states that an exhibit consists of the medical records of a particular doctor, the judge and opposing counsel are entitled to rely on them actually being that physician's records. There is no reason to suspect that, as here, the records put in evidence would have highlights or comments by the defense.

8. There Were Evidentiary Errors. I.R.C.P. 59(7) authorizes a new trial for errors of law and procedure. And IRCP 59(a)(6) allows a new trial "where the verdict is against the law." Together with the other errors of law and fact, the prejudicial evidence presented to the jury resulted in an unfair trial, justifying a new one.

Licensure Evidence. In *Appellant's Opening Brief,* Dr. Harper presented the problem with the trial court having allowed the jury to hear extensive, one-sided testimony that he lost his license to be a state authorized/licensed counselor. Specifically, they heard that Dr. Harper had an elderly patient to whom he was ministering in his chaplain and counselor capacity, and that he

somehow influenced her to make large donations and/or gifts to him. Dr. Harper has another side to that story, but for present purposes it is enough that the jury heard those things, and heard that his license was revoked or suspended as a result. Even the specific Findings and Order detailing the scandalous matter were presented to the jury. Ms. Seamons' effort to counter the arguments on this issue are slim, and bereft of any legal authority. *Respondent's Brief*, p. 24.

Even if it had some relevance (which Dr. Harper does not concede), relevant evidence is to be excluded if it is more prejudicial than probative. *Perry v. Magic Valley Regional Medical Center,* 134 Idaho 46, 56, 995 P.2d 816, 826 (2000); *Hawks v. EPI Products USA, Inc.,* 129 Idaho 281, 286, 923 P.2d 988 (1996). Any relevance here was so miniscule as to make the shocking, negative nature of the information poisonous to a jury. It may explain the prejudice and passion that resulted in the awkward verdict.

Dr. Harper stands on his previous Brief's argument against the notion that these documents, though never produced,[3] were admissible as "impeachment." *Appellant's Opening Brief* @ 32. Ms Seamons' response to this, and to the fact these documents were never produced in evidence, is typified by the statement that somehow it's ok not to have produced them, because Dr. Harper must have known about it.

Ms. Seamons argues that the limited licensure information had to be (and was) supplemented by the licensing agency's detailed findings and order of suspension, because Dr. and Mrs. Harper "continued to testify" about it. *Respondent's Brief*, p. 25. This is an odd, bootstrap argument. Under her theory, if highly prejudicial information comes in (e.g. the mention of license revocation), the prejudiced party must stay silent in response. If he attempts to explain or rehabilitate himself, he will be deemed to have opened the door for far more

[3] Ms. Seamons comments that while the information may have been a surprise to counsel, Dr. Harper certainly knew of it. The rules of discovery would be adjudged nearly out of existence if a party could withhold matters just because the opposing party, but not his counsel, "knew" about them.

prejudicial evidence on the same subject matter (such as page after page of findings and order). If he tries to explain he will, as Dr. Harper was here, be punished with more detailed, graphic evidence on the same issue.

Talk Show Video. The parties and Judge Goff seem to agree that one the most influential exhibits the jury saw, if not the most influential, was the Daystar' TV video of Dr. Harper being interviewed on a Denver religious program. Its admission, though rejected as an exhibit, and the failure to preserve it, becomes all important. It is not, and cannot be, part of the Record in this case.

Ms. Seamons argues that the interview was admissible as some sort of impeachment, and that it was relevant because it showed Dr. Harper sharper and more alert than he appeared during much of the trial. Without doubt he was sharper in the high-adrenaline television interview than in a week and a half trial. He testified that, like most injured people, he has good and his bad days.

In response to the problems raised about the exhibit showing as rejected in the Record, and not having been preserved, Ms. Seamons in her brief says "it is common practice" to show things to the jury without them being admitted into evidence. *Respondent's Brief* p. 26. She cites to no rule, statute or common law that approves such a practice. "Common practice" has never been usable authority. And of course the common practice is to show demonstrative exhibits, such as charts and summaries, to the jury. This is a far cry from that.

The video was assigned exhibit number 765. It was not preserved. Clerk's Record. R. 361. The Clerk's Record shows, on Defendant's Exhibit List, that the *video, Exhibit 765, was not admitted* into evidence.

Ms. Seamons had no explanation or authority to counter the fact that the video was revealed for the first time in the heat of trial, and never produced in discovery. It was played during Dr. Harper's testimony, with no advance notice, and no opportunity to even ask for

redactions. Even if the propounding party were allowed to keep such evidence secret until time for use, certainly fair play requires that, as soon as they knew they were going to show the interview, they provide a copy to opposing counsel.

Ms. Seamons' argument is essentially that that it is exempt from all rules of discovery and evidence, and from the Pretrial Orders' production and witness provisions, and that it need not be in the Record, just because it is "impeachment." This position is no more availing than a somewhat similar situation in *Perry v. Magic Valley Regional Medical Center,* 134 Idaho 46, 53, 995 P.2d 816, 823 (2000).

Perry is a medical malpractice case. The defendant hospital's psychiatrist had evaluated the injured plaintiff, and was prepared to testify that she had a character disorder which could cause her to fabricate her testimony if there was a financial gain involved. The Court confirmed that a trial court may exclude relevant testimony, if its probative value is substantially outweighed by the danger of unfair prejudice. ***Perry, supra,*** 134 Idaho 55. On that basis, it was appropriate to exclude the psychiatrist's testimony entirely, despite what sounds like strong relevance. And it was proper to exclude testimony that the plaintiff occasionally gave away some of her pain pills, again because such evidence was substantially more prejudicial than probative. ***Perry, supra,*** 134 Idaho 55-56. The video tape and the licensure information were evidence of that type: substantially more prejudicial than probative.

Ms. Seamons' Brief makes much of Dr. Harper's drowsiness, contrasted with his performance on the video. Dr. Harper is prone to bouts of low energy and sleepiness, as noted in Exhibit 24a - pages 406-411, Dr. Emens' report. Dr. Emens is a sleep specialist. Dr. Harper is (and was at the relevant times) being treated for a sleep disorder, and is often lethargic. Id., p. 2 (p. 406 of Exhibit 24a). Mention is made by Dr. Emens of his "excessive daytime somnolence

(drowsiness/sleepiness) and unintentional falling asleep (nodding off while listening to someone talk)." The last sentence notes that he is a "morning person."

The Denver video shown in court was made in the morning, when he is more alert. His sleep disorder explains his demeanor at court. If the jury placed emphasis on this, it was error. Regardless of the reason for the verdict, the jury did not follow the law, as discussed elsewhere in this Brief.

Ms. Seamons states that the critical mention by Dr. Harper with regard to gays, and commenting on religious matters, were "not inflammatory." *Respondent's Brief*, p. 26. How she is able to divine this, or make such a finding, is unclear.

9. Admissible Doctor Letters Should Not Have Been Excluded. The letters of Dr. Garner, Beaver and Katz should have been admitted. They were not produced late, and they were part of medical records, entitled to be excepted from the hearsay rules.

Their exclusion from evidence is not, as Ms. Seamons seems to claim (*Response Brief,* p. 24), a harmless error. Their content brought the opinions of even the doctors who testified forward and updated them, affirming their opinions as to the nature and causation of Dr. Harper's injuries. This was vital on issues used to attack his various doctors on cross examination.

10. Dr. Harper's Financial Circumstances Entitle Him to a Transcript, paid for by public funds. As noted above, there are bases on which the Court can overturn the verdict without reference to the transcript of the trial. Not the least of these is the fatally inconsistent

verdict form. But as to some aspects of this appeal, the parties truly are hindered by the inability of Dr. Harper to pay the $7,500 cost of a trial transcript.[4]

As demonstrated in *Appellant's Opening Brief,* after trial Dr. Harper filed a *Motion and Affidavit for Fee Waiver* with the trial court. ROA 10. For some unknown reason the clerk never filed it.[5] When the District Court wanted more information, he filed his *Plaintiff/Appellant's Amended Motion and Affidavit for Fee Waiver.* ROA 10. This was not placed in the file either. These errors cumulate with the other problems in this case, to result in an unfair trial. The requests for waiver of fees on appeal were denied, without any findings. ROA 11. On April 13, 2011 Dr. Harper filed with this Court *Appellant's Verified Motion for Waiver of Costs.* See, DOA 10. It was denied on May 16, 2011 without explanation.

Ms. Seamons filed no opposition to either of these applications for waiver, though her attorney did provide mild resistance at the hearing on the motion, which was held on March 30, 2011. See transcript, ROA 11. Now, on appeal, her opposition is strident.

The only evidence in the Record is that Dr. Harper makes under $900 per month, which does not cover his expenses. Ms. Seamons suggests, without there being any evidence to support it, that he could work a better job. However, he is a chaplain/religious counselor (receiving free will offerings when the counseled folks are able), and help run a Christian newspaper. Those are currently not profitable enterprises. The tax return is also uncontested, and shows similar low income. This includes his wife's income, and even considering that, he qualifies as impecunious under IAR 23 and Idaho Code 31-3220.

He satisfies each of the factors in that statute. "Indigent" means one who "is found by the court to be unable to pay fees, costs or give security, for the purpose of prepayment fees, costs or

[4] Of course, as to issues raised by Ms. Seamons, she could have, and did not, provide a transcript.
[5] A file stamped copy was attached as Exhibit B to Dr. Harper's *Appellant's Verified Motion for Waiver of Costs,* filed with this Court.

security in a civil action." Idaho Code 32-3220(1)(d). The Court is invited to examine the motions and their attachments that formed his *Verified Motion for Waiver of Costs,* and his *Plaintiff/Appellant's Amended Motion and Affidavit for Fee Waiver.* In Dr. Harper's *Appellant's Opening Brief on Appeal* he carefully treated each of the concerns Judge Greenwood raised in denying the motion to waive costs. Id., @ pp. 14-15. Ms. Seamons gave that analysis little or no treatment in her *Respondent's Brief.*

Ms. Seamons makes the unsupported claim that it is improper for Dr. Harper to cite to exhibits if there is not a transcript. *Respondent's Brief,* p. 10. Respectfully, this is not the law.

11. Respondent is Not Entitled to Attorney Fees or Costs. Dr. Harper fully expects to prevail on one or more of his Issues on Appeal. As such, there is no basis for Ms. Seamons' request for an award of attorney fees and costs on appeal. But if she should happen to prevail, her only bases to claim fees are IAR 41, and Idaho Code 12-121. *Respondent's Brief,* p. 27.

The biggest issue on which she relies to claim fees is the inability of Dr. Harper to obtain a transcript. An indigent person should not be denied the right to appeal. To award attorney fees for this inability is to punish poverty. It does not require a transcript to see that the verdict is internally inconsistent. And as to indigence, Dr. Harper did provide a transcript of the hearing on waiver of costs. It doesn't require a transcript to show that the vital video played for the jury was not preserved, and was marked as not being admitted into evidence, and yet was played. Inability to provide a transcript should not serve as the basis for a finding that the appeal was frivolous.

To try and gain fees, she makes the outlandish claim that this appeal was pursued to motivate this Court to grant the waiver of the transcript costs. This accusation is false and

unfounded. This appeal is pursued for reasons of justice, and to correct errors in the trial court. Such appropriate motives should not be discouraged by fee awards.

> An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation.

Page v. Pasquali, 244 P.3d 1336, 1239 (2010).

Ms. Seamons relies heavily on the *Karlson* case for entitlement to fees. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004). In that case a *pro se* appeal, the appeal was without foundation, and was merely an invitation for the Court to second-guess the proceedings below. 97 P.3d @ 437. It is not at all comparable to this case.

Dr. Harper has solid points, with a good foundation, so no attorney fees are appropriate. "The Hospital brought some legitimate issues before this Court and did not pursue the appeal 'frivolously, unreasonably, or without foundation.' I.C. § 12-121. Therefore, this Court declines to award attorney fees on appeal to Perry." ***Perry v. Magic Valley Regional Medical Center,*** 134 Idaho 46, 60, 995 P.2d 816 (2000). Even if some claim were deemed to be without foundation (which is denied), the rest are not.

> The district court should evaluate whether "all claims brought or all defenses asserted are frivolous or without foundation" before awarding attorney fees under I.C. § 12-121. *Bingham v. Montane Resource Assocs.,* 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999). Puckett's claims were not all frivolous.

Puckett v. Verska, 144 Idaho 161, 158 P.3d 937, 946 (2007).

CONCLUSION

Ms. Seamons has been unable to explain adequately why the verdict as entered is valid. The jury, having found that her fault caused injury to Dr Harper, cannot reasonably award a tiny

amount for special damages and nothing for pain and suffering. With a verdict like that, Judge Goff should have granted a judgment notwithstanding the jury verdict, a new trial, or additur.

The admission of prejudicial, undisclosed evidence (the licensure sanction paperwork and the Denver interview video), and the exclusion of letters from medical providers, which were timely disclosed, also provide independent and adequate bases for granting a new trial. Further, the Record shows that the video was not received in evidence; yet it was played to the jury. Ms. Seamons failed to preserve this evidence,[6] and it cannot be reviewed by this Court.

Dr. Harper is impecunious, and the trial court (and this one) should have waived the requirement that he pay for transcripts on appeal.

Respectfully submitted this 22nd day of November, 2011.

PURNELL LAW OFFICES, PLLC

By: _____
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[6] Ironically, if the defense had provided a copy of the evidence as required by the rules and the Pretrial Order, there would have been a preserved copy.

CERTIFICATE OF SERVICE

I certify that on November 22, 2011, I served a true copy of the foregoing document by the method and address indicated below to the following:

Rodney Saetrum	[✓]	U.S. MAIL
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/s/ DRP

David R. Purnell