DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P. O. Box 277
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)
(208) 351-3915 (c)
rdunn@dunnlawoffices.com

Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANA R. MCCANDLESS and MABEL, ROBIN BLACKEAGLE,	)	
	)	**Docket No.: 46936-2019**
Plaintiffs/Appellants	)	**District Court: Case No. CV-2013-01332**
vs.	)	
MAX E. PEASE, Also; BRENT WEDDLE and CHARLES WEDDLE (released from lawsuit),	)	
Defendant/Respondent.	)	

APPELLANTS' BRIEF

Appeal from the District Court of the Second Judicial District for Nez Pearce County
Honorable Jeff M. Brudie, District Judge, Presiding

Robin D. Dunn, Esq. #2903
DUNN LAW OFFICE, PLLC
P.O. Box 277
Rigby, Idaho 83442
(208) 745-9202
rdunn@dunnlawoffices.com

APPELLANTS

John "Nick" Crawford, Esq. #3220
BRASSEY CRAWFORD, PLLC
P.O. Box 1009,
Boise, Idaho 83701-1009
208.344-7300.
jnc@brassey.net

RESPONDENT

TABLE OF CONTENTS

STATEMENT OF THE CASE AND RELATED PROCEEDINGS……4
The Collision……..….4
Liability.....5
Damages.....6
Procedural Posture.....7

STANDARD OF REVIEW 7

ARGUMENT……..9

ISSUES……..

1. **The Idaho Rules of Civil Procedure, Rule 59, outline the information for the request for a new trial and the necessary factual assertions for the court to apply to the law……9**

I.R.C.P. Rule 59(a)(1)(A) and (C)……9

I.R.C.P. Rule 59(a)(1)(F)……..….13

I.R.C.P. Rule 59(a)(1)(G)……16

I.R.C.P. Rule 59(d)(2): Other factors: eight (8) points

……..….18

2. **The inability to discuss insurance and the relationship in a jury trial of Idaho Rule of Evidence, Rule 411 added to the prevention of a fair trial and does not bear the truth to the jury and is misleading and prejudicial as the same is a fiction…....22**

CONCLUSION……...24

CERTIFICATE OF SERVICE……25

TABLE OF AUTHORITIES

RULES:

I.R.C.P. 59 p. 18

I.R.C.P. 59.1 p. 17

I.R.C.P. 26(4)(A) p. 20

I.A.R. 11 p. 7

I.A.R. 17 p. 7

I.R.E. 411, 403 p. 22, 24

CASES:

Bott v. Idaho State Bldg. Auth., 122 Idaho 471, 835 P.2d 1282 (1992) p. 8

Carlson v. Stanger, 146 Idaho 642, 200 P.3d 1191 (2008) p. 8

Dinneen v. Finch, 100 Idaho 620, 603 P.2d 575 (1975). p. 8

Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003). p. 14, 17

Howes v. Fultz, 115 Idaho 681, 769 P.2d 558 (1989). P. 17, 21

Litchfield v. Nelson, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992) p. 8

Loza v. Arroyo Dairy, 137 Idaho 764, 53 P.3d 347 (Idaho App. 2002) p. 22

Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989) p. 9

Sheridan v. Saint Luke's Reg'l Med. Ctr., 135 Idaho 775, 25 P.3d 88 (2001) p. 8

Smallwood v. Dick, 114 Idaho 860, 761 P.2d 1212 (1988). p. 7, 18

Yick Wo v. Hopkins, 118 U.S. 356 (1886). p. 24

CONSTITUTION:

Idaho and U.S. Constitution, Articles I §§ 7 p. 18

STATEMENT OF THE CASE AND RELATED PROCEEDINGS

THE COLLISION:

On June 30, 2011, at approximately 5 p.m., Dana McCandless "Dana" was driving a 2005 Dodge truck eastbound on Highway 12 near mile post 69 in Idaho County. The weather was clear and the road was dry and straight. Mabel Robin Blackeagle "Robin" was a passenger and was seated in the front passenger seat. 1 Both occupants wore seatbelts and Mr. McCandless was traveling between 45 and 50 miles per hour in a 55-m.p.h. zone. 2

At the same time, Brent Weddle was traveling westbound on Highway 12 and stopped and/or was turning his father's 1989 Toyota Pickup in the west bound lane near milepost 69 to make a left turn onto Swarthout Road. Max Pease was also driving westbound on Highway 12 and was positioned immediately behind Mr. Weddle's vehicle. Pease failed to stop and crashed into the rear of Weddle's truck causing it to launch into the eastbound lane of travel and collide with the appellants' vehicle.3

McCandless took evasive action while being struck by Weddle and drove off the side of the roadway coming to rest after nearly rolling the Dodge Pick-up. He was unconscious and injured his head, neck and arm area and was bleeding from his head.4 His chief complaint was his eye and elbow. His wife, Robin, struck the inside of the Dodge. Both were wearing seatbelts. Both were injured.

---

1 Dana and Robin are now husband and wife. The vehicle was registered to Robin Blackeagle.
2 The plaintiffs' nephew was in the rear seat and is not a party to this lawsuit.
3 Tr. pp. 206-207
4 Tr. p. 203

LIABILITY:

Max Pease claims that Mr. Weddle passed him and then almost immediately came to a stop such that Pease had to slam on his brakes but was unable to prevent from striking Weddle's vehicle. Based upon written statements, conversation with Weddle and basic logic, Pease's attempt at deflecting liability was without merit.

In Pease's written statement to the Idaho State Police in response to the question of what happened, he stated, "Suddenly I realized the truck in front wasn 't moving [sic]. I tried to miss by steering right & breaking." I also noted that he did not realize the problem until "just before impact". In response to the question of what he could have done to avoid the crash, he wrote, "Be more alert!" The written statement was completed on July 14, 2011, two weeks after the crash, so he would not have been under any stresses and could have accurately asserted that it was not his fault and that Weddle had slammed on his brakes. Moreover, in his written statement Pease asserts that he was 25-30 yards behind the car in front of him [Weddle] and that he was traveling between 40-50 mph. If Weddle had passed him and then hit his brakes, Pease would not have been "following" him and, thus, would state that he was 25-30 yards behind Weddle. [Plaintiffs' Exhibit 4].

Pease's statement, introduced at trial and questioned in cross-exam, proves he was traveling too closely and was inattentive. Pease's reaction time may have been somewhat impaired over the average person as he admits that he was taking methadone the morning of the incident. Add in the time and distance it takes to stop and it is clear that Pease's tailgating and inattentiveness all but guaranteed a collision.

Mr. Weddle's witness statement disputes any notion of him slamming on his brakes and confirms that Pease caused the crash. Weddle states, "I was driving home, signaled to turn left, there was (cars coming in the oncoming lane so I had to come to a complete stop, then looked in my rearview mirror and the Chevy pickup tryed [sic] to swerve around me and hit my passenger rear end which caused my truck to enter the oncoming lane where the blue dodge 4x4 hit my front end. Additionally, and introduced at trial, via examination, was deposition testimony and interrogatories of Pease re-stating similar language which he attempted to recant 7.5 years later. Thus, three sources confirmed his negligence which was believed to be conclusive as to 100% negligence."

All parties agreed that the only driver of the vehicles that was non-negligent was that of McCandless. The issue on comparative negligence was between Weddle and Pease and whether Weddle had passed to quickly in front of Pease. The jury was asked to compare the negligence of these two vehicles and the two drivers. The jury assigned 25% negligence to Weddle5 and 75% to Pease.6 (Weddle settled with appellants just prior to trial.)

Appellants presented their case to a twelve-member jury in Nez Pearce County.7 The defendant, Pease, cross-examined the witnesses of appellants but only asked two questions, not related to the accident or damages, in his case-in-chief. None of the damage issues were contested by the defendant/respondent by virtue of witnesses or exhibits. The special verdict form awarded damages as contained on said form.8 Both Weddle and Pease were reimbursed by their insurance coverage for vehicle loss and damage along with injury settlements.9 Appellants do not believe they were treated fairly based upon the evidence presented.

DAMAGES:

The special verdict10 rendered by the jury does not follow the evidence. The jury could not have made the monetary awards without speculating, using quotient verdicts or merely guessing. The evidence is not in the record for the jury to make such unusual monetary awards.

---

5 Weddle settled with appellants before the commencement of trial.
6 R. p. 162
7 The case was filed in Nez Pearce by the original attorney for appellants and was not removed.
8 R. 162-164.
9 Both Weddle and his father, Charles Weddle, testified wherein the father indicated the settlement for the vehicle titled in his name (1989 Toyota) and of injury settlement for his son.
10 R. pp. 162-164.

Interestingly, the court granted a new trial subject to an additur on general damages. For the reasons stated in this brief, the good judge could not have made the reasoning on special damages based upon sound exercise of discretion. The evidence does not support the conclusions reached by the court nor the dicta contained in his ruling upon the motion for a new trial.

No conflicting evidence was introduced by the defendant/respondent.

PROCEDURAL POSTURE:

Over seven years transpired from the date of the accident to the trial actually occurring. Various continuances and procedural issues caused the lengthy delay. Subsequent to the jury trial, appellants requested a new trial, pursuant to court rule, which the court granted conditioned upon the respondent accepting an additur. Appellants never requested an additur from the court. Respondent accepted the meager additur proposed by the court. The additur only addressed general damages. Appellants appealed to this court pursuant to I.A.R., Rules 11 and 17.

STANDARD OF REVIEW

The standard for review of a trial court's ruling on a new trial is set forth in numerous cases by this court. In *Smallwood v. Dick,* 114 Idaho 860, 761 P.2d 1212 (1988), the court set forth the basic standard which is "the Supreme Court must conclude that (1) the damages awarded by the jury were inadequate, (2) the issue of liability was close, and

(3) other circumstances indicated that the verdict was probably the result of prejudice, sympathy or compromise, or that, for some other reason, the liability issue was not actually determined by the jury."

Liability was not a factor in the case at bar as to the appellants. The issues were comparative negligence between the two defendants and the amount of damages. The plaintiffs/appellants were not subject to comparative negligence.

This brief's focus is on the comparison of negligence between the two defendant drivers, the inadequate damages and other circumstances along with issues related to expert witnesses and insurance.

Multiple cases further define the standard of appellate review. The basic role of the appellate court is stated as follows: "Role on appeal is not to "re-weigh" the evidence, but is limited to determining whether there was a manifest abuse of discretion by the trial court." *Litchfield v. Nelson,* 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992). See also, *Bott v. Idaho State Bldg. Auth.,* 122 Idaho 471, 835 P.2d 1282 (1992); *Sheridan v. Saint Luke's Reg'l Med. Ctr.,* 135 Idaho 775, 25 P.3d 88 (2001); *Carlson v. Stanger,* 146 Idaho 642, 200 P.3d 1191 (2008).

The reviewing court's collective conscience can be "shocked in granting a new trial where it was almost completely confirmed by other witnesses including the (IME) for the defense and where he was not impeached and the surrounding circumstances supported him, for the jury and later the trial judge to disregard testimony on any point, including lost wages was error." *Dinneen v. Finch,* 100 Idaho 620, 603 P.2d 575 (1975).

ARGUMENT

1. **The Idaho Rules of Civil Procedure, Rule 59 outline the information for the request for a new trial and the necessary factual assertions for the court to apply to the law.**

I.R.C.P. Rule 59(a)(1)(A)(C)

Liability. No defense was presented by the defendant/respondent on any of the evidence presented by the plaintiffs/appellants. Cross-examination occurred by the defendant's counsel of the plaintiffs' witnesses. The defendant, Max Pease, took the stand in defense and answered two questions unrelated to any issues before the jury.11 No other witnesses testified in the defendant's case-in-chief. His defense was that he was honest.12 "Admission of character evidence as to truthfulness of a defendant was improper and warranted a new trial . . ." See, *Pierson v. Brooks,* 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

No experts of the defendant were presented to contest any of the special damages which included property damage, health care expenses, lost income; and any out-of-pocket expenses. General damages of pain and suffering, loss of enjoyment of life and those matters covered as general damages by court instruction 13 had minimal, if any, testimony on cross-examination. No evidence was presented in respondent's case-in-chief. The only evidence before the jury was the report of

---

11 Tr. pp. 240:21-25; 241:1-19.
12 Tr. p. 286:10-13.

the IME of the defendants which was introduced to the jury by stipulation and introduced by the appellant/plaintiff.

Brent Weddle was found by the jury to be 25% negligent wherein no evidence was presented except cross-examination. No actual defense was tendered in direct by defendant, Max Pease. Max Pease, plaintiff/respondent was elderly and had to be helped/lifted into the witness chair. This factor can only explain the bias of the jury for the elderly man. Brent Weddle was made whole by the defendant, Max Pease. How could he be considered negligent?13

The testimony of Pease in his cross examination in the plaintiffs' case-in-chief showed he claimed responsibility on three separate occasions. First, his statement to the police, Exhibit 4 of the plaintiff entered into evidence, shows he states that he should be " Be More Alert". His deposition testimony stated: "15-20 seconds behind Weddle." This deposition testimony was used to obtain the trial testimony. At trial Pease confirmed he had 15-20 seconds to avoid any collision.14 The jury was given 15 seconds of "quiet" time to evaluate the availability of Pease to make a stop to avoid Weddle.15 This statement was put before the jury from page 15 of his deposition wherein he was questioned. His discovery answer to Interrogatory 13 shows he stated Weddle was "100 yards in front." This statement was also presented to the jury. Yet at trial 7.5 years later he tried to explain away all of these statements when such statements were in preparation for trial. Appellants'

---

13 Tr. p. 201:12-21.
14 Tr. pp. 45-46.
15 Tr. p. 46:1-5.

Memorandum is set forth on this issue to the court.16

The jury had to be acting with passion or prejudice. This conclusion is borne out by the unusual monetary awards discussed hereafter. The Brent Weddle testimony at pp. 64-69 of the transcript completely supports the written statements, deposition testimony and interrogatories given by Pease. Comparative negligence should have been a non-issue. The compared negligence could not be accurate although jury members have great latitude in weighing evidence.

<u>Property Value.</u> The closing arguments of counsel were not considered evidence and the court so instructed in jury instruction no. 1. Defense counsel's statements were not accurate nor based upon evidence before the jury. The appellant presented zero evidence on value of property.

Defendant/respondent's counsel stated:

"The argument by the plaintiff is their testimony is unrebutted. Unrebutted except by common sense."17

"There is no way in the world that this vehicle has that value. And even the .. even the add-ons lose their value, they depreciate by time. I'm suggesting to you that you all have it within your own ability, your own common sense to come up with a value on that.

I'll give you a broad range. I suggest to you that it's somewhere in the neighborhood of twenty to thirty thousand dollars, that' what that vehicle's worth. I suggest to you that is the appropriate range to look at when you are analyzing the appropriate range to look at when you are analyzing damages."18

"The same with the pick-up. I suggested a range and I'm telling you that' what the evidence shows in this case. It's not split the baby, not at all; <u>it's what the evidence shows.</u> (Emphasis supplied). 19

---

16 Tr. pp. 198-199.
17 Tr. p. 299:20-22.
18 Tr. p. 300:5-16.
19 Tr. p. 301:17-21.

The respondent, via counsel, knew that no rebuttal evidence existed and that his argument to the jury was not based upon evidence. No evidence existed to rebut any testimony of Dana McCandless and the 19 comparables of truck value.20

(See rebuttal argument that no expert was produced by the respondents.21)

The jury verdict is impossible because the jury used monetary numbers which were totally devoid in the evidence presented; and, was totally unrebutted by the defendant in any manner. The jury awarded $15,500.00 for property damage. This court should remember that over seven (7) years had transpired since the accident when value of vehicle was being presented to the jury seven years later. Appellant asked for damages as of the date of the collision.22

Income Damages. Also, on income damages, defense counsel argued that the $5,000.00 roofing income offered to Mr. McCandless was not disclosed. It is clearly in the deposition testimony attached as Exhibit A to the declaration of counsel in support of the motion for new trial.23 The objection, which was improper, had an actual bias upon the jury because the jury ignored this evidence. The objection was not explainable but was influential to the jury because this dollar sum was ignored.

Medical Costs/General Damages. In regards to medical and health care costs, the jury also committed error. The court did find that general damages were subject to a new trial based upon jury error.24

---

20 Tr. p. 224:2-6
21 Tr. pp. 309:21-25; 310:1-8.
22 Tr. pp. 225-226.
23 R. p. 197.
24 R. p. 236

Defense counsel argued to the jury:

"Take a multiple of two of that continuing treatment, and that equals your general damages. . . . for a total of $12,355 for medicals and pain and suffering."25

"Do the same thing with respect to Ms. Blackeagle. . .That's $15,366 for meds and pain and suffering."26

Clearly, the jury did not even reach this sum in general damages and had to be influenced by outside considerations. The jury did not even award what was suggested by defendant/respondent!

I.R.C.P. Rule 59(a)(1)(F)

The unrebutted testimony of the plaintiff was property damage to Dodge 250 Truck was $35,000.00 as of the date of the collision. (7.5 years later trial was held). The extra add-ons to the motor vehicle were testified to being $11,000.00 to $14,000.00. The lowest possible figure the jury could consider was $46,000.00. No other testimony existed in the trial exhibits, the trial testimony and only argument of respondent in closing. The jury awarded $15,500.00. This sum would have to come from a totally speculative source as no other evidence existed. It is impossible, from the evidence and even from the arguments, to come to any other result. $15,500.00 is blatant error by the jury.

However, in his decision the court specifically stated the jury awarded $15,500.00 for the vehicle of appellants.27 The question on the special verdict was

---

25 Tr. pp. 300: 24-25; 301:1-4.
26 Tr. p. 301:5-8.
27 R. p. 221 at top of page.

property damage. The "normal" lay interpretation of property would include a motor vehicle. The judge, by way of dicta, indicated in footnote 3, page 3 of his decision (R. p. 222) that the amount paid by the plaintiffs' insurance company was close to the figure reached by the jury. The court does not take into account that the GEICO payment was taken into account before opting to have a jury set the value of the vehicle; and, they (appellants) knew that the total sum sought would be determined at trial. The court reduced the verdict on vehicle sum by funds received from GEICO contrary to *Dyet v. McKinley,* 139 Idaho 526, 81 P.3d 1236 (2003).

In any event, there is no logical way to reach $15,500 when the lowest figure based upon evidence for the truck was $46,000.00; and the income from fishing $5,000.00; and for roofing income of $5,000.00. The jury had to use some form of quotient verdict or guess.

As stated earlier, McCandless had 19 comparables on the truck value and was well versed in auto values. No person or any exhibit disputed this testimony.28

Actual expenses included medical/health care billings. Any addition by mathematics of the actual billings was not possible for the jury to reach this result. A "clean" exhibit was introduced so as not to prejudice the jury on the mathematics for both of the appellants. (See, Plaintiff Exhibits 15 and 16; Compare Plaintiff Exhibits 17 and 18; no objection by defense counsel). Dana McCandless was awarded $4,900.00. His hospital and chiropractic care exceeded that sum. The IME, prepared by the defendant's expert, introduced into evidence by plaintiff

---

28 Tr. pp. 223-226.

indicated the medical treatment was fair and reasonable and more likely than not to a reasonable degree of medical certainty. (Plaintiffs' Exhibits 13 and 14). No evidence rebutted that presumption. Plus, there are no billings that match the sum awarded by the jury.

The medical expenses for Robin Blackeagle were awarded at $10,200.00. This figure does not match any of the medical/health care billings placed before the jury. (See, Plaintiffs' Exhibits 16 and 18).

The jury numbers on medical/health care billings are impossible from the evidence and documents presented. Furthermore, the exactness of the numbers shows the jury had to conclude said sums from a source other than the actual billings. (Note: It is alleged, that the jury did not have plaintiffs exhibits 15 and 16 in the jury room but the record indicates the same were introduced. This fact, if substantiated excluded exhibits submitted to the jury.) These exhibits completed all additions in mathematical format for the jury; and, set forth all health care costs claimed. Regardless, the actual medical billings were before the jury and had been "cleaned" to remove any reference to insurance. As such, the result reached, which was not rebutted, could not be a possibility.

Finally, the plaintiffs testified to lost wages of $5,000.00 for fishing and taking said fish to the local summer markets. The second loss of wages was for a roofing job that was set at $25.00 per hour not to exceed 200 hours for a total of $5,000.00. The total lost wages were $10,000.00. There is no rebuttal evidence on this point. The jury simply ignored this evidence.

The respondent, via his attorney, in closing argument on the roofing issue stated: " I could find a friend who could do it for cheaper than that."29

Also, defense counsel argued that the $5,000.00 roofing income was not disclosed. It is clearly in the deposition testimony attached as Exhibit A to the declaration of Dunn in support of the motion for new trial.30 The objection, which was improper, had an actual bias upon the jury because the jury ignored this evidence. The objection was not explainable but was influential and prejudicial to the jury because this dollar sum was ignored.

(I.R.C.P. Rule 59(a)(1)(G)

No evidence exists in the record to justify property damage of $15,500.00. That number has never been mentioned by anyone. A jury would have to use its own numbers to come to such a result.

No health care billings would allow the jury to reach numbers of $4,900.00 for McCandless and $10,200.00 for Blackeagle. Those numbers simply do not exist in the record. A jury would have to use its own numbers to come to such a result. (Compare plaintiff exhibits 15, 16, 17 and 18.)

No sum was ever mentioned for lost income. The jury found no such number. The lost income was not rebutted or explained away by anyone. A jury would have to exclude these numbers to come to such a result. Emotion or inflamed

---

29 Tr. p. 297:23-24.
30 R. p. 197.

jury is the only possible result.

There was no conflicting evidence introduced by the defendant/respondent.

General damages are discretionary. But it appears the small sums were as the result of passion or prejudice. 31 The judge made this finding, as stated earlier, in his ruling on a new trial. The defendant was an elderly man that had to be assisted/lifted into the witness chair. Only, emotion could explain the potential sympathy for this defendant. The court ruled that general damages were inadequate and ordered a new trial subject to additur to be accepted by the respondent; and the judge ruled that the jury had to be under undue influence or passion and prejudice.

The court shifted the burden on the additur from the appellant/plaintiffs to the defendant/respondent. It is clear that the decision to accept an additur rested with the appellants. (See, *Howes v. Fultz,* 115 Idaho 681, 769 P.2d 558 (1989).)32

The court reduced the amount of the Dodge Pick-up truck owned by the appellants by the sum paid by their personal insurance, GEICO. The judgment should not be reduced pursuant to *Dyet v. McKinley,* 139 Idaho 526, 81 P.3d 1236 (2003). "Defendant was not entitled to have the judgment reduced for payments plaintiff received from her insurance company." *Dyet,* supra.

The respondents repurchased the truck and were counting on the trial to pay

---

31 R. p. 223 (page 4 of court decision on new trial).

32 "A trial judge can grant an additur or remittitur only by offering a new trial as an alternative, and then only if he determines that the disparity between his evaluation of damages and the jury's award is sufficient to suggest that the jury's evaluation of damages was the result of passion or prejudice." (See also, IRCP, 59.1).

the value established according to the 19 comparables testified to by Dana McCandless.

I.R.C.P. Rule 59(d)(2): Other factors: eight (8) points

The court can consider other factors not in the motion as outlined by Rule 59, I.R.C.P. Those factors may include the following:

1. **The collision occurred on the reservation of the Nez Pearce tribe. Highway 12 at MP 69 in Idaho County, Idaho is in the reservation land of the Nez Pearce tribe.33**
2. **The plaintiff, Robin Blackeagle is from the Nez Pearce native American tribe. No Native-Americans were on the jury. Robin did not have a jury of any of her peers. The lost income was from fishing enterprise that she performs. The jury might not have appreciated this fact. The appellants have no way to prove if there was any bias by the fact non-native Americans were on the jury. The Idaho34 and U.S. Constitution35 guarantee a jury of one's peers.36**
3. **The defendant was unable to properly ambulate. He was lifted/assisted into the witness chair.**

   The court and all observers could determine this fact. The record does not reflect this fact. The court had the ability to observe this fact

---

33 Tr. p. 73,
34 Article I §7.
35 Article 1 §7.
36 *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990). See also, *Smallwood v. Dick, supra.* 'the standard for granting a new trial under IRCP 59(a)(5) permits an adequate review of the decision of the trial court in order to ensure the right to trial by jury guaranteed by this section." Dee also, Tr. p. 81.

and the demeanor of all witnesses. This observation is appropriate for argument that will be set forth in this brief hereafter. The health of the defendant/respondent and his wife was briefly discussed in testimony in his examination.37

4. **Brent Weddle was made whole by the defendant. How Weddle could be considered negligent is unusual. 38**
5. **Defense counsel used innuendo and insinuation that the plaintiffs were only greedy people. Yet Charles Weddle, owner of the Toyota, testified McCandless evasive action prevented a head on collision with the Toyota.39**
6. **McCandless testified he saw Weddle do nothing improper.**

These factors are believed to have inflamed or caused emotional decisions by the jury not supported by fact. The jury was influenced by some measure other than factual or documentary evidence. (See, Transcript, pages 206-209.)

7. **Dr. McCormick, the IME expert, was to appear on Thursday to testify for the defense. Her subpoena was cancelled. Plaintiffs' counsel knew this may occur. For over one month prior to trial, offers were made to pay her fees to attend. Counsel refused any contact of their "expert" to**

---

37 Tr. pp. 29, 33: 17-18, 41: 17-25, 60;7-10.
38 (See, Transcript at page 201:12-21.)

39 (See, Transcript at pages 199-200.)

subpoena. Then at trial, the defense indicated the court could not allow a subpoena to an out-of-state expert. Yet the plaintiffs/appellants were forced to be examined out-of- state by this expert. The plaintiffs had no 40 choice. The court ruled that the expert witness did not have to be made available in his decision on the new trial.41

-Important questions could have been asked of this witness. The plaintiffs were denied due process. This matter was discussed at the pretrial conference. A motion in limine was propounded with a response from the plaintiffs. The same was never heard by the court. See, page 10 of clerk's record and response of plaintiffs on 12/11/2018. See also, page 201 of clerk's record on the memorandum of plaintiffs being denied the ability to subpoena the IME expert; first full paragraph. I.R.C.P. 26(4)(A) is silent on the ability to subpoena expert witnesses of the defendant.

-The court stated in his memorandum decision on request for new trial that the appellants were not denied due process. 42

-Appellants had tried for months to subpoena Dr. McCormick to no avail.43

---

40 R. 237-238.
41 R. Id.
42 (See, clerk's record, page 225.)

43 (See also, Transcript pages 151:20-25; 152-153.)

The appellants suggest that the remedy is a new trial with the ability to subpoena all witnesses desired subject to paying the reasonable costs for experts.

8. The trial court found that the award to the appellants was inadequate on general damages. The court granted an additur wherein the appellants did not request an additur. The court can grant an additur but the following case law is salient:

"A trial judge can grant an additur or remittitur only by offering a new trial as an alternative (Emphasis Supplied), and then only if he determines that the disparity between his evaluation of damages and the jury's award is sufficient to suggest that the jury's evaluation of damages was the result of passion or prejudice." *Howes v. Fultz,* 115 Idaho 681, 769 P.2d 558 (1989). The appellants request a new trial and the foregoing case indicates that right for the appellants. Yet the court gave the determination to the respondents to either accept or reject the additur. The appellants were never granted any option for new trial which the foregoing case indicates is the standard. The trial court declared that the evaluation by the jury was the result of passion or prejudice. 44

The appellants desire a new trial.

---

44 R. p. p. 236.

2. **The inability to discuss insurance and the relationship in a jury trial of Idaho Rule of Evidence, Rule 411 added to the prevention of a fair trial and does not bear the truth to the jury and is misleading and prejudicial as the same is a fiction.**

The case of *Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (Idaho App. 2002) explains with accuracy the purpose and application of Rule 411, I.R.E. However, in the case at bar, the inability to mention that the defendant was insured was harmful to the process of a fair trial because of his physical limitations. He was elderly and suffered from neuropathy which cause a daily use of methadone. His wife was to elderly and ill to appear at trial.45 In sum, the defendant was a "prop" for the insurance company which undoubtedly evoked sympathy and bias from the jury.

The jury instruction no. 12 which prohibits the mention of insurance and informs the jury not to consider the issue of any insurance causes an injustice since it is a "legal fiction". 46 As attorneys we are supposed to bring forth the "truth" and be zealous representatives of our clients. By not mentioning insurance as attorneys, we are asked to present a fraud and not be completely honest. The truth is that Max Pease was not the real party in interest but rather State Farm Insurance.

Rule 411 has exceptions but read in conjunction with Rule 403 makes any use of the "exceptions" to Rule 411 on the mention of insurance non-admissible. This factor is brought before this court to point out that the practice of trial work with an insurance company is one-sided. The plaintiff, in the case at bar, is prevented from presenting the true facts to the jury. Rule 411 is adopted by this court for

---

45 Tr. p. 60:7-10.
46 R. p. 180.

practitioners. It appears fruitless to argue to this court the rule it adopts.

The point being made is that Rule 411 has its purpose but does not allow for unusual circumstances that may lead to actual bias from a jury. An elderly infirmed man, Max Pease, was presented to the jury. Sympathy and bias were likely increased. The reason for presentation of this argument is "other factors" justify a new trial.

The difficult question to answer is what can be done differently or suggested to this appellate court as a cure for the problem. We must accept people as we find them and as they are allowed to testify. In preparation for trial, three different sources of the defendant testimony were obtained on the issue of liability and comparative negligence between the two defendant drivers. Max Pease recanted the years of preparation for the trial on the three sources concerning his testimony.47 His aging process was likely a problem. The jury awarded a 25% negligence comparison to Brent Weddle. The court noted actual prejudice or bias in regards to general damages as mentioned previously.

No comment was made by the court on the general health or ability of the defendant to recall or testify. Rule 411 should be expanded to allow the court to give instructions on health issues related to such factors as age, medications, limitations or other unusual circumstances and to allow the mention of the real party in interest, to-wit: insurance. The expansion of case law on this issue could correct the perceived injustice that occurred in this trial.

---

47 Tr. p. 49.

CONCLUSION

1. **The relief requested by the appellants is a new trial on all issues. The comparative negligence, property damage, the medical/health care costs, lost income and general damages were all inconsistent with trial testimony and exhibits. The court found on general damages that the jury was influenced by passion or prejudice.**
2. **The court should have granted the appellants the ability to accept the additur or a new trial and not the respondent.**
3. **The appellants seek rulings on the inability to subpoena the defense IME expert witness.**
4. **The appellants seek rulings on the status of the insurance non-disclosure rules adopted by this court. Rule 411 should be expanded for unusual circumstances that could be brought to the attention of the court with the remedy of mentioning insurance as the real party in interest.48**

Dated this 30th day of July, 2019.

/s/ Robin D. Dunn
Robin D. Dunn
Attorney for Appellants

48 **"The fundamental and foundational reason man creates government is to protect the rights of the individual. If government fails to perform this duty it is to be thrown down." Thomas Jefferson. The U.S. Supreme Court has stated the reiterated numerous years ago the statement of sovereignty of the people.** ***Yick Wo v. Hopkins,*** **118 U.S. 356 (1886).**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of July, 2019, a true and correct copy of the foregoing was delivered, via the E-filing system of I-court as set forth in the Idaho Appellate Rules to the following:

Robin D. Dunn, Esq. **DUNN LAW OFFICE, PLLC** **P.O. Box 277** **Rigby, Idaho 83442-0277** **(208) 745-9202** **rdunn@dunnlawoffices.com** **APPELLANTS**	**John "Nick" Crawford, Esq. #3220** **BRASSEY CRAWFORD, PLLC** **P.O. Box 1009,** **Boise, Idaho 83701-1009** **(208) 344-7300** **jnc@brassey.net** **RESPONDENT**

/s/Robin D. Dunn
Robin D. Dunn, Esq. #2903
DUNN LAW OFFICES, PLLC