102452-5

IN THE SUPREME COURT FOR
STATE OF WASHINGTON

RAY GARBAGNI,

Petitioner

v.

KARIN DOVE and ANEW,

Respondents

Court of Appeals Case No. 84335-4-I
Appeal from the Superior Court of the
State of Washington for King County

PETITION FOR REVIEW

Zachary B. Herschensohn, WSBA 33568
Herschensohn Law, PLLC
19219 – 68th Ave. S., Suite M-101
Kent, Washington 98032
206/588-4344
Attorneys for Petitioner Ray Garbagni

October 6, 2023

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I. INTRODUCTION

In August 2017, appellant Raymond Garbagni ("Garbagni") was injured when his vehicle was rear-ended by the respondents, Karen Dove and her employer Apprenticeship and Nontraditional Employment for Women (ANEW). Ms. Dove caused the collision while acting in the course of her employment as the director of ANEW, a 501(c)(3) organization. Respondents (hereinafter "Respondents" or "ANEW-Dove") were sued for their negligence and *respondeat superior* liability.

Since the collision, Garbagni has suffered from a debilitating brain injury.

When Garbagni sued, ANEW-Dove admitted liability, but the case went to trial so that a jury could determine the amount of damages owed to Garbagni for his past, present, and future pain and suffering. CP 304:19. At trial, Garbagni presented evidence that showed the collision "destroyed his life." RP 1040:7-1042:16.

Dr. David Widlan, a clinical psychologist, testified at the trial on June 29, 2022, that Garbagni suffers from a neurocognitive disorder as well as a personality change due to brain trauma from the collision. RP 841:7-842:19. Garbagni and his family members testified to the many physical and emotional challenges he continues to face: injury-related headaches, fatigue, and numbness; injury-related job loss; and injury-related emotional lability. RP 536:1-537:19; 647:1-9; 669:11-671:25; 738:22-740:11; 768:4-769:7.

Despite this evidence of ongoing pain and suffering, the trial court granted the respondents' CR 50 motion to prohibit the jury from awarding damages for the pain and suffering that Garbagni experienced on or after June 12, 2021. RP 1198:3-7; 1202:20-24. After first striking Garbagni' s claim for permanent injury the trial court further instantiated its ruling in a jury instruction which forbade the jury from awarding any general damages after June 12, 2021. RP 1240:22-25.

This Court must reverse. Washington courts have consistently held that a jury can award past and future damages so long as there is some supporting evidence admitted at trial. This is especially true for noneconomic damages, which by their nature are difficult to measure and–should not be arbitrarily limited. The trial court was required to view all the evidence concerning future and past pain and suffering in a light most favorable to Garbagni but failed to do so. Consequently, the trial court erred when it granted the respondents' CR 50 motion which erroneously dismissed Garbagni' s claim for damages experienced on and after June 12, 2021.

Furthermore, the ruling carried over to the erroneous jury instruction, jury instruction 11, which improperly suggested to the jury that the trial court agreed with the respondents' argument that Mr. Garbagni failed to present sufficient evidence of noneconomic damages. Therefore, the instruction amounted to an unconstitutional comment on the evidence.

The prejudicial impact of the trial court's comment on the evidence extended beyond simply limiting the time period of general damages, but rather influenced the weight and credibility of Dr. Widlan's causation opinions and the observational testimony provided by Garbagni and his family members. Dr. Widlan testified live at trial on June 29, 2022 that Garbagni suffered from his condition presently, but the jury was instructed not to consider any damages past the exact date when Dr. Widlan conducted his interview and diagnosed Garbagni's brain injury. Thus the instruction rendered his causation opinion non-sensical and largely meaningless. RP 882:8-23. Similarly, the lay family members' testimony was also impaired temporality limitation embedded in the erroneous jury instruction. Garbagni' s lay witnesses provided extensive testimonial evidence that described symptoms observed during the time spanning the year leading up to the trial, June 2021, through June 2022. RP 507-772. The trial court's erroneous jury instruction disallowed the jury from

considering both the symptoms described by the lay witnesses and diagnoses rendered by the expert, because both occurred during the time period that the jury instruction limited.

II. ASSIGNMENT OF ERROR

1. The superior court erred by ruling that general damages could not be awarded for losses incurred after June 12, 2021. RP 1202:2-25.

2. The superior court erred by giving Jury Instruction 11, which limited any pain and suffering award to pain and suffering experienced on or before June 12, 2021. CP 825; RP 1240:14-25.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err by granting a CR 50 motion prohibiting general damages incurred after June 12, 2021, given that substantial evidence to support such general damages was presented?

2. Did the superior court err by giving Jury Instruction 11, given that the instruction misstated the applicable law due to the erroneous CR 50 order?

IV. STATEMENT OF THE CASE

On August 16, 2017, appellant Garbagni was injured when the automobile he was driving was rear-ended by the respondent Karen Dove while she was acting in the course of her employment with respondent, ANEW. RP 612:20-24. Upon impact, Garbagni' s head struck the headrest. RP 612:20-23. Immediately after the crash, Garbagni "start[ed] to feel weird." RP 614:10-20. Garbagni called his wife, Mary Garbagni, and told her he was rear-ended and that he was not feeling well and asked her to come get him and take him to the emergency room. RP 615:11-20 Garbagni vomited in the street while waiting for his wife. RP 616:4-9. During the drive to the hospital, Garbagni complained of sensitivity to light, blurry vision, headache, and dizziness. RP 526:20-25; 528:10-11. Following the collision, Garbagni experienced increased irritability, aggression,

headaches, blurry vision, apathy, fatigue, and sleep deprivation. RP 532:17-25; 539:24-25; 540:1-6.

On June 10, 2020, Garbagni filed suit. Subsequently, the respondents admitted liability. RP 304:19. On June 21, 2022, the case proceeded to a jury trial to determine the amount of general damages owed to Garbagni. *See* RP 489:16-17. The evidence at the trial showed that Garbagni sustained a brain injury, and that this condition severely impacted his physical, mental, and emotional well-being. Garbagni testified that he still experiences ongoing physical symptoms. He testified to ringing in his ears, a symptom that he testified "hasn't left [him] since the day of the accident," he also testified that he has headaches several times per week, has persistent sleep disturbances, and he has difficulty with daily tasks such as getting ready for work. RP 642:2-7; 670:16-20; 674:20-675:2; 696:9-24.

The evidence presented at the trial showed that Garbagni has difficulty with daily tasks because his post-injury mental capabilities are significantly diminished as compared to his pre-

injury cognitive function. Garbagni, who worked as a copy machine repairman for Canon of North America, was unable to return to work until November 2017—roughly three months after the collision—because of his injuries. RP 677:7-20. Upon his return, Garbagni had difficulty reading manuals and interpreting photocopier error codes because his concentration and ability to pay attention were impaired. RP 678; 681:13-25. Garbagni struggled in his continuing education classes and even failed several routine exams for Canon certification—exams that he had routinely passed before the accident. RP 688. Ultimately, Garbagni was fired from his job at Canon of North America due to cognitive performance issues, he testified that he was unable "to pass specific courses" required for his continuing education, and his "stats . . . were all pretty dismal." RP 690.

After losing his job, several months passed before Garbagni found employment with a different copy machine repair company. RP 691-94. Though he was ultimately able to

return to work, albeit with a different employer, Garbagni continues to encounter difficulties with the continuing educational and certification requirements of his trade, as well as other cognitive aspects of the job. RP 694. For example, he now must take detailed notes and screen shots when training, and he maintains a large binder detailing the work performed for customers just so he can keep up with his basic job responsibilities and pass routine performance exams. RP 694:24-695:9.:

Garbagni also testified that his brain injury has led to persistent and ongoing problems regulating his emotions. RP 694, 696, 698, 700, 716. Ever since the collision, he is more susceptible to unpredictable emotional outbursts and often overreacts to trivial matters and gets angry for no reason. RP 697:12-701:15. 697:16-698:22.

For example, the evidence showed that on one occasion, Garbagni confronted a stranger who bumped his car while parallel parking. Garbagni got out of his car, yelled at the driver,

and ripped the license plate off the other car with his bare hands. RP 698:23-699:9. On another occasion, while driving with his young granddaughter, Garbagni pulled the car over and screamed at her after she told a harmless joke. RP Garbagni's wife testified that his injury-related symptoms "have persisted. And he's kind of just tried to adjust. It's now like daily life." RP 542:5-11.

Garbagni' s son, Tristan Garbagni, echoed this testimony, stating that his father's mental condition following the accident continues to affect their lives: "my dad is not very engaged…he doesn't show interest in stuff that he used to enjoy. . . he gets like sensory overload, loud noises, doesn't like being around big crowds." RP 739:2-7. Tristan testified that Garbagni "quite frequently" loses control of his emotions "at least three times a week," and said that his father "gets irritable and irritated over the littlest things that he's never you know really had an issue with." RP 741.

One of Garbagni' s granddaughters testified that she had a good relationship with him prior to the rear end collision. RP 761:19-762:17. She stated that "[w]e were really close. He was like – he was the closest thing I had to my dad." RP 763:25-764:1. But she also testified that since the collision, Garbagni is irritable, tired, and moody. RP 768:4-25; 771:4-13.

Dr. David Widlan, a licensed clinical psychologist, reviewed Garbagni's medical records, interviewed him, and administered cognitive testing. RP 818:6-820:9; 820:13-20; 842:1-19; 882:9-13. During the trial, Dr. Widlan was qualified as an expert in clinical psychology without objection. RP 817:24-818:3. Dr. Widlan diagnosed Garbagni with "mild neurocognitive disorder due to a traumatic brain injury" and "personality change due to a traumatic brain injury." RP 818:6-820:9; 820:13-20; 842:1-19; 882:9-13. Dr. Widlan testified on June 29, 2022, that, "on a more probable than not basis with a reasonable degree of medical certainty," the conditions he diagnosed were caused by the collision on August 16, 2017. RP

842:1-19. Dr. Widlan based his diagnostic and causation opinions on the constructs and diagnostic methodology provided in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-V"). RP 799:13-22. Brain damage due to trauma is described in the DSM-V as "mild neurocognitive disorder due to traumatic brain injury." RP 789:2-11; 799:13-16. During his testimony, Dr. Widlan mentioned that he first interviewed Garbagni on May 19, 2021. RP 847:7-11. The June 12, 2021, date later referenced by Defense counsel was not part of anyone's testimony. *See id.*

On cross-examination Dr. Widlan was asked to provide the factual foundation for his opinions. RP 841; 842; 851; 853. Dr. Widlan testified that he relied upon the symptoms reported to him by Garbagni, and noted the following:

> [T]he discrepancy in his cognitive and his memory profile each are indicative of cognitive changes . . . the issue with temporality . . . we have had this car accident, we had all this list of symptoms . . . all of this comes together to indicate that there's been cognitive changes [due to the auto accident].

RP 841:12-18.

During Dr. Widlan's testimony about the sub-diagnosis regarding Garbagni' s personality changes due to traumatic brain injury—not the primary diagnosis of mild neurocognitive disorder due to traumatic brain injury—Dr. Widlan conceded that it had been a year since he had seen Mr. Garbagni but "[h]is symptoms have persisted up until the time of the — of my report. So, I don't want to say that his symptoms are occurring today because I haven't interviewed him today. But in terms of what is provided in my report, I feel comfortable — confident and comfortable in doing so." RP 882:9-883:17. However, Dr. Widlan never limited or qualified his opinions regarding Garbagni' s diminished cognitive ability in any way, and insofar as the sub-diagnosis of *personality change due to traumatic brain injury*, his statement merely described his lack of knowledge regarding the persistence of symptoms of emotional lability in the year since he performed testing. *Id.*

Dr. Elizabeth Ziegler, the medical expert called by the defense, met with Mr. Garbagni on October 20, 2021 (during the time period when the jury was forbade from considering evidence). While she did not attribute his reported symptoms to the collision, she testified that Garbagni reported patterns of anger proneness, irritability, and having a low frustration tolerance, and she found that he performed very low on the nonverbal problem-solving test. RP 1065:17-23; 1128:9-14; 1130:17-25. Dr. Ziegler's testimony confirming Garbagni' s ongoing emotional lability when she tested him on October 20, 2021, also addressed the factual ambiguity expressed by Dr. Widlan and was sufficient to defeat the partial CR 50 motion, but even her testimony was overlooked by the trial court.

A. CR 50 Motion.

After all the testimony had been taken, but before closing arguments were given, the respondents filed their CR 50 motion seeking dismissal of all claims for general damages, or in the alternative, seeking to limit the general damages claim to the

finite period between the collision and June 12, 2021. ANEW-Dove's attorney claimed that Garbagni' s lawyer had "attempted to get [Dr. Widlan] to agree to a permanent injury or something beyond that time frame and Dr. Widlan testified to the jury he has no opinions beyond the last time that he saw Garbagni on June 12 of 2021," and thus—according to the respondents—there was "absolutely no testimony to support" damages beyond that date. RP 1190:21-25 1191:1-16. This representation by ANEW-Dove lawyer's statement lacked candor and was not supported by the evidence, since no witness ever testified as such.

Despite the compelling evidence of Garbagni's persistent symptoms, the trial court granted the CR 50 motion and struck Garbagni' s claim for general damages incurred beyond June 12, 2021. The trial court reasoned that "[t]here needs to be some medical information of record that the symptoms are related to this incident for a time certain" and "[a]ll we have is June 12." RP 1202:20-25. The trial court later clarified that the ruling

meant that any alleged damages after June 12, 2021, were prohibited as a matter of law. RP 1202:20-25.

The trial court formalized its ruling by issuing jury instruction number 11: "If you find for the plaintiff, you should consider the following non-economic damages elements: The nature and extent of the injuries; the pain and suffering experienced through June 12, 2021." RP 1240:22-25.

The jury returned a verdict for the defense and awarded Garbagni no damages. RP 1296:20-22.

V. ARGUMENT

Granting a motion for judgment as a matter of law is only appropriate when, after viewing the evidence in a light 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, 254 (2001) (*citing Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). When reviewing a ruling on a motion for a

judgment as a matter of law, the appellate court engages in the same inquiry as the trial court, i.e., *de novo* review. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208, 1212 (2009), *as amended* (Aug. 6, 2009).

A. The Superior Court erred by dismissing Garbagni's general damages after June 12, 2021, given that there was sufficient evidence to present these claims to the jury and there was no basis for dismissing these claims *ab initio*.

When viewed in a light most favorable to Garbagni, Dr. Widlan's expert testimony and the Garbagni family's lay testimony provided sufficient evidence to prove that Garbagni suffered ongoing collision-related symptoms after June 12, 2021. By limiting Garbagni' s general damages to the period between the collision and June 12, 2021, the trial court erred. In this case, the jury should have been allowed to consider awarding general damages beyond June 12, 2021. *Indus. Indem. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990) (A judgment as a matter of law requires the court to conclude, "as a matter of law, that there is no substantial

evidence or reasonable inferences to sustain a verdict for the nonmoving party."); *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864, 867 (2007) ("'Substantial evidence' is evidence that is sufficient 'to persuade a fair-minded, rational person of the truth of a declared premise.' ").

Additionally, the trial court erred in striking Garbagni's claim for general damages after June 12, 2021, because Washington courts have consistently held that lay witnesses can establish the basis for claim for future general damages, no expert is needed. *See Bitzan v. Parisi*, 88 Wn.2d 116, 121, 558 P.2d 775, 778 (1977) ("[W]e hold the lay testimony, reviewed sufficient, alone, to support the instruction on future damages."); *Stevens v. Gordon*, 118 Wn. App. 43, 56, 74 P.3d 653, 661 (2003) ("Lay testimony on future damages may be sufficient to justify a jury instruction."); *Leak v. U.S. Rubber Co*., 9 Wn. App. 98, 102-3, 511 P.2d 88 (1973).

In *Bitzan* the court stated that "an injured person can testify to subjective symptoms of pain and suffering, and to the

limitations of his physical movements." *Id.* Thus, the court concluded that a "future damage instruction can be given even though there is no medical testimony, or even if the medical testimony is contrary to plaintiff's testimony." *Id*. at 122 (citation omitted).

Here, Dr. Widlan's opinion that Garbagni continued to suffer from brain damage as of the date of his live trial testimony, June 29, 2022, (based upon testing and an interview he had conducted a year earlier), and the lay witness testimony that appellant continued to suffer the symptoms after June 21, 2021, was evidence ongoing general damages. Garbagni himself provided evidence of cognitive impairment RP 592:9-13; 588:14-15; 591:22-25; 592:16-17. Garbagni, testified that he had no trouble passing work related copy machine tests until after the collision. RP 599:5-10. Prior to the accident, Garbagni took performance tests every two months, and he passed every time. RP 605:20-25. He only began to struggle to pass these tests "after the accident." RP 606:1-2

Garbagni explained the extensive emotional and physical suffering he has experienced since the collision:

> I constantly have a headache and still having issues with light, focusing on stuff is day to day. …[t]here's just a lot of things. I mean, there's ringing in my ears…the other day I said I have to get in the shower. When it first happened it was something that I kind of blew off. Like I didn't think it was an issue. But it's gotten like for me to like get in the shower it feels like I'm sitting in a coffin…I can't breathe. I've never had that issue. Since this accident, it destroyed my life. I go to restaurant that I have been into hundreds of times. Two months ago, three months ago we go into that restaurant, and I'd see some family members. We talk to them for a second. I'm waiting for my order. All of a sudden, the place starts erupting. There's noise and lights and everything is just so overwhelming. There's no way to control it. I have to get out of the building and go sit in the car to wait for the rest of my family to come out. And I let them enjoy their breakfast and stuff while I sit in the car because I can't walk back in. This I nothing that's never—I've never had this before.

RP 1040:7-1042:16.

Due to the trial court's CR 50 ruling and Jury Instruction No. 11, the jury was not allowed even to consider the evidence concerning ongoing general damages. It was not reasonable for

the court to take the issue of whether Garbagni had damages away from the jury pursuant to CR 50(a). Indeed, "[t]he continued existence of these elements of damage at the time of trial permits a reasonable inference that future damage will be sustained." *Bitzan*, 88 Wn.2d at 122. Garbagni presented credible evidence to support an award of damages, even without the testimony of Dr. Widlan. *Id*. There is no imperative for expert testimony to prove damages, for "[e]xpert medical testimony to this effect may also be given but it is not essential" and "a future damage instruction can be given even though there is no medical testimony … or even if the medical testimony is contrary to plaintiff's testimony." *Id*. (ellipsis added); *accord, Stevens v. Gordon*, 118 Wn. App. 43, 56-57, 74 P.3d 653 (2003) (holding plaintiff's "testimony regarding lost earnings and reduced work capacity up to the time of trial permits a reasonable inference that future economic losses will be sustained"; following *Bitzan*).

Courts recognized a similar inference of future damages from the continued existence of past damages in *Stevens* and *Leak*. *Stevens v. Gordon*, 118 Wn. App. 43, 56, 74 P.3d 653 (2003) ("Ms. Stevens's testimony regarding lost earnings and reduced work capacity up to the time of trial permits a reasonable inference that future economic losses will be sustained."); *Leak v. U.S. Rubber Co.,* 9 Wn. App. 98, 102-3, 511 P.2d 88 (1973) (upholding recovery for future disability "because it could be inferred from the evidence that the *petit mal* seizures would continue for at least some time after the trial"); *see also Bankson v. Laflam*, 92 Wash. 437, 438-39, 159 P. 369, 369 (1916) ("The law presumes a continuance of what exists, and it is neither surprise to the opposite party nor unreasonable from any point of view to say that when a man exhibiting a permanent injury testifies also to his having pain up to the very time when he is talking to the jury, there may be a continuance of it for some time in the future, so no express proof upon that is necessary"); *Passage v. Stimson Mill Co*., 52 Wash. 661, 670,

101 P. 239, 242 (1909) (present pain plus the actual loss of a finger permitted inference of future pain); *Brammer v. Lappenbusch*, 176 Wash. 625, 634, 30 P.2d 947, 950 (1934) (future pain and suffering instruction appropriate when "respondent testified that his eye was still irritated, that it throbbed at night and disturbed his sleep" and "that his back still gave him trouble"); *Suprunowski v. Brown & White Cab Co*., 142 Wash. 65, 68, 252 P. 155, 157 (1927) Because of these binding appellate decisions, the trial court could not, as a matter of law, arbitrarily set June 12, 2021, as a limit on those damages. This Court must reverse.

B. The misrepresentation to the court about Dr. Widlan's testimony by opposing counsel formed the basis of the court's CR 50 ruling.

Dr. Widlan testified that Garbagni' s traumatic brain injury can result in persistent behavioral changes affecting emotional regulation, and thus Mr. Garbagni might "[lose] his temper more easily" and he may strain his marriage or other

family relationships when he "flies off the handle." RP 881:8-23.

Initially, Dr. Widlan testified that these symptoms are "persistent to this day," though he later clarified his testimony by stating that Garbagni' s symptoms "persisted up until the time of the –of my report. So I don't want to say that his symptoms are occurring today because I haven't interviewed him today." RP 881-83. Dr. Widlan was merely qualifying his knowledge of symptoms; he did not withdraw or disavow his opinions.

Anew-Dove's counsel stated erroneously that Dr. Widlan "testified that he does not have any opinions beyond the last time that he saw Garbagni which was June 12th of 2021." RP 1190:21-1191:16. This was not Dr. Widlan's testimony.

Respondents' argument that Dr. Widlan's testimony—that he had no current information concerning Garbagni' s ongoing symptoms—required a hard cap on Garbagni's damages was baseless.

C. The trial court's improper jury instruction amounted to an unconstitutional comment on the evidence.

The Superior Court's instruction to the jury that they should only determine the pain and suffering experienced through June 12, 2021, constituted an improper comment on the evidence under the Washington Constitution, article IV, section 16.

Following its ruling on the CR 50 motion, the trial court issued Jury Instruction No. 11, which directed the jurors to only consider pain and suffering experienced through June 12, 2021. RP 1240:14-25. This instruction constituted an improper comment on the evidence. The question of pain and suffering—at all relevant periods of time—was a factual question that should have been considered by the jury. The instruction also suggested to the jury that the judge agreed with the respondent's criticism of Dr. Widlan's testimony, and improperly tipped the scale against Garbagni.

Washington's Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *See State v. Eisner*, 95 Wn.2d 458, 626 P.2d 10, 12 (1981) (Holding the judge's questioning of the prosecution's witness, which elicited answers that were sufficient to prove one of the charged crimes, was a violation of Wash. Const. art. 4, § 16). This provision prohibits the trial court from commenting on the evidence. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996, 1002 (1996). Thus, under article IV, section 16, a judge may not convey to the jury his or her personal attitudes toward the merits of the case or instruct a jury that matters of fact have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076, 1081 (2006).

When a jury instruction resolves a contested factual issue for the jury, the instruction constitutes an improper comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213, 218 (2015). Judicial comments on the evidence are presumed to be prejudicial and reversal is required, unless the party

benefiting from the improper comment can show it was harmless beyond a reasonable doubt. *Id*.

Following the presentation of the evidence, the question of damages should have then been turned over to the jury. Instead, the judge improperly weighed the evidence and made the decision that there was no pain and suffering damages past June 12, 2021 thus foreclosing any possibility of a finding of present damages, despite Garbagni' s testimony to that he still had physical and mental problems. Making such a determination as a matter of law and binding the jury's hands with an improper instruction constituted an improper comment on the evidence and is presumptively prejudicial. *See State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213, 218 (2015).

Additionally, the trial court's arbitrary limitation on Mr. Garbagni's pain and suffering damages impermissibly revealed the judge's opinion that Garbagni failed to present any compelling evidence of pain and suffering damages past June 12, 2021, when the record showed the opposite. The jury

instruction purged Garbagni' s substantial testimony offered in support of Garbagni' s general damages claim. Dr. Widlan testified live at trial on June 29, 2022, that it was his opinion that Garbagni suffered from the condition presently. RP 882:8-23. The lay witnesses provided extensive testimonial evidence that described symptoms that they observed during the time spanning the year leading up to trial, June 2021, through June 2022. RP 507-772. Since the expert opinion expressed by Dr. Widlan occurred after that date and because the lay testimony described symptoms experienced and described by witnesses was said to have occurred during the precise time period when the jury was wrongfully instructed that it could not award damages, the trial court's ruling on the CR 50 motion and corresponding jury instruction had the effect of destroying Garbagni' s entire case.

VI. CONCLUSION

The trial court's granting of the respondents' CR 50 motion and the trial court's instruction that the jury could only

consider claims for pain and suffering experienced through June 12, 202 improperly prevented the jury from considering Garbagni's claim for injury-related general damages, undermined his entire case, and constituted clear errors of law. This Court should reverse the trial court's erroneous decision on the CR 50 motion and the resulting jury instruction and remand the case for a new trial on all damages.

I certify that this brief is in 14-point Times New Roman font and contains 4,700 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 6th day of October, 2023.

HERSCHENSOHN LAW, PLLC

By:_____
Zach Herschensohn,
WSBA No. 33568

Attorney for Appellant

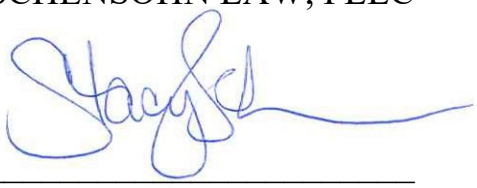
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 6th day of October, 2023, I caused to be delivered via electronic service, a true and correct copy of this PETITION FOR REVIEW RAY GARBAGNI, addressed to following:

Kelley J. Sweeney
Freimund Smith Tardif PLLC
1223 Commercial Street
Bellingham, WA 98225
Counsel for Defendants

SIGNED this 6th day of October, 2023.

HERSCHENSOHN LAW, PLLC



By:_____
Stacy R. Schumacher

APPENDIX A – ORDER FROM COURT OF APPEALS

FILED
7/17/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAY GARBAGNI, Appellant, v. KAREN DOVE and JOHN DOE DOVE, individually and on behalf of their marital community thereof, and APPRENTICESHIP AND NONTRADITIONAL EMPLOYMENT FOR WOMEN (ANEW), a corporation, Respondents.	DIVISION ONE No. 84335-4-I UNPUBLISHED OPINION

DWYER, J. — Ray Garbagni sued Karen Dove and her employer for injuries allegedly sustained in an automobile collision. The jury returned a defense verdict. On appeal, Garbagni argues that the trial court erred by limiting his damages claim to a finite period of time and instructing the jury accordingly. Because the jury rejected Garbagni's claim that the collision proximately caused his alleged injuries, he cannot establish that he was prejudiced by the trial court's rulings. We therefore affirm.

I

On August 16, 2017, Ray Garbagni's vehicle was rear-ended by a vehicle driven by Karen Dove while she was acting in the course of her employment with

Apprenticeship and Nontraditional Employment for Women (ANEW). Dove admitted liability but disputed causation and damages.

In June 2020, Garbagni sued Dove and ANEW (collectively Dove) for personal injuries allegedly suffered in the collision. Garbagni obtained the opinion of Dr. David Widlan, a clinical psychologist, regarding the nature and cause of his injuries. After reviewing medical records and conducting an evaluation, Dr. Widlan opined in a report dated June 18, 2021, that Garbagni suffered from "mild neurocognitive disorder due to traumatic brain injury." Dove subsequently moved to limit Dr. Widlan's testimony under ER 401, ER 403 and ER 703 on the ground that, as a psychologist, Dr. Widlan was not qualified to diagnose traumatic brain injury causally related to the automobile collision. The trial court denied Dove's motion to limit Dr. Widlan's causation testimony.

Trial took place during seven days from June 21 through July 1, 2022. As to the duration of Garbagni's damages, Dr. Widlan testified that Garbagni's symptoms persisted up until the time of his report. But he could not "say that [Garbagni's] symptoms are occurring today because I haven't interviewed him today." Garbagni and several of his family members testified that he has suffered persistent mental and emotional problems since the collision occurred. Dove's expert witnesses, neurologist Dr. Linda Wray and neuropsychologist Dr. Elizabeth Ziegler, testified that the evidence did not support a finding that the collision caused a concussion or a traumatic brain injury.

Following the close of evidence, Dove moved to dismiss Garbagni's claims under CR 50 on the ground that Garbagni presented no medical testimony to support causation of any injury, let alone permanent brain damage. To the extent that the court

denied the motion, Dove sought an order prohibiting an award of general damages beyond June 12, 2021, which was the date Dr. Widlan last interviewed Garbagni. The trial court denied Dove's CR 50 motion to dismiss Garbagni's claims but ruled that general damages would be prohibited beyond June 12, 2021. The court instructed the jury accordingly.

The jury returned a unanimous verdict in favor of Dove. Garbagni appealed.

II

Garbagni argues that the superior court erred by granting Dove's CR 50 motion to limit his general damages claim to the period between the collision and June 12, 2021. This is so, he contends, because Dr. Widlan's expert testimony and the Garbagni family's lay testimony provided sufficient evidence to prove that he suffered ongoing collision related symptoms past that date. Because Garbagni has not established that he was prejudiced by the trial court's ruling, he is not entitled to appellate relief.

A party seeking reversal based on a trial court's exclusion of evidence must demonstrate prejudice, "for error without prejudice is not grounds for reversal." Barriga Figueroa v. Prieto Mariscal, 193 Wn.2d 404, 415, 441 P.3d 818 (2019). As the plaintiff, Garbagni bore the burden to prove that he suffered injuries proximately caused by Dove's negligent conduct. See Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998) ("In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury.").

Here, the trial court generously permitted Dr. Widlan to testify that Garbagni suffered from "mild neurocognitive disorder due to traumatic brain injury." In so ruling,

the court allowed the jury to consider whether to accept or reject Dr. Widlan's opinion regarding the nature, extent, and cause of Garbagni's injuries. See Larson v. Georgia Pac. Corp., 11 Wn. App. 557, 560, 524 P.2d 251 (1974) ("[O]nce the expert testimony is admitted into evidence, its weight and credibility is like all other evidence to be considered by the jury."). In rendering a unanimous verdict in favor of the defendants, the jury necessarily determined that Garbagni did not meet his burden of proof. It therefore did not reach the question of damages. Allowing the jury to consider whether Garbagni's injuries persisted beyond the date of Dr. Widlan's report would not have changed this result. Garbagni cannot establish that he was aggrieved in any way by the trial court's ruling. He is not entitled to appellate relief.

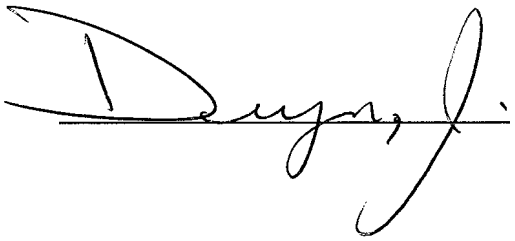
III

Garbagni also argues that jury instruction 11, which limited any damages award to pain and suffering experienced on or before June 12, 2021, amounted to an unconstitutional comment on the evidence. This court reviews whether a jury instruction amounts to a comment on the evidence de novo. State v. Butler, 165 Wn. App. 820, 835, 269 P.3d 315 (2012). An impermissible comment on the evidence is one that conveys the judge's attitude on the merits of the case or permits the jury to infer whether the judge believed or disbelieved certain testimony. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

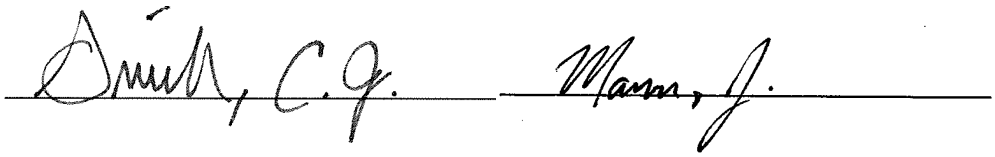
Here, jury instruction 11 reflected the trial court's determination that the evidence was insufficient to support a finding that Garbagni's injuries persisted beyond the date of Dr. Widlan's report. The instruction did not otherwise limit the jury's ability to consider Dr. Widlan's opinion that Garbagni suffered from "mild neurocognitive disorder due to

traumatic brain injury" as a result of the collision. It did so, and awarded nothing. Again, Garbagni shows no ground for appellate relief. See State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006) (judicial comment is not prejudicial where the record affirmatively shows no prejudice could have resulted).

Affirmed.



WE CONCUR:



APPENDIX B – ORDER ON MOTION FOR RECONSIDERATION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAY GARBAGNI,

Appellant,

v.

KAREN DOVE and JOHN DOE DOVE, individually and on behalf of their marital community thereof, and APPRENTICESHIP AND NONTRADITIONAL EMPLOYMENT FOR WOMEN (ANEW), a corporation,

Respondents.

DIVISION ONE

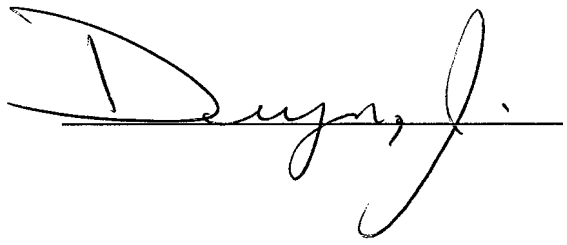
No. 84335-4-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

For the Court:



HERSCHENSOHN LAW, PLLC

October 06, 2023 - 2:43 PM

Filing Petition for Review

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