SC#93739-7

COURT OF APPEALS No. 73926-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ANNE CUTONE,

Appellant/Plaintiff

v.

WAI K. LAW and JANE DOE LAW,
and their marital community,

Respondents/Defendants

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Anne Cutone was the plaintiff in the trial court and the appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Ms. Cutone seeks review of the Court of Appeals' unpublished decision of September 6, 2016. A copy of the Court of Appeals decision is attached as Addendum A.

II. ISSUE PRESENTED FOR REVIEW

Whether the trial court erred when it denied Ms. Cutone's motion in limine to exclude evidence of a 28-year-old collarbone injury without any evidence of pre-existing symptoms in contravention of 50 years of Washington case law.

III. STATEMENT OF THE CASE

A. Facts of Accident

This case arises out of a motor vehicle collision that occurred on November 22, 2010 at a Chevron gas station located in Bellevue, Washington. (RP 154-56). Plaintiff Anne Cutone's vehicle was parked while waiting for an available gas pump. (Id.). Defendant Wai K. Law began backing his vehicle out of the gas pumping area at a high rate of speed. (RP 155, 157). He swung his vehicle outward, and forcefully struck

the front of Plaintiff's vehicle. (RP 157). Defendant admitted that he was negligent for causing the collision shortly before trial.

B. Medical Facts

Following the accident, Anne Cutone contacted her primary care doctor, Daniel Riegel M.D., for his first available appointment. (RP 160-61). Because of her underlying medical conditions, Ms. Cutone did not want to go to an emergency room or another provider for treatment until she could be seen by Dr. Riegel.[1] (RP 71-72).

Ms. Cutone presented to Dr. Riegel on December 1, 2011, nine days following the collision, complaining of a gradual onset of pain since the accident date which was now significant in her right neck, shoulder, low back with occasional radiation down her right arm and leg. (RP 64). Ms. Cutone did not see Dr. Riegel sooner because she travelled with her daughter to visit family over the Thanksgiving holiday and had recently been diagnosed with cancer. (RP 153-54). Dr. Riegel diagnosed Ms. Cutone with a cervical strain, trapezius sprain and lumbosacral sprain on December 1, 2011. (RP 67-68). Among her symptoms, Ms. Cutone experienced numbness and tingling in both of her arms. (RP 74-75).

[1] Anne Cutone has an underlying blood disorder that has not been fully diagnosed but is related to hemophilia.

On June 15, 2011 Ms. Cutone returned to Dr. Riegel after receiving other medical therapy. (RP 73). While she reported some improvement from therapy, Ms. Cutone had continued numbness and tingling in her arms and had increased pins-and-needles sensation and was concerned about thoracic outlet syndrome. (RP 73-74). Dr. Riegel then referred Ms. Cutone to Andrew Lynch, D.O., to assess her thoracic outlet type symptoms. (RP 78-79). Dr. Lynch also testified at trial. (RP 319-69).

Dr. Lynch began treating Anne Cutone on August 2, 2011. (RP 323). On May 10, 2012, Dr. Lynch referred Ms. Cutone to Mark Ombrellaro, M.D., for a vascular evaluation for thoracic outlet syndrome. (RP 327-28).

C. Procedural Background

This case was arbitrated on September 22, 2014 consistent with the King County Mandatory Arbitration Rules. On October 31, 2014, Defendant, by and through State Farm Insurance Company, filed for trial de novo.

On May 4, 2015, Ms. Cutone filed her motions in limine. (CP 22-38). Among these motions, Ms. Cutone moved to exclude evidence that she suffered from pre-existing injuries that were asymptomatic within a reasonable period of time prior to the car accident of November 22, 2010. (CP 7-13). Defendant opposed Ms. Cutone's motions. (CP 64-125). In particular, Defendant argued that Ms. Cutone's collarbone injury that

occurred in either 1981 or 1982 was admissible. (CP 65-68). Defendant produced two expert reports and a declaration from its paid forensic medical expert, Dr. Richard Kremer. (CP 85-95, 96-102). In his declaration, Dr. Kremer states:

> "I noted that plaintiff suffered a fractured clavicle in the 1981-82 automobile accident. The fractured clavicle resulted in structural change and fracture calcification, evident on my physical examination of the plaintiff. This condition, as well as an increase in plaintiff's weight, is more probably than not the cause of plaintiff's alleged thoracic outlet syndrome symptoms, due to intermittent partial obstruction of the right subclavian artery and/or the right subclavian vein."

See CP 73.

According to Dr. Kremer's own report, Ms. Cutone was 5'6" tall and weighed approximately 168 lbs. at the time her CR 35 examination took place on June 18, 2014. (CP 88). Dr. Kremer further notes in his report that Ms. Cutone weighed approximately 30 lbs. less in 2010. (CP 86). Ms. Cutone testified that she stopped exercising regularly after the accident occurred. (RP 169-70). Ms. Cutone was 50 years old at the time of the automobile accident in November 2010.

On the first day of trial, the trial court held oral argument on the parties' motions in limine. (RP 1-46). In particular, counsel for Ms. Cutone specifically argued that Ms. Cutone's 28-year-old collarbone injury was inadmissible under established Washington case law. (RP 9).

The court ruled that Ms. Cutone's 28-year-old collarbone/clavicle injury was admissible during trial. (RP 23). The trial court simply stated:

"I'm going to allow counsel to question witnesses, expert witnesses about whether or not, and his own, about whether or not a prior injury such as a broken clavicle can cause this." (RP 23; see also RP 310-11).

D. .Trial Testimony of Anne Cutone's 1982 Collarbone Injury.

Once the trial court ruled that Ms. Cutone's collarbone injury was admissible, counsel for Ms. Cutone was obligated to address the issue with the Plaintiff. Consequently, Ms. Cutone testified as follows:

Q. All right. So -- and then let me also ask you about did you ever have a collarbone injury?

A. Yes.

Q. And the collarbone injury was when?

A. 1980 something, one or two.

Q. How old were you?

A. 22 or 23.

Q. Did you ever have any problems with your collarbone injury after that point?

A. No. I forgot about it.

(RP 182). Ms. Cutone was also cross-examined about her collarbone injury by defense counsel, James Mendel. (RP 216, 229-30).

At trial, counsel for Ms. Cutone called three of her own treating physicians to testify as treating expert witnesses. Daniel Riegel, M.D., Andrew Lynch, M.D., and Mark Ombrellaro all testified that Ms. Cutone's

thoracic outlet syndrome was caused by the automobile accident of November 22, 2010. (RP 59 and 89; 322-23; 363-64).

Ms. Cutone never was diagnosed with thoracic outlet syndrome before this accident. (RP 159-60). Further, Dr. Ombrellaro and Dr. Lynch were both asked about Ms. Cutone's 28-year-old collarbone injury. Both Dr. Ombrellaro and Dr. Lynch opined that Ms. Cutone's collarbone injury was unrelated to her current diagnosis of thoracic outlet syndrome. (RP 272-77, 282-83, 360-63).[2]

In contrast to Ms. Cutone's treating medical professionals, Defendant hired a forensic physician by the name of Richard Kremer, M.D. At trial, Dr. Kremer testified as follows:

> Q. Now, given your clinical examination did you notice something on plaintiff's clavicle?
>
> A. Yes, she had a -- an area on the right Clavicle between the mid and distal thirds.
>
> Q. Would you demonstrate where that is?
>
> A. Right here. Which is a -- which is a -- and I asked her if she had broken her clavicle and she said that she had. It was a -- an enlargement of the bone where the bone heals by forming a callous. In other words, it was sort of an exaggerated callous, if you will, that I felt on physical exam.
>
> Q. And after you felt that, did you then -- did you have a discussion with the plaintiff and it was only at that point that she remembered actually that happening in the '80s?

[2] Dr. Riegel was not asked about Ms. Cutone's collarbone injury during trial.

A. Yes. That was my -- I asked her how it had happened and she then remembered that how it had happened.

Q. Okay. And so once you felt that, what, did it ring in the bells for you, or what were your thoughts or your opinions as a result of hearing what her symptoms are and then feeling this prominence in her clavicle area?

A. Well, I was concerned about that. Because in general in my experience, most patients with thoracic outlet syndrome do have an antecedent history of trauma in that area. And so I thought well, perhaps that was -- it had -- she had trauma that had occurred which would make the thoracic outlet a more viable possibility in her.

See RP 410-11.

In closing argument, counsel for Ms. Cutone asked the jury to award past and future economic damages in the form of medical expenses, and past and future non-economic damages. Previously during trial, Dr. Riegel and Dr. Ombrellaro both testified that Ms. Cutone's past medical bills of $23,000 were reasonable and necessary, and related to the car accident of November 2010. (RP 107, 272).

On July 21, 2015, the jury returned a verdict in favor of Anne Cutone on causation (CP 190). However, the jury provided extremely minimal compensation as follows: (1) $4,980.00 for past economic damages; (2) $0.00 for future economic damages; (3) $500.00 for past noneconomic damages; and (4) $0.00 for future noneconomic damages.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted because the Court of Appeals ignored 50 years of Washington appellate precedent that prohibits a defendant from introducing a plaintiff's preexisting condition without any evidence of prior symptoms. This is black letter Washington law and a bedrock principle of personal injury law. The Court of Appeals attempted to rationalize its decision to affirm the trial court by reasoning that Defendant's paid forensic medical expert could provide an ***opinion*** that Ms. Cutone was probably experiencing symptoms without a shred of factual or medical.

Ms. Cutone suffered from a collarbone injury when she was approximately 23 years old. There is absolutely no evidence to show that Ms. Cutone ever felt pain after the date of her collarbone injury. There is no evidence that Ms. Cutone even saw a doctor of any kind for this fracture. There are no medical records to show that Ms. Cutone ever had any symptoms following her fracture – let alone evidence of recent symptoms prior to the accident of November 22, 2010. Under long-standing Washington law (and common sense), an expert cannot support his or her opinions based upon speculation.

The Court of Appeals should accept review for three reasons. First, the Court of Appeals' decision directly conflicts with over 50 years of

Washington appellate case law. See RAP 13.4(b)(1). Second, the Court of Appeals decision to affirm the trial court is based upon rank speculation in contravention of numerous Washington appellate decisions. See RAP 13.4(b)(2). And finally, the issue of a plaintiff's preexisting condition is an issue of substantial and increasing public importance, which is litigated on a daily basis in Washington court rooms throughout the state. See RAP 13.4(b)(3).

A. Ms. Cutone's Twenty-Eight-Year-Old Collarbone Injury was Inadmissible under Black Letter Washington Law.

Washington's appellate courts have repeatedly held that if there is no evidence that a pre-existing condition was causing pain or disability before the occurrence, then the lighting up of that pre-existing condition makes a defendant liable for all damages proximately caused to the person in that condition. There is no prior pain or disability to segregate. Bennett v. Messick, 76 Wn.2d 474, 457 P.2d 609 (1969); Greenwood v. Olympic, Inc., 51 Wn.2d 18, 315 P.2d 295 (1957); Reeder v. Sears, Roebuck & Co., 41 Wn.2d 550, 250 P.2d 518 (1952).

In Bennett, the plaintiff injured his ankle prior to the accident. The defense argued that a dormant arthritic condition caused such injury despite evidence that the earlier injury had healed and plaintiff suffered no pain or disability prior to the accident. The Court upheld a jury verdict in favor of plaintiff and held:

> The rule is that when a latent condition itself does not cause pain, suffering, or a disability, but that condition plus an injury brings on pain or disability by aggravating the pre-existing condition and making it active, then the injury, and not the dormant condition, is the proximate cause of the pain and disability. Thus, the party at fault is held for the entire damage as the direct result of the accident.

Id. at 478; see also Xieng v. Peoples Nat'l Bank, 63 Wn. App. 572, 821 P.2d 520 (1991).

In this case, there was a complete and total absence of evidence that Plaintiff Anne Cutone had any symptoms related to her collarbone injury after 1982. If there is no evidence that a prior injury was symptomatic, evidence of that prior injury is inadmissible because it only invites the jury to speculate. Id.

In Vaughan v. Bartell Drug Co., 56 Wn.2d 162, 351 P.2d 925 (1960), there was evidence that a plaintiff had suffered an injury of the same type and in the same location as an injury previously suffered. There was no evidence, however, that any previous injury was symptomatic at the time of the injuries forming the subject of the lawsuit. The court held that admission of prior injury evidence would be irrelevant and speculative, and ultimately ordered a new trial. Id. at 167.

The law has not changed in the fifty-five years since Vaughan. In Harris v. Drake, 116 Wn. App. 261, 288-89, 5 P.3d 350 (2003), the court held that evidence of injuries sustained 14 months prior to the injury complained of, and which had resolved 6 months before the complained of

injury, were properly excluded. In excluding evidence of the previous injury, the court stated:

> Drake argues that the trial court erred by not permitting her to prove that in February 1995, about 14 months before the accident in issue here, Harris had complained of pain to a chiropractor. She did not call the chiropractor in her offer of proof, relying instead on testimony from Harris, Dr. Nacht, and Dr. Finkleman. Harris testified that he had seen the chiropractor for "mid and low back pain" that had subsided prior to the accident in issue here. Dr. Nacht testified that one of the chiropractor's chart notes said, "left shoulder pain, MRI 2/24/95"' that he had no idea what that means"; and that he did not know whether a MRI (magnetic resonance imaging) had been done at that time. Dr. Finkleman testified that in the six months prior to the accident, Harris had not suffered from "ongoing pain or discomfort" in his left shoulder. Dr. Finkleman also testified that after the accident, Harris suffered from an "impingement syndrome" of the left shoulder that "was directly related to the motor vehicle accident" and was not a preexisting condition. **There was no evidence that Harris was experiencing shoulder or back pain just prior to the accident, so that trial court sustained Harris' relevance objection.**
>
> **We agree with the trial courts' ruling. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition IS NOT A PROXIMATE CAUSE of the resulting damages.** Even assuming that Harris had some sort of preexisting condition in his left shoulder, the only reasonable inference from Drake's offer of proof was that such condition was dormant and asymptomatic prior to the accident.

Id. at 288-89 (emphasis added).

The exclusion by the trial court of evidence regarding previously

resolved asymptomatic conditions was upheld on appeal by the Washington Supreme Court:

> [Harris's] surgeon testified that painters often have impingement syndrome problems caused by their profession. **However, there was no evidence of a shoulder problem prior to trial. Even allowing for the possibility of a preexisting condition, the defense failed to show that such a condition was symptomatic prior to the accident. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages.**

Harris v. Drake, 152 Wn.2d 480, 494, 99 P.3d 782 (2004) (citing Bennett v. Messick, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969)) (emphasis added); see also Hoskins v. Reich, 142 Wn. App. 557, 174 P.3d 1250 (2008), rev. denied, 164 Wn.2d 1014, 195 P.3d 88 (following Harris v. Drake, on this issue).

Like the plaintiff in Harris v. Drake, Anne Cutone was asymptomatic after injuring her collarbone in approximately 1982. Permitting the Defendant to ask Ms. Cutone about her prior collarbone injury invited the jury to speculate about this pre-existing condition, especially given the lack of any symptoms at any time prior to the collision of November 22, 2010.

In Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), the Washington Supreme Court addressed why the introduction of such evidence would be improperly prejudicial to plaintiff in the context

of post-accident speculative evidence, which equally applies to pre-accident speculative evidence:

> Sherman was involved in two rear-end collisions after his 1972 industrial accident. Dr. Bridgeford, Sherman's medical witness, testified that these accidents had no effect on Sherman's low back condition but may have resulted in some injury to his neck and upper back. Respondent's counsel asked Dr. Bridgeford and Dr. Monk, Sherman's other medical witness, whether automobile accidents or other trauma could also aggravate pre-existing low back condition.
>
> Because no showing was made that Sherman's subsequent auto accidents had any effect on his disability, respondent's questions were misleading. **Such questions improperly suggested to the jury that there may have been a superseding cause of Sherman's condition although no proof of such a cause is in the record.**

Id. at 691-92 (emphasis added).

This logic applies equally in this case. As a result of the trial court's ruling on the collarbone issue, counsel for Ms. Cutone was forced to confront this issue from the trial's inception, including opening statement. Defense counsel questioned three medical expert witnesses throughout the trial in regards to the collarbone injury. Defense counsel also cross-examined Ms. Cutone extensively on her collarbone injury. And finally, defense counsel's principal explanation as to the cause of Ms. Cutone's ongoing medical problems was focused upon her collarbone injury that she suffered while she was attending college.

The trial court manifestly abused its discretion by ignoring 56 years of Washington precedent. See e.g., Harris v. Drake, 152 Wn.2d 480, 494, 99 P.3d 782 (2004); see also Hoskins v. Reich, 142 Wn. App. 557, 174 P.3d 1250 (2008), rev. denied, 164 Wn.2d 1014, 195 P.3d 88 (following Harris v. Drake, on this issue). The only explanation the trial court provided to explain its decision to admit evidence of Ms. Cutone's 28 year old collarbone injury was the following: "I'm going to allow counsel to question witnesses, expert witnesses about whether or not, and his own, about whether or not a prior injury such as a broken clavicle can cause this." (RP 23). The Court's analysis and conclusion is untenable, insupportable, and unjust.

B. The Court of Appeals' Decision Relies Upon Rank Speculation.

The Court of Appeals' decision to affirm the trial court relies completely upon the following statement contained in Dr. Richard Kremer's report as quoted by the Court of Appeals as follows:

> [I]t is more likely than not, that plaintiff continued to suffer from symptomatic conditions prior to the subject accident on a more probable than not basis.

See Addendum A at pg. 5.

The problem with the Court of Appeals' reliance upon this statement is that it is completely lacking a factual basis. Ms. Cutone never suffered from any symptoms after her injury when she was 23 years old. Further, none of Ms. Cutone's voluminous medical records reference her

collarbone injury in any manner whatsoever. Thus, Dr. Kremer's "opinion" is 100% speculative.

At oral argument and in its briefing before the Court of Appeals. Plaintiff argued that Dr. Kremer's opinion was not supported by a factual basis and was thus wholly speculative. The Court of Appeals analysis of this legal question is contained in its opinion as follows: "Not so."

The Washington Courts of Appeals have long held that the opinions of an expert must be based on facts. "An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." Theonnes v. Hazen, 37 Wn. App. 644, 648, 681 P.2d 1284, 1286–87 (1984) "[T]he opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation." (citing Anton v. Chicago, M. & St. P.R. Co., 92 Wash. 305, 159 Pac. 115 (1916)). "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." Safeco Ins. Co. v. McGrath, 63 Wash. App. 170, 177, 817 P.2d 861, 865 (1991) *review denied,* 118 Wn.2d 1010, 824 P.2d 490 (1992). "In addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Miller v. Likins, 109 Wn.App. 140, 148, 34 P.3d 835, 839 (2001).

VI. CONCLUSION

For more than 50 years, the appellate courts of Washington have held that pre-existing injuries are inadmissible without evidence of recent symptoms. In this case, there is not a shred of evidence that Anne Cutone suffered pain, discomfort or symptoms of any kind relating to her collarbone injury when she was 23 years old or at any point thereafter.

The Washington Supreme Court should accept review in this case because the Court of Appeals ignored over 50 years of Washington precedent. The Supreme Court should also accept review in this case because the preexisting injury rule is litigated frequently and should be further clarified and endorsed by this Court to assist practitioners and judges on this issue of public importance in the area of personal injury law.

Respectfully submitted this 6th day of October 2016.

DEARIE LAW GROUP, P.S.

By:_____
Raymond J. Dearie, WSBA #28792
Attorney for Petitioner Anne Cutone

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 6th day of October 2016 a true and correct copy of the foregoing *Petition for Review* was served upon the following parties and their counsel of record in the manner indicated below:

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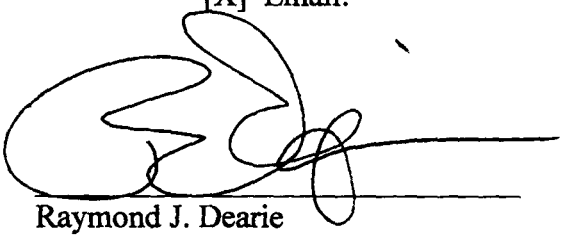

Raymond J. Dearie

Addendum A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANNE CUTONE, Appellant, v. WAI K. LAW and JANE DOE LAW, and their marital community, Respondents.	)	No. 73926-3-I DIVISION ONE UNPUBLISHED FILED: September 6, 2016

Cox, J. — Anne Cutone appeals the judgment on a jury verdict in this personal injury case. Because the trial court did not abuse its discretion by denying, in part, Cutone's motion in limine and deciding that limited evidence of her prior injury would be admissible at trial, we affirm.

Cutone and Wai Law were involved in a car accident. Based on Law's admission that he was negligent, causation and damages were remaining issues at trial.

Cutone claimed that the accident gave her thoracic outlet syndrome. Law argued that Cutone's complaints were related to a prior injury and were not caused by this 2010 car accident.

In her motion in limine, Cutone moved to exclude evidence of her prior injuries. The trial court denied, in part, Cutone's motion and allowed opposing counsel to question expert witnesses "about whether or not a prior injury such as a broken clavicle" could cause Cutone's claimed injuries.[1] The trial court specifically prohibited Law from mentioning that a car accident caused the prior injury.

At trial, Cutone's three treating physicians concluded that the car accident caused Cutone's claimed thoracic outlet syndrome. Conversely, Law's medical expert, who performed a CR 35 examination of Cutone prior to trial, testified that she did not sustain thoracic outlet syndrome, or any injuries, from this 2010 car accident.

The jury rendered its verdict in Cutone's favor in the total amount of $5,480.00. This included past economic and noneconomic damages. The jury did not award her future economic or noneconomic damages. The trial court entered a judgment on the jury verdict.

Cutone appeals.

IN LIMINE RULING

Cutone argues that the trial court abused its discretion by partially denying her motion in limine to exclude evidence of her prior injury. We hold that the trial court properly exercised its discretion in its ruling.

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[1] Report of Proceedings (July 13, 2015) at 23.

Trial courts have "wide discretion to determine the admissibility of evidence."[2] Courts may grant motions in limine if the motions describe "the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial."[3]

We review for abuse of discretion a trial court's decision to admit evidence.[4] "'An abuse of discretion exists [w]hen a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.'"[5]

In Harris v. Drake, the supreme court reiterated the rule that "[w]hen an accident lights up and makes active a preexisting condition that was ***dormant and asymptomatic*** immediately prior to [an] accident, the preexisting condition is not a proximate cause of the resulting damages."[6]

In Hoskins v. Reich, following Harris, Division Two of this court stated that evidence of a party's pre-accident treatment was not relevant to proximate cause and damages because there was no "evidence of symptoms or a preexisting

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[2] State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (plurality opinion).

[3] Douglas v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

[4] State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014).

[5] Id. at 197 (alteration in original) (internal quotation marks omitted) (quoting State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)).

[6] 152 Wn.2d 480, 494, 99 P.3d 872 (2004) (emphasis added).

condition subject to a natural progression."[7] Thus, Division Two of this court concluded that the trial court in that case abused its discretion in admitting evidence of a party's pre-accident chiropractic treatment because there was no evidence of a symptomatic condition prior to the accident.[8]

Here, before trial, Cutone moved to exclude evidence of her prior injuries. The legal question was whether there was medical evidence to show that this accident made active a preexisting condition that was neither dormant nor asymptomatic. If the answer to that question was yes, the evidence was relevant and admissible at trial.

At the motion hearing, Cutone argued that she was not symptomatic prior to this car accident with Law. Law's medical expert, Dr. Richard M. Kremer, who performed a CR 35 examination of Cutone, testified otherwise.

His declaration and written report of his CR 35 examination state his medical opinions under the proper standard: that they are on a more probable than not basis to a reasonable degree of medical certainty.[9]

He testified that Cutone:

> suffered a fractured clavicle in the 1981-82 automobile accident. The fractured clavicle resulted in a structural change and fracture calcification, evident on my physical examination of the plaintiff. This condition, as well as an increase in plaintiff's weight, is more probably than not the cause of plaintiff's alleged thoracic outlet

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[7] 142 Wn. App. 557, 568, 174 P.3d 1250 (2008).

[8] Id.

[9] Clerk's Papers at 74.

> syndrome symptoms, due to intermittent partial obstruction of the right subclavian artery and/or the right subclavian vein.[10]

He further testified that:

> Given plaintiff's long-standing and chronic complaints of neck and back pain, it is more likely than not, that plaintiff continued to suffer from symptomatic conditions prior to the subject accident on a more probable than not basis.[11]

The CR 35 examination report states, among other things, in response to a series of questions:

> Did plaintiff suffer from any preexisting conditions that were asymptomatic but "lit up" in the collision?
>
> The only preexisting condition that the plaintiff has is the previous cervical trauma caused by a motor vehicle accident in 1981-1982 time frame, with broken clavicle, which is identifiable on physical examination. This only came to light during my examination when I noted the callous formation of the clavicle and asked the plaintiff if she had ever broken her collar bone. This, as well as increase in the plaintiff's weight, could cause an anatomic situation in the area of the thoracic outlet, which could cause intermittent partial obstruction to the right subclavian artery in an individual who admittedly sleeps solely on her back. This may also be supported by the vascular testing which was positive in the resting position and with the Adson's maneuver, an unusual set of findings. I do not believe that any condition was "lit up" by the collision.[12]

The trial court denied, in part, Cutone's motion. The court ruled that opposing counsel would be allowed at trial to question expert witnesses "about whether or not a prior injury such as a broken clavicle" could have caused

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[10] Id. at 73.

[11] Id. at 74.

[12] Id. at 89.

Cutone's claimed injuries.[13] The court excluded any mention of the fact that an automobile accident caused the prior injury. There was no abuse of discretion in this ruling.

This medical expert opinion is sufficient to show that Cutone's preexisting condition was neither dormant nor asymptomatic. Accordingly, it was relevant to the question of proximate cause, as presented to the court at the time of the motion in limine. What developed later, at trial, was not relevant to the question of what was before the court at the time of the motion.

Cutone argues that this medical expert opinion was speculative. Not so. In any event, it was within the trial court's discretion to allow the trier of fact, in this case the jury, to determine the witnesses' credibility.

Because we have resolved this matter on the basis discussed, we need not address the other arguments raised by the parties.

We affirm the judgment on the jury verdict.

Cox, J.

WE CONCUR:

[13] Report of Proceedings (July 13, 2015) at 23.