

No. 34127-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

ASHLEE J. JOHNSON,	)	
	)	Cowlitz County Circuit
Respondent,	)	Court Case No.
	)	04 2 02275 5
v.	)	
	)	
THOMAS JOHNSON	)	
	)	
Appellant.	)	

---

**APPELLANT'S OPENING BRIEF**

---

Michael A. Lehner, WSB #14189  
 LEHNER & RODRIGUES  
 Attorneys for Appellant

1150 Crown Plaza  
 1500 S.W. First Avenue  
 Portland, Oregon 97201-5834  
 Telephone: (503) 226-2225

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
A. ASSIGNMENTS OF ERROR .....	1
No. 1 .....	1
No. 2 .....	1
No. 3 .....	1
B. ISSUES FOR REVIEW .....	1
No. 1 .....	1
No. 2 .....	2
No. 3 .....	2
No. 4 .....	2
No. 5 .....	2
No. 6 .....	2
C. STATEMENT OF THE CASE .....	2
NATURE OF THE JUDGMENT .....	2
SUMMARY OF FACTS .....	3
ARGUMENT .....	5
Assignment of Error No. 1 .....	5
Issue No. 1 .....	5
Issue No. 2 .....	7
Issue No. 3 .....	10
Assignment of Error No. 2 .....	11
Issue No. 4 .....	11
Issue No. 5 .....	15
Assignment of Error No. 3 .....	17
Issue No. 6 .....	17
CONCLUSION .....	18

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Berger v. Sonneland</i> , 144 Wn2d 91, 110, 26 P3d 257, 267 (2001) . . . . .	7
<i>Brown v. Superior Underwriters</i> , 30 Wn App 303, 306, 632 P2d 887 (1980) . . . . .	6
<i>Church v. West</i> , 75 Wn2d 502, 506, 452 P2d 265 (1969) . . . . .	13
<i>Conrad v. Alderwood Manor</i> , 119 Wn App 275, 280, 78 P3d 177, 181 (2003) . . . . .	6
<i>Erdman v. Lower Yakima Valley, Washington Lodge No. 2112</i> , 41 Wn App 197, 208, 704 P2d 150 (1985) . . . . .	9, 10
<i>Harris v. Groth</i> , 99 Wn2d 448, 449, 663 P2d 113 (1983) . . . . .	7
<i>Ma'Ele v. Arrington</i> , 111 Wn App 557, 564, 45 P3d 557, 561 (2002) . . .	8
<i>Miller v. Staton</i> , 58 Wn2d 879, 886, 365 P2d 333 (1961) . . . . .	8
<i>Patterson v. Horton</i> , 84 Wn App 531, 543, 929 P2d 1125, 1130 (1997) . . . . .	8, 13
<i>State v. Larson</i> , 62 Wn2d 64, 381 P2d 120 (1963) . . . . .	18
<i>State ex rel Henderson v. Woods</i> , 72 Wn App 544, 865 P2d 33 (1994) . . . . .	18
<i>Stevens v. Gordon</i> , 118 Wn App 43, 55, 74 P3d 653 (2003) . . . . .	10
<i>Williams v. Hoffer</i> , 30 Wn2d 253, 265, 191 P2d 306, 312 (1948) . . . . .	11
Other:	
5 <i>Carl B Tegland</i> , Washington Practice: Evidence Law & Practice Section 103.14 at 52 (4 <sup>th</sup> ed. 1999) . . . . .	12

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying defendant's motion for partial directed verdict and post-trial motion for judgment as a matter of law concerning plaintiff's claim for future economic loss. (CP No. 39, pp. 106-108)
2. The trial court erred by providing the jury with Instruction No. 8 concerning the plaintiff's obligation to repay insurance benefits as follows:  
  
"Some medical expenses claimed herein have been paid by an insurance company. The plaintiff is required to ask for these expenses as damages and to repay them if awarded. You are not to make, decline to make, increase or decrease any award because you believe a party does or does not have medical insurance, workers' compensation, liability insurance or some other form of coverage." (CP No. 27, Instruction No. 8; CP No. 39, pp. 106-108)
3. The failure of the trial court to prepare an adequate record for review requires a remand for new trial.

**B. ISSUES FOR REVIEW**

1. Was there sufficient evidence for the jury to find future economic loss of \$50,865.00? (Assignment of Error No. 1)

2. May a plaintiff recover damages for medical expense in the absence of testimony by a qualified expert that the treatment is both reasonable and necessary? (Assignment of Error No. 1)
3. May a plaintiff recover damages for medical expense in the absence of testimony as to the amount of expense incurred? (Assignment of Error No. 1)
4. Did the introduction of insurance in the case deprive defendant of a fair trial? (Assignment of Error No. 2)
5. Did the court's instruction on insurance constitute an impermissible comment on the evidence? (Assignment of Error No. 2)
6. Is defendant entitled to a new trial because the trial court failed to make an adequate record for appeal? (Assignment of Error No. 3)

**C. STATEMENT OF THE CASE**

**NATURE OF THE JUDGMENT**

This is an appeal from a final judgment following a jury trial in an action at law wherein the plaintiff sought damages for economic and non-economic loss sustained as the result of a bodily injury. Plaintiff's complaint alleged her injury was caused by a motor vehicle accident which occurred because of the negligence of the defendant.

Defendant admitted liability for the accident but denied the nature and extent of injuries and economic loss. At the conclusion of the trial

defendant made a motion to dismiss the claim for future economic loss, which was denied. The jury returned a verdict, including damages for past and future economic loss, of \$60,176.82. Defendant made a post-trial motion pursuant to CR 50, asking the court to enter a judgment as a matter of law disregarding the damages for future economic loss. Defendant's motions were based on the argument that plaintiff failed to present sufficient evidence for the jury to find those damages. It was undisputed that past economic loss for medical expense and wage loss totaled \$2,440.82. Plaintiff's total claim for past economic loss was \$9,301.82. The jury was not asked to award any future economic loss other than medical expense. Therefore, assuming the jury awarded plaintiff all of her claim for past economic loss, the award for future medical expenses was \$50,865.

#### **SUMMARY OF FACTS**

On May 25, 2003, plaintiff was a passenger in a vehicle operated by defendant when they became involved in a single vehicle rollover accident. CP 1-5. Plaintiff did not have any visible cuts or bruises and did not seek medical treatment the night of the accident. RP 54. The day after the accident she was examined at an emergency room and found to have

pain in her upper back, trapezius, shoulders and neck. RP 55. Thereafter, plaintiff received care from a chiropractor, a medical doctor and an acupuncturist. These care providers testified at trial.

Dr. Clayton Bartness, a chiropractor, testified that soft-tissue injuries similar to those suffered by plaintiff often resolve within six months. If symptoms last longer they are “probably more chronic”, but he said “it’s very hard to speculate” as to whether symptoms would resolve. RP 29. Dr. Bartness said such patients “could have” symptoms off and on. RP 30. Dr. Bartness treated plaintiff from July 11, 2003 until May 5, 2004. He opined she has a reversed cervical Kyphosis which makes her more susceptible to re-injury. He states that with such conditions “some people are pain free” and others have symptoms. RP 37. He speculated this plaintiff may have accelerated degeneration. RP 40. Concerning her need for future medical care, he recommended only exercise. RP 41, 47. He did not recommend medication, and he stated physical therapy was of no help to her. RP 40-41, 43. He also said she is not a candidate for surgery. RP 44.

Dr. Richard Kirkpatrick also testified for plaintiff. His specialty is internal medicine. RP 63. He agreed with Dr. Bartness that 80 to 90% of

patients with soft-tissue injuries like plaintiffs resolve quickly. RP 67.

His advice for the future was to “work out” and “stay trim”. RP 70. When asked, he was unable to give an opinion about the amount of future health care costs. RP 79.

Plaintiff’s final medical witness was Patricia Kuchar, an acupuncture specialist. She treated plaintiff from February 25, 2004 until July 7, 2004. RP 91. She stated if plaintiff’s pain reoccurred it could be relieved with acupuncture. RP 94. She thought plaintiff’s pain complaints could wax and wane. She was asked about future health care costs but simply stated “everything costs more”. RP 94. Ms. Kuchar expressed no opinion about whether plaintiff would need future acupuncture or, if so, at what frequency or cost.

### **ARGUMENT**

**Assignment of Error No. 1:** The trial court erred in denying defendant’s motions for partial directed verdict and judgment as a matter of law because there was insufficient evidence to support an award of damages for future economic loss.

**Issue No. 1:** A verdict without sufficient support in the evidence should not be allowed to stand.

When determining a motion for directed verdict or a motion for judgment as a matter of law, the court must view the evidence most favorably to the non-moving party, but the motion should be granted when there is “no substantial evidence or reasonable inference to sustain a verdict.” *Conrad v. Alderwood Manor*, 119 Wn App 275, 280, 78 P3d 177, 181 (2003). To support the verdict the evidence must be “sufficient to persuade a fair-minded, rational person of the truth” of the jury’s finding. *Conrad, Id.*, quoting *Brown v. Superior Underwriters*, 30 Wn App 303, 306, 632 P2d 887 (1980).

In this case, the jury awarded damages of \$50,865 for future medical expense without any evidence to support the conclusion that future medical care was necessary. There was no evidence that plaintiff would require future medical care on a more probable than not basis. In addition, there was no evidence as to the cost or likely extent of future medical care.

The conclusion that medical care would be necessary, as well as the probable cost of such care, involves the formulation of an opinion. The jury is not capable of forming that opinion without hearing opinion evidence from a qualified expert that the treatment is necessary from a

medical standpoint and that the proposed cost is reasonable. Here, there was no evidence that future treatment was medically necessary and no evidence to support the conclusion that future treatment would cost \$50,865.

**Issue No. 2:** Testimony by a qualified medical expert is required to show the need for future medical care.

As a general rule, expert testimony is required to establish an element of plaintiff's case when the conclusion is beyond the expertise of a layperson. *Berger v. Sonneland*, 144 Wn2d 91, 110, 26 P3d 257, 267 (2001), citing *Harris v. Groth*, 99 Wn2d 448, 449, 663 P2d 113 (1983). As stated by the court in *Berger*, "medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training". *Berger, supra*, 144 Wn2d at 111.

Opinion testimony by a lay witness is not permitted if it concerns scientific, technical or specialized knowledge. ER 701. Expert testimony is required to establish plaintiff's injury where it is subjective and unobservable in nature. In *Berger*, the court held expert testimony was needed to establish plaintiff's claim of emotional distress. It stands to

reason that if the medical condition must be shown by a medical expert, the treatment needed must also be shown by a medical expert.

It is understood that evidence of medical expense is not relevant unless there is testimony showing the expense was reasonable in amount and necessary for treatment. *Patterson v. Horton*, 84 Wn App 531, 543, 929 P2d 1125, 1130 (1997). In addition, the causal relationship between an accident and the claimed injury must be shown by expert testimony. Causation must be shown by a “more-likely-than-not standard”. *Ma’Ele v. Arrington*, 111 Wn App 557, 564, 45 P3d 557, 561 (2002), citing *Miller v. Staton*, 58 Wn2d 879, 886, 365 P2d 333 (1961).

The proof required for causation logically must apply to the cause of the medical expense, as well as the cause of the medical condition. There is no evidence in this case that the plaintiff needed any continued medical care to treat or cure her medical condition. Dr. Bartness recommended exercise and did not recommend any form of medical treatment. Dr. Kirkpatrick advised her to stay in shape and work out. There was testimony by the acupuncturist that future acupuncture treatment could relieve pain if it reoccurs. However, that answer was in

response to a hypothetical question from plaintiff's counsel as to whether pain could be relieved if it occurred "twenty years from now". RP 94.

None of the medical experts testified that future medical care was necessary from a medical standpoint. No medical opinions were expressed as to a reasonable course of future treatment. There was no evidence as to the frequency or type of future treatment. Finally, there was no evidence as to the cost of future treatment. In the absence of this evidence, presented through the opinions of a qualified expert, the jury could not be allowed to render a lay opinion that future treatment would be necessary at a cost which they could only have arrived at through speculation. If a lay person is incapable of expressing those opinions, the jury is incapable of adopting those opinions without expert support.

In the trial court plaintiff relied upon *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112*, 41 Wn App 197, 208, 704 P2d 150 (1985) in support of her argument there was sufficient evidence. *Erdman* is distinguishable in that the court there was faced with the type of medical condition which does not require medical expertise. The plaintiff in that case was described as "like a kid" due to significant brain impairment. There was testimony he would need assistance in making decisions and

performing simple tasks, such as dressing and eating. In those circumstances the jury could reasonably infer that future care will be required. In addition, in *Erdman* plaintiff was receiving treatment right up to the time of trial. In this case plaintiff had not received any treatment during the thirteen months before trial. The jury in these circumstances should not have been allowed to speculate that future medical care would be necessary and there is no support in the record for the amount awarded by the jury.

**Issue No. 3:** Future medical expense should not be awarded without evidence of the reasonable cost.

The correct method of proving the cost of future medical care was demonstrated in *Stevens v. Gordon*, 118 Wn App 43, 55, 74 P3d 653 (2003), wherein the plaintiff's doctor testified in terms of reasonable medical probability and on a more probable than not basis that the plaintiff would require future medical care. The doctor in that case also provided his opinion as to the estimated cost of such future medical care. No such evidence was presented in this case. That evidence was required in the circumstances of this case to justify the jury's award of damages for future

medical expense. The judgment should be reduced by the amount which was unsupported, i.e., \$50,865.

**Assignment of Error No. 2:** The trial court erred in denying defendant's motion for new trial based on improper introduction of insurance.

**Issue No. 4:** Did the introduction of insurance deprive defendant of a fair trial?

It has long been recognized that it is prejudicial error to allow evidence of insurance in a trial for negligent personal injury. As stated in *Williams v. Hoffer*, 30 Wn2d 253, 265, 191 P2d 306, 312 (1948): "It is undoubtedly the general rule in this state, in personal injury cases, that the fact that the defendant carries liability insurance is entirely immaterial on the main issue of liability, and that the wanton intrusion of such fact by the plaintiff is positive error, essentially prejudicial to the defendant, and constitutes ground for reversal". 30 Wn2d at 265.

On the other hand, when insurance is mentioned inadvertently, a mistrial may not be appropriate. In this case, plaintiff's counsel intentionally introduced evidence of insurance by asking the plaintiff whether she delayed her medical care to determine whether she had

insurance. [The record concerning this testimony is incomplete but colloquy concerning the circumstances can be found in the record of proceedings dealing with jury instructions at RP 64-66]. This testimony of plaintiff was offered on redirect to rebut her own earlier testimony on cross-examination to the effect that the delay occurred because her symptoms were minor. Defendant objected to plaintiff's question on redirect but the trial court overruled the objection on the basis that defendant had "opened the door" by questioning plaintiff on the delay of 34 hours between the motor vehicle accident and her initial medical care.

The court's ruling that defendant opened the door was incorrect. A party opens the door when inadmissible evidence is introduced in direct or cross-examination. 5 *Carl B Tegland*, Washington Practice: Evidence Law & Practice Section 103.14 at 52 (4<sup>th</sup> ed. 1999). The opposing party may then introduce relevant but otherwise inadmissible evidence in cross-examination or redirect examination in order to contradict or explain the evidence offered. 5 Washington Practice, *supra* at 52-53. The use of inadmissible evidence triggers application of the open door rule. 5 Wash Practice, *supra* at 62. As stated by Professor Tegland, "if a party simply introduces evidence that is admissible, albeit damaging to the opponent's

case, introduction of the evidence does not open the door to rebuttal by inadmissible evidence. 5 Wash Practice, *supra* at 62 (citing *Patterson v. Kannewick Public Hospital District No. 1*, 57 Wn App 739, 744-745, 790 P2d 195 (1990)).

The evidence introduced by defendant during cross-examination of the plaintiff was admissible evidence regarding her delay in treatment. That evidence did not open the door to the admission of inadmissible evidence by plaintiff during redirect. The court's conclusion to the contrary was error.

It has long been held that evidence of liability insurance is entirely immaterial and the deliberate injection of insurance for the purpose of prejudicing a jury is grounds for a mistrial. *Church v. West*, 75 Wn2d 502, 506, 452 P2d 265 (1969). In this case, the testimony offered by plaintiff during redirect did not specify the type of insurance, because she merely stated she delayed seeking care until she confirmed there was insurance. This testimony informed the jury that insurance paid for her medical treatment and the jury could easily conclude this was insurance provided by the defendant and that insurance was available to pay any further damages to be awarded by the jury.

The rationale for excluding evidence of insurance is that it suggests a basis for a verdict which is unfair and unrelated to the merits of the claim. Once jurors know there is insurance to pay a claim they are inclined to award damages. Close questions are more likely to be resolved in favor of providing more compensation if its known that insurance may fund the award. Granted, many jurors may wonder if insurance is available and may speculate as to how a judgment will be paid. But, it is unfair to reinforce the belief that they need not worry about the source of payment. Insurance availability is even more damaging to the defense because prejudice and bias against insurers is very common. In addition, since the plaintiff and defendant in this case are husband and wife, once the suggestion of insurance is given to the jury, they could easily conclude this is a “friendly” lawsuit in which both plaintiff and defendant will benefit from a large verdict to be paid by an insurer.

Jury verdicts should be based only on evidence bearing on fault for the accident and fair compensation for a proven injury. The existence of insurance has no tendency to prove or disprove any of the issues the jury will decide.

**Issue No. 5:** The Court's jury instruction constituted an impermissible comment on the evidence.

Plaintiff's counsel submitted a proposed instruction which modified pattern instruction 2.13 by making specific reference to plaintiff's receipt of insurance to pay medical bills. CP 26, pp. 53-54. RP 64. Plaintiff's justification for the instruction was that it was needed to explain that benefits received by plaintiff had to be paid back to insurers via their subrogation rights. Defendant objected but the court gave a modified instruction as follows:

“Some medical expenses claimed herein have been paid by an insurance company. The plaintiff is required to ask for these expenses as damages and to repay them if awarded. You are not to make, decline to make, increase or decrease any award because you believe a party does or does not have medical insurance, workers' compensation, liability insurance or some other form of coverage.” CP 27, Instruction No. 8.

Defendant made timely exception to the modified instruction. RP 69, 84.

The instruction included a comment on the evidence in that it adopted and enforced plaintiff's claim that she delayed seeking treatment until she confirmed insurance was available. Because the only mention of

insurance in the testimony was plaintiff's explanation about her delay in seeking treatment, the court's instruction that insurance was received by plaintiff reinforced that claim. Defendant's evidence during cross-examination of plaintiff was that she delayed medical care because she wasn't seriously hurt. The instruction from the court conveyed the court's view that plaintiff's testimony was correct and defendant's theory was wrong.

The instruction also once again rang the bell that insurance was available, i.e., no one would be impacted by their verdict other than the wealthy insurance company. The pattern instruction no. 2.13 was created for the express purpose of telling the jury that insurance should not be considered. The instruction given by the court, on the other hand, asked the jury to consider that medical expenses paid by insurance must be repaid. There is no evidence in the record to support the claim in the instruction that "plaintiff is required to ask for these expenses as damages," or that plaintiff is required "to repay them if awarded".

The existence of insurance was wilfully and intentionally injected into the case by plaintiff. The court exacerbated the error by instructing the jury that plaintiff did collect insurance; was required to include those

benefits in her claim; and was required to repay those benefits. This was information not supported by the evidence and information which was entirely immaterial to any issue to be decided by the jury. In addition, key language from the pattern cautionary jury instruction concerning insurance was omitted when the court gave its instruction no. 8. It did not include the language as follows:

“You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide.”

The instruction as modified by the court unfairly commented on the evidence in plaintiff’s favor and unfairly reminded the jury that insurance was available to cover the plaintiff’s damages.

**Assignment of Error No. 3:**

**Issue No. 6:** Reversal and remand for a new trial should be ordered if the record of proceedings is incomplete so as to deprive the defendant of a fair appeal.

As noted above, the record of proceedings in this case is incomplete. The redirect testimony of the plaintiff is not in the record. The record does not include all of the colloquy concerning jury

instructions, nor does it include closing arguments of counsel. There are other gaps in the record of proceedings which may affect the court's review of the assignments of error discussed above.

To the extent the court is unable to fully evaluate the alleged error, defendant is deprived of fair opportunity to present this appeal. The trial court is required to maintain and prepare an adequate record of these proceedings and its failure to do so results in unfairness to the defendant and should result in an automatic reversal and remand for new trial. See *State v. Larson*, 62 Wn2d 64, 381 P2d 120 (1963) and *State ex rel Henderson v. Woods*, 72 Wn App 544, 865 P2d 33 (1994).

### **CONCLUSION**

Because of the error discussed above under defendant's first assignment of error and issues 1, 2 and 3, this case should be remanded to the trial court with instructions to enter a judgment in favor of plaintiff awarding non-economic damages of \$5,000 and economic damages of \$9,301.82. This represents the original verdict returned by the jury, reduced by future medical expense award of \$50,865.

In the alternative, this case should be remanded to the trial court for new trial for the reasons discussed in Assignments of Error 2 and 3.

DATED this 28<sup>th</sup> day of June, 2006.

LEHNER & RODRIGUES PC

By   
Michael A. Lehner, WSB #14189  
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the original and 1 copy of **APPELLANT'S OPENING BRIEF** was filed with the State Court Administrator on June 28, 2006, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with first-class postage thereon fully prepaid and addressed as follows:

Court Clerk  
Washington Court of Appeals  
Division II  
950 Broadway, Ste. 300 MS TB-06  
Tacoma, WA 98402-4454

RECEIVED  
JUN 29 2006  
MAY 16 10 41 AM '06

I hereby certify that I served a true copy of the foregoing **APPELLANT'S OPENING BRIEF** on:

Duane C. Crandall  
Crandall, O'Neill & McReary, P.S.  
1447 Third Avenue, Suite A  
PO Box 336  
Longview, WA 98632  
Attorney for Respondent

- by causing a full, true and correct copy thereof to be **MAILED** in a sealed, postage-paid enveloped, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;
- By causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;
- By causing a full, true and correct copy thereof to be **FAXED** to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

DATED this 28th day of June, 2006.

LEHNER & RODRIGUES PC

By Michael A. Lehner  
Michael A. Lehner, WSB #14189  
Of Attorneys for Appellant