

No. 34127-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ASHLEE J. JOHNSON,)
)
 Respondent,)
)
 v.)
)
 THOMAS JOHNSON,)
)
 Appellant.)
 _____)

Cowlitz County Superior
Court Case No.
04 2 02275 5

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JAN 12 2005
COWLITZ COUNTY SUPERIOR COURT
COURT CLERK

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. <u>ISSUES</u>	1
No. 1.....	1
No. 2.....	1
No. 3.....	1
No. 4.....	1
II. <u>STATEMENT OF THE CASE</u>	1
A. Sufficiency of the Evidence re: Damages.....	1
B. Jury Instruction No. 8.....	7
C. Insurance.....	7
III. <u>ARGUMENT</u>	8
A. Damages.....	8
B. Legal Requirements for Proving Damages.....	10
C. Evidence of the Specific Dollar Costs of Future Medical Expenses is Not Required.....	13
D. Insurance.....	17
E. Challenged Jury Instruction.....	19
V. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bigelow v. RKO Pictures, Inc.</i> , 327 U.S. 251, 265, 90 L.Ed. 652, 66 S. Ct. 574 (1946).....	12
<i>Bingaman v. Grays Harbor Comm. Hosp.</i> , 103 Wn.2d 831, 699 P.2d 1230 (1985).....	9
<i>Bingaman, supra</i> , at 836.....	10
<i>Bitzan v. Parisi</i> , 88 Wn.2d 116, 558 P.2d 775 (1977).....	15
<i>Carson v. Fine</i> , 123 Wn.2d 206, 225-26 (1994).....	17
<i>Bunch v. Dept. of Youth Servs.</i> , 155 Wn.2d 165, 176 (2005).....	10
<i>Erdman v. B.P.O.E.</i> , 41 Wn.App. 197, 704 P.2d 150 (1985).....	13
<i>Erdman v. B.P.O.E., supra</i> , at 209-210.....	12
<i>Erdman v. Lower Yakima Valley</i> , 41 Wn.App. 197, 208, <i>rev. denied</i> , 104 Wn. 2d 1030 1985).....	17
<i>Federal Signal v. Safety Factors</i> , 125 Wn.2d 413, 439, 886 P.2d 172 (1994).....	9
<i>Goldengate Hop Ranch, Inc. v. Velsicol Chem. Corp.</i> , 66 Wn.2d 469, 403 P.2d 351 (1965).....	12, 15
<i>Hinsman v. Palmanteer</i> , 81 Wn.2d 327, 501 P.2d 1228 (1972).....	15
<i>Johnson v. Weyerhaeuser Co.</i> , 134 Wn.2d 795 (1998).....	17
<i>Kramer v. Portland-Seattle Auto Freight</i> , 43 Wn.2d 386, 261 P.2d 692 (1953).....	12, 15

<u>Cases</u>	<u>Page</u>
<i>Larsen v. Walton Plywood</i> , 65 Wn.2d 1, 390 P.2d 677 (1964).....	15
<i>Larson v. Union Inv. Loan Co.</i> , 168 Wash. 5, 11, 10 P.2d 557 (1932).....	11, 15
<i>Leak v. United States Rubber Company</i> , 9 Wn.App. 98, 511 P.2d 88 (1973).....	13, 15
<i>Leak v. United States Rubber Co.</i> , <i>supra</i> , at 104.....	14
<i>Lewis River Golf v. O.M. Scott & Sons</i> , 120 Wn. 2d 712, 717-718, 845 P.2d 987 (1993).....	10, 12
<i>Lundgren v. Whitney's Inc.</i> , 94 Wn.2d 91, 614 P.2d 1272 (1980).....	15
<i>Moore v. Smith</i> , 89 Wn.2d at 932, 944 (1978).....	16
<i>Patterson v. Horton</i> , 84 Wn.App. 531, 929 P.2d 1125 (1997).....	12, 14
<i>Patterson v. Horton</i> , 84 Wn.App. 531, 543 (1997) citing <i>Erdman v. Lower Yakima Valley</i> , 41 Wn.App. 197, 208, <u>rev. denied</u> , 104 Wn. 2d 1030 (1985).....	17
<i>Rorvig v. Douglas</i> , 123 Wn.2d 854, 861, 873 P.2d 492 (1994), citing <i>Haner v. Quincy Farm Chems., Inc.</i> , 97 Wn.2d 753, 757, 649 P.2d 828 (1982).....	11
<i>Sherrell v. Selfors</i> , 73 Wn.App. 596, 601, 871 P.2d 168 (1994).....	12
<i>State v. Barnes</i> , 153 Wn.2d 378, 382 (2005).....	19
<i>State v. Godsey</i> , 131 Wn.App. 278 (2006).....	19
<i>State v. Monschke</i> , 135 P.3d 966 (2006).....	21
<i>State v. Walker</i> , 136 Wn.2d 767 (1998).....	19

<i>State v. Woods</i> , 143 Wn.2d 561, 591 cert. denied, 534 U.S. 964 (2001).....	20
<i>State v. Zimmerman</i> , 130 Wn.App. 170, 174 (2005).....	20
<i>State v. Zimmerman, supra</i> , at 180-181.....	21
<i>Storey Parchment Co. v. Patterson Parchment Paper Co.</i> , 282 U.S. 555, 75 L.#d. 544.....	11
<i>Sund v. Keating</i> , 43 Wn.2d 36, 259 P.2d 1113 (1953).....	12
<i>Wagner v. Flightcraft, Inc.</i> , 31 Wn.App. 558, 643 P.2d 906 (1982).....	15
<i>Walker v. State</i> , 121 Wn.2d 214, 217 (1993).....	20
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 268-69, 840 P.2d 860 (1992).....	9
<i>Washburn, supra</i> , at 271.....	10
<i>Washburn, supra</i> , at 280.....	10
<i>Webster v. Seattle, Renton, Etc., R. Company</i> , 43 Wash. 364, 365, 85 P.2 (1906).....	13, 14
<i>Wenzlar & Ward v. Sellen</i> , 53 Wn.2d 96, 330 P.2d 1068 (1958) P.2d 351 (1965).....	12
<i>Williams v. Hoffer</i> , 30 An.2d 253, 265 (1948).....	18
Other:	
Court Rule 51 (f).....	20
RAP 2.5 (a).....	20
<i>Courtroom Handbook on Wash. Evidence</i> , K. Tegland, p. 255 (2006).....	18

I. ISSUES

1. Whether testimony of lifelong chronic pain justifies future palliative care.
2. Whether admitted bills showing current cost of palliative care and evidence of increased cost of care over time forms an adequate basis for a jury award.
3. Whether subrogated medical coverage of the Plaintiff communicates to a jury that Defendant has a liability policy.
4. Absent a showing that missing portions of a record are relevant to error claimed, is Defendant entitled to new trial?

II. STATEMENT OF THE CASE

A. Sufficiency of the Evidence re: Damages

Growing up Plaintiff didn't have much experience with doctors. She does what they tell her to do; she doesn't think she knows more than a doctor. So when they told her to go to a physical therapist, a massage therapist, and an acupuncturist, she went and she thought it was reasonable to do so because that's what she was told to do. RP 34, 10-11-05. She improved some but she never got back to where she was. RP 35, 10-11-05. She has some pain in her neck, shoulders and upper back every day that's always there. No change in the last year or so. Then she has bad

days. RP 39, 10-11-05. She doesn't remember ever being pain-free since the accident. RP 39, 10-11-05.

She's always tired, wakes up tired, usually has three bad nights a week. RP 42, 10-11-05. She would like to see a chiropractor, an acupuncturist, a massage therapist in the future when she's having a bad day. But she has a bad day a couple times a week. RP 45, 10-11-05.

Dr. Bartness, Plaintiff's chiropractor, testified that people with persistent soft tissue symptoms to neck and back from auto accidents that have lasted for two years probably would have chronic symptomatology off and on. RP 29, 10-10-05. When injured in a car accident, as people age they accelerate the degenerative process. RP 30, 10-10-05.

Dr. Bartness testified she had a kyphotic cervical spine from the trauma. RP 35-36, 10-10-05. It's initially caused by spasm but in her case will never go away. RP 36, 10-10-05. This condition makes her more subject to trauma and symptomatology in the future. RP 37, 10-10-05. By the time of trial her condition was chronic and it's how she will live for the rest of her life. RP 39, 10-10-05. Even though she is young, this accident speeded up the arthritic changes in her neck and back; they will get worse as she ages. RP 40, 10-10-05. One option she has is to medicate. Since she's going to live another 58 years medication is not his

favorite option. RP 41, 10-10-05. If the pain gets bad enough, physical therapy or acupuncture in addition to exercise are other options. RP 42, 10-10-05. There are conservative options for musculo-skeletal pain: physical therapy, acupuncture, manipulative therapy, medicine, exercise and massage therapy. RP 44, 10-10-05. There is nothing she can do to get back to pre-accident status. RP 47, 10-10-05.

Dr. Richard Kirkpatrick, her Board Certified M.D., testified if people are not better in two years from a soft tissue injury the prognosis is really bad; they're not likely to get better, ever. As they get older the arthritic process is accelerated. RP 68, 10-10-05. After a year or two, you're not going to get well. RP 69, 10-10-05. Plaintiff falls into that unfortunate category. RP 69, 10-10-05. Sometimes acupuncture can make a dramatic difference. RP 69, 10-10-05. She will never get better. RP 87, 10-10-05.

Ms. Kuchar, the acupuncturist, gets referrals from both Dr. Kirkpatrick and Dr. Bartness. RP 91, 10-10-05. She can successfully treat the symptoms of arthritis; she can't cure it, but she can make people feel better for awhile. RP 92, 10-10-05. Toward the end of the treatment of Ashlee, she was keeping her pain-free for almost a week at a time. RP 93, 10-10-05. But there was probably no chance that she could have

permanently improved her. RP 94, 10-10-05. Acupuncture would be a good choice for her in the future instead of medication (RP 94, 10-10-05), particularly for acute episodes (RP 96, 10-10-05). In attempting to calculate what acupuncture would cost in the future, her treatments went from \$40 per session to \$90 in 10 years, the jury could multiply the same rate by each decade of Plaintiff's life. RP 97-99, 10-10-05. Ms. Kuchar was hoping to get Plaintiff to where only one treatment per month would be necessary instead of weekly. RP 100, 10-10-05.

Plaintiff called five lay witnesses;

they all testified approximately the same.

Her husband, the defendant, testified that they used to be pretty active before the accident. RP 32, 10-11-05. Her cousin, Joanna McDonald, testified that both women worked in the family store and before the accident Plaintiff was a good worker; in fact, she set a record for stacking the walk-in. RP 39, 10-11-05. After the accident her ability to work was significantly impacted. RP 9-10, 10-11-05. She is uncomfortable driving to Chehalis, could only shop in two stores as opposed to pre-accident when she could shop from 8:00 a.m. to 6:00 p.m. non-stop. RP 11-12, 10-11-05. At least 3-4 times per day her co-worker would observe Plaintiff to suddenly stop, wait a moment, compose herself,

and then proceed. The co-worker could see in Plaintiff's eyes that she was hurting. RP 16. Her sister describes Plaintiff as very athletic, very active, and never had an injury she didn't get over except for the wreck. RP 19-20, 10-11-05. Sister hasn't seen any improvement in Plaintiff's condition in the last year. RP 23-24, 10-11-05. Plaintiff fidgets in the car and can only shop half as long in Portland. RP 24-25, 10-11-05. Plaintiff can't perform water sports as well or as long as before the accident. RP 28-29, 10-11-05. Her husband testified that Plaintiff continues to hurt, to this day, from the accident. RP 31, 10-11-05. Her mother testified that Plaintiff has been miserable in the years since the accident. RP 107, 10-10-05. That Plaintiff had been a multi-sport athlete since she was little, was very strong and proud of the recognition it brought. RP 108, 10-10-05.

Requests for Admissions regarding medical billings were answered and later admitted into evidence. Ex. 4 & Ex. 5. Defendant conceded certain treatment was reasonable and customary. Defendant also conceded all the bills were a "...result of injuries sustained in the occurrence of May 25, 2003".

The jury was instructed that Plaintiff could have an approximate life expectancy of 58.7 years. CP, 27. A verdict was returned awarding

her \$5,000.00 in general damages and \$60,176.82 in special damages.

Presumably the vast bulk was for future health care.

Defendant brought a motion for judgment N.O.V. (CP 39) raising the same issues as in this appeal. The trial judge, in ruling on the award of special damages held:

The Court: "This is a highly unusual verdict. When - when the Clerk read the verdict, Mr. Patton remarked, 'Didn't they get that backwards?' and the foreperson said, 'No, we didn't get it backwards, that's our verdict.' It's an unusual verdict.

This is the way I understood the testimony, and I'm taking - I am accepting the testimony, for the purpose of this verdict, in the light most favorable to the Plaintiff, which I think I have to do. She's got a permanent injury; no medical treatment in the future is reasonable or necessary to cure her, because she can't be cured; she will continue to suffer pain, and while we cannot cure the problem, we can treat it palliatively; and most of what's happened in the past has been, as it turns out, palliative treatment. That's what I think of the testimony.

I think there is a basis for the jury to find, on the evidence, that future treatment is palliative and that she can minimize her general damages, which they certainly did, they can mini - that the Plaintiff can minimize her general damages of pain and suffering by having regular, palliative treatment, and we'll pay for the palliative treatment on a regular basis, and we're not going to award her anything - or very much for general damages. I think that's what the verdict says, so - and, I think it's sustainable. Highly unusual, but I think it's within the parameters of the jury to do that. So Plaintiff's (sic) Motions are denied."

RP 37-38, 11-9-05

B. Jury Instruction No. 8

Plaintiff submitted a modified version of WPI 213, Plaintiff's proposed No. 7A. RP 64, 10-11-05, CP 26. It added a paragraph discussing subrogation. The Court declined to give it, and after some discussion in open court, drafted its own instruction No. 8. CP 27, RP 64-67, 10-11-05.

"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.

C. Insurance

While the record is incomplete (through no fault of the parties), Plaintiff and Defendant agree that on redirect examination Plaintiff explained the initial delay in seeking treatment was the need to determine whether she had PIP coverage. The accident occurred at a freeway tunnel entrance in Portland, Oregon. The pickup careened off the walls and rolled. See photos, Ex. 1, 2 3. Because the truck was totalled she spent the night at friends in Hillsborough. RP 54, 10-11-05. She was transported home to Cowlitz County the next day. She went to St. John's

some 36 hours after the accident. See Request for Admissions, Ex. 4 (St. John Medical Center ER billing).

On cross-examination Plaintiff was asked if certain medical records were accurate, as if she had written them or otherwise embraced them as her own. Objections were sustained. RP 55, 10-11-05. The impression Defendant tried to give was that delay in treatment was really because she wasn't hurt.

In order to explain the delay, Plaintiff, on redirect, testified that she needed to ascertain whether she had PIP medical coverage; she then began treating.

III. ARGUMENT

A. Damages

The amounts awarded for future medical costs were reasonable and entirely consistent with the evidence. The jury heard undisputed evidence as to how many treatments each expert provided Plaintiff; it was a simple matter of division to determine the per visit cost if any juror missed the testimony of the witness.

The Court instructed the jury as to Plaintiff's probable life expectancy (see Instruction No. 7); it was 58.7 years. The jury ultimately awarded \$60,176.82 in total economic damages. Since Plaintiff prevailed,

it is reasonable to assume the jury awarded not only the uncontested amount of past medical expenses, \$2,440.82, but the contested as well, \$7,236.00.

Subtracting the total of the above two sums leaves a future economic award of \$50,500.00. Dividing that figure by her proposed life expectancy yields \$860.31 per year for treatment, or \$71.69 per month.

The above monthly figure reflects about one or one and one-half chiropractic sessions or less than one acupuncture session at the approximate current costs without adjusting for the inevitable increase in health care costs and without reflecting Dr. Kirkpatrick's and Dr. Bartness's prediction that Plaintiff will suffer the earlier onset of arthritis and further deterioration toward the end of her life.

Generally, an appellate court will not disturb a damage award unless it is clearly outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to have been arrived at as a result of passion or prejudice. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 268-69, 840 P.2d 860 (1992), citing with approval, Bingaman v. Grays Harbor Comm. Hosp., 103 Wn.2d 831, 699 P.2d 1230 (1985); Federal Signal v. Safety Factors, 125 Wn.2d 413, 439, 886 P.2d 172 (1994). Deference and weight must be given to the evaluation of the trial

court's exercise of its discretion in denying a new trial on a claim of excessiveness, and the verdict is strengthened by denial of a new trial by the trial court. Washburn v. Beatt Equipment Co., *supra*, at 120 Wn.2d 271; Bingaman, *supra*, at 836; Washburn, *supra*, at 280. If a trial court remits a verdict, appellate review is de novo; if remittitur is denied, review is for abuse of discretion. Bunch v. Dept. of Youth Servs., 155 Wn.2d 165, 176 (2005).

B. Legal Requirements for Proving Damages

The Washington cases make a clear distinction between the sufficiency of the evidence to establish *the fact* of damage and the sufficiency of the evidence to sustain *the amount* of damages awarded. Once the fact of damage has been established by substantial evidence (i.e. that future palliative treatment will be necessary), a more liberal rule applies to determination of the amount of damages (i.e. the cost of future palliative treatment), requiring only that there be a reasonable basis for estimating the loss; the substantial evidence test no longer applies. This rule is peculiarly applicable to proof of future damages. *See, Lewis River Golf v. O.M. Scott & Sons*, 120 Wn. 2d 712, 717-718, 845 P.2d 987 (1993).

In fact, evidence supporting an award of damages is sufficient if it

affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation and conjecture. Rorvig v. Douglas, 123 Wn.2d 854, 861, 873 P.2d 492 (1994), citing Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 757, 649 P.2d 828 (1982).

Our Supreme Court in the case of Larson v. Union Inv. Loan Co., 168 Wash. 5, 11, 10 P.2d 557 (1932) cited the holding of the United States Supreme Court case of Storey Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 75 L.#d. 544, in pointing out the distinction between cases in which the evidence of *the fact of damages* is uncertain and those in which the fact of damages is clearly established, the uncertainty existing only as to *the extent of the damages*:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Larson v. Union Inv. Loan Co., *supra*.

The reason for the more liberal rule governing proof of damages is the elementary principle of justice that where the fact of the damages has been proved, the wrongdoer must bear the risk of uncertainty of proof of

the extent of the damages caused by his wrong. Kramer v. Portland-Seattle Auto Freight, 43 Wn.2d 386, 261 P.2d 692 (1953). The Kramer decision recognized this principle when it quoted with approval the following passage from Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 265, 90 L.Ed. 652, 66 S. Ct. 574 (1946):

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created... The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. The difficulty of ascertainment is no longer confused with the right of recovery for a proven invasion of the plaintiff's rights."

Once a plaintiff has established the fact of damages, difficulties of proof that prevent an absolute establishment of the specific amount of future damage, will not preclude recovery. Sund v. Keating, 43 Wn.2d 36, 259 P.2d 1113 (1953); Wenzlar & Ward v. Sellen, 53 Wn.2d 96, 330 P.2d 1068 (1958). Mathematical precision or exactness is not required. Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 403 P.2d 351 (1965); Sherrell v. Selfors, 73 Wn.App. 596, 601, 871 P.2d 168 (1994); Patterson v. Horton, 84 Wn.App. 531, 929 P.2d 1125 (1997).

In fact, it is now well recognized that compensatory damages are often at best approximate; they need only be proved with whatever definiteness and accuracy the facts permit, but not more. Lewis River Golf

v. O.M. Scott & Sons, supra, at 718.

C. **Evidence of the Specific Dollar costs of Future Medical Expenses is Not Required**

In Erdman v. B.P.O.E., 41 Wn.App. 197, 704 P.2d 150 (1985), the trial judge incorrectly set aside a jury award of \$1,118,834 for future medical expenses. On appeal, the Court of Appeals reinstated the award based upon the holdings in the Webster v. Seattle, Renton, Etc., R. Company, 43 Wash. 364, 365, 85 P.2 (1906) and Leak v. U.S. Rubber Company, 9 Wn.App. 98, 511 P.2d 88 (1973) cases. The court ruled that the evidence was sufficient to sustain the award where there was proof that the plaintiff would require future care and treatment, and where evidence of the plaintiff's past medical expenses was introduced. The court held:

"Since Mr. Erdman's impairments were present at the time of trial and he had received medical attention for the impairments, there can be no doubt from the evidence that future treatment is essential for his existence; the jury was entitled to award damages. Thus, we find the court erred in denying that portion of the verdict relating to future medically related expenses."

Erdman v. B.P.O.E., supra, at 209-210.

In Leak v. United States Rubber Co., supra, the evidentiary basis for an award of damages for future medical care was that the plaintiff was still under treatment for the epileptic seizures which had recurred after the

injury, and was still having neck and back pain. He had been hospitalized once to endeavor to control the seizure and reduce medication. While the spinal condition was in a chronic state, the attending physician believed it would be worse. Medical expenses had already totaled \$2,440.56. The Court of Appeals, relying on Webster v. Seattle, Renton, Etc. R. Co., supra, held that the evidence was sufficient without evidence of the specific costs of future care to sustain a jury award which included damages for future medical expenses:

"Since plaintiff's epileptic seizures were recurring at the time of trial and he had received medical attention for the seizures, including a neurological study at the University of Washington Hospital, it could be inferred from the evidence that future treatment would be necessary. Likewise, since his back and neck were continuing to cause him pain, both from the initial injury and an aggravation and worsening of a pre-existing arthritic condition to that area, it could be inferred that he would have additional medical treatment in the future. The court was warranted in submitting the issue of future medical expense to the jury."

Leak v. United States Rubber Co., supra, at 104.

In essence, the Webster and Leak cases (cited with approval in Patterson v. Horton, supra) hold that a jury must be permitted to determine the amount of future medical and care expenses through a process of inference based on evidence of past events and conditions. There is nothing novel about this principle. It is the heart of the jury system. It is

routinely applied to cases involving future wage losses, future pain and suffering and future profits, and in Webster and Leak it was simply applied to proof of future medical-related expenses.

These cases indicate that the Washington appellate courts are realistic in their recognition that the proof of future damage can be difficult. Clearly it generally requires some degree of estimation by the jury, but that the need for the jury to estimate the damage based on the evidence and their personal experience does not invalidate the jury's determination if it is an informed estimate based on evidence of past events and conditions, to include the plaintiff's past condition and medical expenses and his condition at the time of trial. See, Larson v. Union Investment & Loan Co., *supra*; Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 403 P.2d 351 (1965); Kramer v. Portland-Seattle Auto Freight, *supra*; Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977); Wagner v. Flightcraft, Inc., 31 Wn.App. 558, 643 P.2d 906 (1982); Lundgren v. Whitney's Inc., 94 Wn.2d 91, 614 P.2d 1272 (1980); Larsen v. Walton Plywood, 65 Wn.2d 1, 390 P.2d 677 (1964); and Hinsman v. Palmanteer, 81 Wn.2d 327, 501 P.2d 1228 (1972).

In Bitzan v. Parisi, *supra*, the court held that the evidence warranted a jury instruction on recovery for future pain, suffering, disability and loss

of earnings based on lay witnesses' testimony that the plaintiff was still experiencing pain, suffering disability and loss of earnings at the time of trial, and that such testimony permitted a reasonable inference that future damages would be sustained.

As noted in Moore v. Smith, 89 Wn.2d at 932, 944 (1978), the propriety of a damage instruction is not measured by a substantial evidence test. Once liability is established, the more liberal "reasonable basis" test applies.

The jury had Plaintiff's medical billings and Defendant's admissions as evidence. Plaintiff's Request for Admission No. 3 asked Defendant to review a list of medical bills and declare whether or not the bills were incurred "...as a result of injuries sustained in the occurrence of May 25, 2003" (the accident). With the exception of about \$111.00, the Defendant admitted. Request for Admission No. 5 asked if the medical expenses in No. 3 were "reasonable and customary in the medical community at the time incurred". The Defendant so admitted. Request for Admission No. 9 contained a stack of Plaintiff's medical bills and Defendant's response was the decision not to contest them.

Despite the above, Defendant argues on page 8 of Appellate's brief that causation must be shown by expert testimony. Plaintiff suggests that

if the jury entirely disregarded all of Plaintiff's witnesses, Defendant's admissions would establish causation. Medical bills can properly create a presumption that there will be, at a minimum, a nominal cost for such future treatment. Patterson v. Horton, 84 Wn.App. 531, 543 (1997) citing Erdman v. Lower Yakima Valley, 41 Wn.App. 197, 208, rev. denied, 104 Wn. 2d 1030 (1985).

D. Insurance

The burden of demonstrating unfair prejudice is on the party challenging admission of the evidence in question, and reversible error is found only in the most exceptional circumstances. Carson v. Fine, 123 Wn.2d 206, 225-26 (1994).

Both the trial judge and Plaintiff's counsel feared that jurors would believe Plaintiff was trying to get a double recovery. If the medical bills were already paid by her health insurer any additional amounts awarded by the jury for those same bills would appear to be a windfall to Plaintiff. RP 64-68, 10-11-05.

While her PIP medical payments were a collateral source and normally barred as evidence, Johnson v. Weyerhaeuser Co., 134 Wn.2d 795 (1998), her short delay in treatment was caused by her need to first determine whether that medical care would be covered. This explanation

was offered only after Defendant created the issue by linking the initial delay in treatment to alleged insignificance of injuries.

Introduction of evidence regarding Plaintiff's own insurance for medical payments does not begin to violate ER 411. The defendant and the possibility of a liability policy was never remotely approached. Defendant's quote from Williams v. Hoffer, 30 Wn.2d 253, 265 (1948) is simply not relevant. Even the introduction of evidence that Defendant has a *liability* policy is not necessarily prohibited if probative or explanatory of some other situation in the trial; Courtroom Handbook on Wash. Evidence, K. Tegland, p. 255 (2006).

Tellingly, Defendant argues on page 14, Appellant's Brief, "But, it is unfair to reinforce the belief that they need not worry about the source of payment."

First, the practical application (from a defense attorney's viewpoint) of exclusion of *any* mention of insurance is to allow the innocent among the jury to believe that the Defendant will personally pay any judgment. In a slip of Freudian dimension, Counsel now argues that it's *unfair* to strengthen the jury's belief that it should concern itself with fixing a damage amount and not wonder about how poor the Defendant will become.

Secondly, the Court's instruction No. 8 reaffirms Washington common law that jurors are to disregard the source of funding for any judgment reached.

E. Challenged Jury Instruction

Generally, claimed errors of law in jury instructions are reviewed de novo. State v. Barnes, 153 Wn.2d 378, 382 (2005). But when the instruction is based upon facts, the review is an abuse of discretion standard. State v. Walker, 136 Wn.2d 767 (1998); State v. Godsey, 131 Wn.App. 278 (2006).

The pattern damages instruction was given without objection and it contained two lists: contested bills and uncontested bills. The Court declined to give Plaintiff's proposed instruction No. 7A (CP 26) and instead drafted its own, the challenged No. 8. At the time, defense counsel engaged in colloquy with the Court and succeeded in having "...if awarded" added to the Court's instruction. (RP 67-68) An exception was still taken. However, Counsel never provided any argument other than the instruction was inconsistent and contradictory. In essence, the jury was told about insurance then told to disregard it.

CR 51 (f) requires a party objecting to an instruction to "state distinctly the matter to which he objects and the grounds of the objection".

The purpose is to clarify the exact points of law and reasons upon which Counsel argues the Court is committing error. Walker v. State, 121 Wn.2d 214, 217 (1993). The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection. Walker, 12 Wn.2d at 217. If an exception is inadequate to apprise the trial judge of certain points of law, appellate courts will not consider those points on appeal. Walker, at 217; RAP 2.5 (a). For the first time on appeal, Defendant complains that instruction No. 8 is a comment on the evidence. Appellants Brief, p. 15. The objections now raised: violation of ER 411, "prejudice and bias against insurers is common", and suggests liability insurance, are all too late. Appellant's Brief, pp. 13-14.

However, if the Court allows Defendant's argument Plaintiff maintains that No. 8 cannot be a comment on the evidence.

"A judge comments on the evidence if statements or conduct convey the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. State v. Zimmerman, 130 Wn.App. 170, 174 (2005). A jury instruction that does no more than accurately state the law pertaining to an issue is not an impermissible comment on the evidence. State v. Woods, 143 Wn.2d 561, 591 cert. denied, 534 U.S. 964 (2001); Zimmerman, at 180-181."

State v. Monschke,
135 P.3d 966 (2006)

IV. CONCLUSION

The jury award was consistent with the evidence presented. Availability of Plaintiff's medical insurance was appropriately introduced and the Court's instruction regarding subrogation was proper.

DATED this 21 day of July, 2006.

CRANDALL, O'NEILL & MCREARY, P.S.

By: 
DUANE C. CRANDALL, WSB #10751
of Attorneys for
Plaintiff/Respondent

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of **BRIEF OF RESPONDENT** was filed with the State Court Administrator on July 21, 2006, by depositing the same in the United States mail in Longview, Washington, enclosed in a sealed envelope with first class postage thereon fully prepaid and addressed as follows:

Mr. David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
State of Washington
950 Broadway, Ste. 300 MS TB-06
Tacoma, WA 98402-4454

[Handwritten signature]
JUL 21 2006
U.S. MAIL
LONGVIEW, WA 98501

I hereby certify that I served a true copy of the foregoing **BRIEF OF RESPONDENT** on:

Mr. Michael A. Lehner
Lehner & Rodrigues
Ste. 1015, Crown Plaza
1500 SW First Avenue
Portland, OR 97201

by causing a full, true and correct copy thereof to be **MAILED** in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Longview, Washington on the date set forth below.

DATED this 21st day of July, 2006.

CRANDALL, O'NEILL & MCREARY, P.S.

By: *[Handwritten signature]*
DUANE C. CRANDALL, WSB #10751
of Attorneys for Respondent