

No. 35150-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL HOSKINS, Appellant,

vs.

DEREK REICH and "JANE DOE" REICH, Respondents.

07 JUN 18 11:01
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
DEPUTY

BRIEF OF RESPONDENTS

Address:

1021 Regents Boulevard

Fircrest, WA 98466

253-272-8400

RICHARD J. JENSEN, P.S.

By: Beth A. Jensen #15925

Attorneys for Respondents

TABLE OF CONTENTS

	Page
I. INTRODUCTION-----	4
II. STATEMENT OF THE CASE-----	5
A. Statement of Facts-----	5
B. Statement of Procedure-----	12
III. ARGUMENT-----	14
A. There are No Bases for New Trial-----	14
B. <i>Harris v. Drake</i> Does Not Apply-----	14
C. WPI 30.18 Does Apply-----	16
D. There was no Misconduct-----	19
E. The Damages Verdict is Supported by Evidence-----	20
Future economic damages-----	21
Future Neck Surgery-----	21
Future Carpal Tunnel Surgery-----	22
Future Loss of Earning Capacity-----	23
Noneconomic Damages-----	24
IV. CONCLUSION-----	27

TABLE OF AUTHORITIES

Table of Cases

	Page
<i>Cooperstein v. Van Natter</i> , 26 Wn.App. 91, 611 P.2d 1332 (1980)-----	21
<i>Cowan v. Jensen</i> , 79 Wn.2d 844, 490 P.2d 436 (1971)-----	21
<i>Harris v. Drake</i> , 152 Wn.2d 480, 99 P.3d 872 (2004)-----	4, 14
<i>Harris v. Drake</i> , 116 Wn.App. 261, 65 P.3d 350 (2003)-----	4, 5, 14, 15, 16, 18, 27
<i>James v. Robeck</i> , 79 Wn.2d 864, 490 P.2d 878 (1971)-----	21
<i>Johnson v. Marshall Field & Co.</i> , 1 Wn.App. 655, 463 P.2d 645 (1969)-----	21
<i>Kellerher v. Porter</i> , 19 Wn.2d 650, 189 P.2d 233 (1948)-----	20-21
<i>Lundgren v. Whitney's, Inc.</i> , 94 Wn.2d 91, 614 P.2d 1272 (1980)-----	21
<i>Wooldridge v. Woolett</i> , 96 Wn.2d 695, 668 P.2d 566 (1981)-----	21

Rules

CR 59-----	14
CR 59(a)(2)-----	14, 19
CR 59(a)(5)-----	14, 20
CR 59(a)(7)-----	14, 20
CR 59(a)(8)-----	14, 16
CR 59(a)(9)-----	14

Other Authorities

	Page
WPI 30.18-----	13, 17, 18

I. INTRODUCTION

In this personal injury case, appellant Hoskins objected to the admission of all evidence regarding his prior treatment for back and neck problems. After considerable argument, and offers of proof from Hoskins' chiropractor, the trial court did admit some of the evidence. The trial court entered judgment on the jury's verdict and denied appellant Hoskins' motion for new trial. In his oral decision, the trial judge noted:

Well, if the plaintiff's claim had been for a cervical strain and for a temporary injury and for damages associated with that alone I would agree with plaintiff that the prior evidence should not have come in. But what happened in this case was the issues that developed in the trial. They became what were the injuries that were caused by the accident? That was the big question. And the plaintiff was claiming permanent back injury, claiming compensation for surgery to correct a protruded disk . . . a disk derangement. But it was quite expensive. And the defendant's position was that this was a cervical strain, that it was temporary, that it was an injury from which the plaintiff recovered over a period of several months and that was it. So, it was because of that framework of the issues that the prior examinations became relevant in the case. Also, credibility was a big issue in the case, I believe, and who is the jury going to believe. Motion will be denied.

RP (7/14/06) 21-22.

Hoskins has appealed. He relies on *Harris v. Drake*, 152 Wn. 2d 480, 99 P.3d 872 (2004) and *Harris v. Drake*, 116 Wn.App. 261, 65 P.3d 350 (2003) for the proposition that evidence of **any** asymptomatic prior condition is not admissible at a personal injury trial. This is simply not the

holding of *Harris*. Further, the facts in *Harris* are considerably different than in the case at bar, and therefore, *Harris* does not apply here.

Here, Hoskins' spine and ligaments were not in perfect condition before the accident. The jury was entitled to know that so that it could award damages in favor of Hoskins only for injuries that were the result of the accident, not for a condition that pre-existed the accident. Personal injury law in Washington has always recognized this distinction. Hoskins' own doctors recognized the need for such a baseline measurement.

This court should affirm the trial court's trial rulings and its denial of the new trial.

II. STATEMENT OF THE CASE

A. Statement of Facts

This case arises out of an automobile accident that occurred on May 10, 2001. CP 2. Liability was not an issue at trial. CP 120. The issues to be determined by the jury were the nature and extent of Hoskins' injuries and the amount of damages to be awarded. CP 156, 160-161. Hoskins claimed future medical care and loss of earning capacity. CP 103-104. He claimed future noneconomic damages, including disability and loss of enjoyment of life, and pain and suffering, mental and physical.

CP 103. He claimed that his injuries and damages were permanent and the court gave a life expectancy instruction. CP 163.

At trial, Hoskins' chiropractor, Dr. Rody, testified that "chiropractic is the detection of misalignments of the spine" and "we call that subluxation." "[S]ubluxation' is what we treat with chiropractic methods." CP 291. He testified that he saw Hoskins the day after the accident on May 11, 2001. CP 293. Dr. Rody testified that "after having him explain everything and as well as look over the form that he filled out, then we look at the patient." CP 294-295. Dr. Rody testified on direct examination, without objection: "I've actually seen Mr. Hoskins before this. He's been my patient since 1998, so I knew a little bit about him and was able to observe him prior to this, and I knew that he wasn't like this in his normal everyday life." CP 295. After describing his evaluation of Hoskins, Dr. Rody diagnosed:

a spinal sprain, . . . Then, in addition, he had the subluxation pattern, the curvatures that we saw. He had postural imbalance, and he also had the issues of the nerves from his neck into his arms and his nerves from the legs – from the lower back into the legs. So we call that brachial and lumbar plexus injury.

CP 302-303. He further testified that "we found that there were these six or seven different curvatures in his spine from the accident. . . I call them new injuries." CP 306.

On cross examination Dr. Rody described his notations regarding his x-ray findings. He agreed that the x-ray findings by July 20, 2001 were "much reduced" from the findings of May 11, 2001. CP 327. He was asked: "Instead of looking at a zigzag pattern, we're looking at more of a straight line?" His answer was: "Quite a bit straight." And he admitted that that was what he wanted. CP 327. Dr. Rody testified that on examination on July 20, 2001 several of the positive findings from before had improved or were normal. CP 332-334. In a letter written August 2, 2001, Dr. Rody "wrote that the prognosis was excellent for full recovery within the next 30 days." CP 334. He did not expect any permanent or partial impairment. CP 334-335. He recommended once per week treatment for a month. "He was straight, but I didn't really think he had healed yet fully. . . I wanted to keep him straight so he would heal that way." CP 335.

Dr. Rody testified that he approved Hoskins to return to work in the floor covering business on June 18, 2001 with some restrictions. Hoskins had trouble working. Dr. Rody testified that he then released Hoskins back to work again on July 24, 2001, without restrictions and that Hoskins went back to work on July 31. CP 329-330. Dr. Rody also testified that Hoskins worked in a fireworks booth from June 27 through July 18 with no notable exacerbations. CP 331-332.

Hoskins saw Dr. Rody until August 16, but then did not return until October, 2001. CP 335. At the October 18, 2001 visit, Hoskins was primarily focused on his low back. CP 336. Dr. Colfelt, respondent Reich's expert, testified that when Hoskins visited his family doctor at the Tribal Health Clinic on December 11, 13, and 27, 2001, there were no chart notes indicating any neck or back complaints at that time. CP 465-466.

Hoskins did not return again to Dr. Rody until February 5, 2002. At this time, Dr. Rody completed a report form indicating "that the current symptoms were neck pain, acute right shoulder radiating pain with right arm numbness, also headaches daily, symptoms started as a result of falling asleep wrong," and "Patient was told by me that this is not an accident-related injury, but a maintenance exacerbation." This was the last time Hoskins saw Dr. Rody. CP 397.

After this portion of Dr. Rody's testimony, respondent Reich requested (outside the presence of the jury) that he be allowed to inquire about Hoskins' prior treatment with Dr. Rody. CP 344-348. The court heard extensive argument and offers of proof from Dr. Rody from both parties. CP 344-385. The court allowed Reich to present evidence of Dr.

Rody's prior treatment of Hoskins beginning in September 1998. CP 385-386.

In 1998 Hoskins presented to Dr. Rody with back pain, poor circulation into his left arm with numbness and tingling, and neck pain that had been going on for a period of several years. CP 386-387. Dr. Rody testified about his treatment of Hoskins between September 25, 1998 and November 13, 2000. CP 386-389. He further testified that in a letter to Hoskins' lawyer dated July 2003, after the accident, that he referred to the previous treatment. Regarding the prior treatment, Dr. Rody was asked: "And why was that important to you in writing this letter? Why was that important in letting Mr. Lindenmuth know that?" CP 390. And Dr. Rody explained:

It created a time in continuum here that I could compare to. So he came in with a certain amount of measurements and then on the new injury he came in with different measurements, and I was able to make the comparison."

CP 390. Dr. Rody testified that after his 1998 treatment, Hoskins' x-ray showed "a measurable amount of improvement. 80 percent is what I put down." CP 390. Prior to the accident, Hoskins had ligament damage. CP 392. Dr. Rody was asked: "was that condition completely cured so he was back to what he would have been before the trauma that sent him to

you in 1998?” CP 392. He responded: “It would not be as good as if you were brand-new.” CP 392.

Dr. Rody testified that Hoskins treated in a concentrated manner in 1998 and then he treated periodically thereafter in 1999 and 2000 for “small microtraumas” that were not new injuries. CP 391.

Hoskins first saw Dr. Finkleman on September 11, 2003, CP (Finkleman Deposition) 6, a year and a half after the last visit with Dr. Rody on February 5, 2002. Dr. Finkleman testified that he did ask Hoskins about prior traumas. This was something that was relevant to him in his evaluation because “I wanted to make sure there was no preexisting chronic pain syndrome, which he said there was not.” CP (Finkleman Deposition) 41.

Dr. Finkleman also testified that symptoms from traumatically induced carpal tunnel syndrome would be noticeable within one to four weeks after the accident. CP (Finkleman Deposition) 48-49. “[T]here’s usually an inc – a dramatic lighting up of or increase in the symptoms.” CP (Finkleman Deposition) 64. Dr. Rody testified that he noted no numbness in the hands or arms on May 11, 2001, the day after the accident, and none on May 15, 16, 18, 22, 23, or 25, 2001. CP 328-329.

The evidence demonstrated that Hoskins had concentrated treatment through August, a period of three months, then was fairly sporadic, and then stopped for a year and a half until he saw Dr. Finkleman. This was remarkably similar to what he did before the accident. He was off of work through July, about twelve weeks.

Respondents Reich's expert, Robert Colfelt, M.D., a neurologist, also took into consideration Hoskins prior record. He examined Hoskins on January 27, 2005. CP 428. As part of his evaluation process, he reviewed Hoskins' "medical records and documents, et cetera, which are sent to me, that are part of what's going on or relevant to this man." CP 429. In this case Dr. Colfelt also had x-rays from several sources, including Dr. Rody's films from 1998 and from after the accident. CP 429. Dr. Colfelt was asked: "What was important to your analysis in this case about the X-rays and MRI's?" He testified

I think the X-rays, to start with, those, as I'm sure you know, he had seen Dr. Rody in the past and we had a film there, and at that point his neck is kind of straight. And in some people that's perfectly normal. It doesn't always have to have a slight bend in it. The film that's in '98, and the film after the accident, looked really the same, there wasn't any change in the film.

CP 434-435.

Dr. Colfelt also testified that the plaintiff's claimed carpal tunnel syndrome was not the result of the accident, and was not lighted up by the

accident. CP 440. Dr. Colfelt based his opinion on the fact that there was no mention of numbness in his hands until much later. CP 440-441.

When asked what did cause Hoskins' carpal tunnel syndrome, Dr. Colfelt testified

I think most likely, in almost everyone, it's due to repetitive use of hands and wrists. That's, I think, pretty common knowledge, and that's by far the most likely cause of his symptoms, which would come and go depending on what he's doing.

CP 440.

The jury reached a verdict, the form for which had a single line for past economic damages. CP 167. The jury awarded \$25,095 for past economic damages, nothing for future economic damages, and \$15,000 for noneconomic damages. CP 167.

B. Statement of Procedure

This case was tried to a jury beginning February 23, 2006 and concluding with the jury verdict on March 3, 2006. CP 205, 167.

Hoskins' motion in limine regarding evidence of prior neck and back treatment was argued extensively on the first day of trial on February 23.

CP 205-222. The trial judge ordered that the prior treatment not be mentioned until the experts testified. CP 222.

The issue of the prior treatment was then raised during Dr. Rody's testimony, prior to the testimony of respondents' expert, Dr. Colfelt. The court heard extensive argument and offers of proof from Dr. Rody from both parties. CP 344-385. The court allowed the respondent to present evidence of Dr. Rody's prior treatment of the plaintiff beginning in September 1998. CP 385-386.

Both parties proposed (CR 105, 124) and the court gave instruction No. 9, WPI 30.18 regarding asymptomatic pre-existing conditions. CP 162. That instruction provided:

If you find that: (1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and (2) because of this occurrence the pre-existing condition was lighted up or made active, then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition. There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition without this occurrence.

CP 162.

Judgment was entered on June 1, 2006. CP 168-169. A motion for new trial was filed on June 9, 2006. CP 170. Reich responded on July 12, 2006. CP 505-541. Hoskins replied on July 13, 2006. CP 542-548. The court heard argument and denied the motion on July 14, 2006. CP 549. This appeal was filed on July 26, 2006. CP 550-554.

III. ARGUMENT

A. There are No Bases for New Trial.

Hoskins argues for a new trial based on five provisions of CR 59. They are: misconduct of prevailing party (CR 59(a)(2)); inadequate damages (CR 59(a)(5)); verdict unsupported by the evidence (CR 59(a)(7)); error of law (CR 59(a)(8)); and substantial justice not done (CR 59(a)(9)). Each of these bases however relates to Hoskins' primary argument under CR 59(a)(8), error of law, that evidence of his prior medical history should not have been admitted pursuant to *Harris v. Drake*, 152 Wn. 2d 480, 99 P.3d 872 (2004) and *Harris v. Drake*, 116 Wn. App. 261, 65 P.3d 350 (2003).

B. *Harris v. Drake* Does Not Apply.

The *Harris* cases are not on point. *Harris* involved the issue of whether the car accident at issue caused a shoulder impingement. There had been one complaint of "shoulder pain" fourteen months before the accident at issue. There was no description of where the pain was, and there was no follow-up. The plaintiff's doctors had no explanation for the prior condition and there was no treatment of it. The case at bar is much different.

In *Harris*, Dr. Finkleman testified that the impingement syndrome was caused by the accident and was not a preexisting condition. Here, Dr. Rody testified, as outlined above, that Hoskins' prior neck and back condition was relevant to his analysis of the injuries from this accident. Dr. Rody testified that Hoskins achieved 80% recovery after his prior episodes of back pain. He was not 100% normal at the time of the accident. Dr. Rody continued to treat Hoskins for microtraumas. He testified that because of prior injury, Hoskins' ligaments were not "as good as if you were brand-new." The ligaments were not 100% normal either. Dr. Rody testified that Hoskins had preexisting back conditions and that he needed to recognize that so that he could separate out what was caused by the accident.

Further, Dr. Finkleman testified that he did ask Hoskins about prior traumas. This was something that was relevant to him in his evaluation because "I wanted to make sure there was no preexisting chronic pain syndrome, which he said there was not." CP (Finkleman Deposition) 41. In fact, Hoskins had periodic treatment of neck and back complaints during 1998, 1999, and 2000 prior to this accident of 2001.

Both of Hoskins' doctors were glad to have a baseline for him in order to evaluate what was actually caused by the accident. There was

prior medical information about the less than perfect state of Hoskins' spine that was useful to his own doctors in their evaluations of him. It was no error to admit the evidence that those doctors actually used. To exclude such information would have been a misrepresentation to the jury.

The evidence of Hoskins' prior treatment pattern was also relevant in this case. In *Harris*, there was one complaint, fourteen months before the accident. Here, the plaintiff had a pattern of periodically using the chiropractor prior to the accident. He would have acute, concentrated care, and then sporadic care. After the accident at issue, he had similar acute, concentrated care, and then followed that with sporadic care, the same pattern as before the accident at issue. Unlike *Harris*, here there were multiple prior complaints of neck pain and multiple treatments.

Because the facts of this case are quite different than in *Harris*, it does not apply. The trial court was correct in its decision to allow some of Hoskins' prior medical history into evidence. There was no error of law by the trial court to support a new trial under CR 59(a)(8).

C. WPI 30.18 Does Apply.

Hoskins claimed at trial that he had ongoing, permanent neck complaints as a result of the accident. He claimed future disability and loss of enjoyment of life, and pain and suffering, mental and physical. It

was relevant to the issue of noneconomic damages that he had these complaints periodically before the accident. The plaintiff was not symptom free before this accident and should not have been presented that way to the jury. To do so would have been a misrepresentation.

Dr. Rody testified that Hoskins' prior condition was relevant to him. He needed to be able to differentiate what was caused by this accident, and what was prior. He needed a comparison because Hoskins' back was not in perfect condition before this accident. And that was the exact issue in this case. That was exactly the issue the jury was being asked to decide. The jury needed to know about Hoskins' prior condition and course of treatment in order to evaluate the claimed injuries from the accident at issue – the same as the plaintiff's own chiropractor.

The jury instructions anticipate that there may be some conditions a personal injury plaintiff may have which are not symptomatic at the time of the accident. WPI 30.18, proposed by both parties, and given by the court as instruction number nine, provides guidance for what the jury is to do if the injured person has a previous infirm condition that is not causing pain or disability, i.e. symptoms. The jury is to award damages for the lighting up of the condition.

Here, Hoskins had a preexisting spinal misalignment and preexisting ligament damage. He had been treated periodically for these things before the accident. He had not just complained once without any treatment as in *Harris*. Rather, he had complained and had treatment for the complaint many times. Hoskins argues that these objective conditions were not symptomatic at the time of the accident. But it would be a misrepresentation to the jury to let them believe that these conditions were not present. They were there, and had been symptomatic and treated many times before the accident. They were permanent conditions, existing before the accident at issue. They affected the plaintiff's chiropractor's analysis of his injuries from the accident.

The jury instructions contemplate just this sort of situation. *Harris* does not overturn decades of the established use of WPI 30.18. *Harris* even refers to the instruction and the cases supporting it. See footnote 71, *Harris v. Drake*, 116 Wn.App. 261, 289, 65 P.3d 350 (2003). Hoskins attempts to argue that evidence of a preexisting permanent condition cannot be considered by the jury. This is not the law in Washington because *Harris* cannot be interpreted under its peculiar facts to go that far. To adopt Hoskins' broad reading of *Harris* would be to dramatically change Washington personal injury law. This court should not do that.

The trial court properly allowed the relevant evidence of the plaintiff's prior conditions and treatment.

D. There was no Misconduct.

Hoskins argues pursuant to CR 59(a)(2) that defense counsel committed misconduct. He claims that defense counsel represented to the court that the defense orthopedic surgeon would testify about the relevance of Hoskins' prior condition and treatment; and then failed to do so. This allegation is flatly wrong. First, Dr. Colfelt did testify that he relied for his opinions on a comparison of x-rays from before and after the accident. CP 428-435. Second, there was no need for Dr. Colfelt to go into detail about relevance of the prior treatment because the plaintiff's own doctors, Rody and Finkleman, had already done so by the time Dr. Colfelt testified.

Dr. Rody explained that his prior treatment and analysis of Hoskins' condition allowed him to determine what new injuries there were from the accident. CP 390-392. Dr. Finkleman also compared prior and subsequent x-rays. CP (Finkleman Deposition) 41.

The evidence does not support Hoskins' argument on this point, and in fact proves just the opposite: that the evidence of the prior

condition and treatment of Hoskins was relevant to his own doctors and therefore properly admitted.

Hoskins infers that respondents Reich violated the trial court's ruling on the original motion in limine. This is not supported by the record. The record indicates just the opposite. Counsel for Reich cross examined Dr. Rody within the boundaries of the trial judge's pre-trial ruling and then asked for the jury to be excused. CP 325-344. Evidence of Hoskins' prior treatment and condition was not mentioned by Reich's counsel until specifically allowed by the trial judge after extensive argument and offers of proof. CP 374, 385.

E. The Damages Verdict is Supported by Evidence.

Hoskins argues that the jury's damages verdict is inadequate under CR 59(a)(5) and that the verdict is unsupported by the evidence under CR 59(a)(7). The jury awarded \$25,095.00 for past economic damages, nothing for future economic damages, and \$15,000 for noneconomic damages. CP 167. It is the lack of future economic damages and allegedly low noneconomic damages that Hoskins alleges is inadequate and unsupported.

When a verdict is so low as to unmistakably indicate passion or prejudice, a new trial should be ordered. Kellerher v. Porter, 29

Wash.2d 650, 666, 189 P.2d 223 (1948). The court will not disturb an award of damages made by a jury if the amount is not so disproportionate as to indicate it resulted from passion or prejudice. Lundgren v. Whitney's, Inc., 94 Wash.2d 91, 96, 614 P.2d 1272 (1980). If the damages are within the range of evidence they will not be found to have been motivated by passion or prejudice. James v. Robeck, 79 Wash.2d 864, 870-71, 490 P.2d 878 (1971); Cooperstein v. Van Nattler, 26 Wash.App. 91, 98, 611 P.2d 1332 (1980); Johnson v. Marshall Field & Co., 1 Wash.App. 655, 661, 463 P.2d 645 (1969). The granting of a new trial on grounds of inadequate damages is peculiarly within the discretion of the trial court, and a denial of such motion will not be disturbed absent a manifest abuse of discretion. Cowan v. Jensen, 79 Wash.2d 844, 847, 490 P.2d 436 (1971).

Wooldridge v. Woolett, 96 Wn.2d 695, 668 P.2d 566 (1981).

Future economic damages. There were three primary components of the future economic damage claim: neck surgery, carpal tunnel surgery, and loss of earning capacity.

Future Neck Surgery. Hoskins' neurosurgeon, Richard Wohns, M.D. testified that neck surgery was necessary as a result of the accident. CP (Wohns Deposition) 15. However, respondent Reich's expert neurologist Robert Colfelt, M.D. testified that the neck surgery was not necessary as a result of the accident. CP 441-442. He testified that Hoskins' pain problem was in the muscles and ligaments and that operating on a disc would not do anything for that pain. CP 464-465; CP 442-443. Dr. Colfelt explained that there are three reasons to do surgery

on the neck. CP 442-443. None was present in this case. In fact, Dr. Finkleman agreed that the EMG test showed “no specific cervical radicular nerve damage. CP (Finkleman Deposition) 12; and no objective evidence of nerve damage in this case. CP (Finkleman Deposition) 63.

Dr. Colfelt also testified that another reason not to do the surgery was that the level of the spine at which the discogram test was positive was not a level showing any positive findings on the MRI. CP 443-444. The tests did not match up. There was no clear-cut surgical target. CP 444. In fact, in the five years between the accident and the trial, Hoskins had not had the surgery. The jury’s decision not to award this element of claimed future economic damages is well supported by the evidence.

Future Carpal Tunnel Surgery. Dr. Colfelt testified that when he saw Hoskins on January 27, 2005, nearly four years after the accident, he was not having any carpal tunnel symptoms. CP 428, 439. Dr. Colfelt testified that the carpal tunnel syndrome was not caused by the accident, but rather by repetitive work activity. CP 440. The plaintiff was not doing that kind of work any more.

Dr. Finkleman testified that in a case of trauma induced carpal tunnel syndrome, the symptoms would appear in one to four weeks. CP

(Finkleman Deposition) 48-49. Dr. Rody confirmed that there were no symptoms during that period of time. CP 328-329.

There was plenty of evidence that the plaintiff did not need carpal tunnel surgery and that any carpal tunnel symptoms were not the result of the accident. The jury's decision not to award this element of claimed future economic damages is well supported by the evidence.

Future Loss of Earning Capacity: Hoskins claimed at trial that at the time of the accident he earned \$18.00 per hour and that after the accident he retrained and could only earn \$13.00 per hour. CP 76-77. Because the appellant has not provided any of the record on this issue, but instead just relies on his trial brief for the argument, this court should refuse to address this issue at all.

However, if the court does consider Hoskins argument on this element of future economic damages, Respondents Reich's arguments opposing the new trial do address the issue. The evidence showed that Hoskins made more money after the accident than he did before. In 1999 he made \$5000; in 2000 he had no income. He had worked for NW Flooring for only three months before the accident. There was no indication that he would have continued indefinitely. There was no recent history of continuous employment. After his change of careers, Hoskins

had full time, permanent employment, with benefits. The work environment was much better. Hoskins' work life improved dramatically after the accident. CP 514-515.

The jury's decision not to award this element of claimed future economic damages is well supported by the evidence.

Noneconomic Damages: Respondents Reich presented evidence through Hoskins' medical providers that demonstrated that Hoskins was much recovered from his injuries from the accident within about four months, and returned to his regular construction work and his prior sporadic chiropractic treatment schedule. He sought no treatment for about a year. When he did return, he had few objective physical findings.

Reich also presented evidence that Hoskins' carpal tunnel syndrome was caused by his repetitive work in the flooring industry and not from the accident. This was especially credible since Hoskins had no symptoms after the accident within the time frame expected by his own doctor. Hoskins' carpal tunnel symptoms ceased when he stopped doing floor covering work and pursued another career.

Reich presented evidence through Dr. Colfelt that Hoskins had injury to his neck muscles and ligaments as a result of the accident, and that the injury resolved. There was a clear difference of professional

opinion regarding whether or not claimed neck surgery was necessary or would be helpful. Hoskins had not pursued it. Dr. Finkleman testified that he hated to see so much done. Dr. Colfelt said that the surgery would not solve the plaintiff's pain problem.

Hoskins had an ongoing physical condition which periodically was exacerbated by his activity, before and after the accident. His condition was aggravated by the accident, then returned to what it was before - a periodic problem. Before the accident Hoskins had sporadic chiropractic treatment, and none for the six months prior to the accident. After the accident, he had an acute phase of treatment, and then no treatment for fourteen months.

Hoskins argues that the verdict is inconsistent because the jury allowed \$25,095.00 in past economic damages, but "only" \$15,000 in noneconomic damages. Hoskins attempts to lead the court to believe that all of the \$25,095.00 was for medical bills, and therefore allowing only \$15,000 in noneconomic damages is disproportionate. However, what was included by the jury for past economic damages is not known. Many different items could have been included in this number.

The jury was instructed to award \$3,150.98 in past medical bills that were agreed. CP 160. The jury was also to consider other past

medical bills. CP 160. Further, the jury was instructed to consider “the reasonable value of earnings, earning capacity, business opportunities, earning opportunities, lost to the present time, and the reasonable value of necessary nonmedical expenses that have been required to the present time.” CP 160.

The medical evidence from Dr. Rody was that Hoskins was off work from the date of the accident, May 10, 2001 through the end of July, 2001. This amounted to twelve weeks. The plaintiff earned \$18.00 per hour. At forty hours per week, there was thus a claim for at least \$8,640.00 in past lost wages. Dr. Finkleman testified that when he first saw Hoskins on September 11, 2003, he was working. However, Dr. Finkleman would not allow Hoskins to continue working heavy construction or flooring. CP (Finkleman Deposition) 6, 25-26. So there was additional time loss from 2003 until the time of trial in 2006.

By the time the case went to trial in February 2006, Hoskins had retrained to become a drug and rehabilitation counselor. CP 76. He presented evidence of his Tacoma Community College tuition costs. CP 91. He also presented travel expense evidence. CP 91.

The jury very well could have included all or some of the following items in it \$25,095.00 verdict for past economic damages: (1)

past lost wages immediately after the accident, (2) past lost wages at Dr. Finkleman's recommendation, (3) retraining expenses, (4) travel expenses, and (5) the hourly wage differential for the new job up to the time of trial.

Considering all of the evidence, the noneconomic damage award cannot be said to be so disproportionate as to indicate that it resulted from passion or prejudice. It is supported by the evidence in the record.

IV. CONCLUSION

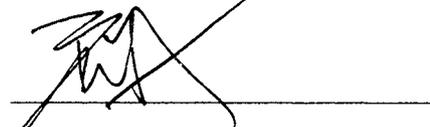
The granting of a new trial was within the discretion of the trial court. The trial court heard all of the evidence and determined that there was no inconsistency in the verdict and that it was supported by the evidence. The court may not speculate on the bases for the jury's verdict. No court should substitute its judgment regarding damages for that of the jury. The jury's decisions in this case, reflected in the verdict, were supported by the evidence.

Further, there was no error in law. The court properly allowed evidence of some of Hoskins' prior treatment. The facts in this case are not the same as in *Harris*, and that case should not be applied as broadly as the appellant urges. To do so would be a dramatic change in Washington law. The jury's verdict was based on the evidence and the trial judge made correct legal rulings during trial. Justice was done.

Respondents Reich request that the court AFFIRM the trial court's trial rulings and its denial of the motion for new trial.

DATED this 8th day of June, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Beth A. Jensen', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

Beth A. Jensen #15925

Attorney for Respondents

FILED
COURT OF APPEALS
DIVISION II

07 JUN -8 PM 6:01

STATE OF WASHINGTON

DEPUTY

CERTIFICATE OF SERVICE

DIANA G. SCAMPORLINA hereby states and declares ~~BY~~

follows:

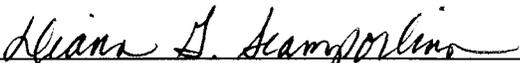
I am the office manager for Richard J. Jensen, P.S. and Associates, attorneys for respondent in the above-entitled action, am over the age of 18, am competent to testify to the facts contained herein, and make this certification based upon my personal knowledge.

On the 8th day of June, 2007, I delivered to ABC Legal Services, Inc. a true and correct copy of the document to which this certificate of service is attached for delivery on 6/8/07 to the following:

Paul A. Lindenmuth
Attorney for Appellant
4303 Ruston Way
Tacoma, WA 98402

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Fircrest, Washington, this 8th day of June, 2007.



Diana G. Scamporlina