

No. 36051-9-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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ELIZABETH G. LUTES,

*Respondent,*

v.

ROTSCHY, INC.,

*Appellant.*

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**BRIEF OF APPELLANT**

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ORIGINAL

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## I. INTRODUCTION

This case arises out of a two-car motor vehicle accident that occurred on August 6, 2002, in Clark County, Washington. A truck owned by defendant/appellant Rotschy, Inc. (hereinafter "Rotschy") pulled from a side street into the path of the car driven by plaintiff/respondent Elizabeth Lutes. Mrs. Lutes was injured in the accident. Liability was admitted and the case proceeded to trial on the issue of general damages only (no medical treatment or income loss claims).

Mrs. Lutes claimed she suffered a mild traumatic brain injury in the accident, though her head did not strike anything and she had no loss of consciousness. She also sustained bruising and continual headaches that dissipated somewhat after starting medication. None of her treating doctors testified at trial. Mrs. Lutes retained a neuropsychologist who tested her and claims she sustained a traumatic brain injury from the accident. Rotschy retained a neuropsychologist who tested Mrs. Lutes and determined she had no brain injury, just long-standing personality traits that made her think she was impaired. No medical doctor diagnosed her with brain

injury.

Mrs. Lutes has a pre-existing history of various ailments, including migraine headaches, depression, high blood pressure, sleep apnea, and obesity. Three years after this accident and before any neuropsychological testing, she was knocked unconscious by a falling ceiling vent.

Almost two years post-accident Mrs. Lutes was fired from her part time job. She briefly held two subsequent jobs. She claims these events were due to her traumatic brain injury, but she made no claim at trial for income loss. Mrs. Lutes made no claim for past or future medical treatment.

The case was tried to a jury the week of January 8, 2007, in Clark County Superior Court, Hon. Roger A. Bennett presiding. The jury returned a verdict in favor of Mrs. Lutes for general damages alone in the amount of \$700,000. Rotschy made a timely Motion for a New Trial or Remittitur, which was denied. This appeal followed.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

No. 1: The trial court abused its discretion when it gave

Instruction No. 11 to the jury.

No. 2: The trial court abused its discretion when it denied Rotschy's motion for a new trial on March 6, 2007.

No.3: The Trial Court abused its discretion when it denied Rotschy's motion for remittitur on March 6, 2007.

**B. Issues Pertaining to Assignments of Error**

1. Did the trial court abuse its discretion by giving Jury Instruction No. 11 when the instruction was not supported by substantial evidence? (Assignment of Error 1.)

2. Was giving the Instruction error because it did not meet the legal causation element of proximate cause? (Assignment of Error 1.)

3. Was the Instruction prejudicial to Rotschy because it prevented Rotschy from arguing its theory of the case? (Assignment of Error 1.)

4. Did irregularities by Lutes and the Court's orders prevent Rotschy from obtaining a fair trial? (Assignment of Error 2.)

5. Were the damages awarded by the jury so excessive as to

be unmistakably the result of passion or prejudice? (Assignment of Error 2.)

6. Was the verdict justified when there was no evidence or reasonable inferences from the evidence to justify the verdict?

(Assignment of Error 2.)

7. Was substantial justice denied to Rotschy? (Assignment of Error 2.)

8. Was the award outside the range of substantial evidence?

(Assignment of Error 3.)

9. Should the amount of the award have shocked the conscience of the Court? (Assignment of Error 3.)

10. Was the award based on passion and prejudice?

(Assignment of Error 3.)

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Procedure**

Mrs. Lutes filed a civil lawsuit against Rotschy Inc. and its employee/driver, Donald Koistinen, on June 13, 2005, alleging personal injuries, income loss, and medical bills as the result of the defendants' negligent conduct on August 6, 2002. CP 1-6.

Defendants answered the Complaint. CP 7-13. The parties later stipulated to dismissing defendant driver Koistinen. CP 18-20.

The parties filed Motions in Limine and Responses. CP 21-32, CP 33-35, CP 36-45, CP 46-51, CP 52-61. The motions in limine were argued the first day of trial. RP pp. 6-57. The case was tried to a 12-person jury January 8-11, 2007, in Clark County Superior Court, Hon. Roger A. Bennett presiding. The jury returned a verdict in favor of Mrs. Lutes for general damages alone in the amount of \$700,000. CP 80. Rotschy made a timely Motion for a New Trial or in the Alternative, Remittitur. CP 81-98. Lutes responded opposing the motion. CP 99-125. Rotschy filed a Reply in support of its motions. CP 131-137.

Rotschy's Motion was heard February 9, 2007. RP pp. 987-1015. The Court denied part of the motion and took the remaining matters under advisement, pending submission of additional documents by Lutes. RP p. 1015, ll. 6-15. Lutes filed the deposition transcript of defense witness John Wendt, M.D., and an unofficial, uncertified partial trial transcript of the testimony of defense witness Frederick Wise, Ph.D., and argument on proposed Jury Instruction

No. 11. CP 138-340. In response, Rotschy filed an Addendum to its Reply Brief that included argument and a motion to strike the partial transcript. CP 341-246. Lutes filed Authority in Opposition to Rotschy's Addendum. CP 347-367. Rotschy filed a Motion to Strike Unpublished Citation. CP 368-370. Lutes filed a Non-Opposition to the Defense Motion. CP 380-381.

The Court issued a written ruling on March 6, 2007. It denied Rotschy's motion for remittitur. It denied defendant's motion for a new trial on the basis of insurance and a document withheld from defense counsel. However, the Court determined it could not decide whether Instruction No. 11 should have been given because an official report of proceedings was not provided. CP 372-375. Final judgment was entered on March 5, 2007. CP 376-377. This Appeal timely followed.

**B. Summary of the Facts**

In support of her claims that she suffered a mild traumatic brain injury, plaintiff Lutes sought to present the testimony of seven fact witnesses and the testimony of an expert neuropsychologist, Dr. Perillo, who tested Lutes in 2005 at her attorney's request. The fact

witnesses included Lutes' husband, her two daughters, a friend, two former employers (via videotape perpetuation depositions), and a former work supervisor—all of whom testified to changes in her behavior post-accident. Lutes did not call as witnesses any of her treating doctors, which would have included a general practitioner and two neurologists. None of her doctors diagnosed Mrs. Lutes as having a traumatic brain injury. None referred her for neuropsychological testing.

Defendant Rotschy presented the testimony of a neurologist (via videotaped perpetuation deposition) and a neuropsychologist, who opined Lutes sustained persistent headaches from the accident, but not a brain injury. During the trial, certain issues were brought up and ruled upon by the Court, which form the basis for the present appeal as set forth below.

**1. Defense Pre-Trial Objection to Plaintiff Employer Testimony.**

Before trial testimony began, Rotschy objected to the testimony of two former Lutes employers and a supervisor. RP p. 11, ll. 1-14; RP p. 13, l. 14 to p. 19, l. 3. Rotschy argued that

testimony about Lutes' inability to hold or keep a job would prejudice the jury and lead to an award that unconsciously included some sort of income loss or inability to keep a job as an element of damages, despite there being no official claim. RP p. 16, l. 18 to p. 17, l. 17. Plaintiff responded that the testimony was merely to show Mrs. Lutes tried to keep her jobs thus she was not "faking" her symptoms. RP p. 11, l. 20 to p. 13, l. 11. The Court denied Rotschy's motion to strike the testimony. RP p. 24, ll. 6-25.

Subsequently during the trial, Lutes and her witnesses presented the following testimony:

Mr. Lutes (husband): "To the best of my knowledge she spends the majority of time looking for work." RP p. 232, ll. 10-11.

Mrs. Lutes: I have applied for over a hundred jobs. RP p. 643, l. 8.

Laura Suchy (friend): "I can understand why she doesn't have—isn't able to keep a job...". RP p. 460, ll. 23-24.

Dr. Perillo: She cannot keep pace at work. RP p. 350, ll. 1-10. People like Mrs. Lutes have limited job opportunities. RP p. 393, l. 18.

**2. Excluded Evidence of Failure to File Tax Returns.**

Rotschy submitted ER 904 evidence that Mrs. Lutes failed to list her income for 2002, 2003, and 2004 on the joint Federal Income Tax Return. She wrote out her own payroll checks, in contravention to what her employer said in his videotaped deposition. The basis for presenting the evidence was to show that plaintiff had other issues going on her life other than the accident that affected her, including her relationship with her husband, and to allow the jury relevant information about whether to believe Mrs. Lutes. RP p. 48 l. 22 to p. 50, l. 23. Plaintiff objected, arguing that because there was no claim for income loss, the material was more prejudicial than probative. RP p. 52, ll. 17-20. The Court excluded the proffered evidence citing ER 806(b) as its basis. RP p. 55, l. 3 to p. 57, l. 7.

**3. Defense Pre-Trial Objection to Duplicative Plaintiff Witnesses.**

Before testimony was taken, Rotschy also objected to the duplicative proposed testimony of four Lutes family members and friends plus her three employers/supervisors, all geared toward countering the single defense neuropsychologist's opinion that Lutes

did not have a cognitive brain injury. Rotschy argued the testimony was duplicative and unfair, especially when plaintiff also had an expert neuropsychologist. RP p. 17, l. 9 to p. 18, l. 24. The Court denied Rotschy's motion to strike the testimony of Lutes' former employers or supervisor. The Court excluded one of Lutes' two daughters, but allowed the remaining testimony. RP p. 24, ll. 6-25.

**4. Defense Pre-Trial Motion to Exclude Evidence of Insurance.**

The parties agreed to Rotschy's pre-trial motion to exclude evidence of insurance. Yet during the trial, the jury heard the following from Mrs. Lutes: "I believed the defendant's representative, Vicki Gilmore. She told me that they were there for me and they were going to take care of me." RP p. 623, ll. 22-25.

Rotschy's counsel moved for a mistrial on the basis that the jury had been tainted by references to insurance. RP p. 626, l. 1 to p. 634, l. 20. Lutes counsel apologized and asserted he had instructed witnesses not to mention insurance. RP p. 628, ll. 5-13. The Court found the references to insurance were inadmissible, but denied the motion for a mistrial. RP p. 632, ll. 5-8.

The very next day, during cross-examination of Rotschy's neuropsychologist Dr. Wise, Lutes counsel made the following deliberate references to insurance:

"[Y]ou're referred people by defense lawyers, by plaintiff lawyers, by insurance companies... ." RP p. 787, ll. 5-7. "Well, if you say, for example, I don't think this person needs any more treatment and an insurance company cuts off the treatment, if you're wrong that could have serious consequences, couldn't it?" RP p. 789, ll. 6-9.

Counsel asked the following questions about Dr. Haley (upon whose test Dr. Wise relied extensively for his opinion that Mrs. Lutes was consciously or unconsciously making up her symptoms of head injury): "He works exclusively for the civil defense organizations such as defense attorneys and insurance companies, doesn't he?" RP p. 880, ll. 2-4. "He lectures to insurance adjusters and insurance executives on a very frequent basis?" Id. at ll. 6-7. "And so Dr. Haley took the people the insurance company sent him, he determined who he suspected of being malingerers... ." Id. at ll. 16-18. "Well they aren't all created by a group of patients sent by

insurance companies or defense firms, are they?" Id. at ll. 23-24.

"It's all done at the time by a group of neuropsychologists who make their living testifying for insurance companies and institutional defendants, isn't it?" RP p. 881, ll. 8-10.

**5. Defense Objection to "Eggshell Skull" Jury Instruction.**

Defendant's theory of the case was that Mrs. Lutes did not have a traumatic brain injury, she merely acted as if she did based on her somatic focus and her pre-existing risk factors for cognitive dysfunction like depression and headaches. See, e.g., testimony of defense neuropsychologist Dr. Wise at RP p. 779, l. 6 to p. 780, l. 6. Plaintiff counsel fastened on the word "whiner" to describe Dr. Wise's characterization of Mrs. Lutes before and since the accident.

Lutes proposed an instruction that came to be known as Instruction No. 11, which stated:

**"If you find that:**

- (1) before this occurrence the plaintiff had a mental condition that was not causing pain or disability, and**
- (2) the condition made the plaintiff more susceptible to injury than a person in normal health,**

**Then you should consider all the injuries and damages 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 even without this occurrence."**

CP 77.

The following was testimony during the plaintiff's case:

Dr. Perillo: Lutes does not have a whining, complaining personality. RP 397, ll. 7-21. His tests show she is not exaggerating. RP p. 376, ll. 9-18. He has reviewed all her doctor's records and none said Lutes was a whiner. No records reflect that diagnosis or opinion. RP p. 445, l. 11 to p. 446, l. 3.

Husband Ken Lutes: She is not faking or exaggerating. RP p. 238, ll. 10-16. Before the accident there were times she did not sleep well if things were not going well at work. RP 223, ll. 19-20. She was a little bossy and liked to run the show. RP 243, ll. 9-17. Before the accident she had debilitating migraine headaches that could last for days. RP p. 224, ll. 8-23.

Friend Laura Suchy: She is not faking or exaggerating issues. RP p. 459, ll. 16-18. She did not have a whining, complaining personality. RP p. 453, ll.21-24. She had migraine headaches before the accident. RP p. 459, l. 23. She has been adamant for years that Suchy's daughter stole something from her, despite denials. RP p. 464, l. 18 to p. 465, l. 1.

Daughter Laura Lutes: Mother was the controlling figure in the family. RP p. 562, ll. 10-22. Mother had a long history of migraine headaches requiring her to lie down in a dark room and everyone would tiptoe around her. RP p. 563, l. 21 to p. 564, l. 5.

Plaintiff Lutes: I've always had a strong personality and fought for my point of view. RP p. 646, ll. 5-7. I had a history of neck pain before the accident that led to migraines. RP p. 650, ll. 2-3, RP 653, ll. 6-22. When I had migraines I lay down in a dark room and take Imitrex. Sometimes I had trouble thinking clearly during a migraine. RP p. 654, l. 17 to p. 655, l. 12. I had problems before the accident with depression and stress. I saw a counselor before the accident for depression. My job was very stressful. RP 650, l. 22 to p. 651, l. 7. I have used a CPAP unit for sleep apnea since before the

accident. RP p. 654, ll. 8-16. Migraines and sleep apnea made me forgetful. RP p. 657, ll. 1-16. I had high blood pressure and thyroid problems before the accident. RP p. 659, ll. 1-7.

Medical records admitted into evidence at trial and examined by the experts show Mrs. Lutes had a pre-accident history of migraine headaches, neck pain, hypertension, and obesity. Ex. 7.

Plaintiff rested her case. Defendant neuropsychological expert Dr. Wise began to testify. On direct examination, Dr. Wise testified that Mrs. Lutes did not have a traumatic brain injury because she scored in the normal range on the tests that measure cognition. Although she complained of cognitive deficits, the objective test data both he and Dr. Perillo obtained showed she did not have the complained-of memory problems, math problems, or problems adapting to novel situations. RP p.777, l. 15 to p. 778, l. 21. However, on the MMPI<sup>1</sup> tests that measure personality, she tested as somatically focused. His conclusion was that she had a premorbid history of emotional and physical problems (as set forth in

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<sup>1</sup> Minnesota Multiphasic Personality Inventory -2, a test that assesses personality types.

her pre-accident records and by her own report to him) superimposed on a personality type that tends to be somatically focused. RP 779, l. 6 to p. 780, l. 6.

Counsel began discussing the proposed jury instructions half-way through the testimony of Dr. Wise. Defense counsel agreed to plaintiff's proposed Instruction No. 10 based on Washington Pattern Instruction (WPI) 30.17, which stated that plaintiff was entitled to damages for pre-existing physical or mental conditions that were made worse by the accident. CP 76; RP p. 802, ll. 18-25. After argument, plaintiff withdrew her next proposed instruction, the "lighting up" instruction, based on WPI 30.18. RP p. 803, l. 1 to p. 807, l. 9. Plaintiff Lutes then proposed an instruction based on WPI 30.18.01, often called the "eggshell skull" instruction. Rotschy opposed this instruction as well, which later became Jury Instruction No. 11. CP 77; RP p. 807, ll. 14-15. Lutes counsel admitted he had not established evidence to support the instruction in his case in chief, but argued that he would be able to establish the foundation for Instruction No. 11 through cross-examination of Dr. Wise. The

Court agreed to hear the testimony and reserve a ruling. RP p. 808, l. 22 to p. 809, l. 3.

Dr. Wise's testimony concluded and counsel began final argument on jury instructions. RP 913 ff. Lutes counsel asserted that Dr. Wise provided the needed testimony to support Instruction No. 11, that Lutes had a latent personality condition lighted up by a neural cognitive deficit sustained in the accident. He agreed the instruction was not appropriate unless those conditions were met. RP p. 916, ll. 19 to p. 917, l. 3.

Dr. Wise did not establish that necessary foundation. He testified on both direct and cross that in his opinion, Mrs. Lutes thinks she has a traumatic brain injury but that is not borne out by the accident facts (no loss of consciousness) or the neuropsychological test data. RP p. 905, ll. 14-16. "There's no evidence that convinces me that there's structural brain damage. I think she probably does have some cognitive dysfunctioning in activities of daily living related to a bunch of other things." RP p. 909, ll. 11-14 (emphasis added). There is nothing wrong with her from a neuropathological standpoint. *Id.* at ll. 15-17. The "other things" Dr. Wise referred to

were Mrs. Lutes' pre-accident history of depression, headaches, and stress, not the accident.

Dr. Wise testified on both direct and cross-examination that Mrs. Lutes might have had a post-concussive "syndrome" for a period of time, but not traumatic brain injury. A syndrome is just a working diagnosis related to complaints only, not to actual organic brain injury or physical concussion. RP p. 721, l. 14 to p. 722, l. 7, RP p. 867, ll. 9-11.

Defense counsel argued against giving Instruction 11 because a personality trait is not a mental condition. RP p. 917, ll. 12-19. Further, counsel argued that holding Rotschy liable for a pre-existing mental condition that amounted to no more than a personality type was outside the bounds of the legal consequences prong of proximate cause. RP p. 918, l. 8 to p. 919, l. 3. The Court allowed the instruction to go to the jury, noting that "if it appears that the jury has exceeded all reasonable bounds I'll have to take that into consideration if there's a motion." RP p. 919, ll. 4-25.

In closing argument, plaintiff counsel did not make any argument supporting Jury Instruction No. 11. To the contrary, he

argued that Dr. Wise was wrong when he said she was a whiner and complainer. RP 937, l. 18 to p. 938, l. 2. Her personality before the accident was not as Dr. Wise portrayed. RP p. 946, ll. 1-7. The fact witnesses and Dr. Perillo testified Mrs. Lutes was specifically not that personality type before the accident. RP p. 951, ll. 21-23.

Defense counsel argued in closing that the objective test results from both neuropsychologists confirm that Mrs. Lutes did not have objectively verifiable cognitive deficits. The standardized tests are more valid than the subjective reports of family and friends. Mrs. Lutes's personality produces heightened responses to stressful events, including those before the accident, such as migraines and neck pain from her job. RP p. 962, l. 1 to p. 964, l. 19.

After the verdict was returned, Rotschy moved for a new trial or in the alternative remittitur. CP 81-98. Rotschy again argued that there was no basis for giving Instruction 11 because the required elements of the instruction had not been substantially established. Mrs. Lutes has a personality that tends toward exaggeration, not a "mental condition" as set forth in the Instruction. Neither Dr. Wise nor Dr. Perillo testified Mrs. Lutes had a pre-existing mental

condition, or that a mental condition made her more susceptible to injury, or that a mental condition created more injuries than would have been incurred by a person without the mental condition.

Lutes responded opposing the motion. CP 99-125. She said she did not argue or rely on the jury instruction in her case. The instruction was irrelevant to the plaintiff's case and only supplied to counter Dr. Wise's opinion. Rotschy filed a Reply in support of its motions. CP 131-137. It argued that plaintiff did not extract from Dr. Wise the information to support the instruction.

Rotschy's Motion was heard February 9, 2007. RP pp. 987-1015. At the hearing, Lutes for the first time argued that the testimony of Dr. Wise and Dr. Wendt did support the giving of Instruction 11. RP p. 1000, l. 9, to p. 1007, l. 25. She did not produce copies of the record to support her claim. The Court denied the defense motion for a new trial on the basis of impermissible introduction of insurance. It took the remaining matters under advisement pending submission of additional documents by Lutes to support jury instruction 11. RP p. 1015, ll. 6-15.

Lutes then filed the Wendt deposition transcript and an unofficial, uncertified transcript of the testimony of defense witness Wise with argument about Instruction 11. CP 138-340. In response, Rotschy filed an Addendum to its Reply Brief. CP 341-346. It moved to strike the partial transcript as uncertified (which the Court granted, CP 373). Rotschy argued that Lutes failed to provide testimony to support the elements of the Instruction. In particular, Dr. Wise stated only that Mrs. Lutes suffered complaints, not deficits, and he found no evidence of a traumatic brain injury from any test results.

The Court issued a written ruling on March 6, 2007. CP 372-375. It denied Rotschy's motion for remittitur. It denied defendant's motion for a new trial on the basis of insurance and a document withheld from defense counsel. However, the Court determined it could not decide whether Instruction No. 11 should have been given because an official report of proceedings was not provided.

#### **IV. SUMMARY OF ARGUMENT**

Rotschy did not receive a fair trial because an erroneous jury instruction was given. The plaintiff impermissibly introduced

insurance into the trial. The testimony of plaintiff's employers and other fact witnesses was prejudicial, yet defendant was precluded from introducing probative testimony relevant to Lutes' credibility. The judgment should be reversed and the case remanded for a new trial. In the alternative, the Court should reduce the verdict to a sum in conformance with the non-objectionable testimony at trial.

## V. ARGUMENT

### A. Standard of Review

The standard of review for determining whether a given jury instruction was error is abuse of discretion.<sup>2</sup> The reviewing Court must determine if the abuse of discretion was manifestly unreasonable, exercised on untenable grounds, or was for untenable reasons. The standard of review for denial of a Motion for New Trial is abuse of discretion.<sup>3</sup> The standard of review for denial of a Motion for Remittitur is abuse of discretion.<sup>4</sup>

### B. Assignment of Error No. 1: The Court Erred in Giving Jury Instruction No. 11 to the Prejudice of the Defendant.

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<sup>2</sup> *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996)

<sup>3</sup> *Olpiniski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968)

<sup>4</sup> RCW 4.76.030

A jury instruction cannot be given unless it is supported by substantial evidence. The verdict must be reversed and a new trial held if the error was prejudicial to the opposing party and affected the outcome of the trial.<sup>5</sup>

It was error to give Jury Instruction No. 11 to the jury. There was no substantitive support for the instruction and giving the instruction prejudiced Rotschy. The trial court essentially instructed the jury on plaintiff's theory of case while portraying Rotschy's argument as merely another version of the plaintiff's argument. The only remedy for this prejudice is a new trial.

**1. The Instruction Was Not Supported By Substantial Evidence.**

The trial court can only submit instructions to a jury where there is substantial evidence to support the party's theory of the case. The supporting facts for a theory and instruction may not be based upon speculation and conjecture.<sup>6</sup> In *Savage v. State*, an assault victim claimed the parolee who assaulted her was not properly supervised. The trial court refused to give the State's instruction

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<sup>5</sup> *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996)

<sup>6</sup> *Savage v. State*, 127 Wn.2d 434, 448-49, 899 P.2d 1270 (1995)

telling the jury it could take into account the State's available resources and resource allocation policy because the only evidence the State presented was the vague testimony of a single parole supervisor. The reviewing Courts affirmed, holding that the State had not presented substantial evidence at trial to support giving the instruction.

Likewise, in the present case, there was no substantive evidence upon which to give the instruction for three reasons: (A) Not a single plaintiff witness gave evidence supporting the instruction. (B) Dr. Wise did not testify in support of the instruction's elements. (C) There was no medical evidence to support each and every element of the instruction, namely that: (1) plaintiff had a mental condition that was not causing pain or disability, (2) the condition made her more susceptible to injury than a person in normal health, and (3) the incident caused this otherwise quiescent mental condition to flare up for the first time.

**(A) Plaintiff Witnesses Did Not Support the**

**Instruction.** Every witness was asked the same question by plaintiff counsel: was Mrs. Lutes exaggerating her cognitive difficulties?

Every one of them said no. Her expert neuropsychologist, Dr. Perillo, testified that Mrs. Lutes did not have a whining, complaining personality. He reviewed all her doctor's records and no one diagnosed her as a whiner. Plaintiff rested her case without presenting any evidence of a latent personality trait that made her more susceptible to injury which was caused by the accident.

**(B) Dr. Wise Did Not Support The Instruction.**

Dr. Wise testified that Mrs. Lutes did not sustain a traumatic brain injury from the accident, as documented by objective test results. The MMPI personality test results showed she was somatically focused. His conclusion was that before this accident her somatic personality was superimposed on physical and emotional conditions [headaches, depression, stress]. In his opinion, she has cognitive dysfunction in activities of daily living related to ongoing circumstances, not the accident. *See, e.g.*, RP p.909, ll. 11-17. Thus, the condition was not latent before the accident.

There was testimony by her husband, daughter, and friend that Mrs. Lutes exhibited behaviors before the accident that tended to show this personality trait: headaches and sleeplessness as reactions

to stress at work (RP p. 223, ll.19-20), insistence that a friend's daughter was a thief (RP p. 464, l. 18 to p. 465, l. 1), a controlling personality (RP p. 221, l. 23 to p. 222, l. 4; RP p. 562, ll.10-22), migraines that forced her family to tiptoe around her as she lay in a darkened room (RP p. 224, ll. 8-23; RP p. 563. l. 21 to P. 564, l. 5), a history of neck pain (RP 650, ll. 2-3; RP 653, ll. 6-22), not thinking clearly when stressed or having a headache (RP p. 654, l. 17 to p. 655, l. 12), and history of depression and stress, especially from her job (RP p. 650, l. 22 to p. 651, l. 7).

Therefore, there was no evidence at all, let alone substantial evidence adduced at trial, to support an instruction that Mrs. Lutes had a latent "mental condition" that was not causing "pain or disability."

**(C) Medical Evidence Did Not Support the**

**Instruction.** Medical evidence is required to establish a claimed injury, and the evidence must be supported by at least some objective findings.<sup>7</sup> In the *Oien* case, the Court rejected the injured worker's

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<sup>7</sup> *Parks v. Department of Labor & Indus.*, 46 Wn.2d 895, 989, 286 P.2d 104 (1955); *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), *reconsideration denied, review denied*, 125 Wn.2d 1021 (1995)

"lighting up" claim of increased disability due to an industrial injury. The records showed only that he subjectively complained of increased pain, but there were no objective medical findings by any doctor.

Other Intermediate Courts have refused to give the instruction when there is no testimony the condition was latent or inactive.<sup>8</sup> The *Austin* case, while not controlling, involved a similar jury instruction that was impermissible because no medical doctor testified in support of the instruction. The same jury instruction at issue in the present case was refused in the *Austin* trial because the trial testimony of Austin's own doctor could not support the instruction. Austin argued that the defense doctor established latency on cross-examination. A review of the record by the appellate court showed that the defense doctor did not testify the preexisting condition was latent or lighted up by the injury. The instruction was properly refused.

In the present case, there was no medical evidence at trial to

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<sup>8</sup> *Austin v. Department of Labor & Industries*, 6 Wn. App. 394, 399, 492 P.2d 1382 (1971).

establish on a more probable than not basis each and every element of Instruction No. 11, namely that: 1) plaintiff had a mental condition that was not causing pain or disability before the accident; 2) the condition made her more susceptible to injury than a person in normal health; and 3) the accident caused this mental condition to flare up for the first time.

No expert testified Mrs. Lutes had a preexisting "mental condition." A propensity to be a "whiner" is not a recognized mental condition. Dr. Wise testified that the MMPI showed Mrs. Lutes had a certain type of personality that predisposed her to complaining, which could explain her behavior whereas the neurocognitive test results could not confirm a head injury. Being a "whiner," as plaintiff counsel constantly referred to it, is not a recognized mental condition, just a personality type identified by the MMPI that exaggerates and externalizes things that happen to her. The MMPI does not diagnose mental conditions. Only the DSM-IV is the standard for determining mental conditions and it does not include

"whiner" as a mental condition.<sup>9</sup> No expert testified at trial that using the MMPI to diagnose a mental condition is generally accepted in the scientific community.

To support a scientific or medical theory, there must be general acceptance by scientists or other professionals, not the courts.<sup>10</sup> An expert may testify on the basis of specialized knowledge to help the trier of fact understand evidence or determine a fact at issue.<sup>11</sup> No expert testified at trial that Mrs. Lutes had a pre-existing (let alone latent) mental condition diagnosed by recognized professional standards.

The very fact that the jury instruction requires that the condition not be causing a disability signifies that a mere personality trait is not a mental condition. How can a personality trait cause pain or disability when the personality trait is "whining." That is why reliance on DSM-IV definitions is so crucial, because that gold

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<sup>9</sup> The DSM-IV (Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition) is the standard reference work of recognized mental conditions used by all mental health specialists to diagnose mental disorders. Published by the American Psychological Association, this "bible" also provides information as to cause, prognoses, and research into all recognized mental disorders. "Whiner" is not a recognized mental disorder.

<sup>10</sup> *Grant v. Boccaia*, 133 Wn. App. 176, 137 P.3d 20 (2006), *review denied*, 154 P.3d 919 (2007)

<sup>11</sup> *Grant v. Boccaia*, at 178

standard sets forth criteria for identifying and explaining the nature of the disability for generally accepted mental conditions.

Further, Dr. Wise stated that Mrs. Lutes's personality predisposes her to exaggeration of complaints only—not deficits. In other words, there is no disability connected to this personality type, just subjective symptoms. *Oien, supra.*<sup>12</sup>

Plaintiff may argue that a Division One case, *McDonagh v. Department of Labor & Industries*<sup>13</sup> supports the proposition that personality characteristics can light up a disorder. In the *McDonagh* case, the plaintiff's "lighting up" instruction was refused by the trial court, but reversed by Division One. The case facts were quite different. There was substantial evidence to support the instruction by way of McDonagh's own psychiatrist, who testified that McDonagh had a biological predisposition for the development of a major depressive illness with phobic anxiety—clearly DSM-IV classifications. In the present case, there was no biological basis

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<sup>12</sup> *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), *reconsideration denied, review denied*, 125 Wn.2d 1021 (1995)

<sup>13</sup> *McDonagh v. Department of Labor & Indus.*, 68 Wn. App. 749, 845 P.2d 1030 (1993)

and no DSM-IV diagnosis, just a personality type evidenced by the MMPI that tended to exaggeration and "whining."

In another Division One case the appellate court found that a lighting up jury instruction was proper to show that an employee's pre-existing post-traumatic stress disorder (a DSM-IV categorization) was lit up by employment discrimination, resulting in severe emotional distress, physical ailments, and depression.<sup>14</sup> But in that case, four plaintiff doctors testified regarding the relationship between the pre-existing condition and the claimed injuries on a more probable than not basis. The medical testimony was convincing enough to remove the instruction from the realm of speculation and conjecture.<sup>15</sup>

In the present case, the jury was forced to speculate because no testimony supported the instruction. The trial court abused its discretion by giving the instruction on untenable grounds.<sup>16</sup>

## **2. The Instruction Did Not Meet the Legal Causation Requirement.**

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<sup>14</sup> *Xieng v. Peoples National Bank of Wash.*, 63 Wn. App. 572, 821 P.2d 520 (1991), *affirmed on other grounds*, 120 Wn.2d 512, 844 P.2d 389 (1993)

<sup>15</sup> *Xieng*, at 582-83; *Savage v. State*, 127 Wn.2d 434, 448-49, 899 P.2d 1270 (1995)

<sup>16</sup> *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996)

The Court erred in giving the instruction. Legal causation should not extend from a latent personality trait as a "whiner" to a jury verdict for \$700,000. The trial court raised concerns on its own about the legal causation prong of proximate cause, and should have acted on its concerns by refusing to give the instruction. RP p. 914, l. 24 to RP p. 919, l. 9.

Proximate causation is divided into two elements: cause in fact and legal causation.<sup>17</sup> Both of these elements must be present to establish the proximate cause element of negligence; failure to establish both elements is failure to establish proximate cause. Cause in fact refers to the actual "but for" cause of the injury, i.e., but for the defendant's actions, the plaintiff would not have been injured.<sup>18</sup> Establishing cause in fact involves a determination of what actually occurred and is generally left to the trier of fact.

Unlike actual causation, which is based on a physical connection between an act and an injury, legal causation is grounded in policy determinations as to how far the consequences of a

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<sup>17</sup> *King v. Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974)

<sup>18</sup> *King v. Seattle*, at 250

defendant's acts should extend, given the existence of cause in fact.<sup>19</sup>

Legal causation is for the court to decide as a matter of law. Justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained. If the resulting damage is not reasonably expectable at the time of misconduct, legal liability should not attach.<sup>20</sup>

In the present case, justice and common sense dictate that a trucking company not be held liable for injuries based on Jury Instruction No. 11. It is not reasonably expectable that a pre-existing but heretofore never demonstrated personality trait of being a whiner should result in injuries valued by the jury at \$700,000.

### **3. The Instruction Prejudiced the Defendant.**

When there is an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish grounds for reversal, unless it affirmatively appears that the error was harmless.<sup>21</sup> An error is only

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<sup>19</sup> *Eckerson v. Ford's Prairie School Dist. 11*, 3 Wn.2d 475, 482-84, 101 P.2d 345 (1940)

<sup>20</sup> *Eckerson v. Ford's Prairie School Dist.*, at 484

<sup>21</sup> *McKay v. Acorn Custom Cabinetry*, 127 Wn.2d 301, 311, 898 P.2d 284 (1995)

harmless when it is trivial or merely academic, or formal, did not prejudice the substantial rights of the opposing party, and when it "in no way affected the final outcome of the case."<sup>22</sup>

In the present case, the plaintiff certainly obtained an award in her favor. It was an erroneous instruction unsupported by substantial evidence and as such, has the propensity to confuse the jury and there is a presumption that it did so. Jury instruction 11 must be presumed prejudicial and there is nothing about this verdict or the evidence that makes the error harmless.

A case on point is *Greenwood v. The Olympic, Inc.*<sup>23</sup> The trial court granted a new trial because of the presumed prejudice caused by an instruction that was a correct statement of law but not supported by the evidence, just as in the present case. The defendant Olympic proposed an aggravation of pre-existing condition jury instruction. While there was evidence that plaintiff's dormant arthritic condition was activated by the accident, there was no

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<sup>22</sup> *McKay v. Acorn Custom Cabinetry*, at 311, quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977), quoting *State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)

<sup>23</sup> *Greenwood v. The Olympic, Inc.*, 51 Wn.2d 18, 315 P.2d 295 (1957)

testimony to support the remainder of the instruction, that plaintiff was suffering from this condition before the fall on defendant's property. The jury returned a very small award for the plaintiff. Plaintiff Greenwood argued the unsupported instruction may have been the reason for the small general damages award. The Supreme Court held it was prejudicial error to give the instruction. It was prejudicial to the plaintiff because it invited the jury to find that the preexisting condition was symptomatic, even though there was insufficient evidence to support such a finding.

In the present case, giving Instruction No. 11 was also error because it was not supported by substantial evidence and prejudiced Rotschy. The instruction invited the jury to find—without any basis in the record—that Mrs. Lutes had a pre-existing, latent mental condition that made her more susceptible to injury than a person in normal health. It completely undercut Rotschy's theory of the case that Mrs. Lutes did not have a traumatic brain injury, but she might have a personality that typically exaggerates misfortunes. The erroneous instruction can explain the exorbitant award to Lutes, just as the *Greenwood* Court found the error explained the miserly award

in that case. Like the Court in *Greenwood*, this Court must grant the motion for new trial because the erroneous jury instruction was prejudicial.

Jury instructions must permit each party to argue its theory of the case, must not be misleading and taken together must properly inform the jury of the applicable law.<sup>24</sup> In *Douglas v. Freeman*, the Supreme Court held that the given instructions as a whole allowed the clinic to argue its theory of non-liability.

In the present case, the instructions taken as a whole did not permit Rotschy to argue its theory of the case and were misleading. Essentially, Jury Instructions 10 and 11 taken together instructed the jury that Mrs. Lutes should be awarded substantial damages, regardless of whether her cognitive injuries were real or not, whether caused by the accident or pre-existing. The instructions do not reflect the defense theory of the case or the testimony at trial.

The trial court made the following comment when finally it agreed to allow Jury Instruction No. 11 to go to the jury: "I'm just

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<sup>24</sup> *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991)

going to have to listen to the closing arguments and see what sort of verdict we get. And if it appears that the jury has exceeded all reasonable bounds, I'll have to take that into consideration if there's a motion. RP p. 919, ll. 21-25.

This jury's award did exceed all reasonable bounds for a case premised entirely on general damages—no wage loss, no medical specials, no loss of consortium. The court below abused its discretion, which was exercised on untenable grounds and for untenable reasons as set forth above. Defendant Rotschy asks the Court to find that there was no substantial basis to give Jury Instruction No. 11, the legal causation element of proximate cause was not met, and the defendant was prejudiced. The Court should vacate the judgment and order a new trial based on the clear prejudice to the defendant.

**C. Assignment of Error No. 2: The Court Should have Granted Defendant A New Trial**

The Court has discretion to grant a motion for a new trial if the substantial rights of a party are materially affected.<sup>25</sup> It is an

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<sup>25</sup> Court Rule 59(a)

abuse of discretion not to order a new trial when substantial justice has not been done.<sup>26</sup> The jury award for emotional distress damages only was not supported by the evidence. Defendant Rotschy seeks a new trial on subparts (1), (5), (7), and (9) of CR 59(a) as follows:

1. Irregularity in the proceedings of the adverse party and orders of the Court that prevented defendant from having a fair trial;
2. Damages so excessive as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
3. No evidence or reasonable inferences from the evidence to justify the verdict; and
4. Substantial justice was not done.

**1. Irregularity in the Proceedings.**

Rotschy did not obtain a fair trial due to the following irregularities in the proceedings, which have been discussed in the Summary of the Facts, above.

Plaintiff impermissibly introduced insurance into the proceedings. Mrs. Lutes referred to a Rotschy representative whom said she would help plaintiff. RP p. 623, ll. 22-25. The Court denied

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<sup>26</sup> *Olpinski v. Clement*, 73 Wn.2d 944, 950-51, 442 P.2d 260 (1968)

Rotschy's motion for a mistrial, but the very next day plaintiff attorney himself poisoned the jurors with multiple references linking defense counsel, insurers, and Rotschy's expert neuropsychologist in cross-examination of Dr. Wise. RP pp. 787, 789, 880-81.

When the issue of insurance is inserted deliberately or for the purpose of prejudicing the jury then it calls for a mistrial or new trial.<sup>27</sup> While Mrs. Lutes' reference may have been inadvertent, her counsel's attacks on cross-examination were a deliberate attempt to interject insurance into the trial to prejudice the jury against defendant and its expert in contravention of the agreed motion in limine.

The Court gave Jury Instruction No. 11 to the jury when it was not substantially supported by the evidence at trial. See above for full explication of this issue.

Plaintiff Lutes used the testimony of employers and others to insinuate an income loss claim into a trial that was supposed to be about general damages only. The Court allowed duplicative

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<sup>27</sup> *Kodiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 160, 422 P.2d 496 (1967)

testimony from a parade of plaintiff witnesses. It did not allow Rotschy to present evidence of income tax records.

All these irregularities in the Proceedings materially affected Rotschy's ability to have a fair trial.

**2. The Damages were Clearly Excessive and Unsupported.**

The trial court can order a new trial when the damages awarded are outside the range of admissible evidence.<sup>28</sup> Juries are not allowed to presume the existence of damages and must rely on the evidence to support the elements of the claim.<sup>29</sup> In the *Himango* case, the court ordered a new trial when the damages awarded were not supported by credible evidence.

In the present case, the trial court abused its discretion in not granting Rotschy a new trial because the amount of the verdict was so excessive it indicated that the jury considered other matters outside the allowed damages, such as loss of income and future job opportunities. Plaintiff asserted an income loss claim in her

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<sup>28</sup> *Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 680 P.2d 432 (1984), review denied, 102 Wn.2d 1004 (1984)

<sup>29</sup> *Himango v. Prime Time Broadcasting, Inc.*, at 268-69

Complaint, but dropped the claim before trial to avoid having evidence of filing false returns before the jury. Yet Mrs. Lutes and her witnesses were allowed to introduce testimony about her hundreds of job searches and inability to get or hold a job after the accident.

One of the testifying witnesses was her only expert, neuropsychologist Dr. Perillo. His opinions as an expert would naturally carry weight, especially when his opinion was not tempered with positive opinions about her ability to get or keep a job. RP pp. 350, 354, 393. Further, the Court permitted three employers or supervisors to testify about her work behavior. The testimony was allowed over the objections of Rotschy, which argued that the testimony would influence the jury to award Mrs. Lutes for income loss. The Court offered to and did instruct the jury that income loss was not an element of the claim, but the overwhelming evidence and the amount of the award made it clear that a limiting instruction alone was not sufficient to keep the jury from going outside the bounds of the legitimate claim for general damages only.

The excessive jury award bore out Rotschy's pre-trial concern that matters outside the prayer for relief would be introduced into the trial to "back door" an income loss claim. Plaintiff was allowed to put former employers on the stand and to insinuate inflammatory testimony about income loss without having to put on the required competent expert testimony to support the claim.

If a proper income loss claim had been made, Rotschy would have introduced evidence that Mrs. Lutes failed to file income taxes for the last three years she was working, and that she was responsible for writing her own payroll checks. This would have contradicted the testimony of Dominic Chan and Rex Kellso about how she handled her job before and after the accident, and cast doubt on Mrs. Lutes' income loss claim and the cause of her depression and headaches. Instead, there were inferences that Mrs. Lutes may never work again (*e.g.*, her testimony that she had applied for over a hundred jobs without success, RP p. 643, l. 8). Rotschy was unable to exclude the testimony and to counter the insinuations that resulted in an excessive verdict.

### **3. There Was No Evidence to Justify the Verdict.**

The Court has discretion to order a new trial "on the ground that the evidence is insufficient to justify the verdict, or that the verdict is against the weight of the evidence."<sup>30</sup>

In addition to the testimony about job loss, the erroneous giving of Instruction No. 11 allowed the jury to award plaintiff Lutes an excessive verdict even if it did not believe she had a traumatic brain injury. The Court abused its discretion by giving the instruction, which had the effect of allowing the jury to speculate about damages for which there was no competent testimony.<sup>31</sup>

### **4. Substantial Justice Was Not Done.**

The trial court can order a new trial when it believes substantial justice had not been done.<sup>32</sup> Rotschy was denied substantial justice in this trial. Jury Instruction 11 was given, despite the lack of substantial evidence. Plaintiff's repeated and deliberate references to insurance, defense attorneys, and the relationship

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<sup>30</sup> *Dyal v. Fire Companies Adjustment Bureau*, 23 Wn.2d 515, 522, 161 P.2d 312 (1945)

<sup>31</sup> *Savage v. State*, 127 Wn.2d 434, 448-49, 899 P.2d 1270 (1995)

<sup>32</sup> *Trompeter v. United Ins. Co.*, 51 Wn.2d 133, 141, 316 P.2d 455 (1957)

between defense counsel and insurers denied defendant a fair trial by prejudicing the jury against the defense.

The trial court abused its exercise of discretion for untenable reasons and upon untenable grounds when it denied Rotschy a new trial pursuant to CR 59(a).

**D. Assignment of Error No. 3: The Court Should Have Granted Defendant Remittitur.**

In lieu of a new trial, the trial court should have lowered the amount of Mrs. Lutes' award, which was not supported by the evidence. RCW 4.76.030 provides that the trial court, upon finding a verdict excessive, may enter an order providing for a new trial unless the adverse party agrees to a reduction of such verdict. The procedure for reducing a verdict is designed to achieve a just result and to avoid multiple trials. It is a procedure that our courts have endorsed.<sup>33</sup>

The three bases for remittitur are: an award outside the range of substantial evidence on the record, the award shocks the

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<sup>33</sup> *Benjamin v. Randell*, 2 Wn. App. 50, 54, 467 P.2d 196 (1970)

conscience of the Court, or the award appears to have been based on passion or prejudice.<sup>34</sup>

**1. The Award Was Outside the Range of Substantial Evidence.**

Juries must be limited to awarding damages for actual injuries, not to presume the existence of damages in the absence of findings supporting the elements of the claim.<sup>35</sup>

Jurors are instructed to attend to all the instructions and presumably these jurors did so. Jury Instruction No. 11 allowed the jury to award Mrs. Lutes nearly three quarters of a million dollars despite any medical testimony to establish that she had a pre-existing but quiescent character trait that was affected by the accident. There was an absence of evidence to establish that Mrs. Lutes was an "eggshell" whose mental condition was affected by the accident. The erroneous jury instruction encouraged jurors to award Mrs. Lutes damages that were not supported by the evidence.

Moreover, the testimony from friends and family members

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<sup>34</sup> *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)

<sup>35</sup> *Taskett v. King Broadcasting Co.*, 86 Wn.2d 439, 447, 546 P.2d 81 (1976)

demonstrate that Mrs. Lutes is still able to perform many of the tasks she could do before the accident, albeit with less energy. She can still square dance. RP p. 239, l. 18 to p. 240, l. 3. She can perform housework. RP p. 245, ll. 12-15. After the accident she participated in 4-H with her daughter for three more years. RP p. 465, l. 24 to p. 466, l. 2. She visits with friends, sews, and helped redecorate her friend's home. RP p. 466, ll. 15-16. She still rides her horse, though not as often. RP p. 568, ll.22-24. She feeds her horses and cleans the stable. RP p. 565, l. 24 to p. 566, l. 4. Her husband says she is still happy, but with more variability in her level of happiness. RP p. 233, ll. 8-11.

**2. The Award Should Shock the Conscience of the Court.**

This was a pure general damages case. Mrs. Lutes claimed no special damages whatsoever: no medical expenses, no wage loss, no future medical care expenses, no loss of ability to work. She can drive, care for herself and others, is physically active, and has no claim for loss of limb or of any of her five senses. Her husband did not have a loss of consortium claim. The sum total of the lay testimony is that she is not as pleasant to be around as she was before

the accident and she is not as organized. Her neuropsychologist testified that she had a cognitive brain injury, but added no more to the opinion of the lay witnesses as to Mrs. Lutes' life after the accident. Under these circumstances, an award of \$700,000 is "flagrantly outrageous and extravagant."<sup>36</sup>

**3. The Award was Based on Passion and Prejudice.**

Where there is meager evidence to support an award there is a presumption that the verdict was based on passion or prejudice.<sup>37</sup>

In the present case, this jury's award was based on sympathy for Mrs. Lutes, whose friends and family do not like her as well as they did before. Her husband testified he contemplated divorce, but they never went to counseling. Mrs. Lutes did not introduce evidence of income loss through an economist, as required for support a jury instruction, but did introduce this subject indirectly, which impassioned the jury and colored its high award. They heard she was spending all her time looking for a job and had applied for over 100 jobs without success. Her expert opined she had limited

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<sup>36</sup> *Bingaman v. Grays Harbor Community Hospital*, at 836-37

<sup>37</sup> *Anderson v. Dalton*, 40 Wn.2d 894, 901, 246 P.2d 853 (1952)

job opportunities. These suggestions of future inability to get work—introduced without the evidence of an economist to support them—induced jury passion.

The plaintiff's repeated references to defense insurance interjected a forbidden topic and prejudiced the jury against the defendant. Mrs. Lutes stated that the defendant led her believe it would take care of her, then implied Rotschy or its insurer denied her fair compensation, forcing her to take legal action. These repeated references created an atmosphere where Rotschy and its experts were de-humanized, a scheme reinforced by plaintiff's dismissal of the only human defendant, driver Koistinen. CP 18.

The trial court abused its discretion in not reducing the jury award, which abuse was manifestly unreasonable.

## **VI. CONCLUSION**

The Court below abused its discretion in giving Jury Instruction No. 11, which was not supported by substantial evidence and which prejudiced the defendant's case. The Court abused its discretion by not ordering a new trial or in the alternative, offering

Mrs. Lutes remittitur in lieu of a new trial. As a consequence of the Court's actions, Rotschy was not accorded the right to a fair trial.

The judgment should be reversed and the case remanded to the Superior Court for retrial on the issue of damages.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of September, 2007.

A handwritten signature in cursive script that reads "Tracy Antley-Olander".

Tracy Antley-Olander, WSBA #15272  
Attorney for Appellant Rotschy

No. 36051-9-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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ELIZABETH G. LUTES,

*Respondent,*

v.

ROTSCHY, INC.,

*Appellant.*

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CERTIFICATE OF SERVICE

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Tracy Antley-Olander, WSBA #15272  
Attorney for Appellant

Law Office of William J. O'Brien  
999 Third Avenue, Suite 805  
Seattle, WA 98104

(206) 515-4800

ORIGINAL

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 5th day of September, 2007, I caused to be delivered a true and correct copy of:

1. *Brief of Appellant*; and
2. *Certificate of Service*.

to the following counsel of record:

**PARTY/COUNSEL**

**DELIVERY INSTRUCTIONS**

**COUNSEL FOR PLAINTIFF**

Kirsten Tinglum Friedman  
Richard Friedman  
Friedman Rubin & White  
1126 Highland Avenue  
Bremerton, WA 98337-1828

- Via U.S. Mail  
 Via ABC  
 Via Facsimile  
 Via DHL Overnight

**ORIGINAL TO:**

Clerk  
Court of Appeals of the  
State of Washington, Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4427

- Via U.S. Mail  
 Via ABC  
 Via Facsimile  
 Via DHL Overnight

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

DATED this 5 day of September, 2007.

  
\_\_\_\_\_  
Karen Langridge  
Assistant to Tracy Antley-Olander