

JW

No. 36051-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

ELIZABETH G. LUTES,

Respondent,

v.

ROTSCHY, INC.,

Appellant.

REPLY BRIEF OF APPELLANT

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I. RESTATEMENT OF FACTS

The Court will be reviewing all citations to the Report of Proceedings, so that a restatement of the facts is not required. One area that does need clarification, however, concerns the testimony of Dr. Frederick Wise as it relates to Jury Instruction No. 11.

Appellant Rotschy objected to what became Jury Instruction No. 11 because Respondent Lutes failed to establish facts to support the instruction in her case in chief. RP 807, ll. 14-15. Lutes counsel responded that he intended to obtain testimony during cross-examination from Dr. Wise to support the instruction. RP 808, l. 22 to RP 809, l. 3. The judge even cautioned Lutes' counsel that he "had better" focus on getting that testimony. RP 809, l. 3.

Dr. Wise did not establish that necessary foundation. He testified on both direct and cross that in his opinion, Mrs. Lutes's neuropsychological testing did not support a traumatic brain injury. Rotschy's theory of the case was that Mrs. Lutes sustained headaches from the accident that affected her behavior, but not a head injury. Dr. Wise opined that a reason for her subjective belief of injury might be her pre-existing and previously exhibited personality trait

of exaggerating physical symptoms at stressful times. RP 826, ll. 16-25. Despite this testimony, the trial court allowed Jury Instruction No. 11 to go to the jury.

Rotschy preserved the issue of Jury Instruction No. 11 for appeal. After the verdict, Rotschy moved the trial court for a new trial or remittitur because the Court allowed Jury Instruction No. 11 to go to the jury despite insufficient evidentiary support. CP 81-98. Mrs. Lutes responded that she did not rely on Instruction No. 11 for her theory of the case. CP 121-137. During oral argument on the motion, Plaintiff changed her argument and asserted she had established the required elements. She revealed for the first time that she had a partial trial transcript showing she established the required evidence to support the Instruction. RP 1000, l. 9 to RP 1007, l. 25. However, that transcript when produced was filled with errors. Rotschy timely objected to plaintiff's use of this flawed transcript to support her new argument. CP 341-346.

The court agreed with Rotschy that the transcript could not be used in connection with the motion. The court instead determined that it could not rule on the issue, essentially leaving the parties to

bring the matter to the Court of Appeals, which Rotschy did via this appeal. CP 372-375.

In her Brief of Respondent, Mrs. Lutes returns to her original argument and admits that she did not establish the elements required to substantially support Jury Instruction No. 11. The erroneous instruction favored Mrs. Lutes, who prevailed at trial. Thus, the error is presumed prejudicial unless it affirmatively appears that the error was harmless.¹ Mrs. Lutes fails to show that the error was harmless.

II. ARGUMENT IN REPLY

The Court is respectfully requested to vacate the judgment and remand the case to the Superior Court for retrial on the issue of damages because Jury Instruction No. 11 was not substantially supported by the evidence. Giving the instruction prejudiced Appellant Rotschy. Alternatively, the Court should remand the case to the Superior Court either for a new trial or for remittitur of the jury award because it was outside the range of substantial evidence.

¹ *McKay v. Acorn Custom Cabinetry*, 127 Wn.2d 301, 311, 898 P.2d 284 (1995)

A. Giving Jury Instruction No. 11 Was Reversible Error.

Jury Instruction No. 11, while a correct statement of the law, was not applicable to the facts of this case. There was no "proper legal context" for it to be presented to the jury as Mrs. Lutes asserts.² It is error to give an instruction that is not supported by substantial evidence.³ The Instruction was misleading and did not permit Rotschy to argue its theory of the case.⁴ Under either the *Stiley* or the *Adcox* standard, the Instruction was prejudicial to Rotschy and requires a new trial.

1. The Instruction Was Not Supported by Substantial Evidence.

Jury Instruction No. 11 should not have been given because it was not supported by substantial evidence. In fact, some required elements of the Instruction were not supported by any evidence at all, such as latency.

² Brief of Respondent at p. 19.

³ *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996)

⁴ *Adcox v. Children's Orthopedic Hospital & Medical Center*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993), citing *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991)

The Instruction required a showing that Mrs. Lutes had a pre-existing mental condition, that the condition was not causing her pain or disability, that it made her more susceptible to injury than a person in normal health, and that therefore, injuries proximately caused by the occurrence were compensable. No testimony by any combination of witnesses supported all these elements. In particular, plaintiff's cross-examination of Dr. Wise did not establish the elements.

Mrs. Lutes concedes that Dr. Wise did not establish the elements of the Instruction as her counsel told the Court she would do. Respondent suggests—without authority—that the Instruction was proper "even if not fully supported by Dr. Wise." Brief of Respondent at p. 20. However, unless some witness established each and every element of the Instruction, it was improper to give it. No witness or combination of witnesses established all the elements.⁵

Mrs. Lutes is incorrect in her assertion that as long as some evidence supports the instruction, that is sufficient, citing *Thogerson*

⁵ Brief of Appellant at pp. 24-26

v. Heiner.⁶ The standard is substantial evidence, not just some evidence. The *Thogerson* trial court gave the equivalent of Jury Instructions No. 10 and 11 because there was substantial and disputed evidence by the plaintiff and defense experts as to whether Mrs. Thogerson's pre-existing migraines were lit up after the accident. In the present case, there was no contradictory expert testimony about whether Mrs. Lutes's somatic personality was or was not lit up by the accident.

(a) The behavior was not a mental condition. This instruction was never proper to give because Mrs. Lutes's tendency to exaggerate does not qualify as a "mental condition," as required by the language of the instruction. Respondent repeatedly uses the phrase "particular susceptibility" in her Brief to define the mental condition required by the Instruction. The Instruction requires that the individual first have a mental condition, not a "particular susceptibility." There was no evidence at trial to establish that Mrs. Lutes had a prior mental condition.

⁶ *Thogerson v. Heiner*, 66 Wn. App. 466, 472-475, 832 P.2d 508 (1992)

The *McDonagh* and *Fox* Division I cases cannot be used here to establish that a tendency to exaggeration is a mental condition.⁷ A psychiatrist testified that the plaintiff in *McDonagh* had a biological predisposition for developing a major depressive illness with phobic anxiety—clearly DSM-IV classifications. The doctor testified that the major depression was lit up by job stress. McDonagh's prior traits of obsessiveness and desire to please were not the quiescent conditions lit up by job stress—major depression was. The *McDonagh* court specifically noted that plaintiff's biological predisposition conformed with the words "infirmity or weakness" found in the instruction.⁸

By contrast, Mrs. Lutes's counsel repeatedly referred to Mrs. Lutes' predisposition as "whining." No one testified at trial that whining was a biological infirmity, or that it led to a true mental

⁷ *McDonagh v. Department of Labor & Indus.*, 68 Wn. App. 749, 845 P.2d 1030 (1993); *Fox v. Evans*, 127 Wn. App. 300, 111 P.3d 267 (2005), *review denied*, 156 Wn.2d 1017 (2006). Respondent objected to Appellant's use of other cases involving workman's compensation cases. See pp. 21-22 of Brief of Respondent. Yet *McDonagh* is also a workman's compensation case.

⁸ *McDonagh*, 68 Wn. App. at 755.

condition such as major depression, as occurred in the *McDonagh* case.⁹

The *Fox* case concerned a different issue—failure to mitigate. This Division I case, which is not controlling on this Court, noted without comment that the trial court issued an "eggshell skull" instruction based on the fact that plaintiff presented evidence to support the instruction. The issue of whether Fox had a pre-existing personality trait was not before the Court of Appeals and it did not comment even in dicta on whether that was a valid basis for giving the instruction.

(b) The condition was not lit up by the accident.

The pattern jury instruction from which Instruction No. 11 was taken requires evidence that a physical or mental condition was latent. If a physical condition is at issue, then to meet the requirements of the Instruction, medical evidence is required to establish that a plaintiff had a quiescent physical condition.¹⁰ When the issue involves a

⁹ Further, the Instruction envisions a progressive mental disease, not a life-long character trait. There was no evidence to show "whining" has a natural disease progression.

¹⁰ *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), *reconsideration denied, review denied*, 125 Wn.2d 1021 (1995). This case stands for the proposition that objective medical evidence is required to establish a prior physical condition.

mental condition, the plaintiff likewise must provide competent expert opinion to establish a quiescent mental condition, and then establish that it made her more susceptible.¹¹

Mrs. Lutes did not present any testimony by a qualified expert to establish that she had a latent mental condition that was lit up by the accident. Rotschy's expert Dr. Wise opined that Mrs. Lutes' tendency to exaggerate physical complaints manifested itself throughout her life in times of stress. Therefore, no expert testified that a latent mental condition was lit up by the accident, as case law requires.¹²

Mrs. Lutes had the burden of coming forward with the evidence to support the instruction, as the Court noted. RP 809, l. 3. There was no testimony at trial to establish each of the elements and no closing argument. Mrs. Lutes failed to come forward with evidence to support every element of the instruction, thus the

¹¹ The Washington Pattern Jury Instruction from which Jury Instruction No. 11 was taken addresses physical as well as mental conditions. The physical condition portion was removed from the instruction as not applicable in this lawsuit. RP 807, l. 15 to RP 808, l. 2.

¹² *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), *reconsideration denied, review denied*, 125 Wn.2d 1021 (1995); *Austin v. Department of Labor & Industries*, 6 Wn. App. 394, 399, 492 P.2d 1382 (1971).

required substantial evidence threshold was lacking. The Court erred in allowing the jury instruction to go to the jury.

2. The Instruction was Misleading.

The Instruction was misleading because it invited and permitted the jury to award substantial damages to Mrs. Lutes even if the jurors did not believe she suffered a traumatic brain injury. Rather than clarifying the respective theories of the case, the Instruction clouded the theories and created overlapping theories of recovery for Mrs. Lutes.

The Instruction allowed plaintiff to turn Dr. Wise's testimony to her advantage, in effect to argue that even the defense expert believed there was something mentally wrong with Mrs. Lutes. The misleading instruction invited the jury to award Mrs. Lutes general damages either because she had a traumatic brain injury, or because she thought she had one. Neither the Instruction nor the case law supports an award of damages for a subjective belief of injury.

Objective testimony from experts is required to establish the elements, not the subjective belief from the plaintiff.¹³

The jury was allowed to speculate that Mrs. Lutes had a disabling condition that was not supported by substantial evidence. An instruction that permits the jury to speculate when there is insufficient evidence to support the instruction is prejudicial error.¹⁴

3. The Instruction Did Not Permit Rotschy to Argue Its Theory of the Case.

The Instruction legitimized Mrs. Lutes' subjective belief in her disability. It turned Dr. Wise's testimony into support for the plaintiff's theory that Mrs. Lutes was severely disabled. The Instruction informed the jury it could award damages as if she had a traumatic brain injury even if the jurors did not believe she had an actual brain injury. The instruction, coupled with Instruction No. 10, invited the jury to chose either a brain injury, or a perceived brain injury as the two alternatives upon which to base an award, rather than the alternatives of traumatic brain injury versus bad headaches.

¹³ *E.g., Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), review denied, 125 Wn.2d 1021 (1995).

¹⁴ *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007).

In her Brief of Respondent, Mrs. Lutes admits this was her intent in proposing Jury Instruction No. 11. She proposed the Instruction "so that the jury could properly account for the role of her 'personality type,' if it found that this played any role in her current disabilities...".¹⁵

The *Thogerson* case supports Rotschy's position that Jury Instruction No 11 combined with No. 10 overemphasized plaintiff's case and deprived Rotschy of a fair trial. Repetitious and overlapping instructions taken as a whole that overemphasize one party's case deprives the other party of a fair trial.¹⁶ Jury Instructions No. 10 and 11 offered the jury a choice of finding that Mrs. Lutes either was brain-injured, or she thought she was brain-injured, and should be compensated equally regardless of whether the jury believed Dr. Perillo or Dr. Wise.

It does not matter how many instructions were provided regarding damages—if one was erroneous it should not have been given. In the present case, taking Jury Instructions No. 10 and 11

¹⁵ Brief of Respondent at 29.

¹⁶ *Thogerson*, 66 Wn. App. at 474.

together informed the jury that it could award damages regardless of whether Mrs. Lutes suffered an actual injury in the accident or just thought she did.

The instructions prevented the defense from presenting its theory of the case by legitimizing a subjective belief of injury and wrongly attributing the "diagnosis" of this "mental condition" to defendant's expert Dr. Wise. The Instruction inferred that Rotschy's own expert supported a find that Mrs. Lutes was substantially injured.

4. The Instruction Was Harmful and Prejudicial.

The jury was told to consider all instructions. Presumably it did.¹⁷ The effect of this erroneous instruction was to ensure that only the plaintiff's case was presented to the jury as follows: whether Mrs. Lutes had a brain injury or merely perceived she did because of her somatic personality, she should be compensated all the same.

Rotschy was prejudiced because Instruction No. 11 informed the jury that even Rotschy's own neuropsychologist endorsed Mrs.

¹⁷ *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994).

Lutes' injury, because a subjective belief of injury was just as valid as objective findings. As stated above, subjective belief of injury alone is not sufficient to support a verdict.¹⁸

A new trial is required because the jury could have been swayed by the impermissible Instruction. This Division recently reversed a jury verdict in favor of a plaintiff and remanded a case because of the effect erroneous jury instructions could have had on the jury.¹⁹

In *Magana*, plaintiff's expert testified about a particular theory concerning the Hyundai seat belt system. The testimony was subsequently stricken, but the trial court failed to instruct the jury that the testimony was to be ignored during their deliberations. On appeal, the Court determined the defendant was prejudiced by the failure to remind the jury the plaintiff's expert testimony was to be

¹⁸ *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), review denied, 125 Wn.2d 1021 (1995); *Austin v. Department of Labor & Industries*, 6 Wn. App. 394, 399, 492 P.2d 1382 (1971).

¹⁹ *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 94 P.3d 987 (2004). The Court noted that the jury found liability against Hyundai 10 to 2, and that if one juror was swayed, the verdict might not have been in favor of plaintiff. In the present case, liability was never at issue, but jurors similarly could have been swayed by the erroneous instruction into believing they could find the same measure of damages even if Mrs. Lutes did not sustain a brain injury.

ignored. The stricken testimony could have been relied upon by the jury and could have substantially affected the verdict. Because the trial court should have cautioned the jury it could not consider the stricken testimony, the error was not harmless.²⁰

In the present case, the erroneous instruction allowed jurors who were not persuaded Mrs. Lutes had a brain injury to award her substantial sums for emotional distress (no medical bills, no income loss) on the basis that her perception of injury was sufficient.

Of course, there is no way of determining how many jurors would have reached a different damages figure if they had not been offered the choice, just as the *Magana* Court could not determine how many jurors would have been swayed. However, the entire record, the lack of evidentiary support or argument for the instruction, and the potential that jurors could still award nearly three quarters of a million dollars without finding that Mrs. Lutes was brain-injured show the error was not formal, trivial, or academic, the standard set forth in *Adcox*.²¹

²⁰ *Magana*, 123 Wn. App. at 317. Further, once the testimony was stricken, counsel did not raise the issue in closing argument.

²¹ *Adcox*, 123 Wn.2d at 36.

B. A New Trial or Remittitur Is Required.

With no prayer for special damages of any types, the amount of the award was not supported by the remaining evidence for pain and suffering alone. The erroneous jury instruction allowed the jury to express its sympathy for Mrs. Lutes, despite the lack of evidence to support the amount of the jury award.

1. The Amount of the Award Shocks the Conscience.

Mrs. Lutes never introduced evidence as to job/income loss at trial. Nor did she present evidence of past or future medical bills. Ipso facto, the jury award of \$700,000 purely for emotional distress was so out of proportion to the evidence that it should shock the conscience of the court.

As Mrs. Lutes states in her Brief of Respondent, there was never any claim for lost wages or for future loss of income or inability to get a job. She correctly notes that her counsel asserted in closing that she would eventually get another job. Further, Respondent never presented any evidence of bills for past accident-related treatment and did not request payment for any treatment. She did not ask the jury to award her sums for future treatment.

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

Her family and friends believe Mrs. Lutes 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 shed no more light on the changes to Mrs. Lutes' life after the

accident. Under these circumstances, an award of \$700,000 is "flagrantly outrageous and extravagant."²²

2. The Award Was Clearly Excessive and Unsupported, and Was the Result of Passion.

Conversely, if the jury did impermissibly consider the elements of past and future medical expenses and past and future income loss, then their award was based upon passion rather than the instructions given by the Court. Juries are not allowed to presume the existence of damages.²³

III. CONCLUSION

The Court below abused its discretion in giving Jury Instruction No. 11. It should not have been given to the jury because it was not supported by the evidence adduced at trial, a fact that Respondent acknowledges. It is irrelevant that the instruction is based on a correct statement of the law. The Instruction prejudiced the defendant's case by allowing the jury to consider Mrs. Lutes' subjective belief of injury in the absence of expert evidence.

²² *Bingaman v. Grays Harbor Community Hospital*, at 836-37.

²³ *Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 680 P.2d 432 (1984), review denied, 102 Wn.2d 1004 (1984).

Further, the Instruction allowed Mrs. Lutes to argue that Rotschy's own expert endorsed an impairment that was not supported by the evidence.

The Court abused its discretion by not ordering a new trial or offering Mrs. Lutes remittitur in lieu of a new trial because the jury award was far beyond the evidence at trial. In the alternative, the jury took into consideration special damages that were not pleaded as the result of passion and sympathy.

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 2nd day of November, 2007.


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No. 36051-9-II

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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 2nd day of November, 2007, I caused to be delivered a true and correct copy of:

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

to the following counsel of record:

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

DATED this 2nd day of November, 2007.



Karen Langridge
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