

No. 44871-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TAMMY D. KARTHAUSER and VON KARTHAUSER,
wife and husband,

Plaintiffs/Respondents,

v.

MACKENZIE ADAMS,

Defendant/Appellant.

AMENDED BRIEF OF RESPONDENT

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INTRODUCTION

This was a contested liability case where the Appellant/Defendant called only one witness, the Defendant herself. She spoke to the accident, denied fault, and did not address damages at all. Essentially Defendant was gambling on a defense verdict and made no effort to present lay or expert testimony regarding damages. The jury chose to believe Plaintiff and her witnesses and awarded almost exactly what Plaintiff's lawyer suggested in closing argument.

I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in denying Appellant's motion for a new trial or remittitur.
2. The court did not err in allowing post-trial motions to be heard by a judge that did not preside over the trial.
3. The court did not err in denying Appellant's motion for a directed verdict on future medical expenses.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the verdict was based upon:
 - a) speculation
 - b) substantial evidence
 - c) passion and/or prejudice

2. Whether Appellant received substantial justice during post-trial motions where the trial judge did not preside.

3. Whether Plaintiff presented sufficient evidence to support instructions for future medical care and impaired earning capacity.

III. STATEMENT OF THE CASE

Because liability was contested no property damage nor medical bills were paid. (RP 142) Ms. Karthauser asked for sufficient money to pay her medical bills. (RP 136) She asked to be paid for her ruined Honda SUV. (RP 140)

While Plaintiff “did not present the testimony of even a single physician at the time of trial” (Brief of Appellant, p. 3) her medical records were properly before the jury in Plaintiff’s ER 904. Appellant had an opportunity to compel a CR 35 examination and present their own CR 35 witness for either a review of her records or by physical examination. They chose not to do so.

Ms. Karthauser testified that she never had a bad back, neck, shoulder, or hip before the accident. (RP 137) Now she hurts all the time. (RP 137) It’s not her recollection that the physical therapist ever got her right shoulder under control. (RP 137) Her right shoulder gives her problems and she can’t do anything above shoulder level. She has a hard

time taking her shirt off. (RP 138) She can't assist her 300-pound 71-year old client in and out of the tub anymore. (RP 138) She uses her 18-year old son to help her because he's a "big boy". (RP 139) But her son will move out some day. She has a 12-year old daughter still living with her but when she gets worn out Ms. Karthausser will no longer be able to be an in-home caregiver. (RP 139) She tries not to think about the future. (RP 140) Now when she drives through a "T" intersection and someone's waiting at the stop sign she feels sick. (RP 132) At the end of her direct examination she was asked if she wanted to be compensated for what was taken away from her.

"Q Do you want to be compensated for what was taken away from you?

MR. MITCHELL: Your Honor, I guess I'm objecting. This is beyond permissible questioning because it's into the scope of what the jury does.

MR. CRANDALL: She's entitled to ask the jury for damages, that's why we're here.

THE COURT: Overruled. You may answer the question.

A I feel like I've lost a lot, but I don't like to take from other people. But there's a lot of stuff I can't do that I did before. (Inaudible)

Q Do you have a choice? If I could wave a magic wand and restore you to how you were ten minutes before the crash right now, would you walk away?

A Yes.”

(RP 143)

Ms. Karthausser, a home caregiver, explained to the jury that she was not physically able to care for her invalid client to the extent necessary to be paid by the State (RP 138) so was being kept on by the client (RP 150) out of his own pocket at a much reduced rate. She sought no lost wages (RP 149), only a diminution of earning capacity.

On cross-examination Ms. Karthausser explained she could no longer sit on bleachers. She had to bring a chair for her daughter’s softball games. (RP 153) After the collision, it was the first time in 24 years she did not go hunting. (RP 153) She could no longer help coach her youngest daughter because she can’t throw a ball anymore. (RP 154) The first lay witness called by Ms. Karthausser was Bill Clayton, age 73, who is a retired meat cutter. He started at age 12. (RP 86) He has a small locker at his home where he still cuts and grinds meat for family and friends. (RP 87) He is married to Ms. Karthausser’s mother, Roxy, and they have reunions about once a year with anywhere from 100 to 200 people attending. A small gathering at his place is 30-35 people. (RP 88) In the 25 years he has known Ms. Karthausser she would help him in the locker. (RP 88) She

would help skin and quarter the animals (deer and elk) and carry the quarters to hang in the locker. (RP 89) She filled her own big game tags. (RP 89) In fact, she shot perhaps the biggest elk Mr. Clayton had ever seen as a professional meat cutter. The cut and wrapped meat alone was over 600 pounds. (RP 97) She didn't stay in the truck, she ran up and down the hills. (RP 89) She would go clamming and pull her limit with a clam gun, shuck oysters, surf fish. (RP 90)

Bill Clayton sees her once or twice a week. She can't do any of the above activities anymore. (RP 90) He knew her physical abilities before the accident and now she has about 25% of her prior abilities left. (RP 91) She can no longer play horseshoes and in the last six months prior to trial, during the holiday season, he never saw her raise her right arm above her shoulder. (RP 93) She has trouble with the kitchen duties. On cross-examination the jury heard that for family get-togethers it takes two full pickup loads to bring just their kitchen gear. (RP 95) It included tents, barbecues, canopies, and Ms. Karthausser was always there to pack, unpack, set up, take down, etc. (RP 96)

Ms. Karthausser's sister, Shelly Kingsley, testified that the family get-togethers vary from 100 to 300 people. They last for 4-5 days and include a central kitchen, bathrooms, and horseshoe pits. (RP 100) Plaintiff actually

did more than her sister and the women generally do more than the men. (RP 101) They would usually go up early and clear the brush away, cut firewood, and get ready to set up. (RP 101) Plaintiff was “usually always” involved in all the sports her kids and the extended families’ kids played. (RP 102) She can’t help make camp or strike tents like she used to. (RP 103) She could catch, bat and pitch. (RP 103) Since the accident there has been a definite change in Plaintiff’s attitude. She doesn’t leave the house much, has trouble sleeping. (RP 104) She doesn’t clam anymore; the one time post-accident Shelly persuaded Plaintiff to go to the beach clamming the drive hurt her so much she couldn’t sleep at the hotel. (RP 105) She no longer digs clams. (RP 107)

On cross-examination the jury heard that the latest clamming expedition before trial was September of 2012 (some five months before trial) and that Ms. Karthausers’ sister Shelly with her children, Tammy and her kids, the older sister Holly and her husband Rick, and Ms. Karthausers’ parents went to Fort Canby. (RP 108) They rented yurts, the parents had their motorhome, and someone brought a trailer. (RP 109) She didn’t even go down to the beach. (RP) 109) Ms. Karthausers is simply not as active anymore. Instead of cooking at the family get-togethers she might have made a salad. (RP 110)

Ms. Karthausers daughter, 25-year old Natasha Slater, an employee of Columbia Analytical Services, testified she sees her mom once or twice every couple of weeks. (RP 113) She remembers, since the crash, she shared a hotel room with her mom who kept getting up because of pain. (RP 115) This was just last year and she has seen no overall improvement in the six months before trial. (RP 115) Ms. Slater goes camping without Mom. (RP 116) Her mom no longer hikes with her because of her hip or back. (RP 116) Her mom is not eager to go to the mall with her. (RP 118) She doesn't anticipate that her mom will be able to go to a mall shopping with her and get very far without having to sit down. (RP 118)

Ms. Karthausers 21-year old daughter, Kaitlin Karthauser, played softball for 6-7 years (RP 120) and volleyball for 1 ½ years. She was good and got recognition for it. She's always been strong and athletic and her mom helped her with her sports. She would pitch, catch, outfield and bat. She would watch Kaitlin at her sports. (RP 121) Mom didn't throw like a girl, and she never had any trouble throwing, batting, catching, or picking up a hop outfield. (RP 122) Now when shopping Mom has to stop too frequently, Kaitlin leaves her and comes back to pick her up. (RP 126) Mom's physical problems have affected their relationship. (RP 123)

Ms. Karthausers mother, Roxie Clayton, testified that she has four

children and all her children have kids. (RP 124) Apparently her life centers pretty much around food, the kitchen, cooking. Her family likes her homemade salsa and she uses local produce and no food processor. She will put up 45-50 pints at a time. (RP 126) When Tammy helped her this last time, they chopped the vegetables by hand and after one-half hour Ms. Karthausser had to lay down because her back was killing her. Her mom had finished by the time Ms. Karthausser got up. She couldn't do near what she usually does. (RP 126) Before the accident Ms. Karthausser would have done a lot more than she did that day. (RP 127) Her mother couldn't see Ms. Karthausser giving up all the things she always loved to do unless she was incapacitated. (RP 128) "She tries, just can't do it." (RP 128) The family is there to help out Ms. Karthausser when they can but they all work, too, and don't have a lot of left over energy or spare time. (RP 128)

On cross-examination Ms. Karthausser's mother confirmed that last year Ms. Karthausser tried to go hunting but couldn't do too much and this year she didn't go at all. (RP 129) She can't lift like she used to. She used to love to hunt. (RP 129)

IV. ARGUMENT

- A. The trial court correctly denied Appellant's motion for a new trial or remittitur.**

1. **The jury's verdict was supported by substantial evidence, not speculation.**

Appellant declares that "...Karthouser sustained soft tissue injuries *only* in the subject accident, received healthcare treatment for alleged injuries attributable to that accident for *only* several months..." (Brief of Appellant 17) (emphasis added)

The above implies that mere "soft tissue" injuries are somehow a lesser form of injury and should be dismissed without too much thought. But there was no evidence that such injuries were less than life changing; certainly nothing from Appellant. Further, Appellant admitted to the reasonable and necessary treatment received by Karthouser until she could no longer afford the debt load. As discussed by Judge Sullivan during argument on Appellant's unsuccessful motion for a directed verdict, the jury saw the prior medical bills including physical therapy and could simply "...make a reasonable calculation if they decided to do that" (RP 188-189) yielding some award for future costs.

The Washington cases make a clear distinction between the sufficiency of the evidence to establish *the fact* of damage and the sufficiency of the evidence to sustain *the amount* of damages awarded. Once the fact of damage has been established by substantial evidence (i.e.

that future palliative treatment will be necessary), a more liberal rule applies to determination of the amount of damages (i.e. the cost of future palliative treatment), requiring only that there be a reasonable basis for estimating the loss; the substantial evidence test no longer applies. This rule is peculiarly applicable to proof of future damages. *See, Lewis River Golf v. O.M. Scott & Sons*, 120 Wn. 2d 712, 717-718, 845 P.2d 987 (1993).

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

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

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof

necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Larson v. Union Inv. Loan Co., supra, at 11

The above analysis was recently applied in *C1031 Properties v. First American*, 175 Wash.App. 27 (2013).

The reason for the more liberal rule governing proof of damages is the elementary principle of justice that where the fact of the damages has been proved, the wrongdoer must bear the risk of uncertainty of proof of the extent of the damages caused by his wrong. *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d 386, 261 P.2d 692 (1953). The *Kramer* decision recognized this principle when it quoted with approval the following passage from *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265, 90 L.Ed. 652, 66 S. Ct. 574 (1946):

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

Once a plaintiff has established the fact of damages, difficulties of

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

In fact, it is now well recognized that compensatory damages are often at best approximate; they need only be proved with whatever definiteness and accuracy the facts permit, but not more. *Lewis River Golf v. O.M. Scott & Sons*, *supra*, at 718.

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

"Since Mr. Erdman's impairments were present at the time of trial and he had received medical attention for the impairments, there can be no doubt from the evidence that

future treatment is essential for his existence; the jury was entitled to award damages. Thus, we find the court erred in denying that portion of the verdict relating to future medically related expenses."

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

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

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

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

In essence, the *Webster* and *Leak* cases (cited with approval in *Patterson v. Horton*, *supra*) hold that a jury must be permitted to determine the amount of future medical and care expenses through a process of inference based on evidence of past events and conditions. There is nothing novel about this principle. It is the heart of the jury system. It is routinely applied to cases involving future wage losses, future pain and suffering and future profits, and in *Webster* and *Leak* it was simply applied to proof of future medical-related expenses.

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

(1972).

In *Bitzan v. Parisi, supra*, the court held that the evidence warranted a jury instruction on recovery for future pain, suffering, disability and loss of earnings based on lay witnesses' testimony that the plaintiff was still experiencing pain, suffering disability and loss of earnings at the time of trial, and that such testimony permitted a reasonable inference that future damages would be sustained.

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

The jury had Plaintiff's medical billings and Defendant's admissions as evidence. Plaintiff's Request for Admission No. 7 asked if the medical treatment received by Plaintiff to address her injuries resulting from this accident was reasonable and necessary. The Defendant admitted that the bills incurred were reasonable and necessary but they denied the remainder. Plaintiff's Request for Admission No. 8 asked Defendant to review a list of medical bills and declare whether or not the bills were incurred as a result of injuries sustained in the accident. The Defendant so admitted. Request for Admission No. 9 asked if the medical expenses in Request for Admission No. 8 were reasonably necessary for the treatment of injuries sustained by plaintiff in the occurrence on March 29, 2011. Defendant admitted.

Request for Admission No. 16 contained a stack of Plaintiff's medical bills and Defendant's response was the decision not to contest them.

2. Passion or Prejudice.

“The jury’s verdict in this case was so excessive as to compel the conclusion that it is based on passion and/or prejudice”. (Brief of Appellant 19)

In addressing a similar argument the Washington Supreme Court in *Bunch v. Dept. of Youth Services*, 155 Wn.2d 165 (2005) stated:

“The ‘shocks the conscience’ test asks if the award is ‘flagrantly outrageous and extravagant.’ *Bingaman*, 103 Wn.2d at 836-37. Passion and prejudice must be ‘unmistakable’ before they affect the jury’s award. RCW 4.76.030; *Bingaman*, 103 Wn.2d at 836. We once stated the rule this way:

‘The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.’

Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 395, 261 P.2d 692 (1953) (quoting *Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253 (N.Y. Sup. 1812) (Kent, C.J.)).

The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of

fact. *Robeck*, 79 Wn.2d at 869. We strongly presume the jury's verdict is correct. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989). 'The jury's role in determining noneconomic damages is perhaps even more essential.' *Id.* at 646."

Bunch, supra, at 179-80.

While *Bunch* was a discrimination case, on appeal the question became what quantum of evidence was sufficient to support an award for non-economic damages. Defendants in that case argued that insufficient evidence supported the verdict for non-economic damages and claimed the award was outside the "range of substantial evidence". In turn Bunch argued that the "substantial evidence" standard was "meaningless in the context of non-economic damages". *Bunch*, at 180. The court held the damage instruction given in *Bunch* was a proper instruction, a portion of WPIC 30.01.01, identical to the one given in Karthausser's case (Court's Instruction No. 10), and a plaintiff need only present proof of anguish or emotional distress. Bunch never consulted a health care professional "and no one close to him testified about his anxiety". The court held that "such evidence is not strictly required" and can be proven by the plaintiff's own testimony. *Bunch*, at 181. "Bunch presented sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish, and that is enough to support an award for emotional distress." *Bunch*, at 181. Ms. Karthausser and her witnesses all

testified about her limitations and the jury was entitled to infer the emotional cost of such changes.

An appellate court will not disturb a jury's damages award unless it is outside the range of substantial evidence in the record, it shocks the conscience of the court, or it appears to have resulted from passion or prejudice. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985).

“We will not disturb a jury's damage award unless the award is outside the range of substantial evidence in the record. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005). And we presume (strongly presume) the jury's verdict is correct. *Id.* The damages awarded by the jury here fell within the range.”

Burchfiel v. Boeing Corp.
149 Wn.App. 468, 484 (2009).

Substantial evidence requires that the evidence “be such that it would convince ‘an unprejudiced, thinking mind.’” *Bunch v. Dep't of Youth Servs.*, 155 Wash.2d 165, 179, 116 P.3d 381 (2005) (quoting *Indus. Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wash.2d 907, 916, 792 P.2d 520 (1990)).

Appellate courts give deference and weight to the trial court's discretion in denying a new trial on a claim of excessive damages. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 330, 858 P.2d 1054 (1993). A trial court's denial of a new trial strengthens the

verdict. *Fisons Corp.*, 122 Wash.2d at 330, 858 P.2d 1054. While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, “appellate review is most narrow and restrained” and the appellate court “rarely exercises this power.” *Fisons Corp.*, 122 Wash.2d at 330, 858 P.2d 1054 (quoting *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 269, 840 P.2d 860 (1992)).

Appellant complains that the final remarks of Plaintiff’s attorney in closing argument were so inflammatory as to be the sole reason the jury awarded money to Plaintiff. (Brief of Appellant 19-20) That, somehow two days of testimony, unopposed or rebutted by Appellant, counts for nothing and was completely unpersuasive. The objection regarding the taxpayer remark was sustained. No instruction to disregard was sought. No motion for a mistrial was made. Rather, Appellant preferred to wait and see...to gamble on the verdict.

Plaintiff/Respondent can find only two cases discussing taxpayers in closing argument. One is reported and one not. In *State v. Sellovich*, 156 Wash. 388, 391 (1930), a prosecutor during closing argument told the jury that a defense witness from Oregon would be paid witness fees and mileage (\$120.00, a tidy sum in those days) and it “would come out of the taxes of Spokane County”. The Washington Supreme Court held the comment was

“not of sufficient moment to justify a reversal of the case”.

In the case at bar the Court gave the pattern instruction (*Court's Instruction No. 1*) that contained “You will permit neither sympathy nor prejudice to influence your verdict”. The same instruction cautioned them to make no assumptions or draw any conclusion based on a lawyer’s objections. Further, that argument by the attorneys are not evidence and should be disregarded if not supported by the evidence. Juries are presumed to follow the instructions. *State v. Stein*, 144 Wn.2d 236, 247 (2001). The taxpayer remark was a single comment, isolated, and stated an obvious and commonly known fact. A curative instruction was not sought. Curative instructions are commonly used to neutralize allegedly inflammatory remarks. *State v. Dhaliwal*, 150 Wn.2d 559 (2003); *State v. McKenzie*, 157 Wn.2d 44 (2006). Defendant has not demonstrated that a timely curative instruction could not have cured any prejudicial effect.

CR 59(a)(2) permits a trial court to grant a new trial based on “misconduct of prevailing party.” Again, such misconduct must “materially affect the substantial rights” of the moving party. CR 59(a); *Alcoa v. Aetna Cas.*, 140 Wn.2d 517, 538 (2000). In order to obtain a new trial:

“As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial

in the context of the entire record... The movant must ordinarily have properly objected to the misconduct at trial, ...and the misconduct must not have been cured by court instructions.”

Alcoa, at 538.

Very few Washington cases interpret the standard for counsel misconduct in the civil context. *Alcoa, supra*, at 538. But, it is appropriate to analogize to cases in the criminal context. *Alcoa, supra*, at 538. A frequently cited criminal case on counsel misconduct is *State v. Belgarde*, 110 Wash.2d 504, 755 P.2d 174 (1988). In that case, the prosecutor made improper comparisons, calling the American Indian Movement “a deadly group of madmen” and “butchers, that killed indiscriminately”. *Belgarde, supra*, at 506-07. The court found that these comments were “flagrant” and a “deliberate appeal to the jury’s passion and prejudice.” *Belgarde, supra*, at 507-08. No such flagrant and ill-intentioned misconduct occurred here.

B. It was not error to have the post-trial motions heard by a different judge.

Defendant did not object when Judge Warning took the bench to hear Defendant’s post-trial motions. Defendant did not seek a continuance nor make any inquiry about Judge Sullivan’s absence. Ms. Karthaus suggests the absence of inquiry, request for a continuance or objection of any kind became a waiver of the issue on appeal. There is nothing in the record

that would put Judge Warning on notice his presence on the bench was inappropriate. Where points of law are not called to the attention of a trial judge, those points cannot later serve as a basis for a post-trial motion for new trial. *Egede-Nissen v. Crystal Mtn., Inc.*, 93 Wn.2d 127, 134 (1980). Similarly, legal issues first raised on appeal, after the complained of conduct occurred and it is too late to remedy, are not favored. RAP 2.5; *Wilson & Son Ranch v. Hintz*, 162 Wn.App.297, 303 (2011) citing *Smith v. Shannon*, 10 Wn.2d 26, 37 (1983).

As conceded by Appellant, the standard of review for Judge Warning's denial of Appellant's motion is abuse of discretion. After reviewing Judge Warning's train of thought (RP 264 to 265) it is difficult to understand how the ruling was manifestly unreasonable or based on untenable grounds. *Wn. St. Physicians Ins. v. Fisons Corp.*, 122 Wn.2d 299 at 339 (1993).

“THE COURT: All right. Thank you, Counsel. Ends up being an interesting issue because of that verdict form. You know, it happens. I wish I could say I've not ever been reading instructions and run across or realized we didn't do this. And those are generally harry times at that point.

What we've got here is there is testimony that was before the jury about future economic potential consequences. Palliative medical treatment, diminution in earning capacity. Those were both properly before the jury. Because of the manner of the jury verdict form we have

basically a non-differentiated future damages. And that appears how the jury took it.

It includes the damages for pain and suffering, and it seems to me that that's important here, that they're not differentiated. The – any time we give those instructions I always kind of cringe because we ask the jury to perform this – you know, what's basically alchemy, turn pain and suffering into gold. And we tell them, we don't have – we don't have any fixed or something or other way for you to do this; we drop it in your lap and you have to come up with a number. I mean, that's what we tell them.

And so, because of that, the case law is pretty clear that the notion of general damages are uniquely the province of the jury. Here we've got a non-differentiated number, assuming I can consider the Forman's (*sic*) affidavit, that included something economic. But, in either event, we have a non-differentiated number that includes that pain and suffering in it.

The verdict might be large in comparison to the bell curve, but I don't think that I've got anything in front of me that shows it's a result of passion or prejudice, as that is defined, so I will deny the motion.”

Appellant claims that Judge Sullivan was somehow compelled to preside over post-trial motions and his failure to do so renders the entire trial void. (Brief of Appellant 23) This is incorrect.

Judge Sullivan is the duly elected sole judge for Pacific and Wahkiakum Counties. Because he was recused from hearing a case in that venue Judge Marilyn Haan from Cowlitz County traded with Judge Sullivan and he ended up hearing this case in Cowlitz County. Once the trial was

concluded he returned to presiding over two court houses and their respective clerical and administration staff. Plaintiff's attorney has no personal knowledge but suggests that the administrative staff of Pacific/Wahkiakum and the administrative staff of Cowlitz County decided who would hear Appellant's post-trial motions without consulting the judges themselves. Plaintiff's counsel was certainly never consulted or asked to give an opinion. More importantly, Appellant never raised an objection to Judge Warning hearing the post-trial motions. The "objection to entry of judgment" was just that. While Appellant requested Judge Sullivan, the objection was to the amount. (CP 30) The record contains no complaint from Appellant during the entire hearing that Judge Warning was somehow unqualified to sit in this matter. (RP 254-265) Assuming Appellant was ambushed by Judge Warning's appearance that afternoon on the bench, Counsel could still have asked for a continuance or explanation. He did not.

To embrace Appellant's interpretation of CR 63 (b) "disability" would throw smaller counties' court administration into chaos. Case law is unhelpful because the reported cases deal with bench trials and death of a judge before Findings of Fact could be entered. Here, the jury found the facts in a very brief amount of time, 1 hour 14 minutes. (RP 248) Ms. Karthaus suggests that the term "disability" should be interpreted as

“unavailable” in the same sense that witnesses may be “unavailable”.

C. The trial court did not err in denying Appellant’s motion for judgment as to future medical expenses and impaired earning capacity.

Appellant claims there was no notice until shortly before trial that Plaintiff would claim future medical expenses with diminished earning capacity. (Brief of Appellant 7) Appellant possessed all the medical records and deposed Plaintiff. Appellant could have objected to testimony on those issues but did not. Plaintiff’s condition physically and economically was hardly a surprise at time of trial. Moreover, Appellant’s attorney attached Ms. Karthaus’s answers/supplemental answers to Appellant’s interrogatories to the Motion for a New Trial or Remittiture. (CP 32) Plaintiff never pressed a lost wage claim. The answers informed Appellant that Ms. Karthaus had been turned over to collection because she could not pay for existing, much less future, medical care. This was all subject to Appellant’s Motion in Limine and the trial court ruled Plaintiff could testify that she could not pay her medical bills so she did not continue to treat. The court prohibited Plaintiff from testifying she had been turned over to collection. (RP 25-26)

“There was no medical testimony as to any permanent impairment, disability, or restriction...” (Brief of Appellant 17)

Despite Appellant's protestations it is Plaintiff's position that a licensed physical therapist with 31 years of experience (RP 75) can give a "medical opinion" from the perspective of a physical therapist. The trial court so ruled after Appellant's unsuccessful limine motion. (RP 39-40) While there was no other medical testimony, Ms. Karthausser's medical records were provided by way of Requests for Admission and ER 904. It was un rebutted that Ms. Karthausser had no pre-existing medical condition. All her witnesses blamed her current condition on the collision. There was no need to segregate damages between various alternate causes, something that may have required live medical doctor testimony. In the absence of other injury causing events, no "medical testimony" was required at all.

"There is no reason laymen may not testify to their sensory perceptions, the weight of the testimony to be determined by the trier of fact. Physical movement by the injured person can be seen and described by a layman with no prior medical training or skill. (*citations omitted*) Furthermore, an injured person can testify to subjective symptoms of pain and suffering, and to the limitations of his physical movements. See S. Schriber, *Damages for Personal Injuries and Wrongful Death Cases* 256-59 (1965); S. Sweitzer, *Proof of Traumatic Injuries* § 565 (1961). See generally E. Cleary, *McCormick's Handbook of Law of Evidence* 689-94 (2d ed. 1972).

Proof of pain and suffering as late as at time of trial even though subjective in character will warrant an instruction on future damages. The same is true of proof of disability and lost earnings. The continued existence of these

elements of damage at the time of trial permits a reasonable inference that future damage will be sustained. Expert medical testimony to this effect may also be given but it is not essential. Such evidence if unfavorable is admissible however to limit recovery. (*citations omitted*)

Bitzan v. Parisi, 88 Wn.2d 116 (1977).

“In cases such as these a future damage instruction can be given even though there is no medical testimony (*Mabrier v. A.M. Servicing Corp.*, 161 N.W. 2d 180, 183 (Iowa 1968), or even if the medical testimony is contrary to plaintiff’s testimony of continued pain. *Jones v. Allen*, 473 S.W. 2d 763 (Mo. App. 1971). The following quotation from *Jones, supra* at 766, illustrates this point:

As to the lack of evidentiary support for the future damage instruction it may be conceded that no direct evidence was adduced that plaintiff would have disability or pain in the future although defendant’s doctor conceded a person could have difficulty for several years. Plaintiff relies upon the recognized rule that ‘the long continuance of conditions existing at the hearing of the cause is sufficient to warrant the giving of an instruction on future pain and suffering * * * and ‘makes a situation where it is for the jury to determine the probable duration of the injury.’ *Harrison v. Weller*, Mo.App. 423 S.W. 2d 226 . . . The evidence of such conditions may com solely from the plaintiff and need not be corroborated by medical evidence, an din fact may be in conflict with medical evidence on the question. *Palmer v. Lasswell*, Mo.App., 267 S.W.2d 492 . . . *Johnston v. Owings*, Mo.App. , 254 S.W.2d 993 . . .”

Bitzan, at 121-23.

While the physical therapist testified that Plaintiff “could” get better

on a permanent basis, (RP 79-80) the opinion was not more probable than not nor did the opinion state by how much. Appellant contends “During the therapy treatments Karthausers shoulder and neck complaints resolved.” (Brief of Appellant 4) This is a mischaracterization of “...it’s been documented that she made significant improvements with her shoulder and neck”. (RP 82) The jury was entitled to, and did, rely upon the testimony of those witnesses intimately familiar with her and in a position to relate their observations.

Another mischaracterization is “Karthausers admitted she often did not do her home exercise program...” (Brief of Appellant 4) The trial testimony was taken from Plaintiffs discovery deposition on cross-examination wherein she answered that she tried to do them every day when she could but she did not do all of them all the time. (RP 151) She was “very busy with life” and sometimes she didnt have a chance to do the exercises. (RP 151) She enumerated a number of reasons including deaths in the family and a daughters wedding. (RP 152)

But all of the above is moot because the affirmative defense of failure to mitigate damages was never raised in Appellants Answer nor was such an instruction proposed or given.

The Court gave the proposed Plaintiffs instructions. (CP 24) The

giving of a diminution of earning capacity instruction was proper because evidence establishing such a claim was admitted into evidence without objection. The instructions simply conformed to the evidence.

“Jury instructions are sufficient if they (1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Knowles v. Harnischfeger Corp.*, 36 Wash.App. 317, 321, 674 P.2d 200 (1983).”

“Instructions to which no exceptions are taken become the law of the case.” *Valdez-Zontek v. Eastmont S. Dist.*, 154 Wn.App. 147, 165 (201).

Appellant argues that the verdict form did not allow the jury to indicate whether they found the Appellant negligent. Rather, they were told to decide whether the negligence of the Appellant proximately caused the accident.

Ms. Karthaus respectfully points to the rest of the jury instructions, particularly Nos. 6, 7 and 10, all of which inform the jury that negligence is their decision to make. Of even greater importance is the argument from both lawyers which spent a great deal of time explaining why Appellant was either negligent or negligence-free. The declaration from the foreperson (CP 36) candidly states the jury recognized the verdict form contained mistakes and the jury went about its business deciding what to do with the case. In fact, Judge Sullivan interrupted closing arguments to tell the jury about one

of the verdict form defects. (RP 215-16)

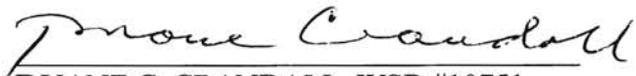
When Defendant did not object immediately to the apparent inconsistencies with the verdict form, Defendant waived the right to challenge the verdict through a motion for a new trial under CR 59. *Gjerde v. Fritzsche*, 55 Wn.App. 387, 393-94 (1989) *rev. denied* 113 Wn.2d 1038 (1990). A failure to object to inconsistencies in the verdict before the jury is discharged waives any objection on appeal. *Gjerde*, at 394. The verdict here was returned at 1:52. (RP 248). The first question remained unanswered but the second question, with three lines to be filled, was answered. The judge held a sidebar, then asked the jury to return to the jury room and answer the first question. The jury took less than a minute (1:56 to 1:57) and returned with “Yes” written in. (RP 250) They were thereafter polled with an 11 to 1 count. (RP 253) Defendant raised no objection to the verdict form before it was given (RP 193) nor when the jury returned the verdict.

V. ATTORNEY FEES, RAP 18

Pursuant to RAP 18.1(b) and RCW 4.84.080 Ms. Karthauser respectfully requests her attorney fees and costs in this matter should she prevail.

VI. CONCLUSION

The jury's verdict was based on unrebutted evidence of damages. The only real contest was that of liability which the Defendant/Appellant lost. The jury followed the Court's instructions and returned a fairly rapid verdict. Having produced very little evidence of her own, Appellant should not be allowed to complain that the overwhelming evidence was insufficient. RESPECTFULLY SUBMITTED this 15 day of October, 2013.


DUANE C. CRANDALL, WSB #10751
of Attorneys for Plaintiff/Respondent
Tammy D. Karthaus

Pursuant to RAP 9.6, the undersigned submits the attached Brief of Respondent. The undersigned has caused copies of the attached document to be served on appellant's counsel.

DATED this 15 day of Oct, 2013.

CRANDALL, O'NEILL, IMBODEN & STYVE, PS

By: 

DUANE C. CRANDALL, WSB #10751
of Attorneys for Respondent
1447 Third Avenue
PO Box 336
Longview, Washington 98632
(360) 425-4470

APPENDIX A

1 REQUEST FOR ADMISSION NO. 7: Admit that the medical treatment received by
2 Plaintiff to address her injuries resulting from this accident was reasonable and necessary.

3 ADMIT OR DENY:

4 Defendant admits that the bills incurred by plaintiff listed in the following interrogatory were
5 reasonable and necessary for her condition. Deny the remainder of the request.

6
7 REQUEST FOR ADMISSION NO. 8: To date, plaintiff Tammy Karthausser has incurred the
8 following medical expenses as a result of injuries sustained in the occurrence on March 29,
9 2011. (If you admit to some but not all of these expenditures, set forth those admitted and
those denied, and as to those denied set forth the basis for the denial.)

10	Fire District 6	\$ 1,777.20
11	PeaceHealth/St. John Medical Center	1,669.65
12	Cascade Emergency Assoc.	343.00
13	Longview Radiologists	213.00
14	Cowlitz Family Health Center	180.00
15	Safeway Pharmacy #19-0091	347.58
16	PT Northwest of Longview, Inc.	<u>6,315.00</u>
17	Total Medical Expenses to Date	\$10,845.43

18 ADMIT OR DENY:

19 Admit.

20 REQUEST FOR ADMISSION NO. 9: The medical expenses set forth in Request for
21 Admission No. 8 were reasonably necessary for the treatment of injuries sustained by
22 plaintiff in the occurrence on March 29, 2011. (If you admit to some but not all of the
23 expenditures, set forth those admitted and those denied, and as to those denied set forth the
24 basis for the denial.)

25 ADMIT OR DENY:

26 Admit

REQUEST FOR ADMISSION NO. 10: Plaintiffs have incurred \$506.80 towing services as
a result of the collision occurring on March 29, 2011.

1 ADMIT OR DENY:

2 Admit that the bill from the tow company was in the above amount, but that much of it was
3 for storage.

4
5 REQUEST FOR ADMISSION NO. 11: Plaintiffs have incurred the loss of the value of their
6 totaled 1996 Honda Passport in an amount not less than \$1,265.00 as a result of the collision
7 occurring on March 29, 2011.

8 ADMIT OR DENY:

9 Admit as to \$1,265.

10 REQUEST FOR ADMISSION NO. 12: Plaintiff Tammy Karthaus received the following
11 injuries as a result of the occurrence on March 29, 2011. (If you admit to some but not all of
12 the injuries, set forth those admitted and those denied, and as to those denied, set forth the
13 basis for the denial.)

14 Sprained right shoulder
15 Thoracic/chest contusion
16 Low back strain
17 Left hip contusion
18 Neck strain

19 ADMIT OR DENY:

20 Admit.

21 REQUEST FOR ADMISSION NO. 13: Plaintiff Tammy Karthaus suffered and/or
22 continues to suffer the following conditions as a result of injuries sustained in the occurrence
23 of March 29, 2011. (If you admit to some but not all these conditions, set forth those
24 admitted and those denied, and as to those denied set forth the basis for the denial)

25 Low back pain
26 Hip pain
Right shoulder pain

ADMIT OR DENY:

Admits plaintiff sustained soft tissue injuries to the right shoulder, hip, and low back, which were appropriately treated, but deny the remainder of the request.

1 REQUEST FOR ADMISSION NO. 14: Admit that you were personally served with a copy
2 of the Summons and Complaint for Damages.

3 ADMIT OR DENY: Admit
4
5
6

7 REQUEST FOR ADMISSION NO. 15: Exhibit A attached hereto represents true and
8 accurate copies of plaintiff's medical records produced in the regular and ordinary course of
9 business of plaintiff's medical providers at or near the time of the acts, conditions and events
10 that they record.

11 ADMIT OR DENY: Deny, but without waiving said objection, admits as to the radiological
12 studies, ambulance report, emergency room report, and physical therapy records, and Cowlitz
13 Family Health records contained within Exhibit A.

14 REQUEST FOR ADMISSION NO.16: Exhibit B attached hereto represents true and
15 accurate copies of plaintiff's medical bills produced in the regular and ordinary course of
16 business of plaintiff's medical providers at or near the time of the acts, conditions and events
17 for which they bill.

18 ADMIT OR DENY: Admit
19

20 REQUEST FOR ADMISSION NO. 17: Exhibit C attached hereto represents a true and
21 accurate copy of the towing bill produced in the regular and ordinary course of business of
22 Bean's towing at or near the time of the acts, conditions and events that they record.

23 ADMIT OR DENY: Admit
24

25 REQUEST FOR ADMISSION NO. 18: Exhibit D attached hereto represents a true and
26 accurate copy of Kelley Blue Book Private Party Prices as obtained over the internet.

ADMIT OR DENY: Admi

APPENDIX B

FILED
SUPERIOR COURT

2013 MAR 13 P 2:12

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK

BY LM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF COWLITZ

TAMMY KARTHAUSER,

Plaintiff,

vs.

MACKENZIE ADAMS,

Defendant.

No. 11-2-00602-7

COURT'S INSTRUCTIONS TO THE JURY

DATED this 13 day of March, 2013.

BY: Michael J. Sullivan
SUPERIOR COURT JUDGE

(24)

Scanned

NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It is also your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any

evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the

facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonable infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

NO. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

NO. 4

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

A cause of an injury is a proximate cause if it is related to the injury in two ways: (1) the cause produced the injury in a direct sequence unbroken by any superseding cause, and (2) the injury would not have happened in the absence of the cause. There may be more than one proximate cause of an injury.

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do some act which a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 6

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

The defendant has the burden of proving the following affirmative defense claim by the defendant:

Defendant lost consciousness as she was approaching the stop sign that controlled traffic traveling in her direction and entered the intersection only because of this sudden physical incapacitation.

If you find from your consideration of all the evidence that this affirmative defense has been proved, your verdict should be for the defendant.

NO. 7

If you find that the Defendant was negligent in operating her vehicle, then you must find and the parties stipulate to the following: That the Plaintiff recovers all damages proximately caused by the collision.

Alternatively, if you find that the Defendant was not negligent in the operation of her vehicle immediately prior to the collision, then Plaintiff recovers nothing.

NO. 8

According to mortality tables, the average expectancy of life of a female aged 44 years is 38.17 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

NO. 9

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 10

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the Plaintiff, your verdict must include the following undisputed past economic damages:

Fire District 6	\$ 1,777.20	
PeaceHealth/St. John Medical Center	1,669.65	
Cascade Emergency Assoc.	343.00	
Longview Radiologists	213.00	
Cowlitz Family Health Center	180.00	
Safeway Pharmacy #19-0091	347.58	
PT Northwest of Longview, Inc.	6,315.00	
Bean's Towing	506.80	
Value 1996 Honda Passport	<u>1,265.00</u>	(Plaintiff contends fair market value of \$1,790.00)
Total Past Economic Damages	\$12,617.23	

In addition, you should consider the following past economic damages:

Value 1996 Honda Passport	\$ 525.00	(amount still in controversy)
Mileage expense to and from providers	<u>516.12</u>	
Total Additional Past Economic Damages	\$ 1,041.12	

In addition you should consider the following future economic damages elements:

The reasonable value of earning capacity with reasonable probability to be lost in the future.

Future medical costs.

In addition you should consider the following noneconomic damages elements:

- a) The nature and extent of the injuries;
- b) The disability and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; and
- c) The pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case and by these instructions.

NO. 11

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated to you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.