

No. 49150-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**MIRIAM HALL**  
Respondent,

v.

**VIRGINIA CARSON,**  
Appellant.

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Appeal from the Superior Court of Washington for Clark County

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**Appellant's Opening Brief**

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## **I. Introduction**

This is an admitted liability, motor vehicle accident case, where the only question for the jury was the amount of general damages. The jury awarded Plaintiff \$348,000, in a case where the Plaintiff never saw a medical doctor for soft-tissue injuries that she claimed will require a lifetime of care.

This appeal presents two questions for this Court. The first concerns RCW 4.28.360, which requires a plaintiff to provide a statement of damages to defendant upon request. Plaintiff refused to provide a statement that conformed to the statute, and then the trial court prohibited Defendant from referring to Plaintiff's various, equivocal statements of damages at trial. This was error under established precedent, which materially affected the result.

The second question is whether the trial court erred when it refused to give Defendant's mitigation instruction. The Plaintiff claimed she suffered a soft-tissue injury that will require a lifetime of care, yet she never consulted with a medical doctor about treatment options. She instead treated exclusively with spinal manipulations, 223 visits to the chiropractor in two and a half years, which a doctor testified is the "opposite of what you want to do" with an injury of this sort. Her injuries became progressively worse. Under such circumstances, a mitigation instruction was appropriate.

Defendant requests that this Court order a new trial.

**2. Assignments of Error**

A. The trial court erred when it prohibited Defendant from referring to Plaintiff's statements of damages at trial.

B. The trial court erred when it failed to give a mitigation instruction.

**3. Issues Presented**

A. Whether a statement of damages is admissible at trial.

B. Whether a mitigation instruction is warranted when a plaintiff never sees a medical doctor for an injury that purportedly will require a lifetime of care, and there is evidence that the pain became progressively worse due to Plaintiff's choice in treatment.

**4. Statement of the Case**

On September 11, 2014, Plaintiff was stopped at a crosswalk in her Volkswagen Jetta, when she was rear-ended by Defendant, driving a Suzuki Sedona. Defendant was driving about 25 miles per hour when she was temporarily blinded by the sun. RP 327-28. Defendant saw a "red object" in front of her that was "too close," so she pressed her brakes "really hard to the floor." RP 328. Defendant's car hit Plaintiff's car, pushing it into the car in front of it. RP 328; RP 590-91. Defendant's car was totalled. RP 329. Plaintiff's car suffered "under \$2,000 in damage." RP 241.

**A. The First Lawsuit.**

Plaintiff filed two identical lawsuits arising out of the accident. In the first, Clark County Case No. 14-2-01653-4, Plaintiff would not provide Defendant a statement of damages that complied with RCW 4.28.360, and then moved *in limine* to exclude as evidence the statement that she did provide. CP 26, Ex. 3. The trial court denied the motion based on *M.R.B. v. Puyallup School District*, 169 Wn. App. 837, 282 P.3d 1124 (2012). CP 26, ¶ 5.

One week before trial, Plaintiff served an amended statement of damages, labelled a settlement communication, which stated that she is “not at this time able to ascertain the exact amount of general damages she will request” but was willing to “enable the defense to assess whether there is an excess insurance claim, based upon a comparison of similar cases, we state the same shall not be less than \$250,000.” CP 26, Ex. 4.

Defendant moved to strike the improper parts of the statement, such as reference to insurance. The trial court granted the motion, and Plaintiff then voluntarily dismissed her case. CP 26, Ex. 2.

**B. The Present Lawsuit.**

Plaintiff then filed an identical lawsuit on June 23, 2015. Defendant again requested a statement of damages. After resistance by Plaintiff, *see* CP 26, Ex. 6, she finally provided the following:

This is an ER 408 communication for settlement purposes. Pursuant to RCW4.28.360 you have requested that we set forth the damages suffered by Ms. Hall. RCW 4.28.360 is not a discovery rule and this response is not discovery. I do not know why you need this information as my evaluation of the case is completely irrelevant. My evaluation will have very little to no influence on the evaluation given the case by Mrs. Carson's insurance company any way.

....

I object to answering the request for other reasons. One is that it requires me to apply my training and experience to the facts of the case as I understand them and reach conclusions about a reasonable range of damages, that seems like work product to me. Such estimates are based on speculation with a dose of experience applied. I fail to see how it would be helpful to you.

....

You know that the damages claimed exceed the policy limit carried by your client's insured Mrs. Carson.

Those limits are \$100,000. It is for the jury to determine the actual amount of damages which may be more or less than what is claimed. We do not know if special damages in the form of either medical expenses or income loss will be claimed. I do know the amount of these damages is important to insurance companies, particularly those with computerized evaluation programs. We have previously provided you will copies of the bills, wage loss information and everything else you need to figure out the amounts. We will supplement these if there is any change.

Defendant filed a motion to compel, asking the trial court to require Plaintiff to provide a statement of damages that: (1) sets forth separately the amounts of any special damages and general damages sought; (2) attributes the statement to Plaintiff, not her counsel; (3) does not include any qualifications or references to settlement or insurance. CP 25. At argument, Plaintiff's counsel stated that Plaintiff would not even look at the statement:

THE COURT: Let me make my ruling very simple. And then we're going to move on.

MR. JACOBS: Okay.

THE COURT: I am requiring that the plaintiff comply with 4.28.360. I don't care if it's a letter form. I don't care if it's a pleading form. The statute does not – doesn't – specifically saying what

special damages they are seeking, if any. And the general damages amount that they are seeking. I am not making any ruling whether its considered an offer of settlement under 408, or if it's an admissible document at trial.

MR. JACOBS: Thank you, Your Honor. They did – one very kind of nitpicky point is that the statute does phrase it in terms of the plaintiff, herself, setting forth the statement. Now we're fine if that's – if that's done through Mr. Robison as –

THE COURT: He's –

MR. JACOBS: -- as the agent.

THE COURT: He's an agent.

MR. JACOBS: -- for – right.

MR. ROBISON: I'm not going to make a CP 2A stipulation that this is the amount of damages that my client (inaudible).

THE COURT: Well, someone has to sign it. It says the plaintiff will do it. It's either going to be the actual plaintiff, or the attorney representing the plaintiff.

MR. JACOBS: As – as her agent.

MR. ROBISON: **And – which I won't even show it to her. And I won't consult with her about it.**

THE COURT: That's – how you practice, what you choose to do, is your business. I'm just requiring that this be complied with.

RP 16-17 (emphasis added).

The trial court's order, entered November 17, 2015, required a statement of damages that "identifies the amount of General Damages and the amount of Special Damages that plaintiff is seeking. The remainder of defendant's motion is denied." CP 49, Ex 4.

Plaintiff submitted a new statement of damages, labelled "***FOR ER 408 Settlement Purposes.***" CP 49, Ex 5. It said:

Pursuant to Judge Collier's ruling ... this shall serve as our amended responses to your request for statement of damages. The purpose of this communication is to inform you of what we are seeking at this time. This will allow you to inform Mrs. Carson and her insurance company of what we are willing to take to settle the case at this time so that they may act and plan accordingly.

At this time, general damages combined with special damages totaling a sum equal to Mrs. Carson's policy limits of \$100,000 are sought. We reserve the right to amend this response should circumstances change, new information come to light and/or if this matter

proceeds to trial. It is for the jury to determine the actual amount of damages.

*Id.*

**C. The Motions *in Limine*.**

Plaintiff and Defendant filed motions *in limine* about whether Defendant could use the statement of damages at trial. Defendant asked the trial court to defer to the ruling by the first trial judge in the first case Plaintiff had filed. The court refused to do so, and ultimately granted Plaintiff's motion to exclude "any reference to the amount stated in plaintiffs' [sic] response to request for damage statements." CP 43, 44.

**D. Trial.**

**(i) Introduction.**

Trial occurred on May 23-25, 2016. Defendant admitted liability. RP 330. Plaintiff ultimately asked for \$1,445,000 in general damages, despite having identified \$100,000 in combined damages in her statement of damages. RP 663.

Because Defendant's assignments of error only concern (1) the statement of damages and (2) the mitigation instruction, Defendant's statement of facts focuses on the testimony relevant to those issues, which was from Plaintiff, her chiropractor and Defendant's medical expert.

**(ii) Plaintiff's Testimony.**

At the time of the accident, Plaintiff was a nursing student. RP 616-17. After the accident, Plaintiff suspected she had “some form of whiplash or something” but did not go to the hospital, despite being advised to by her mother, who is an RN. RP 595-96. She treated her injuries with ibuprofen and ice. *Id.* When asked why she did not go to a hospital, she answered: “Between, you know, growing up in a medical family and then going to nursing school, I mean, these are all things that you learn about. I mean you – you just – it’s kind of hard to explain but essentially you just kind of feel like you can self treat, especially to an extent.” RP 596.

Because Plaintiff continued to feel pain in her neck and back twelve days after the accident, she decided to see a chiropractor. RP 600. Plaintiff decided not to see a medical doctor. RP 601, 617. She believed her “options were going to be fairly limited with an MD.” RP 601-02. Plaintiff testified:

I wanted to be as conservative as possible. It’s my body, you know. I don’t want to be cutting into it or adding things to it that don’t need to be there. If it gets to that point down the line, then that’s down the line. So it was a conservative approach. And, you know, based on speaking with co-workers and other health care professionals within my nursing school community, reading into it a lot, you know, reviews online, I just

decided I would give [chiropractic treatment] a shot.”

RP 602.

Plaintiff presented to Chiropractor Steven Lewis on September 23, 2013. After taking X-rays, but not an MRI, Lewis determined that Plaintiff would need a lifetime of chiropractic care. See Lewis Testimony, *infra*. Plaintiff has received 223 chiropractic treatments in the two years and eight months between that visit and trial. Plaintiff’s pain has gotten progressively worse, but she still “didn’t feel the need” to see a medical doctor. RP 614-15.

Plaintiff testified that “most of my pain is in my neck” but at times can “stretch down into my arms and mid/lower back, you know, if it gets jarred up enough and I can’t turn right or can’t, you know, use my back or neck how I’m used to.” RP 596-99. Sometimes if “some sort of nerve was tweaked and, you know, my fingers will go numb.” RP 599.

Plaintiff agreed that her symptoms had “progressively gotten worse over time” but she said “chiropractic care does help with them fairly significantly as long as I stay on top of it as well.” RP 617-18. But when asked why she did not “do something different” given her 223 visits to the chiropractor, even though her pain had only increased, she testified: “Why change something that’s helping.” RP 600.

**(iii) Chiropractor Steven Lewis.**

Chiropractor Steven Lewis was Plaintiff's treating chiropractor. One of the benefits he advertises on his website is his "professional relationships" with personal injury attorneys. RP 490-91. His website also states that after an accident, "there's a short window of opportunity to begin treatment that results in the best possible outcome and the recovery from your injuries. The common approach of waiting to see if the pain goes away on its own often has disastrous results." RP 499. Lewis did not believe that his statement was true as applied to Plaintiff, however. RP 500.

Plaintiff presented to his clinic on September 23, 2013. Plaintiff "palpated" Plaintiff's neck and spine, looking for signs of ligament injury, such as muscle spasms, swelling, or tenderness. RP 437-39. Plaintiff's primary complaint was "pain and restriction, reflex spasm, and tenderness overlying [the] articular components," which Lewis believed indicated an injury to the "facet joints," which are "commonly injured and sources of chronic pain." RP 441.

Lewis did not perform an MRI, even though an MRI is designed to show ligament injuries. RP 493-94. Instead he ordered an X-ray designed to measure "individual motion of these spinal segments." RP 445. Plaintiff testified "anything more than one millimeter of translation either anterior or posterior is indicative of what we call ligament subfailure or tearing or injury." RP 447.

Anything “more than three and a half millimeters is considered very catastrophic injury to these ligaments.” RP 447. He also measured “angulation where if the vertebra opens up more than . . . seven degrees . . . that means there’s potential injury also.” RP 448. Lewis also took X-rays of a “very special ligament called the ligamentum flavum,” which could show an “upper cervical injury at C1 and C2.” RP 451.

Lewis sent the X-rays to a company in Wisconsin called “Spinal Kinetics,” where “board certified radiologists have special training” and equipment to read X-rays. RP 449. Lewis claimed he knew of no radiologists in Washington who have the training or equipment to read these X-rays like Spinal Kinetics. RP 492-93. Before Lewis even sent the X-rays to Wisconsin, he already had told Plaintiff she may need “12 months or longer of ongoing management” of her condition. RP 505.

On October 4, 2013, Lewis received his report from Spinal Kinetics. Spinal Kinetics reported that its special equipment showed a loss of translation at 3.5 millimeters for C2 and 3.74 millimeters at C3, which indicated a “very severe ligament injury to . . . those components, the anterior ligament . . . the posterior ligament, and the joint capsule.” RP 461. Lewis stated the impairment “was at a level that was ratable for a 25 percent whole body impairment, lifetime impairment in the cervical spine,” which was akin to a “loss of an

arm.” RP 460-62. The report also “gave us results at C4 of 2.02 millimeters, and at C5 at 1.81, and at C6 at 1.00,” which indicated additional ligament injury. RP 462. The x-rays of the “ligamentum flavum” showed ligament injury in her upper neck. RP 467. Lewis testified that these are “permanent injuries to these structures that are lifelong and they’re going to be there, she’s going to live with them for the rest of her life.” RP 464.

Lewis believed the best treatment option is “restoring joint movement” through repeated “spinal manipulation.” RP 477-78. Lewis admitted that, despite over 223 treatments, Plaintiff “seems to be getting worse over time.” RP 483. Lewis saw no need to refer her to a medical doctor because “that was a determination I didn’t see necessary.” RP 504. He testified that a medical doctor simply would not understand his diagnosis: “It’s a fact that most M.D.s, orthopedists really don’t understand nor do they look for or do the workup that we do with these very unique injuries to the spine. . . . So the bottom line is, it’s difficult, very difficult to find an orthopedist or a spine surgeon or anybody really that understands these and takes the interest in it to a degree to work as a partnership.” RP 504.

When asked whether spinal manipulations exacerbated Plaintiff’s pain because he was not giving the ligaments a chance to heal, Lewis testified that “if you do [spinal manipulation] in a very

controlled process, like using an impulse tool or your skill level, you can adjust [the vertebrae] without further damage” to it. RP 495-97.

**(iv) Dr. Reed Wilson.**

Defendant’s only witness was Dr. Reed Wilson, a doctor who is board certified in neurology and internal medicine. RP 536-37. Dr. Wilson retired from clinical practice in 2007, and now performs forensic neurology. RP 535. Dr. Wilson reviewed Plaintiff’s medical records and examined Plaintiff. RP 536. He testified that he had never reviewed a medical record of a patient with so many chiropractic treatments; nor had he seen a diagnosis similar to what Lewis provided after his first examination of Plaintiff, before he had reviewed a single X-ray. RP 539-40.

Dr. Wilson examined the X-rays but did not see objective evidence that supported Spinal Kinetics’ conclusions. RP 544-45. Nor did he find objective evidence of the injuries when he examined Plaintiff. RP 546.

He testified that repeated spinal manipulations likely exacerbated any ligament injury, because moving the spine does not give the ligaments the opportunity to heal. RP 550. Dr. Wilson testified:

A: Tissues can heal, muscle strains can heal, tendons, ligament injuries can heal. How do they heal? Well you just keep them from –give them a rest. And how would you give

somebody's ligaments a rest? Well, keep – immobilize them. Keep them from moving. If they had a ligamentous injury in their neck you might give them a hard collar to wear for a while until that ligament heals up. Or if the ligament injury is very severe and persisted after you took them out of a hard collar, you might want to ask a neurosurgeon to tighten the ligaments or fuse the bone so there wouldn't – so it wouldn't be a catastrophic result from movement.

Q: And if you had a patient who you believed had a ligament injury, would you recommend that they undergo several spinal manipulations by a chiropractor?

A: No. Unless – common sense tells you if there's ligamentous injury, avoidance of movement is proper. You don't want to put the patient at risk for damage from stretching the ligament. You want to give it a rest. So I would think manipulation would be the opposite treatment of what you'd really want to do if you suspected someone had a ligamentous injury.”

RP 550-01.

Dr. Wilson reiterated that “if she had a ligamentous injury, then the treatment would not be the fix. There may be no fix because ligamentous injuries can fail to heal and leave ongoing

problems. But it's – there are two types of treatment. One if there's sufficient laxity to endanger the spinal cord, surgery would be the answer. If not, then just avoidance of those extreme motions that would aggravate the problem.” RP 561.

**(v) Jury Instructions and Verdict.**

Defendant asked the Court to provide a “mitigation” instruction, civil jury instruction No. 33.01. RP 631. Defendant argued that there was evidence that Plaintiff delayed seeking treatment, and she pointed to Plaintiff's refusal to see a medical doctor, and the testimony from Dr. Wilson about “immobilization as being a therapy to heal a spinal ligamentous injury . . .” RP 646-48. The Court refused to give the instruction. RP 646.

Plaintiffs' statement of damages identified \$100,000 of combined general and special damages. At closing, Plaintiff took advantage of the trial court's ruling precluding use of the statement of damages at trial by now asking for \$1,445,000 in general damages. RP 663. Plaintiff also noted the absence of a mitigation instruction by arguing that any injuries that resulted from the delay or choice in treatment are still compensable because “all of those things are just consequences because they're choices that never would have had to have been made but for the fact that [Defendant] did not pay attention.” RP 671.

The jury returned a verdict, 10-2, for \$348,000 in general damages. CP 74.

**5. Argument.**

**A. The Trial Court Erred When it Allowed Plaintiff to Circumvent RCW 4.28.360.**

**(i) Summary of Argument.**

Washington law requires a plaintiff to identify separately her general and special damages on request. RCW 4.28.360. The statute is plain on its face and does not permit the type of equivocation and qualification seen in the statements that Defendant received from Plaintiff. The statute requires a statement “from the plaintiff” that sets forth separately “the amounts of any special damages and general damages sought.” It is not a “settlement communication,” and cannot be circumvented by referring to insurance or refusing to show the statement to the plaintiff. It is a legislatively-mandated mechanism for providing a defendant notice of how much money is at stake, and must be followed like any other statute.

This Court has held already that a statement of damages is admissible, for the common sense reason that it is a statement from the plaintiff on a disputed factual issue, and is relevant to credibility and bias, *inter alia*. Indeed, the simplest (and only) way to enforce the statute is to allow a defendant to use the statement at trial as evidence. Because the trial court prohibited Defendant from

referring to the statement at trial, Plaintiff could refuse to provide a statement that complied with the statute, and then request fourteen times what was identified on the statement, without consequence. For that reason, this Court should order a new trial.

**(ii) RWC 4.28.360 Is Not Ambiguous – It Requires a Statement of Damages From the Plaintiff.**

RCW 4.28.360 provides:

In any civil action for personal injuries, the complaint shall not contain a statement of the damages sought but shall contain a prayer for damages as shall be determined. A defendant in such action may at any time request a statement from the plaintiff setting forth separately the amounts of any special damages and general damages sought. Not later than fifteen days after service of such request to the plaintiff, the plaintiff shall have served the defendant with such statement.

When interpreting RCW 4.28.360, the Court’s “fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914–15, 281 P.3d 305 (2012). The best indication of legislative intent is the “plain meaning of the statutory provision.” *Id.* If the statute is ambiguous, then the Court “may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.” *Id.*

RCW 4.28.360 is not ambiguous. The first sentence prohibits a party from including a “statement of the damages sought” in a complaint. The second sentence, however, provides a mechanism for informing the defendant of the amount of damages sought. It provides that a defendant may request a statement “from the plaintiff” that sets forth “separately the amounts of any special damages and general damages sought.” The plaintiff must comply with the request, and “shall” serve the statement within 15 days. The plain text therefore shows that (1) the statement is not optional; (2) it must state “the amounts of any special damages and general damages sought”; and (3) it must be “from the plaintiff.”

The Washington Supreme Court analyzed the legislative history of RCW 4.28.360 in *McNeal v. Allen*, 95 Wn.2d 265, 621 P.2d 1285 (1980), a medical malpractice case where the plaintiff’s complaint included a request for \$500,000. The defendant asserted a counterclaim based on the violation of RCW 4.28.360. *Id.* at 266. The Supreme Court affirmed the dismissal of the counterclaim because “the statute is procedural, rather than substantive, and reveals no legislative intent to abrogate the common law rule that allegations in pleadings are absolutely privileged and cannot form the basis for a damage action.” *Id.* at 267.

The Court noted the statute “originated as part of a bill to regulate and restrict malpractice actions,” but was amended to apply

to all personal injury actions. *Id.* at 268. The “records of the legislature are silent as to the reasons for the enactment,” but there were a few statements implying that the statute was enacted (1) to eliminate unnecessary friction between the medical and legal profession caused by claims for “astronomical damages,” which “impose needless anxiety and often unfounded notoriety upon defendant physicians,” (2) because “publication of the fact that a patient is suing his doctor for a large sum may inspire others to bring similar suits”; or (3) because it “may influence prospective jurors.” *Id.* at 268. The Court did not know “which, if any, of these considerations the legislature had in mind” when it enacted the statute. *Id.* at 269.

The Washington Supreme Court addressed the statute again in *Beckman v. Spokane Transit Authority*, 107 Wn.2d 785, 733 P.2d 960 (1987), where it examined the incongruity between RCW 4.84.250 – which allows attorney fees to a prevailing party when the “amount pleaded” is \$10,000 or less – and RCW 4.28.360, which does not allow the pleading of damages. The Court resolved the inconsistency by noting that “defendants in these cases may always request plaintiffs to provide a statement of general and special damages sought pursuant to RCW 4.28.360.” *Id.* at 789. The Court also observed that, if the defendant had requested a statement of damages (it had not), and the amount provided exceeded the amount

identified in RCW 4.84.250, then “RCW 4.84.250 would not have applied.” *Id.* at 790-91.

Put another way, a request for a statement of damages is not a meaningless formality, as Plaintiff argued below. It is a statement from the plaintiff, and legal consequences. *Pierson v. Hernandez*, 149 Wn. App. 297, 303, 202 P.3d 1014 (2009)

**(iii) A Statement of Damages Is Admissible As Evidence.**

The record in this case shows the hurdles over which a defendant must jump in some personal injury cases, to receive a statement of damages that complies with the statute. After litigation that spanned two cases, Defendant eventually received a statement labelled a “settlement communication,” which referred to insurance, and still did not separately state the amount of general and special damages. Plaintiff’s counsel said on the record that Plaintiff would not even look at the statement. RP 16-17.

The trial court let Plaintiff disregard the statute when it prohibited Defendant from referring to the statement at trial. This is contrary to *M.R.B. v. Puyallup School Dist*, 169 Wn. App. 837, 861, 282 P.3d 1124 (2012), which holds that the statement is relevant and admissible as evidence.

In *M.R.B.*, a group of students sued a school district for publishing a negative article about the students in a student newspaper. The defendant requested a statement of damages, and

plaintiffs provided statements that said, *inter alia*: “Juries in similar cases . . . have awarded general damages in the \$2 million to \$4 million range.” *Id.* at 855.

The defendant used the statements of damages to cross-examine the plaintiffs, all of whom claimed not to have seen them. The defendant also referenced the statements at closing to argue that the plaintiffs “had a personal interest in the outcome of the case and the jury should take that bias into account.” *Id.* at 856-57. The jury ultimately found for the defendant.

On appeal, the students argued that the defendant’s reference to the statement of damages was “flagrant misconduct.” This Court disagreed, because the defendant’s argument “related directly to a proper consideration for the jury, the credibility of the testimony and circumstantial evidence.” *Id.* at 860. The court noted: “Evidence that a witness has a financial interest in the lawsuit’s outcome may show bias. This is exactly how . . . counsel used the statement of damages evidence here.” *Id.*

Thus, *M.R.B.* unequivocally holds that a statement of damages is admissible.

**(iv) The Trial Court Erred When it Refused to Allow Reference to the Statement of Damages at Trial.**

The trial court refused to follow *M.R.B.*, and prohibited defendant from referencing the amounts identified in the statement of

damages. It is difficult to understand the basis for the trial court's ruling. It should be uncontroversial that a defendant may use a statement "from the plaintiff" to cross-examine the plaintiff about the subject of that statement, when that subject is the only issue before the jury. This is consistent with *M.R.B.*, where the court observed that the amount identified on a statement of damages is relevant to credibility and bias. The same is true in this case.

Plaintiff argued below that the statement was a "settlement communication" but that is false. A statement of damages is a statutorily required response to a defendant's demand for a statement of damages. It cannot be rendered inadmissible by labelling it a settlement communication. Like any statement from the plaintiff, it was relevant and admissible as an admission from the plaintiff on the primary issue before the jury. Even if considered a statement from the plaintiff's attorney, it still can be used as evidence against the plaintiff. *State v. Williams*, 79 Wn. App. 21, 28, 902 P.2d 1258 (1995) (observing that, in some cases, an attorney's statement concerning litigation sometimes qualifies as an admission of a party opponent).

The trial court's rulings in this case rendered RCW 4.28.360 meaningless. It allowed Plaintiff to suffer no consequences from her refusal to comply with RCW 4.28.360. The trial court erred when it precluded use of the statement of damages at trial.

**(v) The Error Prejudiced Defendant.**

An evidentiary error requires reversal only if it results in prejudice, meaning the error affects, or presumptively affects, the outcome of the trial. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 905, 151 P.3d 219 (2007).

Here the trial court's error affected the outcome of the trial. Defendant admitted liability, and Plaintiff sought general damages only. General damages are inherently subjective and dependent on a plaintiff's credibility and other amorphous factors. The statement of damages "from the plaintiff" sought \$100,000 of combined general and special damages, yet Plaintiff requested \$1.4 million at trial. The discrepancy between the statement and the amount sought at trial was powerful evidence of plaintiff's credibility and bias, and at a minimum required some explanation from the Plaintiff.

It is impossible to believe that a jury would have awarded Plaintiff \$348,000 in this low-impact MVA case that resulted in no visits to a medical doctor, and where general damages were not sought, if it knew that her last statement of damages identified a total of \$100,000 of damages. It is reasonable to conclude, then, that the trial court's error affected the outcome of the trial.

Defendant requests a new trial based on evidentiary error.

**B. The Trial Court Erred When it Refused to Provide a Mitigation Instruction.**

The trial court also erred when it refused to provide a mitigation instruction. Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). If a party's theory is backed by substantial evidence – meaning a “sufficient quantum [exists] to persuade a fair-minded person of the truth of the declared premise” – then the court must instruct on it. *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782 (2013), *aff'd*, 182 Wn.2d 794, 346 P.3d 708 (2015).

When determining whether the evidence was sufficient to support the giving of an instruction, this court must view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000).

**(i) The Mitigation Instruction.**

Defendant's primary theory in this admitted liability case was that Plaintiff failed to mitigate her damages because she: (1) delayed seeking treatment; (2) treated exclusively through 223 chiropractic treatments, even when her symptoms became progressively worse; and (3) refusing to present to a medical doctor, who would have prescribed immobilization. Defendant's expert testified that

immobilization was the proper initial treatment because it would have given the ligaments and tissues time a chance to heal, while repeated manipulations of the spine only exacerbated the problem.

The “mitigation” instruction reads:

“A person who is liable for an injury to another is not liable for any damages arising after the original injury that are proximately caused by the failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage. Defendant has the burden to prove Plaintiff’s failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.”

The instruction is supported by this court’s case-law, if the evidence supports it viewed in the light most favorable to defendant. *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 244. 935 P.2d 1377 (1997) (“An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate.”); *see also Hawkins v. Marshall*, 92 Wn. App. 38, 47–48, 962 P.2d 834 (1998) (holding instruction not warranted when defendant presented no evidence that the failure to follow a doctor's advice aggravated the plaintiff's condition or delayed her recovery).

But if a defendant presents evidence to a reasonable medical certainty that a course of treatment not undertaken would have benefitted the plaintiff, then the court must give the instruction.

*Fox v. Evans*, 127 Wn. App. 300, 306–07, 111 P.3d 261 (2005). If reasonable minds can differ on whether the plaintiff mitigated her damages, then it is a proper question for the jury. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 826, 142 P.3d 209 (2006).

*Fox v. Evans* is instructive. In *Fox*, the plaintiff sued the defendant for injuries allegedly suffered in an automobile accident. 127 Wn. App. at 302. The plaintiff’s physician testified that the plaintiff refused to accept a diagnosis that she suffered from depression, and that she might respond well to anti-depressants. *Id.* Other doctors testified that the plaintiff “had the potential for moderate improvement by taking medication” or through alternative means of treating her depression, but the plaintiff “was reluctant to try further psychotherapy” or take medication. *Id.* at 302-03.

The court provided a mitigation instruction and the Court of Appeals held the trial court did not err because the defendant presented evidence of the plaintiff’s refusal to try alternative methods of treatment. The Court noted that a defendant “requesting a failure to mitigate instruction must show that there were alternative treatment options available to the plaintiff and that the plaintiff acted unreasonably in deciding on treatment.” *Id.* at 305 (quoting *Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P2d 1099 (1956)). The

rule “recognizes that an injured party has some duty to lessen his or her damages.” *Id.*

**(ii) The Evidence Supported the Instruction.**

Like the plaintiff in *Fox* who refused to accept alternative methods of treating her general damages, Plaintiff in this case, based on her self-diagnosis as a nursing student, rejected any and all treatment that might be recommended by a medical doctor. Plaintiff conceded that she never sought an opinion from a medical doctor about an injury that she believes needs a lifetime of care. She instead chose to treat exclusively through spine manipulations and chiropractic treatments, even though her condition became progressively worse.

Defendant’s expert, Dr. Wilson, testified that he had never seen a patient with so many chiropractic treatments. RP 539. Nor had he seen a diagnosis quite like that provided by Chiropractor Lewis after a single visit, and without the benefit of an X-ray. Dr. Wilson testified that immobilization of the cervical spine is an accepted method of treating a serious ligament injury, and that repeated spinal manipulations is the “opposite treatment” for this type of injury. RP 550. Dr. Wilson testified:

A: Tissues can heal, muscle strains can heal, tendons, ligament injuries can heal. How do they heal? Well you just keep them from –give them a rest. And how would you give

somebody's ligaments a rest? Well, keep – immobilize them. Keep them from moving. If they had a ligamentous injury in their neck you might give them a hard collar to wear for a while until that ligament heals up. Or if the ligament injury is very severe and persisted after you took them out of a hard collar, you might want to ask a neurosurgeon to tighten the ligaments or fuse the bone so there wouldn't – so it wouldn't be a catastrophic result from movement.

Q: And if you had a patient who you believed had a ligament injury, would you recommend that they undergo several spinal manipulations by a chiropractor?

A: No. Unless – common sense tells you if there's ligamentous injury, avoidance of movement is proper. You don't want to put the patient at risk for damage from stretching the ligament. You want to give it a rest. So I would think manipulation would be the opposite treatment of what you'd really want to do if you suspected someone had a ligamentous injury.”

RP 550.

Dr. Wilson also testified that “if she had a ligamentous injury, then the treatment would not be the fix. There may be no fix because ligamentous injuries can fail to heal and leave ongoing

problems. But it's – there are two types of treatment. One if there's sufficient laxity to endanger the spinal cord, surgery would be the answer. If not, then just avoidance of those extreme motions that would aggravate the problem.” RP 561.

Giving Defendant the benefit of all favorable inferences, this should be sufficient evidence to allow a jury to conclude that Plaintiff failed to exercise reasonable care in refusing to consult with a doctor for a purportedly permanent injury that will require a lifetime of care. Had she consulted with a doctor, immediate immobilization would have given her injuries an opportunity to heal. Plaintiff instead chose repeated manipulations of her spine, which is the “opposite treatment of what you'd really want to do if you suspected someone had a ligamentous injury.” RP 550.

Defendant's theory on damages fit right into the mitigation instruction. Defendant presented evidence from which a jury could conclude that Plaintiff's damage was “proximately caused by the failure of [plaintiff] to exercise ordinary care to avoid or minimize such new or increased damage.” The trial court erred in failing to give this instruction.

**(iii) The Failure to Provide the Instruction  
Prejudiced Defendant**

The failure to give the instruction greatly prejudiced Defendant. The mitigation instruction tracked Defendant's theory of the case on the only issue before the jury. Without the instruction to

guide the jury, Defendant's theory was less powerful. Plaintiff took advantage of the instruction's absence by arguing that it did not matter whether Plaintiff's decision to refuse to see a medical doctor, or to treat a ligament injury by manipulating the spine, exacerbated her injury:

“And the law is that there can be more than one proximate cause of a condition....And so keep in mind that if there's a connection between any damage that befell [Plaintiff], even if other things came in, **so just her delay in going for treatment or choosing to treat with what her nurse's training,** all of those things are just consequences because they're choices that never would have had to have been made but for the fact that [Defendant] didn't pay attention.”

RP 671 (emphasis added).

Had the jury been correctly instructed, they would have seen through this argument. Plaintiff, in fact, does have an obligation to act reasonably when faced with an injury that purportedly requires a lifetime of care.

A jury could reasonably conclude that, at a minimum, a person in Plaintiff's position should not wait twelve days for treatment, and should see a medical doctor to explore common medical therapies that might have allowed her ligament to heal,

rather than continuing down a course of treatment that only resulted in more pain. Even if the jury did agree with Defendant on this issue, the absence of the mitigation instruction meant that the jury likely attributed to Defendant all damages caused by Plaintiff's failure to act reasonably, because it was not otherwise instructed.

For that reason, the trial court's error in not giving the mitigation instruction materially affected the outcome of this case, and this Court should order a new trial.

**6. Conclusion.**

Defendant requests this Court reverse the verdict and remand for a new trial.

Respectfully Submitted this 12th day of December, 2016.

HART WAGNER LLP

By: *s/ Matthew J. Kalmanson*

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## CERTIFICATE OF FILING AND SERVICE

I certify that on the 12<sup>th</sup> day of December, 2016, I filed the original **DEFENDANT-APPELLANT'S OPENING BRIEF** with the Court of Appeals, Division II by Electronic Filing.

I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by electronic filing:

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Respectfully Submitted this 12th day of December, 2016.

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**HART WAGNER LLP**

**December 12, 2016 - 1:03 PM**

**Transmittal Letter**

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