

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 Reply Brief and Opposition to Cross-Appeal**

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## ARGUMENT

### 1. Defendant Preserved Its First Assignment of Error.

Plaintiff argues that Defendant failed to preserve its first assignment of error, *i.e.*, that the trial court erred in granting Plaintiff's motion *in limine* on whether Defendant could make "any reference to the amount stated in Plaintiffs' response to request for damage statement." CP 43, 44. Despite the trial court's unequivocal ruling on this issue, Plaintiff argues that the assignment of error is unpreserved because Defendant: (1) did not argue that there was an incongruity between the amount sought at trial and the amount provided in statement; (2) Defendant did not submit an "offer of proof"; and (3) a ruling on a motion in limine is "interlocutory." None of these arguments have merit.

Plaintiff's first argument is belied by the record. Defendant filed a pleading in opposition to Plaintiff's motion *in limine*, and the parties argued this issue at length to the trial court. Defendant specifically argued that the statement of damages was admissible as evidence of Plaintiff's general damages, as well as her credibility and bias. CP 54, p.4-6. Defendant cited and discussed *M.R.B. v.*

*Puyallup School*. RP 26-39. These are the same arguments being made on appeal.

Plaintiff focuses on one argument made in Defendant's opening brief — that there was a significant difference between the amount claimed at trial and that identified in the statement — and argues that the entire assignment of error is unpreserved. This is a red herring. On appeal, Defendant observed the incongruity between the statement of damages and the amount requested at trial to show prejudice. Defendant's arguments on admissibility, by contrast, mirror the grounds raised in the trial court.

Moreover, the "incongruity" point is simply a different way of arguing that the statement of damages was circumstantial evidence of Plaintiff's actual damages, as well as her credibility and bias. Indeed, there would be no need to introduce the statement of damages if it was the same as what Plaintiff sought at trial. Plaintiff concedes this in her appellate brief, stating "the defense wanted to use the amount in the damage statement . . . just as the defense did in *M.R.B. v. Puyallup* . . . . This intention was not lost on the trial court." (Plaintiff's Brief, p.12). If Defendant made the same

arguments that were made in *MRB*, and the trial court understood those arguments, then there is no preservation issue.

Plaintiff's second preservation argument is that Defendant failed to provide an offer of proof. That is also incorrect. An offer of proof serves three purposes: "it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray*, 116 Wn. 2d 531, 538, 806 P.2d 1220 (1991). An offer of proof is not required "if the substance of the excluded evidence is apparent from the record." *Id.* Even when an offer of proof is required, the "substance of an offer of proof need not be made known in detail." *In re Detention of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013).

Here, the parties extensively litigated whether the statement of damages was admissible. The trial court understood Defendant's legal theory; it knew the specific nature of the offered evidence (the statement of damages); and there is a record for this Court to review. No offer of proof was required, beyond the statement of damages

itself. *See Ray*, 116 Wn.2d at 539 (“The extended colloquy between the prosecutor, defense attorney, and the court, however, revealed the substance of the evidence that Ray wished to introduce and the theory under which it was offered.... ER 103(a)(2) does not require that the details of the testimony be apparent.”).

Finally, Plaintiff argues that a motion in *limine* is “interlocutory,” and thus Defendant had to ask the court to reconsider its ruling during trial. This is also not true. Defendant opposed Plaintiff’s motion in *limine*, and by doing so preserved its objection to the trial court’s decision to grant that motion. *See generally, State v. Evans*, 96 Wn.2d 119, 124, 634 P.2d 845 (1981).

Defendant is unaware of a case that supports Plaintiff’s view that a party must move to “reconsider” a ruling on a motion in *limine* in order to preserve it for appellate review. Plaintiff cites *Jordan v. Berkey*, 26 Wn. App. 242, 611 P.2d 1382 (1980), but there the court issued a “deferred ruling” on an evidentiary issue. *Id.* at 245 (noting “the order was not as definite as Jordan asserts. Primarily, the court was confronted with an admission of liability. The court deferred ruling upon the question as it might pertain to damages.”).

There was no deferred ruling in this case. The trial court did not ask for further evidence. Defendant did not sleep on her rights – this issue was litigated fully, across two cases, and she had no obligation to ask the court to reconsider. There are no procedural hurdles to Defendant’s first assignment of error.

**2. The Question Before the Court Was Answered in *M.R.B.***

The remainder of Plaintiff’s argument is a variation on the argument that Plaintiff made below, *i.e.*, that RCW 4.28.360, despite being a statutory mandate, is meaningless and toothless. This Court need only review the record to see how difficult it is to ensure compliance with the statute.

In furtherance of her goal of interpreting RCW 4.28.360 out of existence, Plaintiff argues that it “has been held to have only one practical application,” *i.e.*, it can trigger (or not trigger) the attorney fee provisions of RCW 4.84.250 depending on the amount of damages identified in the statement. But that is misleading because while the Supreme Court did hold that a statement of damages in excess of \$10,000 can remove a Plaintiff from operation of RCW 4.84.250, it has never held that this is its only practical application.

*See Beckman v. Spokane Transit Authority*, 107 Wn.2d 785, 733 P.2d 960 (1987). The logic of *Beckman* is that a statement of damages pursuant to RCW 4.28.360 impacts RCW 4.84.250 because it is a statement from Plaintiff of her damages. This is exactly what the statute says: “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.” (Emphasis added).

It follows that other legal consequences may flow from this “statement from the plaintiff” about her damages, including evidentiary consequences. This is what the court held in *M.R.B.*, where it stated that a statement goes to bias and credibility, and is “circumstantial evidence.” 169 Wn. App. at 860.

Plaintiff argues that *M.R.B.* is “not helpful” because the issue was decided in the context of the Plaintiff’s argument that the Defendant’s use of the statement at trial was “flagrant misconduct.” The Court’s reasoning in *M.R.B.*, however, establishes that this is a distinction without a difference. The reason the Defendant did not commit “flagrant misconduct” when he used the Plaintiffs’

statements of damages on cross was that they were admissible as evidence. The statements “related directly to a proper consideration for the jury, the credibility of the testimony and circumstantial evidence. . . . Evidence that a witness has a financial interest in the lawsuit’s outcome may show bias. . . . That is exactly how the District’s counsel used the statement of damages evidence here.” *Id.*

The statement of damages was admissible.

**3. The District Did Not Have “Discretion” to Exclude the Evidence.**

Plaintiff takes the position that the trial court did not “abuse its discretion” in excluding the evidence. While it is true that evidentiary rulings are determined under an abuse of discretion standard, in this case the trial court excluded the evidence based on an incorrect interpretation of RCW 4.28.360. The court held that a request for damages “is statutory and is not discovery and is not incorporated within the discovery rules,” is “procedural in nature,” and is “not really an out of court statement of a party.” CP 58. Those aspects of the trial court’s ruling that are intertwined with its interpretation of the statute should be reviewed under the error of law standard. *State v. Lewis*, 141 Wn. App. 367, 382, 166 P.3d 786 (2007) (“Construction of a statute is

a question of law, which we review de novo under the error of law standard.”). An exclusion of evidence that is based on a faulty legal interpretation about the meaning of a statute, by definition, is an abuse of discretion.

The trial court did not exclude the evidence because of any specific circumstances present in this common, admitted liability motor vehicle accident case. The trial court ruled that a statement of damages is never admissible for the very reason that it should have been admissible, *i.e.*, it might be harmful to the Plaintiff. But “evidence is not inadmissible under ER 403 simply because it is detrimental or harmful to the interests of the party opposing its admission; it is prejudicial only if it has the capacity to skew the truth-finding process.” *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (1997).

The trial court incorrectly interpreted RCW 4.28.360; incorrectly interpreted *MRB*; and erred when it held that the statement of damages was prejudicial simply because it might harm Plaintiff. Because the trial court’s ruling was based on untenable grounds and an incorrect statement of law, it is an abuse of discretion. *Bay v. Jensen*,

147 Wn. App. 641, 651, 196 P.3d 753 (2008) (noting that a trial court abuses its discretion if “it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard”).

**4. Plaintiff’s Remaining Arguments Are Without Merit.**

**A. CR 54(c) Is Irrelevant.**

Plaintiff argues that CR 54(c) prohibits the introduction of a damages statement into evidence. That procedural rule concerns default judgments, and has no relevance to the issue before this Court.

It provides:

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Plaintiff argues that this provision means that her judgment may exceed the amount stated in the statement. Defendant agrees, and has never argued otherwise. Defendant did not seek to reduce the award to the amount of the statement, as did the Defendant in

*Stineman v. Fontbonne College*, the case on which Plaintiff relies.

There, the Eighth Circuit applied F.R.C.P. 54(c) exactly as it's written, *i.e.*, not to preclude recovery of amounts greater than the prayer. 664 F.2d 1082, 1088 (8th Cir. 1981). That is not the scenario before the court.

Plaintiff repeatedly argues that Defendant wish to use the statement as a "binding admission" but that is another red herring. Defendant agrees that Plaintiff is not bound to the damages statement as a matter of law. The question before the court is whether the statement is admissible, not whether it is a "binding." CR 54(c) does not address that issue, and is irrelevant to the issues before the Court.

**B. The Damages Statement Is a Statement from Plaintiff.**

Plaintiff then argues that her statement about her own damages is an inadmissible opinion. That again misstates Defendant's position. Defendant sought to introduce a "fact," *i.e.*, that Plaintiff made a particular statement about her damages. That "fact" is admissible for the reasons stated above, and its admission does not take from the jury the determination of the amount of money to award.

Plaintiff then argues that her statement is not a "statement."

This is incorrect because RCW 4.28.360 expressly states that it is; it requires “a statement from the plaintiff setting forth separately the amounts of any special damages and general damages sought.” (Emphasis added).

**C. The Damages Statement Is Not a Settlement Proposal.**

Finally, Plaintiff argues that the damages statement is a settlement proposal. Defendant agrees that the statement Plaintiff provided contained boilerplate language calling the statement a settlement communication, but that does not make it so.

Defendant had to move to compel the damages statement. Plaintiff provided the statement in response to a court order. Plaintiff’s counsel stated on the record that he would not show the statement to his client, and reiterated that position on appeal. (RP 26, *see also* Plaintiff’s Brief, pp.25-26 (noting “counsel’s practice never to show the damage statement to the client”).) If Plaintiff did not look at the statement, then how could it be a settlement proposal?

Under these circumstances, Plaintiff cannot artificially render the statement inadmissible by placing the words, “For ER 408 Settlement Purposes,” on the letter, nor more could she turn an

ordinary email into a privileged communication by labelling it “Attorney Client Privileged.”

**5. Defendant Suffered Prejudice.**

Defendant described prejudice in her Opening brief. Plaintiff’s response is that exclusion of a damages statement could never be prejudicial because a Defendant may always argue that Plaintiff was exaggerating and is greedy. This discounts the potential impact on the jury of the Plaintiff’s own statement about her pain and suffering, which was the only issue in this trial, and which varied greatly from the amount requested at trial. Evidence of Plaintiff’s own statement on the only issue before the jury was not harmless.

Defendant requests that the reverse the verdict and order a new trial.

**REPLY ON SECOND ASSIGNMENT OF ERROR**

**1. Preservation**

Defendant’s second assignment of error concerned the trial court’s failure to give a jury instruction on mitigation. Defendant agrees that the instruction was not filed with the clerk, but it does not follow that the issue was not preserved.

Plaintiff cites *Gorman v. Pierce County*, but that case is distinguishable because the instructions in *Gorman* were not submitted to the trial court in writing. 176 Wn App 63, 87, 307 P3d 795 (2013) (finding Defendant failed to preserve trial court’s error in not providing an instruction when she “did not propose the instruction in writing”). There are numerous cases which hold that an objection to a jury instruction is not preserved if not submitted in writing. *See also Ogilvie v. Hong*, 175 Wn. 209, 212, 27 P.2d 141 (1933) (noting rules “clearly place upon counsel the duty of preparing, reducing to writing, and requesting such instructions”); *Russell v. Quigg*, 2 Wn. App. 294, 303, 467 P.2d 618 (1970) (finding no preservation when “the defendant did not proposed and additional written instruction”).

Here the record shows that pattern instruction WP 33.01 was submitted to the trial court in writing. RP 631 (Court: “Then there’s . . . defense submitted what is labeled Number 9, 33.01. Persons liable for an injury to another is not liable for any damages arising after.” . . . Mr. Robinson: “It’s a failure to mitigate instruction.”); RP 636 (Court: “I’ve got here 33.01. Oh, that’s the one that we’re waiting, we talked

about, that I need to make a ruling on.”).

To find no preservation under these circumstances elevates form over substance. Defendant submitted the instruction in writing to the trial court, the parties argued the issue, and the court ruled on the issue before it. The argument was not over the wording of the pattern instruction, but over whether the evidence was sufficient to support the defense at all.

That issue is properly before this court.

**2. There Was Sufficient Evidence to Support the Instruction.**

There was sufficient evidence to support a mitigation instruction. The evidence is undisputed that Plaintiff never saw a medical doctor for an injury that she claimed would require a lifetime of care. A medical doctor described the potential options for treatment – one of which simply was to rest of the strained ligaments – and he testified that the treatment Plaintiff chose to receive, based on her own self-diagnosis, is “the opposite of what you would want to do” for an injury of this sort. RP 550-01.

That is, the failure to mitigate evidence is not that some other therapy might have cured her; it is that her refusal to see a medical

doctor, and choice to treat through repeated spinal manipulations, only made things worse. The evidence on that point is not just from Defendant's expert, it is also from Plaintiff's chiropractor and from Plaintiff herself. (Defendant's Brief, p.9-14.) Defendant argued this to the trial court, stating a mitigation instruction was warranted because Plaintiff "has tried no alternative therapies." RP 647.

Plaintiff argues there "was no evidence that Ms. Hall had ever been offered neck immobilization" and argues that it is "generally accepted" that an "instruction on mitigation of damages for failure to submit to a certain treatment modality cannot be given when the injured person has not been offered the treatment modality in question." That again misstates Defendant's position, which is that Plaintiff failed to mitigate when she self-diagnosed her condition, ruled out visiting a medical doctor, and chose to treat by repeated manipulations of her spine.

Examining the evidence in the light most favorable to Defendant, a reasonable juror could conclude from this evidence that through these actions Plaintiff failed to mitigate her condition. *See Fox v. Evans*, 127 Wn. App. 300, 306–07, 111 P.3d 261 (2005)

(finding mitigation instruction warranted when “there were alternative treatment options available to the Plaintiff and that the Plaintiff acted unreasonably in deciding on treatment”).

Finally, Plaintiff argues that Defendant should have asked the court to instruct on contributory fault, but Defendant is unaware of a requirement that a jury may consider mitigation only if a contributory fault instruction is given. A Plaintiff charged with failure to mitigate may request such an instruction and propose being named on the verdict form, but a Defendant does not have to request that procedure. WP 11.07 is irrelevant to the question raised in Defendant’s second assignment of error.

### **3. Defendant Suffered Prejudice.**

Plaintiff argues that the trial court’s error did not prejudice Defendant because it did not interfere with its ability to present its theory of the case. That argument misses the point – the reason the lack of an instruction prejudiced Defendant is because the evidence supported the instruction. The instruction was necessary to provide the legal structure for the jury to apply the facts to the law. Without the instruction, Plaintiff was free to argue that Defendant was responsible

for Plaintiff's injury even if it believed Plaintiff's own decisions exacerbated her pain.

Plaintiff then argues that the instruction was not prejudicial because Defendant purportedly claimed that she suffered no damages. That is simply not true. At closing argument, Defendant's counsel proposed an appropriate amount. RP 691. The trial court's failure to provide a mitigation instruction prejudiced Defendant's defense.

### **OPPOSITION TO PLAINTIFF'S ASSIGNMENT OF ERROR ON CROSS APPEAL**

#### **1. Standard of Review.**

Plaintiff dismissed her first case arising out of this accident after the trial court ruled that her statement of damages was admissible. After Plaintiff filed this lawsuit, Defendant moved for an award of costs, which is expressly authorized by CR 41(d). The rule provides that if a Plaintiff dismisses an action and then commences an action "based upon or including the same claim against the same defendant," a court may "order for the payment of taxable costs of the action previously dismissed as it may deem proper." Because a rule expressly authorizes an award of fees, the proper standard of

review is an abuse of discretion. The court did not abuse her discretion here.

**2. Defendant Timely Filed Her Motion for Costs.**

Defendant argues that the motion was untimely because it had to be filed within 10 days of the entry of the order of dismissal in the first case, under CR 54(d)(1). That is nonsensical. CR 54(d)(1) concerns costs and fees awarded in the case that was dismissed. CR 41(d), by contrast, is triggered by the filing of a new lawsuit, not an order of dismissal in the first lawsuit.

CR 41(d) provides:

**Costs of Previously Dismissed Action.**

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(Emphasis added).

By CR 41(d)'s plain terms, Plaintiff's commencement of a second action "based upon or including the same claim" is a condition precedent to Defendant's motion. The reference to a court

ordering a “stay” of proceedings until the costs are paid establishes that the motion is filed in the new lawsuit, not the old one, and is not subject to CR 54(d)(1)’s ten day rule.

The appropriateness of Defendant’s actions is borne out by the fact that it is the same procedure employed by the Defendants in *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 201 P.3d 346 (2009). In that case, like this one, the Defendant was forced to wait until the second action was filed before moving for costs under CR 41(d) in the second action. The motion was timely made.

**3. The Court did Not Abuse Its Discretion.**

The court awarded Defendant her \$200 statutory attorney fee, \$3,600 for expert costs incurred during a CR 35 examination of Plaintiff, and \$1,100 for expert costs related to preparation for, and cancelation of, his trial appearance. These costs were appropriately awarded in the court’s discretion.

CR 41(3)(d) provides where a Plaintiff who “has once dismissed an action in any court commences and action based upon or including the same claim against the same Defendant, the court

may make such order for the payment of taxable costs...as it may deem proper.” (Emphasis added).

Plaintiff argues that Dr. Wilson’s trial preparation time, CR 35 examination costs, and late cancellation costs are not recoverable because they are not “taxable costs.” In support of her argument, Plaintiff cites a number of statutes that she argues should apply, and she asks this court to ignore *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 201 P.3d 346 (2009).

Plaintiff argues that because RCW 4.84.010 does not specifically include “expert expenses” as an enumerated category of expenses, Dr. Reed’s costs should not be recoverable. This argument errantly assumes that RCW 4.84.010 exists in a vacuum and fails to acknowledge other statutes and controlling case law.

RCW 4.84.010 itself acknowledges that the list it enumerates is not the sole and exclusive list of awardable costs and fees by stating that its enumerated list is “in addition to costs otherwise authorized by law.” The costs awarded here were properly awarded pursuant to CR 41 as well as RCW 4.84.190, which states:

In all actions and proceedings other than those mentioned in this chapter [and RCW 4.48.100], where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court.

Here, the discretionary costs and fees contemplated by CR 41(3)(d) have been interpreted to include the same category of costs awarded to Defendant here. In *Johnson v. Horizon Fisheries*, the Plaintiff sued Horizon Fisheries under the Jones Act in connection with a personal injury he suffered while working on a Horizon ship. 148 Wn. App. 628, 638. Horizon incurred costs associated with discovery and defense including \$2,762 for a CR 35 examination; obtaining Plaintiff's medical, Social Security, Employment Security, and Coast Guard records; deposing Plaintiff's treating providers; documents fees; and statutory attorney fees. *Id.* at 632. The trial court granted Horizon's motion, ordered Johnson to pay all of Horizon's requested costs, and entered a stay to prevent Plaintiff from proceeding further until he paid Horizon. *Id.* On appeal, the trial court's order was upheld in all respects, including the trial

court's order requiring Plaintiff to pay all of Horizon's costs. *Id.* at 636.

In upholding the trial court's order, the court noted the broad discretion of the trial court, and reasoned:

Because the plaintiff has chosen to prevent a trial when he takes a voluntary dismissal, he should be responsible for the costs the defendant reasonably incurred in anticipation of trial. We affirm the trial court's cost order.

*Id.* at 634-36.

Here, Defendant incurred substantial costs defending this action prior to trial and during the first day of trial totaling \$7,796.73. Although Defendant requested the entirety of this sum, the trial court, in its discretion, limited Defendant's recovery to expert costs and the statutory attorney fee totaling \$4,900.00. The court could have awarded more, but in the exercise of its discretion, limited Defendant's recovery to \$4,900.00. This decision was proper.

Plaintiff's only argument on appeal is that *Johnson* is wrongly decided, but the facts of this case prove is wisdom. The first day of trial commenced, but, following jury selection, Plaintiff voluntarily

dismissed her case. This had the same effect as the voluntary dismissal in *Johnson* since, like the Defendant in *Johnson*, the Defendant here was prevented by Plaintiff's voluntary dismissal from using the work and preparation incurred in anticipation of trial. Therefore, like the Plaintiff in *Johnson*, the Plaintiff here was properly, "held responsible for the costs the Defendant reasonably incurred in anticipation of trial." *Id.*

While Plaintiff may disagree with *Johnson*, that is not sufficient reason for this Court not to follow it. The trial court did not err.

### CONCLUSION

Defendant requests that this Court reverse and remand for a new trial on Defendant's appeal, and reject Plaintiff's Cross-Appeal.

Respectfully Submitted this 15<sup>th</sup> day of March, 2017.

HART WAGNER LLP

By: *s/ Matthew J. Kalmanson*

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## CERTIFICATE OF FILING AND SERVICE

I certify that on the 15<sup>th</sup> day of March, 2017, I filed the original  
**DEFENDANT-APPELLANT'S REPLY BRIEF** with the State Court  
Administrator by Electronic Filing.

I further certify that on the same date, I caused the foregoing to be served  
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Respectfully Submitted this 15<sup>th</sup> day of March, 2017.

HART WAGNER LLP

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Of Attorneys for Defendant-Appellant

**HART WAGNER LLP**  
**March 15, 2017 - 11:44 AM**  
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**Comments:**

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