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DIVISION II

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STATE OF WASHINGTON

NO. 49150-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MIRIAM HALL,

Plaintiff/Respondent

vs.

VIRGINIA CARSON,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE SCOTT COLLIER

BRIEF OF RESPONDENT

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RESPONSE TO DEFENDANT'S ASSIGNMENTS OF ERROR AND
ISSUES PRESENTED ON THOSE ASSIGNMENTS

Response to Assignment of Error No. 1: The trial court did not err in its rulings concerning the damages statement.

Issues Concerning this Assignment of Error:

1. Did Defendant properly preserve this assignment of error?
2. Did the trial court abuse its discretion?
3. Was the damages statement admissible?
4. Did Defendant suffer any prejudice?

Response to Assignment of Error No. 2: The trial court did not err by refusing to give an instruction on mitigation of damages.

Issues Concerning this Assignment of Error:

1. Did Defendant properly preserve this assignment of error?
2. Was there sufficient evidence to support the giving of an instruction on mitigation of damages?
3. Is Defendant's failure to except to the concluding instruction that the trial court gave and the verdict form that the trial court approved fatal to its claim?
4. Could Defendant argue her theory of the case?

ASSIGNMENT OF ERROR ON CROSS APPEAL AND ISSUE
PRESENTED

ASSIGNMENT OF ERROR: The trial court erred by entering the Order on Defendant's Motion.

1. Did the Defendant timely submit the cost bill?
2. Can expert witness fees be assessed against a party who dismisses a case without prejudice?

STATEMENT OF THE CASE

I. Operative Facts.

By September 11, 2013, Miriam Hall was a twenty-four year old licensed practical nurse working at a memory care facility in Vancouver. She was enrolled in a program at Lower Columbia College to become a registered nurse. (RP 282-84) She rode all terrain vehicles and motorcycles, worked out at the gym, ran and played soccer. She was also able to do the heavy lifting required to help her future in-laws move. (RP 305-308; RP 338) She was active with her young daughter. (RP 339) She did all her own housework and took care of her lawn. (RP 340-41)

On September 11, 2013, Virginia Carson drove her Suzuki Sedona into the rear of Ms. Hall's Volkswagen Jetta pushing it into the rear of the car ahead. (RP 328) It would have cost a minimum of \$4,480.00 to repair Ms. Carson's vehicle. It was rendered a total loss. (RP 328; Ex. 35)

The rear of Ms. Hall's vehicle and its undercarriage were damaged in the collision. Also, the muffler and rear bumper detached from the vehicle. (RP 590-91; Exs. 10-32)

Ms. Hall developed a bad headache after the collision. She treated with ice, over the counter medication, and massage over the next days. On September 23, 2013, Ms. Hall began care with Dr. Steven Lewis, a chiropractor in Longview. (RP 499-500; RP 595-96; Ex. 3, p. 18)¹ She treated with him up to trial. The defense counted 223 visits with Dr. Lewis during that time. (RP 489)

The crash injured the ligaments in Ms. Hall's cervical spine at four levels. (RP 459-62) These are permanent injuries. (RP 464, 505) They cause her ongoing neck pain, headaches, and disturb her sleep. Her activity level is greatly reduced. She no longer rides all terrain vehicles or motorcycles. She cannot do housework as she did before and cannot be as active as she was with her young daughter. Her disposition has been affected. She has gained weight. Ms. Hall completed her education to become a registered nurse, but she must work lower paying jobs that do not involve direct patient care. (RP 317-18; 342; 346-47; 352; 383-85; 596-98; 604-606)

¹ Exhibit 3 is Dr. Lewis' chart on Ms. Hall. Page references are to bates numbers on the pages in that exhibit.

II. Procedural Facts.

Ms. Hall first filed suit against Ms. Carson in June of 2014. (CP 7-8) At length, Ms. Hall gave a damage statement indicating that she would seek no less than \$250,000.00. (CP 127) The defense obtained a CR 35 exam from Dr. Reed Wilson.

Trial commenced on June 8, 2015. (CP 5) After jury selection in that case, Ms. Hall took a voluntary non-suit pursuant to CR 41(a)(1)(B) due to uncertainty as to whether she could obtain the testimony of an expert witness. (CP 37-38) The order dismissing the matter was entered on June 19, 2015. (CP 53)

This action was filed on June 23, 2015. (CP 1) The defense answered and admitted fault. Its answer listed the failure to mitigate damages as an affirmative defense. (CP 33-34)

On July 7, 2016, the defense filed Defendant Virginia Carson's Motion for Costs, Reasonable Attorney's Fees, and for Stay together with a cost bill. The motion sought, among other things, statutory attorney's fees, \$3,600.00 for Dr. Wilson's exam and \$1,100.00 for his trial preparation. (CP 23-31) The trial court entered the Order on Defendant's Motion which awarded statutory attorney's fees—which Ms. Hall conceded—and the \$4,700.00 sought for Dr. Wilson. (CP 66)

The defense requested a new damage statement in the re-filed case. After the trial court ordered a new damage statement (CP 162-63), Plaintiff submitted a letter that contained the legend explicitly “For ER 408 Settlement Purposes.” It stated in pertinent part:

. . .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. Carsons’ 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.

(CP 216) The defense made no motion concerning the sufficiency or propriety of this damage statement. (RP 40)

Plaintiff’s Motion in Limine was filed on April 19, 2016. Among other things, it asked the trial court to prohibit any reference to the amount stated in Plaintiff’s response to request for damage statement. (CP 177) The accompanying Memorandum in Support of Plaintiff’s Motion in Limine made clear that Ms. Hall was not making any claim for economic damages for treatment by Dr. Lewis and was only seeking non-economic damages. (CP 199-200) In response, the defense stated that it offered the statement of damages to show the bias of Ms. Hall and Dr. Lewis based on

their financial interest in the suit. (CP 311) It also noted that Dr. Wilson would testify that Ms. Hall's "subjective complaints do not match the objective findings in her medical records" which placed the credibility of Ms. Hall's pain complaints at issue. (CP 309; RP 33; RP 55) It made several references to the Court's decision in *M.R.B. v. Puyallup School District, infra*. (CP 310-11) It wanted to use Dr. Lewis' bills to show his financial interest in the suit. (RP 45-48) Finally, the defense conceded that the damage statement would not bind the jury in the amount of damages it could award. (CP 310-12) During argument on the motion, Ms. Hall's attorney advised that he was going to argue for more money than was set forth in the damage statement. (RP 26) The defense raised no issue concerning this prospect.

The trial court ruled that the damage statement would not be mentioned at trial. It first noted that the Court had not held that damage statements were admissible in *M.R.B. v. Puyallup School District, infra*.

It then stated:

The request for damage statement is statutory and is not discovery and is not incorporated within the discovery rules. As we talked about these are commonly prepared by counsel and without any assistance from their client; as is the case here. It's a procedural in nature. This is not really an out of court statement of a party. This case is best decided on the facts, evidence and law absent from using (the damage statement) to possible (sic) confuse the jury

and to inflame an emotional response from a jury about the Plaintiff's possible-alleged greed motive.

(CP 403)

In opening statement, counsel for Plaintiff told the jury that Ms. Hall's damages were \$1,445,000.00. (RP 269) The defense made no objection at that time or any other time and did not ask the trial court to reconsider its ruling on reference to the damage statement. (CP 269)

The defense laid out its theory of the case in its opening statement. It contended that Ms. Hall could not have been hurt in the collision because it was a minor impact; because she waited twelve days before seeking any treatment; because she rated her pain at 2 on a scale of ten with ten being the worst when she first saw Dr. Lewis; because a healthy person of her age would not be substantially injured in a collision of this type; because 95% of the people who suffer injuries to the soft tissues of the spine are well within one month after being injured; because after the collision, she suffered injuries to her back and neck in her work; and because, despite the fact that no economic damages were being claimed, that it was not fair to ask for damages for future treatment expenses. (RP 269-76)

Plaintiff's first witness was Christina Becker, a friend and nursing colleague of Ms. Hall. The following exchange occurred early in her cross examination by the defense:

Q. Do you know how much money she's asking for in this case?

A. I don't.

Q. Okay. They didn't tell you that she's asking my client for over a million dollars for this accident?

A. No. They—they didn't say that to me.

At this point, Plaintiff objected on the basis of relevance, the trial court sustained the objection. (RP 296-97) At closing, the defense discussed its need to engage a doctor to look over Ms. Hall's condition. The following statement was made in the course of doing so:

So my only alternative is to go find another doctor and say, hey, we're being sued for over a million bucks, what's going on here?

(RP 686)

On closing, counsel for Ms. Hall gave argument as to how the jury could reach a verdict of \$1,445,000.00. This argument drew no objection from the defense. (RP 678-81)

The jury ultimately returned a verdict of \$348,000. (CP 390) Judgment was entered on that verdict along with costs. (CP 395-96) The

defense did not move for a new trial or seek a reduction in the verdict under RCW 4.76.030.

ARGUMENT

RESPONSE TO DEFENDANT’S ASSIGNMENT OF ERROR NO. 1:

I. Standard of Review.

The defense has assigned error to the trial court’s refusal to allow it to refer to or admit into evidence the damage statement that Ms. Hall provided. This assignment of error implicates both admissibility of evidence and management of the trial generally. Both issues are reviewed for abuse of discretion. The burden of proving such abuse rests on the party claiming abuse—in this case the defense. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn.App. 65, 69, 155 P.3d 978 (2007); *Lewis v. Simpson Timber Co.*, 145 Wn.App. 302, 328, 189 P.3d 178 (2008); *Marriage of Zigler*, 154 Wn.App. 803, 815, 226 P.3d 202 (2010)

The trial court’s decision was based in part on the relevance of the damage statement and its probative value weighed against the risk of unfair prejudice and confusion of the jury. Rulings on these issues are addressed to the discretion of the trial court and will only be reversed for a manifest abuse of discretion. A manifest abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.

Crescent Harbor Water Co., Inc. v. Lyseng, 51 Wn.App. 337, 344, 753 P.2d 555 (1988) *Radford v. City of Hoquiam*, 54 Wn.App. 351, 354, 773 P.2d 861 (1989) This is particularly true of decisions based on ER 403. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78 882 P.2d 747 (1994); *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994) Finally, the Court can affirm on any basis supported by the record. *State v. Huynh*, 107 Wn.App. 68,74, 26 P.3d 290 (2001)

As will be shown below, the trial court did not abuse its discretion.

II. The Defense Did Not Preserve This Assignment of Error.

The defense has argued that the trial court erred by denying it the opportunity to refer to the damage statement in light of the difference between the amount sought at the time it was given and amount argued for by counsel for Plaintiff in opening statement. Appellant's Opening Brief, pps. 24 It did not, however, bring this concern to the trial court's attention in connection with the motion in limine. To the contrary, it stated that it did not intend to limit the damages that Ms. Hall could recover. And when Ms. Hall's attorney mentioned that he planned to argue for more damages than was on the damage statement, the defense made no response. It did not argue that the damage statement should be admitted to point out any

disparity between its content and counsel's argument. Arguments or theories not presented to the trial court will generally not be considered on appeal. RAP 2.5(a); *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992) This issue should not be considered for that reason.

Furthermore, a party appealing exclusion of evidence can assert only those grounds for admission presented to the trial court. Error cannot be predicated on a ruling that excludes evidence unless an offer of proof is made that includes the substance of the evidence. ER 103(a)(2) In that context, an offer of proof includes both the evidence to be admitted and the reason that the party offering the evidence believes it is admissible. The party submitting the evidence is bound by the presentation to the trial court and cannot assert another ground on appeal. *Cochran v. Harrison Memorial Hospital*, 42 Wn.2d 264, 272, 254 P.2d 752 (1952); *Makoviney v. Smith*, 21 Wn.App. 16, 23, 584 P.2d 948 (1978) Other decisions have concluded that a party appealing a ruling excluding evidence cannot rely on a theory for the admission of that evidence not raised in the trial court without specific reference to ER 103(a). See, e.g., *State v. Haq*, 166 Wn.App. 221, 246, 268 P.3d 997 (2012); *State v. Mohamed*, 187 Wn.App. 630, 648, 350 P.3d 671 (2015) The defense's desire to admit the

damages statement because Ms. Hall requested damages of \$1,445,000.00 should not be considered for this reason as well.

A ruling on a motion in limine is interlocutory and can be modified as justice requires. *Jordan v. Berkey*, 26 Wn.App. 242, 244, 611 P.2d 1382 (1980), For that reason, if the defense was concerned about the amount stated in opening statement, it could have and should have asked the trial court to reconsider its ruling after Plaintiff's opening statement—or, for that matter, at any other time prior to closing argument. It did not do so. It is elementary that any claim of error in an evidentiary ruling is waived by lack of an objection. *State v. Kilponen*, 47 Wn.App. 912, 913, 737 P.2d 1024 (1987) Furthermore, a defendant cannot sit on his or her rights, bet on the outcome, and then obtain a new trial if the result is adverse. *State v. Fraser*, 130 Wn.App. 13, 26, 282 P.3d 152 (2012) The defense's failure to make any sort of objection or request for further consideration after opening statement waives this assignment of error.

The defense wanted to use the amount in the damage statement to suggest to the jury that Ms. Hall was greedy—that she was exaggerating her pain complaints to try to obtain more in damages than was reasonable under the circumstances—just as the defense did in *M.R.B. v Puyallup School District*, *infra*. This intention was not lost on the trial court. (CP 403) Counsel's comment in opening statement that damages of

\$1,445,000.00 would be sought played into the defense's strategy because it was even higher than the amount in the damage statement. The defense was so happy with this development that it emphasized the amount when it crossed examined the first witness, and in closing, it suggested to the jury that it had known at least since it hired Dr. Wilson that Ms. Hall was claiming over \$1.4 million. In other words, the defense did not attempt to refer to the damage statement any further because it believed that it had been benefited by counsel's opening statement. Its strategy was unsuccessful. It is in no position to complain at this point.

III. The Trial Court Did Not Abuse Its Discretion.

a. Nature of a Damage Statement.

The analysis begins with the nature of a damage statement.

It emanates from RCW 4.28.360 which provides as follows:

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.

This statute eliminated dollar amounts from the *ad damnum* clauses of personal injury complaints. It also provided for the damage statement as a substitute.

While the Legislature's purpose in enacting RCW 4.28.360 is unclear, possible reasons for such a provision are to eliminate friction caused between the medical and legal professions by publication of claims for "astronomical damages" in medical malpractice cases. *Conner v. Universal Utilities*, 105 Wn.2d 168, 172, 712 P.2d 849 (1986) The statute is not limited to professional negligence claims, however. Therefore, the legislature must have wanted all personal injury defendants to be free from material in the public record indicating that they were being sued for large amounts of money. The damage statement then provides general notice of the claim in a form that need not be public.

Other than providing some level of privacy for personal injury defendants, the damage statement has been held to have only one practical application. It can be used to show that a personal injury plaintiff is making a claim of less than \$10,000.00 so as to trigger the attorney fee provisions of RCW 4.84.250, the statute that allows attorney's fees in claims where the amount pleaded is less than \$10,000.00. *Pierson v. Hernandez*, 149 Wn.App. 297, 303, 202 P.3d 1014 (2009) The reference to pleading in RCW 4.84.250 suggests that the damage statement may be viewed as a substitute for the *ad damnum* clause of the complaint of any personal injury plaintiff.

b. The Decision in *M.R.B. v. Puyallup School District* Is Not Helpful.

The defense claims that the Court decided that damages statements are admissible in *M.R.B. v. Puyallup School District*, 169 Wn.App. 837, 282 P.3d 1124 (2012). That was not the decision that the Court made. A close reading of the Court's decision in that case shows that it is not helpful here.

That case involved a high school newspaper publishing a story about oral sex that quoted certain students. The students sued on several theories based on the publication. They submitted damage statements that suggested that verdicts of between \$2 million and \$4 million would be appropriate. Nothing in the statements described them as settlement offers. The defense in that case questioned the plaintiffs about them. It also referred to them in both opening and closing statements with the suggestion that the plaintiffs were greedy. The plaintiffs objected to the admission of the damage statements but did not object to the questioning or to the reference to the damages statements by the defense in opening and closing argument. 169 Wn.App. at 847, 855-57 The plaintiffs then moved for a new trial based on CR 59(a)(2) alleging misconduct of the prevailing party. They raised the admissibility

of the damage statements in that motion. The trial court denied the motion.

The plaintiffs appealed from the denial of the motion for a new trial. On appeal, however, they did not raise admissibility as an issue. The Court determined that they had not preserved the other issues because they had not objected to the testimony or references in argument at trial. It stated that they would have to demonstrate that the misconduct was so flagrant that no instruction could have cured the prejudicial effect. 169 Wn.App. at 857-58. The Court then proceeded to find no flagrant misconduct. It noted that it was fair to use the damage statements to argue bias based on prospective financial gain, especially in light of the fact that the plaintiffs argued that they had brought the suit so that “this would never happen to anybody else.” 169 Wn.App. at 860-61

In short, the Court in *M.R.B. v. Puyallup School District*, *supra*, never decided whether a damage statement is admissible because that issue was not raised on appeal.

c. The Trial Court’s Decision Was within Its Discretion.

The defense sought to admit the damage statement to suggest that Ms. Hall wanted to leverage an insignificant incident into a massive recovery by exaggerating her complaints. In other words, it

wanted to show that she was greedy just as the defense did in *M.R.B v. Puyallup School District, supra*. The trial court denied that request noting that the case “is best decided on the facts, evidence and law absent from using (the damage statement) to possible (sic) confuse the jury and to inflame an emotional response from a jury about the Plaintiff’s possible-alleged greed motive.” This decision was well within its discretion.

The trial court has discretion to control the admission of impeachment evidence subject to review only for abuse. When some indication of a witness’ financial interest in the case is allowed for impeachment, there is no error or abuse of discretion when other evidence is not allowed. This is so because the party seeking to disclose the bias has had ample opportunity to do so. *Brown v. Spokane Fire District*, 100 Wn.2d 188, 202, 668 P.2d 571 (1983)

The mere fact that Ms. Hall was suing for monetary damages was sufficient in and of itself to show that she had a financial interest in the outcome. As the Court noted in *Betor v. National Biscuit Co.*, 85 Mont. 481, 487, 280 P. 641(1929), all of us can use more money to advantage. The defense could have argued her bias based on that alone. But it wanted to admit the damage statements to show that she was greedy. This is confirmed by the defense’s questioning of the first witness about the amount of damages discussed in the counsel’s opening statement

and by its argument at closing about having to hire Dr. Wilson to rebut a \$1.4 million claim. It is also confirmed by the defense's failure to ask the trial court for reconsideration of its in limine ruling after opening statement.

The trial court's ruling shows that its decision was based at least in part on ER 403. That rule provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

An analysis under ER 403 requires balancing of the probative value of evidence against the undesirable characteristics. Highly probative evidence should be admitted even if it has some undesirable aspects. Conversely, evidence that is only remotely probative should not be admitted if it has undesirable attributes. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987) Evidence that is minimally probative but tends to evoke an emotional response as opposed to a rational response should not be admitted. *Carson v. Fine, supra*, 123 Wn.2d at 223

Use of the damage statement to impeach Ms. Hall on the basis of her financial interest in the suit is only remotely probative of any bias because, as indicated above, her financial interest was clear by virtue of her suing for money damages. Taking a page from the defense in

M.R.B. v. Puyallup School District, supra, the defense here offered the damage statement to show that Ms. Hall was greedy and thus to elicit an unfair emotional response from the jury. Argument to that effect is improper. *Day v. Goodwin*, 3 Wn.App. 940, 478 P.2d 774 (1970)—holding that it was improper for counsel to argue that the plaintiff sued for the death of her child to end up “on Easy Street.” If an argument that a party is greedy is improper, then evidence to that effect is unfairly prejudicial. *Wilk v. American Medical Association*, 719 F.2d 207, 231-32 (7th Cir. 1983)—holding, based on Fed. R. Evid. 403, that evidence of greed should not have been admitted because it engendered unfair prejudice and confusion of the issues. The trial court saw that and directed that the case be decided on the facts, evidence, and law.

The trial court concluded that the issues should be decided on the basis of the facts and the law. It was concerned that admitting the damage statements would lead to confusion about how they are prepared and could also engender undue prejudice by the jury based on the defense’s allegation that Ms. Hall was greedy. The trial court’s decision was reasonable and well within its discretion. It was certainly not an abuse of that discretion since it did not amount to a decision that no reasonable person would ever make. On that basis, its decision should be affirmed.

IV. The Damage Statement Was Not Admissible.

a. Damage Statements Should Not Be Admitted Because of CR 54(c).

The damages that a party can recover are not limited by his or her pleadings as CR 54(c) states. The damage statement is a substitute for the *ad damnum* portion of a complaint. It, too, cannot limit that damages a party can recover. Therefore, the content of the damage statement should not be communicated to the jury.

Prior to 1967, no judgment could exceed the amount set out as damages in the prayer or *ad damnum* clause of a complaint. *Olwell v. Nye & Nissen Company*, 26 Wn.2d 282, 287-88, 173 P.2d 652 (1946); *Abbott Corp. v. Warren*, 56 Wn.2d 606, 608, 354 P.2d 926 (1960) This rule was enforced in *Belle City Manufacturing Company v. Kemp*, 27 Wash. 111, 67 P. 580 (1902). The plaintiff in that case sued for \$895.00. The jury awarded \$900.35, and judgment was entered on that sum. On appeal, the Court directed the trial court to reduce the judgment to \$895.00 since that was the amount sought in the complaint. There is no indication in the opinion that the jury was advised of the amount in the prayer. It was apparently allowed to determine the amount of the plaintiff's damages.

This limitation was eliminated by adoption of CR 54(c) effective July 1, 1967. 71 Wn.2d at xxiii. At that time, it was identical to the same rule in the Federal Rules of Civil Procedure, FRCP 54(c). 71 Wn.2d at cxiii. It has been amended once—in 2015—to add gender neutral language. It now reads, as is pertinent:

. . . 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 or her pleadings.

The language in CR 54(c) makes it clear that any party may obtain the relief to which he or she is entitled as shown by the law and facts adduced at trial regardless of what has been alleged in his or her pleadings. For example, in *Allstot v. Edwards*, 114 Wn.App. 625, 20 P.3d 601 (2002), the Court ruled that the plaintiff could be entitled to double damages pursuant to RCW 49.52.050 and RCW 49.52.070(2) even though his complaint did not include a demand for such damages. See also, *State ex. rel A.N.C. v. Grenley*, 91 Wn.App. 919, 959 P.2d 1130 (1998), allowing attorney's fees in URESA matter even though entitlement to them was not pleaded.

Meanwhile, FRCP 54(c) has been amended to change the verbiage without changing the import. It was last amended in 2009. The comparable language is the following:

A default judgment must not differ in kind or amount from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is not entitled, even if the party has not demanded that relief in its pleadings.

When a Washington court rule is substantially similar to rule in the Federal Rules of Civil Procedure, Washington courts can look to the interpretation of the federal rules for guidance. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992); *Outsource Services Management, LLC, v. Nooksack Business Corp.*, 172 Wn.App. 799, 806, 292 P.3d 147 (2013)

The federal rule, FRCP 54(c), has been interpreted to allow for judgments in amounts greater than prayed for in the complaint. See, e.g., *Stewart v. Banks*, 397 F.2d 798 (5th Cir. 1968); *Bail v. Cunningham Bros., Inc.*, 452 F.2d 182 (7th Cir. 1971)

Furthermore, the complaint is not considered any sort of admission on the part of the plaintiff as to what damages can be recovered. In *Stineman v. Fontbonne College*, 664 F.2d 1082 (8th Cir. 1981), the plaintiff sued for damages arising out of the school's failure to provide her with needed medical attention. Her complaint alleged damages in the amount of \$300,000. The jury returned a verdict in the amount of \$800,000. The defendant asked for a reduction to \$300,000.00. In response, the Court stated:

Fontbonne also attempts to characterize the plaintiff's prayer for relief as an admission binding against her. We find no merit in this contention. Rule 54(c) of the Federal Rules of Civil Procedure states that all judgments, except those by default, "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." (Emphasis added.) In accordance with this rule, it is not uncommon for an award to be greater than that requested in the prayer for relief; the complaint is subsequently amended. (citations omitted) The cases relied upon by Fontbonne are inapplicable because they involve situations where a party has made a factual admission as to its own conduct which it later attempts to deny at trial (citations omitted) To the extent we hold that Stineman was not bound by the prayer for relief in her complaint, it was not erroneous for the district court to refuse to reduce the award from \$ 800,000 to \$ 300,000.

664 F.2d at 1088)² In other words, and contrary to the arguments advanced by the defense, the *ad damnum* clause of a complaint is not deemed an admission. The damages statement, which is the substitute for the *ad damnum* clause, is therefore also not an admission which can be submitted into evidence.

The Court's holding in *Menne v. Celotex Corp.* 861 F.2d 1453, 1474 (10th Cir. 1988), suggests that CR 54(c) precludes telling the

² The trial court refused to let the defense refer to the *ad damnum* clause in the complaint, but it did anyway. The Court did not consider this assignment of error for that reason. Over a dissent, the Court directed a new trial on the basis of an excessive verdict unless the plaintiff accepted a \$200,000.00 deduction. The defense makes no such argument here, nor could it since the amount of damages is the province of the jury. *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985)

jury what amount of damages the plaintiff is seeking. In that case, the plaintiff alleged damages of \$5 million. The Court instructed the jury to the effect that this was the limit of what it could award. The jury then returned a verdict for \$2.5 million. The defendant argued that this instruction was improper because it may have inflated the award. After noting that FRCP 54(c) requires a judgment in the amount of the jury's verdict regardless of whether it exceeds the prayer, the Court stated:

If a plaintiff is not limited to the amount of damages sought in the complaint, then it would seem improper for a judge so to instruct a jury, regardless of whether the effect is to limit the damages awarded or to enhance them as is alleged here. We conclude, therefore, that it was error to tell the jury that the damages were limited to five million dollars.

861 F.2d at 1474. It then concluded that the error was harmless.

If the amount of a prayer in a federal action is not an admission of anything and should not be communicated to the jury as a limit on recovery, then the damage statement—which is the substitute for the *ad damnum* clause should also not be communicated to the jury. Rather, the jury should be allowed to set damages based on the facts of the case.

b. The Damages Statement Is Not a Statement Made by Ms. Hall.

The defense claims that the damages statement is admissible because it amounts to an admission from Ms. Hall, in other words, her opinion of the amount of damages. That is simply not the case.

A party may not give an opinion as to the amount of damages he or she has sustained from an injury. Furthermore, the party may not be cross examined on the subject. *DeWald v. Ingle*, 31 Wash. 616, 619-620, 72 P. 469 (1903) This rule applies because damages arising from the injury are incapable of exact measurement, and any statement of the amount would be but an estimate drawn from facts which it is the exclusive province of the jury to draw. *Van Liew v. Atwood*, 115 Wash. 580, 583, 197 P. 921 (1921) If a party cannot testify as to the amount of damages, a statement of what non-economic or general damages might be claimed cannot be a statement of the party.

This rule means that the amount of damages claimed is a matter of argument for counsel. It is not evidence. *Tacoma v. Wetherby*, 57 Wash. 295, 106 P. 9032 (1910); *Jones v. Hogan*, 56 Wn.2d 23, 31, 351 P.2d 153 (1960) A damage statement must therefore be considered as nothing more than a preview of what might be argued by counsel for damages at trial. It amounts to counsel's statement only. This is

consistent with counsel's practice never to show the damage statement to the client. (RP 26)

A damage statement is certainly not an admission of a party under ER 801(d)(2). As that rule indicates, an admission must be a "statement." While that term is defined somewhat circularly in ER 801(a), it is generally thought to be limited to matters describing events or conditions. Tegland *Evidence Law and Practice*, 5B Wash.Prac. § 801.3 The amount of damages, as indicated above, does not describe an event or a fact. Therefore, anything about it is not a "statement" and therefore not an admission of a party. It is not admissible for that reason.

In the criminal context, a statement by counsel made in the defendant's presence at omnibus can amount to an admission that can be used. These cases are not helpful because they deal with factual matters. See, e.g. *State v. Dault*, 19 Wn.App. 709, 578 P.2d 43 (1978)—inconsistent statement made at omnibus about presence at the scene of a homicide. There is also no rule comparable to CR 54(c) in the criminal context.

c. The Damage Statement Was a Settlement Proposal.

The November 2015 damage statement carried the clear legend that it was given "For ER 408 Settlement Purposes." In the first

paragraph, it indicated that its contents “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.” (CP 216) Statements made in the course of settlement discussions cannot be admitted at trial to prove liability or invalidity of a claim or its amount. ER 408 The defense sought to admit the damage statement to show the invalidity of the amount of the claim—that Ms. Hall was too greedy. It could not be admitted for that purpose.

The defense may claim that a damage statement cannot be a settlement demand. There is nothing in RCW 4.28.360 that precludes a settlement demand from being a damages statement. In fact, there is nothing in RCW 4.28.360 that prescribes what form a damages statement can take. *Pierson v. Hernandez, supra*, 149 Wn.App. at 306

As noted above, a damage statement can suffice as notice that a claim may be less than \$10,000.00 for the purposes of RCW 4.84.250. And one of the purposes of RCW 4.84.250 is to encourage settlement of small claims. *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987) If a damage statement can promote settlement in this context, there is no reason why it cannot be viewed in the same light for larger claims. Stated another way, settlement discussions typically start with a demand made by the injured party.

There is no reason why these cannot be done in a damages statement. In fact, damages statements are commonly used in this way. Defense attorneys routinely ask for these to assist claims representatives in making settlement decisions. (RP 25)

The defense made no motion concerning the form or sufficiency of the damages statement even though it expressed some concern about its being labeled a settlement communication. Without such a motion and an adverse ruling by the Court to which it assigns error on appeal, the defense cannot complain.

Since the damages statement was a settlement proposal, it was inadmissible.

IV. The Defense Has Suffered No Prejudice.

The parties agree that prejudice is necessary to reverse a judgment based on exclusion of evidence. The defense cannot show any, however.

The defense cannot claim that it was prejudiced by not being able to use the damages statement to suggest that Ms. Hall was greedy, or exaggerating pain complaints. In opening statement, counsel stated that Ms. Hall was seeking damages of \$1,445,000.00. That is a sum greater than in any damage statement and allowed the defense to argue that Ms. Hall was exaggerating her pain complaints to obtain an unreasonable amount of

money and therefore greedy. Any error on this score is harmless for that reason. *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012)

The defense could also have used Dr. Lewis' billings to show his financial interest in the case regardless of the content of the damage statement. Inexplicably, it did not. Nonetheless, it began his cross examination by eliciting that a session generally costs \$81.16 and that there were 223 visits. (RP 489-90) This would allow anyone to approximate what his bill was. It also discussed at closing that Ms. Hall was a "captive patient" that Dr. Lewis would not refer out suggesting that he might lose revenue if he did. (RP 683)

The defense claims prejudice arguing that the jury would not have awarded the damages it awarded had it known that a lesser amount was given in the damage statement. Appellant's Opening Brief, p. 24. Given the existence of CR 54(c), however, prejudice simply does not flow from exposure to the damages that are proved. Federal courts have allowed motions to amend to increase the amount of the *ad damnum* clause on that basis. *Varveris v. United States*, 141 F.Supp. 874, 875 (S.D.N.Y. 1956); *Roorda v. American Oil Co.*, 446 F.Supp. 939, 948 (W.D.N.Y. 1978); *Dotson v. Ford Motor Co.*, 218 F.Supp.2d 815, 816-17 (W.D. Va. 2002) This is especially true where, as here, the defense has had ample

opportunity to discover the facts of the case. *Goldenberg v. World Wide Shippers of Chicago, Inc.*, 236 F.2d 198, 200 (7th Cir. 1956)

A similar argument was made and rejected in *Bail v. Cunningham Bros., Inc., supra*. In that personal injury case, the plaintiff's prayer sought damages of \$100,000.00. The jury returned a verdict in the amount of \$150,000.00. The plaintiff was then allowed to amend the complaint to request damages in that amount. The defense claimed prejudice on appeal. The Court disagreed. It noted that there could have been no change to the quantum of proof required as to any material fact or that any change of issues resulted. It also refused to believe that counsel would have tried harder if he knew that the potential exposure could have been greater.

In short, the defense can claim no prejudice.

RESPONSE TO DEFENDANT'S ASSIGNMENT OF ERROR NO. 2:

I. Standard of Review.

The defense has assigned error to the trial court's failure to give its proposed instruction on mitigation of damages. The giving or failing to give a jury instruction is reviewed *de novo* if the challenge is based on a matter of law, or for abuse of discretion if based on a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009) In this case, the defense asked the trial court to instruction on mitigation of damages. The trial court refused to do so because there was no substantial evidence to

support such an instruction. That is a matter of fact rather than a matter of law. Therefore, the standard of review is abuse of discretion. Finally, and as noted above, the Court can affirm on any ground supported by the record.

II. Standard for Jury Instructions.

A jury instruction must adequately inform the jury of the law and be supported by substantial evidence. It is error to give an instruction that is not supported by substantial evidence. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn.App. 66, 90, 248 P.3d 1067 (2011) The supporting facts must consist of more than speculation and conjecture. *Savage v. State*, 127 Wn.2d 434, 448-49, 899 P.2d 1270 (1995) The trial court determined that there was no substantial evidence to support an instruction on mitigation of damages. It did not abuse its discretion on doing so.

III. This Assignment of Error Was Not Sufficiently Preserved.

A party appealing from a failure to give a proposed jury instruction must create an adequate record for review. The record must include the instruction that is proposed. Because proposed instructions must be filed with the clerk, a party can easily meet this requirement by designating proposed jury instructions as part of the clerk's papers. CR 51(b), (c) The record can also be made by reading the proposed instruction into the

record. Unless there is a local rule relaxing the requirement, a party wishing to propose pattern instructions must also submit them as the rule requires. Clark County Superior Court has no such local rule. Therefore, pattern instructions in Clark County Superior court must be filed with the clerk as noted above. CR 51(d)(1), (3) Such proposed instructions must be made part of the record on review. CR 51(d)(2)

The defense claims that it proposed an instruction in the form of WPI 33.01. That form contains alternatives and blanks to be completed by the person proposing it. A version of the instruction is set out in Appellant's Opening Brief, p. 26. But the brief is not the record on appeal. The record includes references to WPI 33.01. (RP 631, 636) But it simply does not contain the defense's proposed instruction. It is not in the clerk's papers. The defense did not read its proposed instruction into the record when exceptions were taken. (RP 646-48) We have nothing but a mere reference to WPI 33.01. A party's mere reference to a pattern number is not sufficient to preserve review of the failure of the trial court to give the instruction. *Gorman v. Pierce County*, 176 Wn.App. 63, 86-87, 307 P.3d 795 (2013)—holding that an oral request for WPI 12.02, a pattern instruction stating the emergency rule and containing no alternatives, was not sufficient. The problem cannot be remedied because the defense did

not file its proposed instructions.³ The requirement in CR 51(d)(2) that a pattern instruction be placed in the record has not been met and cannot be met. Therefore, the record is not adequate for review, and this assignment of error must be rejected. Furthermore, the trial court could ignore the proposed instruction because it was not properly submitted. CRF 51(e) There can be no error premised on a jury instruction that the trial court could have ignored.

IV. There Was Insufficient Evidence to Support the Giving of the Instruction.

There was no evidence to support the giving of an instruction on mitigation of damages. The trial court therefore correctly refused to instruct the jury on that defense and did not abuse its discretion.

At trial, the defense claimed that two types of evidence supported the giving of an instruction on mitigation of damages. These were Ms. Hall's failure to seek treatment until twelve days after the collision and the

³ The Court may take judicial notice of this fact since it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b) *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) A search of the filing records this case maintained at the Washington Courts website shows no filing of proposed instructions by the defense.

statement by Dr. Wilson that immobilization is a method of treating an injury to spinal ligaments. The former was based on language on Dr. Lewis' website to the effect that a delay in treatment can have "disastrous results." (RP 647-48)

The defense attempted to adduce evidence to support a mitigation of damage theory in the following exchange in its cross examination of Dr. Lewis:

Q. I want to read to you against from your website, under the topic Time Matters. It says, "When a spinal ligament has been injured, there's a short window of opportunity to begin treatment that result 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."

You're aware that Ms. Hall waited 12 days to come in and see you in this case, correct?

A. Correct.

Q. Is that what happened here, is that she waited too long to get treatment for this ligament injury?

A. No. It's—I'll explain that. It's a good question. Ms. Hall was self-treating, using ice and trying to self-manage, which is appropriate to do that.

One of the things that we want to do in the beginning is use a lot of ice, control the inflammatory response, and I think she was doing the best she could on her own, and I don't think that caused any further damage.

A lot of the window of opportunity that we want to see is these injuries cause—there's a lot of things they

cause that we haven't talked about yet. Changes in the nervous system, changes in the spinal cord, the processing. It's called central hypersensitivity. There's a whole bunch of stuff that goes on.

Also, we know that the inflammatory response, inflammation, like when you cut yourself or bruise yourself, becomes a critical ongoing problem with these injuries. So many times in the beginning, like in Ms. Hall's case, using ice and trying to modulate the inflammatory process is important.

Another thing is that for them to be—communicate to them to do things or not to do things that will cause further damage to their spine.

And in Ms. Hall's particular case I didn't see anything or did she relate anything to me that would further damage or delay.

(RP 499-501) The defense did not ask Dr. Wilson to opine on whether any delay in seeking care caused any injury to Ms. Hall. (RP 534-51)

Dr. Wilson also testified that an injury to spinal ligaments should be treated with immobilization and not by chiropractic adjustment. (RP 549-51) But he never testified that Ms. Hall's condition worsened because she did not receive immobilization. Rather, he opined that she had not sustained an injury to the ligaments in her cervical spine. (RP 542-49)

An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate. *Sutton v. Shufelberger*, 31 Wn. App. 579, 582, 643 P.2d 920 (1982) The defense must prove both that the plaintiff's actions were unreasonable and that

those actions proximately caused additional damages. *Cox v. Keg Restaurants, U.S.*, 86 Wn.App. 239, 244, 935 P.2d 1377 (1997) Generally speaking, a party seeking a jury instruction must show substantial evidence to support the party's theory. Where the failure to mitigate is alleged to stem from a failure to secure treatment, the following additional rules apply:

Expert testimony is required in cases where a determination of causation turns on obscure medical factors. (citations omitted) Submitting the issue to the jury without such testimony is improper because the jury is thus invited to reach a result based on speculation and conjecture. (citations omitted) The issue should also not be submitted if the evidence shows that a proposed treatment might not be successful or if there is conflicting testimony as to the probability of a cure, because it is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief. (citations omitted)

Cox v. Keg Restaurants, U.S., supra, 86 Wn.App. at 244; *Fox v. Evans*, 127 Wn.App. 300, 307-308, 111 P.3d 267 (2005)

The required expert opinion was absent. There was simply no testimony from either Dr. Lewis or Dr. Wilson that Ms. Hall's delay in seeking care caused any damage to her. Dr. Lewis denied that it did, and Dr. Wilson expressed no opinion. Therefore, the giving of the mitigation of damages instruction could not be supported on the delay in seeing Dr. Lewis.

There was also no expert opinion that a failure to have her neck immobilized caused any damage. Dr. Wilson did not state that the result would have been different if Ms. Hall had undergone immobilization. Rather, he denied that there was any ligament damage.

At best, there is a mere possibility that immobilization might have helped Ms. Hall. That is not sufficient. For example, in *Cox v. Keg Restaurants, U.S., supra*, the Court ruled that the plaintiff's failure to seek physical and speech therapy and his delay in taking medication for depression as a result of head injuries would not support the giving of an instruction on mitigation of damages because expert testimony stated only that it was possible—not probable—that these delays impeded his recovery. 86 Wn.App. at 244-45

In that regard, our case is a far cry from *Fox v. Evans, supra*. In that case, the plaintiff suffered depression apparently from injuries sustained in a car crash. Treatment professionals testified that her refusal to follow recommendations to take medication and engage in psychotherapy interfered with her recovery. The Court held that this evidence was sufficient to submit the issue of mitigation of damages to the jury.

There was also no evidence that Ms. Hall had ever been offered neck immobilization as a method of treatment. Dr. Lewis did not believe

it was indicated. (RP 509) None of Ms. Hall's associates recommended it to her because "it's not a practice we really do much of any more." (RP 620) Dr. Wilson certainly was not charged with providing any treatment to Ms. Hall. (RP 563)

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. *Smith v. Jones*, 382 Mich. 176, 188-89, 269 N.W.2d 308 (1969); *Chamberlain v. Palmer-Lumber*, 104 N.H. 221, 224, (183 A.2d 906 (1962)); *Zimmerman v. Ausland*, 266 Or. 427, 435, 513 P.2d 1167 (1973) Ms. Hall certainly cannot be charged with an unreasonable failure to mitigate damages for refusing care that was never recommended. After all, the injured person is afforded a wide latitude of what action to take after being injured; the tortfeasor cannot complain that the injured person chose one choice rather than another; and the plaintiff is not bound at her peril to know what the best thing is to do. *Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956)

The defense also alleges that a mitigation instruction was supported by Ms. Hall's having 223 visits with Dr. Lewis. It did not raise this fact to support its proposed instruction at the trial court, however. (RP 646-48) Exceptions are required by CR 51(f). Based on this rule,

grounds not presented to the trial court will not be considered for the first time on appeal. *Eichler v. Yakima Valley Transportation Company*, 83 Wn.2d 1, 5, 514 P.2d 1387 (1973); *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) Therefore, the Court cannot consider whether a mitigation of damages instruction was required by Ms. Hall's having 223 visits with Dr. Lewis.

In any event, there was no evidence to the effect that Ms. Hall's visits to Dr. Lewis caused her any harm. In fact, she believes that she has obtained relief from Dr. Lewis' treatments. (RP 600, 618) Her spouse agrees. (RP 360) All Dr. Wilson could offer was his opinion that chiropractic care for longer than two months after an injury is not helpful. (RP 541)

It may be that the defense is attempting to foist onto Ms. Hall the issues it sees with the care provided by Dr. Lewis. That will avail the defense nothing. It has long been the law in Washington that a defendant who is responsible for a plaintiff's injury is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner. *Adams v. Allstate Insurance Co.*, 58 Wn.2d 659, 669, 364 P.2d 804 (1961); *Lindquist v. Dengel*, 92 Wn.2d 257, 262, 595 P.2d 934 (1979);

Restatement (Second) of Torts, § 457

V. The Instruction Proposed by the Defense Was Incorrect and Incomplete.

The defense did not propose a correct instruction on mitigation of damages or an instruction to inform the jury of how to deal with the mitigation of damages issue. Finally, it did not except to the verdict form used or propose a form that would allow the jury to make an appropriate decision on mitigation of damages. These circumstances provide another reason to affirm the trial court's refusal to instruct on mitigation of damages.

A trial court may decline to give any instruction which is erroneous in any respect. *Crossen v. Skagit County*, 100 Wn.2d 355, 360, 699 P.2d 1244 (1983) Furthermore, a party entitled to an instruction must propose one that accurately states the law and is based on the evidence. *Harris v. Groth*, 99 Wn.2d 438, 447-48, 663 P.2d 113 (1983); *St. Paul Mercury Insurance v. Salovich*, 41 Wn.App. 652, 658, 705 P.12d 812 (1985) The rules concerning adequacy and propriety of jury instructions also apply to verdict forms. *Micro Enhancement International, Inc., v. Coopers & Lybrand*, 110 Wn.App. 412, 427, 40 P.3d 1206 (2002) *Canfield v. Clark*, 196 Wn.App. 191, 199, ___P.3d ___ (2016) A party who is dissatisfied with a verdict form must propose an appropriate

alternative. *City of Bellevue v. Raum*, 171 Wn.App. 124, 145, 286 P.3d 295 (2012) And a party's failure to except to a verdict form precludes review of the form's propriety. *Lahmann v. Sisters of St. Francis*, 55 Wn.App. 716, 723, 780 P.2d 969 (1989)

First of all, the pattern instruction the defense suggested, WPI 33.01 was not the right pattern instruction. When mitigation of damages is premised on a failure to seek treatment, the proper instruction is WPI 33.02, not WPI 33.01. The note on use of WPI 33.02 states that it should be used only if there is evidence creating an issue of fact as to the injured person's failure to exercise ordinary care in receiving or submitting to medical treatment, and the evidence permits a segregation of the damages resulting from that failure to exercise ordinary care. 6 Wash.Prac. 380 It provides as follows with completion of blanks and alternatives as applicable in this case:

A person who is liable for an injury to another is not liable for any damages arising after the original injury or event that are proximately caused by the failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damages.

In determining whether, in the exercise of ordinary care, a person should have secured or submitted to medical treatment as contended by Defendant, you may consider the nature of the treatment, the probability of success of such treatment, the risk involved in such treatment, and all of the surrounding circumstances.

Defendant has the burden to prove that Plaintiff's failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

The defense failed to propose an instruction consistent with WPI 11.07. It also did not except to the verdict form that the trial court gave or submit an appropriate verdict form in keeping with a mitigation of damages instruction. The failure to mitigate is a species of contributory fault. RCW 4.22.015 And contributory fault serves to proportionally reduce the amount of a plaintiff's recovery. RCW 4.22.005. Therefore, if the jury is to consider whether a plaintiff unreasonably failed to mitigate damages, it must first determine what those damages are and then decide what percentage of those damages could have been avoided by the exercise of reasonable care. *Jaeger v. Cleaver Construction, Inc.*, 148 Wn.App. 698, 201 P.3d 1028 (2009)⁴

If the trial court was to instruct on mitigation of damages in this case, it should have given the following version of WPI 11.07:

If you find that Plaintiff failed to use ordinary care to avoid or minimize her damages, you must determine her failure to do so expressed as a percentage of her total damages. The court will furnish you with a special verdict for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

⁴ The jury in that case was instructed on contributory fault and failure to mitigate. It determined damages; decided that plaintiffs were at fault; and set plaintiff's percentage at 85%. The trial court reduced plaintiff's damages by that percentage.

IT should have also given a special verdict form that included the following additional questions:

3. Did Plaintiff fail to exercise ordinary care to secure treatment?

ANSWER: (Yes or No)

If your answer is “no,” sign this verdict form and do not answer any further questions. If your answer is “yes,” answer Question No. 4.

4. Did Plaintiff’s failure to exercise ordinary care to secure treatment cause Plaintiff any increased damages?

ANSWER: (Yes or No)

If your answer is “no,” sign this verdict form and do not answer any further questions. If your answer is “yes,” answer Question No. 5.

5. Assume that 100% represents the total of Plaintiff’s damages. What percentage of Plaintiff’s damages was caused by her failure to exercise ordinary care to secure treatment?

ANSWER: _____%

Plaintiff alerted the defense to this omission on the second day of trial. (RP 633) Nonetheless, it did not take steps to propose a correct verdict form.

In short, the defense’s failure to propose the proper mitigation instruction, an instruction based on WPI 11.07 and a verdict form that

would allow a correct decision is fatal to its claim under this assignment of error.

VI. The Failure to Give the Instruction Did Not Preclude the Defense from Presenting Its Theory of the Case.

The defense claims that the trial court's failure to give a mitigation of damages instruction interfered with its ability to present its theory of the case. Appellant's Opening Brief, p. The facts do not support that assertion.

The defense's entire theory of in this case was that Ms. Hall had not been injured in the September 11, 2013, incident. It took this position in opening statement. It never conceded that she had been injured but rather presented that question as an issue for the jury to decide. (RP 690-91) If a party intends to rely on mitigation of damages, it must agree that some sort of damage occurred. Otherwise, there is nothing to mitigate. If it seriously intended to advance a mitigation of damages theory, it would have asked Dr. Wilson to opine whether Ms. Hall would have had a better result if her neck had been immobilized; if she had not seen a chiropractor; or if she had sought care earlier than she did. Its failure to do so shows that its theory of the case had nothing to do with mitigation of damages.

The defense also claims that counsel for plaintiff took advantage of the absence of a mitigation instruction on closing argument. Appellant's

Opening Brief, p. 31) That claim is also not supported by the facts. Counsel mentioned Ms. Hall's delay in seeking treatment in the context of arguing that the delay did not break the chain of causation or indicate that the incident did not cause injury. (RP 670-71)

PLAINTIFF'S ASSIGNMENT OF ERROR ON CROSS APPEAL.

I. Standard of Review.

The trial court erred by awarding fees attributable to Dr. Wilson's CR 35 exam and trial preparation in the Order on Defendant's Motion. The review of an issue of costs is a two step process. The Court first determines whether a statute, contract, or equitable theory authorizes the award. Second, if such authority exists, the Court reviews the amount of the award for abuse of discretion. *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn.App. 279, 325, 284 P.3d 749 (2012) In this case, the award was not authorized. The standard of review is therefore *de novo*.

II. Defendant's Motion for Costs Was Not Timely Made.

The defense moved for costs of the first suit. It was required to file its cost bill within ten days of the entry of the Order of Dismissal on June 19, 2015, by June 29, 2015, under the terms of CR 54(d)(1). It waited until July 7, 2015, to file its cost bill and its motion. Therefore, it was limited to recovery of statutory attorney's fees by the operation of CR 54(d)(1) and CR 78(e). The former provides as follows:

Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

And CR 78(e) states as is pertinent:

. . . If no cost bill is filed by the party to whom costs are awarded within 10 days after the entry of the judgment or decree, the clerk shall proceed to tax the following costs and disbursement, namely:

(1) The statutory attorney fee;

The Court may enlarge the time to submit the cost bill under CR 6(b) either before or after the ten day deadline has passed, but if the deadline has passed, the court may enlarge the deadline only if the party's lateness was the result of excusable neglect. CR 6(b)(2) *Clipse v. Commercial Driver Services, Inc.*, 189 Wn.App. 776, 787, 358 P.3d 464 (2015) The defense did not seek enlargement of the time to file its cost bill during the ten days after the entry of the Order of Dismissal or at any other time. It also showed no excusable neglect for its late filing. (CP 26-31, 56-58) Therefore, it is limited to statutory attorney's fees. *Clipse v. Commercial Driver Services, Inc., supra*, 189 Wn.App. at 787-89

III. Fees for the CR 35 Exam and Dr. Wilson's Trial Preparation Cannot Be Recovered.

Even if the timeliness of the defense's request is ignored, the defense was not entitled to any costs related to Dr. Wilson. As CR 54(d)(1) provides, costs and disbursements can be fixed and allowed as provided by RCW 4.84 or some other statute. The rule is identical to longstanding Washington authority to the effect that costs are allowed only as to the narrow range of expenses provided by statute. For most expenses, the statute is RCW 4.84.010. *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 83, 113, 111 P.2d 612 (1941); *Platts v. Arney*, 46 Wn.2d 122, 128, 278 P.2d 657 (1955); *Nordstrom, Inc., v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987); *Gerken v. Mutual of Enumclaw Insurance Company*, 74 Wn.App. 220, 230, 872 P.2d 1108 (1994) That statute is RCW 4.84.010. Fees for expert witnesses are not allowed as costs under RCW 4.84.010. *Fiorito v. Goerig*, 27 Wn.2d 615, 619-20, 179 P.2d 316(1947); *Wagner v. Foote*, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996) Therefore, the trial court erred in awarding them.

The defense is expected to rely on the Court's decision in *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 201 P.3d 346 (2009). That decision should not guide the Court here. It arose from Mr. Johnson's claim for damages under the Jones Act. He did not

cooperate with the litigation process and his attorneys perhaps due to substance abuse issues. He sought and obtained a voluntary non-suit under CR 41(a)(1)(B) after the trial court denied his motion for a continuance. Its order stated that “taxable costs of this action should be imposed on plaintiff” if he were to refile. When Mr. Jones refiled, the trial court ordered him to pay a number of expenses including the cost of a CR 35 exam and prevented him from proceeding until he did. It dismissed the second case when he failed to make payments.

The Court of Appeals affirmed the trial court. It based its reasoning on the following language in CR 41(d):

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.

It noted the CR 41(d)’s use of the term “taxable costs” while the then version of CR 54(d) referred simply to costs. From that, it deduced that “taxable” costs for the purposes of CR 41 were not limited to those allowed by RCW 4.84 or some other statute. The Court went on to say that the phrase “as it may deem proper” in CR 41(d) allowed it to award virtually anything. 148 Wn.App. at 633-34

This reasoning is flawed. The term “taxable costs” refers to costs allowed by statute. *Polygon Northwest Co., v. American National Fire Insurance Co.*, 143 Wn.App. 753, 788-89, 189 P.3d 777 (2008) The Court in *Johnson v. Horizon Fisheries, LLC, supra*, attempted to limit the case by saying that it dealt only with whether attorney’s fees are statutory costs. 148 Wn.App. at 635 That distinction is much too narrow. No less an authority than Professor Tegland has used the term “taxable” to refer to costs that are allowed by statute. Tegland, *Civil Procedure*, 14A Wash.Prac. § 36:17.

Furthermore, CR 41(d) does not authorize a court to make cost awards. It merely allows the court to “make such order for the payment of taxable costs of the action previously dismissed as it may deem proper.” The rule envisions a cost award having been previously made and only addresses orders for the payment of those costs.

In any event, if *Johnson v. Horizon Fisheries, LLC*, is followed, it does not apply to our case. As the Court there noted, CR 41(d) applies only when the plaintiffs dismisses and refiles before trial. Ms. Hall’s suit was dismissed during—not before trial. Therefore, the case is not applicable here.

Finally, the decision in *Johnson v. Horizon Fisheries, LLC, supra*, cannot stand in light of the amendments to CR 54(d). The trial court’s

decision in *Johnson v. Horizon Fisheries, LLC, supra*, was made in 2006. The amendment to CR 54(d) was effective on September 1, 2007. 160 Wn.2d 1117-18 The drafters specifically stated that the amendment was designed to harmonize language in the rules concerning costs. Tegland Rules Practice 4 Wash.Prac. CR 54 The amendment referred to costs “as allowed and provided in RCW 4.84 or by any other applicable statute.” If harmonization is the goal, then the same definition of costs should be applied in CR 41(d).

In short, there was no authority for the trial court to award any costs associated with Dr. Wilson. Its doing so was error.

CONCLUSION

At the end of the day, the defense received a fair trial. The trial court committed no error. The defense’s arguments should be rejected. The judgment should be affirmed. The Order on Defendant’s Motion, however, should be reversed to eliminate the award of \$4,700.00 for fees attributable to Dr. Wilson.

DATED this 10 day of January, 2017.



BEN SHAFTON WSB#6280
Of Attorneys for Plaintiff/Respondent

APPENDIX OF STATUTES

RCW 4.22.005

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

RCW 4.20.015

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

RCW 4.84.010

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
 - (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
 - (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports,

employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.250

Notwithstanding any other provisions of chapter 4.84 RCW and RCSW 12.20.060, in any action where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

APPENDIX OF WASHINGTON RULES

ER 103(a)

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

ER 201(b)

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 408

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose,

such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ER 801(a)

A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person if its intended by the person as an assertion.

ER 801(d)(2)

A statement is not hearsay if--

(2) Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

CR 6(b)

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

CR 41(a)(1)(B)

(a) Voluntary dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case.

CR 51(b) – (f)

(b) Submission. Submission of proposed instructions shall be by delivering the original and three or more copies as required by the trial judge, by filing one copy with the clerk, identified as the party's proposed instructions, and by serving one copy upon each opposing counsel.

(c) Form. Each proposed instruction shall be typewritten or printed on a separate sheet of letter-size (8 1/2 by 11 inches) paper. Except for one copy of each, the instructions delivered to the trial court shall not be numbered or identified as to the proposing party. One copy delivered to the trial court, and the copy filed with the clerk, and copies served on each opposing counsel shall be numbered and identified as to proposing party, and may contain supporting annotations.

(d) Published instructions.

(1) Request. Any instruction appearing in the Washington Pattern Instructions (WPI) may be requested by counsel who must submit the proper number of copies of the requested instruction, identified by number as in section (c) of this rule, in the form counsel wishes it read to the jury. If the instruction in WPI allows or provides for a choice of wording by the use of brackets or otherwise, the written requested instruction shall use the choice of wording which is being requested.

- (2) Record on review. Where the refusal to give a requested instruction is an asserted error on review, a copy of the requested instruction shall be placed in the record on review.
- (3) Local option. Any superior court may adopt a local rule to substitute for subsection (d)(1) and to allow instructions appearing in the Washington Pattern Instructions (WPI) to be requested by reference to the published number. If the instruction in WPI allows or provides for a choice of wording by the use of brackets or otherwise, the local rule must require that the written request which designates the number of the instruction shall also designate the choice of wording which is being requested.
- (e) The trial court may disregard any proposed instruction not submitted in accordance with this rule.
- (f) Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

APPENDIX OF FEDERAL RULES

Fed. R. Evid. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

APPENDIX OF OTHER MATTERS

Drafters' Comment, 2007 Amendments to CR 54

These suggested amendments are based in part on a recommendation of the judges and clerks of the Court of appeals. By imposing a ten-day deadline on the filing of motions for attorneys' fees, costs, and the like, the amendment to CR 54(d) is intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted.

Currently, the Civil Rules contain no deadline by which a party must file a motion for an award of fees in the trial court. Yet RAP 2.4(g) and 7.2(i) allow an appeal of an award of attorney fees (and/or costs) to automatically join an appeal on the merits of the case anytime after the appellate court has accepted review. This can create delay at the appellate level when an aggrieved party seeks to obtain appellate review of a subsequently entered attorney fee award.

The primary purpose of the proposed amendments is to require a prevailing party to move for attorneys' fees (and any other costs not provided by the statute within 10 days of the entry of judgment—the same deadline imposed for other post-judgment motions. This is done by adding a new section (d)(2) to CR 54.

A second purpose of the proposed amendment is to better harmonize the language of the applicable Civil Rules with each other and with the relevant statutes (in particular, RCW 4.84.010, .030 and .090). Language added to new subsection (d)(1) of CR 54 and the amendment to CR 78(e) are designed to expressly

include both “costs” and “disbursements” and to clarify that the disbursement “affidavit” can be part of the “cost bill.”

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 12 PM 2:10

NO. 49150-8-II STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MIRIAM HALL,

Plaintiff/Respondent

vs.

VIRGINIA CARSON,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE SCOTT COLLIER

DECLARATION OF MAILING

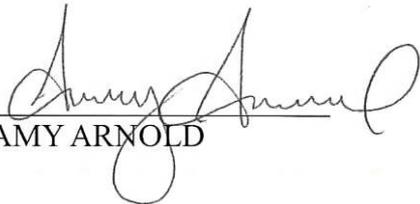
BEN SHAFTON
Attorney for Plaintiff/Respondent
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(360) 699-3001

COMES NOW Amy Arnold and declares under penalty of perjury under the laws of the State of Washington that the following is true to the best of her knowledge, information, and belief:

1. My name is Amy Arnold. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On January 10, 2017, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Brief of Respondent addressed to Matthew Kalmanson, Hoffman Hart LLP, 1000 S.W. Broadway, 20th Floor, Portland, OR 97205.

DATED at Vancouver, Washington, this 10 day of January 2017.


AMY ARNOLD