

NO. 497271-1-II

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

TENSAR INTERNATIONAL CORPORATION; and
JEFFREY and LORI MAIN,

Respondents,

v.

GERHARD J. SANDER and JANE DOE SANDER,

Appellants.

Appeal from the Superior Court for Kitsap County
Cause No. 12-2-01704-4

RESPONDENT SANDER'S BRIEF AS TO MAIN AND REPLY

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I. Reply to Main's Response to Sander's Conditional Cross-Appeal.

A. The Alleged Job Opportunity at Denali was Speculative, Prejudicial and should have been Excluded.

Main's response to Sander's appeal confuses the matters at issue. Sander is appealing the trial court's ruling that allowed Plaintiffs to present speculative evidence of a job opportunity at Denali. In response, Main argues that there is sufficient evidence to support the jury's damages award even if you do not consider the Denali job. However, even if there was substantial evidence of medical specials exceeding the jury's economic damages award, that does not make the evidence of the Denali job any less speculative or any less prejudicial. This evidence should have been excluded when the issue was addressed in motions in limine. The question for the Court is whether it was an error to admit speculative evidence of a job opportunity at Denali – not whether there was sufficient evidence to support the economic damages award.

As previously explained, Plaintiff's forensic economist, Dr. Knowles, relied solely on the declaration of Mr. Sean Updegrave to support his testimony that Mr. Main would have had a job at Denali making \$170,000.00 annually if not for the collision. [CP 558, 618-628.] As explained in motions in limine, Mr. Updegrave's declaration consisted

of mostly speculative or false information. Mr. Updegrove did not have hiring authority, was not in a position to determine a salary or bonus structure for Mr. Main, no employment offer was ever actually made, and the alleged job opportunity was given to another employee before the motor vehicle accident ever occurred. [CP 558-561, 641-642, 636, 638-639.] Despite this evidence that Mr. Updegrove's declaration was speculative at best, Dr. Knowles was still permitted to rely on the declaration to support his expert testimony at trial – making Dr. Knowles' testimony equally speculative. [MIL Hr'g Tr.Vol. I, 150-161, Jan. 26, 2016.] This prejudiced the Defendants because it erroneously bolstered Plaintiff's damages claim through the use of expert testimony. Allowing Dr. Knowles to present this testimony was an error.

Plaintiff claims that the trial testimony of Mr. Chris Gerhardt supports their theory, that but-for the accident Mr. Main would have had a particular job opportunity at Denali. However, even if that were true, Dr. Knowles did not have Mr. Gerhardt's trial testimony prior to testifying at trial. Dr. Knowles relied solely upon Sean Updegrove. Mr. Gerhardt's trial testimony does not make Mr. Updegrove's nor Dr. Knowles' testimony any less speculative.

Furthermore, at trial Mr. Gerhardt admitted he had no personal knowledge of a specific W-2 employment package offered to Mr. Main.

[Gerhardt 49, ll. 5-17, Aug. 15, 2016.] Mr. Gerhardt also testified that he had no firsthand knowledge of why Mr. Main was let go from Denali. [Gerhardt 22, ll. 15-21, Aug. 15, 2016.] Mr. Gerhardt testified that he had no knowledge of how Mr. Main had performed at any time during his employment with Denali. [Gerhardt 24, ll. 17-25, 25, ll. 1-3, Aug. 15, 2016.] Mr. Gerhardt wasn't even aware that Mr. Main was claiming to have a brain injury until well after both Mr. Gerhardt and Mr. Main left Denali. [Gerhardt 44, ll. 4-8, Aug. 15, 2016.] Therefore, Mr. Gerhardt could not testify regarding the impact this accident had on Mr. Main's earning capacity or lost wages. Neither Mr. Updegrove nor Mr. Gerhardt's testimony provided a sufficient foundation for Dr. Knowles' testimony that Mr. Main would have been making \$170,000.00 annually at Denali if not for this accident.

Main criticizes two of the cases relied upon by Sander because they are breach of employment contract cases. Those cases hold that the prospect of employment is too speculative to support a claim of lost wages. However, Main does not explain how the evidence becomes any less speculative in the context of a tort claim. The distinction is not significant to the matter at issue. Speculation about a job that may have been available, at an unknown rate of pay, for an unknown duration, is still

speculation whether it is in the context of a breach of contract claim, or a tort claim.

The alleged job at Denali was never offered to Mr. Main and was in fact given to a different employee before Mr. Main was in the motor vehicle accident. Dr. Knowles should not have been permitted to testify as to the speculative job and compensation package. Admission of this speculative evidence was prejudicial to the Defendants because it provided the perception, through the use of expert testimony, that the effect of the accident was far greater than the facts otherwise prove.

B. Dr. Tay's Testimony as to Causation and Diagnosis of Concussion lacked Foundation.

Dr. Tay did not see Mr. Main until July 30, 2012 – over a year after this motor vehicle accident. At that time, Dr. Tay completed his standard testing for concussion and other neurological conditions and the results were completely normal. [Tay 47, 57-59, and 68-69, Aug. 16, 2016.] Dr. Tay had no foundation to arrive at the conclusion that Mr. Main suffered a concussion. Further, Dr. Tay did not even inquire as to other possible causes of Mr. Main's reported symptoms. [Tay 15, Aug. 16, 2016.] Therefore Dr. Tay certainly did not have foundation to testify as to the cause of Mr. Main's complaints.

During the offer of proof provided on this issue, Dr. Tay testified as follows:

Q: So no – nothing you actually did – the data you collected personally, tests you did personally, were consistent with a concussion, were they?

A: Correct. It was based on –

Q: History?

A: History.

Q: And somebody else’s diagnosis, right?

A: Yes.

Q: Okay. Did you make inquires as to other events in Mr. Main’s life that could have resulted in a concussion?

A: I don’t remember.

Q: Wouldn’t that be important if you were making a differential diagnosis and it’s based on only one trauma ever having occurred, wouldn’t that be essential that you ask a history and take a full history of all events at least within the last, what, five years maybe?

A: Yes.

[Tay 14, ll. 17-25; 15, ll. 1-9, Aug. 16, 2016.]

Dr. Tay admits that the historical information he was lacking, would have been important in arriving at a differential diagnosis. He further admits that none of the results of the tests he completed were consistent with a concussion. Dr. Tay relied upon the “diagnosis” by a chiropractor – who is not qualified to diagnose a concussion and who testified that he could not diagnose a concussion. [Tay 73-75, 77-78, Aug. 16, 2016.] [Pretham 22, 24 and 31, Aug. 15, 2016.]

Dr. Tay did not have any objective medical evidence or historical information to provide a foundation for his testimony that Mr. Main

suffered a concussion and that concussion was caused by this motor vehicle accident. This testimony should have therefore been excluded.

C. Plaintiff's Counsel's Email Should Not have been Excluded.

Washington Evidence Rule 607 allows the credibility of a witness to be attacked by any party. ER 607. An expert witness “is subject to the same rule of impeachment as any other witness. He occupies no higher plane than the ordinary witness, nor does he stand on any different footing.” *State v. Newcomb*, 58 Wash. 414, 422, 109 P. 355, 358 (1910). Evidence of a hired expert’s potential bias, such as their fees or income, is routinely admissible. 5B Wash. Prac., Evidence Law and Practice § 705.8 (6th ed.).

The comment by counsel to this expert that he wanted the expert to delete an unfavorable email is far more relevant than evidence of an expert’s fees or earnings. The purpose of allowing evidence of expert fees is to *imply* that counsel has influence over a hired expert. If the fact that an expert makes a substantial income to testify on behalf of a party is admissible – then certainly *explicit* evidence that the party paying that expert is trying to influence the expert’s testimony should be admissible.

Regardless of whether the email to Dr. Knowles was a joke, or was truly meant as a serious directive to destroy evidence, it was relevant to

the familiarity between attorney and expert as well as the potential influence that familiarity had on Dr. Knowles and his formulation of opinions in this case. Assuming that the email was an attempt at humor, the Plaintiff should have been able to rehabilitate his witness with that argument. However, Defendants should have been permitted to introduce this evidence of bias and it should have been up to the jury to weigh that evidence.

Plaintiff claims that the email would have been cumulative, as there was plenty of other evidence that tended to show counsel's interference with the presentation of facts and damages. However, Plaintiff's claim that the email is cumulative only supports Defendants' argument that the email is highly relevant. It was not only this one email that supports the theory that counsel has orchestrated the damages claim – there is additional evidence supporting that argument. This was a significant piece of evidence tending to prove Defendants' theory of the case – that the alleged damages were orchestrated by the attorneys and the hired experts, rather than real evidence of a real loss.

Finally, Plaintiff argues that the comment was not that important because the Defendants did not introduce the redacted version of the email as evidence at trial. However, whether or not Defendants used the redacted version of the email is irrelevant. The email that should have been

admitted was the unredacted version – and that evidence was erroneously rejected by the trial court.

The email was relevant to show bias and to support Defendants' theory of the case. The weight and significance of this evidence should have been for the jury to decide.

D. Plaintiff's Reliance on Faith should have been Excluded.

The fact that Plaintiffs in this matter sought counseling from their pastor and religious support groups is completely irrelevant. The only purpose of introducing the Plaintiffs' religious affiliation was to attempt to enhance their credibility. Plaintiffs should have been allowed to testify only that they received counseling generally. There was no justification or evidentiary basis to present the Plaintiffs' religion or church affiliation to the jury; it was improper and highly prejudicial to allow Plaintiffs to use Christianity to impermissibly bolster their claims.

Washington Evidence Rule 610 explicitly states that "evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." In this case, there was no other purpose of introducing evidence of religion except to try to enhance the Plaintiffs' credibility. The fact that the counseling and the support

Plaintiffs' received was grounded in religion is completely irrelevant to any of the issues before the jury. This is exactly the type of evidence that ER 610 is meant to exclude.

Plaintiff similarly asked that Defendant Sander be precluded from taking out his bible in the presence of the jury. [MIL Hr'g Tr.Vol. II, 206-207, Jan. 27, 2016.] If Plaintiffs truly believed that evidence of religious affiliation did not improperly bolster a witness' credibility, they should not have had an issue with Mr. Sander's choice of reading materials. Neither party should have been permitted to introduce religion into this trial as it was completely irrelevant.

E. Violations of Motions in Limine.

Plaintiff and his witnesses violated the Court's orders on motions in limine on several occasions, even after being admonished by the judge, making any curative attempts ineffective and prejudicing the Defendants.

On motions in limine, the Court excluded introduction of evidence of insurance *for any purpose*. [CP 894-895, 900.] Further, as Plaintiff explains, ER 411 states that evidence of insurance cannot be used to show negligence. Plaintiff violated not only ER 411 but also the Court's orders on motions in limine.

Plaintiff's repeated mention of insurance, [J. Main 73, 82, 97, 102-104, and 265, Aug. 10 and 11, 2016.] despite the Court's clear rulings and reminders that such evidence was excluded, allowed the jury to consider whether insurance would come into play if they were to give Plaintiff a substantial award. Insurance and collateral sources of any kind were completely irrelevant to this matter – which is why they were excluded. Plaintiffs' repeated violations of the Court's rulings (and the evidence rules) should not be ignored and assumed to be harmless. Evidence of insurance is prejudicial because it tends to cause the jury to award excessive damages *Shay v. Horr*, 78 Wn. 667, 670, 139 P. 604, 605 (1914), see also, *Miller v. Staton*, 64 Wn. 2d 837, 840, 394 P.2d 799, 801 (1964)

Similarly, Dr. Perrillo's testimony that he worked with veterans [Perrillo 8, Aug. 11, 2016; Perrillo 163-176, Aug. 17, 2016] was a direct violation of the Court's order. [CP 905-906, MIL Hr'g Tr. Vol. I, 185-191, Jan. 26, 2016.] In Kitsap County, where the military and Naval Shipyard employs many residents, these violations were an obvious attempt to bolster Dr. Perrillo's credibility, as the reference to veterans was otherwise completely irrelevant.

These numerous violations of the Court's orders cannot be ignored simply because Plaintiff views them as "passing" and does not believe

they impacted the jury. The Defendants raised these issues prior to trial to avoid any improper influence on the jury. The Court agreed that these matters should not be raised at trial because they are irrelevant, improper and prejudicial.

F. Conclusion.

It was prejudicial error to allow the testimony related to concussion, religion and the speculative job opportunity and to exclude the evidence of counsel's correspondence with Plaintiff's experts. Defendants were further prejudiced by Plaintiff's violations of the motions in limine related to insurance and references to work with U.S. Veterans.

II. Response to Main's Conditional Cross-Appeal.

A. Standard of Review.

The admission or exclusive of evidence is a matter of discretion for the trial court that is reviewed for manifest abuse of discretion. "Whether an expert is qualified to testify is a determination within the discretion of the trial court." *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231-232, 393 P.3d 776, 779 (2017). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable,

or exercised on untenable grounds, or for untenable reasons. *Grigsby v. City of Seattle*, 12 Wn. App. 453, 454, 529 P.2d 1167, 1169 (1975).

The appellate court does not use the *de novo* standard of review for such discretionary rulings as Main's brief suggests. Main provides a misleading interpretation *Frausto's* holding related to the standard of review for admission of expert testimony. In *Frausto*, the lower court's exclusion of expert testimony arose on a motion for summary judgment. The *Frausto* court therefore used the *de novo* standard of review. The *de novo* standard of review is only used by an appellate court when reviewing discretionary trial court rulings made in conjunction with a summary judgment motion. *Frausto* at 231. In this case, the ruling to exclude certain testimony by Dr. Perrillo was made at trial, not relating to a summary judgment motion. Therefore, the proper standard of review is manifest abuse of discretion. *Id.*

B. The Trial Court Properly Prohibited Dr. Perrillo from Testifying that the Collision Caused a Concussion.

Main's brief confuses testimony regarding the *diagnosis* and *existence* of a concussion with testimony regarding the *cause* of a concussion. Only the latter was excluded. Dr. Perrillo could not testify as to the cause of Mr. Main's alleged concussion because he did not have information relating to how Mr. Main's body moved inside the vehicle, if

at all, and did not have expertise in biomechanical principals. [Excerpt Hr’g Tr. 12-13, 18-19, 22-2, Aug. 11, 2016.] Dr. Perrillo was able to testify as to the results of his neuropsychological testing. He was only precluded from taking the next step and linking those results to this accident. Dr. Perrillo had neither the facts nor the expertise to make that causal connection.

The trial court did not rule “that neuropsychologists are categorically barred from testifying as to the cause of traumatic brain injury” as Main’s brief suggests. Dr. Perrillo was permitted to testify about what occurs in the brain to cause a concussion. [Excerpt Hr’g Tr. 11, Aug. 11, 2016.] The parties stipulated that Dr. Perrillo could explain “axonal damage” as a cause of a concussion. [Excerpt Hr’g Tr. 10, Aug. 11, 2016.] Dr. Perrillo was only precluded from testifying that the accident was ‘when and how’ the concussion occurred in this case. He was not able to testify that the force of the impact was the cause of the concussion because that is well outside his scope of expertise. To have such an opinion, Dr. Perrillo would have had to testify to biomechanical principles and make assumptions about how Mr. Main’s body and head were positioned in the vehicle at the time of the accident. Dr. Perrillo is not qualified to testify as to biomechanical principals and there was no evidence as to Mr. Main’s position in the vehicle at the time of the

accident. While Dr. Perrillo may be able to testify as to causes of concussions generally, he was not qualified to provide the opinion that this accident resulted in significant enough force to cause a concussion. The trial court's decision to preclude Dr. Perrillo from testifying that the accident caused a concussion was based upon his lack of expertise in biomechanical principles and his lack of information or knowledge of the necessary facts – not because neuropsychologists in general cannot explain what causes concussions.

Main relies primarily on *Frausto* to support his position that an expert does not necessarily need a medical license to testify as the proximal relationship between a breach of duty of care, and an injury. The *Frausto* case concerned the exclusion of testimony by a nurse practitioner in a medical malpractice claim. The nurse was precluded from testifying that the breach of the standard of care was the proximate cause of the injury. *Frausto* holds that “[a] witness may testify as an expert if he or she possess knowledge, skill, experience, training, or education that will assist the trier of fact.” (citing ER 702)...it is “[t]he scope of the expert's knowledge, not his or her professional title, [that] should govern ‘the threshold question of admissibility of expert medical testimony in a malpractice case.’ *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 234, 393 P.3d 776, 780 (2017) (internal citations omitted).

Frausto applies to cases of alleged medical malpractice, not motor vehicle accident injuries. In a medical malpractice case, Dr. Perrillo would certainly be permitted to testify as to the standard of care within his field of expertise. That is a different opinion than the biomechanical testimony that Main wanted Dr. Perrillo to offer. Neither the nurse in *Frausto* nor Dr. Perrillo have the expertise to testify that a particular motor vehicle collision occurred with sufficient force to cause a head injury. However, in the *Frausto* matter, because it was a medical malpractice case, biomechanical principals did not come into consideration.

Dr. Perrillo was permitted to testify as to what happens to the brain when a concussion occurs, the effects of a concussion and his testing results. He was only precluded from testifying as to the events that caused the concussion because he did not have the requisite knowledge or expertise to provide those biomechanical opinions. The ruling in this case is not in conflict with *Frausto*. The trial court did not abuse its discretion when it ruled that Dr. Perrillo was only permitted to testify as to subject matters that were within his area of expertise.

C. Conclusion.

Dr. Perrillo was properly limited to testimony that was within his field of expertise. The Court did not err in denying Dr. Perrillo, a neuropsychologist, the right to testify as to biomechanical principals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Goetz Fick & Scruggs, P.L.L.C.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On September 21, 2017, I served the foregoing **RESPONDENT SANDER'S BRIEF AS TO MAIN AND REPLY** on the following parties via the method indicated:

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