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NO. 52863-1-II

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

**JENNIFER E. LINDSAY-SHINSATO and DOUGLAS T. SHINSATO, wife and
husband, and the marital community comprised thereof,**

Respondents,

vs.

**JEAN M. HERMAN and JOHN DOE HERMAN, wife and husband, and the
marital community thereof,**

Appellants.

**APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Shelly K. Speir, Judge**

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF ISSUES	3
IV. STATEMENT OF THE CASE.....	4
A. STATEMENT OF RELEVANT FACTS	4
B. STATEMENT OF PROCEDURE.....	4
1. Motions in Limine.....	5
2. Trial.....	6
3. Evidence Regarding Medical Causation.....	7
4. Evidence Regarding Earnings/Wage Loss.....	8
5. Jury Instructions.....	10
6. Verdict, Entry of Judgment and Amended Judgment, and Appeal	11
V. ARGUMENT.....	13
A. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF’S MOTION IN LIMINE L AND PRECLUDING DR. KLEIN FROM TESTIFYING ABOUT PLAINTIFF’S PRE-EXISTING DEGENERATIVE DISK DISEASE AS A CAUSE OF HER POST-ACCIDENT NECK SYMPTOMS	13
B. THE TRIAL COURT ERRED IN GIVING SUPPLEMENTAL INSTRUCTION NO. 12 WHICH RULED ON MEDICAL CAUSATION AS A MATTER OF LAW, UNFAIRLY EMPHASIZED PLAINTIFF’S CASE, AND WAS AN IMPERMISSIBLE COMMENT ON THE EVIDENCE	21

C.	THE TRIAL COURT’S REFUSAL TO GIVE MS. HERMAN’S PROPOSED INSTRUCTION NO. 10 WITH THE NATURAL PROGRESSION LANGUAGE DEPRIVED HER OF PRESENTING HER THEORY OF THE CASE TO THE JURY	25
VI.	CONCLUSION	27
APPENDIX A		
	Defendant’s Proposed Instruction No. 10 (CP 106)	
APPENDIX B		
	Court’s Instruction to Jury No. 8 (CP 137)	
APPENDIX C		
	Court’s Supplemental Instruction to Jury No. 12 (CP 135-26)	

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	26
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)	26
<i>Heitfeld v. Benevolent and Protective Order of Keglers</i> , 36 Wn.2d 685, 220 P.2d 655 (1950).....	23
<i>Hollins v. Zbaraschuk</i> , 200 Wn. App. 578, 402 P.3d 907 (2017), <i>rev. denied</i> , 189 Wn.2d 1042 (2018)	19
<i>Samuelson v. Freeman</i> , 75 Wn.2d 894, 454 P.2d 406 (1969)	21, 22
<i>State v. Gefeller</i> , 76 Wn. 2d. 449, 458 P.2d 17 (1969)	19
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	24
<i>State v. Jackson</i> , 83 Wash. 514, 145 P. 470 (1915).....	23, 24
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	24
<i>State v. Ra</i> , 144 Wn. App. 688, 175 P.3d 609, <i>rev. denied</i> , 164 Wn.2d 1016 (2008).....	23
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	24

Constitutions

CONST. art. IV, § 16	23
----------------------------	----

Other Authorities

WPI 30.17	13
WPI 30.18	1, 11, 13
WPI 30.18.01	11

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I. NATURE OF THE CASE

Appellant Herman was involved in a January 2012 motor vehicle accident with plaintiff Jennifer Lindsay-Shinsato (“plaintiff”). Plaintiff claimed permanent injuries from the accident which rendered her unable to work. Plaintiff claimed significant economic damages for her earnings loss. Ms. Herman admitted liability. She challenged the nature and extent of plaintiff’s accident injuries. Ms. Herman also challenged the amount of damages claimed.

The case was tried to a jury. Ms. Herman offered testimony from medical expert, Dr. Klein, that plaintiff’s post-accident neck pain was not accident related. Dr. Klein opined the neck pain was due to pre-existing disk degeneration. Plaintiff’s motion to prohibit this opinion was granted, although plaintiff opened the door to the subject.

Consistent with Dr. Klein’s opinion and her defense, Ms. Herman proposed jury instruction WPI 30.18 which included the statement that plaintiff was not entitled to recovery from any injury that was a result of natural progression of a pre-existing condition. The Court rejected the instruction.

Plaintiff asked the jury to award over \$800,000 in non-economic damages and over \$1.5 million in economic damages. Ms. Herman asked the jury to award \$20,000 in non-economic damages and \$28,644.22 in

economic damages. The jury awarded plaintiff \$481,916 in non-economic damages and \$210,132 in economic damages. The jury also awarded \$34,116 to plaintiff's husband for loss of consortium.

Without Dr. Klein's opinion and the proposed instruction, Ms. Herman was unable to present her case to the jury and argue her theory of the case to the jury. She was denied a fair trial. She asks this Court to reverse and remand for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting plaintiff's motion in limine L. (CP 114; RP 6-11).

2. The trial court erred in prohibiting defense medical expert Dr. Klein from testifying about plaintiff's pre-existing degenerative disk condition and that the post-accident neck pain was a natural progression of the pre-existing condition. (CP 114; RP 223-32; RP 495-99)

3. The trial court erred in giving supplemental instruction no. 12. (CP 126; RP 812)

4. The trial court erred in refusing to give Ms. Herman's proposed instruction no. 10. (CP 106; CP 137; RP 767)

5. The trial court erred in entering judgment on the jury's verdict. (CP 144-45, 221-23)

6. The trial court erred in entering the amended judgment on the verdict. (CP 256-62)

III. STATEMENT OF ISSUES

1. Did the trial court base its ruling on untenable grounds when it granted plaintiff's motion in limine L and prohibited Ms. Herman from presenting the expert testimony about plaintiff's pre-existing degenerative condition which error was prejudicial by denying Ms. Herman a fair trial? (Pertaining to Assignments of Error No. 1 and 2)

2. Did the trial court err in giving supplemental instruction no. 12 because the instruction decided medical causation as a matter of law, unduly emphasized plaintiff's theory of the case, and constituted a comment on the evidence? (Pertaining to Assignment of Error No. 3)

3. Did the trial court err in refusing to give Ms. Herman's proposed instruction no. 10 so the jury was not instructed that plaintiff was not entitled to damages for any injury that resulted from the natural progression of a pre-existing condition? (Pertaining to Assignment of Error No. 4)

4. Was Ms. Herman denied a fair trial when she was not permitted to present expert testimony that plaintiff's post-accident cervical condition was a natural progression of a pre-existing injury and was

deprived of her ability to present this theory to the jury? (Pertaining to Assignments of Error No. 1-6)

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

This lawsuit arises from a January 24, 2012, accident between plaintiff and defendant Ms. Herman. (CP 2) The accident occurred in Gig Harbor, Washington. (RP 666) Plaintiff, who was 62 years old at the time, was visiting from Hawaii. (CP 138; Ex. 35 at 17; Ex. 109 at 1) It was raining that day. (RP 666-67) Ms. Herman stopped at the stop sign. She looked but did not see plaintiff's vehicle. Ms. Herman pulled forward and hit the driver's side of plaintiff's vehicle. (CP 2; RP 666-67)

Plaintiff claimed it was a hit and run. (RP 686) Ms. Herman explained that she pulled to a parking lot where they waited for the police and exchanged information. (RP 667-69)

B. STATEMENT OF PROCEDURE.

On January 15, 2015, plaintiffs sued Ms. Herman alleging that the accident caused injuries to Jennifer Lindsay-Shinsato and a loss of consortium to Douglas Shinsato. (CP 1-4) Ms. Herman answered and admitted liability. (CP 5-7; RP 667) She denied the nature and extent of plaintiff's injuries. (CP 3-4, 6) The question of the nature and extent of injuries and damages was disputed. (CP 6)

1. Motions in Limine.

Prior to trial, plaintiffs filed motions in limine to prohibit reference to various issues at trial. (CP 15-25) Plaintiff also filed supplemental briefing in support of motions in limine regarding plaintiff's pre-existing conditions or prior injuries. (CP 21-22, 26-51)

Plaintiff asked the trial court to prohibit any mention of plaintiff's prior medical history unless three conditions were met: (1) the medical history relates directly to the accident injuries, (2) there is substantial evidence the areas were symptomatic at or near January 2012, and (3) there is competent medical testimony on the subject. (CP 26-27) Plaintiff argued that the prior medical condition is only relevant if Ms. Herman proved that the condition was symptomatic on or soon before the January 2012 accident. (CP 28) Plaintiff argued she had not had neck pain, shoulder pain, or cervicogenic headaches since 2010. (CP 29) The trial court granted plaintiff's motion in limine L. (CP 114)

At plaintiffs' request and over Ms. Herman's objection, the trial court ruled that portions of Ms. Herman's deposition cross-examination of Dr. Spanier be omitted and not played to the jury. (RP 220, 227, 229, 231) Plaintiffs argued the questions and answers addressed preexisting injuries. (RP 220-22) Ms. Herman's counsel had asked Dr. Spanier if it was his testimony that the disk herniation was related to the accident and he

answered, yes the disk protrusion. (Ex. 35 at 90:1-4) Dr. Spanier was asked whether Dr. Graham who treated plaintiff in April 2016 had concluded that the disk protrusions were related to the accident and Dr. Spanier testified Dr. Graham did not make that finding. (Ex. 35 at 90:5-24) Ms. Herman's counsel also asked Dr. Spanier whether the C4-C5 and C5-6 disk protrusions were aggravated by the accident and he answered yes. (Ex. 35 at 95:1-14) These portions of Dr. Spanier's testimony (page 90, lines 1 to 24 and page 95, lines 1-14) were not played to the jury. (RP 229, 231)

2. Trial.

A jury trial was held December 3, 4, 5, 6, 10, and 11, 2018. (CP 146-59) Plaintiffs presented testimony from themselves¹, their daughter Alison Shinsato (RP 76, 78; Ex. 34), and their son Ian Shinsato (RP 110-37) about the accident and its claimed effects; Dr. David Spanier (RP 295, 338, 346, 356, 578-611; Ex. 35) who reviewed medical records and provided an opinion about plaintiff's treatment; and economist Christina Tapia (RP 356-472) and executive search firm owner Waichiro Hayashi (RP 298-336) who testified regarding plaintiffs' claimed executive recruiting income loss. (CP 53, 124)

¹ Douglas Shinsato RP 79-107, 138-201, 233-94; Jennifer Lindsay-Shinsato RP 612-59, 671-705, 784-808.

Ms. Herman presented testimony from herself about the accident (RP 663-71); Dr. Steven Klein (RP 474-558), a neurosurgeon who reviewed medical records and provided an opinion about plaintiff's treatment; and Certified Public Accountant William Partin (RP 709-57, 768-84) who provided an opinion regarding plaintiffs' economic damages claims. (CP 124)

3. Evidence Regarding Medical Causation.

Dr. Daniel Spanier, a physiatrist, testified for plaintiff. (RP 295, 338, 346, 356, 578-611; Ex. 35 at 7) Dr. Spanier did not treat plaintiff; he was a forensic expert who reviewed plaintiff's medical records and examined her on December 5, 2016. (Ex. 35 at 10-13) Dr. Spanier saw plaintiff only once—on the day of the examination. (Ex. 35 at 97) He testified that plaintiff's accident related injuries were cervicogenic headaches, cervical and cervicothoracic sprain/strain, C4-5 and C5-6 disk protrusions, left shoulder sprain, mild AC joint degenerative change, left supraspinatus partial thickness tear and tendinitis, upper extremity paresthesias possibly due to cervical radiculopathy versus thoracic outlet syndrome, and cervical and thoracic myofascial pain. (Ex. 35 at 20-21) He recommended that she have medial branch blocks to treat her neck pain. (Ex. 35 at 73-76) Dr. Spanier testified that without further care, plaintiff's cervical pain may get worse over time. (Ex. 35 at 56)

Dr. Steven Klein, a neurosurgeon, testified for the defense. (RP 474-558) Dr. Klein started his medical practice in 1990. (RP 476) He reviewed twelve volumes of Ms. Shinsato's medical records. (RP 480) Dr. Klein and Dr. Bede, an orthopedist, examined her on December 2, 2016. (RP 485; Ex. 109) Based on the medical records review and examination, Dr. Klein concluded that Ms. Shinsato had the following conditions related to the January 2012 accident: cervical strain or neck pain, lumbar strain, contusion to her left shoulder, and contusion to the left side of her head. (RP 492-93) Dr. Klein testified that the neck pain resolved within four to six weeks. (RP 491, 522)

4. Evidence Regarding Earnings/Wage Loss.

Christine Tapia, Ph.D., an economic expert, testified for plaintiffs. (RP 356-472) She was asked to analyze records and testimony and evaluate the lost earnings of the Shinsato's executive recruiting business. (RP 364) Dr. Tapia's analysis is contained in Exhibit 36. (RP 362-63) Dr. Tapia concluded their company would have earned \$60,400 in revenue for each placement. (RP 376) She testified her analysis was conservative. (RP 377) Dr. Tapia concluded the Shinsatos would have earned \$1.7 million by operating their executive search business through to 2021. (RP 390)

Mr. Shinsato testified extensively about the plaintiffs' executive search business. Mr. Shinsato testified that plaintiff was the researcher for

the business. (RP 98, 106) He testified that after the January 2012 accident, plaintiff was unable to continue doing research because of the pain from her injuries. (RP 148, 199) Mr. Shinsato testified that the business suffered financially. (RP 291-92) He testified that a few years before the accident their income was good. They then started using their cash to build their recruiting/placement business and were in a break-even or negative position. Their net worth was their house. (RP 291) He estimated their net income for 2018 at \$25,000. (RP 291) He testified that the accident adversely affected their future income. They were building their business and had not yet generated a profit. They anticipated profits in the future. (RP 291-92)

Waichiro Hayashi testified by Skype from Tokyo. (RP 295-336) Mr. Hayashi runs Hayashi Partners, an executive search firm in Japan. (RP 298) He testified that a good researcher is fiscally important to the business. (RP 309-11) Mr. Hayashi testified that he believed Mr. Shinsato had the skills and experience to be successful in the Japanese and Asia Pacific market. (RP 314-15) He believed a start-up executive search and placement business could be profitable in one to two years. (RP 315-16) Mr. Hayashi believed that a firm with one researcher should be able to complete four to six searches (i.e. placements) annually. (RP 317-18) Mr. Hayashi testified that Dr. Tapia's projections for future earnings were very conservative. (RP

318-19) Dr. Tapia projected \$194,728 annually for four placements and \$146,046 for three placements. (RP 319-20) Mr. Hayashi acknowledged the executive search business is volatile. (RP 330) He also noted that one of the reasons the Shinsato's business suffered was it had to implement work from a United States firm to Japan and Asia. (RP 323-24)

William Partin, a forensic economic expert, testified for Ms. Herman. (RP 709-57, 768-84) Mr. Partin reviewed and analyzed thousands of pages of documents regarding plaintiffs' income and business. (RP 712-13) Mr. Partin testified that the records demonstrated that prior to 2012, the plaintiffs had substantial losses. (RP 718) After the accident, the plaintiffs' total income was higher than before the accident. (RP 718) Mr. Partin disagreed with Dr. Tapia's opinions because she did not consider any pre-accident activity in her projections of future income. (RP 722, RP 733-38) He opined that plaintiffs did not have any economic loss that was related to the January 2012 accident. (RP 783-84)

5. Jury Instructions.

Plaintiffs submitted nine proposed jury instructions and a verdict form. (CP 61-86). Defendant submitted 12 proposed jury instructions. (CP 87-111)

The court gave 11 instructions to the jury (CP 127-42). The court also gave the jury a supplemental instruction No. 12, which stated, "If you

find that Jennifer Shinsato suffered pain or disability from her cervical disc protrusions you should consider this pain or disability along with any other injuries, if any, proximately cause by the occurrence.” (CP 125-26; RP 810, 812).

The court’s instruction to the jury No. 8 omitted the language in defendant’s proposed instruction No. 10, which stated: “There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.” (CP 106, 137) This language was based on WPI 30.18 and defendant objected to its omission: “my only . . . exception is that of course there is the natural progression portion of the jury instruction on 30.18.01 and (e) are similar. Nothing further. Otherwise I accept.” (RP 767: 16-19) A copy of defendant’s proposed instruction No. 10 is attached hereto as Appendix A. The court’s instruction No. 8 is attached hereto as Appendix B. A copy of the court’s supplemental instruction No. 12 is attached hereto as Appendix C.

6. Verdict, Entry of Judgment and Amended Judgment, and Appeal.

Plaintiffs asked the jury to award over \$800,000 in non-economic damages and over \$1.5 million in economic damages. (RP 819-21, 834-35)

Ms. Herman asked the jury to award \$20,000 in non-economic damages and \$28,644.22 in economic damages. (RP 833)

On December 11, 2018, the jury returned a verdict awarding 1) plaintiff Jennifer Lindsay-Shinsato \$210,132 in past and future economic damages and \$481,916 for past and future noneconomic damages, and 2) plaintiff Douglas Shinsato \$34,116 for past and future loss of consortium. (CP 143)

Judgment on the verdict of \$726,164 was entered on December 11, 2018. The Judgment granted additional time for an award of costs. (CP 144-45)

Plaintiffs filed a request for statutory fees and costs of \$8,142.13. (CP 164-68, 169-209). Defendant objected to a portion of the requested costs. (CP 211-13) and plaintiff replied (CP 210, 214-16). On January 7, 2019, the superior court entered Judgment on the verdict and included an award to plaintiffs of statutory fees and costs of \$3,817.30, for a total of \$729,981.03. (CP 221-23)

Plaintiffs received permission from this Court to enter an Amended Judgment to correct the interest rate on the Judgment. (CP 242-55, 256-62) The superior court entered the Amended Judgment on June 3, 2019. (CP 256-62)

Ms. Herman timely filed a Notice of Appeal of the Judgment, an Amended Notice of Appeal of the Judgment with statutory fees and costs award, and a second Amended Notice of Appeal of the Amended Judgment. (CP 217-20, 224-32, 263-78)

V. ARGUMENT

A. **THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION IN LIMINE L AND PRECLUDING DR. KLEIN FROM TESTIFYING ABOUT PLAINTIFF'S PRE-EXISTING DEGENERATIVE DISK DISEASE AS A CAUSE OF HER POST-ACCIDENT NECK SYMPTOMS.**

The trial court erred in granting plaintiff's motion in limine L regarding evidence of unrelated injuries or medical treatment. (CP 114) Plaintiff moved to prohibit any reference to a prior physical condition unless it was symptomatic at the time of injury or was a latent pre-existing condition that was made active by the injury. (CP 26-31) Plaintiffs also submitted supplemental briefing on pre-existing conditions. Plaintiffs argued that WPI 30.17 and 30.18 require proof that the pre-existing condition was symptomatic. Plaintiffs did not address the last and bracketed paragraph of WPI 30.18:

There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.

The court granted the motion and prohibited defendant from introducing evidence of plaintiff's pre-existing degenerative conditions.

Dr. Klein (defense testifying doctor) and Dr. Bede (non-testifying defense doctor) opined in their report that plaintiff's complaints were due to pre-existing degenerative disk disease and facet arthropathy at C4-C5 and C5-C6. (Ex. 109 at 6-7) They opined that plaintiff sustained a soft tissue cervical strain and contusion of the left side of her head and her left shoulder in the January 24, 2012 accident. They endorsed medical treatment for a period of six weeks. (Ex. 109 at 6-7)

Dr. Klein was prohibited from providing his explanation of the cause of plaintiff's ongoing complaints. (CP 114; RP 499) Dr. Spanier testified that plaintiff had protruding cervical disks prior the accident. (Ex. 35 at 40-41, 43)

Dr. Klein was asked about Dr. Spanier's report. (RP 495) Dr. Klein read a portion from the report which states in part:

“The following diagnoses were likely quiescent and lit up by the subject collision on a more-probable-than-not-basis. Cervicogenic headaches, cervical and cervicothoracic strain/sprain, and segmental dysfunction” at . . . C4-5 and C5-6 “and segmental dysfunction, C4-5 and C5-6 disk protrusion.”

(RP 495) Plaintiffs' counsel asked to be heard outside the jury. (RP 496) Plaintiffs argued that Dr. Klein's reading from Dr. Spanier's report violated the order on motion in limine. Plaintiffs' counsel indicated he might move for a mistrial, then moved for a mistrial, and later withdrew the motion for

mistrial. (RP 497-98, 502, 510) Ms. Herman pointed out that the jury had already heard the phrase “lit up” because Dr. Spanier had used the term. (RP 497-98)

The court explained her ruling that there would be no discussion of preexisting conditions. (RP 499) The court indicated she expected the parties to follow the order. *Id.* Ms. Herman’s counsel began to ask a question that was prefaced as: “[t]here was discussion as to whether or not there was some disk protrusions at C4-5 and C5-6 that were related to the—causally related to the collision.” (RP 501) Plaintiffs objected. (CP 502) Plaintiffs’ counsel argued that discussion of preexisting conditions violated the order on motion in limine. (RP 502) Ms. Herman’s counsel argued that plaintiffs had elicited the same testimony from Dr. Spanier by asking whether the disk protrusions were related to the accident. (RP 503) Ms. Herman’s counsel argued that because Dr. Spanier was permitted to discuss the subject, Dr. Klein should also be allowed to discuss it. (RP 503-04) At page 43 of Dr. Spanier’s deposition, the following was stated and played by video to the jury:

Q: Okay. So you found protrusions and you relate those to the --- to the collision?

A: Potentially so, yes.

(Ex. 35 at 43:4-6) Plaintiffs’ counsel acknowledged that the testimony was inadvertently kept in Dr. Spanier’s video deposition testimony. (RP 507)

Ms. Herman's counsel made the following offer of proof with testimony from Dr. Klein. (RP 508-09)

Q: Are they [the disk protrusions] related to the collision
...

A: No, they're not related to the collision, because a third of the public has these things and you can't correlate it with pain. It's such a common, ubiquitous finding that nobody can assume this is a causation of pain. There's no — It just doesn't work like that, or else all of us here would have pain.

(RP 508-09) The court ruled Dr. Klein could be asked that question and give that answer. (RP 509) Dr. Klein provided his testimony. (RP 510-11)

Dr. Klein explained why he concluded there was no thoracic outlet syndrome. (RP 513) He explained why he concluded the cervicogenic headaches were not related to the accident. (RP 514) Dr. Klein testified that it was significant that there were no emergency services provided to plaintiff at the accident and that she did not seek treatment until six days after the accident. (RP 523) Dr. Klein disagreed with Dr. Spanier's testimony that a physician can objectively assess spasms in the facet joints. (RP 525-26) A cervical spinal x-ray done on July 24, 2012---six months after the accident---was normal. (RP 546) Plaintiff's ongoing symptoms are not related to the accident. (RP 546-47)

The jury asked Dr. Klein the following question: "The Plaintiffs' doctor has offered a very different expert opinion about Ms. Shinsato's

injuries. How do you explain this wide difference of opinion between experts all purporting to supply the same reasonable degree of medical certainty and all sworn to tell the truth?" (RP 549) Dr. Klein answered:

That's an excellent question. There's some things in medicine that really are diverse. This is the way I've seen it. This is my experience. I can't talk to anybody else's. But I can say some things are wrong when I see them and they're directly against my – my experience and training. I'm going to stick up for it, you know.

And it's not Washington, D.C. We don't have to hate each other. But it's --- That's what it comes down to. I – I see a lot of things that I disagree with. Usually they're fine. But if you're asked to give an opinion, you have got to give your opinion. And I feel I can back mine up. The --- And ultimately it's you guys that decide. I mean, that's probably harder than what I do. It's definitely harder than what I do.

(RP 549-50)

After playing Dr. Spanier's video, plaintiffs also called Dr. Spanier to testify live at trial. (RP 578) Dr. Spanier called "preposterous" Dr. Klein's opinion that plaintiff's neck pain resolved six weeks after the accident. (RP 581) Dr. Spanier disagreed with Dr. Klein's opinion that there were no objective findings on examination. (RP 582-83) Dr. Spanier explained his other disagreement with Dr. Klein's opinions. (RP 584-88) Nothing in Dr. Klein's testimony altered Dr. Spanier's opinion. (RP 592) Dr. Spanier restated his opinion that plaintiff suffered a significant injury to her neck and upper extremity, her treatment was reasonable, her symptoms

persist, and she will likely have pain and disability for the foreseeable future. (RP 592-93)

The jury asked Dr. Spanier: “Do you think the defense doctors can have a reasonable degree of medical certainty for their opinions?” and “How do you account for this wide difference among experts all sworn to tell the truth?” (RP 597-98) Dr. Spanier answered that each was providing their medical opinion. He believed the opinions are different because their training is different. (RP 598)

The jury asked Dr. Spanier:

Much of Ms. Shinsato’s alleged loss results from her inability to engage in strenuous physical activity. To what extent should we discount the car crash as the cause of this loss on the grounds that her advancing age would have precluded those activities?

(RP 599) Dr. Spanier answered

Sure, that's a very fair question. All of us we're getting older. Father Time is going to get us all. It's true. What I look at is how was Ms. Shinsato doing immediately prior to the subject collision and since. And it was obviously a precipitous change in her performance.

So, you know, at some point, yes, we're all going to have degeneration if we live long enough that may preclude us from doing a variety of things. But I believe the subject collision was the proximate cause that changed everything for her and sort of set her on a much more steep trajectory for decline. Would she eventually have got there? It's possible. But I can tell you I've seen patients well advanced of Ms. Shinsato's age who are doing quite well and doing everything they want to do. I've got old veteran's at the VA hiking Mount Rainier, golfing all the time, still very active

and vibrant. Just because we have a few grey hairs doesn't mean we have to throw in the towel and give up all.

I may have said it is in my video, the radiologist will look at these x-rays or MRIs and they'll diagnose things like degenerative disc disease. It's not a disease; it's not catching. It's like grey hair; we're all going to get this. The presence of a little wear and tear does not dictate the absence of function or the presence of pain. We have to treat the patient and not just the picture.

(RP 599-600)

The trial court's ruling granting plaintiffs' motion in limine L and prohibiting Dr. Klein from explaining the significance of the pre-existing degenerative condition was not tenable because plaintiff opened the door to the subject. When a party opens the door to a subject, the other party should be permitted to introduce evidence on the subject. *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 586-87, 402 P.3d 907 (2017), *rev. denied*, 189 Wn.2d 1042 (2018). The Washington Supreme Court has explained:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wn. 2d. 449, 455, 458 P.2d 17 (1969).

Here plaintiffs were permitted to bring in testimony about the pre-accident protruding cervical disks. Dr. Spanier testified about it in his

recorded video testimony. (Ex. 35 at 21) The jury heard Dr. Spanier testify that the disk protrusions were related to the accident:

Q: Okay. So you found protrusions and you relate those to the --- to the collision?

A: Potentially so, yes.

(Ex. 35 at 43:4-6)

Then the subject of degenerative conditions was referenced again by Dr. Spanier in his live testimony. (RP 600) Ms. Herman was not, however, allowed to have her medical expert testify that plaintiff's neck pain was due to the natural aging process that was evident in plaintiff's pre-accident cervical MRI. (Ex. 109, pages 6-7) Once the subject was brought up by plaintiff, Ms. Herman was deprived of the opportunity to address it with Dr. Spanier or with Dr. Klein. The exclusion of this subject was prejudicial error because Ms. Herman was not allowed to present her defense that plaintiff's post-accident neck condition was a natural progression of her pre-accident cervical condition. The jury never heard an explanation that plaintiff's pre-accident cervical condition could naturally progress to lead to the conditions she complained about after the accident.

The size of the jury's award, both specials and generals, demonstrates that they believed that all of plaintiff's medical conditions were related to the accident. The jury was also interested in this subject because a juror question asked Dr. Spanier about why his opinion differed

so starkly from Dr. Klein's opinion. (RP 597-98) Ms. Herman was deprived of a fair trial. The jury asked Dr. Klein a similar question. (RP 549) Dr. Klein was not able to provide a complete answer because he was prohibited from giving his full opinion.

B. THE TRIAL COURT ERRED IN GIVING SUPPLEMENTAL INSTRUCTION NO. 12 WHICH RULED ON MEDICAL CAUSATION AS A MATTER OF LAW, UNFAIRLY EMPHASIZED PLAINTIFF'S CASE, AND WAS AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

The Court erred in giving supplemental instruction number 12 which stated:

If you find that Jennifer Shinsato suffered pain or disability from her cervical disc protrusions you should consider this pain or disability along with any other injures, if any, proximately caused by the occurrence.

(CP 126; RP 812)

The supplemental instruction effectively decided medical causation as a matter of law. The jury was told that if plaintiff had pain or disability from cervical disk protrusions the pain or disability was proximately caused by the accident.

The supplemental instruction also placed undue emphasis on plaintiff's theory of the case. When a court repetitiously covers a point of law in favor of one party, the other party is deprived of a fair trial. *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969). In *Samuelson v. Freeman*, the Washington Supreme Court ruled:

When the instructions as a whole so repetitiously cover a point of law or the application of a rule as to grossly outweigh their total effect on one side and thereby generate an extreme emphasis in favor of one party to the explicit detriment of the other party, it is, we think, error-even though each instruction considered separately might be essentially correct. Thus, if the instructions on a given point or proposition are so repetitious and overlapping as to make them emphatically favorable to one party, the other party has been deprived of a fair trial.

75 Wn. 2d at 897. *Samuelson* was a medical malpractice action. The jury was given six instructions about the limitations on the physician's liability. The Supreme Court noted that the instructions were individually correct, yet when considered as a whole, the instructions overemphasized the physician's theory of the case and "became argumentative in character." 75 Wn.2d at 896-97.

While our case does not involve six separate instructions on the same subject, instruction no. 12 accompanied with the exclusion of the defense medical testimony that plaintiff's post-accident neck pain was due to the natural aging process overemphasized plaintiff's theory. And Ms. Herman was deprived of the opportunity to present evidence and argument to the jury that plaintiff's post-accident symptoms were unrelated to the accident. The jury questioned both Dr. Klein and Dr. Spanier about the reasons for the stark differences in their opinions. Dr. Klein was prohibited from presenting the full explanation because he could not testify that the

neck symptoms were the natural progression of the pre-accident protruding cervical disks.

Most significantly, instruction No. 12 was an impermissible comment on the evidence. As a basic premise, “[a] judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Ra*, 144 Wn. App. 688, 705, 175 P.3d 609, *rev. denied*, 164 Wn.2d 1016 (2008). In Washington, a trial judge is prohibited from commenting on the evidence. CONST. art. IV, § 16 provides that, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Washington courts have noted the purpose of this provision:

The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted. The jury is the sole judge of the credibility and weight of the evidence, and courts should be extremely careful of any comments made in the presence of the jury, because such comments may have great influence upon the final determination of the issues.

Heitfeld v. Benevolent and Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655 (1950) (emphasis added). The reasoning behind this prohibition has long been a part of Washington jurisprudence:

Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined

to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who may have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

State v. Jackson, 83 Wash. 514, 523, 145 P. 470 (1915) (emphasis added).

Whether or not the trial judge tainted the proceedings by commenting on the evidence is an issue of law that is reviewed *de novo*. See *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (*de novo* standard of review used where alleged improper comments on the evidence occurred as part of the jury instructions). A court need not overtly express an opinion to the jury. A court's statement may constitute a comment on the evidence if its attitude towards a disputed issue is merely **inferable** from its statements. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is sufficient to constitute a comment on the evidence if a judge's personal feelings are merely **implied**. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

Here the court's instruction told the jury that if it concludes plaintiff had pain from her cervical disk protrusions, the pain was proximately caused by the occurrence. (CP 125-26) The trial court was attempting to craft a solution to what was perceived as a violation of the motion in limine about pre-existing conditions. (RP 571-75)

There was not, however, any violation of the motion by Ms. Herman. Plaintiffs were the ones who introduced the evidence about pre-existing disk protrusions being related to the accident. (Ex. 35 at 43:4-6) Meanwhile, Ms. Herman was not permitted to present expert testimony explaining why the disk protrusions were not related to the accident and that any pain from the disk protrusions were not accident related but were the result of the natural progression of the aging process. Thus, instruction no. 12 was effectively a comment on the evidence. Ms. Herman was deprived of her right to a fair trial.

C. THE TRIAL COURT'S REFUSAL TO GIVE MS. HERMAN'S PROPOSED INSTRUCTION NO. 10 WITH THE NATURAL PROGRESSION LANGUAGE DEPRIVED HER OF PRESENTING HER THEORY OF THE CASE TO THE JURY.

Ms. Herman was not permitted to present her theory of the case to the jury. Dr. Klein was not permitted to explain the basis for his conclusion that plaintiff's prolonged post-accident neck symptoms were not related to any injury in the accident. The symptoms were the result of the natural

progression of her pre-accident condition—the degenerative condition in her cervical spine. (Ex. 109 at 6-7) The omitted natural progression sentence from proposed instruction no. 10 precluded Ms. Herman from arguing her theory of the case to the jury and made the instructions misleading.

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). The jury instructions here were not sufficient because they did not allow Ms. Herman to argue her defense—that plaintiff’s post-accident neck symptoms were the result of the natural progression of her pre-accident condition and not any injury from the accident.

Plaintiffs might argue that Ms. Herman did get her theory of the case to the jury because the jury heard about protruding cervical disks and heard testimony about degenerative conditions generally. Hearing the evidence is not the equal to presenting the theory of the case to the jury. The instructions tell the jury what law they are to apply. Evidence that is only partially developed and that is not linked to any rule of law does not provide a party, such as Ms. Herman, the ability to present her theory of the case to

the jury. The rejection of Ms. Herman's proposed instruction no. 10 and the court's instruction no. 12 were misleading and an abuse of discretion. Ms. Herman asks this Court to reverse the judgment and amended judgment and remand for a new trial.

VI. CONCLUSION

Ms. Herman was deprived of a fair trial when the Court restricted the expert testimony on medical causation, instructed the jury as a matter of law on medical causation, and refused to instruct the jury that plaintiff was not entitled to damages for the natural progression of pre-existing conditions. Ms. Herman respectfully requests that this Court reverse and remand the case for a new trial.

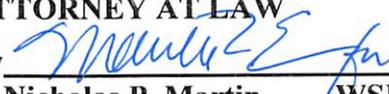
DATED this 2nd day of July, 2019.

REED McCLURE

By 

Marilee C. Erickson WSBA #16144
Attorneys for Appellants

ATTORNEY AT LAW

By 

Nicholas P. Martin WSBA #41863
Attorneys for Appellants

DEFENDANT'S PROPOSED INSTRUCTION NO. 10

If you find that:

(1) before this occurrence, the plaintiff had a bodily condition that was not causing pain or disability; and

(2) because of this occurrence, the pre-existing condition was lighted up or made active,

then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.

WPI 30.18 Previous Infirm Condition

APPENDIX A

106

INSTRUCTION NO. 8

If you find that:

(1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and

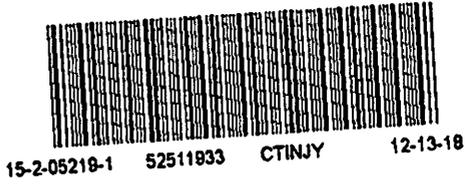
(2) the condition made the plaintiff more susceptible to injury than a person in normal health,

then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

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2/14/2018



FILED
DEPT 5
IN OPEN COURT

DEC 11 2018

PIERCE COUNTY Clerk
By [Signature]
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER E LINDSAY SHINSATO,
DOUGLAS T SHINSATO
Plaintiff(s),

Case No. 15-2-05219-1

vs.

JEAN M HERMAN,
Defendant(s).

COURT'S SUPPLEMENTAL INSTRUCTION NO. 12 TO THE JURY

DATED this 11th day of December, 2018.

[Signature]
JUDGE SHELLY K. SPEIR

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INSTRUCTION NO. 12

If you find that Jennifer Shinsato suffered pain or disability from her cervical disc protrusions you should consider this pain or disability along with any other injuries, if any, proximately caused by the occurrence.

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3/14/2018

FILED
Court of Appeals
Division II
State of Washington
7/2/2019 1:21 PM

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

JENNIFER E. LINDSAY-
SHINSATO and DOUGLAS T.
SHINSATO, wife and husband, and
the marital community comprised
thereof,

Respondents,

vs.

JEAN M. HERMAN and JOHN DOE
HERMAN, wife and husband, and the
marital community thereof,

Appellants.

No. 52863-1-II

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on July 2, 2019, affiant served copies of the following documents: **Brief of Appellants** and this **Affidavit of Service** on counsel below by e-service via the Washington State Appellate Court's

Electronic Filing Portal:

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REED MCCLURE

July 02, 2019 - 1:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52863-1
Appellate Court Case Title: Jennifer E. Lindsay-Shinsato, et al., Resps v. Jean M. Herman, et al., Apps
Superior Court Case Number: 15-2-05219-1

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