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Pierce County Superior Court Cause No. 15-2-05219-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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

Plaintiffs-Respondents,

vs.

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

Defendants-Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiffs-Respondents Jennifer E. Lindsay-Shinsato and Douglas T. Shinsato submit the following response to the Brief of Appellants filed on behalf of Defendants-Appellants Jean M. Herman and “John Doe” Herman, her spouse (“Herman”).

On January 24, 2012, Jennifer Lindsay-Shinsato (“Shinsato”) was injured in a motor vehicle collision caused by Jean Herman (“Herman”). As a result of the collision, she suffered severe and life-changing injuries that required her to obtain significant medical treatment, affected her ability to work, enjoy activities with her family, and perform normal activities of daily living without pain or difficulty. *See* RP RP 110-201, 233-94, 578-705, 784-808; Exs. 34-35.

Herman admitted liability for the collision, but denied the nature and extent of Shinsato’s injuries. The case was tried to a jury, and the jury returned a verdict in favor of Shinsato. Herman appeals the verdict on grounds that its medical expert witness, Dr. Steven Klein, was not allowed to testify that Shinsato’s injuries were caused by natural progression of non-symptomatic pre-existing cervical disk protrusions at two levels of her cervical spine, sometimes described as “degenerative disk disease,” which is the result of natural aging processes. Herman’s appeal lacks merit because Dr. Klein admitted he could not correlate Shinsato’s cervical disk

protrusions with any of her symptoms, *see* RP 508:17-509:1 & 510:17-511:22; an opinion he shared with Shinsato's expert medical witness, Dr. David Spanier, *see* Ex. 35, at 107:5-110:10. This Court should affirm the judgment entered upon the jury's verdict.

II. RESTATEMENT OF ISSUES

1. Did Herman's expert witness, Dr. Steven Klein, opine that Shinsato's post-collision symptoms were the natural progression of her non-symptomatic pre-existing cervical disk protrusions, as Herman claims in her opening brief? *See* Herman Br., at 1-3, 13-14, 19-23 & 25-26. Or, did Dr. Klein admit that he could not determine whether her symptoms had any correlation with, let alone were a natural progression of, her non-symptomatic pre-existing condition, RP 508:17-509:1 & 510:17-511:22? (Assignments of Error 1, 2, 4, 5 & 6.)
2. Did the superior court prohibit Dr. Klein from providing his explanation of the cause of Shinsato's post-collision symptoms, as Herman claims in her opening brief? *See* Herman Br., at 1-3, 13-14, 19-23 & 25-26. Or, did the court allow him to testify on the subject, but he could not determine whether her symptoms had any correlation with her non-symptomatic pre-existing condition, RP 508:17-509:1 & 510:17-511:22? (Assignments of Error 1, 2, 4, 5 & 6.)
3. Did the superior court abuse its discretion in granting Shinsato's motion to exclude evidence of unrelated injuries and medical treatment when:
 - a. Herman's lawyer admitted there was no evidence that Shinsato had any symptomatic pre-existing conditions for more than a year before the collision, RP 7:2-10:18; and

- b. Herman's expert admitted he could not determine whether Shinsato's post-collision symptoms had any correlation with her non-symptomatic cervical disk protrusions, RP 508:17-509:1 & 510:17-511:22?

(Assignments of Error 1, 2, 5 & 6.)

- 4. Did the superior court abuse its discretion in declining to instruct the jury regarding natural progression of a pre-existing condition when Herman's expert admitted that he could not determine whether Shinsato's post-collision symptoms were a natural progression of her non-symptomatic pre-existing condition, RP 508:17-509:1 & 510:17-511:22. (Assignments of Error 2, 4, 5 & 6.)
- 5. In reviewing whether there is sufficient evidence to instruct the jury regarding natural progression of a pre-existing condition, may the appellate court consider a report that:
 - a. Was not offered or admitted into evidence, nor submitted as an offer of proof;
 - b. Contains inconsistent statements regarding the alleged natural progression, and disclaims any intent to "comment on the natural history of conditions, unrelated to the subject collision," Ex. 109, at 8;
 - c. Was jointly authored by two physicians, only one of whom testified, and it is unknown whether the testifying physician was responsible for the alleged natural progression opinions; and
 - d. The sole testifying physician admitted that he could not determine whether Shinsato's post-collision symptoms were a natural progression of her non-symptomatic pre-existing condition, RP 508:17-509:1 & 510:17-511:22.

(Assignments of Error 1, 2, 4, 5 & 6.)

- 6. Did the superior court abuse its discretion in instructing the jury that it should "consider" pain or disability resulting from Shinsato's non-symptomatic cervical disk protrusions, "if any," that was proximately caused by the collision when:

- a. The superior court modified the instruction to account for Herman’s objection, RP 572:8-20 & 573:15-18; and Herman did not otherwise object to the instruction, RP 767:15-19; and
- b. The instruction remedied Herman’s improper attempts to interject Shinsato’s non-symptomatic pre-existing cervical disk protrusions into the case?

(Assignments of Error 3, 5 & 6.)

III. RESTATEMENT OF THE CASE

A. Motion in Limine “L”.

Herman assigns error to the superior court order granting Shinsato’s Motion in Limine “L”. *See* Herman Br., at 2 (Assignment 1). The motion in limine sought to exclude evidence of unrelated injuries or medical treatment, including non-symptomatic pre-existing conditions, as follows:

Any evidence or reference to Plaintiff’s prior physical health should not be permitted unless (a) such condition was symptomatic at the time of injury, or was (b) a latent pre-existing condition that was made active by the injury. *Bennett v. Messick*, 76 Wn.2d 474, 457 P.2d 609 (1969); *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 315 P.2d 295 (1957); *Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 250 P.2d 518 (1952). Please see Supplemental Briefing on Pre-existing Conditions.

CP 21-22 (citations in original).

In the supplemental briefing referenced in the motion, Shinsato specifically sought to exclude evidence of non-symptomatic pre-existing degenerative disk disease associated with natural aging processes—i.e., cervical disk protrusions—along with any other alleged non-symptomatic

pre-existing conditions. *See* CP 30-31. Shinsato explained that she lived a very active lifestyle and was not experiencing any symptomatic conditions when she was injured in the collision caused by Herman. *See* CP 26-31. She attached medical records to the supplemental briefing, showing that last record of any pre-existing symptoms, a problem with her left shoulder known as adhesive capsulitis,¹ was on December 1, 2010, more than a year before the collision with Herman, which occurred on January 24, 2012. CP 38. The last record of any neck pain, which was related to the adhesive capsulitis, was on April 14, 2010, more than 1 ½ years before the collision. CP 46. The last record of any headaches, also related to the adhesive capsulitis, was on December 10, 2009, more than 2 years before the collision. CP 33. Shinsato pointed out that Herman’s expert witnesses were not able to not attribute any of her symptoms after the collision to any pre-existing conditions. CP 30-31. Herman did not file a response to Motion in Limine “L” or Shinsato’s supplemental briefing.

At the pretrial hearing on the parties’ motions in limine, the following colloquy occurred regarding Shinsato’s Motion in Limine “L”:

THE COURT: All right. I've read the briefing on preexisting conditions, and so I just assumed that the parties would want to put something on the record on this one.

¹ Shinsato’s adhesive capsulitis was not attributed to her cervical disk protrusions. *See* CP 33, 38 & 46.

[Counsel for Shinsato]: Yes, thank you, Your Honor. I briefed it, gave a supplemental brief regarding preexisting injuries. This is an issue that comes up a lot, and basically and I have fought this for a long time, and I'm happy about what the law has done with it. Preexisting injuries, especially the insidious sounding degenerative disk disease. Everybody has it. Everybody in this courtroom has degenerative disk disease, and juries don't understand it.

I remember once I had a voir dire with a panel of 40, and I happened to have Dr. Andrew Cole on the jury panel. I asked the jury who here thinks they have degenerative disk disease and nobody except Dr. Cole put up his hand, and we were able to explain it that way. But it's something that even with this explanation and the argument and back and forth that they just latch on to and they can't let go of it.

That's why [WPI 30.17 and 30.18] say that if it was dormant and it was asymptomatic even if it's lighting up, you don't get that instruction unless it was symptomatic, and that's why our motion. If you would like me to go through it, I think we provided the medical records. The last time there was any mention of anything that might possibly be related to the injuries we're asking for compensation for here was December of 2010, and this accident happened in January of 2012. So it's a little over a year, and in that last entry she said free to go and come back if there's any problems; resolved. No further problem.

What she had was adhesive capsulitis in her shoulder, and it was manipulated under anesthesia, and she recovered, and that's what the records show. That refers pain to the neck, and it caused some, what we would call cervicogenic headaches because of that. But those were gone. She hadn't had any symptoms for over a year, and that's why our motion.

THE COURT: Response?

[Counsel for Herman]: *Your Honor, I guess I would say I don't have a record to provide to the Court beyond December 1, 2010*, but what I will indicate is in that chart note, which is the plaintiff's brief, I think page 11 it's numbered as, is that at that time she was still dealing with the left shoulder capsulitis, and at that point had actually obtained a Figure 8, I guess, brace to assist with her dorsal

scapular neuropathy. This is some of the same things that she was receiving care for after the accident, and there's no indication that she had stopped using that brace or that she had stopped as this indicates taking Mobic and/or Celebrex that she had been provided in that. So I guess the point being that just because she was not going into the doctor, even if the condition is stable, that doesn't mean that it's asymptomatic.

At that, I guess I would state that prior to this there are multiple years of similar issues between her cervical region into her left shoulder in addition to the osteoporosis, which she was ultimately diagnosed with following a DEXA scan I believe in December of 2009. In that, Your Honor, it really appears as though there are ongoing complaints leading right up to the accident.

THE COURT: Go ahead.

[Counsel for Shinsato]: If I may respond. The chart note that counsel is referring to is December 1, 2010 by Dr. Katajima [sic.], and the plan was No. 2, follow-up is left open. She may return if she has any questions or problems. There's no return. She's resolved as far as they're concerned. She's had no other treatment and no other symptoms, and that will be her testimony.

[Counsel for Herman]: At that, Your Honor, there's no document that says she was resolved or that she came back in and said, "You know, Doc, I'm doing great." Instead we have this open-ended chart note that indicates that she's using multiple medications, in addition to the home exercise program, in addition to a Figure 8 brace while sitting at a computer. Part of her complaints in this case is that she can't sit at a computer anymore. To me, that was present beforehand. She was wearing a brace in the year prior to this collision to be able to sit at a computer before the collision even occurred, and I think that that's unfair if the jury is not allowed to hear about that.

THE COURT: *Are you going to present any evidence after December 1, 2010 that she had complaints in the left shoulder?*

[Counsel for Herman]: *I don't know that I have that, Your Honor.*

THE COURT: Okay.

[Counsel for Herman]: Only that on this date it's clear that she is not resolved and indicated that she was basically educated as to how to progress with her home exercise program.

RP 7:2-10:18 (brackets & emphasis added). Herman's argument in response to the motion in limine did not mention Shinsato's non-symptomatic pre-existing cervical disk protrusions. *See id.*

Based on the briefing and argument of counsel, the superior court ruled as follows:

I think there is some very specific case law on this point. Unless you have some evidence showing that there were some ongoing complaints, I'm obliged to not allow any sort of mention of the left shoulder under these circumstances.

RP 10:19-23. The court's verbal ruling was reduced to a written order granting Motion in Limine "L" and providing "No Reference to Unrelated Injuries or Medical Treatment." CP 114 (capitalization in original).

B. Testimony of Dr. Steven Klein.

Herman assigns error on grounds that the superior court "prohibit[ed] defense medical expert Dr. Klein from testifying about plaintiff's pre-existing degenerative disk condition and that [Shinsato's] post-accident neck pain was a natural progression of the pre-existing condition." Herman Br., at 2 (Assignment 2; brackets added).

Dr. Klein jointly examined Shinsato with another physician, Dr. Brandt Bede, and together they drafted a report produced in pretrial discovery. *See Ex. 109.* The report does not identify which opinions were

held by Dr. Klein, which were held by Dr. Bede, and which were jointly held. *See id.* Only Dr. Klein testified at trial. *See* RP 474:13-558:14.

While the Klein-Bede report was mentioned at trial, it was merely used to refresh Dr. Klein's recollection. *See* RP 481:5-15 & 491:11-492:8. It was not offered or admitted into evidence. *See* CP 163. It was not referenced during the argument regarding Shinsato's Motion in Limine "L," or otherwise submitted as an offer of proof. Nonetheless, in her opening brief Herman cites the report without acknowledging these facts, as if the report were admitted as evidence or submitted as an offer of proof. *See* Herman Br., at 4, 8, 14, 20 & 26.

The Klein-Bede report confirms Shinsato suffered cervical and lumbar strains, and left head and left shoulder contusions as a result of the collision caused by Herman, although it repeatedly describes these injuries as "resolved" or "totally resolved." Ex. 109, at 6 ("resolved" three times); *id.* at 7 ("resolved"); *id.* at 8 ("totally resolved" and "resolved").²

The Klein-Bede report does not opine that Shinsato had any symptomatic pre-existing conditions when she was injured in the collision. *See* Ex. 109, at 6-8. The report merely documents pre-existing disk protrusions at two levels of her cervical spine, described as degenerative

² Shinsato's expert health care provider witness, Dr. David Spanier, described Dr. Klein's opinion that her symptoms had resolved as "preposterous." CP 581:19-582:6.

disk disease related to natural aging processes. *See id.* at 6-7. The report is inconsistent regarding whether Shinsato's post-collision symptoms were related to this condition. At points, the report states that "[t]he only objective findings to corroborate [Shinsato's] subjective complaints of pain are the disk protrusion," but these "subjective complaints of pain [are] out of proportion to objective findings[.]" *Id.* at 6 & 8 (brackets added). At other points, the report surmises that Shinsato's "[o]ngoing complaints of pain are related to pre-existing degenerative disk disease," and "[a]ny limitations would be related to pre-existing degenerative disk disease," phrased in the subjunctive mood. *Id.* at 7 & 8 (brackets added). In the final analysis, however, the report states "[i]t is also beyond the scope of this report to comment on the natural history of conditions, unrelated to the subject collision." *Id.* at 8 (brackets added).

During his trial testimony, Dr. Klein purported to testify only as to his own opinions, not the opinions of the report's co-author, Dr. Bede:

Q. [By counsel for Herman]: together you both prepared kind of a joint report?

A. [By Dr. Klein]: Correct.

Q. But in doing so, I mean, did you each provide your own opinions?

A. Yes.

Q. And do you have any issues—are you comf- [sic.]—You are able to testify on your own opinions regardless of what Dr. Bede's opinions are or would be?

A. Oh, yes.

Q. And so if he didn't testify here today, that's not affecting anything that you would testify to; is that right?

A. No.

RP 485:12-25.

Dr. Klein testified that Shinsato suffered neck pain, cervical and lumbar strains, and left head and left shoulder contusions that were causally related to the collision caused by Herman. *See* RP 490:25-493:6. He further testified that these injuries had, or at least should have, "resolved," and that any ongoing symptoms must not be related to the collision. *See* RP 522:3-17, 524:9-16, 527:24-528:3, 546:23-547:4 & 550:2-551:9.

In the course of direct examination, counsel for Herman elicited testimony from Dr. Klein about Shinsato's pre-existing cervical disk protrusions by having him read another health care provider's record to the jury, prompting an objection from Shinsato based the court's order granting Motion in Limine "L" because the protrusions were non-symptomatic prior to the collision. *See* RP 495:1-500:25. The court did not sustain or overrule the objection, nor did the court strike the testimony or ask the jury to disregard it. *See id.* Instead, the court simply confirmed its order in limine "that there was to be no discussion of preexisting conditions." RP 499:15-17.

Immediately following the objection, counsel for Herman asked Dr. Klein another question about Shinsato's disk protrusions, prompting another objection. *See* RP 501:16-508:6. The court asked counsel for Herman to make an offer of proof "as to what the testimony is going to be on the protrusions so I can ... better inform my ruling." RP 508:7-11 (ellipses added). Counsel for Herman then made the following offer of proof:

Q. [By Counsel for Herman] Are they [i.e., Shinsato's disk protrusions] related to the collision?

A. [By Dr. Klein]: 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 508:17-509:1 (brackets, ellipses & emphasis added). Counsel for Herman did not reference or incorporate the report prepared by Dr. Klein and Dr. Bede into his offer of proof. *See id.*

Based on the offer of proof, counsel for Shinsato withdrew his objection, and the court permitted counsel for Herman to ask the question in front of the jury. *See* RP 509:5-12. Counsel for Herman then proceeded to ask Dr. Klein about Shinsato's non-symptomatic pre-existing disk protrusions, as follows:

Q. [By Counsel for Herman]: I would just ask, would you relate protrusions to an accident, or can you tell us what disk protrusions are?

A. [By Dr. Klein]: In between your vertebrae here, there's an area that's not the same. It's not bone. It's soft. It's kind of ligamentous. People say it's liquid. It's not. And if it comes a little bit outside the margins of the posterior aspects of the vertebra, it's called a protrusion. If a piece breaks off and moves someplace else, that's an extrusion. The bottom line is, whatever you call it, if it presses on the spinal cord or the nerves that go to the arm, it can hurt.

You cannot—*You cannot assume that because they're there that's a cause of pain, because a third of the public, without symptoms, a third of the public, without symptoms, has no pain, has no neck pain. And so you can't correlate that sometimes with pain and other times with not, you know, depending on the circumstances.* It's not—

It's one of the biggest mistakes a surgeon can make, is to find somebody with neck pain and find some disks that, you know, bulge out here and there that don't correlate with anything in the human body or any syndrome and operate on them, because you will make your patients miserable, basically.

So I guess that's the long answer.

RP 510:17-511:22 (brackets & ellipses added).³ No testimony from Dr.

Klein was excluded by the superior court. *See* RP 474:13-558:16.

C. Supplemental Instruction 12.

Herman assigns error to Supplemental Instruction 12 given to the jury. *See* Herman Br., at 2 (Assignment 3). After counsel for Herman led Dr. Klein into a violation of the court's order granting Motion in Limine "L" by having him read another health care provider's record, Shinsato

³ Shinsato's expert, Dr. Spanier, agreed that there was no correlation between her post-collision symptoms and her pre-existing cervical disk protrusions. Ex. 35, at 107:5-110:10.

proposed a curative instruction to address the issue. *See* RP 567:9-575:14.

Shinsato's proposal read as follows:

any pain or disability that you find that Jennifer Shinsato suffered from her cervical facet joints, cervical discs or cervical disc protrusions[,] left shoulder or in the form of cervicogenic headaches after the accident is attributable to the accident; therefore, any such pain or disability is the responsibility of the defendant.

RP 571:7-13 (brackets added).

When given the opportunity to object to Shinsato's proposed instruction, counsel for Herman only asked that the references to injuries other than "cervical disc protrusions" be deleted, i.e., "cervical facet joints, cervical discs," "left shoulder" and "cervicogenic headaches." RP 572:8-20.

In response to this objection, the court modified the instruction to address the objection:

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.

RP 573:15-18; *accord id.* at 575:4-8.

At the jury instruction conference, counsel for Herman did not take exception to the instruction as modified by the court. *See* RP 767:15-19. The modified instruction was then given to the jury as Supplemental Instruction 12. *See* CP 126; RP 812:13-21.

Instruction 12 was one of several damages elements the court instructed the jury to consider, along with economic damages for past and

future medical care, household services, earnings, and non-economic damages for the nature and extent of Shinsato's injuries, disability and loss of enjoyment of life, and pain and suffering. CP 139-40 (Instruction 10).

With respect to damages, the jury was also instructed:

You are to decide what injuries to Plaintiff were proximately caused by the Defendant's negligence and what amount Plaintiff should recover. The Plaintiff has the burden of proof on these issues.

CP 131 (Instruction 2). And:

You must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by the negligence of the Defendant

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

CP 139-40 (Instruction 10; ellipses added).

D. Herman's Proposed Instruction 10.

Herman assigns error the superior court's decision not to give Proposed Instruction 10 to the jury. *See* Herman Br., at 2 (Assignment 4).

The proposed instruction states:

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.

CP 106. The proposed instruction adapts WPI 30.18 and includes the optional, last paragraph pertaining to “natural progression of the pre-existing condition.” *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 30.18 (7th ed.). The court gave the instruction to the jury, without the last paragraph regarding natural progression. CP 137 (Instruction 8). Counsel for Herman took exception to the omission of this paragraph. *See* RP 767:15-19.

IV. ARGUMENT

A. Contrary to Herman’s briefing, Dr. Klein did not opine that Shinsato’s neck pain was due to her non-symptomatic pre-existing cervical disk protrusions, and the superior court did not prohibit Dr. Klein from providing his explanation regarding the cause of Shinsato’s post-collision symptoms.

In her opening brief, Herman repeatedly claims Dr. Klein opined that Shinsato’s neck pain was due to the natural progression of her non-symptomatic pre-existing cervical disk protrusions, also described as

degenerative disk disease related to natural aging processes. *See Herman Br.*, at 1-3, 13-14, 19-23 & 25-26. Herman also repeatedly claims that the superior court prohibited Dr. Klein from testifying to this opinion at trial. *See id.* These factual claims form the basis for claiming that the superior court erred and that Herman was prejudiced thereby. *See id.*

However, these claims are simply not borne out by the record. The superior court allowed Dr. Klein to testify that “[y]ou cannot assume that because they’re there [i.e., disk protrusions] that’s a cause of pain,” because they cannot be correlated with pain, RP 511:9-21 (brackets added); an opinion he shared with Shinsato’s expert, Dr. Spanier, Ex. 35, at 107:5-110:10. The superior court otherwise allowed Dr. Klein to testify that Shinsato’s symptoms were resolved or unrelated to the collision caused by Herman, and no testimony Herman offered from Dr. Klein was excluded. In other words, the error and prejudice alleged by Herman in her opening brief did not occur.⁴

⁴ Herman also claims that Shinsato “opened the door” to testimony from Dr. Klein about her non-symptomatic pre-existing cervical disk protrusions. *See Herman Br.*, at 1 & 19-20. While this is not true, it is also immaterial because Dr. Klein was allowed to “walk through the door” when he testified about the lack of a relationship between Shinsato’s post-collision symptoms and her non-symptomatic pre-existing cervical disk protrusions. *See* RP 508:17-509:1 & 510:17-511:22. There is no error.

In connection with the door-opening argument, Herman complains that portions of the perpetuation deposition of Dr. Spanier was “omitted and not played to the jury.” *Herman Br.*, at 5-6 (citing RP 220, 227, 229, 231). She identifies the omitted portions as Ex. 35, at 90:1-24 & 95:1-14. *See Herman Br.*, at 6. Aside from the fact that Herman does not assign error or provide argument or authority regarding omissions from Dr. Spanier’s perpetuation testimony, Herman’s complaint is simply not true. The superior court initially

B. The superior court did not abuse its discretion in granting Shinsato’s Motion in Limine “L” because Herman’s lawyer admitted there was no evidence she was suffering from any symptomatic pre-existing conditions, and Herman’s expert, Dr. Klein, admitted there was no correlation between her post-collision symptoms and her pre-existing cervical disk protrusions.

A trial court order in limine regarding the admissibility of evidence is reviewed for an abuse of discretion. *See State v. Powell*, 126 Wn. 2d 244, 258, 893 P.2d 615 (1995). The trial court does not abuse its discretion unless the exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *See id.*, 126 Wn. 2d at 258.

In this case, the superior court did not abuse its discretion in granting Shinsato’s Motion in Limine “L” because non-symptomatic pre-existing conditions are inadmissible in a personal injury case. *See Bennett v. Messick*, 76 Wn. 2d 474, 478, 457 P.2d 609 (1969); *Harris v. Drake*, 152 Wn. 2d 480, 494, 99 P.3d 872 (2004) (following *Bennett*). Admission of such evidence constitutes an abuse of discretion because it invites the jury to improperly negate causation and/or damages. *See Hoskins v. Reich*, 142 Wn. App. 557, 568-70, 174 P.3d 1250, *rev. denied*, 164 Wn. 2d 1014 (2008).

ruled that the cited portions should not be presented to the jury, but the court later reversed its decision and allowed the material to be presented to the jury. *See* RP 342:20-24. Again, there is no error.

Herman's lawyer admitted he did not have evidence that Shinsato suffered from any symptomatic pre-existing conditions when she was injured in the collision with Herman. *See* RP 7:2-10:18. Herman's expert, Dr. Klein, further admitted he could not make any correlation between her current symptoms and her pre-existing cervical disk protrusions. *See* RP 508:17-509:1 & 510:17-511:22. Given the absence of any evidence that Shinsato was suffering from a symptomatic pre-existing condition at the time of the collision, it would have been an abuse of discretion for the superior court to deny her motion in limine.

C. The superior court did not abuse its discretion in declining to instruct the jury regarding natural progression of a pre-existing condition because Dr. Klein admitted that he could not correlate Shinsato's post-collision symptoms with her non-symptomatic pre-existing condition.

If a trial court's decision whether to give a jury instruction is based upon a matter of fact, it is reviewed for an abuse of discretion. *See Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 767, 389 P.3d 517 (2017). "To determine whether an instruction is appropriate, the trial judge must merely decide whether the record contains the kind of facts to which the [instruction] applies." *Id.*, 187 Wn. 2d at 767 (quotation omitted; brackets added).

In this case, the superior court did not abuse its discretion in declining to instruct the jury regarding natural progression of a pre-existing

condition because there was a lack of evidence to support the instruction. Jury instructions must be supported by substantial evidence. *See Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn. 2d 745, 754, 375 P.2d 487 (1962); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011) (applying *Albin* to damages instruction). Giving an instruction that is not supported by substantial evidence interjects collateral issues into the case and misleads the jury. *See Blodgett v. Olympic Savings & Loan Ass'n*, 32 Wn. App. 116, 123, 676 P.2d 139 (1982) (collecting cases). It is also tantamount to an improper comment on the evidence because it suggests to the jury that the court must think there is evidence on the issue. *See Albin*, 60 Wn. 2d at 754. In particular, giving a natural progression instruction without substantial evidence constitutes an abuse of discretion. *See Hoskins*, 142 Wn. App. at 568-70 & n.6.

Here, substantial evidence of a natural progression is lacking. “Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Wilcox v. Basehore*, 187 Wn. 2d 772, 782, 389 P.3d 531, 537 (2017) (quotation omitted). While Herman makes specific claims about Dr. Klein’s opinions in her opening brief—i.e., that Shinsato’s post-collision symptoms were a natural progression of her non-symptomatic pre-existing cervical disk protrusions, *see Herman Br.*, at 1-3, 13-14, 19-23 & 25-26—Herman’s claims are

contrary to Dr. Klein's actual testimony. He expressly stated there is no correlation between Shinsato's current symptoms and her cervical disk protrusions. *See* RP 508:17-509:1 & 510:17-511:22. It would have been an abuse of discretion to give the natural progression instruction requested by Herman in light of this testimony.

D. The Court should not consider the report co-authored by Dr. Klein because it conflicts with his testimony, and was not offered or admitted as evidence, nor submitted as an offer of proof at trial.

To support her claim that Dr. Klein testified that Shinsato's neck pain was due to the natural progression of her non-symptomatic pre-existing condition, Herman relies on the report co-authored by Dr. Klein and Dr. Bede. *See* Herman Br., at 14, 20 & 25-26 (citing Ex. 109, at 6-7). The Court should decline to consider the report for multiple reasons.

First, Herman did not preserve the ability to rely on the Klein-Bede report because it was not presented to the superior court, either as evidence or an offer of proof regarding the allegedly excluded opinions of Dr. Klein. If a pretrial motion in limine excluding evidence is granted, or if evidence is excluded when offered during trial, the proponent of the evidence must make an offer of proof to preserve any error arising from the exclusion of the evidence. *See* ER 103(a)(2); *Hermann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wn. App. 626, 627 n.2, 564 P.2d 817 (1977). "[I]t is the

duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling.” *Tomlinson v. Bean*, 26 Wn. 2d 354, 361, 173 P.2d 972 (1946). “Appellant is bound by the ground for admissibility stated at the trial and may not assert other grounds for the first time in her brief on appeal.” *Cochran v. Harrison Mem'l Hosp.*, 42 Wn.2d 264, 272, 254 P.2d 752, 757 (1953), *disapproved on other grounds by Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967); Admissibility on different grounds cannot be urged for the first time on appeal. *See Makoviney v. Svinth*, 21 Wn. App. 16, 23, 584 P.2d 948, 953 (1978), *rev. denied*, 91 Wn. 2d 1010 (1979) (following *Cochran*).

In this case, marking the Klein-Bede report as an exhibit and using it to refresh Dr. Klein’s recollection is insufficient to satisfy offer of proof requirements. *Cf. Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617, 762 P.2d 1156 (1988) (following *Tomlinson*; holding that making a copy of a doctor’s deposition available to the trial court was insufficient offer of proof as to what testimony would be elicited from the doctor if he were permitted to testify). As a result, Herman should not be allowed to rely on the report to establish what Dr. Klein’s testimony would have been.

Second, because the Klein-Bede report was not offered as evidence or submitted as an offer of proof, it cannot serve as substantial evidence for

Herman's claim that Shinsato's neck pain was due to the natural progression of her non-symptomatic pre-existing condition. The fact that portions of the report were used at trial to refresh Dr. Klein's recollection does not convert the report itself into substantive evidence, even if it had been offered and admitted. *See* ER 612; *State v. Savaria*, 82 Wn. App. 832, 842, 919 P.2d 1263, 1268 (1996), *disapproved on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003) (stating "ER 612 provides for admission of evidence only to impeach the testimony to which the writing relates").

Third, the Klein-Bede report does not constitute evidence of Dr. Klein's allegedly excluded opinions. The report was prepared by Dr. Klein and his co-author, Dr. Bede. The report does not identify which opinions were held by Dr. Klein, which were held by Dr. Bede, and which, if any, were jointly held. Dr. Bede did not testify, and Dr. Klein limited his testimony to his "own opinions regardless of what Dr. Bede's opinions are or would be[.]" RP 485:5-25. To the extent the report contains opinions other than those expressed by Dr. Klein at trial, there is no basis for concluding that those opinions, in fact, were held by Dr. Klein as opposed to Dr. Bede. Dr. Klein cannot testify as to Dr. Bede's opinions because such testimony would be inadmissible hearsay. *See* ER 801-802; *Washington Irr. & Dev. Co. v. Sherman*, 106 Wn. 2d 685, 689, 724 P.2d 997 (1986) (holding "reports of non-testifying physicians" inadmissible hearsay).

Fourth, the Klein-Bede report is not probative of the alleged natural progression of Shinsato's non-symptomatic pre-existing condition because it contains inconsistent statements on the subject and disclaims any intent to "comment on the natural history of conditions, unrelated to the subject collision." Ex. 109, at 8. In this way, the report is not relevant evidence of the alleged natural progression. *See* ER 401-402.

Fifth, and perhaps most importantly, Herman's characterization of the Klein-Bede report conflicts with Dr. Klein's actual trial testimony that he could not determine whether Shinsato's post-collision symptoms were a natural progression of her non-symptomatic pre-existing condition. *See* RP 508:17-509:1 & 510:17-511:22. Herman is trying to use the Klein-Bede report to attribute opinions to Dr. Klein's that Dr. Klein does not actually hold. For all of these reasons, the Court should not consider the Klein-Bede report in its review of this case.

E. Herman failed to object to Supplemental Instruction 12, and has not preserved any alleged error related to the instruction.

CR 51(f) requires parties to make specific objections to jury instructions, as follows:

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.

The purpose of this rule give the trial court an opportunity to correct any instructional error, and avoid the unnecessary expense of appeals and retrials. *See Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310, 372 P.3d 111 (2016); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 703, 853 P.2d 908 (1993). Failure to object to the instruction or an inadequate objection precludes appellate review of the instruction. *See Millies*, 185 Wn. 2d at 310; *Van Hout*, 121 Wn. 2d at 703. Jury instructions that are not properly objected to become law of the case. *See Millies*, 185 Wn. 2d at 313.

In this case, the superior court modified what became Supplemental Instruction 12 to account for Herman's initial objection. Herman did not raise any objection to the final form of the instruction as modified. *See* RP 767:15-19. Accordingly, she has not preserved any alleged error with respect to the instruction.

F. Even if Herman had preserved the alleged error related to Instruction 12, the superior court did not abuse its discretion in the wording of the instruction.

“It is axiomatic that the trial court has considerable discretion in how the instructions will be worded and whether the rules contained in general instructions will be or should be repeated in specific instructions in more detail to guard against a misunderstanding by the jury.” *Roberts v. Goerig*,

68 Wn. 2d 442, 455, 413 P.2d 626 (1966). “The propriety of a jury instruction is governed by the facts of the particular case.” *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). The superior court below properly exercised its discretion to give Supplemental Instruction 12 in order to avoid or minimize the prejudice from Herman’s efforts to interject Shinsato’s non-symptomatic pre-existing cervical disk protrusions into the case.

On appeal, Herman claims that Supplemental Instruction 12 “effectively decided medical causation as a matter of law,” prevented her from arguing her theory of the case, and constituted an improper comment on the evidence by the superior court judge. *See* Herman Br., at 21-25. As noted above, these objections were not raised in the superior court. Moreover, they are contrary to the text of the instruction, which begins with the conditional statement, “If you find that Jennifer Shinsato suffered pain or disability from her cervical disc protrusions” CP 126 (ellipses added). The instruction does not require the jury to find that Shinsato did, in fact, suffer from such pain or disability as a result of the collision. If and only if the jury finds she suffered from such pain or disability, then the instruction directs the jury to “consider” it. CP 126. This essentially the same as the pattern damages instructions, and it does not direct the jury to award

damages or a particular amount of damages for the pain or disability. *See* CP 139-40.

Herman's objections seem to focus on the last part of the instruction that states that this pain or disability should be considered "along with any other injuries, if any, proximately caused by the occurrence." Herman appears to read this part of the instruction as directing the jury to find that pain and disability from cervical disk protrusions was caused by the occurrence, but it is equally, if not more, plausible to read the instruction as reminding the jury of the requirement to prove proximate causation.

This latter reading is reinforced by the instructions as a whole. The proximate cause instruction (Instruction 3) placed the burden on Shinsato to prove that her injuries were proximately caused by Herman's negligence. *See* CP 131. The damages instruction (Instruction 10) likewise placed the burden on Shinsato to prove that her damages were proximately caused by Herman's negligence. *See* CP 139-40.

In light of the text of Supplemental Instruction 12 and the related causation and damages instructions, Herman's interpretation of Supplemental Instruction 12 is untenable. She was free to argue that Shinsato's pain or disability was unrelated to her cervical disk protrusions, as both parties' experts testified. Her challenge to the instruction should be rejected on the merits as well as her failure to preserve the alleged error.

V. CONCLUSION

Shinsato asks this Court to affirm the judgment of the superior court in its entirety.

Respectfully submitted this 27th day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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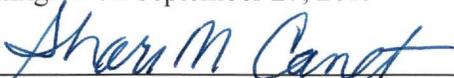
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Signed at Moses Lake Washington on September 27, 2019



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