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NO. 52863-1-II

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

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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.

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

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The parties disputed the nature and extent of plaintiff's injuries. Plaintiffs wanted to present a case that all of plaintiff's post-accident conditions were related to the accident. Plaintiffs contended that she had no symptomatic conditions leading up to the accident so pre-existing conditions were inadmissible. Ms. Herman maintained that plaintiff's ongoing need to wear a shoulder brace in the months leading up the accident showed a symptomatic condition. The Court granted plaintiffs' motion in limine L prohibiting any reference to pre-existing medical conditions.

Plaintiffs also wanted to avoid presenting on a lighting up case, i.e. that plaintiff's pre-existing conditions were lit up or made active by the accident. Then when plaintiffs' forensic medical witness, Dr. Spanier, testified, he addressed the disc protrusions that existed before the accident. Plaintiffs were concerned that the jury would be reluctant to "punish Ms. Herman" if plaintiff had osteoporosis and disc bulges before the accident. (RP 573)

During the direct testimony of Ms. Herman's defense medical expert, Dr. Klein, plaintiffs' case theme changed into a lighting up case. The change occurred because plaintiffs' forensic medical witness, Dr. Spanier, has testified about plaintiff's pre-existing disc protrusions. While Dr. Klein was testifying, he strove to abide by the court's prior ruling on

motion in limine L which limited the scope of his testimony. His testimony was truncated, and he was not allowed to fully express the opinions made in the CR 35 report.

The trial court gave the lighting up instruction (WPI 30.18) but without the natural progression language. Plaintiffs then argued to the jury that a “wrongdoer . . . cannot benefit by the fact that somebody has a condition that may make them more susceptible.” (RP 837) The giving of instruction no. 12 and the omission of the natural progression language in instruction no. 8 prevented Ms. Herman from presenting her theory to the jury and impermissibly permitted plaintiffs to tell the jury that Ms. Herman was responsible for all of plaintiff’s medical problems. Ms. Herman asks for reversal and remand for a new trial.

## **II. ARGUMENT**

### **A. THE TRIAL COURT ERRED BY LIMITING DR. KLEIN’S OPINION.**

Plaintiffs argue there was no error in limiting Dr. Klein’s testimony and if there was error, it was harmless. Plaintiffs argued Dr. Klein was allowed to give his explanation about plaintiff’s preexisting degenerative disk disease and the cause of her post-accident symptoms. He could not correlate her post-accident symptoms with her non-symptomatic preexisting cervical disk protrusions. He could not opine that her post-accident symptoms were a natural progression of the condition.

At the time of Dr. Klein's testimony, the court was trying to enforce the ruling on plaintiffs' motion in limine L—that there could be no reference to asymptomatic pre-existing conditions. Yet by that time in the trial, the jury had heard Dr. Spanier testify that plaintiff had pre-existing disc protrusions. Based on his training, experience, review of 12 volumes of plaintiff's medical records, and examination of plaintiff, Dr. Klein concluded Ms. Shinsato's accident related injuries were neck pain, lumbar strain, left shoulder contusion, and contusion on the left side of head. (RP 477, 480, 485, 491-93) His December 2, 2016 CR 35 report was marked as Exhibit 109 and referenced in his testimony. (RP 491-92)

By the time Dr. Klein testified, the jury had heard the video testimony of Dr. Spanier. (RP 295, 338, 346, 356; Ex. 35) Dr. Spanier had testified about the connection between the disk protrusions and post-accident symptoms:

the discs may or may not be symptomatic. The only way we'll know that is by marching down this diagnostic pathway. And you treat the facet joints, if the pain gets better then the discs are not involved. If you treat the facet joints and she continues to have axial neck pain, the discs could be involved, or may well -- there is more investigation that would need to occur.

Q. Yet here we are seven years down the road and none of that's even been attempted; correct?

A. She has attempted -- I mean --

Q. Has it -- has that been attempted, the medical branch block?

A. They have not been attempted.

(Ex. 35 at 110:3-16)

During his direct examination, Dr. Klein was asked to describe what conclusions Dr. Spanier had reached about Ms. Shinsato. (RP 495) Dr. Klein read from Dr. Spanier's report:

"The following diagnoses were likely quiescent and lit up by the subject collision on a more-probable-than-not basis. . . .  
. Upper extremity paresthesias, possibly due to cervical radiculopathy, versus thoracic outlet syndrome, and cervical and thoracic myofascial pain."

(RP 495) Plaintiffs' counsel then asked to be heard outside the presence of the jury. (RP 496)

During the argument outside the presence of the jury, plaintiffs argued that Ms. Herman had violated the motion in limine L. (RP 505-06)<sup>1</sup> The court asked plaintiffs' counsel whether plaintiffs were requesting damages for pain from lighting up or an aggravation. (RP 505) In answering the question, plaintiffs' counsel stated that Dr. Klein would testify that any pain and symptoms after the six weeks of neck pain were the result of the natural progression of degenerative disk disease. (RP 506)

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<sup>1</sup> Plaintiffs argue that Ms. Herman violated Motion in Limine L. (Brief of Resp. pp. 13-14) They have not cross-appealed this issue, therefore, any discussion of an alleged violation is irrelevant on appeal. RAP 2.5(a).

Dr. Klein said he would not testify that way because of the judge's rulings.

*Id.* The exchange was as follows:

THE COURT: In your request for damages, are you going to be asking for pain relating to a lighting up or an aggravation?

MR. MALLING: I didn't want to, but now we're going to have to have a lit up instruction. We went over that, you know, in depth in our motion in limine. I don't want to ask for lit up. I don't want to ask for aggravation. I want to ask for – And that's --- That's the whole discussion about the difference between the two WPICs, one lit up and one ---

And Dr. Klein, if he had the – what he would say is, “Well, sure, after six weeks all of her complaints were a natural progression of her degenerative disk disease.” And that's –

THE WITNESS (Dr. Klein): You're presuming what I would say. I wouldn't say that because I listened to the judge.

MR. MALLING: Well, in any event, that's what typically happens in these cases. And the jury says, “Well, why should they be at fault for something that was this sinister thing that exists in their body?”

(RP 505-06)

Ms. Herman's counsel maintained that Dr. Klein should be allowed to address the subject because Dr. Spanier testified that the disc protrusions were casually related to the accident. (RP 507) The trial court asked for an offer of proof by questions and answers. (RP 508) The following exchange took place:

Q. (By Mr. Martin) Will you tell the Court what you would say?

A. The question is . . . ?

Q. (By Mr. Martin) Are they related to the collision? I mean, I can withdraw the question and reask are they related to the collision. But that's only going to upset Karl more.

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. Maybe we do, but . . .

(RP 507-08)

Plaintiffs withdrew their objection (RP 510) and the Court allowed Dr. Klein's testimony to the jury.

Q. (By Mr. Martin) And I would ask, would you relate protrusions to an accident, or can you tell us what disk protrusions are?

A. A disk protrusion --- In between the vertebrae, if I can use – Can I use this? . . .

Q. (By Mr. Martin) There's laser pointer.

A. 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.

(RP 510-11)

Plaintiffs opened the door to the issue through Dr. Spanier's testimony. Plaintiffs then, mid-way through the trial, were allowed to fully discuss pre-existing conditions that were lit up by accident.

Plaintiffs argue that there is no error in limiting Dr. Klein's testimony because Ms. Herman purportedly admitted there was no evidence that respondent Shinsato was symptomatic at the time of the accident. . (Brief of Resp. p. 19) Ms. Herman pointed to evidence that Ms. Shinsato was still undergoing care for her shoulder with the brace---she was still using the brace. (RP 8:17-9:13; 9:22-10:18) Ms. Herman was not required to cite to a particular chart note. Shinsato's use of the brace is evidence that she had symptoms. In other words, she was not asymptomatic.

It was apparent that Dr. Klein was being careful in his testimony to stay within the court's rulings. As his direct examination continued, Dr. Klein asked the judge a question and the judge indicated she could not answer questions. Dr. Klein said: "I just don't want to get in trouble." (RP

514) Because of the shifting situation on the court's ruling on evidence, Dr. Klein was reluctant to use the phrase "natural progression."

The limitation of Dr. Klein's testimony was an abuse of discretion which prejudiced Ms. Herman and materially affected the outcome of the case. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

**B. THE FAILURE TO GIVE THE NATURAL PROGRESSION LANGUAGE IN INSTRUCTION NO. 8 WAS AN ABUSE OF DISCRETION AND PREJUDICIAL ERROR.**

Plaintiffs argue the trial court properly refused Ms. Herman's WPI 30.18 instruction because there was not sufficient evidence to instruct the jury regarding natural progression of a preexisting condition. Plaintiffs also argue Ms. Herman did not make a sufficient offer of proof on the subject. There was evidence supporting the instruction and the offer of proof requirement was fully satisfied.

The purpose of an offer of proof is to provide the trial court sufficient disclosure of the reasons for admissibility so the court may make an informed decision. *Kubista v. Romaine*, 87 Wn.2d 62, 67, 549 P.2d 491 (1976), quoting, *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946).

An offer of proof performs three functions: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.

*Thor v. McDearmid*, 63 Wn. App. 193, 204, 817 P.2d 1380 (1991), *citing*,  
*State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

ER 103 sets forth the requirements for offers of proof. ER 103  
states:

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

...

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

(b) **Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of any offer in question and answer form.

Ms. Herman satisfied the offer of proof requirement on symptomatic pre-existing conditions in the hearing on the motions in limine. The offer of proof showed that plaintiff's condition was symptomatic in the months leading up to the January 2012 accident.

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.

....

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?

MR MARTIN: I don't know that I have that, Your Honor.

THE COURT: Okay.

MR MARTIN: 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 8:17-9:13, 9:22-10:18)

Ms. Herman also satisfied the offer of proof requirement that pre-existing conditions are the cause of subsequent problems through Exhibit 109, the CR 35 report. The report provided sufficient proof of what Dr. Klein would say on the subject of natural progression.

As discussed above, it was apparent that Dr. Klein was being careful in his testimony to stay within the bounds of the court's MIL L ruling. And plaintiffs' counsel had lodged several objections regarding the scope of Dr. Klein's testimony. (RP 496, 502) Plaintiffs, consistent with their theory of the case to that point in trial, wanted to eliminate any evidence about pre-existing conditions because those conditions were purportedly symptomatic.

Respondents cite to *Makoviney v. Svinth*, 21 Wn. App. 16, 23, 584 P.2d 948 (1978), *rev. denied*, 91 Wn.2d 1010 (1979) for the principle that a party may not argue on appeal for admission of evidence on different grounds than those argued at the trial court. (Brief of Resp. p. 22) Ms. Herman does not dispute this principle of law. It does not, however, advance respondents' argument that the CR 35 report was properly rejected. Ms. Herman did not attempt to offer the CR 35 report. (RP 491; CP 163) And Ms. Herman is not challenging any ruling about the CR 35 report. Ms. Herman properly relies on the CR 35 report to demonstrate what Dr. Klein would say.

Similarly, respondents' argument that the CR 35 report cannot be used as an offer of proof because it is inadmissible under ER 612 does not advance respondents' argument. ER 612; *State v. Savaria*, 82 Wn. App. 832, 842, 919 P.2d 1263 (1996), *disapproved on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). (Brief of Resp. p. 23)

Ms. Herman was entitled to have the natural progression language added to Instruction No. 8. Respondents argue that a trial court may only give an instruction which is supported by substantial evidence. They cite *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962). (Brief of Resp. p. 20) In *Albin*, the Supreme Court was addressing whether an instruction which was given should have been given. The case involved a wrongful death suit where the vehicle occupant was killed by a falling tree. The estate sued the owner of the property. The case proceeded to trial and resulted in a defense verdict. The trial court had given an instruction on *volenti non fit injuria* – that a person who knows of a danger and voluntarily exposes himself to danger has assumed the risk. The appellant argued the instruction should not have been given because there was no evidence that plaintiff knew of or appreciate the danger involved. The Supreme Court determined the instruction should not have been given and remanded for a new trial. The *Albin* court stated:

There being no such evidence, it could be argued that the jury was not influenced by this instruction. However, the giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue; and we have consistently followed the rule that it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it. *Reynolds v. Phare* (1961), 58 Wn. 2d 904, 905, 365 P.2d 328; *White v. Peters* (1958), 52 Wn. 2d 824, 827, 329 P.2d 471.

60 Wn. 2d at 754.

Here there was sufficient evidence presented to the jury to support the natural progression sentence for WPI 30.18. And should this Court conclude that the evidence was not sufficient, Ms. Herman would have been able to present sufficient evidence if the court had not granted plaintiffs' motion in limine L and then permitted plaintiffs through their own introduction of the subject to change their theory mid-trial. Ms. Herman asks this Court to reverse and remand for a new trial.

**C. TRIAL COURT ERRED BY INSTRUCTING THE JURY ON MEDICAL CAUSATION.**

Plaintiffs argue that Instruction No. 12 was necessary to minimize the prejudice from Ms. Herman interjecting pre-existing conditions into the case. (Resp. Br. at 26) It was plaintiffs who introduced the subject through Dr. Spanier's testimony. (Ex. 35, pp. 42-43) Plaintiffs did not move to strike Dr. Spanier's testimony on the subject. And when the subject was raised during Dr. Klein's testimony, plaintiffs objected but withdrew their objection. They did not move to strike. Plaintiffs interjected the subject in

the case. Plaintiffs requested Instruction No. 12 because of the evidence they presented.

Ms. Herman preserved the objection to Instruction No. 12. While no formal objection was made during the court's abbreviated discussion about jury instructions (RP 764-67), the court was aware from the prior discussion about Instruction No. 12 that Ms. Herman objected to the instruction. (RP 567-75) CR 51(f) does require a party objecting to an instruction to "state distinctly the matter to which counsel objects and the grounds of counsel's objection." The question is whether the trial judge was sufficiently apprised of the nature and substance of the objection. *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983). Ms. Herman objected because it was plaintiffs' witness, Dr. Spanier, who interjected the issue into the trial.

Assuming the trial court was not fully apprised of Ms. Herman's objection to Instruction No. 12, the issue is properly before this Court because Instruction No. 12 constitutes a comment on the evidence. Plaintiffs argue that Ms. Herman did not previously assert improper comment on the evidence as an objection to Instruction No. 12. (Resp. Br. at 26) Ms. Herman was not required to raise this argument at the trial court because a comment on the evidence is a manifest error affecting a constitutional right. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); RAP 2.5(a).

Article 4, section 16 of the Washington constitution prohibits judges from charging a jury on matters of fact and from commenting on the evidence. “Judges shall not instruct with respect to matters of fact, nor comment thereon.” CR 51(j). Instruction No. 12 told the jury that if it found that plaintiff “suffered pain or disability from her cervical disc protrusions you should consider this pain or disability . . . proximately caused by the occurrence.” (CP 126)

Plaintiffs argue the instruction does not direct the jury to conclude that disc protrusion pain is proximately caused by the accident and instead merely directs the jury to consider whether the pain was proximately caused by the accident. (Resp. Br. at 26-27) The wording of Instruction No. 12 is distinctly different from Instruction No. 8 (“If you find . . . then you should consider all the injuries and damages that were proximately caused by the occurrence”) and Instruction No. 10 (“You must determine the amount of money that will reasonably and fairly compensate the Plaintiff such damages as you find were proximately caused by the negligence of the Defendant”) (CP 137, 139) At best, Instruction No. 12 was ambiguous and confusing and should not have been given.

The error in giving Instruction No. 12 prejudiced Ms. Herman’s fair trial right. Not only did the instruction tell the jury that any pain from disc protrusions were proximately caused by the accident, the instruction

received extra emphasis. The Court read the instructions to the jury just before the lunch break. (RP 809-11) After the instructions were read, plaintiffs' counsel realized that Instruction No. 12 was not included. (RP 810) After the lunch break and immediately before closing arguments, the court read Instruction No. 12. Instruction No. 12 was added separately to the jurors' set of instructions. (RP 812) Singling out the instruction gave it extra emphasis.

### III. CONCLUSION

Ms. Herman was deprived of a fair trial when the court usurped the jury's function. The court decided factual disputes and deprived her of a fair trial. Ms. Herman respectfully requests that this Court reverse the superior court's rulings and judgment on jury verdict and remand for a new trial.

Dated this 20th day of November, 2019.

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**REED MCCLURE**

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