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CAUSE No. 68943-6-I

COURT OF APPEALS, DIVISION ONE
IN THE STATE OF WASHINGTON

AIMEI CRETTOL and MARTIN CRETTOL, individually and the marital community
composed thereof, Appellants,

v.

FILBERTO GONZALEZ-REYES and JANE DOE GONZALEZ-REYES, individually
and the marital community composed thereof, Respondents.

BRIEF OF RESPONDENTS GONZALEZ-REYES

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court act properly in entering the jury's defense verdict?

Did the trial court abuse its discretion in allowing the emergency jury instructions?

Did the trial court abuse its discretion in admitting testimony regarding Mr. Gonzalez-Reyes's leukemia?

Did the trial court abuse its discretion in admitting evidence referring to somatic focus?

II. STATEMENT OF THE CASE

Mr. Gonzalez-Reyes wishes to add a few facts to Ms. Crettol's Statement of the Case.

Regarding the testimony of Michael Steiner (the driver of the vehicle in front of Ms. Crettol who ran over the cement block in the middle of the road), Mr. Steiner testified that he did not actually see any car hit Ms. Crettol's van. VRP of Steiner at 13. In addition, Mr. Steiner heard multiple impacts. VRP of Steiner at 12-13, 19.

As to Mr. Gonzalez-Reyes, the entire testimony regarding his limp was as follows:

- BY MS. CANIFAX:
- Q. Filberto, it's obvious you walk with a limp now. Can you tell us what's going on with your health right now?
- MR. MACDONALD: Objection, relevance.
- THE COURT: Overruled.
- A. It was about the treatment I had for leukemia.
- BY MS. CANIFAX:
- Q. For leukemia?
- A. Yes.
- Q. All right. And at the time of this accident in 2008, were you able to drive?
- A. Yes.
- Q. Okay. So the – your limping and your leukemia didn't come from this accident?
- A. No.

VRP for Gonzalez-Reyes at 9-10.

Regarding the evidence as to somatic focus in Ms. Crettol's medical records, the trial court held that references to somatic focus were admissible for reasons other than diagnosis. VRP 4-25-12, Ruling, at 5-7. Specifically, such references were allowed as to Ms. Crettol's recovery, or lack thereof:

THE COURT: Okay. So let me clarify. Request from defense counsel then, so do you have a doctor that says or an expert that says that she has behavioral disorder or somatoform disorder or some kind of somatoform behavior?

MS. CANIFAX: No. I guess the simple question – answer to that is no. But the physical therapy isn't – records aren't saying that they're giving her a diagnosis

that she needs that treatment for that. They're saying that her physical therapy was not as successful as it could be because she exhibited those type of things.

Now, when I – what I recall her testimony being was that the physical therapy she had with Capen was making her lift too much, and so I guess the idea is that's why she didn't progress with that. The physical therapist in the discharge note and Dr. Brooke is just saying that she progressed overall well, but she could have done better, we think, except for her focus on her somatic symptoms and pain behaviors. Both, the physical therapist and the occupational therapist, they're not diagnosing her for the purposes of treatment and saying that she has that, but as I understand what the plaintiff's testimony is, one of the things that she's going to say for her ongoing injuries, I think, is none of the treatment can cure her, because it can only help alleviate some symptoms but not cure her. And here we have testimony from the physical therapist that she could have done better except for these behaviors.

And that is why I asked Dr. Brooke that question, because he was the one primarily that's saying that the treatment after three months or something, I don't know, is not going to cure her.

THE COURT: So I understand your distinction. You're making a distinction between a diagnosis and a behavior?

MS. CANIFAX: That's what the record is about. That's what the record says. She could have progressed more, except for these somatic behaviors and pain – or somatic symptoms and focus and pain behaviors.

THE COURT: All right, thank you. Anything else, Counsel?

MR. MACDONALD: Just briefly, your Honor. I'm really not trying to be flip, but the physical therapist is as qualified to offer an opinion about somatic focus as I am.

THE COURT: Well, all right. I think the – well, I'm not so sure that, number one, that a physical therapist isn't qualified to talk about a description. I think the physical therapist is not necessarily equipped to render an expert opinion based on a more likely than not basis of a diagnosis, but certainly are capable of observations to the

extent it's characterized as a descriptor or a term. They have patients every day, and they describe their likelihood of success or not as a physical therapist. So the motion is denied. Your objection is going to weight.

VRP 4-25-12, Ruling, at 5-7.

Ms. Crettol made a significant misstatement in her brief as to the argument quoted above regarding Dr. Brooke's testimony that must be called to the Court's attention. Ms. Crettol stated as follows:

In the colloquy, Gonzalez-Reyes' [sic] went on to erroneously state that Dr. Brooke said Crettol had 'progressed overall well, but she could have done better ... except for her focus on her somatic symptoms and pain behaviors.' (4/25/12 VRP of Colloquy 5:21-25). Dr. Brooke never stated that or testified in that manner.

Opening Brief of Appellant at 12. Ms. Crettol did not include the entire quote. Ms. Gonzalez-Reyes's counsel was actually emphasizing that the Capen therapists were making these comments. See the above quotation, paragraph beginning 'Now, when I,' starting with the second sentence through the end of the paragraph. In addition, the ellipsis that Ms. Crettol used omitted two important words: "we think." See same paragraph above. By saying "we think," Mr. Gonzalez-Reyes's counsel was summarizing the Capen therapists' opinions. See Opening Brief of Appellant at 11 for quotes by the Capen therapists.

Nonetheless, Dr. Brooke did testify that he thought that Ms. Crettol's anxiety had a relationship to her pain and decreased function:

Q. And can you briefly tell the jury what your recollection is, and I realize this was a long time ago, about why there was a referral out to Dr. Davis?

A. Yes. Because there was an obvious component of anxiety, and not being a psychologist I wouldn't necessarily make a more definite diagnosis or evaluate it in a lot more detail than that. And it was obviously interfering with her driving and had some relationship to her pain and her decreased function. And so I felt that psychology was a very important component of her treatment.

CP 186.

III. ARGUMENT

A. Standard of Review

The Washington Supreme Court summarized the law regarding jury instructions in Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002):

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. Even if an instruction is misleading, it will not be reversed unless prejudice is shown.

Keller, 146 Wn.2d at 249 (internal citations omitted). The courts review jury instructions de novo. Singh v. Edwards Lifesciences

Corp., 151 Wn. App. 137, 210 P.3d 337 (2009). “But, where a jury instruction correctly states the law, as here, the court’s decision to give the instruction will not be disturbed absent an abuse of discretion.” Singh, 151 Wn. App. at 151.

In fact, our Supreme Court recently held that a trial court’s decision to give a jury instruction on emergency is reviewed for abuse of discretion:

We have not previously defined the proper standard of review for a trial court’s decision to give or refuse to give an emergency instruction. A trial court’s decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. Unlike the self-defense instruction at issue in Walker [136 Wn.2d 767, 966 P.2d 883 (1998)], the emergency doctrine has no objective component; the trial court is not required to draw any legal conclusions to determine whether the doctrine applies. The trial court must merely decide whether the record contains the kind of facts to which the doctrine applies. Therefore, we review the trial court’s decision to give an emergency instruction for abuse of discretion.

Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)

(citations omitted).

The court in Kappelman expressly held that the abuse of discretion standard applies to an emergency instruction. Moreover, the instructions at issue here were taken from pattern jury instructions and correctly state the law. Instruction No. 12 (CP 87)

is copied from WPI 70.04 (CP 31), and Instruction No. 15 (CP 90) is copied from WPI 12.02 (CP 30). See also Szupkay v. Cozzetti, 37 Wn. App. 30, 678 P.2d 358 (1984) (held that WPI 12.02 correctly states the law). Therefore, the trial court’s decision to give these two instructions is reviewed for abuse of discretion.

As to the other two issues—the admission of testimony of Mr. Gonzalez-Reyes’s leukemia and the admission of evidence referring to somatic focus—the standard of review is also abuse of discretion:

The trial court’s decision to admit or exclude evidence and the court’s balancing of probative value against prejudicial effect are entitled to a ‘great deal of deference, using a “manifest abuse of discretion” standard of review.’

Degroot v. Berkley Const., Inc., 83 Wn. App. 125, 920 P.2d 619 (1996), quoting State v. Luvене, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). A trial court’s decision to admit business records, including medical records, is reviewed only for a manifest abuse of discretion. State v. Garrett, 76 Wn. App. 719, 722, 887 P.2d 488 (1995). The trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

B. The New Trial Standard Has Not Been Met.

The standard for ordering a new trial has not been met here. Litigants have an inviolate right to a trial by jury. Const. art. I, § 21. Under the Washington Constitution, there is a strong presumption that a verdict is adequate. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967). Unwarranted exercise of a trial court's authority may constitute a violation of the right to a jury trial. Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795 (2000).

Matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the jury. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990). The jury has considerable leeway in assessing damages, and its verdict will not be lightly set aside. Cox, 70 Wn.2d 173. The trial court may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages. Cox, 70 Wn.2d 173.

The trial court has no discretion to modify a verdict if the verdict is within the range of the credible evidence. Green, 103 Wn. App. 452. The court should not alter a verdict unless the record unmistakably indicates that the jury was prejudiced against

a party or its reasoning was overcome by passion. Jacobs v. Calvary Cemetery & Mausoleum, 53 Wn. App. 45, 765 P.2d 334 (1988). The jury is the appropriate assessor of damages, and its determination should not be overturned except in the most extraordinary circumstances. Miller v. Yates, 67 Wn. App. 120, 834 P.2d 36 (1992).

There are simply no extraordinary circumstances in this case that would warrant reversal of the jury's verdict. Unlike the case cited by Ms. Crettol, Ide v. Stoltenow, 47 Wn.2d 847, 289 P.2d 1007 (1955), damages and liability were disputed in the instant case. In Ide, the damage award did not include the sum of at least \$500 over the irreducible minimum of special damages, and therefore granting a new trial on the ground of inadequacy of damages was not an abuse of discretion. The court in Ide noted that the trial court was entitled to accept as established those items of damages that are undisputed and beyond legitimate controversy.

In the instant case the issues of liability and damages were disputed and were legitimately in controversy. It was within the province of the jury to weigh the evidence and decide who was and who was not liable for the accident. Evidence was presented to the

jury that would allow the jury to find that Mr. Gonzalez-Reyes was not liable, and therefore the jury verdict should be upheld.

We cannot know how the jury reached its conclusion. However, since there are no extraordinary circumstances that warrant a reversal, the parties must accept the jury's verdict.

C. The Trial Court Did Not Abuse its Discretion in Allowing the Jury Instructions.

The trial court did not abuse its discretion in allowing the two jury instructions at issue here. Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. Caruso v. Local 690, Int'l Bhd. of Teamsters, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987).

The essential element to invoke the emergency doctrine is confrontation by a sudden peril requiring instinctive reaction. Seholm v. Hamilton, 69 Wn.2d 604, 419 P.2d 328 (1966). The rule is applicable where a person has been placed in a position of peril and there is a choice between courses of action after the peril has arisen. Sandberg v. Spoelstra, 46 Wn.2d 776, 285 P.2d 564 (1955).

The doctrine excuses an unfortunate human choice of action that would be subject to criticism as negligent

were it not that the party was suddenly faced with a situation which gave him no time to reflect upon which choice was the best.

Zook v. Baier, 9 Wn. App. 708, 714, 514 P.2d 923 (1973).

Moreover, an emergency instruction is required where there is conflicting evidence: “a conflict of evidence on the applicability of the doctrine of sudden emergency requires submission of the theory to the jury.” Bell v. Wheeler, 14 Wn. App. 4, 6, 538 P.2d 857 (1975) (trial court erred in declining to give emergency instruction where there were facts in dispute).

In the instant case the evidence presented to the jury demonstrated that Mr. Gonzalez-Reyes did have an alternative course of action—he could have swerved to the right as did the red car in front of him. Because Mr. Gonzalez-Reyes had an alternative course of action, it was not an abuse of discretion to give the emergency instruction. It is irrelevant whether Mr. Gonzalez-Reyes made the wiser choice in trying to stop his car rather than swerve to the right because the emergency instruction excuses an unfortunate choice.

Moreover, the cases cited by Ms. Crettol do not actually help her. In Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983), one of the plaintiffs was

driving a vehicle that collided with a fire engine. According to the facts of that case, the sudden emergency presented to the plaintiff afforded him no alternative course of action other than to strike the fire engine. Therefore, the emergency instruction was inappropriate.

Also, in Zook v. Baier, 9 Wn. App. 708, 514 P.2d 923 (1973), the court found that the trial court did not abuse its discretion in refusing the emergency instruction for two reasons. First, the instruction does not apply where the failure of the party requesting the instruction to foresee the danger permitted the emergency to occur, which the court suggested was the case in that situation. Second, there were no alternatives available to avoid the accident in that case, so the instruction was not appropriate. Neither of these reasons applies here—Mr. Gonzalez-Reyes did not create the emergency, and he had an alternative course of action available to him.

In the instant case, Mr. Gonzalez-Reyes did have an alternative course of action—he could have swerved to the right. This was his theory of the case, and he is thus allowed to present this jury instruction since the instruction correctly states the law

and is not misleading. Therefore, the trial court did not abuse its discretion in allowing the emergency instructions.

D. The Trial Court Did Not Abuse its Discretion in Admitting Testimony of Mr. Gonzalez-Reyes's Leukemia.

Because abuse of discretion is the standard of review for a trial court's decision as to admissibility of evidence, "the trial court's rulings are reversible only if no reasonable person could have so ruled." Tewell, Thorpe & Findlay, Inc., P.S., v. Continental Cas. Co., 64 Wn. App. 571, 578, 825 P.2d 724 (1992). The trial court did not abuse its discretion in admitting testimony regarding Mr. Gonzalez-Reyes's leukemia. There is no evidence that the jury found that the brief verbal exchange regarding Mr. Gonzalez-Reyes's limp was prejudicial; rather, Ms. Crettol merely speculates that the exchange was prejudicial.

In one of the opinions cited by Ms. Crettol, the court noted that "[n]early all evidence will prejudice one side or the other in a lawsuit" and that the "burden of showing prejudice is on the party seeking to exclude the evidence." Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 618, 20 P.3d 496 (2001). Moreover, courts "find reversible error only in exceptional circumstances

under ER 403.” Id. In Hayes, the court found no reversible error in admitting the evidence at issue in that case. Id.

There are no exceptional circumstances here that result in reversible error. Ms. Crettol has not met her burden of showing that no reasonable court could have so ruled as the trial court did here or that she was unfairly prejudiced. Moreover, the explanation of Mr. Gonzalez-Reyes’s limp was relevant in order to avoid the jury speculating as to whether he was limping because of the accident, or whether he was limping at the time of the accident and perhaps should not have been driving.

E. The Trial Court Did Not Abuse its Discretion in Admitting Evidence Referring to Somatic Focus.

The trial court did not abuse its discretion in admitting evidence referring to somatic focus. Ms. Crettol was able to present her case through Dr. Brooke, who testified that he did not think that Ms. Crettol demonstrated a risk of somatization or pain behavior. As the trial court noted above, Ms. Crettol’s arguments to exclude references in the Capen records to somatic focus go to weight, not admissibility.

Medical records are admitted as an exception to the hearsay rule under RCW 5.45.020. State v. Garrett, 76 Wn. App. 719, 721-22, 887 P.2d 488 (1995). The statute states as follows:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information and time of preparation were such as to justify its admission.

RCW 5.45.020. The statute does not require that the record be made by, e.g., a person performing a specific test mentioned in the record, but only that it was made in the regular course of business under circumstances that the court finds makes it trustworthy.

State v. Sellers, 39 Wn. App. 799, 806, 695 P.2d 1014 (1985); see also State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (trial court properly allowed supervising physician to testify about a child's condition on the basis of a report prepared by another physician who had examined the child).

RCW 5.45.020 and the case law citing it provide enough authority to admit Ms. Crettol's physical and occupational therapy records. The therapy records were made in the regular course of business of Capen Industrial Rehabilitation and were relevant to

the therapists' observations of Ms. Crettol and her likelihood of success in treatment. Thus, the records were properly admitted at trial under the statute.

Ms. Crettol cites ER 803(a)(4) in her brief on this issue. However, it is not clear whether the rule applies here. The rule usually applies to statements made by the person receiving treatment. See, e.g., State v. Fisher, 130 Wn. App. 1, 108 P.3d 1262 (2005). In the instant case, Mr. Gonzalez-Reyes was seeking to admit statements made by the Capen therapists, not by Ms. Crettol. Thus, ER 803(a)(4) does not apply here. However, if the Court were to find that ER 803(a)(4) applies, the therapists' comments would be admissible under the rule because they were made for purposes of Ms. Crettol's treatment.

The trial court was clear that it admitted the therapists' references to somatic focus as the therapists' observations, not as a diagnosis. As the trial court noted, a physical therapist sees patients every day and is qualified to testify as to his or her observations and likelihood of success as a physical therapist. That is exactly what the therapists here were doing—they observed and commented on Ms. Crettol's likelihood of success of engaging in physical or occupational therapy. As part of the therapists'

observations, they commented that Ms. Crettol's somatic focus would affect her recovery.

The therapists' statements are not being offered as statements regarding diagnosis. Thus, the therapists do not need to qualify as experts in diagnosing somatic focus. Rather, the trial court found that the therapists were capable of making the observations made regarding Ms. Crettol. Therefore, Ms. Crettol's claim that the therapists are not qualified is erroneous.

Ultimately, the trial court admitted the statements because the statements were part of the therapists' observations of Ms. Crettol's likelihood of success in treatment. Therefore, the statements are admissible under RCW 5.45.020, and the trial court did not abuse its discretion in admitting them.

In addition, the cases cited by Ms. Crettol are not helpful to her because they are so different factually. The admission of evidence is a matter that is highly fact specific and unique to each case, and so other cases based on different facts often do not provide much guidance. In Vaughan v. Bartell Drug Co., 56 Wn.2d 162, 351 P.2d 925 (1960), the issue was whether to instruct the jury to segregate the plaintiff's pre-existing injuries where no evidence had been entered that there were any pre-existing injuries.

In the instant case, none of the matters Ms. Crettol is appealing addresses whether she had any pre-existing injuries and whether the jury should be instructed to segregate her injuries. Therefore, Vaughan is in applicable here.

Similarly, Bertsch v. Brewer, 97 Wn.2d 83, 640 P.2d 711 (1982), a medical malpractice case, does not provide any guidance. In Bertsch, the plaintiff's personality profile, which contained a derogatory description of the plaintiff, was wrongly admitted. The profile was a separate exhibit and went back to the jury room. Id. at 85. The Bertsch court assumed that the trial court had admitted the profile pursuant to ER 801(d)(2) as a statement that the plaintiff adopted and believed to be true, which the Bertsch court found to be in error. Id. at 85-86. In addition, the defendant doctor (not merely a treating doctor) did not use the test in making his diagnosis, and thus the profile was inadmissible under ER 803(a)(4). Id. at 86-87. Moreover, the defendant did not establish a proper foundation. Id. at 87. In the instant case, the comments regarding somatic focus are not being offered as substantive evidence or evidence that plaintiff was diagnosed with the condition. No somatic focus test was submitted as evidence and given to the jury. Rather, the somatic focus comments are simply

part of the physical and occupational therapists' observations of Ms. Crettol and the likelihood of success in her treatment.

Therefore, Bertsch is inapplicable.

Kirk v. WSU, 109 Wn.2d 448, 746 P.2d 285 (1987), is not helpful to Ms. Crettol either. Not only was the evidence of the plaintiff's abortions being offered as substantive evidence as to her mental state, but also the court noted that the evidence was clearly prejudicial: "The prejudicial nature of this evidence is beyond question. The judge particularly noted the attitudes of the community regarding abortions influenced his decision to exclude the evidence." Id. at 462. There is simply no comparison between a few references to somatic focus as part of physical and occupational therapists' observations and a plaintiff's abortions. Kirk adds nothing to the analysis here.

Finally, the references to somatic focus did not violate the Mothershead rule. Mothershead v. Adams, 32 Wn. App. 325, 647 P.2d 525 (1982). The court in Mothershead affirmed the trial court's granting of a protective order refusing to allow the plaintiff to depose a physician who was retained by the defendant but who was not to be called as a witness at trial. Id. at 332. Mr. Gonzalez-Reyes did not attempt to call a potential expert retained by Ms.

Crettol but whom Ms. Crettol declined to call at trial. Ms. Crettol did indeed call Dr. Brooke to testify at trial. Therefore, Mothershead is inapplicable here.

In sum, Ms. Crettol has not shown that the trial court abused its discretion in admitting the physical and occupational therapists' references to somatic focus and Ms. Crettol's success in recovery. The trial court stated during oral argument that the references were admissible as to the therapists' observations, not as a diagnosis, and that the therapists were qualified to state observations regarding a patient's likelihood of success in treatment.

IV. CONCLUSION

Respondents Gonzalez-Reyes respectfully requests that the Court affirm the jury's verdict and the trial court's entry of that verdict. The trial court did not abuse its discretion in admitting the emergency jury instructions, the brief reference to Mr. Gonzalez-Reyes's leukemia, or the therapists' observations regarding somatic focus.

RESPECTFULLY SUBMITTED this 29th day of

November, 2012.

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DECLARATION OF SERVICE

I declare that I served the foregoing BRIEF OF
RESPONDENTS GONZALEZ-REYES on the party below

F. Hunter MacDonald
Attorney for Appellant
PO Box 1761
Tacoma, WA 98401-1761

[X] by causing a full, true and correct copy thereof to be
MAILED in a sealed, postage-paid envelope, addressed as shown
above, which is the last-known address for the party's office, and
deposited with the U.S. Postal Service at Bellevue, WA, on the
date set forth below;

John A. Sterbick
Law Offices of John A. Sterbick, P.S.
Attorney for Appellant
1010 S I St
Tacoma, WA 98405-4555

[X] By causing a full, true and correct copy thereof to be
HAND-DELIVERED BY ABC MESSENGER SERVICE to the
party, at the address listed above, which is the last-known address
for the party's office, on the date set forth below;

I declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

Executed at Bellevue, Washington, on this 30th day of
November, 2012.



Cheryl Frost
Assistant to Nancy Canifax