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69800-1

No. 69800-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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JAMES WRIGHT and SUSAN WRIGHT

Appellants,

v.

KEVIN BEDLINGTON and JANE DOE BEDLINGTON

Respondents.

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**BRIEF OF RESPONDENTS**  
**KEVIN BEDLINGTON and JANE DOE BEDLINGTON**

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Whatcom County Cause No. 11-2-02885-9

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## I. INTRODUCTION

This is a straightforward, soft-tissue cervical strain/"whiplash" injury claim that arises out of an uncontested liability motor vehicle accident. On May 27, 2009, defendant Kevin Bedlington rear-ended plaintiff James Wright.<sup>1</sup> Mr. Bedlington admitted he was at fault.<sup>2</sup> Mr. Wright took his personal injury claim to the jury on damages only.

Mr. Wright presented under \$4,000 in medical and physical therapy expenses incurred from the date of the accident to the date he stopped medical treatment in December 2009.<sup>3</sup> Nevertheless, the Wrights asked the jury to award Mr. Wright \$185,000 in general damages and an additional \$45,000 to his wife, Susan, for loss of consortium allegedly caused by the accident<sup>4</sup>

After the accident, Mr. Wright slowed down for a day or two, and then returned to his full time work as an attorney.<sup>5</sup> He went through a short and typical course of physical therapy and over-the-counter anti-inflammatory medications for cervical strain – a problem his own physicians testified is typically fully resolved within a matter of months in 90% to 95% of such cases.<sup>6</sup> Mr. Wright barely missed a day of work after the accident

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<sup>1</sup> CP 4-9.

<sup>2</sup> CP 10-12.

<sup>3</sup> CP 244; VRP 377-378.

<sup>4</sup> VRP 356-357.

<sup>5</sup> CRP 128-131

<sup>6</sup> CRP 187-193, 287-289

and within months he was no longer seeking medical care for injury related to the accident.<sup>7</sup>

Then something new and very different occurred in late March 2010, months after his last accident-related medical visit: Mr. Wright landed in the hospital with a rare and very serious neurological problem called “brachial plexus neuritis.”<sup>8</sup> He was in such severe pain, he believed he would die.<sup>9</sup> Mr. Wright spent days in the hospital and was so weakened by this episode, he could not leave the house, much less work, for many weeks.<sup>10</sup> Ever since that episode, Mr. Wright has continued to suffer from “nerve pain” and “weakness.”<sup>11</sup>

Mr. Bedlington has never denied that Mr. Wright has ongoing neurological issues. But not one witness has ever linked Mr. Wright’s brachial plexus neuritis to the automobile accident. Furthermore, Mr. Bedlington offered evidence to show that unlike Wright’s post-accident cervical strain, brachial plexus neuritis is a serious neurological ailment that results in long-term neurological symptoms, just like Mr. Wright’s complaints of neuropathic pain and weakness, in close to 40% of patients struck by the disease.<sup>12</sup>

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<sup>7</sup> Trial exhibit 5; CRP 278, 287-289

<sup>8</sup> CP 126-131, 135.

<sup>9</sup> VRP 108-109

<sup>10</sup> VRP 174-175

<sup>11</sup> VRP 176 *compare* VRP 171-172

<sup>12</sup> CP 135

Despite his medical history and his own cessation of treatment within months after the accident, Mr. Wright tried to convince the jury that his continuing neurological problems should be pinned on Mr. Bedlington; and that Mr. Bedlington should pay Mr. Wright and his wife over \$200,000 because of those problems.

The jury did not believe Mr. Wright's theory. Instead, it apparently put two and two together to conclude that Mr. Wright had a typical, mild "whiplash" injury in May 2009 that was probably resolved before the brachial plexus neuritis episode occurred at the end of March 2010. The jury awarded Mr. Wright damages that were consistent with that type of transient soft tissue injury, \$8,200.50. The jury declined to award loss of consortium damages to his wife for this minor accident-related injury – for the simple reason that the Wrights failed to give the jurors any evidence that the accident and Mr. Wright's minor whiplash injury caused any such damages.

After the jury returned its verdict, Mr. Wright asked the trial court to grant a substantial "additur" to his damages award, or to grant him a new trial, arguing that the jury's verdict was not supported by the evidence and was, instead, the product of pure passion, prejudice and juror misconduct.<sup>13</sup> In response, Mr. Bedlington showed that the jury's verdict was supported by substantial evidence in the record.<sup>14</sup>

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<sup>13</sup> CP 176-184.

<sup>14</sup> CP 235-245.

The trial court declined to substitute its judgment for the jury's well-founded verdict, and therefore declined to grant an additional award of damages or a new trial.<sup>15</sup>

On appeal, Mr. Wright cannot point to a single error that occurred before or during the trial – not one pre-trial motion improperly granted or denied, not one shred of evidence that was excluded or admitted in error over a timely objection, not one jury instruction that was improper. His only stated basis for reversal once again is simply that the jury did not agree with his theory of the case; that the jury could not have done so based on the evidence; and that the jury must have failed to properly perform its duties as the trier of fact in accordance with the trial court's instructions.<sup>16</sup>

As this brief will demonstrate, Mr. Wright is wrong, pure and simple. His appeal is based on an argumentative and one-sided view of the evidence, not on the record as a whole. The jury's verdict, on the other hand, is based on perfectly reasonable inferences drawn from the evidence presented at trial – and much of the evidence came from Mr. Wright's own witnesses. The Wrights and their lawyer wanted the jury to see things one way; but the jury saw them another way. This case is as straightforward as that.

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<sup>15</sup> CP 293-294.

<sup>16</sup> Wright also appears to argue – although he does not say so in his assignments of error or in the issues pertaining to those assigned errors – that Bedlington's counsel "advanced improper argument" to the jury that was not based on evidence in the record. (Brief of Appellant at 20-23). But he never objected to that argument before the jury returned its verdict – and it is too late to object to it now.

And that is not reversible error. The trial court's judgment on the jury verdict should be affirmed.

## II. STATEMENT OF THE CASE

**A. Mr. Wright reported "mild" pain and "did not miss any substantial time from work" during the months following his motor vehicle accident of May 27, 2009; and he stopped treatment for accident-related injuries in mid-December 2009.**

On May 27, 2009, James Wright was driving his Toyota Land Cruiser, headed west on F Street in Bellingham.<sup>17</sup> Kevin Bedlington was also driving westbound in his Ford F-250 pickup truck, behind Mr. Wright's car, going about 25 miles per hour. Mr. Bedlington admittedly failed to stop in time to avoid hitting the rear of Mr. Wright's Land Cruiser.<sup>18</sup>

Mr. Wright went to the emergency room after the accident. Within an hour so, Mr. Wright walked out of the emergency room; his wife Susan drove him back to the accident scene; and Mr. Wright drove their banged up old Land Cruiser back home, where it is still in use as a spare car.<sup>19</sup> Mr. Wright is an attorney. He went to his office to work the day after the accident and worked a half day; then put in another short day on the next day, a Friday. By his own account, when the following Monday came around, Mr. Wright

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<sup>17</sup> Trial exhibit 3; CP 5.

<sup>18</sup> Trial exhibit 12; VRP 333-335

<sup>19</sup> VRP 172-173; trial exhibit 3.

was back at work, putting in “pretty ordinary or regular business hours” from that point on.<sup>20</sup>

Mr. Wright waited two weeks to see a doctor, when he saw his long-time family physician, Dr. Dickson.<sup>21</sup> Mr. Wright had a history of shoulder problems associated with a traumatic injury he suffered in 1992 or 1993, and had gone through physical therapy as recently as 2005 to address pain and limited range of motion that resulted from that injury.<sup>22</sup> Mr. Wright’s chief complaint was neck pain. On physical exam, Dr. Dickson did not find any irregularities or record any complaints from Mr. Wright that extended to other areas like his arms, shoulders or trapezius. Mr. Wright denied weakness, headaches and other symptoms resulting from the accident.<sup>23</sup> Dr. Dickson concluded Mr. Wright had “mild residual symptoms” from the accident and expected he would “fully recover”.

Q. Why did you expect that?

A. Because of the mild nature of his physical exam findings. ... And his presenting complaints.<sup>24</sup>

Given the nature of Mr. Wright’s complaints and Dr. Dickson’s findings on examination, Dr. Dickson did not feel prescription medications were called for and suggested Mr. Wright take over-the-counter medication

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<sup>20</sup> VRP 98 – 99.

<sup>21</sup> VRP 177-193.

<sup>22</sup> VRP 179-182; *see also* VRP 138

<sup>23</sup> VRP 184-186.

<sup>24</sup> VRP 187.

like Aleve or Tylenol for any pain he might have. Dr. Dickson suggested Mr. Wright return in 30 days.

Instead, Mr. Wright did not return for two months, and once again, his complaints were directed to a pain in his neck. Dr. Dickson saw no sign of a problem more serious than “cervical strain” and again told Mr. Wright to return “PRN” – as needed.<sup>25</sup> At his deposition in 2012, Dr. Dickson was asked to place an “X” on an outline of the human body to show where Mr. Wright complained of pain or showed any tenderness or other abnormality during his exams. Dr. Dickson placed a single “X” at the base of the neck, at the back of the head.<sup>26</sup>

Mr. Wright did not see Dr. Dickson again until March 19, 2010 – and he wasn’t seeing Dr. Dickson for treatment for the car accident of May 2009. Mr. Wright visited Dr. Dickson with what appeared to be a viral or bacterial infection and flu-like symptoms. Dr. Dickson prescribed an antibiotic, and never heard from Mr. Wright again.<sup>27</sup>

Mr. Wright also saw Dr. Goldman in October, 2009 and again in December, 2009. In connection with those visits, Wright filled out an “MRI screening questionnaire” that asked him to show, on an outline of the human body, where his problems were. He put a single “X” at the base of his neck

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<sup>25</sup> VRP 190-192.

<sup>26</sup> Trial exhibit 7.

<sup>27</sup> VRP 193. Mr. Wright’s treating neurologist, Dr. Baker, later observed that this could have been a precursor to the brachial plexus neuritis that landed Mr. Wright in the hospital just ten days later. CP 128-129.

at the back of his head – just as Dr. Dickson would later do at his deposition to illustrate Mr. Wright’s accident-related symptoms.<sup>28</sup> Dr. Goldman’s note from December 2009 says that Mr. Wright was having a “good response to conservative management” of his accident-related symptoms. Mr. Wright was told he should continue with neck exercises and return only if he “has a progression of symptoms and wants to be re-evaluated.”<sup>29</sup>

Other than time he spent at these few medical appointments and physical therapy sessions, Mr. Wright, by his own admission, “*did not miss any substantial time from work*” in the months following the auto accident.<sup>30</sup> Although Dr. Goldman had told him to come back if he had a “progression of symptoms,” Mr. Wright did not seek further medical treatment related to the accident in January, February or March 2010.

But then, on March 29, 2010, something horrible happened to Mr. Wright that was unlike anything he had experienced before.

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<sup>28</sup> Trial exhibit 8.

<sup>29</sup> Trial Exhibit 5. Dr. Goldman was focused on what appeared to be a bulging disc at C5/6 on an MRI scan. Dr. Shibata, a neuroradiologist, later reviewed the scans and concluded this was the result of age related degenerative changes and not related to the accident. See Section II.D., below.

<sup>30</sup> VRP 128-131.

**B. On March 29, 2010, Mr. Wright suffered from a paroxysmal attack of a debilitating neurological disease, called “brachial plexus neuritis,” that resulted in a lengthy hospital stay and months of missed work – and since that time, he has complained of chronic weakness and “nerve pain” in many areas of his upper body.**

On March 29, 2010 – three months after his last medical appointment related to the motor vehicle accident – Mr. Wright was having dinner in Seattle when he began to experience pain in his neck, his shoulders, and down into his left and right arms. “And the amount of pain kept ratcheting up and up and up.”<sup>31</sup> Mr. Wright called for emergency medical care, “and they obviously see [sic] I was in pretty significant pain. ... *When my wife drove me out of the driveway of the house to the emergency room I didn't know whether I'd ever be coming back.*”<sup>32</sup>

Mr. Wright did not spend an hour or so in the emergency room, walk out under his own steam and then drive himself home, as he had done after the motor vehicle accident ten months earlier. Instead, he spent three full days in the hospital. A number of doctors saw Mr. Wright during that time.<sup>33</sup> Three doctors agreed that Mr. Wright was suffering from “acute idiopathic brachial plexus neuritis” – a rare and severe neurological disease of unknown cause.<sup>34</sup>

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<sup>31</sup> VRP 108.

<sup>32</sup> VRP 109. (Emphasis added).

<sup>33</sup> VRP 114-115.

<sup>34</sup> CP 127-131; VRP 116; VRP 174.

Mr. Wright did not return to work the day after brachial plexus neuritis struck in March 2010 – as he had returned to work the day after the car accident in May 2009. Mr. Wright recalled that he was out of the office for “two complete weeks” following this episode of severe neurological disease.<sup>35</sup>

His wife Susan had a somewhat different recollection, reporting that during April and May 2010, Mr. Wright was “mostly at home”; that “he was having severe pain”; and that he was having difficulty eating, sleeping or “doing anything at all.”<sup>36</sup> As a result, Ms. Wright took time off from work to care for him<sup>37</sup> - something she did not claim she had done after the motor vehicle accident in May 2009. And, as Ms. Wright has observed, since this severe neurological disease hit Mr. Wright on March 29, 2010, he has had “nerve pain” in his hands, forearms, shoulders and upper arms. This nerve pain affects “his arms and strength” and limits his activities.<sup>38</sup>

In August 2010 – a matter of a few months after the onset of Mr. Wright’s severe bout of brachial plexus neuritis – Mr. Wright went to see Dr. Frederick Braun, a Bellingham neurologist, on referral from attorney Greg

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<sup>35</sup> VRP 128.

<sup>36</sup> VRP 174.

<sup>37</sup> VRP 174-175.

<sup>38</sup> VRP 176. Curiously, however, Ms. Wright reports that Mr. Wright continues to work 60 hours a week, despite his “nerve pain.” VRP 171-172.

Kosanke.<sup>39</sup> As part of the exam procedure, Dr. Braun had Mr. Wright prepare and sign a sketch of the human body, similar to the one he had prepared for Dr. Goldman in 2009. This time, instead of placing a tiny “X” at the base of the back of his neck to show the area that was causing him pain and concern, Mr. Wright drew in dozens of marks that showed pain extending over the front and back of his shoulders, his upper back and his collar bone, and radiating all the way up and down the front and back of both of his arms.<sup>40</sup>

Dr. Braun confirmed that Mr. Wright had not sought any treatment between December 18, 2009 and the onset of brachial plexus neuritis at the end of March 2010; and that the symptoms Mr. Wright complained of in August 2010 are associated with brachial plexus neuritis.<sup>41</sup>

With this lawsuit pending and headed for trial, Mr. Wright went to see a physical therapist in mid-March 2012. The therapy notes, which were also contained in Dr. Braun’s notes for Mr. Wright, stated the reported “date of onset” of Mr. Wright’s problems was “two years ago,” which Dr. Braun confirmed meant March 2010 – *the time of Mr. Wright’s episode of brachial plexus neuritis*, and not the date of the automobile accident in May 2009.

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<sup>39</sup> VRP 212-218. One might draw the inference that Mr. Kosanke and Mr. Wright hoped Dr. Braun would opine that Mr. Wright’s brachial plexus neuritis was caused by the May 2009 accident. He declined to do so.

<sup>40</sup> Trial exhibit 9, VRP 135-136.

<sup>41</sup> VRP 278.

Dr. Braun also confirmed that “ninety to ninety-five percent of people with neck injuries” of the sort Mr. Wright reported after the auto accident “do heal within three to six months,” although he resolutely maintained that Mr. Wright was in the “five to ten percent category” of people who do not.<sup>42</sup>

**C. Not one lay or expert witness attributed Mr. Wright’s brachial plexus neuritis to the motor vehicle accident of May 27, 2009.**

As noted above, the testimony of Mr. and Ms. Wright themselves indicated that Mr. Wright missed virtually no work after the motor vehicle accident. His medical records indicated that he reported no more than “mild” pain; had minimal medical care in the months following the accident; and had not seen a doctor at all for months before the sudden, excruciatingly painful onset of brachial plexus neuritis. The Wrights’ own testimony established that after that episode of severe neurological disease, Mr. Wright continued to have severe pain and weakness that left him virtually incapable of functioning for months.<sup>43</sup> Mr. Wright reports that similar pain and weakness, albeit less severe, has stayed with him ever since – but he attempts to attribute his problems to the May 2009 motor vehicle accident, and not the brachial plexus neuritis.

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<sup>42</sup> VRP 287-289. Although the Wrights’ opening brief does not refer to trial exhibits 20, 21 and 22, they have for some reason designated those exhibits as part of the record on review. Exhibits 20 and 21 were rejected; and the Wrights have not challenged any of the trial court’s evidentiary rulings as part of this appeal. The exhibits are not properly before this Court. Exhibit 22 was offered for illustrative purposes only, and similarly is not part of the evidence of record that was considered in the jury’s deliberations.

<sup>43</sup> VRP 174.

Yet not one witness – not the Wrights, nor their friends, nor their medical experts and treating physicians, nor Mr. Bedlington’s medical experts – testified that Mr. Wright’s brachial plexus neuritis was related to the automobile accident in any way, shape or form.

Instead, the uncontroverted evidence told the jury this severe neurological disease is rare; its cause is unknown; and it frequently results in permanent nerve pain, weakness and numbness. In short, the jury had ample evidence to show that it was probable that Mr. Wright’s problems were ongoing symptoms from his brachial plexus neuritis – and that it was extremely unlikely they were related to his May 2009 car accident.

Dr. Braun explained that he had seen Mr. Wright on two occasions – once in August 2010, and again just prior to trial, on September 11, 2012. Mr. Wright’s own counsel asked Dr. Braun if he could link brachial plexus neuritis to the auto accident and Dr. Braun was perfectly candid:

Q. As you sit here today after the second exam on September 11, 2012, you don’t have an opinion as to what caused the brachial plexus neuritis?

A. That is correct.

Q. What does the term ‘idiopathic’ mean?

A. I don’t know. That’s what it means. Undetermined etiology.<sup>44</sup>

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<sup>44</sup> VRP 233.

Dr. David Baker was the neurologist on call when Mr. Wright was in the hospital in late March 2010. Dr. Baker testified that Mr. Wright reported to him that his problems from the car accident had been largely resolved before the onset of severe nerve pain in his neck, trapezius and shoulders on March 29, 2010. He diagnosed Mr. Wright as having severe inflammation of the brachial plexus – the bundle of nerves that comes out of the spine and goes down under the clavicle and into the arms. He concluded that the car accident was unrelated to the brachial plexus inflammation, in part because Mr. Wright reported that he had improved with “conservative measures” like “physical therapy, time and anti-inflammatory medications” after the accident, and in part based on a review of Mr. Wright’s MRI.<sup>45</sup>

Dr. Baker also testified that close to 40% of patients who suffer from brachial plexus neuritis “remain permanently with symptoms” after a bout of the disease:

Q. Did you believe there was a risk that his brachial plexitis could leave him with permanent symptoms?

A. Yes. I explained... that about 63 percent of patients will have complete recovery at one year, but there’s going to be 37 percent of patients who may have variable recovery.

Q. And what could be the ongoing symptoms for those unfortunate 37 percent?

A. *They could still have neuropathic pain. They could... still have weakness and numbness.*<sup>46</sup>

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<sup>45</sup> CP 126-131.

<sup>46</sup> CP 135. (Emphasis added). Contrast this with Dr. Braun’s testimony that fully 90% to 95% of patients with cervical strain following a car accident are cured through conservative

Mr. Wright's history following his severe attack and hospitalization for brachial plexus neuritis bear out Dr. Baker's prognosis for victims of the disease. Two other doctors who saw Mr. Wright, Drs. MacKay and Mayadev, suggested a conservative course of physical therapy and pain relief after Mr. Wright's severe, acute symptoms had improved – much like the conservative measures Mr. Wright employed after the May 2009 auto accident.<sup>47</sup>

But unlike the soft-tissue cervical strain Mr. Wright incurred in the May 2009 accident, which, according to his own doctors, “made a good response to conservative management,” Mr. Wright's brachial plexus neuritis did not respond to similar conservative therapeutic measures like physical therapy and over-the-counter anti-inflammatory medication. Mr. Wright continued to suffer from “nerve pain” and weakness for years – making him one of the nearly 40% of victims of the disease who have permanent neurological issues, including neuropathic pain, weakness and numbness after their first acute attack.

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therapy after three to six months, and with Mr. Wright's cessation of treatment for three full months before the onset of the wholly unrelated brachial plexus neuritis – which caused symptoms so severe that Mr. Wright thought he would go to the hospital and never come back home alive.

<sup>47</sup> VRP 125-126.

**D. Dr. Shibata closely reviewed Mr. Wright's MRI results and did not find objective signs of accident-related injury.**

Dr. Dean Shibata is a board certified neuroradiologist and an associate professor at the University of Washington. He specializes in interpreting MRI and CT scans of the brain, neck and spine.<sup>48</sup> At the request of Mr. Bedlington's counsel, Dr. Shibata reviewed an x-ray and a number of MRI scans of Mr. Wright.

Without any objection from Mr. Wright's counsel, Dr. Shibata expressed a straightforward professional opinion, to a reasonable degree of medical certainty: "In looking upon the MR scan from August 2009, I saw no evidence of traumatic injury on the MR scan."<sup>49</sup> Instead, Dr. Shibata saw evidence of age related degeneration of Mr. Wright's spine that made him "confident the bony changes didn't occur over weeks or even months. They're changes that occurred over years."<sup>50</sup> Dr. Shibata also testified that while he did not see any specific evidence of a "soft-tissue whiplash injury," that is not something that "could be excluded" based on his review of the imaging.<sup>51</sup> But one thing was clear – Mr. Wright had a bulging disc at C5/6 that was the result of years of bony, degenerative changes in Mr. Wright's spine, and not the result of a traumatic injury in the May 27, 2009 auto

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<sup>48</sup> VRP 293-294.

<sup>49</sup> VRP 298; *see also* Trial exhibit 29 (admitted for illustrative purposes only at VRP 300).

<sup>50</sup> VRP 305.

<sup>51</sup> VRP 308-309.

accident. The protruding disc also did not appear to explain his present symptoms of neuropathic pain and weakness.<sup>52</sup>

As in any trial, Mr. Wright's counsel was free to cross-examine Dr. Shibata, and he did so. Mr. Wright's theory – as presented in counsel's leading questions -- seemed to be that if Mr. Wright did have a protruding C5/6 disc – as Dr. Goldman himself had observed in Mr. Wright's MRI scan in 2009 – the auto accident must have “lit off” an otherwise asymptomatic problem.<sup>53</sup> Counsel also sought Dr. Shibata's agreement that the accident “damaged the ligaments” in Mr. Wright's neck. Dr. Shibata disagreed, stating “we didn't see any evidence of that in the MRI scan.”<sup>54</sup> Making little headway, counsel reverted to badgering the witness, asking questions like: “do you know how much time you spent before you decided to come here and try to claim there's nothing wrong with Mr. Wright?”<sup>55</sup> On recross, counsel also sought to undermine Dr. Shibata's clear and well-founded direct testimony with remarks like “it's not necessary to talk to Jim Wright before you come here and testify under oath what your opinions are, is [that] what you're telling the jury?”<sup>56</sup>

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<sup>52</sup> VRP 302-307.

<sup>53</sup> VRP 319-322.

<sup>54</sup> VRP 320.

<sup>55</sup> VRP 322.

<sup>56</sup> VRP 326.

Notwithstanding the *ad hominem* attacks of Mr. Wright's counsel,<sup>57</sup> Dr. Shibata presented, without timely objection or credible rebuttal, a qualified medical opinion based on his considerable experience and expertise and his review of the objective radiological evidence of Mr. Wright's condition post-accident in 2009.

**E. The jury returned a verdict for plaintiff that covered his accident-related medical expenses and general damages for the period before he stopped treating in December 2009; and the trial court declined to substitute its own judgment for the jury verdict.**

Mr. Bedlington's theory of the case was simple and based on the evidence. Dr. Goldman and Dr. Shibata confirmed that Mr. Wright had a bulging disc at C5/6. Dr. Shibata concluded, based on objective evidence seen in the MRI scans, that problem was the result of age related-degenerative changes, not the accident. He had a soft-tissue cervical strain or "whiplash" injury as a result of the auto accident, and that injury was essentially resolved by the end of 2009, when Mr. Wright stopped treatment – just like 90% to 95% of such injuries. Months later, Mr. Wright suffered from an unrelated and debilitating neurological disease that causes permanent neuropathic pain, weakness and numbness in about 40% of patients – and those are the very symptoms Mr. Wright has suffered since March 2010. Mr. Wright presented \$3,950.50 in medical bills incurred through the end of 2009

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<sup>57</sup> See VRP 383-386 (mocking Dr. Shibata for being "prepared to share my wisdom with twelve strangers so that these people get no money after two hours" of time spent to prepare a report of his findings).

as a result of the accident. He returned to work the day after the accident; he and his wife offered no evidence that there had been costs for post-accident care or any “loss of consortium” related to the accident. Thus, Mr. Bedlington asked the jury to award the amount of those medical bills and a modest amount, \$4,250, for Mr. Wright’s modest post-accident “pain and suffering,” for a total of \$8,200.50.<sup>58</sup>

On the other hand, Mr. Wright asked the jury to believe that his injuries from the auto accident persist to this day, and that his current neuropathic pain, weakness and numbness are the result of the auto accident, not the unrelated neurological disease that is known to be directly associated with those symptoms. Based on the testimony of the Wrights and their friends and family about the impact these symptoms have on his life and on his wife Susan, the Wrights asked the jury to award Mr. Wright \$185,000 and Ms. Wright \$45,000 for a “lifetime of pain.”<sup>59</sup>

The jurors weighed the evidence, as jurors are sworn to do. The jury was properly instructed on the law – there is no dispute about that. In view of the jury instructions and the evidence, the jury returned a verdict for \$8,200.50, as Mr. Bedlington suggested.

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<sup>58</sup> VRP 369-381.

<sup>59</sup> VRP 353-369. Counsel also claimed it was “undisputed” Mr. Wright had “172 thousand dollars of lost income” – despite Ms. Wright’s testimony that her husband works 60-hour weeks, and Mr. Wright’s admission that he did not lose any time at work after the accident. VRP 368-369.

The Wrights were not happy with that result. They asked the trial court to grant a new trial or to modify the jury's damage award on the grounds that "defendants failed to meet any burden (apart from speculation and conjecture), that his damages and injuries were the result of any intervening causes." They claimed that "the jury decided damages without proper reflection on the evidence and argument." The Wrights asked the trial court arbitrarily to award \$90,000 to James Wright and \$10,000 to Susan Wright.<sup>60</sup>

Mr. Bedlington's response recounted the evidence that supported the jury's conclusion that Mr. Wright had a mild cervical strain that was resolved three to six months after the accident – just as his own Dr. Braun testified would occur in 90% to 95% of such cases. He recounted the evidence that Mr. Wright had a subsequent serious neurological disease that results in permanent symptoms identical to Mr. Wright's in close to 40% of patients; asked the trial court not to reweigh the evidence and substitute its own subjective judgment for that of the twelve jurors; and urged the court to let the jury's verdict stand.<sup>61</sup>

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<sup>60</sup> CP 176-184.

<sup>61</sup> CP 235-242.

The trial court, noting it did not have the power to modify the jury's damages award based on its own weighing of the evidence and subjective opinion, denied the Wrights' motion.<sup>62</sup>

### III. ARGUMENT AND AUTHORITIES

**A. Washington appellate courts give considerable deference to a trial court ruling denying a request for a new trial, *additur* or *remittitur*, but closely scrutinize a ruling that modifies a jury's damages award – because such rulings invade the jury's constitutional role as the trier of fact.**

Although the Wrights would have this Court believe otherwise, trial courts do not have the discretion to modify jury verdicts based on their own opinions about the evidence presented at trial.<sup>63</sup>

CR 59(a) provides that “a verdict may be vacated and a new trial granted” where damages are “so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice . . .” or where “there is no evidence or reasonable inference from the evidence to justify the verdict....”<sup>64</sup> “Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award when fairly made. Denial of a new trial on grounds of

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<sup>62</sup> CP 293-294.

<sup>63</sup> Judge Mura acknowledged the constraints on the trial court's authority to invade the province of the jury, both during oral argument and in an interlineated comment in the order denying the Wrights' motion for *additur* or new trial. VRP 412-414, CP 293-294.

<sup>64</sup> CR 59(a)(5), (7).

inadequate damages will be reversed only where the trial court abuses its discretion.”<sup>65</sup>

When a motion for new trial is based on a purported lack of evidence to support the verdict, the appellate court also reviews the trial court’s ruling only for an abuse of discretion. The verdict must be upheld if there is evidence “in sufficient quantum to persuade a fair-minded person of the truth” of the non-moving party’s claims or defenses. In viewing the sufficiency of the evidence, the trial court considering a motion for new trial must view the evidence and all reasonable inferences in the light most favorable to the non-moving party.<sup>66</sup>

The standard of review of a trial court’s decision on a motion for *additur* is even more deferential. While Washington appellate courts review a trial court order *denying* a motion for *additur* under a deferential, abuse of discretion standard, an order *granting* a motion for *additur* is subject to the highest degree of scrutiny under a *de novo* standard of review.

The Washington Supreme Court adopted this two-prong standard of review in its 2005 decision in *Bunch v. King County Department of Youth*

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<sup>65</sup> *Kadmiri v. Claassen*, 103 Wn.App. 146, 150, 10 P.3d 1076 (2000) (citations omitted).

<sup>66</sup> *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 758, 260 P.3d 967 (2011), *rev. denied*, 173 Wn.2d 1029, 274 P.3d 1039 (2012); *see also, Hendrickson v. Konopaski*, 14 Wn.App. 390, 396 54! P.2d 1001 (1975) (“We are of the opinion the trial court erroneously disregarded this evidence [supporting the verdict] and in this respect substituted its judgment for that of the jury”).

*Services*,<sup>67</sup> emphasizing that close scrutiny of any order modifying a jury's award of damages is necessary to protect the jury's constitutional role as the trier of fact:

[W]e hold that a trial court order remitting a jury's award of damages is reviewed *de novo* since it substitutes the court's finding on a question of fact. Trial court orders denying a *remittitur* are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent. This rule harmonizes the statute, our case law, and the jury's constitutional role.<sup>68</sup>

By statute, a trial court may grant a motion for an award of *additur* only if it finds that “the damages awarded by a jury [are] so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice.”<sup>69</sup>

However, when the evidence is conflicting or there are inconsistencies in the evidence, it is for the *jury* to resolve those conflicts and inconsistencies. The trial court, as Judge Mura himself observed, may not modify the verdict – or grant a new trial – merely because it would have weighed the evidence differently and formulated a different result:

Regardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages. When the evidence concerning injuries is conflicting, the jury decides whether

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<sup>67</sup> 155 Wn.2d 165, 116 P.3d 381 (2005).

<sup>68</sup> *Id.*, 155 Wn.2d at 176.

<sup>69</sup> RCW 4.76.030

the injuries are insignificant, minor, moderate, or serious, and it determines the amount of damages.<sup>70</sup>

“[T]he law gives a strong presumption of adequacy to the verdict.”<sup>71</sup>

The great deference our trial and appellate courts must grant to the jury’s findings of fact has constitutional dimensions:

To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.<sup>72</sup>

When the trial court is asked to rule that a jury’s award of damages is inadequate, as distinguished from the question of granting or denying a new trial outright, the court should first look to the scope or range of the evidence in relation to the verdict. In those instances where the verdict is reasonably within the range of proven damages, whether conflicting, disputed or not, and where it can be said that the jury, in exercising its exclusive constitutional powers as the trier of fact, could believe or disbelieve some of it, and weigh all of it, and remain within the range of the evidence in returning the challenged verdict, then a trial court cannot properly find that the verdict was unmistakably “so excessive or inadequate as to show that the jury had been motivated by passion or prejudice” solely because of the amount.<sup>73</sup>

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<sup>70</sup> *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967) (citation omitted).

<sup>71</sup> *Id.*, 70 Wn.2d at 176.

<sup>72</sup> *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971).

<sup>73</sup> *Id.*, 79 Wn.2d at 870-71.

Our appellate courts will not, absent rare and compelling circumstances, assume that the jury did not fairly consider the evidence and follow the law as presented in the trial court's instructions:

This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. *The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.*<sup>74</sup>

“If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.”<sup>75</sup> *A trial court has no discretion to disturb a verdict within the range of evidence.*<sup>76</sup>

Similarly, inconsistencies in the evidence are matters which affect the weight and credibility of the witnesses and their testimony, and of the documentary evidence. All such matters are within the exclusive province of the jury and may not be second-guessed by the trial court or the reviewing court on appeal.<sup>77</sup>

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<sup>74</sup> *Burnside v. Simpson Paper Co.*, 123 P.2d 93, 108, 846 P.2d 937 (1984) (citations omitted, emphasis added)(quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)).

<sup>75</sup> *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987) (quoting *Levy v. N.Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978)).

<sup>76</sup> *Bunch*, 155 Wash.2d at 177-78, 116 P.3d 381 (quoting *Hendrickson v. Konopaski*, 14 Wn.App. 390, 394-95, 541 P.2d 1001 (1975)).

<sup>77</sup> *Dupea v. City of Seattle*, 20 Wn.2d 285, 290, 147 P.2d 272 (1944); *McUne v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954).

In addition, our courts may not properly inquire into or speculate upon the reasoning that lies behind the jury's verdict. Such matters inhere in the verdict and are not properly before the court.<sup>78</sup>

Finally, not every injury must result in an award of general damages. “[T]here is no per se rule that general damages must be awarded to every plaintiff who sustains an injury.”<sup>79</sup> Rather, the adequacy of a verdict on general damages “turns on *the evidence*,”<sup>80</sup> and “[a] jury may award special damages and no general damages when *the record* would support a verdict omitting general damages.”<sup>81</sup> Thus, if the evidence at trial calls into question the cause, degree, or credibility of alleged pain and suffering, a verdict awarding medical treatment expenses without general damages may be within the range of the evidence.<sup>82</sup>

Against this overwhelming body of authority, the Wrights asked the trial court to carefully scrutinize the testimony of the medical experts for possible inconsistencies – and then to resolve all of those inconsistencies in their favor. Judge Mura had no difficulty applying the controlling law, and did not err in denying the Wrights motion for *additur*, because the evidence

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<sup>78</sup> See, e.g., *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991) (when juror misconduct is alleged as a basis for a new trial, it must be proven by objective evidence, and without probing the jurors' mental processes and reasoning).

<sup>79</sup> *Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 591 (1997).

<sup>80</sup> *Id.* 132 Wn.2d at 201.

<sup>81</sup> *Gestison v. Scott*, 116 Wn.App. 616, 620, 67 P.3d 496 (2003) (emphasis added) (quoting *Palmer*, 132 Wn.2d at 202).

<sup>82</sup> *Lopez v. Salgado-Guadarama*, 130 Wn.App. 87, 122 P.3d 733 (2005).

clearly permitted a very simple explanation for the jury's damages award that was consistent with the evidence presented at trial:

I agree that maybe I wouldn't consider this, but can't the jury say that he went to the doctor two or three times, and he never went again, there was a long period of time before the brachial plexus problem hit him in Seattle, can't they look at that and say circumstantially he was recovered? Put all the doctors away... Can't they look at that and say this accident, considering the severity of the accident... and the number of doctor visits, when he goes for three months and doesn't go see a doctor and has no problem... can't they say that shows he was healed from the car accident?<sup>83</sup>

The simple answer is, "yes, the jury surely can consider just such evidence in reaching its verdict." Whether this was the jury's reasoning or not, we cannot know with certainty, nor are we even permitted to inquire or speculate into such matters, which inhere in the verdict. But the evidence in the record plainly would support that view. It was the common sense theory of the case the Bedlingtons argued to the jury - and if it was the theory the jury did adopt, in whole or in part, it is also entirely consistent with their verdict.

The jury may have given Mr. Wright the entire \$3,950 that was documented for post-accident medical care and physical therapy, up to the time he stopped treating - giving him the benefit of the doubt that all of this was reasonable and related to the accident.

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<sup>83</sup> VRP 408-409.

Or it may have actually awarded only a fraction of those expenses, taking into account the fact that Mr. Wright actually had a pre-existing degenerative disc problem that explained his symptoms.<sup>84</sup>

But even assuming the jurors awarded all of the medical expenses incurred from the date of the accident to Mr. Wright's cessation of treatment post-accident, the jury also awarded more than an additional \$4,000 for his "mild" cervical strain and associated pain and suffering. The jury gave his wife Susan nothing for loss of consortium damages, for the simple reason that it was free to believe, based on the evidence, that Mr. Wright's "mild" post-accident cervical strain did not cause such damages.

Indeed, there was no evidence that Ms. Wright suffered any discernible "loss of consortium" because of the accident. Instead, virtually all of the "pain and suffering" and "loss of consortium" testimony from friends and family focused on the period after Mr. Wright's March 2010 bout of brachial plexus neuritis. Mr. and Ms. Wright both offered testimony that showed neither of them missed a beat after the May 27, 2009 auto collision. Mr. Wright left the ER, got in the accident vehicle and drove home. He went to work the next day and picked up right where he left off, never missing any substantial time off of work. Ms. Wright did not take time off from work to

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<sup>84</sup> In argument on the Wrights' post-trial motion, Judge Mura acknowledged that the jury might have given some weight to the evidence that Mr. Wright had degenerative disc disease, that his symptoms could relate to that problem, and that the problem predated the accident. VRP 408.

care for him or hire a third party to care for him, and other than taking the time for a few visits to the doctor's office and physical therapy, the quality of life for the Wrights apparently did not change in any way during the few months that Mr. Wright sought treatment for mild cervical strain after the accident.<sup>85</sup>

Judge Mura got it absolutely right when he stated, on the record:

[U]nder the evidence presented in this case this court is of the conclusion I don't have the authority, that I would be invading the province of the jury.<sup>86</sup>

Judge Mura did not abuse his discretion by denying the Wrights' request for *additur* or new trial. He followed the law.

**B. The jury properly considered *all of the evidence* the trial court admitted into the record; and the jurors were not required to adopt the opinions of the Wrights' "independent medical exam" doctor, Dr. Braun.**

Although the Wrights primarily couched their pretrial motion, and now their appeal, as a question of *additur* because the jury awarded insufficient damages, their real complaint is that the verdict indicates the jury did not adopt the opinion of the only physician who claimed that Mr. Wright has ongoing symptoms as a result of the May 27, 2009 auto collision. Forget

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<sup>85</sup> The Wrights have suggested that to affirm the jury verdict, Judge Mura was "required... to continue the centuries of discrimination directed at women warned of in *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272 (1980)." (Brief of Appellant at 17). There is, of course, no reason to believe Judge Mura or the jury did any such thing, and the very suggestion is yet another unwarranted insult to the intelligence and character of the jurors and the trial court – and proof the Wrights are ready to say just about anything in order to obtain a larger damages award than the one the jury saw fit to grant to them based on the cold hard evidence in the record on review.

<sup>86</sup> VRP 413.

a new trial – the evidence proved, as a matter of law, that Mr. Wright’s current complaints are the result of the accident; and therefore, since Mr. Bedlington did not attempt to rebut the testimony concerning Mr. Wright’s pain and suffering, the jury’s award of general damages must be too low and should have been supplemented.

However, this case involved an alleged “whiplash” injury after a low speed auto collision – something that is well within the realm of experience of many jurors. Recent authority makes it plain that the jury was not required to adopt or reject the opinion of any one of the medical experts in reaching its verdict in this case. In fact, even where there is direct evidence that the jury formulated its own theories of medical causation, in cases that involve medical issues far more complex than post-accident “whiplash” injuries, our courts have held that a new trial is not warranted.

This Court’s decision in *Richards v. Overlake Hospital Medical Center*<sup>87</sup> is instructive. In *Richards*, the plaintiffs claimed that their child had suffered severe neurological injury at birth because of the defendants’ negligent misdiagnosis and failure to treat the mother’s hypoglycemia. Not surprisingly, their experts all offered that opinion. The defendants’ experts, also not too shockingly, opined that the plaintiff suffered from congenital brain defects, unrelated to the mother’s treatment. However, one of the jurors

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<sup>87</sup> 59 Wn. App 266, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991).

concluded, using her "quasi-medical" background to review the medical records that were in evidence, that the plaintiff's birth defects were the probable result of the mother having had the flu 20 weeks into gestation, and not the negligence of the health care providers. None of the expert witnesses – for the plaintiff or for the defense -- had ever testified about this theory of causation. The juror shared her causation theory with other jurors. The jury returned a defense verdict. The plaintiff moved for a new trial based on the jury's use of this alleged "extrinsic evidence" and juror misconduct. The trial court denied a new trial.

This Court affirmed. Even though the juror's theory of causation was based on her own background and training, and unquestionably different from all of the expert medical opinions offered at trial, this Court held that the juror had not injected "extrinsic evidence" into the jury deliberations at all. The juror had, instead, properly used her own personal training, experience and beliefs to draw her own conclusions *from the evidence in the record*, which she and the rest of the jurors had properly made the basis for their decision. So long as she had not concealed her background during *voir dire*, there was no misconduct - and no grounds for a new trial.<sup>88</sup>

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<sup>88</sup> *Richards*, 59 Wn. App. 266, 274-75, 796 P.2d 737 (1990). See also *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 75 P.3d 944 (2003) (jurors properly considered their personal medical care experiences, rather than opinions of expert witnesses, to determine the appropriate "standard of care" in medical malpractice action: Supreme Court held the jurors had properly considered all of the evidence in the case, as well as their own life experience, in reaching their verdict for the defendants).

Once again, the record of the argument on the Wrights' motion for *additur* or new trial demonstrates that Judge Mura got it right – and that the Wrights were asking the trial court to adopt an argument that is contrary to controlling law:

MR. SHEPHERD: Can the jury disregard all the evidence and believe that the plaintiff is making it up?

THE COURT: No, the question is the jury doesn't have to believe the doctors.

MR. SHEPHERD: The jury has to have testimony from the doctors on causation. ... they have to have medical testimony.

THE COURT: But as to what causes an injury, correct.

MR. SHEPHERD: And we had testimony.

THE COURT: As to what causes an injury. But can't they, based upon the evidence, say that he was ---

MR. SHEPHERD: Fully recovered.

THE COURT: -- he was recovered because he didn't go to the doctor for three months?

MR. SHEPHERD: Absolutely can.<sup>89</sup>

In short, even the Wrights' own counsel appears to concede that just because Dr. Braun opined that Mr. Wright still has symptoms resulting from the May 27, 2009 accident, the jurors were not required to believe him. Yet he went on to argue that the jurors were not permitted to apply their own

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<sup>89</sup> VRP 409-410.

“common sense” when judging what weight to give to Dr. Braun’s testimony, if any:

MR. SHEPHERD: The opening instruction says you must apply the law I give you to the facts that are presented in this case. Not your common sense or making up medical things to the facts that have been presented in this case.<sup>90</sup>

Although we cannot know with certainty what the jurors’ thought processes were – and we are not entitled to know – it seems reasonably clear the jury did not believe that Mr. Wright suffered a serious or long-term injury as a result of the accident. There is plenty of evidence in the record to support that conclusion.

The only “expert” who testified that Mr. Wright had long-term problems related to the accident was Dr. Braun – who was retained on the advice of an attorney for the Wrights to perform an “independent medical exam,” not to provide treatment; who was paid to appear and provide testimony favorable to the Wrights’ lawsuit; who admitted that injuries like Mr. Wright’s resolve within months in 90% to 95% of patients; who admitted that Mr. Wright’s symptoms are also symptoms of brachial plexus neuritis; who could not say that Mr. Wright’s brachial plexus neuritis was caused by the accident; who admitted that Mr. Wright had stopped treatment for accident-related cervical strain months before brachial plexus neuritis struck; who could not contradict the testimony of Dr. Baker that close to 40% of the

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<sup>90</sup> VRP 412.

victims of brachial plexus neuritis suffer from the very same symptoms Mr. Wright complains of today – “nerve pain” and weakness in his upper body and arms.

Indeed, the evidence presented at this trial makes one wonder why the Wrights ever thought a jury would believe Dr. Braun and the implausible theory of the case that Dr. Braun came to the courtroom to espouse. The jury was not required to leave its common sense at the door when it entered the courtroom, and it was not required to defer to Dr. Braun’s opinion. Instead, the jurors did what we ask all jurors to do, as laypersons and representatives of the community: apply common sense to the evidence in the record and reach a reasonable result.

**C. The jury is presumed to follow the trial court’s instructions; and the Wrights are not entitled to an *additur* or a new trial because of a single sentence of irrelevant testimony that the court promptly directed the jury to disregard.**

Since they cannot point to a single jury instruction or evidentiary ruling that constituted error – much less outcome determinative, reversible error – the Wrights grasp at straws, and attempt to argue that a single sentence of testimony so prejudiced the outcome of this trial that it required the trial judge to grant a new trial, or to substitute its own judgment for that of the jury and award them tens of thousands of dollars in damages the jury chose not to award. The argument is not merely meritless – it is preposterous.

Mr. Bedlington's offending testimony consisted of this one brief statement about his background:

"I worked in commercial lending for 12 years. And at this point I'm currently unemployed pursuing new employment in lending."<sup>91</sup>

As the Wrights accurately report, their counsel objected and asked the court to strike the testimony and to give a curative instruction to the jury. The trial court did just that:

Ladies and gentlemen, the fact that the defendant is unemployed is not relevant to any issue that you must decide in this case. So I have stricken that testimony of the defendant and you will not consider that in your deliberations in any way.<sup>92</sup>

Apparently satisfied with this instruction, the Wrights did not move for a mistrial. Instead, they awaited the verdict, and now argue that the verdict demonstrates the jury ignored the court's curative instruction and the trial was fundamentally unfair. The argument is meritless.

Our appellate courts *presume* that juries follow the trial court's instructions and consider only the evidence that is properly before them. In

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<sup>91</sup> RP 330.

<sup>92</sup> RP 335-338. Wright's counsel also complained because Mr. Bedlington, asked to briefly recap his education and employment history, told the jurors he had been in farming; had allergies that prevented him from working in that occupation; and had returned to school to obtain an MBA and become a banker. The trial court properly concluded this could not possibly affect the jurors' deliberations, and the Wrights have at least had the good sense not to argue on appeal that it did. Nor have they repeated the absurd argument their counsel made below – that a proper curative instruction would have been to tell the jury that Mr. Bedlington had auto insurance with liability limits of \$250,000. RP 336.

particular, our courts assume that the jurors follow the court's instruction to disregard certain testimony.<sup>93</sup>

Furthermore, on its face, there is nothing "inflammatory" or "prejudicial" about Mr. Bedlington's one sentence statement of the simple fact that he was looking for "new employment in lending."

Even if this Court were to presume the jury *did* ignore the trial court's instructions, that would not constitute outcome determinative, reversible error.<sup>94</sup> No reasonable person could say this one remark so tainted the proceeding that the Wrights did not receive a fair trial – particularly in view of the evidence that supports the jury's verdict.<sup>95</sup> Indeed, the very notion that the jurors decided this case on the basis of "prejudice" because of this brief, irrelevant remark -- in the face of a clear cautionary instruction -- is an

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<sup>93</sup> *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011); *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007); *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

<sup>94</sup> For examples of truly prejudicial testimony and undue surprise that might have given the trial court a basis for granting a new trial, one might look to *Lockwood v. AC&S, Inc.*, 44 Wn. App. 330, 364, 722 P.2d 826 (1986), *aff'd on other grounds*, 109 Wn.2d 235, 744 P.2d 605 (1987) (crucial issue in trial was identity of product that allegedly injured plaintiff, new trial granted when plaintiff offered photo at trial showing his use of defendant's product, never revealed during discovery); *Ewing v. Esterholt*, 210 Mont. 367, 684 P.2d 1053 (1984) (new trial granted when witness offered clearly erroneous and implausible testimony on a key issue in the case); *Whitfield v. Debrincat*, 18 Cal. App.2d 730, 64 P.2d 960 (1937) (new trial granted when, for the first time at trial, a witness contradicted his own pre-trial testimony on the central issue in the case). In contrast to these cases, Mr. Bedlington's statement that he was "pursuing new employment in lending" doesn't even move the needle on the "undue surprise and prejudice" meter.

<sup>95</sup> Although the Wrights do not cite CR 59(a)(9), it appears that is the basis for their claim that a new trial is warranted as a result of this "prejudicial" testimony. "We observe that granting new trials under CR 59(a)(9) for "lack of substantial justice" should be rare because of the other broad grounds for relief under CR 59(a)." *McCoy v. Kent Nursery, Inc.*, 161 Wn. App. at 769, citing *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 717-18, 201 P.3d 1028, *rev. denied*, 166 Wn.2d 1020, 217 P.3d 335 (2009); and *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

unwarranted insult to their *bona fides* and to the considerable time, effort and intelligence they devoted to their duties as the trier of fact in this case.

## VI. CONCLUSION

The evidence showed that Mr. Wright had a mild cervical strain/whiplash injury that responded well to conservative treatment, of a type that is expected to fully resolve within a few months in 90% to 95% of patients. He also had pre-existing degenerative disc disease.

Mr. Wright did not miss substantial time off work because of the accident. He stopped treatment for his cervical strain injury about six months after the accident. Months after that, he was struck by a new and very serious neurological disease – unrelated to the accident. Mr. Wright has suffered from persistent symptoms of neuropathic pain and weakness consistent with that disease ever since. This is not at all unusual – it is the course of the disease in about 40% of patients.

While the jurors' thought processes inhere in the verdict and cannot be known, it appears relatively clear the jury awarded damages to the Wrights consistent with the cervical strain injury related to the accident, and did not award damages for the far more serious and long-lasting effects of Mr. Wright's subsequent, unrelated neurological disease.

The trial court declined to award a new trial, or to grant a substantial *additur* as the Wrights demanded, because the jury's verdict is supported by

substantial evidence. The Wrights cannot point to a single error – not one pre-trial ruling, evidentiary ruling or jury instruction – in connection with this case. Instead, they argue that the trial was “unfair” – with no real basis other than the fact they do not like the outcome of the trial.

The record demonstrates, beyond dispute, that the jury did not act on “passion or prejudice.” It decided the case on the evidence. The trial court did not err by declining to invade the province of the jury by ordering a “do over” or stepping in to award the Wrights more damages.

The judgment entered on the jury verdict should be affirmed.

SIGNED and respectfully submitted this 12<sup>th</sup> day of July, 2013.

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DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed and served the attached document as follows:

**VIA E-MAIL AND US MAIL TO:**

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DATED this 12<sup>th</sup> day of July, 2013, at Seattle, Washington.

  
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Stephanie Kim