Supreme Court No. 1024525

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 84335-4-I

DIVISION I OF THE WASHINGTON COURT OF APPEALS

RAY GARBAGNI,

Plaintiff - Appellant,

v.

KAREN DOVE and ANEW,

Defendants - Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Garbagni did not present any medical testimony at trial to support causation of an alleged permanent brain injury as causally related to the minor motor vehicle accident at issue. There can be no dispute that Garbagni failed to meet his burden of proof on causation. A unanimous jury agreed and returned a defense verdict in favor of ANEW and Karen Dove. The Court of Appeals correctly found that "[b]ecause the jury rejected Garbagni's claim that the collision proximately caused his alleged injuries, he cannot establish that he was prejudiced by the trial court's rulings." Decision at 1. Because Garbagni cannot show review is warranted under any of the criteria of RAP 13.4(b), his Petition must be denied.[1]

The issue was not whether Garbagni had proven damages; it was whether, as a preliminary matter, he had proven a *brain injury* as proximately caused by the minor motor vehicle accident

[1] Garbagni did not reference RAP 13.4 in his Petition and has not argued any specific basis for review thereunder.

at issue. Indisputably, he did not.

Garbagni's "Introduction" in this matter illustrates his continued misapprehension of the trial court's proper rulings and the Court of Appeals' correct Decision following review. Indeed, he begins by alleging: "Since the collision, Garbagni has suffered from a debilitating brain injury." Petition at 1. However, there was no medical testimony offered at trial supporting causation of an actual brain injury, let alone a debilitating one.

He continues: "When Garbagni sued, ANEW-Dove admitted liability, but the case went to trial so that a jury could determine the amount of damages owed to Garbagni for his past, present and future pain and suffering." Petition at 1. This is not an accurate statement. Rather, the case went to trial to first prove *causation of a brain injury*, and if proven, *then damages.*

He further states: "The trial court agreed with the respondents' argument that Mr. Garbagni failed to present sufficient evidence of noneconomic damages." Petition at 3.

This is not correct. ANEW and Dove's argument all along was that Garbagni did not provide sufficient proof of *causation* of brain injury, let alone permanent brain injury. The argument was not about the sufficiency of evidence related to general damages. The trial court simply did not allow Dr. Widlan, a psychologist, to provide support for Garbagni's allegation of a *permanent* brain injury.

Boldly, Garbagni also incorrectly asserts: "Dr. Widlan testified live at trial on June 29, 2022, that Garbagni suffered from *his condition presently*, but the jury was instructed not to consider any damages past the exact date when Dr. Widlan conducted his interview and *diagnosed Garbagni's brain injury*." Petition at 4 (emphasis supplied). This is also an inaccurate statement. Dr. Widlan testified Garbagni's *symptoms* persisted up until the time of his report. Emphatically, Dr. Widlan, a psychologist, **did not** and **could not** diagnose a "brain injury."

Lastly, Garbagni argues: "[T]he instruction [11] rendered

[Dr. Widlan's] causation opinion non-sensical and largely meaningless." Petition at 4. Here, there is at least partial agreement. Dr. Widlan's causation opinion was meaningless in that he admittedly could not provide medical testimony to support causation of any underlying brain injury. However, this was certainly not a result of the trial court's proper instruction limiting the scope of his opinion per his own testimony.

Garbagni has not outlined any basis for review under RAP 13.4(b). Nevertheless, he has argued that this Court must reverse because "Washington courts have consistently held that a jury can award past and future damages so long as there is some supporting evidence admitted at trial." Petition at 3. This is an accurate statement when there is supporting evidence of causation of an injury, in this case, an alleged permanent brain injury. There is no question that Garbagni presented evidence regarding past and future *damages* through several lay witnesses. But there is similarly no dispute that Garbagni failed to present medical testimony regarding *causation* of a *permanent brain*

injury. [2]

As the Court of Appeals recognized, the "trial court generously permitted Dr. Widlan to testify that Garbagni suffered from 'mild neurocognitive disorder due to traumatic brain injury.'" Decision at 3. Further, the Court of Appeals correctly determined that this ruling allowed the jury to consider whether to accept or reject Dr. Widlan's opinion. Decision at 4. However, the jury was aware that Dr. Widlan was not a medical doctor and did not diagnose a brain injury.

Garbagni continues to erroneously believe the trial court's partial ruling on CR 50 (effectively negating a claim for *permanent* brain injury) and the related jury instruction No. 11

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[2] Garbagni has never addressed, let alone refuted, his burden of proof on causation of a brain injury and his failure to offer medical testimony to support such causation. As such, it remains undisputed that before Garbagni could recover damages for a medical condition allegedly caused by a negligent act, he had to present competent medical testimony to establish the causal relationship between the negligent act and the alleged physical condition, i.e., "brain injury." *See Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961). He completely failed to meet this burden.

prevented the jury from reaching a verdict in his favor. But the jury clearly did not find that Garbagni even met his initial burden of proof on causation of *any brain injury*. The Court of Appeals correctly found as much when it recognized that "in rendering a unanimous verdict in favor of defendants, the jury necessarily determined that Garbagni did not meet his burden of proof" and that "[a]llowing the jury to consider whether Garbagni's injuries persisted beyond the date of Dr. Widlan's report would not have changed the result." Decision at 4. The Court of Appeals correctly found no prejudice and affirmed the jury's unanimous defense verdict.

Garbagni failed to present any evidence to support *causation* of a *brain injury* to meet his burden of proof. Garbagni can provide no evidence that the trial court's rulings impacted the jury's unanimous verdict in any way or any flaw in the Court of Appeals' analysis. This Court should deny the Petition for Review.

II. COUNTER STATEMENT OF ISSUES

A. Should this Court deny the Petition where the Court of Appeals correctly found that Garbagni was not prejudiced in any way by the trial court's decision to limit Garbagni's claim for damages consistent with Dr. Widlan's testimony; thus, review is not warranted under RAP 13.4(b)(1) or RAP 13.4(b)(2)? *Yes.*

B. Should this Court deny the Petition where the Court of Appeals correctly found that jury instruction 11 reflected the trial court's determination that the evidence was insufficient to support a finding that Garbagni's injuries persisted beyond the date of Dr. Widlan's report and no prejudice resulted; thus, review is not warranted under RAP 13.4(b)(3)? *Yes.*

C. Should this Court deny the Petition where affirming a unanimous jury defense verdict based on Garbagni's complete failure of proof does not involve an issue of substantial public interest as contemplated by RAP 13.4(b)(4)? *Yes.*

III. COUNTER STATEMENT OF THE CASE

There is no dispute as to the following facts:

- Low speed, admitted liability, minimal property damage rearend impact occurring August 16, 2017. CP 853-57; RP 703, 708 (Garbagni); RP 774-780 (Dove).
- Garbagni did not present a medical expert to opine on causation of an alleged brain injury.[3]
- Garbagni only presented a psychologist Dr. Widlan to opine related to neurocognitive disorders. RP 842, 881-82.
- Dr. Widlan is a psychologist, not a medical doctor and possesses no medical training. CP 454-459. RP 813:4, 847:21-23, 848:12-16.
- Dr. Widlan did not and could not diagnose a brain injury as causally related to the motor vehicle accident at issue. CP 724-726. RP 848-850.

[3] Garbagni did not present a medical expert to opine on causation of *any* injury.

- Garbagni presented several lay witnesses to testify regarding his alleged symptoms following the accident.
- The trial court recognized the need for medical evidence to support that Garbagni's reported symptoms were causally related to the accident and (generously) permitted Dr. Widlan to provide that support, but only as of the last time he saw Garbagni. RP 1202.
- Garbagni asked the jury to award damages based on his only alleged injury, i.e., "brain damage." RP 1246, 1248.
- The jury returned a unanimous verdict in favor of ANEW and Dove. CP 636, CP 840.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court will grant discretionary review of a decision terminating review only under discrete circumstances. RAP 13.4 (b).

Here, Garbagni has not articulated any basis for review. He does not argue that the Decision conflicts with decisions by this Court and published decisions by the Court of Appeals, or

that the case involves a significant question of constitutional law, or even that this case involves an issue of substantial public interest. Garbagni has not provided any basis for review. His Petition should be denied.

Further, RAP 13.4(c)(5) requires a "a concise statement of the issues presented for review" rather than assignments of error as would be found in an appellate brief. Here, Garbagni has outlined "Assignment of Error" and then "Issues Pertaining to Assignments of Error" as directed toward the trial court's conduct. Petition at 5.

It is understood that the primary purpose of a petition for review is to persuade this Court to accept review, by reference to the considerations specified in RAP 13.4 (b). As such, a petition should demonstrate why one or more of those considerations point towards acceptance of review; the purpose is not to reargue the appeal on the merits. Here, Garbagni has simply rehashed the merits of his appeal with the same arguments as presented in his Opening Brief and Reply in the Court of Appeals and again

in his Motion for Reconsideration. ANEW and Dove have resisted the urge to simply regurgitate arguments on the merits as presented in their briefing in the Court of Appeals and instead have attempted to concisely outline why review should be denied.

A. The Court of Appeals Correctly Affirmed the Trial Court's Decision to Limit Garbagni's Claim for Damages Consistent with Dr. Widlan's Testimony.

Again, Garbagni does not provide a basis for review of the Decision. He does not specifically articulate that the Decision conflicts with any appellate decisions. Garbagni argues regarding the trial court's limitation of damages; however, as the Court of Appeals correctly found, the jury did not even get to the issue of damages.

The Decision is in entirely in line with decisions of this Court and those published in the Court of Appeals. Garbagni's arguments are misplaced. He cites case law and argues regarding the sufficiency of proof of *damages.* There has never been a question regarding the sufficiency of proof of damages to get to

a jury. It is uncontested that lay witnesses can provide a basis for future damages. That is not the issue here. The issue all along, and still completely unaddressed by Garbagni, is that he failed to offer medical testimony to prove causation of a brain injury. The Petition should be denied.

Garbagni outlines the testimony provided by Garbagni and his lay witness family members regarding his alleged symptoms suffered to present day and argues that the trial court erred when it "arbitrarily set June 12, 2021, as a limit on those damages." Petition at 21. However, again, Garbagni ignores, or does not understand, the fact that this limitation was not because the trial court found the lay testimony insufficient to support a future damage claim. It was that the trial court found Dr. Widlan's testimony insufficient to support a *permanent* brain injury claim. Again, it was generous that the trial court allowed the jury to even consider awarding damages for an alleged brain injury for the timeframe between August 16, 2017, and June 12, 2021, where no medical doctor had supported a brain injury as causally

related to the minor accident at issue in the first place.

Garbagni goes so far as to allege that it was defense counsel's "misrepresentation to the court about Dr. Widlan's testimony" that "formed the basis of the court's CR 50 ruling." Petition at 23. And had previously asserted that this "representation … lacked candor." Petition at 15. Regrettably, these false assertions again highlight the disconnect. The partial quote Garbagni references of defense counsel arguing "absolutely no testimony to support" was not regarding *damages.* Garbagni takes this quote out of context and is misleading the Court. The argument all along to the trial court was that there was no evidence to support *causation.* RP 1187 -1191.

In partially granting the CR 50 Motion the trial court partially understood the need for a medical expert's *causation* testimony. But the trial court only applied it prospectively, and so the trial court ruled: "There needs to be some medical information of record that the symptoms are related to this incident for a time certain. All we have is June 12th." RP 1202.

In other words, the trial court treated Dr. Widlan's testimony as an admission that he could not relate Garbagni's *current* symptoms to the collision, i.e., could not support a *permanent* brain injury.[4]

Because the jury awarded no damages, Garbagni must argue that somehow the trial court's rulings impacted Dr. Widlan's credibility and thereby the jury's causation determination. To be clear, the issue was never Dr. Widlan's credibility. Dr. Widlan told the jury, and in response to one of *their* questions, he could not diagnose a brain injury. RP 892. Even though the trial court generously permitted Dr. Widlan to offer an opinion, the jury knew they had not heard from a medical doctor who had diagnosed an underlying brain injury as causally related to the minor accident at issue. Quite the contrary, they heard from Dr. Wray, a neurologist and Dr. Ziegler a neuropsychologist, that Garbagni in fact did not suffer a brain

[4] Needless to say, and again, Dr. Widlan was not qualified to support *any* brain injury as causally related to the minor accident.

injury. RP 913 (Dr. Wray) and RP 1076 (Dr. Ziegler). The jury had all they needed to know to return a defense verdict from Dr. Widlan himself. The Court of Appeals correctly found the trial court's limitation on damages had no effect on the jury's determination. The Petition should be denied.

B. The Court of Appeals Correctly Found that Jury Instruction 11 Reflected the Trial Court's Determination that the Evidence was Insufficient to Support a Finding that Garbagni's Injuries Persisted Beyond the Date of Dr. Widlan's Report and that No Prejudice Resulted.

As a preliminary matter, our state constitution confers on juries the "ultimate power to weigh the evidence and determine the facts," and there is a strong presumption that jury verdicts are correct. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971); *Bunch v. King County Dep't of Youth Servs*., 155 Wn.2d 165, 179, 116 P.3d 381 (2005). Further, an appellate court must show appropriate deference to the jury's constitutional role as the ultimate finder of fact and will "presume that the jury resolved every conflict and drew every reasonable inference in favor of the prevailing party." *Coogan v. Borg-Warner Morse Tec Inc.*,

197 Wn.2d 790, 812-13, 490 P.3d 200 (2021).

Again, Garbagni does not cite RAP 13.4(b)(3), but asserts that jury instruction 11 amounted to an unconstitutional comment on the evidence.

The Court of Appeals correctly found that instruction 11 reflected the trial court's determination that the evidence was insufficient to support a finding that Garbagni's injuries persisted beyond the date of Dr. Widlan's report and that no prejudice resulted. Decision at 4-5.

The trial court merely limited Garbagni's claim for damages to a discrete timeframe consistent with the opinion of his only causation witness. This ruling did not affect the jury's ability to consider Dr. Widlan's testimony or negate other witnesses' testimony. It would have been reversible error for the trial court to submit future damages where they were not supported by medical testimony. *Gosa v. Hyde*, 117 Wash. 672, 676–77, 202 P. 274 (1921) (reversible error to include an element of damage in an instruction when there is no proof of that

element).

An instruction that is supported by the evidence and does no more than accurately state the relevant law is not a comment on the evidence. *Hamilton v. Dep't of Labor & Indus*., 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *see, e.g., Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626, 30 A.L.R.5th 822 (1994); *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26, 68 Fair Empl. Prac. Cas. (BNA) 995 (1993), opinion amended, 122 Wn.2d 483, 865 P.2d 507 (1994).

Here, the trial court correctly resolved the issue of *permanent* damages on the CR 50 motion. It ruled as a legal matter that Garbagni had not met his burden to establish causation of any ongoing injury as causally related to the minor motor vehicle accident after Dr. Widlan's examination.

The jury found Garbagni did not meet his initial burden to prove even an original injury. As such, no prejudice could have possibly resulted from an alleged error in a "duration of damages" instruction even if such was a comment on the

evidence. *See State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076, 1084 (2006). The Court of Appeals correctly recognized that judicial comment is not prejudicial where the record affirmatively shows no prejudice could have resulted. *Id.;* Decision at 5.

Ultimately, Garbagni argues that that "the trial court's ruling on the CR 50 motion and corresponding jury instruction had the effect of destroying Garbagni's entire case." Petition at 28. Unfortunately for Garbagni, he did not even have a case without a medical doctor to support causation of a brain injury. The only concern of constitutional import implicated herein is preserving a jury's unanimous defense verdict based on a failure of proof. The Petition should be denied.

C. The Decision Affirming a Unanimous Defense Verdict Given Garbagni's Failure of Proof Does Not Involve an Issue of Substantial Public Interest.

Garbagni has not argued that this case implicates a substantial public interest under RAP 13.4(b)(4). However, to be clear, these facts certainly do not present an issue of

substantial public interest. To the contrary, this case involved a jury's proper determination following a complete failure of proof. Indeed, a compelling public interest, if anything, is certainly to affirm a unanimous jury verdict and a proper analysis which avoids the disaster of allowing damages to be awarded on a personal injury claim without competent medical causation evidence.

V. CONCLUSION

Discretionary review is reserved for those few cases that meet one or more of the criteria of RAP 13.4(b). This is not one of them. A unanimous jury returned a defense verdict in favor of ANEW and Karen Dove given Garbagni had failed to meet his burden of proof.

Garbagni cannot establish any criteria warranting review under RAP 13.4(b). Garbagni cannot establish any conflict between the Decision and a decision of this Court or a published decision of the Court of Appeals, a significant question of constitutional law or that this case is of substantial public

interest. Garbagni's Petition should be denied.

This document contains 3,182 words, excluding the parts exempted from the word count by RAP 18.17.

Dated this 3rd day of November, 2023.

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ERICA SUMMERS, hereby declares:

On November 3rd, 2023, I caused to be served, by electronic service via Washington State Courts – Court of Appeals E-Filing/Service the Respondents' Answer to Petition for Review via e-service to the following:

SUNAINA ASWATH, hereby declares:

On November 3rd, 2023, I caused to be served, by electronic service the Respondents' Answer to Petition for Review via e-mail

to the following:

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

Dated this November 3rd, 2023, at Olympia, Washington

_/s/ Erika Summers_____
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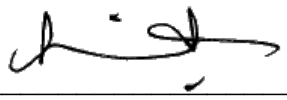
Dated this November 3rd, 2023, at Bellevue, Washington



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