73926-3

73926-3

No. 73926-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

ANNE CUTONE,

Appellant/Plaintiff

v.

WAI K. LAW and JANE DOE LAW,
and their marital community,

Respondents/Defendants

RESPONDENTS' BRIEF

BENDELE & MENDEL, PLLC

By: James Mendel, WSBA No. 29223
Colin Hutchinson-Flaming, WSBA No. 45294
BENDELE & MENDEL, PLLC
200 West Mercer Street, Ste 411
Seattle, WA 98119
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Regulations and Rules

I. INTRODUCTION

Respondents contend that the trial court did not commit error in allowing evidence of Appellant's past collarbone fracture. Respondents provided expert opinion testimony that (1) Appellant was not injured in the subject motor vehicle accident and does not have thoracic outlet syndrome (TOS); (2) her current complaints were caused by the natural progression of a collarbone fracture that occurred in 1981-82; (3) this fracture resulted in a permanent physical change to Appellant's collarbone; and (4) at the point of fracture, the bone healed forming a callous formation on the bone that resulted in intermittent partial obstruction to the right subclavian artery.

Appellant moved to exclude evidence of Appellant's prior accidents and preexisting conditions, including the 1981-82 fracture (fracture); however, the trial court correctly determined that the fracture and resulting callous formation was highly relevant to Respondents' theory of causation of Appellant's alleged symptoms. The trial court did exclude prior medical records a possible diagnosis of TOS prior to the accident and any mention of prior motor vehicle accidents.

After Appellant introduced conflicting accounts of when Appellant's alleged TOS symptoms began, Appellant gave her case to the

jury. The jury returned a verdict of $5,480.00 for general and special damages.

Appellant contends that it was error to allow the introduction of evidence of the fracture and that such error resulted in prejudice to Appellant. Appellant's contention of error is unfounded in the record because her own case called into question the veracity of her testimony and that of her expert witnesses. As such, any erroneously introduced evidence would be harmless due to its cumulative and insignificant nature in light of the evidence presented as a whole.

Appellant also contends that the only reasonable interpretation of the verdict is that the jury believed that her injuries were caused by her pre-existing collarbone injury; however, there is no evidence to support this. Rather, the verdict demonstrates the fact that Appellant failed to prove causation of her TOS to the accident and that the she was awarded damages for a soft tissue sprain/strain injury as the only injury being proximately caused by the subject gas station parking lot incident.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court act within its discretion when it determined that evidence of the fracture was relevant to Respondents' theory of causation of Appellant's alleged symptoms?

2. Did the trial court act within its discretion in allowing introduction of evidence of the fracture when it resulted in a permanent callous formation on Appellant's collarbone that naturally progressed to

the point of causing intermittent partial obstruction to the right subclavian artery?

3. If any error did occur, was it harmless error that was cumulative and insignificant in light of the evidence presented as a whole?

4. Should this Court overturn the jury's determination when the Appellant has offered no evidence to support her claim that they were influenced by any evidence of a pre-existing collar-bone injury?

III. STATEMENT OF ADDITIONAL FACTS

A. Undisputed Background of Claim

This matter arises from a motor vehicle accident that occurred on November 22, 2010 at a Chevron gas station in Bellevue, King County, Washington. Appellant alleged personal injuries as a result of the subject accident. Appellant filed suit in King County Superior Court on November 8, 2013. Trial commenced on July 13, 2015. Appellant relied on three treating providers at trial: Daniel Riegel, MD, a general practice physician; Andrew Lynch, MD, a physiatrist; and Mark Ombrellaro, MD, a vascular surgeon. All three opined that Appellant was injured in the accident and supported a diagnosis of TOS related to the accident. Respondents relied upon Richard Kremer, MD, a vascular surgeon, who opined that (1) Appellant was essentially uninjured in the subject accident, (2) Appellant does not have TOS, and (3) Appellant's current complaints are a natural progression of a callous formation on the collarbone/clavicle that resulted in intermittent partial obstruction to the right subclavian artery.

B. Pretrial Motions

Appellant filed a motion in limine to exclude testimony and evidence related to prior injuries and accidents, and the trial court heard argument from both parties on the issue. (RP 6-25). The trial court heard argument from Respondents that Appellant's current complaints were caused by the natural progression of a callous formation on Appellant's collarbone and not a result of the subject auto accident. (RP 15-19). The trial court ruled that Respondents could question witnesses if Appellant's fractured collarbone could cause her current complaints. (RP 23). The trial court ruled that mention of prior car accidents would be excluded as well as prior medical records discussing possible TOS from 2008. (RP 23).

C. Dr. Reigel

On direct examination, Dr. Riegel testified that he first saw Appellant on December 1, 2010, and at that time, he believed she sustained sprain injuries but no "significant physical trauma that would need immediate attention" and would "get a lot better over the next couple of weeks." (RP 67-70). Dr. Reigel then testified that he next saw Appellant about six months later, at which point he noted new complaints of paresthesia. (RP 74). Dr. Reigel confirmed the paresthesia was a new symptom and referred Appellant to Dr. Lynch for evaluation. (RP 77-78).

Dr. Reigel opined that all of Appellant's medical treatment billing was reasonable, necessary, and causally related to the subject accident. (RP 107).

On cross examination, Dr. Reigel acknowledged that a billing for a November 12, 2011 treatment was in fact not related to the subject accident, contrary to his previous testimony. (RP 110). Dr. Reigel confirmed this treatment was in relation to Appellant's memory issues and a diagnosis of cognitive dysfunction. (RP 111). Also, Dr. Reigel acknowledged that a billing for a March 10, 2012 treatment was in fact not related to the subject accident, contrary to his previous testimony. (RP 113). Dr. Reigel confirmed this treatment was in relation to Appellant's weight gain and fatigue. (RP 114). Dr. Reigel confirmed that he did not make a diagnosis of TOS during his December 1, 2010 or January 15, 2011 treatments. (RP 117). Dr. Reigel also testified that he did not note any paresthesia until June 15, 2011. (RP 117-18). He also confirmed that on December 1, 2010, he had instructed Appellant to return in two or three weeks "unless you are feeling significantly better" and that she did not return until June 15, 2011. (RP 118). Dr. Reigel confirmed that his evaluation of Appellant's extremities on June 15, 2011 was normal. (RP 120). He also confirmed that Appellant's extremities were normal on December 1, 2010 and neurologically intact. (RP 123). Additionally, Dr.

Reigel confirmed on cross examination that Appellant's mid back pain and low back pain had resolved by June 15, 2011. (RP 122-23).

D. Appellant

On direct examination, Appellant testified to her diagnosis of TOS and testified that she had not previously heard of the condition before this accident. (RP 160). However, on cross examination, Appellant was impeached regarding discussions she had with a former physician regarding possible TOS in 2008. (RP 200). Further cross examination revealed that Appellant's stopped treatment for allegedly accident related injuries from April 2013 until early 2015. (RP 207). Appellant confirmed that she did not mention any accident related injuries during the treatment visit in December 2013 for a fall that occurred in her garage. (RP 204-06). Appellant also confirmed that after a November 8, 2012 treatment that she had initially reported to her provider that her numbness and tingling was gone but then later called in to amend her subjective complaints to include numbness while applying mascara and handling luggage. (RP 218-19). Appellant also testified that she experienced unintentional weight gain after her daughter was diagnosed with cancer and began chemotherapy in 2011. (RP 221-22). Finally, Appellant confirmed that the only physician to locate the callous formation on her clavicle was Dr. Kremer and that she

did not inform any of her treating physicians about the previously broken clavicle. (RP 230-31).

E. Dr. Ombrellaro

On direct examination, Dr. Ombrellaro testified that TOS usually develops "weeks to a couple months or so after the inciting event." (RP 268). On cross examination, Dr. Ombrellaro admitted that a technician from his office saw Appellant in June 2012 but that he had not examined Appellant until February 2015. (RP 279). Dr. Ombrellaro also testified that Appellant reported to him that her paresthesia began two to three days following the subject accident. (RP 284).

F. Dr. Lynch

On direct examination, Dr. Lynch testified that he saw and examined Appellant in August 2011. (RP 323-33). Dr. Lynch testified that a diagnostic test performed by Dr. Ombrellaro's office in June 2012 did not confirm TOS but confirmed thoracic outlet compression. (RP 326). Dr. Lynch testified that there were "several months between the accident and the development of [Appellant's paresthesia] symptoms." (RP 340). He further testified that a period of several months was longer than would be expected for onset of TOS. (RP 342-43).

On cross examination, Dr. Lynch testified that his records indicate that Appellant complained of new symptoms of paresthesia involving her

arms that started in May 2011. (RP 354). Dr. Lynch confirmed that a fractured clavicle that had healed could cause TOS. (RP 361-62). He then admitted that he was unaware if Appellant had ever fractured her clavicle. (RP 362).

G. Dr. Kremer

On direct examination, Dr. Kremer, a board certified vascular surgeon, testified that Appellant did not sustain TOS as a result of the subject accident. (RP 403). Dr. Kremer testified that he conducted an examination of Appellant and took a medical history. (RP 404). Dr. Kremer testified that none of the physical testing he performed on Appellant revealed TOS. (RP 405). Dr. Kremer testified that the testing performed by Dr. Ombrellaro's office actually "would be against [a] diagnosis of thoracic outlet syndrome" and that the technician who performed the testing did not conduct it correctly. (RP 409-10). Dr. Kremer testified that during his examination of Appellant, he noted a callous formation on Appellant's clavicle. (RP 410). At which point, Dr. Kremer inquired if Appellant had ever fractured her clavicle, which she confirmed. (RP 410-11). Dr. Kremer testified that he did not believe that Appellant sustained TOS as a result of the accident but that her subjective complaints were a result of an intermittent partial obstruction to the right

subclavian artery due to Appellant's unrelated weight gain and postural problems. (RP 411-14).

H. Jury Instructions

After close of evidence, the trial court heard argument on the inclusion of various jury instructions, including WPI 30.18. (RP 444). Specifically, Respondents argued that the last portion of bracketed text in the model instruction should be given: "There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence." (RP 449-50). Appellant opposed this instruction. (447-48). The trial court noted that there had been expert testimony that Appellant's callous formation could cause Appellant's subjective complaints and determined that including the bracketed language from WPI 30.18 was appropriate.

Additionally, instructions regarding Appellant's burden of proof as well as proximate cause were heard and submitted to the jury. (RP 433 – 458).

IV. ARGUMENT

A. Standard of Review

An appeal of a trial court's evidentiary rulings is reviewed for an abuse of discretion. *Torno v. Hayek*, 133 Wn. App. 244, 135 P.3d 536

(2006). Discretion is abused if "no reasonable person would take the position adopted by the trial court." *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003) (*citing Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000)).

If the trial court abuses its discretion, the error will not be reversible unless the appellant demonstrates prejudice. *Portch v. Sommerville,* 113 Wash.App. 807, 810, 55 P.3d 661 (2002). *review denied,* 149 Wash.2d 1018, 72 P.3d 761 (2003).

B. The Trial Court Acted Within its Discretion in Allowing Evidence of Collarbone Fracture when the Facture was Relevant to Respondents' Theory of Causation and Supported by Competent Medical Testimony

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence." *Hayes v. Wieber Enters., Inc.*, 105 Wn. App. 611, 617, 20 P.3d 496 (2001). However, relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice. ER 403. Defense medical experts are permitted to offer alternative explanations for a plaintiff's condition, and such opinions are relevant so long as they "tend

to deprive plaintiff's proof of the persuasive power necessary to cross the 50 percent threshold." *Colley v. Peacehealth*, 177 Wn. App. 717, 731, 312 P.3d 989 (2013).

Prior accident(s) and preexisting condition(s) can be highly relevant to a defendant's theory of causation of a plaintiff's purported injuries allegedly caused by a precedent event. *Torno*, 133 Wn. App. at 251. In such a situation, a trial court does not abuse its discretion in allowing introduction of such evidence at trial. *Id.*

In *Torno*, defendants Hayak and Boyle admitted liability for two separate 2000[1] rear-end motor vehicle accidents involving plaintiff Torno. *Id.* at 247; however, both defendants disputed plaintiff's alleged damages. *Id.* At trial, over plaintiff's objection, defendants introduced evidence of a 1993 motor vehicle accident and injuries that resulted therefrom. *Id.* at 251. Defendants presented expert testimony that plaintiff sustained a cervical strain that required three weeks to three months of treatment before recovering. *Id.* at 248. The experts testified that plaintiff's ongoing complaints were not related to two recent accidents but were an effect of preexisting fibromyalgia. *Id.*

On appeal, the Court of Appeals noted that plaintiff's preexisting conditions were "highly relevant to defendants' theory on causation." *Id.*

[1] May 22, 2000 and June 4, 2000.

at 251. Accordingly, the Court held that the trial "court did not abuse its discretion in finding this evidence relevant and sufficiently probative to overcome any unfair prejudice." *Id.*

Here, like in *Torno*, Appellant's clavicle fracture is highly relevant to Respondents' theory regarding causation. Like the experts in *Torno*, Dr. Kremer testified at trial and in declaration form submitted in response to Appellant's motion in limine, that Appellant's subjective complaints were not caused by the subject accident. In this case, rather than as a result of the accident, Dr. Kremer opined that Appellant's clavicle facture healed to form a permanent callous formation and that callous formation along with the Appellant's weight gain and postural issues caused Appellant's subjective complaints. The parallel between this case and the *Torno* case could not be more evident. In both cases a prior condition or event was determined by competent expert testimony to be the cause of subjective complaints. In both cases, the prior condition or event was a part of the defending parties' theory regarding causation. Relevance of the fracture could not be more clear or established with more certainty.

///

///

1. Appellant's Arguments and Case Law are Unpersuasive and Easily Distinguishable

Appellant goes to great length to analogize this case with *Harris v. Drake*[2] and its progeny; however, upon closer inspection, Appellant is attempting to pound a square peg through a round hole.

In *Harris v. Drake*, plaintiff sued defendant for personal injuries arising out of a motor vehicle collision. 116 Wn. App. at 265-66. Plaintiff's primary claim consisted of a left shoulder impingement syndrome that resulted arthroscopic surgery. *Id.* at 266. For issues not germane to this appeal, defendant's medical expert was excluded and would have testified that plaintiff's shoulder injury was unrelated to the accident. *Id.* at 265-66. Defendant proceeded to trial without a medical expert and attempted to present evidence that plaintiff had complained of pain to a chiropractor some 14 months prior to the accident; however, the trial court did not permit introduction of the prior complaints to the chiropractor. *Id.* at 268. The trial court granted directed verdict for plaintiff on the issues of causation and the amount of special damages. *Id.*

On appeal, the Court of Appeals analyzed defendant's offer of proof as to why plaintiff's complaints 14 months prior to the collision were relevant to the current action. *Id.* at 288. The Court noted that (1) defendant did not call the chiropractor; (2) Harris testified that his prior

[2] 116 Wn. App. 261, 5 P.3d 350 (2003); 152 Wn.2d 480, 99 P.3d 782 (2004).

complaints resolved prior to the accident; and (3) the experts testified that Harris had no pain complaints in the six months prior the accident and that his shoulder injury was directly related to the accident. *Id.* The Court of Appeals agreed with the trial court sustaining plaintiff's relevance objection. *Id.* "**The offer of proof had no tendency to prove a fact of consequence to the action, and the trial court correctly ruled that it was irrelevant**."[3] *Id.* at 289 (emphasis added). The Court went on to hold that when an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages. *Id.* at 288-89.

Here, unlike in *Harris*, Respondents have supplied competent medical testimony that Appellant's fracture does have a tendency to prove a fact of consequence: the cause of Appellant's subject complaints. Therefore, Appellant's fracture is relevant to this action. Also unlike *Harris*, where the only competent testimony was that plaintiff's injuries resulted from the accident, here, competent testimony was offered that Appellant did not suffer any vascular type injuries in the accident and did not sustain TOS. Here, Respondents do not contend that the subject accident "lit up" or "made active" a dormant condition. Instead,

[3] Appellant notably omits this portion from her block quote on page 14 of her brief.

Respondents contend that Appellant's subjective complaints are entirely unrelated to the subject accident and are related to the progression of her fractured clavicle and weight gain, which was also supported by the timing surrounding her onset of complaints, which was a significant of time after the accident and which corresponded with her weight gain and other non-accident related issues. The trial court did not err in determining that Appellant's fracture was relevant and admitted evidence of the same at trial and after Appellant had made the same arguments in her motion in limine, pursuant to *Harris v. Drake*, that she attempts to re-argue now.

In *Hoskins v. Reich*, the trial court admitted evidence of late 2000 chiropractic treatment and physical complaints in a personal injury trial stemming from a May 10, 2001 motor vehicle accident. 142 Wn. App. 557, 174 P.3d 1250 (2008). The Court of Appeal performed an analysis in accord with *Harris v. Drake* and determined that the trial court erred in admitting evidence of the prior treatment and complaints. *Hoskins*, 142 Wn. App. 566. The Court noted that defendant's desire to have the jury hear that plaintiff "was not a perfect clean slate" at the time of the accident was insufficient to meet basic relevance requirements. *Id.* at 568. "Without evidence of symptoms or a preexisting condition subject to a natural progression, [plaintiff's] prior treatment was not relevant to the issues of proximate cause and damages." *Id.* at 568-69. The Court also specifically

noted that defendant 'failed to explain what [plaintiff's] "condition" was or why it was relevant to the post-accident injuries.' *Id.* at 569.

Here, Respondents thoroughly articulated why Appellant's fractured clavicle and callous formation are relevant to her current complaints because testimony proffered has shown that Appellant's current complaints are the progression of this condition paired with her unintended weight gain. Respondents provided competent medical testimony that Appellant's complaints are caused not by the subject accident but by a progression of her fractured clavicle. This was bolstered by Appellant's own experts' admissions regarding the delayed onset of symptoms, which were unusual if the TOS were proximately caused by a traumatic event. As such, Appellant's fractured clavicle was relevant.

C. The Trial Court Acted Within its Discretion in Allowing Evidence of Collarbone Fracture when Appellant's Complaints are the Natural Progression of that Condition

Evidence of the natural progression of a preexisting condition is relevant to the issues of proximate cause and damages. *Hoskins*, 142 Wn. App. 568-69, 370 (*citing Bennett v. Messick*, 76 Wn.2d 474, 457 P.2d 609 (1969)). Washington Pattern Jury Instruction 30.18 states as follows:

> If you find that:
>
> (1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and

> (2) because of this occurrence the pre-existing condition was lighted up or made active,
>
> then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.
>
> There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.[4]

A party is entitled to have his theory of the case presented to the jury by the instructions when he has presented sufficient evidence to create an issue with respect to it. *Bowman v. Whitelock*, 43 Wn. App. 353, 307, 717 P.2d 303 (1986). Instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied." *Torno*, 133 Wn. App. at 251.

In *Torno*, the Court of Appeals held that giving the last portion of the WPI 30.18 instruction regarding no recovery for naturally progressing conditions was proper given the inference from expert testimony provided at trial. *Id.* at 252-53. At trial, defendant introduced plaintiff's prior physical condition in a motor vehicle personal injury action, and defense experts testified that plaintiff only sustained a cervical strain that required

[4] Edited for admitted liability and only claims of bodily injury by plaintiff.

three weeks to three months of treatment before recovering. *Id.* at 248. The experts testified that plaintiff's ongoing complaints were not related to two recent accidents but were an effect of preexisting fibromyalgia. *Id.*

On appeal, the Court of Appeals noted that "[t]he inference from the summarized defense evidence is that [plaintiff's] prior conditions had degenerated or naturally progressed to the point of becoming symptomatic." *Id.* at 253. Therefore, the instruction was supported by substantial evidence, and defendants were entitled to the instruction under their case theory. *Id.*

Here, like in *Torno*, Respondents provided competent expert medical testimony that Appellant's clavicle fracture and resulting callous formation, along with Appellant's weight gain naturally progressed to result in Appellant's subjective complaints. Additionally, here, Respondents have provided more than an "inference" that Appellant's complaints are a natural progression; Respondents provided testimony at trial and in pre-trial motions that Appellant's subjective complaints are a result of a progression of the fracture:

> The fractured clavicle resulted in a structural change and fracture calcification, evident on my physical examination of the plaintiff. This condition, as well as an increase in plaintiff's weight, is more probably than not the cause of plaintiff's alleged thoracic outlet syndrome symptoms, due

> to intermittent partial obstruction of the right subclavian artery and/or the right subclavian vein.[5]

WPI 30.18 is a pattern instruction, approved by the Washington State Supreme Court Committee on Jury Instructions, and accurately states Washington law. Respondents provided substantial evidence to warrant the instruction and specifically, the last section thereof. Appellant had the burden of proof regarding causation of alleged injuries and complaints. Respondents not only provided an alternative theory on causation but provided testimony regarding a condition of which Appellant's own treating providers were unaware. The trial court acted within its discretion in allowing evidence of the natural progression of Appellant's physical condition and instructing the jury on the same.

D. <u>If the Trial Court Erred, it was Harmless</u>[6]

Even if a trial court does commit error in admitting evidence at trial, if such error is not prejudicial there are no grounds for reversal. *Hoskins*, 142 Wn. App. 570 (*citing Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983)). Improperly admitted evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole. *Hoskins*, 142 Wn. App. 570-71

---

[5] CP 73

[6] Respondent does not believe that any error occurred at trial; however, Respondent puts forth this argument in the alternative to prior arguments.

(*citing Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)).

If damages are proportionate to and within the range of evidence "they will not be found to have been motivated by passion or prejudice." *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). "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." *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

In *Hoskins*, the trial court admitted irrelevant evidence regarding past medical treatment and physical condition of plaintiff in a personal injury trial stemming from a May 10, 2001 motor vehicle accident, but the Court of Appeals determined that such error was harmless. 142 Wn. App. 570-72. There, plaintiff's treating chiropractor testified that he released plaintiff to return work in July 2001 because there was no permanent injury. *Id.* at 571. Additionally, plaintiff's two medical doctors that testified he needed surgery did not examine plaintiff until two years after the accident, and then, in February 2002, plaintiff discontinued treatment for a period of 19 months before continuing treatment. *Id.* at 571-72. In the end, the Court of Appeals held that the record, when viewed as a whole, supported the jury's verdict and evidence of prior treatment and

complaints was of minor significance. *Id.* at 572. Specifically, the Court held that the jury was warranted in determining that plaintiff's alleged complaints after July 2001 were unrelated to the accident and that plaintiff did not require surgery. *Id.* Finally, the Court held that the award was fair in light of the evidence presented as a whole. *Id.*

Here, like in *Hoskins*, the jury award was warranted when viewing all the evidence presented as a whole and admission of the fracture was of minor significance.

1. Dr. Riegel

Dr. Riegel, Appellant's primary care physician testified on direct that (1) he first saw her on December 1, 2010; (2) that he initially believed Appellant sustained sprain injuries but no "significant physical trauma that would need immediate attention" and would "get a lot better over the next couple of weeks;" and (3) he next saw Appellant on June 15, 2011, which was more than six months after the accident, at which point he noted new complaints of paresthesia.

On cross, Dr. Reigel was impeached for relating multiple billing and treatment entries to the accident when they were admittedly not related. He further admitted that subsequent treatment he rendered was in relation to Appellant's cognitive dysfunction, memory issues, weight gain, and fatigue, all of which are wholly unrelated to the subject accident.

Crucially, Dr. Reigel testified that (1) he never made a diagnosis of TOS; (2) Appellant's complaints of paresthesia were new and first noted in June 2011; (3) Appellant was instructed to return in two or three weeks "unless you are feeling significantly better" and that she did not return until June 15, 2011; (4) his evaluations of Appellant's extremities were normal on December 1, 2010 and June 15, 2011; and (5) Appellant's soft tissue injuries resolved by June 15, 2011.

2. Appellant

Appellant testified that she had not heard of TOS until this accident but was impeached on this statement on cross with a 2008 medical record that discussed possible TOS diagnosis. She also admitted to a 20 month gap in treatment for allegedly accident related injuries from April 2013 until early 2015 and admitted to not mentioning any accident related injuries when she sought treatment for a fall in her garage in December 2013. Additionally, Appellant admitted to calling her medical providers in an attempt to add subjective complaints of paresthesia after not reporting any such complaints during examination. Appellant confirmed that the only physician to locate the callous formation on her clavicle was Respondents' physician, Dr. Kremer. Lastly, Appellant's memory and recollection of issues germane to her claims was questionable due to her longstanding use of medications for unrelated issues

3. Dr. Lynch

Dr. Lynch testified that (1) he saw and examined Appellant for the first time in August 2011; (2) the diagnostic testing done did not confirm TOS but did confirm thoracic outlet compression; (3) there were "several months between the accident and the development of [Appellant's paresthesia] symptoms;" and (4) a period of several months was longer than would be expected for onset of TOS.

4. Dr. Ombrellaro

Dr. Ombrellaro testified that TOS usually develops "weeks to a couple months or so after the inciting event." He then testified that he never examined Appellant until February 2015, over four years after the November 2010 accident. Dr. Ombrellaro finally testified that Appellant reported to him that her paresthesia began two to three days following the subject accident, which is directly contrary to Dr. Reigel's and Dr. Lynch's records and testimony and likely was based upon Appellant's memory, which was subject to scrutiny.

5. Dr. Kremer

Dr. Kremer, a board certified vascular surgeon, testified that (1) Appellant did not sustain TOS as a result of the subject accident; (2) none of the physical testing he performed on Appellant revealed TOS; (3) the diagnostic testing performed by Dr. Ombrellaro's office actually "would

be against [a] diagnosis of thoracic outlet syndrome" and that the technician who performed the testing did not conduct it correctly. (RP 409-10).

Here, the jury heard testimony from Appellant's primary care physician that his examinations revealed soft tissue recovery in a matter of months and no abnormalities in her extremities. He noted that Appellant had new complaints of paresthesia in June 2011. This testimony was compounded by Dr. Lynch, who testified that several months of delayed onset for TOS is unusual and that no test revealed TOS. Dr. Ombrellaro testified that TOS usually appears in weeks to a couple months after an inciting event. He then confirmed that he was informed that Appellant's symptoms of paresthesia began days after the accident. His opinions and the foundation therefor were based on an incorrect history from Appellant, who has a history of memory problems and cognitive dysfunction. Finally, Appellant testified that she stopped treating for a period of 20 months from 2013-2015 and made no mention of accident related injuries to her doctors for treatment for subsequent injuries received during that time.

This evidence alone is sufficient to justify the jury's verdict; however, Dr. Kremer's testimony, even excluding that of the fractured clavicle, that Dr. Ombrellaro's testing was done incorrectly and that Dr. Kremer's own testing did not support a TOS diagnosis solidify the jury's

determination and award. Introduction of evidence of the fractured clavicle was insignificant when viewing all the issues presented in Appellant's case in chief, especially when Appellant has the burden of proof with respect to causation of the TOS to the subject accident. Appellant's failure to meet that burden and not any insignificant introduction of Appellant's clavicle brought about the verdict in this case.

Here, the jury was justified in determining that (1) Appellant's soft tissue injuries resolved in a matter of months; (2) her complaints after the June 2011 were unrelated to the subject parking lot accident; (3) Appellant did not sustain TOS as a result of the accident; and (4) that surgery is not warranted. Any perceived error was harmless, insignificant, and cumulative to other evidence justifying the jury's award.

E. <u>The Jury Verdict Should Not be Overturned</u>

Appellant's argument that the only reasonable explanation for the jury's verdict was that they were swayed by the evidence of her previously fractured collarbone is pure speculation. No declarations from any jurors have been provided to support this suggestion and it flies in the face of the presumption that jurors are competent judges of the facts.

Rather, the verdict in this case reflects what Appellant could only prove based upon the evidence presented, the totality of the jury instructions and the standards/burdens that Appellant was required to meet

to establish all of her claims, including those of TOS. The verdict encompasses medical expenses incurred for the initial treatment of soft tissue injuries that she initially reported to her providers and the general damages falls within the appropriate range based on the credibility of the testimony obtained during the trial. Courts will look to the record to determine if sufficient evidence supports the verdict. *McUne v. Fuqua,* 45 Wash.2d 650, 652, 277 P.2d 324 (1954). Court's will rarely overturn a verdict and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict. *Valente v. Bailey*, 74 Wash.2d 857, 447 P.2d 589 (1968).

The 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. *Phelps v. Wescott*, 68 Wash.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for the 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. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wash.2d 244, 391 P.2d 194 (1964).

V. CONCLUSION

For the reasons stated above, Respondents request that this Court find that the trial court acted within its discretion in reviewing and evaluating the issues and allowing introduction of evidence regarding Appellant's clavicle when such evidence was relevant to the issues being tried. Alternatively, if this Court determines that any error did occur, that any error was harmless when viewing the evidence presented as a whole. Further that the jury verdict represents a decision based upon the totality of evidence, the requirements upon the Appellant with respect to burden of proof for causation and damages and that any other interpretation constitutes unsupported speculation.

DATED: March 24, 2016.

BENDELE & MENDEL, PLLC

By: _____
James Mendel, WSBA 29223
Colin Hutchinson-Flaming, WSBA 45294
200 W. Mercer Street, Suite 411
Seattle, WA 98119
T: (206) 420-4267
F: (206) 420-4375
E: james@benmenlaw.com
Attorneys for Defendants/Respondents