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NO. . 64031-3-I

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

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STEPHEN L. SANDBO, as Personal Representative of the Estate of ELLEN V.  
SANDBO, deceased,

Respondent,

vs.

VALLEY MEDICAL CENTER – KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 1,

Appellant,

and

FREDERICK ORDONEZ; and UNKNOWN JOHN DOES,

Defendants.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Andrea Darvas, Judge

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BRIEF OF APPELLANT

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## **I. NATURE OF THE CASE**

In this general survival action, plaintiff alleged medical malpractice. Plaintiff claimed the failure of a hospital's nursing staff to call a doctor sooner the evening after the 87-year-old patient's back surgery resulted in partial paralysis of the legs and incontinence. Despite sharply conflicting evidence, the surgeon was allowed to testify that one of the nurses later apologized for not calling him sooner, evidence that plaintiff's attorney later called "the elephant in the room." After receiving a damages instruction that permitted the jury to award types of general damages not recoverable under the general survival statute, the jury awarded \$1,818,583.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred by—

- A. Entering the July 22, 2009, Judgment on Jury Verdict (CP 395-97);
- B. Granting Plaintiff's Motion in Limine for Admission into Evidence of Out-of-Court Statements of Frederick Ordonez (CP 348);
- C. Denying Defendant Valley Medical Center's Motion in Limine to exclude any evidence of out-of-court statements by Nurse Frederick Ordonez (CP 369);

D. Admitting into evidence testimony and/or other evidence of out-of-court statements allegedly by Frederick Ordonez (7/9/09 Thompson RP 71-72);

E. Giving Instruction No. 14 (CP 390);

F. Failing to give defendant's proposed instruction (unnumbered) on damages (CP 302-04).

### **III. ISSUES PRESENTED**

A. Was Dr. Thompson's evidence that Nurse Ordonez told Dr. Thompson that he, Ordonez, should have called the doctor to report plaintiff's allegedly worsening condition properly admissible under the hearsay rules? (Assignments of Error A-D)

B. Did substantial evidence support the claim that the hospital was negligent in not providing an operating room sooner? (Assignment of Error A)

C. Should a damages instruction for personal injury actions be given in a general survival action where the noneconomic damages recoverable are governed by RCW 4.20.046? (Assignments of Error A, E & F)

#### **IV. STATEMENT OF THE CASE**

##### **A. STATEMENT OF RELEVANT FACTS.**

In October 2005, 87-year-old Ellen Sandbo, a retired nurse, visited a brand new orthopedic surgeon, Dr. Jason Thompson, about severe pain in her lower back and left buttock. The pain was so severe that Sandbo no longer felt like walking. Dr. Thompson, who had just begun his medical practice a month before, found “extensive degenerative disc disease” with “significant central stenosis at L2-3”, “moderate central stenosis” at L3-4, and at L4-5, an extruded disc fragment resulting in displacement of the left traversing nerve root. (Ex. 1, p. VMC 0433; 7/9/09 Thompson RP 3, 71)

Dr. Thompson first prescribed conservative treatment because, as he noted in the medical record, an L-2-3, 3-4 decompression surgery would be “fraught with the potential for complications” “in an 87-year-old woman”. (Ex. 1, VMC 0434) Indeed, Sandbo had several preexisting conditions unrelated to her back pain. (7/9/09 Thompson RP 6-7; 7/13/09 Miller RP 44-46; Ex. 1, VMC 431-34)

Conservative treatment did not work. By January 5, 2006, Sandbo’s pain had become “intolerable.” She signed a written consent to a laminectomy after being informed the risks included, among other things, death, stroke, paralysis, and persistent pain. (Ex. 1, VMC 0434-36)

Surgery occurred the morning of January 31, 2006, ending at 11:32 a.m. (7/9/09 Thompson RP 21-22; Ex. 1, VMC 0550)

Pain is normal for most, if not all, post-operative patients. (7/16/09 Soi RP 5; 7/16/09 Altman RP 20, 78; 7/20/09 Chapman RP 66) Anticipating that pain relief would be required, Dr. Thompson prescribed post-operation pain control, including, among others, a PCA, boluses to the PCA<sup>1</sup>, and morphine sulfate and Vistaril (hydroxyzine) in case of severe pain. (7/16/09 Altman RP 26-27; Ex. 1, VMC 0450-52; 7/14/09 Shin RP 28)

A PCA is a patient-controlled analgesia system. By pushing a button, the patient receives a small amount of Fentanyl, a fast-acting pain medication. To better monitor the patient's pain level and to determine whether a bolus of medication is necessary, the device has a lock out system. (7/14/09 Shin RP 26-28; 7/16/09 Altman RP 27-28)

After Sandbo's surgery, nurses performed periodic neurovascular assessments and monitored Sandbo for, among other things, pain. (Ex. 1, VMC 0489) Pain assessments are done by asking the patient to evaluate pain on a scale of 0 to 10, with 0 being no pain and 10 being the worst

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<sup>1</sup> "Bolus", as used in this case, refers to a supplemental dosage of pain medication. (7/8/09 RP 14)

pain. (7/16/09 Altman RP 28-30) Sandbo's medical records show that from 1:15 p.m. to 8 a.m. the next morning, Sandbo rated pain in her back from a low of 2 at 2:15 p.m. to a high of 8 at midnight. (Ex. 1, VMC 0504; 7/16/09 Altman 30-33) Application of the PCA and boluses reduced her pain, sometimes substantially. (Ex. 1, VMC 0504; 7/16/09 Altman 31-33)

The neurovascular assessments included evaluation of sensation and motion and strength in both legs. (Ex. 1, VMC 0488) They occurred quite frequently just after surgery; as more time passed, the assessments were performed less often, from every half hour to every four hours. (7/14/09 Shin RP 35; 7/16/09 Altman RP 17) One of plaintiff's experts testified that this schedule was reasonable, so long as the checks continued to be normal. (7/14/09 Shin RP 34-35, 50)

Sandbo's medical records show that from early afternoon on January 31, the day of the surgery, through 4 a.m. (0400) on February 1, three different nurses—the first unidentified, followed by Fred Ordonez and then Dinah Isaguirre—performed nine such assessments, each time finding that Sandbo's sensation, motion, and strength were normal. (Ex. 1, VMC 0488; 7/14/09 Shin RP 35)

When Nurse Soi came to work in the morning of February 1, Nurse Isaguirre told her that Sandbo had complained of pain in the back

and legs, but that her neurovascular assessments were normal. (7/16/09 Soi 31, 44) At 8 a.m., however, Nurse Soi noted a change: bilateral numbness and “[m]ovement not against gravity.” (Ex. 1, VMC 0488) A CT scan confirmed that the patient had developed a compressive epidural hematoma, a known complication of the surgery. (Ex. 1, VMC 0437; 7/13/09 McKinley RP 10-11) Dr. Thompson performed a second operation that afternoon, but Sandbo was left with partial paralysis of her legs and incontinence. (Ex. 1, VMC 0555-56; Ex. 2, 9/14/06 Follow up; 7/9/09 Thompson RP 86)

Within a few weeks, Sandbo and her family began talking with Dr. Thompson about what might have happened had the nurses called the doctor earlier. (7/9/09 Thompson RP 98-99; Ex. 2, p. 7) At the time, Dr. Thompson advised them that while “perhaps” the result could have been different, “it is unknown whether the outcome would be any different at all.” (Ex. 2, p. 7; 7/9/09 Thompson RP 99) At trial, he would testify differently. (7/9/09 Thompson RP 73-74)

**B. STATEMENT OF PROCEDURE.**

Sandbo sued the hospital, appellant/defendant Valley Medical Center, in August 2007. (CP 3-16) Even though he was not a hospital employee, Dr. Thompson was not sued. (7/9/09 Thompson RP 94; CP 3-16)

**1. Pretrial Proceedings.**

During discovery, Dr. Thompson was deposed. At his deposition, he testified that within a couple of days after the second surgery, he talked with Nurse Ordonez about the incident:

And I recall him saying something along the lines of, You're right, I should have called you sooner, or I should have called. But I don't want to specifically put words in his mouth because I don't remember mine nor his specific words.

(CP 41-42, pp. 78-79, 82)

In his deposition, Nurse Ordonez testified that when he learned that Dr. Thompson was claiming the patient had complained of numbness and heaviness in her legs during Nurse Ordonez's shift, he called the doctor because "Mrs. Sandbo did not, did not express that to me in any way, shape or form, even through the several times of my neurovascular assessments through that evening." (CP 47, 49) He further testified that "I don't recall explaining to Dr. Thompson that I should have called when there was really no need to call because there wasn't anything that was out of the norm." (CP 55)

In December 2008, Sandbo moved to amend her complaint to add Nurse Ordonez as a party defendant. (CP 90-96) Plaintiff candidly explained why (CP 90):

As plaintiff has been unable to resolve an evidentiary matter with VMC, she seeks to add Ordonez as a defendant

to secure admission into evidence at trial a critical statement by him admitting fault. This statement against interest—now denied by Ordonez and VMC—was made to the treating orthopedist, Dr. Jason Thompson, within a few days of the injury.

The trial court denied the motion because plaintiff had not given the notice required by RCW 7.70.100. (CP 106)

Trial was scheduled to begin on February 23, 2009. (CP 143) On January 14, 2009, less than 6 weeks before trial, plaintiff moved to admit the alleged admission of Nurse Ordonez. (CP 108-15) The trial court denied the motion but continued the trial to allow plaintiff to amend her complaint to add Nurse Ordonez as a party defendant. (CP 143-44, 45-46) Plaintiff amended her complaint to add Nurse Ordonez. (CP 147-50)

Sandbo passed away in April 2009, at the age of 90. (CP 157; Ex. 1, VMC 0436) Her personal representative, her son, plaintiff/respondent Stephen Sandbo, filed a second amended complaint, but did not bring a wrongful death claim. (CP 165-80) Consequently, there was no evidence at trial that Sandbo's death was in any way related to the events at issue.

Shortly before trial, plaintiff moved to admit Dr. Thompson's testimony about Nurse Ordonez's alleged out-of-court statement. (CP 181-90) The hospital moved to exclude the same evidence. (CP 192)

At the hearing on the motions, plaintiff's counsel told the trial court (7/7/09 RP 24):

If your Honor grants the motion, we intend to dismiss Nurse Ordonez. We intend to take a non-suit. That will shorten trial, it will take days off the trial, and we don't have to deal with another party defendant.

In a written order, the trial court granted plaintiff's motion under ER 801(d)(2)(iii)-(iv) and reserved ruling under ER 803(a)(4). (CP 348) The hospital's motion to exclude was denied. (CP 369) After obtaining these rulings but before any testimony was taken, plaintiff dismissed Nurse Ordonez without prejudice. (CP 352; 7/7/09 RP 81)

## **2. The Trial.**

Trial was hotly contested with much of the evidence conflicting.

Dr. Thompson, per the trial court's order in limine, testified that Nurse Ordonez had told him, "I'm sorry, I should have called you sooner" or "Should have called you." (7/9/09 Thompson RP 71) Nurse Ordonez denied ever admitting fault. (7/14/09 Ordonez RP 59-61)

Dr. Thompson also said that when he visited Sandbo around 5:30 to 6 pm on the day of the surgery, he found her doing well. (7/9/09 Thompson RP 22) But the medical records show that during this period of time she reported "ache/sharp pain back 4/10" that with self-administered pain medication was relieved to 3/10 @1830 hrs. (Ex. 1, VMC 0504)

Furthermore, although plaintiffs' experts claimed that the change in Sandbo's pain between 5:30 .pm. and later on in the evening was due to the onset of the epidural hematoma, the defense expert explained that the

patient's feeling well at 5:30 p.m. was likely due to her still being under the influence of an earlier administered medication and powerful antiinflammatory. (7/13/09 McKinley RP 18-19; 7/20/09 Chapman RP 61-63; 7/16/09 Altman RP 82-83) There was also evidence that Sandbo had not used as much of the self-administered pain medication (PCA) as she could have. (7/16/09 Altman RP 35; 7/14/09 Shin RP 32-34)

Sandbo herself (by deposition) as well as her sister and friend who were present testified that around 8:30-9 p.m. the night of the surgery, Sandbo had complained of severe pain in her legs and asked that the doctor be called. They testified that the nurse on duty refused to call the doctor. (Sandbo Dep.<sup>2</sup> 9-10, 12; 7/15/09 Klepach RP 28-30; 7/14/09 Sprouse RP 4-5)

Nurse Ordonez, the nurse on duty at that time, had no recollection that anyone had asked him to call the doctor and flatly denied that Sandbo had complained of severe leg pain. (7/14/09 Ordonez RP 8-9, 22) He said she had complained of an achy right knee. (7/14/09 Ordonez RP 9-10) In addition, his chart notes showed that Sandbo had reported aching/sharp pain back 3/10 at 8 p.m. and an achy pain back 3/10 that was relieved by

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<sup>2</sup> The deposition transcripts for Ellen Sandbo (sub 208) and Dinah Isaguirre (sub 207) have been designated for the clerk's papers but have not yet been prepared by the superior court with page numbers for citation.

the PCA to 2/10 @2230 hrs. (Ex. 1, VMC 0504). This was the same or less pain than reported a few hours earlier when Dr. Thompson visited and found his patient doing well. (Ex. 1, VMC 0504; 7/9/09 Thompson RP 22)

None of the contemporaneous medical records showed anything unusual at 9 p.m. on January 31. (Ex. 1) None of these records mentioned numbness, tingling, or heaviness during that night. Sandbo herself made no mention in her deposition that she had, or complained of, numbness, tingling, or heaviness that night. (Sandbo Dep. 81:02-06) Further, none of the others actually present that night (her sister, her friend, and Nurse Ordonez) said that Sandbo then complained of numbness, tingling or heaviness. (7/14/09 Sprouse RP 7, 9, 35; 7/14/09 Ordonez RP 59-60; 7/15/09 Kreplach RP 39-40)

Indeed, Nurse Isaguirre, who was on duty after Nurse Ordonez, from 11:15 p.m. to 7:15 a.m., remembered Sandbo to be a pleasant patient who liked to tell stories. (Isaguirre Dep. 10:03-04, 10:16-18, 10:21-11:06) She also remembered helping Sandbo to sit on the side of the bed with her legs dangling for a few minutes, an event that she memorialized in the hospital record. (*Id.*; Ex. 1, VMC 0503)

Yet Dr. Thompson—who had left the hospital. and did not return until the next morning—somehow noted that “at approximately 9 pm the

pt. began having numbness and heaviness in her legs.” (7/9/09 Thompson RP 22, 35-36; Ex. 1, p. VMC 0467) One of plaintiff’s experts testified that these symptoms, along with the claimed pain, were the earliest manifestation of the epidural hematoma. (7/13/09 McKinley RP 18-19)

Dr. Miller, Sandbo’s primary care physican, visited his patient at about 6:30 a.m. the day after the surgery, February 1. (7/13/09 Miller RP 13) He testified that she complained of numbness in her feet and pain, the first witness at trial with personal knowledge to have noted this. (7/13/09 Miller RP 14; 7/16/09 Altman RP 19, 42) Although at trial several nurses agreed that numbness and heaviness would require calling the doctor (7/14/09 Shin RP 20; 7/16/09 Soi RP 9, 15; Isaguirre Dep. 42:05-42:12; 7/16/09 Altman RP 26), Dr. Miller said that although he was concerned, he was not alarmed and felt that Dr. Thompson could address it on his rounds. (7/13/09 Miller RP 19, 48) He did not contact Dr. Thompson. (7/9/09 RP Thompson 93-94)

It was undisputed that the epidural hematoma caused the partial paralysis and incontinence. (7/9/09 Thompson RP 62; 7/9/09 Wohns RP 11-12; 7/13/09 Braun RP 32-33) Experts disagreed, however, on whether the outcome would have been different if the second surgery been performed earlier. (7/20/09 Chapman RP 9-10; 7/13/09 McKinley RP 35-36; 7/13/09 Braun RP 40-41 ) Although Dr. Thompson had earlier told

the family that “it is unknown whether the outcome would be different at all”, at trial he told the jury that on a more probable than not basis, an earlier surgery would have meant that Sandbo would have been able to walk and perhaps have had control over her bowels and bladder. (Ex. 2, p. 7; 7/9/09 Thompson RP 73-74)

Experts also disagreed on whether the nurses should have called Dr. Thompson the evening before. (7/9/09 Thompson RP 65-71; 7/13/09 McKinley RP 26; 7/16/09 Altman RP 11, 15, 20-22, 46-47; 7/14/09 Shin RP 14-15, 20-21) For example, plaintiffs’ experts claimed that the nurses should have called the doctor because of the allegedly severe pain Sandbo felt around 9 p.m. the evening of the surgery (7/9/09 Wohns RP 13,15) Plaintiff’s experts also claimed the doctor should have been called because of the incontinence that developed sometime during the evening. (7/14/09 Shin RP 20-21) Defense experts disagreed. (7/16/09 Altman RP 20, 25-26; 7/20/09 Chapman RP 64)

The jury was also presented with evidence that although she had been able to engage in such activities as driving and gardening before the surgeries, Sandbo had suffered from many health problems over her 87 years, including arterial venous malformations, which sometimes resulted in gastrointestinal bleeding or necessitated blood transfusions; anemia; diabetes; dyslipidemia; hypertension; hypothyroidism; and arthritis. She

had also had small strokes and a transischemic attack. A pack-a-day smoker for several years earlier in her life, she had chronic obstructive pulmonary disease, which, by the time she turned 90, required her to use oxygen. (7/13/09 Miller RP 7, 44-46; Ex. 1, VMC 431-34; Ex. 2, p. 76; 7/15/09 Klepach RP 8, 10)

The jury was instructed that Dr. Thompson did not violate the standard of care. (CP 385) Then it found the hospital negligent and awarded plaintiff \$1,818,583 in damages, more than seven times the claimed medical special damages of \$254,058. (CP 394; 7/21/09 Plf.'s Closing RP 39) This appeal followed.

## **V. ARGUMENT**

### **A. EVIDENCE OF NURSE ORDONEZ'S ALLEGED ADMISSION WAS INADMISSIBLE.**

The trial court admitted Dr. Thompson's testimony that Nurse Ordonez had told him that he, Ordonez, should have called Dr. Thompson earlier. (7/9/09 Thompson RP 71) This was an out-of-court statement admitted to show its truth. Consequently, absent an exception to either the definition of "hearsay" or the hearsay rule, the testimony was hearsay and inadmissible. ER 801-802.

1. **Nurse Ordonez Was Not a Hospital Speaking Agent Under ER 801(d)(2)(iii)-(iv).**

The trial court ruled that Dr. Thompson's testimony about Nurse Ordonez's out-of-court statement was admissible under ER 801(d)(2)(iii)-(iv). (CP 348) It was inadmissible under both subsections (iii) and (iv).

ER 801(d)(2)(iii) & (iv) provide that a statement is not hearsay when:

The statement is offered against a party and is . . . (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party . . . .

The drafters of these provisions essentially intended to adopt previous Washington law. Task Force Comment 801 (quoted in R. Aronson, *THE LAW OF EVIDENCE IN WASHINGTON* § 801.02, at 801-9 (4<sup>th</sup> ed. 2009)). Thus, the drafters explicitly elected *not* to adopt the broader FED. R. EVID. 801(d)(2)(D), which provides:

A statement is not hearsay if—

...

The statement is offered against a party and is . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .

As further explained in the Task Force's Comment:

Later decisions have phrased the rule not in terms of *res gestae*, but in terms of whether the agent was authorized to

make the statement on behalf of the principal. . . . This has become known as the “speaking agent” approach and has continued to be applied in relatively recent decisions. *See, e.g., Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 496 (1967). *Accord*, Restatement (Second) of Agency §§ 286-88 (1958). The drafters of the Washington rule felt that existing Washington law, as exemplified by the later cases, reflected the better policy and deleted the language in the federal rule which would have broadened the admissibility of statements by agents.

Aronson, *supra*, at 801-10. *See generally Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 284-85 & n. 20, 966 P.2d 355 (1998).

In the instant case, the trial court said that Dr Thompson’s testimony about what Nurse Ordonez allegedly said was admissible, explaining, “I don’t think he [Nurse Ordonez] is required to be a managing agent per se, his role as a nurse allows him to talk about his care of a patient with a preson who is caring for the same patient.” (7/7/09 RP 51) Under this analysis, the statement would be admissible under FED. R. EVID. 801(d)(2)(D) as “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .” But this is not the version of the rule adopted in this State.

*Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 946 (1967), is controlling. In *Kadiak* a fire occurred on a boat. The boat owner sued the manufacturer of the boat’s engine, claiming it was

defective. At trial, the trial court refused to admit testimony by the defendant's employee that would have related that the plaintiff's port engineer/chief mechanic had said that the fire was caused by something other than the defective engine.

The Washington Supreme Court affirmed the rejection of the evidence. Citing RESTATEMENT (2D) OF AGENCY § 288(2)-(3) (1958), the court said that although the chief engineer's job was to keep and maintain plaintiff's vessels in mechanical running order, there was no evidence that he was authorized to admit liability for or speculate publicly about cause of fire.

*Kadiak* relied on RESTATEMENT (2D) OF AGENCY § 288(2)-(3).

Those provisions read:

Authority to do an act or to conduct a transaction does not itself include authority to make statements concerning the act or transaction.

Authority to make statements of fact does not of itself include authority to make statements admitting liability because of such facts.

The Restatement illustrates how these rules work. For example, suppose a principal authorizes an agent to buy and pay for horses. The agent buys one from a third person. The agent later tells the seller that the principal has not paid for the horse. In an action by the seller against the principal, the agent's "admission" to the seller is not admissible against

the principal, even though the agent was authorized to deal with the seller to buy and pay for the horse. Illustration 1 to comment a, RESTATEMENT (SECOND) OF AGENCY § 288 (1958).

Or suppose a driver runs over a pedestrian while driving within the scope of employment and, at impact, shouts, “I wasn’t looking. It’s my fault.” This statement is not admissible against the driver’s employer as an admission, even though the driver’s actions were within the scope of employment. Illustration 2 to comment a, RESTATEMENT (SECOND) OF AGENCY § 288; *accord Makoviney v. Svinth*, 21 Wn. App. 16, 584 P.2d 948 (1978), *rev. denied*, 91 Wn.2d 1010 (1979).

Washington decisions have reached results consistent with these examples. For example, in *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980), an employee’s out-of-court statement was held inadmissible. There a patron of the defendant bar was killed in an auto accident after drinking too much at the bar. The bar moved for summary judgment on the ground that the patron had not been obviously intoxicated. Citing ER 801(d)(2), plaintiff submitted its attorney’s affidavit that he had spoken to the bar manager, who had told him that the patron had drunk more than usual, was intoxicated, and “smashed.”

Affirming summary judgment, the Washington Supreme Court agreed that the affidavit was inadmissible as hearsay:

*The hearsay exception applies to situations where the agent was authorized to make the statement on behalf of the principal. See Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 422 P.2d 496 (1967); 5 R. Meisenholder, Wash. Prac., EVIDENCE LAW AND PRACTICE §§ 425(1) (1965 & Supp. 1980). No evidence of such authorization is present in the instant record.*

94 Wn.2d at 644-45 (emphasis added).

*Blodgett v. Olympic Savings & Loan Association*, 32 Wn. App. 116, 646 P.2d 139 (1982), also provides a helpful comparison. There plaintiff was injured when a panel from a construction site fell and hit her. When the police arrived, a carpenter employed by the defendant contractor said, “We were getting ready to rebrace it when it fell.” The trial court admitted the police officer’s testimony about this statement on ground that it was an admission against interest by an agent of the defendant.

Division II reversed, holding that the testimony was inadmissible:

The testimony was hearsay. It was not admissible under ER 801(d)(2) because there was no evidence that Lusk, Jr. was a speaking agent acting within the scope of his authority at the time of the statement.

32 Wn. App. at 126. *See also Makoviney v. Svinth*, 21 Wn. App. 16, 584 P.2d 948 (1978), *rev. denied* 91 Wn.2d 1010 (1979).

In each of these cases, out-of-court statements by a party’s employee that essentially admitted liability were excluded. In each case, there was no dispute that the employee in question had authority to “do an act or to conduct a transaction” pertinent to the statements made.

RESTATEMENT (2D) OF AGENCY § 288(2). For example, the chief engineer in *Kadiak* had the authority to maintain the boat's mechanical systems. The bar manager in *Barrie* surely had authority to decide whether to serve the patron. The carpenter in *Blodgett* presumably had the authority to shore up the panel. Yet the courts in each of these cases refused to admit their out-of-court statements that would essentially have conceded their employer's liability.

Here, Nurse Ordonez had the authority to provide nursing services to his patients, including Sandbo. But that alone did not mean that he had the authority to in essence admit liability to bind his employer, the hospital. By allowing Dr. Thompson to testify that Nurse Ordonez had made such an "admission," the trial court failed to follow *Kadiak*, *Barrie*, and *Blodgett*. It instead treated ER 801(d)(2)(iii)-(iv) as if it were identical to FED. R. EVID. 801(d)(2)(D). But the framers of ER 801(d)(2)(iii)-(iv) elected not to adopt the federal rule. Admitting Dr. Thompson's testimony was error.

**2. The Alleged Statement Was Not for Purposes of Medical Diagnosis or Treatment Under ER 803(a)(4).**

Plaintiff also claimed that even if Dr. Thompson's testimony about Nurse Ordonez's out-of-court statement were not admissible as an

admission, it was admissible as an exception to the hearsay rule under ER 803(a)(4). (CP 189) Wrong.

ER 803(a)(4) provides an exception to the hearsay rule, even when the declarant is available, for:

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The Washington Supreme Court has declared, “This exception to the hearsay rule is meant to apply to statements made by a patient in the course of the doctor's diagnosis, and pursuant to the doctor's diagnostic procedures . . . .” *Bertsch v. Brewer*, 97 Wn.2d 83, 87, 640 P.2d 711 (1982). Accordingly, the declarant’s apparent motive must be “consistent with receiving medical care” and it must be reasonable for the physician “to rely on the information in diagnosis or treatment.” *State v. Lopez*, 95 Wn. App. 842, 849, 980 P.2d 224 (1999).

Of course, Nurse Ordonez’s alleged statement to Dr. Thompson, made after the events at issue, was not a statement by a patient, was not made in the course of a doctor’s diagnosis or consistent with receiving medical care, and was not pursuant to the doctor’s diagnostic procedures or relied on in diagnosis or treatment. (7/9/09 Thompson RP 71-72) ER 803(a)(4) does not apply.

**3. Nurse Ordonez Was No Longer a Party Under ER 801(d)(2)(i)-(ii).**

Although plaintiff admitted to joining Nurse Ordonez to make him a party opponent for purposes of ER 801(d)(2)(i), her motion in limine to admit Dr. Thompson's testimony was made under only ER 801(d)(2)(iii)-(iv) and ER 803(a)(4). (CP 93; 7/7/09 RP 28) Presumably because she planned on dismissing Nurse Ordonez if Dr. Thompson's evidence was admitted, plaintiff expressly advised the trial court that the motion was not based on ER 801(d)(i), the exception for admissions of a party's own statement. (7/7/09 RP 28)

Nevertheless, the trial court orally ruled that ER 801(d)(2)(i), as well the other evidence rules discussed *supra*, applied. (7/7/09 RP 50) However, the trial court's written order granting plaintiff's motion said that the motion was being granted only under ER 801(d)(2)(iii)-(iv), with admissibility under ER 803(a)(4) being reserved. (CP 348)

The court's written order trumps its oral ruling. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000). In the event this court should rule that it does not, the law is clear that Dr. Thompson's testimony was not admissible under ER 801(d)(2)(i) because Nurse Ordonez was not a party once trial began.

ER 801(d)(2)(i) provides that a statement is not hearsay if—

The statement is offered against *a party* and is (i) *the party's* own statement, in either an individual or a representative capacity . . . .

(Emphasis added.) The *only* reason why Nurse Ordonez was briefly a party was so that plaintiff could get the trial court to agree to admit Dr. Thompson's otherwise hearsay testimony under this rule. (CP 90) Once the trial court agreed the testimony was admissible, plaintiff voluntarily dismissed Nurse Ordonez, before trial commenced. (7/7/09 RP 81)

In short, when the evidence of Nurse Ordonez's out-of-court statement came in, Nurse Ordonez was no longer a party. Thus, not only was the statement not a statement *by a party*, but it was not admitted against "the party" whose statement it was. Admitting the evidence was contrary to the following principle:

If a case begins as a multiparty case, but one of the parties is removed from the case by dismissal, mistrial, or the like, the admissions of the party who has been removed are inadmissible against the party who remains in the case.

5B K. Tegland, WASHINGTON PRACTICE *Evidence* § 801.50, at 422 (5<sup>th</sup> ed. 2007).

Federal cases construing FED. R. EVID. 801(d)(2)(A), which is identical to ER 801(d)(2)(i), are in accord. For example, in *United States v. Smith*, 746 F.2d 1183 (6<sup>th</sup> Cir. 1984), two brothers were charged with conspiracy to rob a post office. During trial, one brother's taped

confession was admitted into evidence. Shortly thereafter, that brother pled guilty. The second brother was convicted.

The second brother appealed, claiming that his brother's taped confession was improperly admitted. The court of appeals agreed, explaining:

Robert's confession was admitted at trial under the admission-by-a-party exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(A). However, ***once Robert was severed from the case, he was no longer a party and the statement was no longer admissible under 801(d)(2)(A).***

746 F.2d at 1185. *See also Fitzpatrick v. City of Fort Wayne*, 259 F.R.D. 357 (N.D. Ind. 2009). The rule in *Smith* is even more applicable here, where Nurse Ordonez was dismissed from the case ***even before trial began.***

To hold otherwise would be to allow parties to manipulate ER 801(d)(2)(i) so that its "party" requirement no longer has any meaning. A party seeking to admit an out-of-court statement of a person the party would ordinarily not sue would sue that person, get a trial court ruling that that statement is admissible, and then dismiss the person. Indeed, that is exactly what happened here.

Dr. Thompson's testimony about what Nurse Ordonez told him was not admissible under ER 801(d)(2)(i).<sup>3</sup>

**4. Admission of Dr. Thompson's Testimony Was Prejudicial Error.**

Dr. Thompson's testimony about Nurse Ordonez's "admission" to him was not admissible. Because this erroneously admitted evidence was highly prejudicial, a new trial is required. "An error is prejudicial if it affects or presumptively affects the outcome of the trial." *Washington Irrigation & Development Co. v. Sherman*, 106 Wn.2d 685, 695, 724 P.2d 997 (1986).

"When 'there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" *Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)), *rev. denied*, 164 Wn.2d 1014 (2008). For this reason alone, reversal and a new trial are required.

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<sup>3</sup> The trial court also ruled that the testimony was admissible under ER 801(d)(2)(ii). (7/7/09 RP 50) Plaintiff did not raise this subsection of the rule, which applies to a statement of which the party has manifested an adoption or belief in its truth. Subsection (ii) does not apply because Ordonez was no longer a party when Dr. Thompson testified, and because Ordonez denied its truth. (7/7/09 RP 81; 7/9/09 Thompson RP 1-119; 7/14/09 Ordonez RP 58-61)

But this case has more. By its very nature, the testimony appeared to be an admission of the hospital's liability. Furthermore, if the jury believed the alleged admission—that Nurse Ordonez should have called the doctor during his shift, then the jury would have necessarily also concluded that Nurse Isaguirre—the nurse on the shift after Nurse Ordonez—should have called the doctor during her shift. And since Nurse Ordonez denied admitting fault, the testimony also impugned his credibility as the significant fact witness for the hospital. (7/14/09 Ordonez RP 59-61) *See Estate of Lapping v. Group Health Cooperative*, 77 Wn. App. 612, 619, 892 P.2d 1116 (1995).

Thus, it was hardly surprising that plaintiff's counsel essentially admitted that Dr. Thompson's testimony about what Nurse Ordonez allegedly told him was devastating to the defense case. He told the jury as much during closing argument:

Dr. Thompson, because of Frederick Ordonez'[s] choice not to call the doctor, put Ellen Sandbo at needless risk. . . . Fred Ordonez knew. He knew it, because the next day, when he talked to Dr. Thompson, and Dr. Thompson was concerned about what had happened, here is a doctor, he is told by his patient that she had been having these problems the night before, he is told that by the patient that she had asked that he be called. . . . Dr. Thompson, naturally, wanted to find out what happened, so he talked to Fred Ordonez. And you heard Dr. Thompson on the stand, and Dr. Thompson said that Fred Ordonez admitted that he should have called. Why? Because Frederick Ordonez knew that something unusual had been going on the night

before, and he had made a terrible mistake in not calling. He knew that. And he told Dr. Thompson—I know he has retreated from that now, and that, in many ways, is *the elephant in the room*. This is a very, very unusual case in this respect. You have to decide who is telling the truth. Somebody is not telling the truth about that conversation.

(7/21/09 Plf.'s Closing RP 7-8) (emphasis added). In rebuttal, plaintiff's counsel closed his argument on liability by telling the jury:

. . . One other thing I found interesting, I didn't hear a single comment about Nurse Ordonez' statement to Dr. Thompson the next day. In closing, I didn't hear a single comment about that. Where is the truth there? . . .

(7/21/09 Plf.'s Closing RP 54)

The closing argument of the proponent of inadmissible evidence is relevant to determine whether its admission was prejudicial. *See generally In re Sims*, 118 Wn. App. 471, 479, 73 P.3d 398 (2003); *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785 (1993). Admitting Dr. Thompson's hearsay testimony was prejudicial. A new trial is required.

**B. VALLEY CANNOT BE LIABLE FOR ALLEGED DELAY IN MAKING AN OPERATING ROOM AVAILABLE.**

Sandbo went to the operating room for her second surgery at 2:20 p.m. the day the epidural hematoma was discovered. (7/16/09 Soi 25-26) Plaintiff claimed that given that the problem was discovered at 8 a.m.,

February 1, the hospital was negligent in not making an operating room available earlier that morning for Sandbo's second surgery.<sup>4</sup>

Dr. Thompson testified that the ultimate responsibility for telling the operating room how urgently he needed it and following up on the status of an available operating room was his. (7/9/09 Thompson RP 78-79, 117-18) Other witnesses, both for plaintiff and for Valley, agreed that it was the surgeon's responsibility to contact the operating room to request one and to make sure that he or she got top priority if need be. (7/9/09 Wohns RP 60-61, 67-68; 7/13/09 McKinley 61-62; 7/16/09 Soi RP 42, 49-50; 7/20/09 Chapman RP 56-57) Indeed, one of plaintiff's experts, Dr. McKinley, testified (7/13/09 McKinley RP 61-62):

Q. And if you called the OR, and you, on the phone, and asked for an operating room right away, and you didn't get an operating room right away, you

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<sup>4</sup> However, plaintiff conceded (7/21/09 Plf.'s Closing RP 26):

We can't show that surgery performed earlier with respect to getting the OR to her would have achieved complete recovery. Can't do it. It is too close in time to that 2:30, 3:00 surgery.

This was hardly surprising in light of the testimony of plaintiff's experts. Dr. Wohns could not say whether Sandbo's condition would have been better had the operation been performed at 9 a.m. on February 1<sup>st</sup>. (7/9/09 Wohns RP 52-53) Dr. Braun testified that the operation would have had to occur around 5 a.m. to prevent permanent damage. (7/13/09 Braun 40) Dr. McKinley opined that the operation would have had to occur no later than 9 a.m., and preferably before 6 a.m. (7/13/09 McKinley 45-47, 71) In contrast, the defense expert, Dr. Chapman of Harborview Medical Center and the University of Washington Medical system, testified that surgery should occur within 24 hours. 7/20/09 Chapman RP 35)

would go to the OR and insist that you have one; correct?

- A. I would go down there and insist to speak to the nurse in charge of the schedule, and I would insist on speaking to the anesthesiologist in charge of the schedule. . . . So if you are not getting what you want, it is very smart to go down there and talk to people straight on, head to head. And you usually get what you want.

Plaintiff, however, elected not to sue Dr. Thompson and stipulated that he was fault free. (CP 385) That Dr. Thompson was fault free does not mean that Valley was somehow negligent.

A jury verdict cannot be based on mere theory or speculation. *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). Thus, a jury verdict can be overturned when not clearly supported by substantial evidence. *See Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 556-57, 166 P.3d 813 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). “Substantial evidence” is “sufficient evidence to persuade a rational, fair-minded person of the truth of the premise.” *Id.* at 557. There was no substantial evidence to support that the hospital was liable on plaintiff’s operating room claim.

After the neurological problem in Sandbo’s legs was discovered at 8 a.m. on February 1, Dr. Thompson did not immediately order a second surgery, as he would have had to have done to fall within the optimum time frames for the operation as testified to by some of plaintiff’s experts.

*See* footnote 4, *supra*. Instead, he ordered a CAT scan to confirm his suspicions that she had indeed developed an epidural hematoma. (7/9/09 Thompson RP 45-46)

Dr. Thompson could not remember calling the operating room (7/9/09 Thompson RP 47):

You know, I—I don't know exactly when I called the operating room. I'm certain I would have made an initial call to the operating room somewhere around this time. I probably called the CAT scan folks first just as a matter of having that done. But honestly, I mean, that's all honest, but I don't remember talking to the operating room staff.

The CAT scan was done at 9:45 or 10 a.m. (7/9/09 Thompson RP 49) It was not until around 10:00 a.m. that Dr. Thompson told Nurse Soi to make Sandbo “NPO”—that is, she could not take anything orally in preparation for the second surgery. (Ex. 1, VMC 0468; 7/16/09 Soi RP 33; 7/9/09 Thompson RP 89-90) Then Dr. Thompson went to his office to see outpatients. Thirteen patients were scheduled through 12:50 p.m. The doctor did not dispute that he had seen all thirteen. (7/9/09 Thompson RP 48-49, 97)

Although he again could not remember making the call, Dr. Thompson claimed his routine would have been to call the operating room once he got back to his office to confirm that his earlier suspicion that he would need an operating room was true (7/9/09 Thompson RP 47, 54):

Q. And once you saw the CT, did you call to the operating room?

A. I'm sure I did, though, again, I don't remember that phone call, but that would be my routine, call over there and say, "Yes, that heads up I gave you, I do want to do the case, here is her information."

Dr. Thompson further testified (7/9/09 Thompson RP 79):

Q. Nobody told you from the OR, Mr. DeFrisco or anybody else on February 1<sup>st</sup>, 2006, that you couldn't have an OR that you needed urgently; correct?

A. I don't recall them expressly saying, "No, you may not have an operating room," no.

Steve DeFrisco was the operating room charge nurse in charge of scheduling and coordinating the operating rooms on February 1, a Wednesday. (7/15/09 DeFrisco RP 3-4) He too could not recall Dr. Thompson calling about setting up an operating room for Sandbo's second surgery. (7/16/09 DeFrisco RP 8-9) However, he testified that there had been suitable operating rooms and staff available on the morning of February 1. (7/16/09 DeFrisco RP 2) He also testified what happens when a surgeon calls for an operating room (7/16/09 DeFrisco RP 34-35):

When a call comes through, we gather information, okay? . . . [W]e want to know what the surgeon needs to do. We want to know when that surgeon is available, okay? We want to alert anesthesia. Once those parties have communicated, a plan is made. So in other words, a surgeon calls and says, "Okay. My patient—they are getting my patient ready now," or, "I'm just waiting for the patient to return from wherever," okay? Then it is, "Okay. Great. So we are thinking, you know, hypothetically ten

o'clock," okay? At that point, we are not making anymore phone calls. All right. We are getting the room ready, we're attending to other things that might come up during the day. So our expectation is a plan has been made, we have made a plan. So now, as health care professionals, it is time to implement that plan without a lot of phone calls.

He further testified that a physician calling for an OR on an emergent basis was never refused:

Q. Now, if Dr. Thompson had called you at 9:45 when the patient was out of CT, and had at least relative confirmation that she had an epidural hematoma from the surgery he had done the day before, what would your response have been?

A. "What do you want to do? When can you go?"

Q. And if he had called at 11:00 a.m., when he timed his late entry, indicating he had decided to take her to surgery to treat the complication from the January 31<sup>st</sup> surgery, what would your response have been?

A. The same, "What do you want to do? When can you go?"

Q. Now, what if Dr. Thompson had asked you whether he could take Mrs. Sandbo back to surgery after seeing his office patients at about one o'clock? What would your response have been?

A. The day was wide open. We had people and rooms, any time for him.

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Q. During a weekday, have you ever refused a surgeon an operating room who wanted to do a surgery urgently or emergently?

A. That would be a disservice to the patient and the surgeon and myself. No, never.

(7/16/09 DeFrisco RP 16-17) Thus, the evidence was uncontroverted that there were operating rooms with staff available for the second surgery. But for whatever reason, Dr. Thompson saw patients in his office that morning rather than use one of them. (7/9/09 Thompson RP 96-97)

The evidence established that the ultimate responsibility fell on Dr. Thompson, not the hospital, to order and follow up on the availability of an operating room. The evidence also showed that an operating room with staff was available for his use, no matter what time that morning he may have called. But plaintiff elected not to charge Dr Thompson with negligence.

Under these circumstances, there was no substantial evidence to support the claim that Valley was liable for not making an operating room available the morning of the second surgery. Reversal is required.

**C. THE GENERAL DAMAGES INSTRUCTION WAS ERRONEOUS IN THIS SURVIVAL ACTION.**

Not only was the liability portion of the trial prejudicially flawed, so was the damages portion. Over a defense exception, the trial court gave Instruction No. 14, not defendant's proposed damages instruction. (7/21/09 Exceptions RP 9-10; CP 302-04, 390) Instruction No. 14 was based on WPI 30.01.01, the pattern jury instruction for personal injury

actions. In contrast, defendant's proposed damages instruction was based on WPI 31.01.01, the pattern jury instruction for survival actions.<sup>5</sup> This case is a survival action under RCW 4.20.046 because the plaintiff's 90-year old decedent passed away a few months before trial. (CP 157)

As will be discussed, Instruction No. 14 erroneously stated the law. "Whether a jury instruction correctly states the applicable law is a question of law that we review de novo." *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), *cert. denied*, 538 U.S. 945 (2003).

**1. Damages in a Survival Action Are Governed by Statute.**

At common law, death extinguished a person's personal injury claim. *Warner v. McCaughan*, 77 Wn.2d 178, 181, 460 P.2d 272 (1969). The general survival statute, RCW 4.20.046, allows the deceased's personal representative to pursue the claims the deceased could have pursued if still alive. *Federated Services Insurance Co. v. Estate of Norberg*, 101 Wn. App. 119, 125, 4 P.3d 844 (2000), *rev. denied*, 142 Wn.2d 1025 (2001).

However, the original version of RCW 4.20.046 expressly precluded the personal representative from recovering damages for pain

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<sup>5</sup> Copies of Instruction No. 14 and defendant's proposed damages instruction are set forth in the appendix hereto.

and suffering, anxiety, emotional distress, or humiliation personal to and suffered by the deceased. 1961 WASH. LAWS ch. 137, § 1. In 1993, the Legislature amended the statute to provide:

PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased . . . .

1993 WASH. LAWS ch. 44, § 1.

This court will review the meaning of a statute de novo. *Wright v. Jeckle*, 158 Wn.2d 375, 379, 144 P.3d 301 (2006). Although fulfilling legislative intent is the goal, “if a statute is clear, it is not subject to judicial construction and its meaning is to be derived from the statute itself.” *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004). Consequently, there is no room for judicial construction, let alone legislative history, where a statute’s language is clear and unambiguous, because legislative intent is determined from that language. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

Thus, under the plain language of RCW 4.20.046, the jury should have been instructed on pain and suffering, anxiety, emotional distress, and/or humiliation. Instead, not only was the jury instructed on pain and

suffering and emotional distress, it was also instructed on disability, disfigurement, and loss of enjoyment of life. (CP 390)

RCW 4.20.046 does not specify that a plaintiff in a survival action can recover for disability or LOEL, let alone disfigurement. “Where the legislature omits language from a statute, whether intentionally or inadvertently, this court will not read into the statute the language it believes was omitted.” *Qwest Corp. v. City of Kent*, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006).

Indeed, because the general damages recoverable in a survival action are defined by statute, whereas the general damages recoverable in a personal injury action are not, the drafters of the Washington Pattern Jury Instructions drafted two separate damages instructions: (1) WPI 30.01.01 for personal injury actions, and (2) WPI 31.01.01 for survival actions. WPI 30.01.01 allows recovery, in an appropriate case, for such general damages as the nature and extent of the injuries, pain and suffering (both mental and physical), disability, disfigurement, and, in an appropriate case, loss of enjoyment of life, etc.. WPI 30.04-30.06. In contrast, WPI 31.01.01 allows recovery for general damages consisting of pain, suffering, anxiety, emotional distress, humiliation, and fear. There is no mention of such items recoverable under WPI 30.01.01 as disability, disfigurement, and loss of enjoyment of life.

Yet, in violation of RCW 4.20.046, Instruction No. 14 allowed the jury to award general damages for disability, LOEL, and disfigurement. This was error.

**2. LOEL Is Not the Same As the Allowable Pain and Suffering.**

Instruction No. 14's allowance for recovery for loss of enjoyment of life (LOEL) cannot be justified on the ground that LOEL is simply part of the pain and suffering allowed under the survival statute. When a decedent remains alive and conscious for a significant period of time, recovery for loss of enjoyment of life is *not* duplicative of pain and suffering.<sup>6</sup> *Kirk v. Washington State University*, 109 Wn.2d 448, 460-61, 746 P.2d 285 (1987). Rather, "recovery for LOEL compensates a victim for the inability to lead a normal life." *Otani v. Broudy*, 151 Wn.2d 750, 760, 92 P.3d 192 (2004); *cf. Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 899 N.E.2d 1115, 1127-28 (2008) (improper to instruct on both disability and loss of a normal life), *rev. denied*, 919 N.E.2d 365 (2009).

Here, plaintiff's decedent lived for 3 years after the surgeries. (CP 157) Although she could no longer live independently, she was still able

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<sup>6</sup> Where the decedent dies instantly or never recovers consciousness, damages for post-death LOEL are not recoverable in a general survival action. *Otani v. Broudy*, 151 Wn.2d 750, 760, 92 P.3d 192 (2004).

to participate in family gatherings and enjoyed her surprise 90<sup>th</sup> birthday party. (7/13/09 Miller RP 40-41; 7/15/09 Anne Sandbo RP 113-14; 7/15/09 Steve Sandbo RP 80)

Consequently, the trial court erred in giving Instruction No. 14. Based on WPI 30.01.01, Instruction No. 14 is appropriate only in a personal injury action. But this was a general survival action under RCW 4.20.046. Because RCW 4.20.046 allows recovery for pain and suffering but not for LOEL, a plaintiff in a general survival action cannot recover for LOEL. The trial court should have given the defense damages instruction, which was based on WPI 31.01.01.

**3. Instruction No. 14 Overemphasized Plaintiff's Damages Theory.**

Even if LOEL were an element of pain and suffering recoverable under RCW 4.20.046, the result would be the same because an instruction telling the jury to consider not only pain and suffering but also disability, disfigurement, and LOEL would be so repetitious and overlapping as to unduly favor plaintiff. *See Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969).

**a. If LOEL Is Recoverable, It Is Included in Pain and Suffering.**

Since RCW 4.20.046 does not mention LOEL, disability or disfigurement, the only way LOEL damages could be properly awardable

under the statute is as part of pain and suffering. Instruction No. 14, however, treated pain and suffering as a separate element of damages from LOEL. Under RCW 4.20.046, this was error.

*Wooldridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (1981), is illustrative. That case was a general survival action under the pre-1993 version of RCW 4.20.046, which precluded recovery for, among other things, pain and suffering. The Washington Supreme Court ruled that LOEL damages were not recoverable because they were included in pain and suffering:

Damages for loss of life's amenities should not be recoverable in a survival action, however, because such damages are a back-door method of obtaining compensation for pain and suffering . . . .

*Id.* at 666. *See also Tait v. Wahl*, 97 Wn. App. 765, 774, 987 P.2d 127 (1999) (“lost pleasures . . . essentially represent pain and suffering”), *rev. denied*, 140 Wn.2d 1015 (2000).

But Instruction No. 14 did not treat LOEL damages as pain and suffering. Instead, the instruction impermissibly treated them as two different kinds of damage. *See Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (D. Del. 1990); *Flores v. Parkchester Preservation Co.*, 42 A.D.3d 318, 839 N.Y.S.2d 735 (2007), *leave to appeal denied*, 892 N.E.2d 401 (2008).

“[R]epetitious and overlapping instructions that, when read as a whole, overemphasize one party's theory of the case deprive the other party of a fair trial.” *Thogerson v. Heiner*, 66 Wn. App. 466, 832 P.2d 508 (1992). By instructing the jury on pain and suffering and LOEL as separate items of damages, the trial court allowed plaintiff's attorney to overemphasize his damages theory: he suggested to the jurors that they award his client, among other things, \$350-\$450,000 for pain and suffering as a distinct element of damages and \$750,000 to \$1,200,000 for LOEL as a different element of damages. This was error.

**b. LOEL and Disability Are Duplicative.**

Instruction No. 14 was erroneous under RCW 4.20.046 for another reason as well. “[R]ecover<sup>y</sup> for LOEL compensates a victim for the inability to lead a normal life.” *Otani v. Broudy*, 151 Wn.2d 750, 760, 92 P.3d 192 (2004) (emphasis added). Similarly, “[r]ecover<sup>y</sup> for disability compensates for inability to lead a ‘normal life’”. *Kirk v. Washington State University*, 109 Wn.2d 448, 461, 746 P.2d 285 (1987). As Division II so aptly explained:

In considering the meaning of the term “disability” we frequently think in terms of impairment of work capacity. . . . There are, however, other activities which are compensable under the general term of disability. “Man does not live by bread alone” nor does his life consist solely of performing tasks necessary to buy that bread. In the 24-hour day one-third may be devoted to work, one-

third to sleep and one-third to leisure. An impairment of any one of these aspects may constitute disability. . . .

*Parris v. Johnson*, 3 Wn. App. 853, 859-60, 479 P.2d 91 (1970). *See also Blodgett v. Olympic Savings & Loan Association*, 32 Wn. App. 116, 646 P.2d 139 (1982).

The one difference between LOEL and disability is that disability “does not imply any recovery for loss of a specific *unusual* activity such as ballet dancing.” *Id.* (emphasis added). Thus, the plaintiff in *Kirk*, who had aspired to be a professional dancer, was allowed to recover LOEL as well as disability. *See also Grayson v. Irvmar Realty Corp.*, 7 A.D.2d 436, 184 N.Y.S.2d 33 (1959) (aspiring opera singer); *Thompson v. Tartler*, 166 Colo. 247, 443 P.2d 365 (1968) (budding professional musician).

Consequently, unless a plaintiff has lost the ability to engage in a specific “unusual” activity, LOEL and disability both compensate for “inability to lead a normal life.”

The 87-year-old patient here did lose some ability to lead a normal life for the three years until her death at age 90: for example, she could no longer live independently, drive, cook for herself, or tend her raised vegetable and flower garden.<sup>7</sup> (7/13/09 Miller RP 41; 7/15/09 Klepach RP

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<sup>7</sup> Even before the surgeries that are the subject of this case, Sandbo paid someone to mow the lawn and work her flower beds. (7/15/09 Klepach RP 10) And even before the

10) But there was *no* evidence that she lost any ability to engage in a specific *unusual* activity, because there was no evidence that the elderly woman had any *unusual* activities. Thus, instructing the jury on both LOEL and disability was erroneous even if Instruction No. 14 were in other respects correct. Defendants' proposed jury instruction would have cured this defect.

**4. Giving Instruction No. 14 Instead of the Defense Damages Instruction Was Prejudicial.**

“[W]hen the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, as it does here, the error is presumed to be prejudicial and requires a new trial unless it affirmatively appears that the error was harmless.” *Zwink v. Burlington Northern, Inc.*, 13 Wn. App. 560, 569, 536 P.2d 13 (1975); *see also Nordeen Iron Works v. Rucker*, 83 Wash. 126, 129, 145 P. 219 (1915). Since Instruction No. 14 was erroneous for one or more reasons, a new trial is required.

Moreover, the record affirmatively indicates that the erroneous giving of Instruction No. 14 prejudiced Valley. In closing argument, plaintiff itemized the damages he was seeking on behalf of his 90-year old mother's estate for the past 3 years of her life: \$254,058.25 in medical

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surgeries, Sandbo's sister would drive if the trip was outside of Renton or involved freeway driving. (7/15/01 Klepach RP 9)

special damages, \$150,000-\$250,000 due to the nature and extent of the injury, the disfigurement, and the disability, and \$350-\$450,000 for physical and mental pain and suffering; and \$750,000 to \$1,200,000 for LOEL. (7/21/09 Plf.'s Closing 39, RP 42-43)

The jury awarded \$1,818,583 in damages. (CP 394) Thus, the jury must have awarded between \$864,524.75 and \$1,064,524.75 in LOEL damages. Either the LOEL damages were not recoverable at all under RCW 4.20.046, or whatever the jury awarded for disability and/or pain and suffering must have included some LOEL. Moreover, the jury may have awarded impermissible disfigurement and disability damages.

"A new trial is the appropriate remedy for prejudicial errors in jury instructions." *Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160, 36 P.3d 1005 (2001) (quoting *Aero Int'l, Inc. v. United States Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983)), *cert. denied*, 536 U.S. 922 (2002). A new trial is required here.

## VI. CONCLUSION

The "elephant in the room"—Dr. Thompson's testimony about what Nurse Ordonez allegedly admitted to him—was inadmissible hearsay. Moreover, by giving an instruction based on WPI 30.01.01 instead of on WPI 31.01.01, the trial court allowed the jurors to award

types of general damages that were either not contemplated by RCW 4.20.046 or that were duplicative.

Valley did not receive a fair trial. This court should reverse and remand for a new trial.

DATED this <sup>fe</sup> 16 day of February, 2010.

**REED McCLURE**

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**Gene A. Studer      WSBA #20175**  
**Attorneys for Appellant**

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It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate Ellen Sandbo's estate for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff, you should consider the following past economic damages:

1. The reasonable values of necessary medical care, nursing care, treatment, and services received;
2. The reasonable value of domestic services and non-medical expenses that have been required.

In addition you should consider the following noneconomic damages elements:

1. The nature and extent of the injuries;
2. The disability experienced;
3. The disfigurement experienced;
4. The loss of enjoyment of life experienced;
5. The pain and suffering, both mental and physical, inconvenience, mental anguish, and emotional distress experienced.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

**INSTRUCTION NO. \_\_\_\_\_**

It is the duty of the court to instruct you as to the measure of damages on the plaintiff's claim for personal losses suffered by Ellen Sandbo. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate Ellen Sandbo's estate for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff, you should consider the following items:

1. Economic damages:

a. The health care expenses that were reasonably and necessarily incurred by Ellen Sandbo as a result of any additional neurological impairment caused by a delay in returning her to surgery on February 1, 2006 to evacuate her hematoma.

b. The out-of-pocket expenses that were reasonably and

necessarily incurred by Ellen Sandbo as a result of any additional neurological impairment caused by a delay in returning her to surgery on February 1, 2006 to evacuate her hematoma.

2. Noneconomic damages:

The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by Ellen Sandbo as a result of any additional neurological impairment caused by the nurses' role delay in returning her to surgery on February 1, 2006 to evacuate her hematoma.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to

measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 31.01.01(modified)  
Defendants' Proposed Instruction No. \_\_\_\_\_



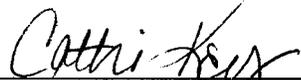
2. This Affidavit of Service by Mail;

addressed to the following parties:

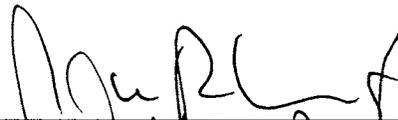
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DATED this 16<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
Cathi Key

SIGNED AND SWORN to (or affirmed) before me on  
2/16/2010 by Cathi Key.

  
\_\_\_\_\_  
Print Name: John W. Rankin  
Notary Public Residing at Mercer Island, WA  
My appointment expires Nov. 18, 2011

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