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NO. 64031-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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.

BRIEF OF RESPONDENT SANDBO

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM

Robert N. Gellatly, WSBA 15284
Deborah L. Martin, WSBA 16370
Attorneys for Respondent Sandbo

701 Fifth Avenue
6700 Bank of America Tower
Seattle, WA 98104
206/467-6090

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I. RESTATEMENT OF THE CASE

On review of the jury's verdict, all facts, and all inferences from those facts, must be viewed in the light most favorable to plaintiff Sandbo as the prevailing party. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000); CR 50; *Westmark Development Corp. v. City of Burien*, 140 Wn.App. 540, 557, 166 P.3d 813 (2007) (the court does not reweigh the evidence, draw its own inferences, make credibility determinations or substitute its judgment for the jury). The jury's findings against VMC are entitled to substantial deference so long as there is any evidence upon which reasonable minds might reach conclusions that sustain the verdict. *Levy v. North Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978).

VMC's statement of the case ignores these standards. It highlights the testimony most favorable to its own defense, construes all evidence and inferences in its own favor and against Sandbo, and mischaracterizes as "uncontroverted" the testimony of defense witnesses whose credibility the jury necessarily rejected in arriving at its verdict.

VMC also ignores the evidence supporting the trial court's discretionary determination that VMC agent Fred Ordonez had authority to speak to Dr. Thompson about their mutual patient. The trial court was well

within its discretion in so ruling. Ordonez' statement was corroborated by overwhelming evidence and testimony from Dr. Thompson and others. Any alleged error was therefore harmless. VMC similarly ignores the uncontested evidence supporting the jury's verdict, which fully justified the trial court's instruction on damages.

The following restatement of the case relies on the facts and inferences that support the jury's negligence verdict.

A. Ellen Sandbo's Injury at Valley Medical Center.

On January 31, 2006, Ellen Sandbo, then 87-years old, was admitted to Valley Medical Center (VMC) for a low back surgery to treat back pain and difficulty walking. Her orthopedic surgeon was Dr. Jason Thompson, to whom she had been referred by her long-time family practice physician, Dr. Howard Miller. RP 7/9/09 (Thompson 4-9).

While VMC attacks Dr. Thompson as inexperienced, Dr. Thompson had strong credentials, was in a highly reputable practice group, was asked to serve on VMC's quality assurance committee, and later as spokesman for its spine surgery program. Dr. Miller had made previous referrals to him with good results. RP 7/13/09 (Miller 69); RP 7/9/09 (Thompson 101). VMC also misleadingly suggests – as it did at trial – that Dr. Thompson would have been liable but for Sandbo's failure to sue him. Yet VMC never

alleged non-party fault against Dr. Thompson, and, when pressed, conceded that he was not at fault for Sandbo's injuries.¹ CP 21; Supp. CP ___ (Dkt. 88); RP 7/13/09 (Colloquy at 3-14).

Sandbo was an excellent candidate for surgery, which was expected to relieve her pain, improve her ability to walk, and require only a few days' hospitalization. This type of surgery is successfully performed on people well into their 90's.² RP 7/9/09 (Thompson 19-20; Wohns 10-11, 42); RP 7/13/09 (McKinley 11-12, 46-47; Braun 16 (noting 90% success rate)) She was fully independent, living in her own home, and able to drive her own car. Her other medical conditions were under control. RP 7/13/09 (Miller 6-8, 10-11, 27-28).

The surgery went well. Dr. Thompson saw Sandbo on routine rounds around 6:00 p.m. that evening, more than six hours after surgery. She was sitting on the bed, happy, alert and normal, had less pain than expected, been able to ambulate to the bathroom, and reported to Dr. Thompson that her legs "felt better than they had in years." Dr. Thompson thought that surgery had

¹ Moreover, VMC does not challenge the trial court's instruction that Dr. Thompson was not at fault. CP 385. The trial court gave this instruction in response to VMC's continued attempts to insinuate, without expressly alleging, that Dr. Thompson was negligent. RP 7/13/09 (Colloquy 3-14).

² Sandbo suffered from spinal stenosis, a narrowing of the spinal canal, which, unlike other types of back problems, generally responds very well to decompressive surgery. RP 7/13/09 (Braun 16).

gone “great” and that Sandbo was “bearing the fruit” of success. He went home and did not get any calls that night from the nurses caring for Sandbo. RP 7/9/09 (Thompson 21-22, 34-36); Ex. 1 at 437, 555, 625.

At about 8:30-9:00 p.m., Sandbo’s condition changed dramatically. Sandbo developed severe leg and back pain. She told the nurse on duty, Fred Ordonez, there was “something wrong with her legs,” that she was a nurse and knew her legs “were not the same,” and repeatedly urged him to call the doctor. CP 442-446.

Her sister, Fran Klepach, and a friend, Marc Sprouse, were present in her room and confirmed these events. RP 7/15/09 (Klepach 28-34); RP 7/14/09 (Sprouse 3-6). Rather than call the doctor, however, Ordonez simply gave additional pain medication. RP 7/14/09; CP 443. He and a nursing assistant told Sandbo that she needed to get out of bed and walk, but she was now immobile and unable to do so. RP 7/15/09 (Klepach 30-31).

At 11:00 p.m., VMC nurse Dinah Isaguirre took over Sandbo’s care from Ordonez. About midnight, Sandbo had an episode of urinary incontinence. At the same time, she reported severe pain rated 8 on a scale of 10. Isaguirre gave her a medication for the severe pain. She also increased the dose of Fentanyl in Sandbo’s PCA device.³ CP 427-31; Ex. 1 at 498,

³ The PCA (personally controlled analgesic) device allowed Sandbo to self administer pain medication at six minute intervals by pushing a button that

504. Sandbo had three more episodes of incontinence over the next several hours. CP 431. By 4:30 am she had attempted to use her PCA 37 times, and from 4:30 am to 8:00 am she tried 134 more times. Ex. 1 at 625; RP 7/14/09 (Shin 23, 59).

About 6:30 a.m. on February 1, Dr. Miller saw Sandbo. She complained of pain and numbness in her legs. Isaguirre did not tell Dr. Miller that Sandbo had been immobile, incontinent and in severe pain during Isaguirre's shift. RP 7/13/09 (Miller 13, 60-62). Dr. Miller was concerned but knew Dr. Thompson would be in shortly to perform a neurologic evaluation; he instructed the nurse to tell Dr. Thompson about the numbness. *Id.* (Miller 19-21, 62). Dr. Thompson and the hospital nurses were responsible for her surgical needs and recovery. *Id.* (Miller 11-13, 18-19). Neither party in the lawsuit alleged any negligence by Dr. Miller.

Within the next hour, Dr. Thompson and his assistant, Jess Meyer, saw Sandbo on their regular rounds. Dr. Thompson found Sandbo looking panicked and "very different" from the evening before. She reported numbness, heaviness and tingling in her legs, and had pain rated 10 on a scale of 10. She told Dr. Thompson she had been in severe pain the night before,

regulated an intravenous dose of Fentanyl. Regardless of how many times she pushed the button, she would only get a dose every six minutes. RP 7/14/09 (Ordenez 11-12).

but that the nursing staff had refused her requests to call him. RP 7/9/09 (Thompson 36-37, 39; Meyer 4-5); Ex. 1 at 467.

Dr. Thompson found an abnormal lumpiness to Sandbo's incision, and that her motor function had markedly deteriorated. RP 7/9/09 (Thompson 42-45, 82). He suspected a hematoma (blood clot) and requested a CT scan. *Id.* (Thompson 45-46); Ex. 1 at 437. He notified the operating room of the likely need for surgery. *Id.* (Thompson 47-48, 111; Meyer 7). He also advised Nurse Darshan Soi, the morning shift nurse, that Sandbo would be going to surgery. RP 7/16/09 (Soi 33, 48-49).

The CT scan revealed a large blood clot severely compressing the nerves. RP 7/9/09 (Thompson 49-50). A compressive hematoma is a known risk of this surgery, and represents a medical emergency. The longer the nerves are compressed, the more likely they are to die, causing permanent injury. RP 7/9/09 (Thompson 52-54); RP 7/13/09 (McKinley 10, 22); RP 7/13/09 (Braun 7, 18-19, 23-24).

Dr. Thompson told the operating room that surgery had to occur as soon as possible. He returned to his office next to the hospital to see patients as he waited for word of an available operating room, growing frustrated as time passed. RP 7/9/09 (Thompson 54-55, 57-58); RP 7/15/09 (Klepach 18); RP 7/14/09 (S. Sandbo 66).

Dr. Thompson testified that he was certain that he had followed up on his initial request for an operating room by making more than one call to the OR to check the status of his request. The OR charge nurse was responsible for notifying him of room availability. RP 7/9/09 (Thompson 117-19).

A room and team were finally made available at about 2:20 pm. Dr. Thompson found and removed a “huge” hematoma covering the whole wound area that placed so much pressure on the cauda equina (the “horse’s tail” or nerve bundle branching out from the base of the spinal cord) that it stopped blood flow into the vessels into that area. Such compression is termed “cauda equina syndrome.” *Id.* (Thompson 58-59; Wohns 28-30); RP 7/14/09 (Braun 10, 17-18). Sandbo’s slowly expanding blood clot – the signs and symptoms of which had started about 18 hours earlier – caused increasing compression and nerve death, rendering Sandbo a partial paraplegic, unable to walk, and permanently confined to a wheelchair. It also caused permanent bowel and bladder incontinence. RP 7/9/09 (Thompson 61-63, Wohns 42-43); RP 7/13/09 (Miller 28-30); RP 7/14/09 (Braun 31-34).

B. VMC’s Negligence.

VMC was negligent in two ways.⁴ First, VMC nursing staff failed to timely recognize and report Sandbo’s abnormal signs and symptoms to Dr.

⁴ After Ellen Sandbo died on April 29, 2009, her son Stephen Sandbo was substituted as as plaintiff for Sandbo’s estate. CP 163-69.

Thompson, so that he could timely diagnose and remove the blood clot and prevent permanent injury. Second, VMC staff failed to timely provide an operating room to Dr. Thompson upon his request. VMC did not challenge the sufficiency of the evidence supporting either theory of negligence at trial.

1. Expert Testimony.

Dr. Thompson and Dr. Miller, and several experts including a neurosurgeon (Dr. Richard Wohns), orthopedic spine surgeon (Dr. L. Mercer McKinley), neurologist (Dr. Frederic Braun), and clinical nurse specialist (Linda Shin) established that Sandbo's sudden onset of leg pain, immobility, and subsequent incontinence were signs and symptoms of compressed nerves, and that VMC nurses violated the standard of care by not alerting Dr. Thompson to them. RP 7/9/09 (Wohns 14-18, 39-40); RP 7/13/09 (McKinley 16-19, 26-28, 45-46, 77-78); Braun 19-21, 38-40); RP 7/14/09 (Shin at 10, 14-15, 20, 25, 61-62).

An epidural hematoma is a medical emergency, and the faster the clot is removed, the better the outcome. RP 7/9/09 (Wohns 24, 27-28, 33-34); RP 7/13/09 (McKinley 22-24, 29, 35-36, 37-38). With an incomplete cauda equina syndrome like Sandbo's (where the patient has not totally lost sensory and motor function), prompt surgery is even more important because the potential for improvement is greater than with a complete cauda equina

syndrome. RP 7/9/09 (Wohns 26-27); RP 7/13/09 (McKinley 43-45; Braun 42). The best outcome is if decompression occurs within 6 hours from the onset of signs and symptoms. Recovery drops to 20 percent or less after 12 hours. RP 7/9/09 (Wohns 24-26, 29, 42); RP 7/13/09 (McKinley 22-23, 35-37).

The standard of care required VMC to provide an operating room within 30 minutes to an hour after request, and it violated the standard of care in failing to do so. RP 7/13/09 (McKinley 34-35). With each passing hour, Sandbo's chance of recovery diminished and her outcome worsened. *Id.* (McKinley 37-38); 7/9/09 (Thompson 74). If Sandbo's clot had been removed between six and eight hours after the 8:30-9:00 pm on-set of signs and symptoms, she likely would have avoided permanent injury. Even if surgery had been done by 9 am, Sandbo would have been more functional. RP 7/9/09 (Wohns 25-26, 42-43); RP 7/13/09 (McKinley 29, 37-38, 46, 72; Braun 37-38, 40-41).⁵

VMC offered a single standard of care expert (Nurse Altman) and a single medical expert on causation (Dr. Chapman). Nurse Altman, who had not had any clinical responsibility for patients in 35 years, RP 7/16/09

⁵ These experts, as well as Dr. Thompson, questioned the accuracy of the "normal" neurovascular reports recorded by the nursing staff in light of their contradiction with other evidence. RP 7/9/09 (Thompson 72-73; Wohns 42, 69); RP 7/13/09 (McKinley at 78; Braun 44-45); RP 7/9/19 (Shin 10, 20, 25, 61-62)

(Altman 62-63), conceded that incontinence is “classic sign” of cauda equina syndrome, as is an inability to walk, and that VMC’s own post-operative policies state that bladder problems should alert the provider to possible cauda equina syndrome. *Id.* (Altman 50, 52-53, 62). She conceded that it is not “normal” to be unable to walk after back surgery, and that an elderly patient should be assessed more frequently and closely. *Id.* (Altman 79-80; 84). She also agreed that it is more difficult to observe a patient who is both sedated and on a PCA. *Id.* (Altman 78-79). Finally, she conceded record discrepancies in recording Sandbo’s pain. *Id.* (Altman 55-56).

Orthopedic surgeon Jens Chapman offered only causation testimony, opining that earlier surgery would have made no difference. RP 7/20/09 (Chapman 9-10). He conceded, however, that the timing of decompression surgery is “a hotly debated subject,” that he personally considers an epidural hematoma a medical emergency, and that the sooner the surgery the better. *Id.* (Chapman 76-77, 89-91). He also agreed that a patient with an incomplete cauda equina syndrome has a better outcome than a patient with a complete one. *Id.* (Chapman 92).

Dr. Chapman was impeached with his deposition testimony that Sandbo’s first symptom of neurologic deficit was increasing pain between 6:30 and 8:00 pm on January 31. *Id.* (Chapman 94-96). Further, he agreed

that Sandbo's onset of urinary incontinence at midnight should be reported to the doctor. *Id.* (Chapman 96-97); Supp. CP__ (Dkt. 206A at 60-61). Finally, he could not rule out the possibility that earlier surgery would have improved Sandbo's outcome. *Id.* (Chapman 99-100).

2. Violations of VMC's Own Hospital Policies.

VMC's written hospital policies required that any of the following signs and symptoms be reported to the doctor: (1) uncharacteristic or new occurrence of pain; (2) unsatisfactory pain relief; (3) excessive pain down limbs in a post-surgery spinal patient; (4) numbness, tingling; or (5) incontinence in a post-surgery spinal patient. These policies also required that the doctor be alerted of "significant changes" in neurovascular status, and that all problems be documented in nursing progress notes. Exs. 8-14. VMC nurses were also required to accurately chart pain complaints, dressing changes, and observations of the wound. RP 7/16/09 (Soi 43-44); RP 7/14/09 (Shin at 18-22). Both Ordonez and Isaguirre repeatedly violated these policies. *Id.*; CP 429; RP 7/14/09 (Ordonez 4-5, 58).

VMC's policy requires a prompt response when a surgeon calls and says he or she has an urgent or emergent case. It is the operating room charge nurse's responsibility to make and implement the surgical plan "without a lot of further calls." RP 7/16/09 (DeFrisco 34-35). From the time the surgeon

calls, the process for arranging the surgery should not take more than ½ hour in either an “urgent” or “emergent” case, so long as rooms and staff are available and resort to a “bumping policy” is not required. *Id.* (DeFrisco 8, 11-12). In that case, emergency cases get priority over urgent cases, and the requesting surgeon has to make a “courtesy call” to the surgeon he bumps. *Id.* (DeFrisco 11); Ex. 19. VMC admitted that if Dr. Thompson had called for urgent or emergent surgery between 11:30 pm and 5 am, the OR would have been ready within an hour of his call. Supp. CP __ (Dkt. 209).

Further, despite the fact that rooms and staff were available to handle Sandbo’s surgery at any point during the morning of February 1st, an operating room was not made available to Dr. Thompson until approximately 2:20 p.m. Tellingly, the team assigned to assist him had just completed a series of neurosurgeries ending immediately before Sandbo’s surgery. *Id.* (DeFrisco 25-27).

DeFrisco could not explain the delay in providing an operating room, could not recall talking to Dr. Thompson about surgery, and did not know how Sandbo’s name was added to the OR schedule. RP 7/16/09 (DeFrisco 18-21); Ex. 18. At that time, unlike now, VMC maintained no record or log to track surgeon requests for an operating room. *Id.* (DeFrisco 37). DeFrisco conceded that it is possible that a doctor’s call could get “lost in the shuffle”

when the charge nurse is very busy. *Id.* (DeFrisco 36).

3. Nursing and Charting Discrepancies.

Ordonez was a recent community college graduate and new to nursing. He had only been caring for patients on his own for a few months. RP 7/14/09 (Ordonez 33-34). He did not know what cauda equina was. *Id.*

At trial, he claimed to recall his care of Sandbo in “vivid detail.” He remembered that Sandbo was visited by Marc Spouse and Fran Klepach during his shift, and that he changed Sandbo’s saturated surgical dressing in response to a request by Sandbo or her visitors. Yet, he did not chart this dressing change or the condition of the dressing as required by hospital policy. *Id.* (Ordonez 4-5); RP 7/16 (Soi 43).

He also claimed to recall “vividly” that he was called into the room while Sandbo’s visitors were with her because she was complaining of a “right achy knee.” He testified in detail to his examination of her knee, even demonstrating to the jury the examination he conducted. He recalled she was sitting in a chair when he performed his exam. He remembered helping her back to bed while her visitors were still with her, and injecting three extra boluses of Fentanyl in her PCA to aid her “achy knee” pain. He insisted, however, that Sandbo never reported any leg pain, back pain, or any numbness or tingling. RP 7/14/09 (Ordonez 8-10, 15, 35-36, 50-56); 7/20/09

(Ordonez 64-65).

Despite this “vivid” recall of the many details surrounding his care of Sandbo, Ordonez stated that he could “not recall” whether Sandbo asked him to call Dr. Thompson. And, he was unwilling to deny under oath that she had. *Id.* (Ordonez 21-22, 67-68).

Further, Ordonez’ contemporaneous nursing records did not chart Sandbo’s right achy knee complaint, as required by hospital policy, or the fact he treated it with extra Fentanyl doses. In fact, he did not chart any reported leg pain during his shift, or record that Sandbo had previously been ambulatory or had spent time sitting in a chair. RP 7/14/09 (Ordonez 15, 62-63); RP 7/20/09 (Ordonez 58, 64-67); Ex. 8 at 14-15.

Ordonez testified that the extra Fentanyl he gave Sandbo controlled her right achy knee pain. RP 7/14/09 (Ordonez 10, 35-36). Yet the PCA record shows Sandbo made 50 attempts to obtain pain relief between 4:00 pm and 10 pm. *Id.* (Ordonez 11-12); Ex. 1 at 625. He also admitted that did not assess Sandbo for pain every hour as required by orders for an over-65 year old patient on a PCA. RP 7/14/09 (Ordonez 65-66); Ex. 1 at 453.

At 10:15 p.m., Ordonez gave Sandbo a maximum dose of Promethazine, an anti-nausea medication that also provides a strong sedative effect. However, he did not chart any nausea. *Id.* (Ordonez 18-21); (Shin 16-

17); Ex. 1 at 498, 589. Further, he could not recall whether she was nauseated, despite his "vivid" memory. *Id.* (Ordonez 21).

Ordonez denied that Sandbo had been incontinent on his shift, but agreed that, if she had been, it should have been reported to the doctor. *Id.* (Ordonez 25-26). He testified that she had gotten up "a couple of times" to use the bathroom, although he did not chart these events. *Id.* (Ordonez 26, 62-63). He also denied ever putting an adult diaper on her. *Id.* (Ordonez 27). Yet the next nurse on duty, Dinah Isaguirre, found Sandbo in a diaper when she took over her care from Ordonez at 11:15 pm. CP 428.

Isaguirre testified that Ordonez never told Isaguirre that Sandbo had complained of any leg pain or knee pain. CP 428. Unlike Ordonez, she recalled Sandbo complaining of leg pain, but did not record this pain anywhere in the chart. CP 427; Ex. 1 at 504. She charted a 3:45 am dressing change, but did not report any observation of the wound. CP 429; Ex. 1 at 500. She also wrote that Sandbo slept through the night on her shift. CP 429; Ex. 1 at 503. Yet according to the physical therapist, Sandbo had a "terrible night" and slept only half an hour on February 1, 2006. RP 7/14/09 (Ordonez 28-29). The medication records confirm that (1) Sandbo made 134 attempts to obtain PCA medication between 4:30 am and 8:00 am; (2) reported pain as 8 out of 10 at midnight; (3) Isaguirre gave her a PCA bolus,

a dose of hydroxazene for “severe pain” at 3 am, and raised her PCA dose up to .5. RP 7/14/09 (Shin 16, 59); Ex. 1 at 625.

The nurses’ credibility was further eroded by the testimony of Sandbo, Fran Klepach (her sister), and Marc Sprouse (her friend). Sandbo never sat in a chair while they were visiting, and Ordonez never performed an exam in their presence. Ordonez never changed Sandbo’s dressing, even though it was saturated and falling off Sandbo’s back. They never saw Ordonez even touch Sandbo. RP 7/14/09 (Sprouse 5); RP 7/15/09 (Klepach 32). Ellen Sandbo testified by deposition that Ordonez never examined her, never asked her to wiggle her toes or move her legs, and that she never walked again after the one trip to the bathroom she made while she was feeling good soon after the surgery. CP 442-44.

Klepach and Sprouse never heard Sandbo complain of a right achy knee. Instead, they witnessed Sandbo in terrible pain, rubbing both legs, telling Ordonez they hurt, that something was wrong with her legs, and asking him at least three times to call the doctor. RP 7/14/09 (Sprouse 5-6); RP 7/15/09 (Klepach 30, 34). Sandbo, too, testified by video deposition that she repeatedly told Ordonez “something was wrong” with her legs and to “call the doctor.” CP 445-46.

C. Uncontested Injuries and Damages.

Dr. Thompson, Dr. Miller, Dr. Braun, Stephen Sandbo, Anne Sandbo, and Fran Klepach all testified to Ellen Sandbo's injuries and damages. VMC did not present a single witness to contest the nature and extent of her injuries or their profound impact.

Following her second surgery, Sandbo remained at VMC until February 7, 2006, when was discharged to a skilled nursing facility for four months of rehabilitation. She then moved to an adult family home. 7/15/09 (A. Sandbo 70); Ex. 4, p.1. She remained at the adult family home for about three years until just a few weeks before her death, when her family arranged for her to go to her own home with 24 hour hospice care. She died on April 29, 2009. RP 7/15/09 (S. Sandbo 72, 80). Her injury-related expenses totaled \$254,058.25. RP 7/13/09 (Miller 42; Braun 43); Ex. 6.

Before her injury, Sandbo was a uniquely capable, active and independent 87-year old woman. She was "spunky and bright and honest and forthright and tough" and "sharp as a tack." RP 7/13/09 (Miller 5); RP 7/15/09 (S. Sandbo 71). She had strong ties to the Renton community where she had lived since childhood. She graduated from Renton High School, obtained a nursing degree from St. Joseph's Nursing College, worked as a military nurse from 1944-46, and then for many years as a nurse for a

Renton physician and nursing home. RP 7/15/09 (S. Sandbo 52); CP 438-39.

Sandbo was a single parent to her only child Stephen, and worked two full time jobs much of her adult life to support him. RP 7/15/09 (Klepach 4-5); CP 438-39. She continued to work into her senior years, and at the time of her 2006 surgery, still had a part time paid position with the Board of Elections. RP 7/15/09 (Klepach 6); CP 439.

Sandbo's independence was fundamental to her well-being and self-worth, particularly in light of her nursing background. She valued it so much that she had helped friends and others remain independent when suffering through their own illnesses, and prepared food for the homeless. RP 7/13/09 (Miller 40-41; A. Sandbo 86-87).

Up until her January 2006 surgery, Sandbo lived alone, cooked, shopped, did her own laundry and housekeeping, maintained her home, drove herself on local errands, and took care of all of her own medical and financial affairs. RP 7/15/09 (Klepach 8-10; S. Sandbo 59, 61; A. Sandbo 114); CP 440; Ex. 24-T, 24-W. She cared for her dog, was an active gardener who grew her own vegetables, and even harvested the fruit from her own trees. She also was socially active, and heavily involved with the Catholic church where she was a longtime member. As her son testified, "half of Renton knew her." RP 7/15/09 (Klepach 12-13; S. Sandbo 55-56, 57, 59; A.

Sandbo 96).

Sandbo was particularly close to her son and his wife, who lived nearby, and her six grandchildren and five great grandchildren. She loved the holidays, beginning her shopping the day after Christmas for the following year. She filled stockings for grandchildren at Christmas, remembered each family member with a card and personal note on holidays, and kept a tradition of including two dollar bills in her grandchildren's birthday cards. RP 7/15/09 (S. Sandbo 53-55; A. Sandbo 88, 91-92). She also greatly enjoyed entertaining family and friends in her home. *Id.* (Klepach 13).

After her injuries, Sandbo was desperate to return home. Her daughter-in-law testified that the first time she ever saw Ellen cry was when she was told at a family care meeting at the nursing home that she wouldn't walk again. RP 7/15/09 (A. Sandbo 104). The second was when she had to ride "like cargo" in a cabulance from the nursing home to the adult care home. *Id.* (A. Sandbo 104-05).

Her incontinence caused urinary tract infections that ultimately required a permanent catheter.⁶ RP 7/13/09 (Miller 33-35). She also suffered numerous painful pressure ulcers from her wheelchair confinement.

⁶ Sandbo had no history of incontinence before the surgery. *Id.* at 33; RP 7/15/09 (Klepach 16-17). Though at times she denied her post-surgery incontinence, likely out of embarrassment, the record firmly established it. RP 7/13/09 (Miller 64-66); RP 7/15/09 (A.Sandbo 98-100).

RP 7/13/09 (Miller 30-33; Braun 46-47).

Although she did not complain, she was clearly depressed living in the adult family home. RP 7/13/09 (Braun 33, 47; Miller 38-39); RP 7/15/09 (Klepach 15). She was the only one of the five residents in the home that did not have dementia, her only activity aside from family visits was television, and she had lost the freedom even to chose her own bedtime. Even diaper changes were beyond her control. RP 7/15/09 (Klepach 23-24; A.Sandbo 100); CP 434.

She continued to receive physical therapy at the adult family home, working on taking steps with a walker and the therapist's assistance. RP 7/15/09 (Muller 4-5, 21-24, 29). She was highly motivated and cooperative. However, her progress had plateaued by July 2007 and by September 2008 she had no ability to ambulate even with assistance. RP 7/15/09 (Muller 4-5, 9, 26); RP 7/13/09 (Miller 35-36); RP 7/13/09 (Braun 26, 32, 36). She became sadder and weaker as time passed and she was unable to achieve her goal of returning home to live independently. RP 7/15/09 (Muller 29-30); RP 7/13/09 (Miller 36-37; Braun 3). Although she still enjoyed outings and celebrations with her family, it pained her to be driven past her home. RP 7/15/09 (Klepach 25-26).

D. Admission of Dr. Thompson's Testimony About Ordonez's Statements.

In his 2008 deposition, where he was represented by VMC's counsel, Ordonez testified that he had initiated a conversation with Dr. Thompson at the instruction of his managers to advise Dr. Thompson that Sandbo had given Dr. Thompson "false information" regarding her complaints during Ordonez' shift. CP 48-51. Dr. Thompson later testified in his own deposition that he had indeed spoken with Ordonez, but testified to his impression that Ordonez had admitted in their conversation that he should have called Dr. Thompson during his shift. CP 79-82.

In February 2009, plaintiff amended her complaint to add Ordonez as a party, and the parties stipulated to a continuance of the trial date. CP 147-150; Supp. CP__(Dkt. 90). Immediately prior to trial, plaintiff moved in limine to admit Ordonez' statement as that of VMC's own speaking agent under ER 801(d)(2), and/or under the medical statement exception in ER 803(a)(4). CP 181-190.⁷ Plaintiff also argued that by representing Ordonez at his deposition, VMC had violated Washington's absolute prohibition against *ex parte* contact with a treating health care provider, and was estopped from denying Ordonez was its managing or speaking agent. CP

⁷ This was a renewed motion, as plaintiff's previous motion to determine the admissibility of Ordonez' non-party testimony had been denied pending trial. CP 145-46.

344; RP 7/7/09 at 42-45.

The trial court held that Ordonez' statement was admissible under ER 801(d)(2)(i), (ii) and (iii). RP 7/7/09 at 50; CP 348. Plaintiff then dismissed Ordonez as a party, and the parties agreed that no mention would be made that he was ever a defendant. RP7/7/09 at 81-82.⁸ The trial court deferred ruling on admissibility under ER 803(a)(4), but at the close of trial ruled it did not apply. CP 348; RP 7/7/09 at 51-52; RP 7/21/09 (Colloquy 5-6).

Both Dr. Thompson and Ordonez testified at trial. Dr. Thompson testified that when he asked Ordonez why he had not called the night before, it was his impression that Ordonez answered "something along the lines of . . . I should have called you" or "should have called you sooner." RP 7/9/09 (Thompson 71, 76-77).

Ordonez claimed that he initiated the conversation by telephone after being told to do so by his charge nurse and his nurse manager in order to advise Dr. Thompson that Sandbo "was not telling the truth" about her condition that night. 7/14/09 (Ordonez 30). Ordonez said that he had expressed concern and sympathy to Dr. Thompson regarding Sandbo's condition, but at no point admitted fault regarding his care. RP 7/14/09

⁸ Plaintiff did not argue that Ordonez' statement would be admissible under ER 801(d)(2)(i) after his dismissal, but VMC never objected to Dr. Thompson's testimony while he was on the stand, thus waiving its argument on that issue on appeal. *See* App. Br. at 22-24; RAP 2.5(a).

(Ordonez 58-61). At the close of testimony, the trial court reaffirmed the admissibility of Ordonez' statement. RP 7/21/09 (Colloquy 7).

In closing, plaintiff's counsel addressed the many contradictions in VMC's evidence, noting as just one of many examples the testimony of Dr. Thompson regarding his conversation with Ordonez. RP 7/21/09 (Pltf. Closing at 7-8).

E. Verdict and Judgment.

After a two week trial, the jury returned a negligence verdict for plaintiff in the amount of \$1,818,583. CP 394. Judgment was entered on the same day. CP 395-97.⁹

II. ARGUMENT

A. The Trial Court Properly Admitted Dr. Thompson's Testimony About Ordonez' Statements.

This court reviews admission of evidence under hearsay exceptions for abuse of discretion. A trial court abuses its discretion only when it takes a view that no reasonable person would take. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008); *Hoglund v.*

⁹ Curiously, VMC notes that this amount was "seven times" the amount of Sandbo's undisputed special damages (App. Br. at 14), suggesting that this verdict was somehow excessive despite the profound injuries suffered by Sandbo. Yet VMC made no post-trial motion and does not assign error to the amount of damages. Nor did VMC move for a directed verdict or new trial based upon alleged insufficient evidence.

Meeks, 139 Wn.App. 854, 875, 170 P.3d 37 (2007) (abuse of discretion requires “high standard” of showing that decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons”). Absent an established abuse of discretion, an appellate court will not reverse “even if we might have excluded the proffered evidence had we been in the trial court's position.” *Hoglund*, 139 Wn. App. at 875.

Ordonez’ statement to Dr. Thompson was admissible as a non-hearsay statement under ER 801(d). It was also admissible under ER 803(d)(4). Finally, any error was harmless in light of the overwhelming evidence of VMC’s negligence, including fact and expert testimony, admitted policy violations, as well as nursing and charting discrepancies.

1. Ordonez Had Both Express and Implied Authority to Make Statements to Dr. Thompson About Sandbo.

ER 801 defines "hearsay" as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” However, the rule excepts from the definition of hearsay statements made by a defendant, as well as statements made by a defendant’s authorized agent:

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; . . . (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. . . .

ER 801(d)(2). Washington law treats ER 801(d)(2)(iii) and (iv) as having essentially the same meaning. *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn.App. 275, 285 (1998). Whether a declarant is a speaking agent for purposes of these exceptions is a question of preliminary fact governed by ER 104(a). *Id.* at 285-286.¹⁰

A statement falls within these exceptions if the declarant was authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party. *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987). When a person does not have specific express authority to make statements on behalf of a party, the overall nature of his authority to act for the party may determine if he is a speaking agent. *Id.* A statement made in the course of an employee's delegated duties is admissible under ER 801(d)(2). See *Hartman v. Port of Seattle*, 63 Wn. 2d 879, 389 P.2d 669 (1964), *o' rld on other grounds*, *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn. 2d 629, 453 P.2d 619 (1969); *Griffiths v. Big Bear Stores, Inc.*, 55 Wn. 2d 243, 347 P.2d 532 (1959).

¹⁰ As noted by appellant, ER 801 was intended to adopt previous Washington law on this issue. However, it also broadened the scope of agency admissions. See 5B K. Tegland, Wash.Prac., Evidence Law and Practice § 801.47 (noting the rule is broader in allowing admission of opinions as well as facts).

In *Griffiths*, plaintiff slipped in a grocery store, and asked the manager why she fell. The manager told her the floor had just been mopped and had not yet dried. The Supreme Court held that this testimony was admissible against the grocery store as the manager was clearly authorized to speak to customers:

It is an inescapable inference that the manager of a retail establishment of this type is authorized to speak to customers. The record also contains evidence that customers were directed to avoid aisle one because it had been recently mopped. This was one of the primary duties of the respondent's agents in exercising care to avoid injuries to customers of the store which, at times, required them to inform people of conditions such as wet floors.

55 Wn.2d at 247.

In *Hartman*, plaintiff's company had contracted with the Port to replace existing electrical cables with a larger size, but had not been informed that the existing cables were defective. A cable with defective insulation injured plaintiff. Defendant's resident engineer made a post-accident statement that the reason the Port was replacing the cable was that the insulation was 'breaking down' and needed replacement. The Supreme Court affirmed the trial court's ruling that the agent was authorized by his employer to speak on the subject to third persons:

At the time of the accident Stitch was the resident engineer of the defendant. His duties encompassed: (a) collaborating with consulting professional engineers with respect to preparation

of work schedules; (b) co-ordinating electrical construction work with the airport's day-to-day electrical needs, including conferences with airport maintenance electricians; (c) seeing that the construction specifications were followed; (d) conferring with the contractor; (e) rendering daily reports to the field supervisor; (f) rendering periodic reports to the assistant chief engineer; and (g) making reports of all accidents. Under these circumstances, we are satisfied Stitch was qualified and had sufficient knowledge and responsibility to constitute a speaking agent. His principal was bound by admissions made while speaking on a subject within the scope of his employment.

63 Wn.2d at 885-86. See *Lockwood v. AC & S, Inc.*, *supra*, 109 Wn.2d at 262 (“In light of the declarants' authority to act as health officials for Raymark, it is reasonable to infer that they were authorized to make statements about the subject of asbestos health issues on Raymark's behalf. Therefore, we conclude that the documents were admissions by a party opponent.”); *State v. Chambers*, 134 Wn.App. 853, 858, 142 P.3d 668 (2006) (conversation between defendant's companion and an undercover police officer concerning drug transaction was admissible under ER 801(d)(2)(iv) where companion was acting as an agent of defendant and therefore within the scope of his authority).

Ignoring this authority, VMC instead relies on distinguishable case law and the broader federal rule to argue error in admitting Dr. Thompson's testimony. It also relies on cases that affirm the trial court's discretionary decision to exclude evidence. These cases are inapposite.

For instance, the pre-rule case of *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 946 (1967), is not, as argued by VMC, “controlling.” To the contrary, the court affirmed the trial court’s evidentiary ruling, which was based on the lack of evidence that a mechanic’s statement was made in the course of the mechanic’s authorized duties, or that he had direct personal knowledge of the subject matter addressed. 70 Wn.2d at 163. Notably, the court distinguished *Hartman* as involving statements by an engineer “with substantially greater delegated responsibility than appears here.” *Id.*

Similarly, in *Makoviney v. Smith*, 21 Wn.App. 16, 21, 584 P.2d 948 (1978), *rev. denied*, 91 Wn.2d 1010 (1979), the court held that the trial court did not abuse its discretion in excluding an agent’s statement regarding the cause of an accident because he “was a salesman with a salesman’s usual duties and authority. He had no express authority to speak regarding the accident.” Citing the *Restatement (Second) of Agency* § 288, relied on by VMC here, the court noted that the statement would only be admissible “if, in speaking, he is carrying out his employer’s business pertaining to the matter about which he uttered the words.” *Id.*

Finally, in both *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 645, 618 P.2d 96 (1980) and *Blodgett v. Olympic Savings & Loan Association*,

32 Wn.App. 116, 126, 646 P.2d 139 (1982), the court's exclusion of testimony was based on the lack of evidence that the declarant was acting within the scope of authority in making the out-of-court statement. 94 Wn.2d at 645.

Here, by contrast, Ordonez was authorized to make statements to Dr. Thompson regarding his post-operative care of a patient and her condition at the time. *Restatement (Second) of Agency* § 288, comment b (where an agent is employed to make statements in regard to his own acts, including past events, any statement by him regarding those events is admissible); RP 7/14/09 (Shin 13-14) (nurses are “the eyes and ears” of a physician, with a duty to communicate to the physician changes and conditions without attempting to make an independent determination of their significance). This implied authority necessarily encompassed what Dr. Thompson described as Ordonez' statement “to the effect of . . . I should have called you” to report on the post-surgical condition of Dr. Thompson's patient.

Moreover, Ordonez' statement was not an admission of legal fault, but an acknowledgment that his patient had abnormal post-surgical signs and symptoms during his shift and had requested that her doctor be called, corroborating other evidence establishing these same facts.¹¹ Thus, it does

¹¹ VMC refrains from referring to Ordonez' statement as an admission of liability, but instead calls it “in essence” an admission. App. Br. at 20.

not fall within the *Restatement* examples, cited by VMC, precluding non-binding agent admissions directed to the legal effect of recited facts. Instead, it constitutes an admissible statement within the scope of Ordonez' implied authority. See *Griffiths and Hartman, supra*.¹² Further, Ordonez had specific express authority to make these statements. See *Lockwood, supra*, 109 Wn.2d at 262. Ordonez testified, both in his deposition while represented by VMC counsel, as well as at trial, that he had been expressly ordered by his managers to discuss Sandbo's condition with Dr. Thompson. RP 7/14/09 Ordonez at 59; CP 48-49. VMC did not object to, contradict, or seek to exclude Ordonez' testimony that he had been given this express authority.¹³ Accordingly, the trial court did not abuse its discretion in admitting under ER 801(d)(2) the testimony of Dr. Thompson relating Ordonez statements regarding the care of their patient during their mutual authorized conversation.

2. VMC Is Estopped From Denying Ordonez' Speaking Authority.

The trial court did not decide plaintiff's alternative argument that

¹² The trial court properly admitted this statement under Washington law. Respondent is correct that under the broader federal rule even a direct admission of liability is admissible.

¹³ In fact, it was VMC who asked Ordonez at trial to explain how his conversation with Dr. Thompson "came about." RP 7/14/09 (Ordonez 58).

VMC cannot lawfully deny Ordonez's speaking agent status.¹⁴ If an employee is not a managing or speaking agent, but is one of plaintiff's health care providers, then Washington law forbids the defendant from having *ex-parte* contact with that health care provider. See *Wright v. Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984); *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). Violation of this rule is sanctionable. See *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn.App. 268, 280, 996 P.2d 1103 (2000) (exclusion of evidence appropriate remedy for violation of *Loudon*).

If Ordonez is not a managing or speaking agent for VMC, then VMC violated *Loudon* by representing him at his deposition prior to his joinder as a defendant, and discussing the case with him. VMC should be estopped from denying his speaking agent status in light of its *ex-parte* contact with plaintiff's health care provider.

3. **Ordonez' Statement Is Admissible Under ER 803(a)(4).**

ER 803(a)(4), which exempts from the hearsay rule "statements made for 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

¹⁴ This court may nonetheless affirm on this ground. *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004) (ruling may be affirmed on any basis supported in the record).

pertinent to diagnosis or treatment,” provides an alternative ground for the admission of Ordonez’ statements to Dr. Thompson.¹⁵ This exception is not limited to statements by a patient to a physician. Tegland, 5C Wash. Prac., Evidence Law and Practice § 803.20 (5th ed.) (“there is nothing in the rule to suggest that the hearsay exception applies only to statements describing the patient's *own* symptoms or medical history”); 5D Wash. Prac., Handbook of Washington Evidence ER 803(a)(4) (“statements by one physician to another, or by a medical laboratory to a physician, may be within the hearsay exception.”).

Ordonez and Dr. Thompson were discussing the onset and course of Sandbo’s symptoms, which was pertinent to her prognosis and treatment. Ordonez’s statements fall within the ambit of ER 803(a)(4).

4. Any Error in the Admission of Hearsay was Harmless.

In the unlikely event that the trial court abused its discretion in admitting evidence of Ordonez’ statement to Dr. Thompson, there was overwhelming corroborating evidence that Sandbo’s condition had drastically deteriorated during Ordonez’ shift. Admission of a hearsay statement is harmless unless it was reasonably probable that the statement changed the outcome of the trial. *Brundridge v. Fluor Federal Services, Inc.*, 164

¹⁵ This court may affirm the admission of this evidence even though the trial court held that this exception did not apply. *Costich, supra*, 152 Wn.2d at 463.

Wn.2d at 452. See *Henderson v. Tyrrell*, 80 Wn.App. 592, 621, 910 P.2d 522 (1996) (“reversal is required only if there is a substantial likelihood the error affected the jury's verdict.”). The improper admission of evidence constitutes harmless error “if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins v. Reich*, 142 Wn.App. 557, 570-571, 174 P.3d 1250 (2008).¹⁶

In *Brundridge*, a group of former pipefitters sued their employer for wrongful discharge in violation of public policy. The trial court admitted an OSHA report which seemed to accept as true the allegations of the pipefitters, and discredited defendant’s version of events. On appeal from a jury verdict in favor of plaintiffs, the Washington Supreme Court held that the evidence was erroneously admitted, but that the error was harmless where substantial other evidence in the case supported plaintiffs’ claims:

Fluor's strongest argument that the error was harmful is that the authority of OSHA and its investigator lent undue credence to the facts presented in the report. The trial court itself recognized this danger. The question is whether this element of enhanced credence by itself had a reasonable probability of affecting the outcome of the trial. As noted above in the “prior bad acts” discussion, the jury heard a substantial amount of evidence of both safety concerns at Fluor and retaliation by Fluor management. Even without the added credibility from the OSHA investigator, a reasonable

¹⁶ Appellant’s partial quotation from *Hoskins* (App. Br. at 25) omits this important qualifier to the rule that improperly admitted evidence requires a new trial.

juror would still have believed, at a minimum, that the workers had made safety complaints and that they were fired and subsequently reinstated. Combined with the other safety and retaliation testimony, it would likely have reached the same conclusion: that Fluor was liable for wrongful discharge. The error did not create a reasonable probability that the outcome of the trial would be different, and thus the error was harmless.

164 Wn.2d at 453 (emphasis added). *See also Henderson*, 80 Wn.App. at 621 (erroneously admitted hearsay testimony was harmless where it was consistent with other admissible evidence, and where witness was clearly testifying to his own inference of the meaning of declarant's statement).

VMC cites without discussion a number of Washington cases, all but one of which found harmless error in the admission of hearsay evidence. *See Washington Irrigation & Development Co. v. Sherman*, 106 Wn.2d 685, 691, 724 P.2d 997 (1986) (letter from claimant's counsel to claimant erroneously admitted, but did not constitute reversible error even where it may have drawn unwarranted attention and claimant was not allowed to present live testimony to mitigate its damaging impact); *Hoskins*, 142 Wn.App. at 572 (error in admitting evidence of plaintiff's pre-accident medical treatment was harmless where the evidence as a whole supported the jury verdict and prejudicial impact could not therefore be shown); *Estate of Lapping v. Group Health Cooperative*, 77 Wn.App. 612, 621, 892 P.2d 116 (1995) (no reversal warranted even where defense counsel engaged in

“egregious misconduct” by asking plaintiff’s expert a “patently prejudicial,” unfounded question intended to insinuate he was under investigation by the disciplinary board).

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983), is the only cited case in which an evidentiary error warranted a new trial. That case involved plaintiffs’ complaints for breach of contract and statutory violations against a beauty school. The trial court allowed plaintiffs to introduce a hearsay letter of complaint against the school that plaintiffs and other students had signed and sent to the State Department of Licensing. Because the non-party signatories were not available for cross-examination, and their signatures reinforced the credibility of the statements made in the letter, admission of the letter was held to be prejudicial. 99 Wn.2d at 105.

Here, in contrast, both parties to the discussion were available to testify as to their respective understandings as to what was said between them. Dr. Thompson freely conceded on cross-examination that he could not remember Ordonez’ exact words. RP 7/9/09 (Thompson 76-77). Ordonez, on the other hand, offered lengthy testimony detailing the circumstances and substance of their conversation. RP 7/14 (Ordonez 58-61). Although the jury had to make a credibility determination, there is no reason to believe Dr. Thompson’s testimony gave plaintiff an unfair advantage, particularly where

Ordonez testified that it was Sandbo who was not telling the truth about what occurred during Ordonez' shift. RP 7/13/09 at 30.

In addition, there was substantial other evidence in this case to raise issues as to Ordonez' credibility. This included the many discrepancies between his nursing records, his testimony, hospital policy, and expert testimony regarding the nature and progression of a hematoma. Eye witnesses Klepach and Sprouse corroborated Sandbo's deteriorating condition, and that she repeatedly asked Ordonez to call the doctor.

There was also substantial, undisputed evidence of VMC's liability apart from Ordonez' statement to Dr. Thompson. This included expert and nursing testimony that both Ordonez and Isaguirre violated the standard of care, as well as VMC's own policies in caring for Sandbo, such as by failing to (1) properly chart pain reports and treatment responses; (2) properly monitor an elderly patient on a PCA; (3) chart all dressing changes and observe and record the condition of Sandbo's wound, and (4) report to Dr. Thompson her sudden, unexplained pain, immobility, and incontinence.

Plaintiff's counsel's reference in closing to Ordonez' statement to Dr. Thompson is insufficient to establish prejudice. Counsel told the jurors it was up to them to decide whether Ordonez' or Dr. Thompson's version of their conversation was true. RP 7/21/09 (Pltf. Closing 54). The trial court

instructed the jury that counsel's argument is not evidence, and that the all credibility issues are for the jury to decide. CP 375-76. See *State v. Bourgeois*, 133 Wn.2d 389, 405-406, 945 P.2d 1120 (1997) (where error in admitting evidence was harmless, argument based upon this evidence was similarly harmless: “[w]hile arguably the prosecution put an additional gloss on this testimony, the trial court instructed the jury that counsel's arguments were not evidence and that they were to disregard any remark not supported by the evidence.”)¹⁷ There was no reversible error in this case.

B. VMC's Challenge to the Negligence Verdict is Unfounded.

1. VMC Failed to Preserve Its Sufficiency Argument.

At no time before or after trial did VMC challenge the sufficiency of evidence supporting a negligence claim based on VMC's failure to timely provide an operating room for Sandbo's second surgery. Its failure to do so in accordance with Civil Rule 50 is a waiver of its right to challenge the sufficiency of evidence on appeal.

CR 50 was amended in 2005 to require that a defendant move for judgment as a matter of law based on the insufficiency of plaintiff's evidence

¹⁷ Compare cases cited by VMC, where prosecutor asked jury to convict based on an erroneous instruction (*In re Sims*, 118 Wn.App. 471, 478, 73 P.3d 398 (2003)), and to infer criminal guilt based on admissible and unduly prejudicial expert testimony (*State v. Braham*, 67 Wn.App. 930, 937-938, 841 P.2d 785 (1992)).

before submitting the case to the jury. CR 50(a)(2). If denied, the movant may “renew” the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment. CR 50(b). See *Mega v. Whitworth College*, 138 Wn.App. 661, 668-69, 158 P.3d 1211(2007).

The purpose of these amendments was to make Washington's practice comparable to federal practice under Fed. R. Civ. P. 50. 4 Tegland Wash. Prac., Rules Practice CR 50 (5th ed.), *citing* Drafters’ Comments. The absence of a CR 50 motion precludes assignment of error on appeal based on the alleged insufficiency of evidence. Tegland, *supra* (compliance with CR 50 is a foundational prerequisite for appeal), *citing Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006) (failure to comply with Rule 50(b) forecloses appellate challenge to sufficiency of evidence). See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218, 67 S.Ct. 752, 91 L.Ed. 849 (1947) (“determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart”).

This result is consistent with RAP 2.5(a) (“the appellate court may

refuse to review any claim of error which was not raised in the trial court”).¹⁸ It also accords with prior Washington law. See *Fowlkes v. International Broth. of Elec. Workers, Local No. 76*, 58 Wn.App. 759, 772-773, 795 P.2d 137 (1990) (“The appellate court reviews only questions passed upon by the trial court. Since on this record the claim of insufficiency of the evidence was not presented to the trial court, it is not subject to review.”); *Valente v. Bailey*, 74 Wn.2d 857, 858, 447 P.2d 589, 590 (1968) (since plaintiff made no motion for a directed verdict, there is no basis to claim error on appeal). See also *Hill v. Cox*, 110 Wn.App. 394, 403, 41 P.3d 495, 501 (2002) (“Once a defendant puts on a case, any challenge to the sufficiency of the evidence before the court at that time is waived”).

Here, VMC failed to give the trial court the opportunity to rule on any challenge to the sufficiency of plaintiff’s evidence under CR 50, and then proceeded to present its own evidence on that issue. VMC thus waived its right to argue on appeal that the evidence submitted to the jury was insufficient to support a negligence verdict.

¹⁸ RAP 2.5(a)(2) provides an exception to allow a party to raise for the first time on appeal “failure to establish facts upon which relief can be granted.” This is “an extension of the traditional notion that failure to state a cause of action can be raised for the first time on review.” 2A Teglund Wash. Prac., Rules Practice RAP 2.5 (6th ed.). Here, however, VMC is not challenging the viability of the cause, but the proof supporting it.

2. Substantial Evidence Established VMC's Negligence.

In the event the court chooses to consider VMC's challenge to plaintiff's alternative theory – that VMC negligently failed to timely provide an operating room for Dr. Thompson to evacuate Sandbo's hematoma – it should reject this challenge on the merits. This additional theory is amply supported by the evidence.

Applying the proper standard, which admits the truth of plaintiff's evidence, and construes all reasonable inferences in plaintiff's favor (*see supra* at 1), Dr. Thompson requested a surgery room for Sandbo in the early morning of February 1st, and VMC failed to comply with its own policy to provide a room within a half hour to an hour after his request. VMC's failure to log or document surgeon calls, DeFrisco's admitted poor recollection of the events of that day, and DeFrisco's concession that calls can simply be overlooked by the charge nurse, must all be construed in favor of plaintiff's theory of negligence. Dr. Thompson followed up with more than one call and was adequately monitoring the situation.¹⁹ Similarly, Dr. McKinley testified that the OR staff violated the standard of care for responding to surgeon requests. RP 7/13/09 (McKinley at 34).

¹⁹ Again, as it was uncontested that Dr. Thompson acted with reasonable prudence, VMC was forced to concede that he was not at fault, and the jury was so instructed. CP 21; Supp. CP __ (Dkt. 88); RP 7/13/09 (Colloquy at 3-14).

Sandbo's injuries worsened with each passing hour. Had VMC made an operating room available sooner, her injury likely would have been lessened.²⁰ *Id.* (McKinley 37-38); 7/9/09 (Thompson 74; Wohms 33-34).

C. The Trial Court Correctly Gave Instruction No. 14 on Damages.

1. RCW 4.20.046 Does Not Limit Recoverable Non-economic Damages in a General Survival Action.

RCW 4.20.046 provides that all causes of action held by a person prior to death will survive after death, provided that the estate may only recover the non-economic damages arising from a cause of action if the decedent is survived by designated statutory beneficiaries:

All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: 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 on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action.

²⁰VMC's footnote describing this testimony (App. Brief. at 28) is not only misleadingly incomplete, but VMC improperly uses it to draw inferences against, rather than in favor of causation. Further, Dr. Chapman's cited defense opinion is irrelevant to the sufficiency of evidence analysis. In short, the evidence on this issue required credibility determinations solely within the jury's province, and was sufficient, when construed in plaintiff's favor, to support its negligence verdict.

RCW 4.20.046.

Prior to its 1993 amendment, this statute exempted from any recovery the very same non-economic items listed in the statute. In other words, the statutory amendment simply had the effect of allowing recovery of the non-economic loss that it had formerly prohibited. Accordingly, for the same reason that the pre-1993 cases such as *Woolridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (2000), held that this list was intended to include all categories of non-economic loss, including LOEL, it likewise must not be considered exclusive after the amendment. The amendment's purpose is to "allow[] recovery of damages for pain and suffering **and other noneconomic damages** suffered by a decedent prior to death so long as specified statutory beneficiaries exist." *Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004) (emphasis added). See *Chapple v. Ganger*, 851 F.Supp. 1481, 1486 (E.D.Wash. 1994) ("In addition to loss of net earnings, a survival action also authorizes an award to the estate for those damages recoverable in a garden variety tort action."); Steve Andrews, Comment, *Survivability of Noneconomic Damages for Tortious Death in Washington*, 21 Seattle U. L. Rev. 625, 636-37 (1998) (Noting that amendment was intended to close loophole that allowed insurance managers who delayed settlements with elderly victims to pay less if the injured party died. "The legislative history

and purpose behind the 1993 amendment illustrate that despite the language apparently specifying available damages, the intended effect of this amendment is that all causes of action, and both economic and noneconomic damages, survive to the decedent's estate.”).

The Supreme Court’s opinion in *Otani, supra*, supports an award of LOEL damages in any personal injury action, whether or not brought under the survival statute, where the injured party survives to experience the loss of life’s enjoyment. *Otani* involved a personal representative’s claims for wrongful death and survival damages suffered by 81-year-old Mrs. Otani, who underwent a negligently performed heart surgery and died several hours later without gaining consciousness. If her heart surgery had been successful, she would have had a 7.9 year life expectancy. After a bench trial, the trial court awarded damages of \$125,000 each to her two children in the wrongful death action. In the survival action, the court awarded the estate \$450,000 for “Loss of enjoyment of life which includes shortened life expectancy,” as well as burial expenses and medical bills. The trial court reasoned that she had not experienced pain and suffering prior to death, but that she was entitled to the life’s pleasures she would have experienced absent negligence. 114 Wn.App. at 550-51.

The Supreme Court affirmed the Court of Appeal’s reversal of the

LOEL award, holding that the estate could not be awarded damages for post-death LOEL damages: “No language in the 1993 amendment allows the recovery of damages for any LOEL or shortened life expectancy that a decedent did not suffer during life.” 151 Wn.2d at 763. *Otani* did not hold or even suggest, however, that LOEL could not be properly awarded under RCW 4.20.046 where decedent experienced LOEL during her lifetime. In fact, it suggests just the opposite.

Further, “disability” has always been recognized as a proper element of recovery under RCW 4.20.046 even prior to amendment. *See Cavazos v. Franklin*, 73 Wn.App. 116, 121, 867 P.2d 674 (1994) (“Under RCW 4.20.046, the decedent's administrator is entitled to maintain an action for the following damages: disability with its attendant permanent loss of earning power; burial and funeral expenses; medical and hospital expenses; and general damages to the decedent's estate); *Balmer v. Dilley*, 81 Wn.2d 367, 370 (1972) (A disabled man may or may not suffer pain. Even if he does, after his death his administrator cannot recover for his pain and suffering. But in our opinion his administrator may recover for his disabilities).

Similarly, Sandbo’s “disfigurement” is compensable under RCW 4.20.046 because of the mental suffering and “humiliation” associated with paraplegia. *See State v. Atkinson*, 113 Wn.App. 661, 667, 54 P.3d 702

(2002) (disfigurement is something which “impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner”); *Gray v. Washington Water Power Co.*, 30 Wash. 665, 674, 71 P. 206, 209 (1903) (acknowledging “mental suffering, mortification and distress of mind” associated with disfigurement).

In sum, because the evidence proved that Sandbo experienced disfigurement, pain and suffering, emotional distress, disability, and loss of enjoyment of life from the time of her injuries to her death, it was proper under RCW 4.20.046 to so instruct the jury. *Lofgren v. Western Washington Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 396 P.2d 139 (1964).

2. The Evidence Supported an Award of LOEL.

As an alternative to its erroneous argument that RCW 4.20.046 precludes an award of LOEL damages because that element is not specifically listed in the statute, VMC argues that LOEL is simply part of pain and suffering, or of disability, and thus could not be separately considered by the jury. This argument should also be rejected.

First, VMC did not preserve this argument. Civil Rule 51(f) requires a party to “state distinctly the matter to which he objects and the grounds of

his objection . . .” in order for the objection to be preserved for appeal. See *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979) (“the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.”); *Walker v. State*, 121 Wn.2d 214, 848 P.2d 721 (1993) (Objection that instruction duplicated language in another instruction was insufficient to preserve for review whether instruction erroneously treated contributory negligence as complete bar to recovery).²¹

VMC excepted to Instruction No. 14 on the basis that LOEL was not recoverable in a survival action, was “confusing” because it was not defined, and because there was no evidence of Sandbo’s “disfigurement.” RP 7/21/09 (Exceptions 9-10). However, it did not advise the trial court of any theory that LOEL improperly duplicated disability and/or pain and suffering damages, or that disability and disfigurement were not recoverable under RCW 4.26.020, and did not propose a special verdict form that would have segregated recoverable damages. Accordingly, the trial court never had the opportunity to consider those objections to Instruction No. 14. This court should refrain from doing so for the first time on appeal. CR 51; RAP 2.5(a).

²¹ Because the trial court has discretion to decide the specific language of jury instructions, a deviation from the language of the Washington Pattern Jury Instructions does not necessarily constitute error. *Humes v. Fritz Companies, Inc.*, 125 Wn.App. 477, 498-499, 105 P.3d 1000 (2005).

Second, VMC has not cited any case that prohibits consideration of disability and pain and suffering as separate components of damages. Indeed, the Washington Supreme Court has recognized that they are not duplicative. *See Kirk v. Washington State University*, 109 Wn.2d 448, 461, 746 P.2d 285 (1987) (pain and suffering compensates for physical and mental discomfort caused by the injury, while recovery for disability compensates for inability to lead a “normal life”); *Parris v. Johnson*, 3 Wn.App. 853, 857, 479 P.2d 91, 93 (1970) (‘disability’ means an impairment of work, sleep or leisure); *Balmer v. Dilley*, 81 Wash.2d 367, 370 (1972) (disability is not, in itself, ‘pain and suffering’).

With respect to the alleged overlap between LOEL and disability, the Washington Supreme Court recognizes that disability only contemplates an interference with the ordinary physical activities of life, rather than activities unique or specific to the person injured. *Kirk, supra*, 109 Wn.2d at 460-61.

VMC argues that Sandbo had no “unusual” activities, and thus consideration of both LOEL and disability was duplicative. To the contrary, the evidence established that Sandbo was an extraordinary 87-year old woman, with unique interests and activities far beyond the “normal” activities of daily living. Even if it can be said that her ability at 87 years old to live independently, drive a car, and go to work were “normal,” the same cannot

be said of Sandbo's gardening, fruit harvesting, social organizing and year-round Christmas preparation. Surely if a WSU cheerleader is entitled to LOEL damages because she could no longer pursue her love of dance, Sandbo was entitled to LOEL damages because she could no longer pursue the special interests unique to a person of her advanced age.

3. No Prejudice in Instruction No. 14.

A trial court's alleged error in instructing the jury is not ground for reversal unless that error affected the outcome of the trial. *Stiley v. Block*, 130 Wn.2d 486, 499, 925 P.2d 194 (1996). The law strongly presumes the adequacy of a jury verdict, and the "existence of a mere possibility or remote possibility of prejudice is not enough" to grant a motion for a new trial. *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969); *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967). Where a verdict is not challenged as excessive, any error relating to damage instructions is harmless. *Perrault v. Emporium Dept. Store Co.*, 83 Wash. 578, 583-584, 145 P. 438 (1915); see *Bullard v. Barnes*, 112 Ill.App.3d 384, 390, 445 N.E.2d 485, 490, 68 Ill.Dec. 37, 42 (1983) ("errors in instructions going to the measure of damages are viewed as harmless when there is no allegation of excessive damage.")

In closing, plaintiff's counsel reminded the jury that it had the power

“to completely ignore” the numbers he proposed, and the jury awarded less than he requested. RP 7/21/09 (Pl. Closing 43); CP 394. VMC did not present any damage evidence at trial, did not address damages in closing, and has not challenged the amount of the verdict on appeal.

VMC nonetheless argues that the jury verdict necessarily included duplicative damages. As established, however, pain and suffering does not duplicate either LOEL or disability. Further, plaintiff’s counsel placed disability damages in the same category as disfigurement and the nature and extent of injuries – what he called “just the physical side” of Sandbo’s damages, arguing for \$150,000 to \$250,000 for that entire category of damages. 7/21/09 (Pltf. Closing at 42). The nature and extent of Sandbo’s injuries alone supported this amount. He then separately addressed Sandbo’s pain and suffering, and her loss of independence (LOEL). The evidence supporting these last two categories of loss also was substantial, and alone supported the entire non-economic verdict. *See Clevenger v. Fonseca*, 55 Wn.2d 25, 33, 345 P.2d 1098 (1959) (error in instructing jury on unsupported “mental suffering, anxiety, distress, grief and mortification” was harmless in the light of the extent and character of the injuries, pain and suffering, and special damages); *Vangemert v. McCalmon*, 68 Wn.2d 618, 622, 414 P.2d 617 (1966) (where damages awarded do not exceed the amount that could

properly be awarded for elements of damage that are indubitably established, error in instructing on additional damage elements unsupported by evidence was harmless). In light of VMC's failure to challenge the amount of the verdict, and the substantial evidence supporting the total damage award, any instructional error was harmless.

III. CONCLUSION

The jury's verdict as to both negligence and damages was amply supported by the evidence, and there was no prejudicial error in the trial court's admission of evidence or instructions to the jury. This court should affirm the trial court's judgment on the verdict.

Respectfully submitted this 26th day of March, 2010.

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM



Robert N. Gellatly, WSBA 15284
Deborah L. Martin, WSBA 16370
701 Fifth Avenue, Suite 6700
Seattle, WA 98104
(206) 467-6090
Attorneys for Respondent Sandbo

CERTIFICATE OF SERVICE:

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Brief of Respondent in the manner set forth below:

Pamela A. Okano
Reed McClure
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363

(VIA U.S. MAIL)

Donna Moniz
Johnson Greaffe Keay Moniz & Wick LLP
925 4th Ave., Suite 2300
Seattle, WA 98104-1145

(VIA U.S. MAIL)

Dated this 27th day of March, 2010.


PATTI L. BENNETT