

67245-2

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No. 67245-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REBECCA LAWRENCE,

Respondent,

vs.

TRUGREEN LANDCARE, LLC., a Washington Business; and
CARMELO BALTAZAR ALEJO, and JANE DOE BALTAZAR ALEJO,
As Husband and Wife and the Marital Community composed thereof,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

APPELLANTS' BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON



BRIEF OF APPELLANTS

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I. INTRODUCTION

The trial court erred in permitting respondent Rebecca Lawrence to present inflammatory and prejudicial evidence to the jury. The trial court compounded its error when it improperly instructed the jury to double count damages and weigh duplicative and prejudicial evidence but not consider a previous infirm condition. Nothing in Washington's law condones the introduction of inadmissible evidence to an improperly instructed jury. Appellants TruGreen LandCare LLC, Carmelo Baltazar Alejo, and Jane Doe Baltazar Alejo (collectively, "TruGreen") was unfairly prejudiced as a result. When errors rise to these levels and manifest themselves in a duplicative and inflamed jury award, the only just outcome is a reversal of the verdict and a new trial.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in allowing a duplicative award when it instructed the jury, via instruction No. 10, to consider the "nature and extent" of Lawrence's injuries as a separate line item of damages, which led to an inflamed jury verdict.

Assignment of Error No. 2: The trial court erred in failing to provide TruGreen's proposed jury instruction No. 4 limiting the purposes of non-admitted evidence upon which Lawrence's experts relied.

Assignment of Error No. 3: The trial court erred in failing to accept TruGreen's proposed jury instruction WPC §30.18 on the aggravation of Lawrence's previous infirm condition.

Assignment of Error No. 4: The trial court erred in permitting Lawrence to make repeated allusions to inadmissible evidence throughout the trial, which led to a prejudiced jury verdict.

Assignment of Error No. 5: The trial court erred in permitting one of Lawrence's experts to testify to information inconsistent with the report on which he reportedly relied.

Assignment of Error No. 6: The trial court erred in permitting Lawrence to produce to TruGreen an inaccurate expert report during trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1: The trial court allowed the jury to consider the "nature and extent" of Lawrence's injuries as a separate line item of damages. Providing this jury instruction enabled Lawrence to recover duplicate damages. Did the trial court err in instructing the jury to consider a duplicative award?

No. 2: In the absence of a Washington pattern jury instruction, should the trial court have accepted TruGreen's proposed jury instruction limiting the purposes of non-admitted evidence upon which Lawrence's expert relied?

No. 3: Lawrence had a documented history of back injury and psychological conditions which affected her ability to perceive pain. Should the trial court have accepted TruGreen's proposed jury instruction on the aggravation of a previous infirm condition?

No. 4: In an admitted-liability matter in which the jury needed only determine the extent of reasonable damages of an automobile accident, Lawrence alluded to inadmissible evidence, including a police report, the driver's identity, and the mechanics of the accident throughout the trial, over the objections of TruGreen. Did those repeated references and allusions taint the jury sufficient to warrant a new trial?

No. 5: Lawrence's expert testified to information inconsistent with the report on which he reportedly relied. Does the expert's presentation of irreconcilable conclusions based on inconsistent evidence require a new trial?

No. 6: Lawrence failed to produce an up-to-date expert report until the time of trial and when it was produced, it was inaccurate. Does Lawrence's untimely production of an inaccurate update report during trial necessitate a new trial?

IV. STATEMENT OF CASE

Rebecca Lawrence was in an automobile accident on June 29, 2007; she subsequently claimed significant physical injuries and sought

millions in recovery from the defendants. CP 130. TruGreen admitted liability and proceeded to trial solely on the issue of damages. CP 532.

Trial commenced on March 8, 2011, in Snohomish County Superior Court. CP 41-46. During trial and closing arguments, as explained further below, Lawrence repeatedly referred to inadmissible evidence over TruGreen's objection. RP 7:17, RP 8:9, RP 8:15, March 9, Officer Greg Cornett; RP 232-233, March 15, Rebecca Sue Bellerive; RP 292:6, March 15, Robert Moss.

At the close of evidence, the court provided the parties an opportunity to modify the proposed instructions for the jury. CP 76-90; RP 306:6-7, March 16, Colloquy. The court and counsel for the parties discussed the proposed jury instructions:

1. The trial court allowed the jury to consider the "nature and extent" of plaintiff's injuries as a separate line item of damages. CP 88 (See Appendix A-1, Trial Court Jury Instruction 10). When TruGreen excepted to the language as being duplicative, the trial court stated that it agreed that TruGreen presented "a good argument" but that it would give the offending instruction nonetheless. RP 318:20-21, March 16, Colloquy.

2. TruGreen introduced a proposed instruction to limit the use of evidence on which the experts testified they relied but which was not admitted into evidence. CP 78 (See Appendix A-2, TruGreen

Proposed Instruction 4). When the trial court denied the instruction, TruGreen formally objected. RP 322:17-19, March 16, Colloquy.

3. TruGreen also moved for an instruction on the aggravation of a previous infirm condition modeled on WPC §30.18. CP 90 (See Appendix A-3, TruGreen Proposed Instruction 8). TruGreen formally objected to the trial court's adoption of WPC §30.18.01 rather than a combination of WPC §30.17, WPC §30.18, and WPC §30.18.01. RP 322:11-16, March 16, Colloquy.

V. ARGUMENTS

A. **The trial court erred in failing to allow TruGreen to present its theory of the case to the jury through proper jury instructions.**

Jury instructions must take the facts of the case and give the jury instructions as to how to apply the law. *See Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001). Each party is entitled to have its theory of the case presented to the jury for consideration; failure to do this constitutes reversible error. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). TruGreen's theories of the case included ensuring that that the "nature and extent" of Lawrence's injuries not be doubly weighed; that the jury be properly instructed concerning Lawrence's previous infirm condition; and that non-admitted evidence, upon which Lawrence's experts relied, be properly

assessed by the jury. Each of those concerns could have been addressed had the trial court properly instructed the jury.

1. Standard of Review: Challenged jury instructions are reviewed de novo; failure to provide a party with the opportunity to present its theory of the case to the jury is reversible error.

On appeal, challenged jury instructions are reviewed de novo. *Hue v. Farmboy Spray Co. Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Review of jury instructions is guided by the principle that those instructions are sufficient if “they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Id.* It is reversible error to not afford a party this opportunity. *Meabon v. State*, 1 Wn.App. 824, 829, 463 P.2d 789 (1970). An erroneous instruction is reversible error where it prejudices a party. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn.App. 35, 44, 244 P.3d 32 (2010), *review granted* 172 Wn.2d 1001, 258 P.3d 685 (Aug. 8, 2011).

2. The jury should not have been permitted to consider nature and extent of Lawrence’s injuries as a separate line item of damages, because doing so led to a duplicative award.

Foremost in the lineup of errors present in this appeal is the trial court’s error in instructing the jury to consider the “nature and extent” of injuries as a separate line item of damages on the verdict form as directed

by the trial court's Jury Instruction No. 10. CP 61-62. Jury Instruction No. 10, taken in pertinent part from WPC §30.04, directed the jury to consider: (1) the nature and extent of the injuries; (2) the disability experienced and with reasonable probability to be experienced in the future; (3) the loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; (4) the pain and suffering experienced and with reasonable probability to be experienced in the future. CP 61-62. In viewing the nature, extent, and duration of Lawrence's injuries as a separate line item of damages, the jury was permitted to award duplicative damages.

This jury instruction improperly directed the jury to award duplicative damages. The "nature and extent" language allowed Lawrence a recovery for the injury itself in addition to recovering for all of the elements of damages, even though it is those elements of damages which are meant to compensate for the injury. In other words, if an instruction directs a jury to award for the injury in addition to award for the pain, suffering, and disability, then the award is necessarily duplicative.

Rather than using this jury instruction, the trial court should have instructed the jury to avoid a duplicative recovery in considering the nature, extent, and duration of the injury from disability itself. This approach is followed by the majority of states. See Michael Graham,

Pattern Jury Instructions: The Prospect of Over or Undercompensation in Damage Awards for Personal Injuries, 28 De Paul L.Rev. 33, 53 (1978). Professor Graham analyzed the jury instructions across the country and found that Washington state is one of only three states which direct the jury to consider the “nature, extent, and duration” as a separate and compensable element of damage. *Id.* The problem with such an approach is that when the court instructs the jury to compensate once for the “nature, extent, and duration” of the injury and again for the various elements of the damage that the injury produced, there is, by extension, the grave possibility of a duplicative award. The jury’s role should not be to award supplementary damages, but instead to determine the damages which will reasonably and fairly compensate the plaintiff for those elements of the damage.

The majority of other states have recognized the inherent prejudice of a duplicative recovery for decades. Texas state courts, for example, have recognized for a century that a jury instruction directing a jury to believe that elements of damages were recoverable in addition to compensation for the injuries was erroneous. *Kansas City, Missouri & Ohio Ry. Co. of Texas v. Florence*, 138 S.W. 430, 431-32 (Tx.Civ.App. 1911). Likewise, in Kentucky, jury instructions permitting double recovery have been disfavored for over eighty years. *South Covington &*

Cincinnati St. Ry. v. Vanice, 278 S.W. 116, 120 (Ky. 1925). Correspondingly, Mississippi courts have found that the elements “nature and extent of injuries” and “disability” are the same and therefore duplicative. *Gillis v. Sonnier*, 187 So.2d 311, 313-14 (Miss. 1966). Similarly, the Missouri Court of Appeals held that such an instruction authorized double damages because one prong of the instruction directed the jury to consider the character, extent, and permanency of the injuries, while the other directed the jury to consider the extent of future disability. *Waymire v. Carter*, 366 S.W.2d 74, 79-80 (Mo.App. 1963).

The language of WPC §30.04 is identical, nearly word for word, with the language of the former Illinois instruction §30.04. Nearly thirty years ago, Illinois’ instruction §30.04 was reversed by the Illinois Supreme Court in *Powers v. Illinois Central Gulf Co.*, 438 N.E.2d 152, 156 (Ill. 1982). In *Powers*, the court found that “a jury cannot determine damages for the nature, extent and duration of a plaintiff’s injury in isolation and apart from the remaining elements of damages.” *Powers*, 438 N.E.2d at 156. The Illinois Court specifically reasoned that “any award for elements such as disability, pain and suffering, or disfigurement will of necessity involve and be based upon the jury’s examination of and assessment of the nature, extent and duration of the injury.” *Id.* The same is true here, as evidenced in the verdict against TruGreen.

Washington should reject the duplicative language of WPC §30.04. The verdict awarded by this jury showcases the manifest error that can result when a jury double-counts the nature and extent of the injuries claimed by a plaintiff. The cause is not the jury's fault—being so instructed by WPC §30.04, it had no other option than to award Lawrence the double damages. Such a result is neither just nor proper. Instead, this court should remit the offending verdict and properly instruct a new jury to calculate the nature and extent of Lawrence's injuries once and only once. Doing so will send a clear signal to trial courts across the state that WPC §30.04 is an inaccurate method of assessing accurate measure of damages. The duplicative award could only be explained by the erroneous jury instruction, given the disproportionate gap between the objective and reasonable damages outlined by the experts and the irrational jury verdict.

3. Given Washington's lack of an applicable jury instruction, the trial court should have accepted TruGreen's proposed instruction limiting the purposes of non-admitted evidence upon which Lawrence's experts relied.

When an expert testifies, basing her opinion on information that is not offered or admitted as evidence, the jury is entitled to know what weight it should give those references. The trial court erred when it failed to properly instruct the jury how to assess that weight. Lawrence relied upon the testimony of lifecare planner Rebecca Bellerive and economist

Robert Moss to establish costs for Lawrence's future care, including goods and services. Throughout their respective testimony, both experts relied upon unadmitted records, articles, and statements by out-of-court individuals to support their projections of future care, as detailed below.

The lifecare planner Bellerive stated that she relied on "a published standard of methodology." March 15, Bellerive, RP 212:10-11. She also stated that she relied on the statements and records of Lawrence's medical provider in Arizona. March 15, Bellerive, RP 234:19-22. She admitted speaking with Dr. Lynch and even admitted to the jury that she based her opinion upon Dr. Lynch's medical opinion. RP 218:4-9, RP 220:5-8, RP 221:16, RP 221:22-222:2, RP 224:4-225:1, March 15, Bellerive. Bellerive did so notwithstanding TruGreen's inability to depose or cross-examine Dr. Lynch. RP 235:17-18, RP 248:14, March 15, Bellerive. The economist Moss admitted to the jury that he based his report on conversations he had with Lawrence's counsel as well as with Bellerive, which necessarily included the out-of-court statements of Dr. Lynch, Lawrence's medical provider in Arizona. RP 302:18, RP 303:3, March 15, Moss.

Dr. Lynch did not testify in any capacity at the trial. The jury did not hear one word fall from his lips. Not one juror was able to assess his credibility and properly consider his testimony. And nothing he said to

Bellerive was properly admitted into evidence. As such, TruGreen requested that a jury instruction be given advising that the experts' testimony which relied on out-of-court statements was limited in purpose and that the material being referred to was not evidence and should not have been considered as such.

That proposed instruction read,

I allowed expert witness to testify in part to records and articles and statements that may not have been admitted into evidence. This testimony is allowed for a limited purpose. It is allowed so that the witness may tell you what he/she relied on to form his/her opinion[s]. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by this witness.

CP 78 (See Appendix A-2, TruGreen Proposed Instruction 4).

Lawrence excepted to the instruction, not for any substantive grounds, but because "we're trying not to confuse the jury with too many instructions." RP 309:24-25, March 16, Colloquy. Instead, Lawrence stated that the jury did not "need a limiting instruction on the evidence itself." RP 310:2-3, March 16, Colloquy. The trial court admitted its own lack of memory regarding the evidence: "I'm not sure [the jury is] going to even understand what we're talking about because I'm having a hard time remembering what was evidence and what is not." RP 310:4-7, March 16, Colloquy. Rather than recognizing that the instruction would

limit the jury's use of that unadmitted evidence, the trial court said, "I'm just not going to give that because I don't think it's helpful; and, two, I think it's kind of confusing." RP 310:9-11, March 16, Colloquy.

If the trial court were confused, the jury could only have been more perplexed without an accurate instruction directing it how to properly weigh the evidence. The trial court was within its discretion to permit an original jury instruction if the proposed jury instruction correctly states the law and facts at trial to support it. *Higgins v. Intex Recreation Corp.*, 123 Wn.App. 821, 99 P.3d 421 (2004). While Washington does not have a limiting instruction in its WPC, several other states do, and the trial court erred in not permitting it. *See* Illinois Pattern Jury Instruction 2.04; *People v. Anderson*, 495 N.E.2d 485, 490 (Ill. 1986); *U.S. v. Madrid*, 673 F.2d 1114 (10th Cir. 1982); *Brown Mechanical Contractors, Inc. v. Centennial Insurance Co.*, 431 So.2d 932, 944 (Ala. 1983).

TruGreen proposed that the trial court issue this instruction modeled after Illinois Pattern Jury Instruction §2.04 to direct the jury on how to assess evidence. Illinois Pattern Jury Instruction §2.04 specifically instructs jurors that information relied upon by experts but which is not admitted into evidence "is not evidence in this case and may not be considered by you as evidence." The jury should be fully advised that when facts or data are not admissible but used to explain the basis of the

expert's opinion, those inadmissible facts should not be weighed at the same level as the admissible facts. *Anderson*, 495 N.E.2d at 490. Such a limiting instruction avoids the jury's potential confusion in assessing the evidence heard from the mouths of the experts. *See Madrid*, 673 F.2d at 1114; *Brown Mechanical Contractors*, 431 So.2d at 944. The trial court erred in refusing to provide a similar limiting instruction. March 16, Colloquy, RP 310:9-11.

Here, we can see the clear prejudice to TruGreen through the error of not instructing the jury on the proper way to assess the records, statements and articles. The jury awarded Lawrence far more than the evidence *submitted* would warrant. Based upon this award, it is unmistakable that the jury could have relied exclusively on the testimony of the economist and lifecare planner to determine the amount of future economic damages awarded. The jury's verdict strongly suggests that it awarded damages not so much for the admitted facts but for the inappropriate and unadmitted facts before it. Absent this proposed instruction, there is a significant likelihood that the jury improperly considered all of the information testified to by both experts as evidence, thereby greatly prejudicing TruGreen. The verdict should be reversed.

4. The trial court should have accepted TruGreen's proposed jury instruction on the aggravation of Lawrence's previous infirm condition.

The trial court erred in failing to permit TruGreen to introduce its theory of the damages through WPC §30.18, as proposed by TruGreen. TruGreen's theory presented to the jury was this: Whether Lawrence's injuries were caused as a result of the automobile accident or as a result of preexisting conditions? And if she had preexisting conditions, how did they manifest themselves in relation to the injuries caused by the automobile accident? TruGreen presented ample evidence that Lawrence had a significant preexisting physical condition—a prior back injury—and even an greater psychological condition, which affected Lawrence's ability to perceive pain.

Lawrence's own treating physicians recognized that she had at least told other providers that she had a significant preexisting physical condition. Dr. Burgess testified that she read and reviewed Lawrence's admissions to her chiropractor that she had preexisting neck and back pain. RP 154:22-155:2, March 14, Dr. Kathleen Burgess. Dr. Burgess testified that Lawrence had this preexisting condition. RP 154:23-156:2, March 14, Dr. Burgess.

In addition, TruGreen presented evidence of a nexus between Lawrence's prior sex abuse and her current psychological condition. Dr.

Bauer testified convincingly that a patient's psychological condition could affect her perception of pain. RP 37:25, March 14, Dr. David Bauer. Dr. Bauer explained to the jury that if he had been Lawrence's treating physician, he would have referred her to a psychiatrist, given her disproportionate gulf between her pain and objective findings. RP 83:9-12, March 14, Dr. Bauer. Lawrence's own treating physician Dr. Burgess indicated that such unprocessed abuse could manifest in the very symptoms Lawrence blamed on TruGreen. RP 152:19-153:3, March 14, Dr. Burgess. The medical testimony regarding Lawrence's inflated perception of pain stands in stark contrast to the inflated jury award. Had the jury been properly instructed, it would have assessed the proper valuation of Lawrence's damages.

Prior to the presentation of evidence, TruGreen had proposed an instruction modeled on WPC §30.18.01. CP 90. After the evidence, based on the testimony of the medical experts, TruGreen recognized that the jury could well conclude that Lawrence had a previous infirm condition and, as such, urged the trial court to use WPC §30.18 or, at the least, WPC §30.18 alongside §30.17. RP 312:6-9, March 16, Colloquy. The trial court even acknowledged that the chiropractor's note evidenced Lawrence's pain prior to the crash. RP 313:5, March 16, Colloquy. Upon question by the court, Lawrence conceded that disputing that she had prior

pain was “not the theory of our case” and that there “is no issue whether she had a preexisting condition. I think everybody here agrees that she had a preexisting condition.” RP 313:10, RP 313:21-24, March 16, Colloquy.

Although TruGreen, the trial court, and even Lawrence herself recognized that the evidence presented a preexisting condition, the trial court refused to issue WPC §30.18. RP 315:20-21, March 16, Colloquy. WPC §30.18 is necessary where the evidence justifies a finding that some of the results would have occurred as a normal progression of the condition, even if there had been no accident. In *Lewis v. Harris*, 8 Wn.App. 841, 843-44, 509 P.2d 396 (1973), the court specifically found that WPI §30.18 is appropriate if the alleged pre-existing condition was merely an infirmity which was not causing pain or disability.

As a result of the trial court’s refusal to include the requested instruction, the jury was instructed to award Lawrence *all* injuries and damages resulting from the automobile accident, even if those injuries were *greater* than those which would have been suffered by a normal person under the same circumstances. Thus, Lawrence’s “infirm” condition was a central component of TruGreen’s theory of the case. To deny the jury the ability to weigh the extent to which her condition was a preexisting condition could only result in prejudice to TruGreen; as such,

the trial court's error to include the requested instruction mandates the remittal of the verdict.

B. The trial court erred in permitting the jury to consider inadmissible and faulty evidence.

Lawrence took countless opportunities to present inadmissible evidence to the jury. The jury heard inadmissible evidence about the police report, the TruGreen driver, and the mechanics of the accident. The trial court erred permitting Lawrence to continue with her questioning and in not halting the evidence presented to the jury.

1. Standard of Review: The admission of evidence based on untenable grounds is reviewed for an abuse of discretion.

A trial court's rulings on admission of evidence are generally reviewed for abuse of discretion. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994). A trial court abuses its discretion when its decision to admit evidence is manifestly unreasonable or based on untenable grounds. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

2. The trial court should not have permitted Lawrence to introduce inadmissible evidence to the jury.

The trial court erred in permitting Lawrence to introduce evidence of the police report in violation of Washington law. During Lawrence's direct examination of the witness police officer, the officer testified, not

from his own independent recollection of the accident investigation, but from his “collision report.” RP 7:17, March 9, Officer Cornett. Based on the collision report—which had been excluded from evidence in a pretrial ruling—the police officer “remembered” that Lawrence claimed “neck and back pain” at the scene. RP 8:15, March 9, Officer Cornett.

Thereafter, Lawrence repeatedly bootstrapped this information into her examination of subsequent medical witnesses, implying to the jury that Lawrence had previously and consistently complained of back pain:

[LAWRENCE] [T]he investigating officer, doing his job, needed to know whether there were any injuries and was informed that she was having neck and back pain. Is that consistent with your opinion that the lumbar condition, the lumbar injury, was caused in the crash?

[DR. HONG] Yes.

* * *

[LAWRENCE] One of the things that happened in our courtroom here is we have the investigating officer come in and he spoke about what he documented at the scene as she was having neck and back pain. Before this, did you know this?

[DR. MOE] No.

RP 79:17-22, March 10, Dr. Hyun Hong; RP 207:12-17, March 14, Dr. Donald G. Moe.

The introduction of the police report itself was precluded under RCW 46.52.080 and the evidence code. RCW 46.52.080 expressly confers a confidentiality on police reports, and those reports are admissible only in the prosecution of providing false information to the police. Moreover, an investigating police officer may not testify as to his opinion regarding fault. *Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967).

It was bad enough that the jury heard the police officer testify to the report, but the trial court compounded the error in permitting witnesses to rely on that testimony, when it became pure inadmissible hearsay. See ER 401, 402, 403, 801, and 802. Lawrence's self-serving prior statement to the police officer was hearsay and does not fall within one of the exceptions enumerated within Rule of Evidence 803. It is elementary evidence law on hearsay that a party may not offer the prior statement of herself through an in-court declarant because a party may not offer her own prior statement into evidence. *Id.* Moreover, a party may not offer the testimony of a police officer under the guise of a statement "made for purposes of medical diagnosis or treatment" when the in-court declarant is a police officer who has no competency or responsibility to diagnose or treat a medical condition. See ER 803(4).

Finally, the police officer's testimony about the report and the medical diagnosis was improper because it permitted the police officer to provide a conclusion as to Lawrence's medical condition. The jury should have relied only upon the medical experts to provide those medical conclusions pursuant to ER 701. ER 701 limits the extent that a lay witness may offer an opinion based on specialized scientific knowledge. Here, the police officer was not trained in medical diagnosis and should not have been permitted to testify to Lawrence's medical condition. That the police officer without any medical training was permitted to testify to Lawrence's medical condition necessitates a reversal of the verdict and a new trial. The jury was left to weigh the evidence presented through the police report as equally substantial as admissible evidence.

The improper admission of this statement from the police report as repeated by multiple witnesses was prejudicial to both parties. It was prejudicial to TruGreen's theory of medical causation, namely, that the potential correlation between Lawrence's alleged back pain and the instant collision was greatly diminished by Lawrence's initial failure to report and receive treatment for her back.

Not only was the report damaging to TruGreen, it was equally detrimental to Lawrence: the police officer's testimony further diminished Lawrence's credibility, in that the report only references "back pain"

generally without specifying its location. Given that the vast majority of the medical damages incurred stemmed from treatment to Lawrence's lower, and not upper or middle back, the statement became non-credible.

The admission of this non-credible hearsay must have had a significant impact on the jury's decision to hold TruGreen liable for the entirety of Lawrence's medical specials. TruGreen's ability to argue that only some of the claimed medical expenses (past and future) were related to the accident was thwarted because of this inadmissible testimony. This error by the trial court, again, significantly impacted TruGreen's ability to present its theory of the case, and, as a corollary, prevented it from having a fair trial. The decision to admit this hearsay testimony is manifestly unreasonable and warrants a reversal of the verdict.

3. The trial court should not have permitted Lawrence to refer to the hiring of the TruGreen driver during closing argument and should have immediately instructed the jury to disregard that information.

The trial court erred in allowing Lawrence to reference not only the identity of the driver but also allude to the fact that the driver was not present before the jury. While the jury was sequestered and prior to closing arguments, Lawrence's counsel dared to say that he would refer to the driver in his closing argument. RP 320:8-10, March 16, Colloquy. The court said, "I noticed the caption is Lawrence v. TruGreen and Alejo,

and I don't know – maybe they won't pick up on it.” RP 320:3-5, March 16, Colloquy. Lawrence's counsel threatened, “They will when I'm done talking.” RP 320:6, March 16, Colloquy. The court, astonished, questioned, “They will?” RP 320:7, March 16, Colloquy. Lawrence's counsel answered in the affirmative, “Yes, sir, they will. Although I certainly would never suggest anything outside of the scope of the evidence or witnesses called.” RP 320:8-10, March 16, Colloquy. The court cautioned, “I'm sure you won't, because you shouldn't.” RP 320:11, March 16, Colloquy.

Lawrence should not have done so for three reasons. First, Lawrence should have heeded the trial court's instruction and not said a single thing about the driver. Second, there was no foundation for mentioning the driver at any point during the trial. Finally, Washington law precludes such testimony from reaching the jury in an admitted liability case. *Snyder v. General Elec. Co.*, 47 Wn.2d 60, 68, 287 P.2d 108 (1955). When a defendant in a negligence case admits liability and contests only the amount of damages, she is entitled to have excluded from the testimony all references to the manner in which the accident occurred, except for those references immediately relevant to the question of damages. *Id.* Nothing about the identity of the accident or the

mechanics of the accident could have been relevant to the amount of Lawrence's damages.

Yet Lawrence's closing argument repeatedly referenced both the identity of the driver and the mechanics of the accident. The following colloquy would be absurd if it were not painfully true:

[LAWRENCE] And people that should never have been behind the wheel at all –

[TRUGREEN] Objection, Your Honor.

[LAWRENCE] At all –

The Court: Sustained.

[LAWRENCE] Because they don't know how to drive –

[TruGreen's counsel] Objection, Your Honor.

The Court: Counsel, limit your argument to the evidence, please.

[LAWRENCE] Sure, judge. People that should never be behind the wheel because they don't know how to drive –

[TruGreen's counsel] Same objection, judge.

The Court: Same ruling, counsel. Move on.

[LAWRENCE] Could I have a side-bar, judge?

The Court: You may.
(Discussion at bench.)

[LAWRENCE] Ladies and gentlemen, I don't know that this gentleman doesn't know how to drive.

Carmelo Baltazar Aleyo [sic], represented by counsel, crashed into a vehicle in front of him that was backed up in traffic on Highway 99 at speed, maybe knowing how to drive.

RP 18:19-19:17, March 16, Plaintiff's Closing.

The trial court did nothing to halt Lawrence's disclosure of information that was not previously admitted during the trial. Even after TruGreen's objection to the improper evidence was sustained, Lawrence continued with the line of argument. The most prejudicial moment for TruGreen, however, was the trial court's failure to properly instruct the jury to disregard the immediate statements of Lawrence's counsel after the side-bar occurred. Instead, Lawrence returned to address the jury and rather than apologize for making the improper mistakes, compounded the fault by saying the name of the TruGreen driver (about whom no testimony was ever proffered) and implying that he did not know how to drive. The trial court, upon realizing that Lawrence was in the process of presenting inadmissible evidence to the jury, should immediately have issued a corrective instruction from the bench to disregard all such mentions of the inadmissible evidence. At a minimum, upon hearing Lawrence's counsel's closing argument replete with inadmissible and improper allusions, the trial court should have exercised its prerogative to control the courtroom. Courts have inherent authority to control their

proceedings. *Nast v. Michels*, 107 Wn.2d 300, 305, 730 P.2d 54 (1986); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981).

4. The trial court should have halted the testimony of Lawrence's economic expert when he testified to information inconsistent with the report on which he reportedly relied.

The trial court erred in allowing Lawrence's economics expert to testify to information inconsistent with evidence previously presented. Lawrence's life care planner expert, Rebecca Bellerive, updated her report shortly before trial. Days before trial, Lawrence produced the updated report to TruGreen. RP 232:18, March 15, Bellerive. At trial, however, Bellerive admitted that the only change to her future life care numbers in the updated report pertained to the cost of goods but not services; in fact, she conceded that the increase was a three thousand percent increase from her original report. RP 233:16-19, March 15, Bellerive. The expert admitted there was no change in her estimate for future services. RP 233:12, March 15, Bellerive.

When Lawrence's economics expert testified, he admitted that his testimony was based on Bellerive's report. RP 291:23-292:9, March 15, Moss. The economics expert increased his estimate for future services by \$200,000 based on the updated report. *Id.* Because Bellerive had testified

that the changes were only to the cost of goods and not services, there can be no other conclusion but that Lawrence's economist based his projections for future services on numbers for which there was absolutely no basis from Bellerive's updated report or trial testimony.

The trial court acted in a manifestly unreasonable manner. It should not have permitted the jury to be confused by the competing and conflicting testimony of Lawrence's experts.

5. The trial court should not have permitted Lawrence to produce to TruGreen an inaccurate expert report during trial rather than produce an accurate report prior to trial.

The trial court erred by permitting Lawrence to produce an inaccurate report to TruGreen. Lawrence's economist Moss prepared an updated report with far greater damages than those originally provided to TruGreen. RP 277: 5-9, RP 289:16-17, March 15, Moss. This "new" information was not provided to counsel for TruGreen prior to trial. RP 289:16-17, March 15, Moss. It was not until the economist began to testify that TruGreen first learned of this updated report. RP 289:16-23, March 15, Moss. Moss estimated an additional half-million dollars in damages than had previously been provided to TruGreen in his first report. RP 292:4-10, March 15, Moss. This new and contrary testimony was "surprise" testimony, which ordinary prudence could not have guarded against. As such, it materially altered the fairness of the trial.

Moss based a significant portion of his trial testimony on information outside of, and inconsistent with, the opinions set forth in his previously disclosed report. TruGreen was entitled to rely upon the fact that the nature of Moss's testimony would be consistent with his expert witness report. TruGreen's counsel was forced to introduce both reports to the jury to demonstrate the conflicting and inconsistent conclusions within them. RP 289:24-25, March 14, Cross-Examination of Moss. The trial court acted unreasonably when it did not strike the expert's report from being considered by the jury.

C. Lawrence's injuries alone could not support this excessive verdict.

No objective view of the facts in this case could result in the verdict against TruGreen. The gulf between the facts and the verdict is substantially beyond any reasonable measure of compensation for Lawrence's injuries and well beyond what was proven by the admissible evidence presented to the jury.

The jury awarded Lawrence \$1,383,265 in damages. CP 42. Such a figure could only come as a result of improper jury instructions. Foremost of the prejudice is the direction of the trial court to award Lawrence duplicative damages as a result of the "nature and extent" jury instruction. CP 61-62. Lawrence's recovery of double damages is not in

the interest of justice. An objective review of the record in this matter points toward a much more reasonable jury verdict. Here, however, the jury had no ability to weigh those damages because it was instructed to double-count Lawrence's damages. Likewise, the jury was improperly instructed regarding the purpose of non-admitted evidence; had the jury been properly instructed regarding the non-admitted evidence upon which Lawrence's experts relied, it could not have awarded Lawrence these damages. Finally, the jury's improper instruction regarding Lawrence's previous infirm condition is shown in the inflamed verdict.

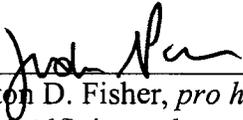
The verdict also shows the prejudice to TruGreen by the trial court's repeated tacit permission to Lawrence to present improper and inadmissible evidence. The police officer's collision report was never introduced and its contents should never have reached the ears of the jurors. Likewise, the improper references to the TruGreen driver manifested in extreme prejudice to TruGreen. TruGreen could not "unring the bell" once the words of Lawrence's counsel reached the ears of the jury. Nor could the jury disregard the inconsistent and baseless testimony of Lawrence's economics damage experts Bellerive and Moss. The trial court's failure to ensure the plaintiff's expert reports and testimony were consistent, accurate, and timely resulted in prejudice to TruGreen. Had

TruGreen been able to properly assess the untimely and inconsistent report, the verdict would not have been so extreme.

VI. CONCLUSION

The jury should have had the opportunity to appropriately weigh the evidence presented and award a balanced measure of damages to Rebecca Lawrence. Instead, the jury was beset with improper evidence during the plaintiff's case in chief and then during closing arguments as well. The trial court erred in failing to properly instruct the jury to assess the evidence provided and to consider Lawrence's infirm condition. The trial court repeatedly failed to caution Lawrence's counsel to operate within the bounds of legal decency, permitting him to move far beyond what the law and the trial court's previous warnings would allow. TruGreen was manifestly prejudiced as a result of these compounded errors, resulting in an unjust and duplicative verdict. The only appropriate outcome is a reversal of the verdict and a new trial.

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APPENDIX

- A-1 Trial Court Jury Instruction 10
- A-2 TruGreen Proposed Jury Instruction 4
- A-3 TruGreen Proposed Jury Instruction 8

INSTRUCTION NO. 910

It is the duty of the court to instruct you as to the measure of damages.

You must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the motor vehicle collision of June 29, 2007.

You should consider the reasonable value of necessary medical care, treatment, and services received to the present time.

In addition you should consider the reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future.

In addition you should consider the following noneconomic damages elements:

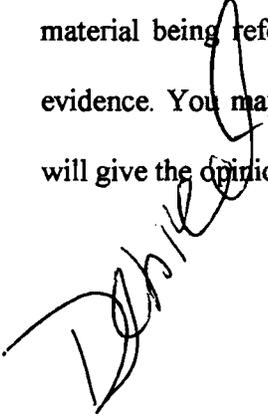
- (1) The nature and extent of the injuries; and
- (2) The disability experienced and with reasonable probability to be experienced in the future; and
- (3) The loss of enjoyment of life experienced, and with reasonable probability to be experienced in the future.
- (4) The pain and suffering experienced, and with reasonable probability to be experienced, in the future.

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.

I allowed expert witness to testify in part to records and articles and statements that may not have not been admitted in evidence. This testimony is allowed for a limited purpose. It is allowed so that the witness may tell you what he/she relied on to form his/her opinion[s]. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by this witness.

A handwritten signature in black ink, appearing to be "D. White", written over the text of the instruction.

TruGreen Instruction no. 4

IPI 2.04 Limiting Instruction—Expert Testifies to Matters Not Admitted in Evidence

If your verdict is for the plaintiff, and if you find that:

(1) before this occurrence the plaintiff had a condition that was not causing pain or disability;
and

(2) the condition made the plaintiff more susceptible to injury than a person in normal health,
then you should consider all the injuries and damages that were proximately caused by the
occurrence, even though those injuries, due to the pre-existing condition, may have been greater
than those that would have been incurred under the same circumstances by a person without that
condition.

There may be no recovery, however, for any injuries or disabilities that would have resulted from
natural progression of the pre-existing condition even without this occurrence.

H agreed *Given*

TruGreen Instruction no. 8

WPI 30.18.01 Particular Susceptibility