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APPEAL NO. 69800-1-I

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

(Whatcom County Court Case No. 11-2-02885-9)

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**JAMES WRIGHT and SUSAN WRIGHT,**

Appellants,

vs.

**KEVIN BEDLINGTON and JANE DOE BEDLINGTON,**

Respondents.

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**Appellant Wrights' Reply Brief**

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Douglas R. Shepherd  
Bethany C. Allen  
Shepherd and Abbott  
2011 Young Street, Ste 202  
Bellingham, WA 98225  
(360) 733-3773

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JAMES WRIGHT  
SUSAN WRIGHT  
KEVIN BEDLINGTON  
JANE DOE BEDLINGTON

**TABLE OF CONTENTS**

I – INTRODUCTION..... 1

II – ARGUMENT..... 3

    A. Treating Doctors’ Testimony ..... 8

    B. Retained Experts’ Testimony..... 10

    C. Lay Witnesses’ Testimony..... 13

    D. Loss of Consortium..... 16

    E. Excluded Evidence..... 18

III – CONCLUSION..... 22

## TABLE OF AUTHORITIES

### Washington Supreme Court

<i>In re Heidari</i> , 174 Wn.2d 288, 274 P.3d 366 (2012).....	7
--	---

### Washington State Court of Appeals

<i>Alpine Industries, Inc. v. Gohl</i> , 30 Wn.App. 750, 637 P.2d 998 (1981).....	8
--	---

### Courts of Other Jurisdictions

<i>Hagens v. Hilston</i> , 388 So.2d 1379 (Fla.App. 1980).....	16
<i>Jenkins v. West</i> , 463 So.2d 581 (Fla.App. 1985).....	16
<i>New York v. Risle</i> y, 214 N.Y. 75 (1915).....	1

### Court Rules

CR 59.....	7
RAP 12.2.....	7

### Other Sources

<i>Autobiography</i> , Mark Twain (1924).....	1
---	---

## **I – INTRODUCTION**

Bedlington argues that the damages awarded would be appropriate if a reasonable juror were able to conclude, on the evidence presented at trial, that James Wright (Wright) fully recovered from the car accident in three to six months. Bedlington's arguments at trial and on appeal depend solely on statistics. The jury had undisputed medical and uncontroverted lay witness testimony that Wright did not fully recover from the 2009 accident. The jury had no evidence, testimony or exhibit which could allow a reasonable juror to conclude that all of Wright's ongoing pain and limitations were caused by the brachial plexus neuritis (neuritis). Sometimes, such as in a death case, a table of life expectancy is the only practical and satisfactory evidence. When the fact to be established is not the probability of a future event, such as the likelihood of full recovery, but what had actually happened years later, reliance upon statistical evidence is error. *New York v. Riskey*, 214 N.Y. 75 (1915).

As better stated by Mark Twain: "There are three kinds of lies: lies, damned lies and statistics." *Autobiography* (1924). Bedlington argues that statistical testimony alone can be used to

prove it was more likely that Wright's permanent pain was caused by his acute episode of neuritis in 2010, and not the chronic whiplash injury suffered in May 2009. Any possible value of either statistic is independent of one another and cannot be looked at separately or collectively when a person suffered from both ailments. Bedlington argues that he successfully convinced the jury that whiplash patients had a 10% chance of not recovering from the whiplash injuries, caused by an accident, and neuritis patients have a 37% chance of not recovering from the neuritis, of unknown origin; therefore, it was four times more likely all Wright's permanent injuries, which Bedlington admitted remained, were not caused by the accident. Bedlington fails in this appeal to demonstrate how that argument is anything other than speculation.

Admittedly, Dr. Braun testified that 90% of whiplash injuries fully recover in three to six months. Admittedly, Dr. Baker testified that 63% of all neuritis patients fully recover in twelve months. Application of these statistics individually to Wright necessarily requires speculation. To conclude that the whiplash recovery statistic applies to Wright and the neuritis recovery statistic does

not apply to Wright does not come from an impartial consideration of any of the evidence.

## **II – ARGUMENT**

The auto accident, at issue in this appeal, occurred on May 27, 2009. CP 5; RP 79. Three months later, on August 19, 2009, Wright had not fully recovered from the accident and was referred by Dr. Dickson to a neurosurgeon. Dickson Dep., p. 28; CP 98. On October 14, 2009, the neurosurgeon, Dr. Goldman, examined Wright regarding the ongoing problems associated with his neck injury. Ex. 4. At that time, four months after the accident, Wright complained of continued severe neck pain with headaches and aching in his upper extremities and episodes of right hand weakness. *Id.* Wright was diagnosed by Dr. Goldman with a severe cervical strain which had not yet been resolved by medical treatment. Wright was further diagnosed with “a traumatic disk herniation at C5-6 caused by this motor vehicle accident on a more probable than not basis.” Ex. 4. Dr. Goldman concluded that the “disk herniation is associated with spinal cord compression and he does have some subtle symptoms of myelopathy.” *Id.* Seven months after the accident, on December 18, 2009, Dr. Goldman

again saw Wright and wrote that Wright's neck pain was less severe, his arm aches were still present but easing up, and the episodes of paresthesias in his arms were occasional. Instead of surgery at that time, Wright was advised to continue conservative management of his injuries from the May 2009 accident and a decision regarding surgery was to be re-evaluated at a later date. Ex. 5.

In late March of 2010, Wright was hospitalized and diagnosed with acute episode of neuritis. Ex. 18. His treating physician, Dr. Baker, advised Wright that the pain from the neuritis would be expected to dissipate and that he should expect to fully recover from the neuritis within one year. However, Dr. Baker advised Wright that his ongoing pain from the May 2009, automobile accident would likely continue. Ex. 18.

Bedlington, in his brief correctly argues: "Mr. Bedlington has never denied that Mr. Wright has ongoing neurological issues." Resp. Brief, p. 2. In his next sentence, Bedlington misshapes the argument by suggesting that Wright's appeal should be denied because "not one witness has ever linked Mr. Wright's brachial plexus neuritis to the automobile accident." *Id.* However, Wright's

appeal is based upon the fact that the witnesses and exhibits do not link Wright's 2012 ongoing "pain" [the term used repeatedly by Wright's witnesses] or "problems" [the term repeatedly used by Bedlington] to the acute bout of neuritis. Bedlington then makes his statistical argument to this Court: "Bedlington offered evidence to show that . . . brachial plexus neuritis is a serious neurological ailment that results in long-term neurological symptoms . . . in close to 40% of patients." Resp. Brief, p. 2.

Wright, in opening, framed the issue of damages and causation as follows:

You will find out that three years later this accident has limited the activities of Jim Wright, the things he liked to do. It has caused significant pain on an ongoing basis in his neck and shoulders. . . . And he has trouble with concentration and focus when he has pain which impacts work and his wife and his children.

RP 39.

Bedlington, in his opening statement framed the dispute at trial and the issue in this appeal as not damages but causation when they argued:

But I'm not here to say anybody's malingering. I acknowledge there was a whiplash injury to the neck, a neck strain from this accident. And I'm not here to say anything negative about the plaintiffs in this case. I

agree he has an ongoing problem. But the problem is not from the car accident.

RP 50-1.

Now, when he calls his mother-in-law, his friends, his co-workers as witnesses, they will say he is having problems. He can't do things, can't throw ball, can't do certain things. I believe it. I agree. Because he has this problem. And I will have very few, if any, questions for those folks. I'm not saying he is a malingerer. He has brachial plexus neuritis and it has caused a real problem.

RP 55.

This factual position and argument continued into closing argument where Bedlington incorrectly and without evidentiary support blamed all of Wright's ongoing pain on the neuritis.

All those lay witnesses, you heard plaintiff's friend, his two employees, his mother-in-law, I never asked them a question because I agree there's problems, and the reason there's problem is the brachial plexus neuritis.

RP 370.

At the hearing on Wright's Motions for an additur or a new trial, the trial court said: "I will put this in an order for you, Mr. Shepherd. If I had the authority under the law to grant an additur or a new trial I would do it." RP 412. The trial court's Order reads as follows: "IT IS HEREBY ORDERED that Plaintiffs' Motion for an Additur or a New Trial is denied. If the court had the power under

the law . . . to grant an additur it would do so.” CP 286. While the trial court’s comments or Orde may not be of value to either Wright or Bedlington, the trial court had both the power and duty under CR 59 to grant Wright’s motions if Wright did not fully recover from the automobile collision in three to six months.

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties . . . Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: . . . .

(5) Damages so . . . inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice. . . .

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; . . . .

CR 59.

This Court has the power to correct an erroneous decision by the jury.

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.

RAP 12.2. *In re Heidari*, 174 Wn.2d 288, 297, 274 P.3d 366 (2012). This Court will not disturb a jury award supported by substantial evidence but where the decision slightly exceeds the

maximum or is lower than the minimum "amount supported by the evidence presented, it is appropriate for the appellate court to exercise its power under RAP 12.2 to modify the decision under review in the interest of justice." *Alpine Industries, Inc. v. Gohl*, 30 Wn.App. 750, 758, 637 P.2d 998 (Div I, 1981).

A new trial is required when the verdict of the jury is so low as to demonstrate it was not based upon the evidence. The jury awarded Mrs. Wright zero damages for loss of consortium.

#### **A. Treating Doctors' Testimony**

At trial, Bedlington offered the Deposition Testimony of Dr. Dickson in an apparent attempt to blame Wright's ongoing pain, limitations and problems on the acute 2010 neuritis episode. Dr. Dickson's testimony on causation of Wright's 2012 pain or problems was as follows:

**Q.** Let's talk about whether Dr. Goldman has authored a letter that believes that the reason he presented to Dr. Goldman was related to the accident. You would leave that to Dr. Goldman; correct?

**A.** Right. I have actually had no contact with Mr. Wright since he was referred to Dr. Goldman.

**Q.** So although you expected full recovery you don't know whether he's fully recovered, do you?

**A.** I have no idea what happened to Mr. Wright's neck after August 19 of 2009.

Dep. of Dickson, pp. 29-30; CP 99-100.

Dr. Baker, in a defense exhibit, provided the following information regarding Wright's expected recovery from neuritis and the automobile accident:

[April 6, 2010] Patient returns to my office today for a follow up evaluation. . . . The pain usually dissipates and I would anticipate that he will be back to sort of where he was before his episode. **He will have pain as a result of his motor vehicle accident.**

Exhibit 18. (Emphasis added.)

At trial, Bedlington offered the deposition testimony of Dr. Baker. Dr. Baker testified as follows regarding whether or not Wright was expected to fully recover from the neuritis and automobile accident.

**Q.** So apparently you and he were having a conversation as to whether he could expect this acute –

**A.** Right.

**Q.** -- problem to --

**A.** Exactly.

**Q.** -- go away, and that's what you expected, correct?

**A.** Mm-hmm.

**Q.** And then he asked you, you know, whether the problem with his neck at that time would likely go away and you said he will have pain as a result of his motor vehicle accident?

**A.** Right.

**Q.** Now, you did not treat him for the automobile accident before April 26, 2010?

**A.** That's correct.

Dep. of Baker, pp. 20-21; CP 140-41.

**Q.** None of your testimony here today is meant to criticize or take issue with anything that we see in this letter of October 14th of 2009, correct?

**A.** That's correct.

**Q.** And you're not prepared to take issue with any of Mr. Wright's treating or other examining physicians as regards to conditions caused by the auto accident, correct?

**A.** That's correct.

*Id.* at p. 22; CP 142.

### **B. Retained Experts' Testimony**

Bedlington argues that the jury could completely disregard the testimony of Dr. Braun. If juries require medical testimony on causation in order to avoid speculation, how can a juror disregard the only medical testimony on causation? Dr. Braun's testimony was not contradicted. As stated in Wright's opening brief, Dr. Braun concluded that Wright had a substantial permanent cervical impairment caused by the automobile accident. RP 224. Wright, at the time of trial was not expected to improve. RP 227. Dr. Braun's opinions on causation were on a more probable than not basis and with a reasonable degree of medical certainty. RP 232.

Bedlington offered the testimony of retained expert Dr. Shibata on whether or not the automobile accident was the cause of Wright's ongoing pain. Dr. Shibata did not testify regarding the cause of the 2010 neuritis or as to the cause of Wright's ongoing pain. To the contrary, he admitted that Wright's pain could be caused by a combination of preexisting conditions in Wright's neck and a "muscle strain." However, he avoided the causation question by entering into speculation as to the source of any "muscle strain."

RP 316.

**Q.** How much do we have to move that protruding disc before it starts to cause a problem?

**A.** I would say it's uncertain.

**Q.** It's uncertain. So the way we determine whether the movement is now causing problems would at least start by having a history from the patient, right?

**A.** Yes.

**Q.** Then you would watch if there's symptoms that start to move past the neck down into, say, the left hand or the left side?

**A.** Yes.

**Q.** When were you first contacted in this case?

**A.** . . . in August of 2012.

RP 315.

**Q.** If you're not able to tell the jury as they sit here how much pain Mr. Wright is in, can you tell them what's causing his pain? Can you tell the jury?

**A.** Well, from looking at the MRI scan, I think there are

two of them, as well as the x-rays, and reviewing particularly the early medical history following the accident, I would say it likely would be a combination of degenerative disease and possibly muscular strain after the accident.

**Q.** A muscular strain after the accident?

**A.** Yes.

RP 316.

**Q.** Well, maybe I'll probably learn something here. If you have whiplash have you damaged the ligaments in your neck?

**A.** I would say physiologically that would probably be true.

**Q.** Do you think there's any doubt in this case that there were ligaments of Mr. Wright's that were damaged in this accident? . . . .

**A.** My understanding he may have and some kind of muscular strain injury. Whether it was actually torn ligaments I think that's hard to say.

**Q.** Are muscle injuries typical of the aging process?

**A.** I would say - -

**Q.** Or typical of whiplash?

**A.** More typical of some kind of stress or trauma than I think normal aging.

**Q.** Are torn ligaments caused by the aging process or more particularly by a whiplash injury?

**A.** I would say again more than likely relating to some kind of stress or trauma, although I would also say as you get older you may be more prone to such injuries.

RP 319-20.

Bedlington, in his brief, after successfully getting the jury to ignore the evidence, attempts to similarly mislead this Court by arguing that the jury could reasonably find that Wright's ongoing

pain was caused by neuritis, when Bedlington's only evidence on causation of Wright's ongoing pain and problems is a "possible" unidentified muscle strain "after the accident."

### **C. Lay Witnesses' Testimony**

At the trial in October 2012, all lay witnesses testified as to their observations of Wright's ongoing pain, limitations, and changes, which they observed on a weekly basis. The uncontested lay testimony focused on observed limitations, problems and pain immediately after the accident which continued until the time of trial.

Wright testified that he does not ski as frequently and skis more carefully because skiing aggravates his neck, causes heightened pain in the neck for a number of days, makes it harder to sleep and the pain is disruptive to his daily tasks. RP 66. He further testified that no doctor had advised him that he did not fully recover from the neuritis. RP 67. His current neck pain and limitations are the "same kind of neck problems . . . ever since the accident." RP 67. Wright takes Advil or other pain medication regularly to control the pain in his neck. RP 72.

Virginia Sullivan testified that prior to the 2009 accident her son-in-law was really busy and very active. He used to ride bikes all the time. He would take his boys with him, or pull them, and they would go hiking. RP 92. She witnessed tremendous changes after the 2009 accident. RP 93. Wright cannot lift his children, mow his lawn, or cut fire wood. RP 93-4. She completed her testimony as follows: "I worry about his quality of life. The quality of life my daughter will have. I worry about my little grandsons. I worry about his livelihood supporting his family with these injuries. I worry about his pain threshold." RP 94.

Chris Haugen, Sumas Chief of Police, is a 20 year friend and colleague of Wright. He dined, hiked, skied, golfed and vacationed with the Wright family. RP 145-46. Prior to the 2009 automobile accident, he observed no physical limitations or problems with Wright. RP 146. In the year before trial, Haugen witnessed what he believed to be limitations in Wright's range of motion. RP 147-48. Haugen provided the jury with a recent examples of how, when they were together in Haugen's patrol vehicle and looking at scenes together Haugen was required to maneuver his car so that Wright, as the passenger, did not need to turn his neck. Haugen

now carries Wright's forms, paperwork and court files because Haugen has observed that is difficult for Wright to carry the items himself. *Id.*

Joy Crabtree described Wright in 2009 as a hard worker; the hardest worker of the three attorneys she worked for. RP 152. She believed he was in good physical condition prior to the accident. RP 153. Prior to the 2009 accident, she had observed no limitation in activities or signs of neck pain. RP 154. She testified that Wright is now often sitting at work rubbing his head or neck. She never witnessed that before the accident. *Id.* She told the jury that the staff now has to carry files, boxes and supplies for him. RP 156. Jayne Cassavant testified similarly. RP 157-160.

Susan Wright testified that the week before the 2009 accident they celebrated their wedding anniversary at Sun Mountain by running daily as much as five miles, taking long hikes and enjoying bike rides. RP 164-65. Now most of that is in the distant past because of pain. *Id.* At home, her husband often holds his neck and cannot sit for very long. RP 166. Because of pain, they have reduced the amount of time that they socialize with other couples. RP 169.

#### **D. Loss of Consortium**

The jury's decision to award zero damages for Susan Wright's loss of consortium claim was against the substantial weight of the evidence. At trial, the jury was instructed they "must determine the amount of money that will reasonably and fairly compensate Susan Wright for such damages as you find were proximately caused by the negligence of the defendant." CP 118. Loss to Susan Wright of the consortium of her husband includes any loss "of emotional support, love, affection, care, services, companionship, . . . as well as assistance from one spouse to the other." *Id.* Although Washington courts have not directly addressed this issue, other courts have. Where negligence is conceded and there is substantial, undisputed evidence of loss of consortium, the spouse is entitled to at least nominal damages, and that "a zero verdict cannot stand." *Jenkins v. West*, 463 So.2d 581 (Fla.App. 1985). "Where substantial, undisputed evidence of loss of consortium exists, a zero verdict is inconsistent with an award for the injured spouse." *Hagens v. Hilston*, 388 So.2d 1379 (Fla.App. 1980)

Susan Wright offered the following substantial, undisputed evidence of loss of consortium:

**Q:** Has his accident changed the lifestyle or quality of life?

**A:** Yes.

**Q:** In what way?

**A:** He is not my husband. We don't do the things that we used to do.

**Q:** Have you had to adapt your life?

**A:** Yeah.

**Q:** In what way?

**A:** I think I just take on more stuff. I don't -- now I can't count on him to do some things so I just do it and I don't ask him to do it. I just take on more than I used to.

**Q:** I guess based on your comments, you still love him; is that correct?

**A:** Oh, yeah, definitely. It's just we don't do as many things as we used to do.

RP 167.

**Q:** Last question I have, have you seen changes in Jim Wright's ability to perform functions around the house that he used to perform before this accident?

**A:** Yes.

**Q:** What are the changes?

**A:** He doesn't do, or very rarely does he mow the grass. Our son has taken over that. And a lot of times my brother-in-law has come up and mowed the grass. Kind of doing various activities around the house. A lot of times, or not activities, a lot of maintenance on the house on the upkeep outside of the house or inside the house. Lot of times he will have his dad come up and do it. Or help him do it, I should say.

RP 170.

## **E. Excluded Evidence.**

Bedlington argues that Wright cannot point to one shred of evidence that was improperly excluded. Resp. Brief, p. 4. Dr. Baker testified at trial on the causation of the neuritis as follows:

**Q:** And based upon the information you had at that time, what was your diagnosis as to why he was in the hospital?

**A:** It was felt that he had acute idiopathic brachial plexitis.

**Q:** Now, that's a mouthful. Acute meaning?

**A:** That it happened recently.

**Q:** Idiopathic meaning?

**A:** We don't know what the cause is.

CP 127-28.

Dr. Baker did not testify that the 2009 automobile collision, on a more probable than not basis, was not the cause of the 2010 neuritis. However, Wright anticipated that Bedlington intended to continue arguing that the automobile accident was not the cause and therefore offered the following testimony of Dr. Braun attempting to properly address Bedlington's opening statement, expected closing argument on causation, and to provide the proper causation evidence for the jury to consider.

There was substantial time spent on what Dr. Braun could and could not say about the neuritis, why he could or could not

testify as offered, and what could appropriately be argued to avoid jury speculation.

**THE COURT:** But the law requires the court, Mr. Shepherd, not to submit evidence which permits the jury to speculate. I can't permit that under the law.

**MR. WESTERN:** What if Braun said I cannot say the brachial plexus neuritis and treatment for it was due to the car accident versus it's possible it's from the car accident? The problem is this possible, leaving open to speculation.

RP 208. The offered testimony of Dr. Braun was as follows:

**Q.** In the report of August 24, 2010, you said in the next paragraph the etiology of condition number two, the possible brachial plexus neuritis, is uncertain, correct?

**A.** Correct.

**Q.** As you sit here today after the second exam on September 11, 2012, you don't have an opinion as to what caused the brachial plexus neuritis?

**A.** That is correct.

**Q.** What does the term idiopathic mean?

**A.** I don't know. That's what it means. Undetermined etiology.

RP 233. The offer of proof continued:

**MR. SHEPHERD:** The way I understand logic, to not say the car accident was the cause and he had another cause is contrary to science, logic and common sense.

**THE COURT:** When we are dealing in personal injury case disputes, the threshold is whether or not a condition or circumstance is, with a reasonable degree

of medical probability, the result of X. Probability is pretty much 51 percent.

Now, maybe, Dr. Braun, you can answer this for me. You're not able to say on a more probable than not basis that this brachial plexus neuritis is caused by the accident on a more probable than not basis or with a reasonable degree of medical probability?

**THE WITNESS:** What I can say is on a more probable than not basis I don't know. The cause of the brachial plexus problem is not known. **That would include the accident.** It would include other etiologies, meaning it's idiopathic, nobody knows the cause, and using the same logic on a more probable than not basis, it's not due to the accident. (Emphasis added.)

**MR. SHEPHERD:** If I were to ask you can you say on a more probable than not basis that the accident didn't cause it?

**THE WITNESS:** I can't tell you that either.

**MR. SHEPHERD:** Do you think it's appropriate to say that based on the records that you have reviewed?

**THE WITNESS:** Based on the medical records it's idiopathic. We don't know the cause. Anything is possible.

**MR. WESTERN:** That's not nearly good enough. It doesn't meet the standard.

**MR. SHEPHERD:** It's intended to rebut Dr. Baker's testimony that the automobile accident wasn't the cause.

**THE COURT:** We don't have sufficient evidence to submit to the jury that it was the cause. So if we don't have sufficient evidence to submit to the jury that the accident was the cause, then what is the relevance of whether a doctor says it wasn't the cause or we don't know what the cause is? In either event the issue can't get to the jury. And for you to rebut a doctor's opinion that the accident did not cause that, it's rebuttal, that's not relevant because the issue can't get to the jury with

the evidence as I understand it is and as it will be presented.

RP 252-253.

Wright is at a loss to understand how Washington law prohibits the above offered testimony of Dr. Braun; yet allows Bedlington to argue, incorrectly, the evidence was that the automobile collision was not the cause of the 2010 neuritis, and that the neuritis was the cause of Wright's ongoing pain and limitations. This ongoing error was again raised by Wright before closing argument.

**MR. SHEPHERD . . .** I don't know that they get to continued problems related to the brachial plexus neuritis. There's not one witness. It was suggested in opening statement, Opposing counsel, I thought, was generous in suggesting he wouldn't be arguing that we are manufacturing the pain or making up the disabilities or talk about the ongoing problems. He would admit my client has substantial ongoing problems and he indicated in opening statements witnesses would testify it was the brachial plexus. That has not occurred. I don't think he should be allowed to have the jury speculate the ongoing problems presently and into the future are related to the brachial plexus. The witness they offered, Dr. Baker, indicated in his video deposition that he would expect recovery within a couple months and put it at the 67 percent figure. No one has testified that he did not recover except for Dr. Braun which is putting that may be 20 percent of the problem.

**THE COURT:** I'm not comfortable commenting on the evidence. I'll let counsel make their arguments and I will rule on any issues that come up during argument.

RP 351-352. It cannot go without comment, that the jury was asked to decide and award of damages in favor of an injured plaintiff trial lawyer and against an unemployed father.

### **III - CONCLUSION**

Wrights did not receive a fair trial and the matter should be returned for a new trial. Bedlington's argument that Wright's injury was a "mild" whiplash injury to the neck that healed in three to six months was not supported by substantial evidence. RP 369. No reasonable juror could conclude that Mrs. Wright suffered no damages. No reasonable juror, after considering fairly and fully all of the evidence, could conclude that Mr. Wright recovered completely from the May 2009 automobile collision within three to six months.

Bedlington falsely presented a statistical argument to the jury, which once accepted by the jury allowed the jury to render a verdict ignoring the evidence. Now, Bedlington wants this Court to accept the unsupported arguments and erroneously conclude that Wrights received a fair trial.

Respectfully submitted this 13th day of August 2013.

SHEPHERD AND ABBOTT

By 

Douglas R. Shepherd, WSBA # 9514

Bethany C. Allen, WSBA # 41180

Of Attorneys for Appellants Wright