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COURT OF APPEALS
CLATSOP COUNTY

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No. 34127-1

STATE OF WASHINGTON

BY ~~COURT OF APPEALS~~, DIVISION II
CLATSOP COUNTY

OF THE STATE OF WASHINGTON

ASHLEE J. JOHNSON,)	
)	Cowlitz County Circuit
Respondent,)	Court Case No.
)	04 2 02275 5
v.)	
)	
THOMAS JOHNSON)	
)	
Appellant.)	

APPELLANT'S REPLY BRIEF

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PM 8-24-06

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REPLY ARGUMENT CONCERNING FUTURE

ECONOMIC LOSS

Plaintiff's brief fails to address the primary basis for reversal argued by defendant. The primary question before the court is whether damages for medical expense can be awarded in the absence of expert testimony that medical treatment is necessary and reasonable. Plaintiff avoids this issue and addresses only the general rules for proof of future economic loss in other contexts. Most of the case law cited by plaintiff deals with claims of future lost profits, lost wages or other forms of commercial loss which typically do not require expert testimony.

Plaintiff begins her argument (at page 8) with speculation about how the jury may have arrived at the future medical expense figure of over \$50,000. She then cites cases dealing with remittitur, an issue not raised by defendant. Defendant in this case is not seeking remittitur. The jury should not have been permitted to award any damage for future medical care because there was no evidence to support it. Defendant does not seek to reduce the award, but to eliminate it.

Plaintiff's argument then discusses general requirements for proof of damages, relying on cases where commercial loss was evaluated for

sufficient evidence (for example, plaintiff cites *Lewis River Golf v. O.M. Scott & Sons*, 120 Wn 2d 712, 845 P2d 987 (1993), a case for breach of warranty where the court held an economist's opinion was sufficient to support damages for lost profits from defective grass seed). Plaintiff provides string cites of cases which are simply not applicable. She relies on U.S. Supreme Court decisions involving anti-trust claims. The rule repeated in those cases is that mathematical precision is not required to establish the amount of future economic loss, as long as there is evidence to show that future loss will be incurred. They distinguish between the "fact of damages" from "the extent of damages" . See Pl. Brief, p. 11. However, in this case, there is no evidence of the fact of future damages. The medical providers did not testify that future medical care was necessary, or even likely to occur. Therefore, the "fact" of future damages, which is assumed in most of plaintiff's cases, was not established in this case.

The few cases cited by plaintiff which did concern bodily injury claims are still inapplicable. In *Bitzan v. Parisi*, 88 Wn 2d 116, 558 P2d 775 (1977), the court considered evidence supporting damages for pain and suffering and future income loss. It did not consider damages for

medical expense. In *Wagner v. Flight Craft Inc.*, 31 Wn App 558, 643 P2d 906 (1982), the court considered evidence of future income loss. In *Lundgren v. Whitney's Inc.*, 94 Wn 2d 91, 614 P2d 1272 (1980), the court considered evidence of past income loss. These cases are simply not on point and do not support plaintiff's claim that evidence in this case supported a claim for future medical care. Proof of the damage at issue in those cases did not require expert testimony. Proof of medical causation and reasonable treatment for medical conditions does require expert testimony. *Torgeson v. Hanford*, 79 Wn. 56, 139 P 648 (1914); *Ma'ele v. Arrington*, 111 Wn App 557, 564, 45 P3d 557, 561 (2002), and *Stevens v. Gordon*, 118 Wn App 43, 55, 74 P3d 653 (2003).

Plaintiff has not cited any cases to demonstrate that medical expenses may be awarded without expert testimony to establish causation or reasonableness and necessity of treatment. At a minimum there must be expert testimony suggesting that medical care is reasonably necessary. There is no such evidence in this case and the future medical expense should be deleted from the award. Plaintiff acknowledges the future economic award for medical expenses exceeded \$50,000. Pl. Brief, p. 9.

REPLY ARGUMENT CONCERNING EVIDENCE OF
INSURANCE AND INADEQUATE RECORD

With respect to defendant's arguments concerning plaintiff's injection of insurance and the trial court's failure to make an adequate record, defendant relies on the points raised in his opening brief.

CONCLUSION

For the reasons stated in defendant's opening brief on appeal and further reiterated in this reply, this court should remand this case to the trial court with directions to delete that portion of the jury verdict which awarded future medical expenses in the amount of \$50,865.

DATED this 24th day of August, 2006.

LEHNER & RODRIGUES PC

By Michael A. Lehner
Michael A. Lehner, WSB #14189
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the original and 1 copy of **APPELLANT'S REPLY BRIEF** was filed with the State Court Administrator on August 24, 2006, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with first-class postage thereon fully prepaid and addressed as follows:

Court Clerk
Washington Court of Appeals
Division II
950 Broadway, Ste. 300 MS TB-06
Tacoma, WA 98402-4454

I hereby certify that I served a true copy of the foregoing **APPELLANT'S REPLY BRIEF** on:

Duane C. Crandall
Crandall, O'Neill & McReary, P.S.
1447 Third Avenue, Suite A
PO Box 336
Longview, WA 98632
Attorney for Respondent

- by causing a full, true and correct copy thereof to be **MAILED** in a sealed, postage-paid enveloped, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;
- By causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;
- By causing a full, true and correct copy thereof to be **FAXED** to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

DATED this 24th day of August, 2006.

LEHNER & RODRIGUES PC

By 
Michael A. Lehner, WSB #14189
Of Attorneys for Appellant

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