

No. 36051-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

*SW*

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ELIZABETH G. LUTES, Respondent

v.

ROTSCHY INC., Appellant

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**BRIEF OF RESPONDENT**

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## **AUTHORITIES PRINCIPALLY RELIED UPON**

### **JURY INSTRUCTION NO. 11:**

If you find that:

(1) before this occurrence the plaintiff had mental 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 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.

### **WASHINGTON RULE OF EVIDENCE 411**

#### **LIABILITY INSURANCE**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

## STATEMENT OF THE CASE

### I. STATEMENT OF THE FACTS<sup>1</sup>

On August 6, 2002, respondent Elizabeth (Lisa) Lutes was driving her 1991 Chevrolet Lumina northbound on SR 503. She was going 40-50 miles per hour. As she approached the intersection of SR 503 with Olmsdorf Road, a Rotschy, Inc. employee drove a Rotschy dump truck and trailer out from a stop sign onto SR 503, directly into Lutes' path. RP 611:2-612:10. Lutes was unable to avoid the crash. Her car was totaled. At trial, Rotschy admitted that its driver's negligence was the sole cause of the crash. RP 953:5.

Lutes was taken to the emergency room, where she was treated and released. She suffered a severe chest and abdomen contusion from the seatbelt and hurt her wrist slightly. RP 612:16-24. She believes she banged her head, but is not sure how. 613:4-8. As a result of the seatbelt injury, she had a large bruise, and has lost most of the feeling in her right breast. RP 612:17-21, 613:24-614:1. This numbness

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<sup>1</sup> "A jury's verdict should not be disturbed if there is substantial evidence to support it." *Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 384, 722 P.2d 854, 858 (1986). Evidence must be viewed in the light most favorable to the prevailing party. *Id.*, at 384-85. Because Rotschy presents the facts in the light most favorable to its position, not Ms. Lutes, a counter statement of facts is required.

continued through the time of trial. RP 612:17-21. After the accident, she was afraid to drive for a while. RP 460:6-1. Lutes immediately began experiencing a headache – what she described as a constant, low level headache from the time of the accident. RP 614:4-19. The headache worsens if she is under stress or her blood pressure rises. *Id.* In addition, the migraines from which she suffered before the accident grew more frequent. RP 671:8-672:6. She was diagnosed with post-concussive syndrome. RP 305:10-25, RP 417:20-418:17; Ex. 10.

Ms. Lutes, her family and friends, and her employers recognized changes in her behavior, personality, and functioning as a result of the accident. Prior to the accident, she was a good multi-tasker, very well organized, decisive, and able to handle complex tasks competently. RP 615:9-19, 618:5-7, 221:16-222:21. People enjoyed being with her. RP 455:1-2. After the accident, she no longer felt capable of handling multiple tasks at the same time; she got confused, and felt overwhelmed. RP 615:20-22, 617:17-23. She needed to develop a system of keeping track of what she needed to do with sticky notes. RP 621:11-623:8. She felt generally grumpy and irritable, even with her own family and beloved granddaughter. RP 616:22-617:7. She

tended to get nervous and anxious. RP 617:17-23. She was depressed. RP 618:24-619:14.

Ms. Lutes also recognized that the changes she observed in herself had affected her relationship with others: “I’m a lot more difficult I guess to get along with.” RP 645:13-14. She felt she had no tolerance for others and experienced difficulty recognizing that other people might disagree with her. RP 645:13-646:3.

Ms. Lutes’ husband and daughter confirmed her observations and even suspected that she was worse than she believed. Ken Lutes described her as having lost her “filter” – becoming socially inept, even rude. RP 228:2-22. Her housekeeping and organizational skills seemed to decline. RP 229:2-19. She lost emotional control. RP 230:4-230:24. She had less energy, and participated in fewer activities. RP 229:16-230:3. Her memory has declined, but she is unable to recognize that she may mis-remember something or be wrong. RP 231:19-232:8. According to Mr. Lutes, as a result of the changes he witnessed, Ms. Lutes seemed to be losing the respect of her daughters. RP 232:20-233:7.

The changes in Ms. Lutes also affected the relationship between her and her husband. Mr. Lutes described their relationship prior to the

accident as “like a right and left shoe. We walked together.” RP 238:6-7. Afterward, however, she no longer participated in decision making, and they had been close to divorce at times. RP 234:17-235:16, 237:4-238:8.

Laura Lutes, Ms. Lutes’ daughter, confirmed that prior to the accident, Ms. Lutes had been very organized and accomplished. RP 546-549. Laura described her mother as someone who was emotionally involved and cared for other people. RP 549:12-19. After the accident, Ms. Lutes became more irritable. RP 552. She lost her ability to carry on conversations while working. *Id.* She is easily distracted. RP 553:11-554:3. She is also more fearful about being on her horse, and rides less. RP 558. Laura felt that her mother “doesn’t notice that she is different,” at least not consciously. RP 559:15-16. Laura also believed that her mother had lost the ability to nurture. RP 560:14-17.

Changes in Ms. Lutes’ behavior were also observed by her friend, Laura Suchy. Ms. Suchy testified that prior to the accident, Ms. Lutes had good interpersonal skills and a jovial, easy going personality, and that people enjoyed being with her. RP 455:1-2, 456:1-7. From mutual involvement in a square dancing club and 4-H,

Ms. Suchy also knew that Ms. Lutes was someone she could count on, very organized, with a good work ethic and lots of energy. RP 454:18-455:6. After the accident, however, it is necessary to tread carefully around her, and some friends had distanced themselves. RP 456:11-457:8. She is also less organized, and unable to do two things at once. RP 458:21-459:2, 460:23-461:4. She is no longer someone to count on. RP 464:2-5.

The changes in Ms. Lutes were very apparent at her work. Prior to the accident, she had worked for ten years at Westwood Shoes. Her boss during much of that period, Dominic Chan, described her as an “excellent employee, very detail oriented” and “very methodical.” RP 475:20-24. Although he had moved to Hong Kong before Ms. Lutes’ accident, she had left a good impression on him, and when he started his own business, he hired her for administrative support similar to what she had provided before. RP 481:23-483:5, 475-477. Ms. Lutes did not, however, perform as he expected: she did not complete work, including simple things she had done well before. RP 483:7-15, 484:2-5. While she had been very professional before, she was now emotional. RP 484:10-24. Although Mr. Chan believed

that she was trying very hard, he ultimately had to let her go. RP 485:3-13; 486:23-24.

Rex Kellso, a co-worker at Westwood who eventually became her supervisor and made the decision to fire her, testified that he had been very impressed with her work prior to the accident. RP 534:12-535:19. She was always very professional, with good people skills and an outstanding work ethic, and very organized. *Id.* After the accident he noticed changes: she could not stay focused, could not remember things, she had to be shown how to do things over and over again, and she made “off the wall” statements, and was not professional. RP 535:20-536:12. She did not always recognize the extent of her difficulties. RP 537:19-25. A few months after he became her direct supervisor, he made the difficult decision to fire her. RP 538:7-13.

Keith Andrade, another former employer who knew Ms. Lutes only after the accident, also testified that although she made great effort and had a good work ethic, RP 581:24-582:5, she did not work out because she lacked organizational skills, did not fit in, and presented interpersonal challenges. RP 582:9-24.

The changes that Ms. Lutes and others saw in her were explained at trial by neuropsychologist, Dr. Richard Perrillo.

Dr. Perrillo tested and examined Lutes and concluded that she suffered from significant neuro-cognitive deficits, consistent with mild traumatic brain injury. RP 393:2-7, 396:13-399:5.

A mild traumatic brain injury is a brain injury resulting from a trauma in which the person has a momentary, but not significant loss of consciousness and achieves a normal result on a neurological exam. RP 274:9-22, 276:2-277:2. In this case, Ms. Lutes was unsure if she hit her head, was unsure of exactly what happened, and felt extremely tired immediately after the accident. RP 278:16-279:5. This qualified as “an alteration of consciousness.” *Id.* Impact to the head is not necessary for a brain injury to occur, as the brain can smash against the inside of the skull from acceleration or deceleration, resulting in axonal shearing. RP 272-274. Dr. Perrillo explained that while most patients with a mild traumatic brain injury recover within three months to two years, approximately 10% to 15% have more persistent problems. RP 286:8-287:12. Age is a big factor in a person’s ability to recover. RP 287:3-12.

Dr. Perrillo interviewed and tested Ms. Lutes for almost ten hours over a two day period. RP 308:9-11. This testing showed that Ms. Lutes had cognitive impairment resulting from a brain injury,

including lateralized brain dysfunction, loss of verbal fluency and processing speed, frontal sustained attention loss, reactive depression, anxiety disorder, and post traumatic stress disorder. RP 393:2-6, 358:14-23. Dr. Perrillo explained that his tests showed lower than expected functioning in several discrete areas of the brain, including the prefrontal and frontal lobe, the temporal lobe, and the occipital lobe. RP 315-318, 320, 323-324; Exs. 15, 17, 25.

These injuries occurred to portions of the brain responsible for higher cognitive functions, such as concentration, focus, problem-solving, memory, language, judgment, and impulse control, verbal learning, visual memory and recognition, and brain processing speed. RP 315-318, 320, 323-324, 327-328; Exs. 15, 17, 25, 19. She also showed lateralized brain dysfunction, which means that the two hemispheres of her brain functioned at different levels, to an abnormal degree, and were not in sync with each other. RP 310, 312-314.

Based on these results, Dr. Perrillo concluded that Ms. Lutes definitely had a dysfunctional brain, or brain damage. RP 330:6-9, 349:3-6. Her results were consistent with injury from acceleration/ deceleration forces. RP 349:11-14. The real world consequences of the injuries Dr. Perrillo identified include an inability to keep pace,

failure to synthesize information correctly, lack of creativity, anxiety, avoidance of new experiences, and a loss of a social filter. RP 350-351. He also explained that a person with Ms. Lutes' injuries would lose her ability to persist, and would get frustrated. RP 352:2-16. She would also be at a higher risk for early dementia. RP 352:17-23. The damage to her frontal lobe in particular would decrease her ability to control her emotions. RP 353:7-9. People with this type of brain damage are difficult to get along with, because they are easily set off, do not inhibit themselves, and may become irritable. RP 354:17-23.

## **II. PROCEDURAL STATEMENT**

Ms. Lutes sued Rotschy and the driver of the truck, Donald Koistinen, in 2005. CP 3-6. Prior to trial, the parties stipulated to dismiss Mr. Koistinen from the case. CP 18-20.

In pretrial motions in limine, Rotschy asked the court to limit the lay witnesses Ms. Lutes could call, and to specifically exclude all fact witnesses who had employed or supervised Ms. Lutes. CP 22, 26, 52-61. These motions were argued on the first day of trial. RP 6-24. Lutes explained that because Rotschy's defense was that Ms. Lutes was exaggerating or faking her injuries, it was necessary to present a fair picture of Ms. Lutes both before and after the accident. RP 7-8. This

required multiple witnesses, who knew Ms. Lutes in different contexts, and could testify not just to her injuries, but to her apparent effort. RP 6-10. Counsel acknowledged that Ms. Lutes was not seeking lost wages, and agreed that the Court could so instruct the jury,<sup>2</sup> but pointed out that the employers were in a good position to address her functioning before and after the accident. RP 9:9-21.

Rotschy's primary argument against these witnesses was that it would be "overkill" – that the testimony was duplicative, and the employer testimony was unnecessary given the lack of a lost wages claim. RP 14, 15-16. Rotschy also expressed concern that the jury might add income loss to their award unconsciously. RP 16-17.

The trial court held that, in light of the differing opinions of the experts regarding whether Ms. Lutes suffered a neurological injury, "any evidence the plaintiff can present that corroborates or supports plaintiff's expert or rebuts defendant's expert is relevant." RP 24:9-12. The court recognized that drawing the line for possibly cumulative testimony was discretionary, and limited Ms. Lutes to calling one of her two daughters. RP 24:17-25.

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<sup>2</sup> Rotschy never proposed such an instruction.

At trial, Ms. Lutes presented evidence of the difficulties the accident caused her, as summarized in the factual statement above, including her own testimony, that of her husband, daughter, and friend, the testimony of three former employers, and Dr. Perrillo's testimony regarding her brain injury.<sup>3</sup> *See pp. 1-9, supra.*

In response, Rotschy relied primarily on the testimony of neuropsychologist, Dr. Fred Wise. Dr. Wise took the position that while Ms. Lutes suffered some injuries in the car accident, including a possible mild traumatic brain injury, she should have recovered from the brain injury,<sup>4</sup> and that she was intentionally or unintentionally exaggerating her continuing symptoms. RP 721, 770:14-19, 863:18-25, 853:1-23, 839:3-9.

Dr. Wise acknowledged that Ms. Lutes had some cognitive impairment. RP 793:6-9. He attributed it, however, to other factors in her life, including a pre-existing personality type which he described as

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<sup>3</sup> Although Rotschy now complains that several witnesses referred to Ms. Lutes' employment difficulties subsequent to the accident, it did not object to this testimony when it was offered. RP 232, 643, 460, 350, 393.

<sup>4</sup> Dr. Wise believes that the likelihood of any person having any long-term cognitive consequences from a mild traumatic brain injury is essentially zero. RP 853:1-4.

“somatically focused and naïve.” RP 779:18-19. He opined that her personality type causes her to focus too much on her own physical problems – to be a whiner and a complainer – and that this caused her to exaggerate, perhaps unconsciously, her problems. RP 760:2-7, 764:15-765:9, 827:1-8; 829:4-12.

Obviously, Ms. Lutes disagreed with this assessment. Her evidence showed that she did in fact experience a brain injury in the car accident, and that this brain injury caused her ongoing problems, especially in social functioning, memory, and accomplishing tasks. RP 330:6-9, 349:3-354:22. To disprove Dr. Wise’s theory, she also presented evidence that, whatever her “personality type,” she was not perceived as a whiner or complainer before the accident, RP 453:21-25, 397:6-21, and that after the accident, she was making great efforts to succeed, which would of course be inconsistent with intentional or unconscious exaggeration of her symptoms. RP 238:9-19, 459:16-20, 370, 376-378.

Thus, some of the questions for the jury were (1) whether Ms. Lutes was faking her symptoms; (2) if they were not faked, whether they were attributable to the accident; and (3) what role, if any, her personality type played in her condition. In addition, Ms. Lutes

acknowledged that she had suffered migraines before the accident, but believed that they had grown worse after the accident. RP 671:8-672:6. To present these questions to the jury fairly, Ms. Lutes proposed two jury instructions based on WPI 30.17 (aggravation of pre-existing condition) and WPI 30.18.01 (particular susceptibility or the “eggshell skull” instruction). RP 798:15-809:3. These became instructions 10 and 11 at trial. CP 76-77.

These instructions, along with an instruction based on WPI 30.18<sup>5</sup>, were first discussed during a recess while Dr. Wise was still on the stand. The court informed Ms. Lutes’ counsel that in order to get the eggshell skull instruction, he would have to focus on that issue with Dr. Wise. RP 808:22-809:4. In the first series of questions after cross examination continued, Dr. Wise admitted (1) that personality type does not change over time, RP 820:8-12; (2) that Ms. Lutes was the type of person likely to have an exaggerated response to the accident, RP 820:13-821:3; and (3) her personality type, plus the accident, caused her to experience her symptoms. RP 821:4-9. Dr. Wise also

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<sup>5</sup> Ms. Lutes withdrew her request for the “lighted up” instruction based on WPI 30.18 in favor of an instruction based on WPI 30.18.01, which became Instruction No. 11. RP 807.

admitted that, although in his opinion Ms. Lutes was exaggerating, he could not determine whether or to what extent she was intentionally exaggerating, and any exaggeration could be unintentional or unconscious. RP 821:10-18, 839:3-9.

At the conclusion of the testimony, the trial court decided that it was appropriate to give Instruction No. 11.<sup>6</sup> RP 919:10-21. Because Ms. Lutes' position was that her difficulties arose from a brain injury, not anything in her "personality type," she did not directly rely on Instruction No. 11 in closing. RP 934-952, 973-981.

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<sup>6</sup> Instruction No. 11 provided, in full:

If you find that:

- (1) before this occurrence the plaintiff had mental 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 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.

The jury returned an award of \$700,000 in general damages. CP 80. Rotschy moved for remittitur or a new trial. CP 81-96. The trial court denied that motion. CP 372-375. It explained:

There was evidence that Plaintiff suffered a significant brain injury, and that the result thereof has been devastating to her relationship with her friends, husband, and children, and that her ample interpersonal capabilities, pre-injury, have been irrevocably compromised. A jury of twelve reasonable men and women are, by law, entrusted with the task of setting a standard for such loss. For me to substitute any judgment for that of the jury would be to replace one allegedly arbitrary decision with another.

CP 374-375.

## ARGUMENT

### I. GENERAL STANDARD OF REVIEW

As Rotschy acknowledges, each of its assignments of error is reviewed for abuse of discretion. Generally, “[a] trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.”<sup>7</sup> With respect to orders denying requests for a new trial, the Washington Supreme Court has also stated “[t]he criterion for testing abuse of discretion is ‘(H)as such a feeling of prejudice been engendered or

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<sup>7</sup> *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111, 1114 (1999).

located in the minds of the jury as to prevent a litigant from having a fair trial?”<sup>8</sup>

## **II. INSTRUCTION NO. 11 WAS PROPER AND CAUSED NO PREJUDICE**

Rotschy’s primary argument on appeal is directed at Instruction No. 11. This instruction, which was taken directly from WPI 30.18.01, is the particular susceptibility or “eggshell skull” instruction. There is no dispute that this instruction correctly states the law regarding a defendant’s responsibility for injuries caused by a plaintiff’s particular susceptibility to an injury. Rotschy’s only argument is that the instruction should not have been given based on the evidence in this case, and that doing so prejudiced it.

### **A. Standard of Review**

“Jury instructions challenged on appeal are reviewed to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether when read as a whole they accurately inform the jury of the applicable law.”<sup>9</sup> The decision

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<sup>8</sup> *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26, 32 (1978).

<sup>9</sup> *Adcox v. Children’s Orthopedic Hosp. & Medical Center*, 123 Wn.2d 15, 36, 864 P.2d 921, 934 (1993), citing *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

on whether to give a particular instruction is committed to the trial court's discretion.<sup>10</sup> Even an erroneous instruction is not ground for reversal "unless the court is 'left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'"<sup>11</sup> An erroneous instruction is "harmless if it 'is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'"<sup>12</sup>

Rotschy does not claim that the instructions as a whole failed to inform the jury of the applicable law, and, as noted above, it is also undisputed that Instruction No. 11 is an accurate statement of the law. The fact that Instruction No. 11 is legally accurate also means that, contrary to Rotschy's argument, this Court will not presume that it

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<sup>10</sup> *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

<sup>11</sup> *Furfaro v. City of Seattle*, 144 Wn.2d 363, 27 P.3d 1160 (2001), opinion corrected on reconsideration, 36 P.3d 1005 (2001), cert. denied 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777 (2002), quoting *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1117 (7<sup>th</sup> Cir. 1983) (additional citations omitted).

<sup>12</sup> *Magana v. Hyundai Motor America*, 123 Wn.App. 306, 316-17, 94 P.3d 987, 992 (2004).

resulted in any prejudice.<sup>13</sup> Therefore, Rotschy must show how the instruction prejudiced it.

**B. Ms. Lutes Established an Evidentiary Foundation for Instruction No. 11**

Rather than discuss the jury instructions in terms of the *Adcox* standard, Rotschy contends that Instruction No. 11 is not supported by substantial evidence. While it is true that a trial court is required to instruct the jury on a theory if it is supported by substantial evidence,<sup>14</sup> it does not follow that it is automatically error to give an instruction that turns out not to be supported by substantial evidence. In such cases, an instruction should only be considered in error if it does not permit the parties to argue their theories of the case, if it is misleading, or if the instructions as a whole do not accurately inform the jury of the applicable law.<sup>15</sup> Nevertheless, Ms. Lutes established an evidentiary foundation for Instruction No. 11.

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<sup>13</sup> *Id.*, 123 Wn. App. at 317, 94 P.3d at 992-93.

<sup>14</sup> *Stiley v. Block*, 130 Wn.2d at 498, 925 P.2d 194.

<sup>15</sup> *Adcox*, 123 Wn.2d at 36, 864 P.2d at 934.

**1. Instruction No. 11 was supported by substantial evidence.**

Initially, it is important to recognize that Ms. Lutes did not contend that she had a mental condition that made her particularly susceptible to suffer either a mild traumatic brain injury or prolonged symptoms of such an injury.<sup>16</sup> Her theory, supported by ample evidence, was that she suffered a brain injury as a result of the crash. RP 168:24, 172:17, 330, 349:3-14. In addition, she presented evidence that she was not a whiner or complainer (and thus did not have a “whining and complaining” personality) prior to the accident, RP 453:21-25, 397:6-21, which tended to disprove Dr. Wise’s contention regarding her ingrained personality type. But a party is not limited to requesting instructions that support her own theories of the case; she is also entitled to instructions that present the opponent’s theories in the proper legal context.

At trial, Rotschy attempted to prove that Ms. Lutes’ ongoing complaints were not attributable to the accident – that although she did

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<sup>16</sup> Ms. Lutes did, however, offer evidence that age was a “big factor” in one’s ability to recover from a brain injury. RP 287:3-12, 297:8-14. Thus, Instruction No. 11 also served to prevent the jury from speculating that because Rotschy was not responsible for Ms. Lutes’ age, it would not have to pay for damages she would not have suffered if she was younger and better able to recover.

have certain ongoing cognitive difficulties, they were not the result of the accident, and that she was exaggerating those symptoms she did have, perhaps unconsciously, due to her personality type. RP 770:14-19, 863:18-25, 853:1-23; 839:3-9. Rotschy's expert admitted that, even under his theory, the accident combined with Ms. Lutes' personality type to lead to her symptoms. RP 821:4-821:9.

Because the jury was free to accept or reject any part of the testimony of Dr. Wise, or any other witness, Instruction No. 11 was appropriate even if not fully supported by Dr. Wise. For example, the jury could believe that Ms. Lutes had a somatically focused personality type, RP 760:2-7, 764:15-765:9, but could also believe that it had not caused her any problems until the accident. RP 397:6-21, 453:21-25. It could find that before the accident, Ms. Lutes did not have any cognitive dysfunction, as shown by her work success, and the testimony of her family and friends. RP 613:9-19, 618:5-7, 221:16-222:21, 549:12-19, 454-455, 475, 534-535. It could conclude that her personality type, combined with the accident to make the consequences of the accident worse for her than it would be for someone else, RP 821, but also believe that the underlying cause of her symptoms

was a traumatic injury to her brain. RP 330, 349. Each of these conclusions was supported by evidence.

In other words, the jury could conclude, based on the evidence presented by the parties, that “(1) before this occurrence [the accident] the plaintiff had a mental condition that was not causing pain or disability; and (2) that the condition made the plaintiff more susceptible to injury than a person in normal health.” *See* Instruction No. 11. Because this was a reasonably possible set of findings, based on the evidence, Ms. Lutes was entitled to an instruction telling the jury how such findings should affect its damage award, in accordance with WPI 30.18.01. For this reason, there was an evidentiary foundation for the instruction, and the trial court did not abuse its discretion in giving it.

## **2. Medical evidence is not required.**

Rotschy argues that Ms. Lutes had to establish through medical evidence each and every element of Instruction No. 11. This contention has no basis in law. The cases Rotschy cites for the proposition that medical evidence is required<sup>17</sup> do not support her

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<sup>17</sup> *Parks v. Dep’t of Labor & Indus.*, 46 Wn.2d 895, 898, 286 P.2d 104 (1955); *Oien v. Dep’t of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), *reconsideration denied, review denied*,

position. *Parks* and *Oien* are workers' compensation cases regarding the need, in that forum, for objective findings of disability. They do not stand for the general proposition that medical evidence is required to establish a particular susceptibility. *Austin* addresses whether a "lighting up" instruction, not a particular susceptibility instruction,<sup>18</sup> was appropriate under the specific facts of that case.

Rotschy's argument also makes no sense. Rotschy called an expert neuropsychologist to imply that Ms. Lutes' problems were either faked or in her head. RP 827-831. He testified that she had a condition, prior to the accident, which he believed was responsible for her current suffering. RP 762-765. Rotschy thus raised the specter of a pre-existing condition that it sought to blame for her problems, and it would be a strange result if it could do so without instructing the jury of the possible legal consequences of such a condition because its expert was not a medical doctor.

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125 Wn.2d 1021 (1995); *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 399, 492 P.2d 1382 (1971).

<sup>18</sup> Rotschy claims that *Austin* involved the same instruction at issue here. This is incorrect. *See* 6 Wn. App. at 395, 492 P.2d at 1383 (setting forth "lighting up" instruction).

**3. The condition that makes a plaintiff more susceptible to injury need not be a DSM-IV diagnosis.**

Rotschy also claims that a pre-existing mental condition that makes a plaintiff more susceptible to injury must be a condition identified in the DSM-IV. It offers absolutely no support for this proposition, which is inconsistent with both the concept of particular susceptibility and Washington law.

First, for the particular susceptibility instruction to apply, by its own terms, the condition must not be causing any pain or disability. DSM-IV diagnoses, however, would tend to indicate at least a potential disability or impairment. Second, the availability of a particular susceptibility instruction should not turn on whether the condition is subject to a medical diagnosis, but rather on whether the condition may in fact make the person more susceptible to injury. That question should be decided by the jury, and clearly can be raised by a condition other than a diagnosed medical condition.<sup>19</sup>

Finally, Washington courts have accepted personality type as a condition that can cause a person to be more susceptible to a particular

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<sup>19</sup> For example, a fair skinned person may be more susceptible to injury caused by being kept out in the sun, but being fair skinned is not itself a diseased condition.

injury. In *McDonagh v. Dep't of Labor & Indus.*,<sup>20</sup> the lower court refused to give a “lighting up” instruction, despite evidence that the plaintiff’s “personality characteristics predisposed him to this type of illness.” The defendant argued, as Rotschy does here, that the instruction was “inapplicable absent a diagnosable pre-existing latent or asymptomatic medical condition and that personality characteristics cannot constitute such a condition.”<sup>21</sup> The Court rejected this argument, specifically holding that the condition need not be diagnosable, and that “there is no authority to support the proposition that a ‘personality characteristic’ is precluded from qualifying as a pre-existing condition.”<sup>22</sup>

Rotschy attempts to distinguish *McDonagh* on the basis of testimony that McDonagh had a biological predisposition for the development of a major depressive illness with phobic anxiety.

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<sup>20</sup> 68 Wn. App. 749, 754, 845 P.2d 1030, 1033 (1993).

<sup>21</sup> 68 Wn. App. at 755, 845 P.2d at 1033.

<sup>22</sup> 68 Wn. App. at 755, 845 P.2d at 1034.

More recently, in *Fox v. Evans*, 127 Wn. App. 300, 307, 111 P.3d 267, 270 (2005), *review den'd*, 156 Wn.2d 1017, 132 P.3d 734 (2006), the Court recognized that the trial court had given a particular susceptibility instruction based on the fact that her personality profile made her more susceptible to depression.

However, based on the description of the testimony in the opinion, the “biological predisposition” clearly refers to his “personality characteristics” – the same sort of traits Dr. Wise purported to identify in Ms. Lutes, and only the resulting illness, not this predisposition, falls within any possible DSM-IV classification.<sup>23</sup>

**C. The Instruction Permitted Both Parties to Argue Their Theories of the Case, Within the Limits of Applicable Law**

Returning to the *Adcox* standard for reviewing jury instructions on appeal, Rotschy briefly argues that Instruction No. 11 portrayed Rotschy’s argument as merely another version of Lutes’ argument. Rotschy brief, at 23. In order to obtain reversal based on the contention that the instructions unduly emphasize the opposing party’s theory of the case, “the instructions on a particular point must be so repetitious as to generate an ‘extreme emphasis’ that ‘grossly’ favors one party over the other.”<sup>24</sup> In this case, however, there were only two instructions addressing the impact of a possible pre-existing condition – Instruction No. 10, dealing with aggravation of a pre-existing condition, and

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<sup>23</sup> 68 Wn. App. at 753, 845 P.2d at 1032-33.

<sup>24</sup> *Adcox*, 123 Wn.2d at 38, 864 P.2d at 935, citing *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969) and *Brown v. Dahl*, 41 Wn. App. 565, 579, 705 P.2d 781 (1985).

Instruction No. 11, dealing with the plaintiff's alleged susceptibility for this injury. These instructions addressed different aspects of pre-existing conditions, and do not unduly emphasize any point.

In fact, Instructions 10 and 11 both also explicitly support Rotschy's theory of the case. Instruction 10 told the jury that it "should not consider any condition or disability that may have existed prior to this occurrence or from which the plaintiff may now be suffering that was not caused or contributed to by this occurrence." Instruction No. 11 provided that "There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the preexisting condition even without this occurrence." Together, these instructions allowed Rotschy to argue that Ms. Lutes' cognitive problems pre-existed the car accident, were not caused by the accident, or were the result of her personality type. In other words, they permitted Rotschy to argue its theory of the case.

The only argument that Instruction No. 11 did not allow Rotschy to make was that it was not responsible for injuries Ms. Lutes

developed because she was more susceptible than other people. Such an argument would, of course, be contrary to law.<sup>25</sup>

Washington courts have also recognized the reasonableness of giving both aggravation and either “eggshell skull” or “lighted up” instructions where the existence or extent of a pre-existing condition is disputed. In *Thogerson v. Heiner*,<sup>26</sup> the court addressed the use of essentially the same two instructions involved in this case: an aggravation instruction based on WPI 30.17 and an eggshell skull instruction based on WPI 30.18 (now WPI 30.18.01). There, it was the plaintiff who claimed that the aggravation instruction was repetitious and prejudicial, in light of the eggshell skull instruction.<sup>27</sup> The court held that “whenever the evidence is in dispute as to the existence of a pre-existing condition or disability, it is appropriate to use instructions based on both WPI 30.17 and 30.18 as were the instructions in this case.”<sup>28</sup> Thus, so long as there was some evidence from which the jury

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<sup>25</sup> See *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246, 248 (W.D. Wa. 1978).

<sup>26</sup> 66 Wn. App. 466, 472-475, 832 P.2d 508, 512-13 (1992).

<sup>27</sup> 66 Wn. App. at 472, 832 P.2d at 512.

<sup>28</sup> 66 Wn. App. at 474, 832 P.2d at 513, citing *Bowman v. Whitelock*, 43 Wn. App. 353, 359, 717 P.2d 303 (1986). *Bowman* addressed the similar question of whether the trial court should have

might believe that Ms. Lutes was particularly susceptible to her injuries, it was appropriate to instruct that Rotschy would still be liable for resulting injuries. Rotschy cannot claim that it was prejudiced because its argument was constrained by a lawful instruction.

**D. Instruction No. 11 Was Not Misleading and Did Not Prejudice Rotschy**

Even if this Court were to conclude that there was not an evidentiary basis for giving Instruction No. 11, the instruction was not misleading and Rotschy was not prejudiced. As discussed above, prejudice is not presumed where the instruction is legally correct.<sup>29</sup> The instruction caused no actual prejudice, even if not supported by the evidence, because Ms. Lutes did not rely on it in her closing, the instructions allowed Rotschy to argue that Ms. Lutes' condition was attributable to other causes, and while the instruction did not invite the jury to speculate about other causes, any possible speculation could only benefit Rotschy.

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given instructions on both aggravation and “lighting up” a pre-existing injury. The court held that both instructions were proper where there was a dispute about whether the pre-existing injury was active or dormant at the time of the accident. 43 Wn. App. at 358-59, 717 P.2d at 306-7.

<sup>29</sup> *Magana*, 123 Wn.App. at 317, 94 P.3d at 992-93.

Although Ms. Lutes asked for Instruction No. 11 so that the jury could properly account for the role of her “personality type,” if it found that this played any role in her current disabilities, her counsel did not refer to or rely on this Instruction in closing arguments. RP 934-952, 973-981. Because it was not even cited, it certainly did not receive any undue emphasis. Moreover, if the jury believed, as Ms. Lutes contended, that she had no relevant pre-existing condition, than Instruction No. 11 would have played no role in its deliberation.

Even if the jury believed that Ms. Lutes had a pre-existing condition, Instruction No. 11 would still play no role if the jury concluded that it did not make her more susceptible, or did not cause her injuries to be worse. CP 77. Thus, the instruction allowed Rotschy to argue that Ms. Lutes did not experience a brain injury, that her difficulties were not the result of the accident, and that she had a personality type that caused her to react like she does under stressful circumstances. RP 961-964. Therefore, the instruction did not interfere with Rotschy’s presentation of its theory of the case.

In addition, as discussed above, Instructions 10 and 11 in combination allowed Rotschy to argue that Ms. Lutes’ personality type was causing her problems prior to the accident, and that she was not

entitled to recover for problems she would have experienced even without the accident. *See* Section II.C, above. Instruction No. 11 even reminded the jury not to allow any recovery for injuries or conditions that would have resulted from the pre-existing condition even in the absence of the accident. CP 77.

*Greenwood v. The Olympic, Inc.*,<sup>30</sup> relied on by Rotschy, does not establish that giving Instruction No. 11 was prejudicial. In *Greenwood*, the jury's damage award was small, and on the plaintiff's motion the trial court granted a new trial on damages.<sup>31</sup> Apparently, the plaintiff argued and the trial court agreed that the small damage award may have been attributable to the wording of an instruction regarding the aggravation of a pre-existing injury instruction. This instruction told the jury that plaintiff could not recover for any physical ailment or disability that existed prior to the fall. There was no evidence of any active pre-existing ailment or disability, however, and the instruction may have invited the jury to speculate about other injuries or disabilities.<sup>32</sup>

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<sup>30</sup> 51 Wn.2d 18, 315 P.2d 295 (1957).

<sup>31</sup> 51 Wn.2d at 23, 315 P.2d at 298.

<sup>32</sup> *Id.*

Initially, *Greenwood* is distinguishable because the trial court in that case, after witnessing the trial and interacting with the jury, concluded that the damage award was too low, and granted a motion for new trial in the exercise of its discretion.<sup>33</sup> That decision was entitled to deference.<sup>34</sup> In contrast, the trial court here did not grant a motion for new trial, and that decision is also entitled to deference.

In addition, if this instruction did invite any speculation, it would have been speculation about some additional pre-existing condition.<sup>35</sup> Such speculation, if it occurred, could only help Rotschy and hurt Ms. Lutes. The jury was clearly instructed to award damages only for harm proximately caused by the car accident, and that Ms. Lutes had the burden of proof. CP 73-75. Speculation about some additional pre-existing condition would necessarily be speculation about something for which Ms. Lutes offered no contrary evidence, and

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<sup>33</sup> *Id.*

<sup>34</sup> *Bingaman v. Grays Harbor Community Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230, 1232 (1985).

<sup>35</sup> In addition to the evidence regarding Ms. Lutes' alleged personality type, there was evidence that prior to the accident she suffered from migraines, sleep apnea, obesity, stress, and depression. RP 223, 224, 459, 563, 650-51, 653, 654; Ex. 7. Dr. Perrillo also stated that Ms. Lutes' age may have been a factor in her ability to recover. RP 287:3-12; 297:8-14.

could only reduce her damages. *Greenwood* illustrates this point, as the concern of both the trial court and the Supreme Court was that speculation about other pre-existing conditions reduced the damage award.<sup>36</sup>

**E. Rotschy Misunderstands Proximate Cause**

Rotschy also argues that Instruction No. 11 did not meet the “legal causation requirement” because a jury should not be able to give a plaintiff damages based on the fact that she was a “whiner.” This is a gross misrepresentation of the role that this instruction might have played, if any.

Even if the jury did find that Ms. Lutes’ current difficulties were made worse because of her personality, the jury still needed to find that the accident caused the injury. A jury is presumed to follow the instructions.<sup>37</sup> Instruction No. 7 told the jury that Ms. Lutes had the burden of proving what injuries were caused by the accident, and Instruction No. 9 explained that proximate cause. CP 73, 75. Instruction No. 11 then emphasized that there should be no recovery for

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<sup>36</sup> 51 Wn.2d at 23, 315 P.2d at 298.

<sup>37</sup> See *McLaughlin v. Cooke*, 112 Wn.2d 829, 839, 774 P.2d 1171, 1176 (1989).

injuries that would have resulted from the preexisting condition without the accident. CP 77. Thus, even if Instruction No. 11 played a role in the jury's decision, the jury's award must reflect a decision that the accident caused the injuries, and that they would not have resulted if the accident had not taken place. Therefore, Rotschy was not liable for Ms. Lutes' damages because she is a "whiner," but because it caused an automobile accident in which she was injured. There is no policy issue with assigning legal responsibility under these circumstances.

In this regard, it is important to recognize that the "particular susceptibility" instruction, based on WPI 30.18.01, actually addresses proximate causation, and embodies the well established doctrine that "a tortfeasor takes his victim as he finds him, and must bear liability for the manner and degree in which his fault manifests itself on the individual physiology of the victim."<sup>38</sup>

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<sup>38</sup> WPI 30.18.01, Comment, quoting *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246, 248 (W.D. Wa. 1975).

### **III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ROTSCHY'S MOTION FOR A NEW TRIAL OR REMITTITUR**

#### **A. Rotschy Waived Its Request for a New Trial Based on Instruction No. 11 By Not Presenting It to the Superior Court Properly**

Rotschy moved in the superior court for a new trial on several grounds, including the court's decision to give Instruction No. 11. CP 81-96. At oral argument, the court indicated that to determine if the instruction was supported by evidence, it would be helpful to review the record, and asked Ms. Lutes' counsel for portions of the testimony supporting the instruction. RP 1013-14. Counsel indicated that the transcript of Dr. Wise's testimony he possessed was received from "some lawyer, whose name I don't even know," and that he was not sure it was an official version. RP 1014. The court nevertheless asked for this transcript, as well as a transcript of defense neurologist Dr. Wendt's deposition to be submitted to the court. *Id.*

After Ms. Lutes submitted these documents, Rotschy objected to the transcript as being unofficial, but did not provide a different version. CP 342. As a result, the court was left with no record of Dr. Wise's testimony. The court held that it could not decide the issue, because although "Defendant has moved for a new trial, claiming that

there is insufficient evidence in the record to support the instruction . . . [it] has provided no record for me to review.” CP 373. Rotschy made no subsequent attempt to supplement the record or otherwise obtain a decision from the trial court.

Under these circumstances, Rotschy should be deemed to have waived its argument for a new trial based on its claim that Instruction No. 11 was not supported by substantial evidence. It did not obtain a decision from the trial court because it failed to give the court the evidence it needed to review its decision, and failed to correct this defect when it was brought to its attention by the court.<sup>39</sup>

Finally, if the Court does reach this issue, for the reasons discussed above, Instruction No. 11 was proper, and does not support a claim for reversal or a new trial. *See* Section II, above.

**B. Rotschy’s Other Arguments for Reversing the Trial Court’s Decision to Deny a New Trial Are Without Merit.**

“[D]eference and weight are given to the evaluation of the trial court’s exercise of discretion in denying a new trial on a claim of excessiveness. The verdict is strengthened by denial of a new trial by

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<sup>39</sup> *See Kenai Chrysler Center, Inc. v. Denison*, – P.3d – 2007 WL 2745193 (Alaska, Sept. 21, 2007), at \*19 (holding that issue not pressed before trial court was waived).

the trial court.”<sup>40</sup> The court’s decision denying the motion for new trial in this case was well within the court’s considerable discretion, and should be affirmed.

**1. References to insurance.**

On Rotschy’s motion for a new trial, the trial court ruled, with respect to references to insurance, “At no time did I detect any prejudice to either side from such references, and I do not believe that any such references were made in a deliberate attempt to circumvent the court’s order in limine. This aspect of the motion is denied.” CP 373. *See also* RP 1015. The court did not abuse its discretion in making this decision.

Rotschy complains of three references to insurance during the trial.<sup>41</sup> These will be addressed in order.

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<sup>40</sup> *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 271, 840 P.2d 860, 874 (1992) (citations omitted).

<sup>41</sup> During trial, Rotschy also moved for mistrial because Dr. Perrillo read from a letter from Ms. Lutes’ physician which referred to her not obtaining certain treatment due to cost concerns. RP 498; RP 446-447. Dr. Perrillo did not say the word “insurance” and Rotschy did not object at the time. *Id.* Rotschy does not mention this reference on appeal and has therefore abandoned any argument arising from this reference. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) (issue not presented in opening brief is waived).

First, Ms. Lutes, during direct examination, and in response to a question about not filing suit for years after the accident, said, “I believed the defendant’s representative, Vicki Gilmore. She told me that they were there for me and they were going to take care of me.” RP 623:22-25. Rotschy moved for a mistrial, which was denied. RP 627, 632. The court did offer to instruct the jury to disregard the testimony, but Rotschy declined that offer. RP 632.

As an initial matter, this is not a clear mention of insurance. Ms. Lutes did not use the word “insurance,” and as a corporation, Rotschy would be expected to have “representatives” other than insurance adjustors.

In addition, it is well settled in Washington that

where the circumstance that a defendant is or might be covered by insurance is injected into a case innocently, inadvertently, by invitation, or in relation to some issue, such revelation is not grounds for mistrial. It is only when the collateral matter is clearly inserted deliberately, wantonly, or collusively for the purpose of prejudicing the jury that it calls for mistrial or new trial.<sup>[42]</sup>

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<sup>42</sup> *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 160, 422 P.2d 496, 501 (1967).

Ms. Lutes' mention of Rotschy's representative, even if a reference to insurance, clearly falls into the "innocent" or "inadvertent" categories, and therefore cannot be a basis for mistrial or ordering a new trial.<sup>43</sup>

The second reference to insurance occurred during Ms. Lutes' cross-examination of Rotschy's expert, Dr. Wise. Counsel asked him about being referred clients "by defense lawyers, by plaintiff lawyers, by insurance companies," RP 787:5-7, and about the possibility of an insurance company terminating treatment coverage based on his recommendations. RP 789:6-9. These questions were part of a series of questions exploring the nature of Dr. Wise's practice. Rotschy did not object to these questions.

While these questions use the word "insurance," they did not state or imply that Rotschy had insurance coverage, or even that Dr. Wise worked exclusively for insurance companies. To the contrary, the first question identifies three possible referral sources for Dr. Wise, plaintiff lawyers, defense lawyers, and insurance companies. RP 787. This implies that defense lawyers and insurance companies

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<sup>43</sup> See also *Mills v. Warn*, 8 Wn. App. 296, 505 P.2d 1288 (1973) (holding that where trial court found reference to insurance to have been inadvertent, it did not justify grant of new trial).

are separate, independent sources. The question regarding termination of benefits by an insurance company was directed to obtaining an admission that Dr. Wise's opinions might have serious consequences for the people involved, and did not imply that an insurance company was involved in this case. RP 789. Certainly, Rotschy did not perceive any such implication at the time, as it did not object.<sup>44</sup>

In the unlikely event that these questions did imply that Rotschy did have insurance, the questions are nevertheless justified as legitimate exploration of the source of his business and income, which is relevant to bias, and of the power he is used to exercising over people's lives.<sup>45</sup>

The third references to insurance also occurred during cross examination of Dr. Wise, when counsel asked a series of questions

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<sup>44</sup> Rotschy now claims that Lutes deliberately attempted to interject insurance into the trial to prejudice the jury. The trial court found differently. CP 373. Moreover, "absent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect." *Sommer v. Dep't of Social & Health Servs.*, 104 Wn.App. 160, 171, 15 P.3d 664, review denied, 144 Wn.2d 1007, 29 P.3d 719 (2001), cited in *A.C. ex. rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 524 n.37, 105 P.3d 400 (2004).

<sup>45</sup> See Evid. R. 411 ("This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, or bias or prejudice of a witness.").

about a doctor, Dr. Lees-Haley, who developed a test Dr. Wise relied upon as a primary support for his opinion. RP 880:2-881:10. These questions focused on the fact that Dr. Lees-Haley developed his test while working exclusively for defense attorneys and insurance companies, and that he also frequently lectures to insurance company representatives. *Id.* Again, Rotschy did not object.

Again, these questions clearly related to another, legitimate purpose: establishing the bias of the doctor who developed the test Dr. Wise relied upon to accuse Ms. Lutes of being an “exaggerator.” Evidence of insurance is allowed to show bias, Evid. R. 411, and evidence that a test was developed by someone with close ties to the insurance industry must also be admissible.

Finally, any possible prejudice by any of these references would have been cured by Instruction No. 4, which reminded the jury that insurance had no bearing on the case. CP 70.

## **2. References to employment**

Rotschy’s current argument that references to Ms. Lutes’ post-accident employment difficulties “insinuated” a lost income claim does not accurately reflect what happened at trial. Ms. Lutes testified that she expected to find work. RP 643. Ms. Lutes’ counsel explicitly told

the jury in closing that she was not asking for a wage loss – that she would get another job, “so we’re not here to ask for wage loss that isn’t going to occur.” RP 942:9-13. The focus of the trial was on Ms. Lutes’ non-economic damages, including her disability, loss of enjoyment of life, pain and suffering, and humiliation.

Instruction No. 12, to which Rotschy does not object, explained the categories of available damages to the jury, and specifically instructed it that its award “must be based upon evidence and not upon speculation, guess, or conjecture.” Washington appellate courts presume that a jury will follow its instructions,<sup>46</sup> and there is no evidence here to the contrary.

In addition, the isolated snippets of testimony which Rotschy relies on for its speculation that the jury must have considered lost wages in determining the amount it awarded as damages were admitted without any objection by Rotschy. Having failed to object, Rotschy waived any objection to the admission of this testimony.<sup>47</sup>

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<sup>46</sup> See *McLaughlin*, 112 Wn. at 839, 774 P.2d at 1176.

<sup>47</sup> See *Drake v. Ross*, 3 Wn. App. 884, 886-887, 478 P.2d 251, 252-53 (1970) (objection will not be considered for first time on appeal).

Moreover, the statements about Ms. Lutes' difficulties in finding a job were relevant and admissible for reasons other than loss of income, such as whether Ms. Lutes was exaggerating or faking her difficulties, RP 231:16-232:19, to address the humiliation and loss of enjoyment of life Ms. Lutes experienced from no longer being a valued member of a work team, RP 641:5-643:16, 460:15-461:13, or to illustrate the practical effects of her brain damage. RP 350, 393. To the extent that Rotschy believed that this evidence might be interpreted differently by the jury, it could have asked for a limiting instruction, or a further closing instruction explaining that lost wages were not being sought.<sup>48</sup> Having failed to do so, however, it should not be allowed to speculate on appeal that the jury awarded damages for anything other than the non-economic damages Ms. Lutes sought.

**C. The Damage Award Was Not Excessive and Does Not Justify Either a New Trial or Remittitur.**

Rotschy asks this Court to order either remittitur or a new trial based on its claim that the damages the jury awarded Ms. Lutes were excessive. As the damages were reasonable in light of Ms. Lutes' extensive injuries, this request has no merit.

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<sup>48</sup> Ms. Lutes indicated that she would be agreeable to such an instruction. RP 9:13-18.

## 1. Standard of review.

It is well settled in Washington that “an appellate court’s role in analyzing the size of jury verdicts is quite limited.”<sup>49</sup> Washington courts “strongly presume the jury’s verdict is correct.”<sup>50</sup> “The determination of the amount of damages . . . is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusions of a jury when fairly made.”<sup>51</sup> “The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact.”<sup>52</sup> “The jury’s role in determining noneconomic damages is perhaps even more essential.”<sup>53</sup>

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<sup>49</sup> *Adcox v. Children’s Orthopedic Hosp.*, 123 Wn.2d 15, 32, 864 P.2d 921, 932 (1993).

<sup>50</sup> *Bunch v. King County Dep’t of Youth Services*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005) (citation omitted).

<sup>51</sup> *Bingaman*, 103 Wn.2d at 835, 699 P.2d at 1232 (citations omitted).

<sup>52</sup> *Bunch*, 155 Wn.2d at 179, 116 P.3d at 389 (citation omitted).

<sup>53</sup> *Bunch*, 155 Wn.2d at 179-80, 116 P.3d at 389 (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 771 P.2d 711 (1989)); see also *Washburn.*, 120 Wn.2d at 269, 840 P.2d at 873 (explaining that the determination of noneconomic damages is “primarily and peculiarly within the province of the jury”) (quoting *Bingaman*, 103 Wn.2d at 835, 699 P.2d at 1232).

“An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.”<sup>54</sup> In reviewing a verdict, “deference and weight are given to the evaluation of the trial court’s exercise of discretion in denying a new trial on a claim of excessiveness. The verdict is strengthened by denial of a new trial by the trial court.”<sup>55</sup> As the Washington Supreme Court summarized in *Washburn*, “given the foregoing constitutional principle and case precedent, appellate review is most narrow and restrained – the appellate court ‘rarely exercises this power,’” that is, the power to reduce the award or order a new trial.<sup>56</sup>

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<sup>54</sup> *Bingaman*, 103 Wn.2d at 835, 699 P.2d at 1233.

<sup>55</sup> *Washburn*, 120 Wn.2d at 271, 840 P.2d at 874 (citations omitted).

<sup>56</sup> 120 Wn.2d at 269, 840 P.2d at 873 (quoting *Bingaman*, 103 Wn.2d at 835, 699 P.2d at 1233). The Court in *Bingaman* explained that the deference given the trial court, and the reluctance of appellate courts to interfere is based on the fact that “the trial court sees and hears the witnesses, jurors, parties, counsel, and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents,” while the appellate courts are “tied to the written record.” 103 Wn.2d at 835, 699 P.2d at 1232-33.

**2. The jury's award is supported by the evidence.**

The jury heard evidence that Ms. Lutes had suffered a permanent brain injury in the accident with Rotschy's truck. RP 330, 349. She has had a constant headache since the time of accident, which worsens under stress. RP 614:4-19. Her migraine headaches are also more frequent. RP 671:8-672:6. She suffered a severe seatbelt bruise, and has lost most feeling in her right breast. RP 612:17-21, 613:24-614:1. She was afraid to drive for a while, and suffers from post-traumatic stress disorder. RP 358:14-23.

Ms. Lutes' brain injury reduced her cognitive functioning and changed her personality. RP 350-354. She is no longer able to handle multiple tasks or perform under stressful conditions. RP 615, 617. She is disorganized. RP 458-463. Her short term memory is reduced, and she must rely on sticky notes to organize her day. RP 621-623. As a result of her increased difficulties, she has lost her self esteem, and is depressed. RP 618-619. She gets angry much easier than before. RP 616:22-617:7, 230:4-24, 456:11-457:8. She enjoys her life and the activities of her life less. RP 616-617. She is less able to spend time with her family and friends, and when she does, she is likely to say rude or inappropriate things to them – she has no “filter.” RP 616-617,

645:13-646:3, 228:2-22, 552. As a result, she has lost friends, and even her family is less willing to spend time with her. RP 456:11-457:8, 234:17-235:16 237:4-238:8, 561:11-15. Her relationships with her husband and with her two daughters have been significantly damaged. RP 232:20-233:7, 234:17-235:16, 237:4-238:8, 561:11-15. She was only 43 years old at the time of the accident, and these problems will continue for the rest of her life.

The losses that Ms. Lutes suffered are not easily calculable. There is no generally acceptable formula for translating them into dollars. Instead, this decision is entrusted to the judgment of a jury, in its collective wisdom. Given the nature and extent of Ms. Lutes' injuries, the jury's award is neither "shocking" nor "flagrantly outrageous and extravagant."

There is also no indication that the verdict was the result of passion or prejudice.<sup>57</sup> Rotschy has not pointed to any event or

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<sup>57</sup> "Before passion and prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable . . . . The issue thus becomes whether the size of the award for pain and suffering in and of itself 'shocks the conscience of the court.' Stated otherwise, were the damages flagrantly outrageous and extravagant?" *Washburn*, 120 Wash.2d at 269, 840 P.2d at 873 (quoting *Bingaman*, 103 Wash.2d at 836-37, 699 P.2d at 1233).

moment at trial that even might have inflamed the passion of the jury, nor any indication whatsoever of prejudice on its part. When the verdict is within the range of proven damages, “it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.”<sup>58</sup>

The fact is that the evidence at trial, seen, as it must be, in the light most favorable to Ms. Lutes, showed that she suffered significant damage to her body and brain, as well as to her sense of self and her ability to interact with others. The verdict is well within the range of reasonable outcomes for such harm. The trial court’s decision denying Rotschy’s motions for new trial or remittitur was within its discretion, and should be affirmed.

## **V. CONCLUSION**

Ms. Lutes was injured in a traffic accident for which Rotschy admits full responsibility. She suffered long-lasting physical injuries, including a constant headache and numbness in her breast, and brain damage which resulted in cognitive impairments which significantly

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<sup>58</sup> *James v. Robeck*, 79 Wn.2d 864, 870-1, 490 P.2d 878 (1971).

impact her ability to function and relate to others. After a fair trial, the jury awarded her \$700,000 in general damages for her losses. This award was fair and supported by evidence, and should be affirmed.

RESPECTFULLY SUBMITTED at Tacoma, Washington, this  
\_\_\_\_\_ day of October, 2007.

FRIEDMAN, RUBIN AND WHITE  
Attorneys for Respondent

By: \_\_\_\_\_

Richard H. Friedman  
WSBA No. 30626

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No. 36051-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ELIZABETH G. LUTES, Respondent

v.

ROTSCHY INC., Appellant

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**CERTIFICATE OF SERVICE**

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Richard H. Friedman, WSBA No. 30626  
Attorney for Respondent

FRIEDMAN RUBIN & WHITE  
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The undersigned declares as follows:

1. I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

2. On the 4<sup>th</sup> day of October, 2007, I caused to be delivered a true and correct copy of:

- a. *Brief of Respondent*
- b. *Certificate of Service*
- c. *Plaintiff/Appellee's Designation of Clerk's Papers and Exhibits*

To the following council of record:

COUNSEL FOR APPELLANT

Tracy Antley-Olander  
Law Office of William J. O'Brien  
999 Third Avenue, Suite 805  
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- Via US Mail
- Via ABC
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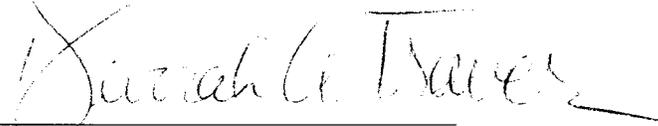
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3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Bremerton, Washington this 7th day of October, 2007.

  
\_\_\_\_\_  
Deborah A. Traver  
Paralegal to Richard H. Friedman

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