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I. INTRODUCTION

Washington Defense Trial Lawyers (“WDTL”) files this brief as a friend of the Court to provide context and supplemental analysis on one issue addressed by the parties, *i.e.*, the admissibility of a plaintiff’s response to a request for statement of damages under RCW 4.28.360.

It is proper for juries to consider a plaintiff’s view on matters disclosed during adversarial litigation, including any information the plaintiff chooses to share about his or her own valuation of general damages he or she is seeking. Where, as here, plaintiffs made a strategic decision to provide to the defendant a specific dollar amount outside of protected settlement discussions, they cannot be permitted to disavow it simply because doing so may better suit plaintiffs’ strategy at trial. To the contrary, admissibility of discovery responses preserves defendants’ rights to confront evidence against them, encourages good faith discovery responses, and furthers the stated purposes of the Civil Rules.

Accordingly, WDTL respectfully requests that this Court conclude that a trial court’s decision to allow a jury to consider a plaintiff’s responses to defendant’s request for damages does not, in itself, prejudice the jury or deprive the plaintiff of a fair trial.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WDTL, established in 1962, includes more than 750 Washington attorneys principally engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its members is through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

III. STATEMENT OF THE CASE

After plaintiffs sued the defendant Puyallup School District (“PSD”), PSD asked plaintiffs for a statement of the damages they were seeking. Plaintiffs’ response stated, in relevant part:

General damages fall within the exclusive province of the jury. ... [I]n similar cases involving public ridicule, juries have awarded general damages in the \$2 million to \$4 million range. An award within this range would be appropriate in this case.

See Respondent’s Appendix, at CP 684-85. During trial – with the trial court’s permission – counsel for the PSD and counsel for plaintiffs discussed plaintiffs’ statement of damages. RP 250. After a four-week trial, the jury returned a verdict in favor of the PSD. On appeal, plaintiffs contend that PSD’s counsel “misused” plaintiffs’ responses to requests for

statements of damages by discussing them during trial. They argue that these discussions prejudiced the jury and deprived them of a fair trial.¹

IV. ARGUMENT

A. Discovery of Damages Being Sought is Properly Obtained Through Requests for Statements of Damages.

In Washington state, where the damages amounts cannot be set forth in a publicly-filed complaint, defendants must ask plaintiffs to provide the amount of damages being sought:

In any civil action for personal injuries, the complaint shall not contain a statement of the damages sought but shall contain a prayer for damages as shall be determined. A defendant in such action may at any time request a statement from the plaintiff setting forth separately the amounts of any special damages and general damages sought. Not later than fifteen days after service of such request to the plaintiff, the plaintiff shall have served the defendant with such statement.

RCW 4.28.360 (emphasis added).

Although the legislative history of RCW 4.28.360 is silent as to its intent, it appears that the statute was enacted to protect defendants and, in particular, health care providers, from undue embarrassment and harm resulting from unreasonable prayers for relief being made in public pleadings at the outset of civil litigation. *See Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986) (“[P]ossible reasons for such a provision are ‘to eliminate unnecessary friction caused between the

¹ Plaintiffs raised additional issues on appeal that are outside the scope of WDTL’s brief.

medical and legal professions by claims for astronomical damages’ and to prevent the adverse effects of the publication of suits against doctors for large sums.”) (quoting *McNeal v. Allen*, 95 Wn.2d 265, 268, 621 P.2d 1285 (1980)). The committee report submitted by appellants indicates that the inclusion of a specific amount of damages sought in a complaint (as used to be the rule in Washington) resulted in stated amounts “frequently published by the news media” thereby “injur[ing] the reputation of physicians.” See Appendix to Appellant’s Opening Br. (Committee Report, Dec. 16, 1975, at 2). Balancing the publicity concerns with the defendant’s right to determine the amount of damages being sought, the legislature has prohibited this practice. Instead, defendants have the right to request a statement of damages during discovery. See *id.* (describing the “mechanism by which a defendant could determine in a timely manner the amount of damages the plaintiff is seeking”).

The ban on pleading specific dollar amounts in complaints also provides protections and benefits to many classes of plaintiffs. For a variety of reasons, some plaintiffs may not want the public or others, including family members and friends, to know the full extent of the damages they are seeking in a given civil action. For example, plaintiffs seeking redress for emotional harm or medical conditions of a sensitive or potentially embarrassing nature could face stigma damage by having the

extent of their medical or psychological injuries made public before trial, which could foreseeably impact many things including but not limited to continued or future employment, and family or social relationships.

Similarly, a demand for large sums of money from sympathetic defendants, like churches, non-profit organizations, or even other family members could subject plaintiffs to undue scrutiny, ostracism, or even solicitations for money from individuals unassociated with the litigation who otherwise lack any genuine reasons for access to plaintiffs' personal financial information. Thus, all types of litigants have the potential to benefit from the narrow pleading ban contained in RCW 4.28.360, which effectively mandates the use of a more discrete discovery tool in lieu of a public pleading.

B. Discovery Should Not be Hidden From Juries.

Unlike complaints, the content of written discovery, depositions, and statements of damages generally are not filed or made public (if at all) until the time of trial. Plaintiffs have the ability to prevent such disclosures during trial by obtaining orders from the court. Parties who abuse the process by seeking to use discovery as a tool for harassment and embarrassment face the potential for sanctions. *See* CR 37 (discussing discovery sanctions).

A formal request for a statement of damages made pursuant to RCW 4.28.360 is one of a myriad of discovery devices defendants may use to discover damage information. When plaintiffs respond in deposition testimony, written discovery, or requests for statements of damages for information concerning the amounts of damages they intend to seek at the time of trial, they should reasonably expect the information to be used by party opponents. *See* ER 801(d)(2). This includes, but is not limited to, demands for precise amounts of special and general damages, to which plaintiffs' responses vary greatly. *See Pierson v. Hernandez*, 149 Wn. App. 297, 306, 202 P.3d 1014 (2009) ("RCW 4.28.360 does not prescribe a particular form for either the request for damages or the response to one."). Indeed, it is the potential for admission and use during cross-examination and argument by counsel at trial that encourages plaintiffs to be accurate and complete when providing defendants with damages information at every stage of the discovery process.

Damages issues, which necessarily involve subjective opinions of value, are properly vetted during discovery and generally not made public until trial. Such an approach benefits not only defendants by protecting them from baseless claims for "astronomical damages," but also protects plaintiffs from public scrutiny of sensitive information, particularly in the

form of medical and psychological evidence, allegedly justifying significant general damages.

The right of confrontation at trial regarding all types of damages is fundamental to ensuring that the civil justice system remains a process for addressing valid claims for actual injuries, not a lottery system for rewarding undeserving personal injury plaintiffs who merely perceive that they have been unfairly victimized. *See Conner v. Universal Utilities*, 105 Wn.2d 168, 173, 712 P.2d 849 (1986) (“Due process requires ‘notice reasonably calculated to apprise a party of the pending proceedings affecting him and an opportunity to present his objections before a competent tribunal.’ ”) (quoting *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wn.2d 327, 335, 553 P.2d 442 (1976)); *Rogoski v. Hammond*, 9 Wn. App. 500, 508, 513 P.2d 285 (1973) (noting in a lawsuit by landlord, the tenant “has a right to produce evidence and arguments thereon, including the right to confront and cross-examine witnesses when those are used”); *see generally State v. Caton*, --- Wn. App. ----, 2011 WL 4036109, at *6 (No. 40422–2–II, Sept. 13, 2011) (explaining that the “Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses”) (footnotes omitted).

Damages, whether for personal property or personal injury, are based upon mixed determinations of credibility, objective proof, and law. Plaintiffs who engage in “puffery” or exaggeration with regard to claims for damages for pain, suffering or emotional distress deserve no more protection from court than plaintiffs who exaggerate claims for property loss or contract damages. *See* ER 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness.”). Similarly, plaintiffs who make unreasonable demands for general damages in response to a request for statement of damages made pursuant to RCW 4.28.360 deserve no more protection for themselves than if they had made the same response at deposition, in response to written interrogatories, or during direct examination at trial. Personal injury plaintiffs who demand excessive amounts of general damages without a compelling basis in fact or law should expect to be confronted about their financial statements during the course of litigation and trial. Again, it is the risk associated with confrontation and cross-examination that compels plaintiffs to act responsibly and honestly in making demands and answering discovery at every stage of the litigation process.

C. **Responses to Statements of Damages Should Be Utilized and Encouraged, Not Undermined.**

The stated purpose of the Civil Rules, as set forth in CR 1, is the “just, speedy, and inexpensive” determination of every action. Requests for statements of damages are a valuable discovery tool for defendants, because they are inexpensive and must be answered within fifteen days of receipt, making them the most expeditious way for defendants to obtain detailed damage information from plaintiffs.

Defendants frequently serve requests for statements of damages in order to determine the value of the claims being made against them. Plaintiffs themselves are initially in the best position to determine the value of their own claims. This is particularly true in cases where plaintiffs suffered virtually no special damages, but perceive their injuries as sufficient to support substantial general damage awards.

Depending upon the responses, settlement may be pursued. Plaintiffs, of course, have the option to present settlement demands in an offer of compromise, thereby preventing defendants from introducing specific sums as evidence during trial. When plaintiffs opt to provide their full views on specific dollar figures they are seeking as general damages, they should reasonably expect that these figures will be considered and evaluated by the defendant and the jury. If settlement is not possible, then

the statement of damages information will be relied upon to make decisions regarding the appropriate scope of discovery as warranted by the plaintiffs' allegations.

The important purposes of RCW 4.28.360 would be seriously undermined if plaintiffs were free to provide unfettered responses to requests for statements of damages, knowing they would never be admitted at trial. The result would be increased litigation costs and delayed resolution. Plaintiffs could employ a strategy of dramatically understating their claims during discovery, only to ambush defendants at trial, presumably after enjoying a less exhaustive discovery based upon intentional misstatements of value. This would be contrary to the stated purpose of the Civil Rules, *i.e.*, the "just, speedy, and inexpensive" determination of every action. *See* CR 1.

V. CONCLUSION

Whether a plaintiff's responses to requests for statements of damages under RCW 4.28.360 are properly admitted as evidence during trial falls within the discretion of the trial court. Defendants have the right to confront these statements and juries have the right to consider them, barring extenuating circumstances. To the extent the statements may not reflect the individual views of any one plaintiff, then the plaintiff has the opportunity to provide the jury with an explanation that includes the

circumstances under which the information was provided. The responses should not under any circumstances be hidden from the jury.

For all of the reasons set forth herein and by the Respondent Puyallup School District, WDTL respectfully requests that this Court conclude that the discussion of a plaintiff's statement of damages during trial does not prejudice the jury or deprive the plaintiff of a fair trial.

RESPECTFULLY SUBMITTED this 30th day of September, 2011.



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DECLARATION OF SERVICE

11 OCT -3 AM 11:03

The undersigned states:

STATE OF WASHINGTON
BY 
DEPUTY

I am a citizen of the United States of America and a resident of the

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

On this 30th day of September, 2011, I caused to be filed the foregoing WASHINGTON DEFENSE TRIAL LAWYERS' AMICUS CURIAE BRIEF by sending the original and one copy via U.S. Mail, First Class Postage Pre-Paid, to Division II of the Court of Appeals for the State of Washington. I also served copies of said document on the following parties as indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 30th day of September, 2011.



Melissa O'Loughlin White

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