

62770-8

62770-8

No. 62770-8-1

Filed
8/31/09
TB

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

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

Respondents/Cross-Appellants.

vs.

TIMOFEY FEDORCHENKO and JANE DOE FEDORCHENKO,
husband and wife, and the marital community thereof,

Appellants/Cross-Respondents.

**BRIEF OF RESPONDENTS & CROSS-APPELLANTS
HERNANDEZ**

Richard B. Kilpatrick, WSBA 7058
1750 112th Avenue NE #D-155
Bellevue, WA 98004
(425) 453-8161
kilpatrick.d@comcast.net
*Co-Counsel for Respondents/Cross-
Appellants*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
CROSS-APPEAL	1
ASSIGNMENT OF ERROR	1
With no specific proof of negligence rather than a presumption, the trial court should have granted summary judgment removing the issue of Warmenhoven’s third party fault.....	1
STATEMENT OF THE CASE	1
With a green light Fedorchenko unexpectedly stopped at an intersection in a thru lane, and Hernandez safely stopped behind him, but Warmenhoven could not stop in time causing Hernandez’ injury that ultimately required surgery.	1
ARGUMENT	4
A. The trial court did not abuse its discretion by excluding the defense doctor when after two special hearings the defendant still failed to provide any reasonable explanation for its failure to conduct the doctor’s deposition or for its failure to comply with the court’s last chance order to provide the witness far enough before trial.	4
B. Fedorchenko admitted at deposition that he suddenly stopped under the green light in the thru-only lane to wait to make an illegal left turn. The trial judge was correct to enter summary judgment....	9
C. There was no judicial comment on causation in the Special Verdict Form because the language actually referred to negligence. Nor could it have possibly caused confusion – the jury did decide causation.....	10

D. The court's instructions allowed Fedorchenko to argue all supposed negligence of Warmenhoven, and the jury found her substantially at fault. The evidence did not support a separate lane change instruction. The trial judge has substantial discretion how to phrase the instructions..... 12

E. The trial judge was well within his discretion to exclude the extent of physical damage to cars or the claimed force of impact where that evidence affected no liability question and no expert would tie them to the injuries..... 15

F. The trial court should have granted summary judgment regarding third-party fault because there was no evidence of specific negligence as required by case law. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

<i>Allied Financial Services</i> , 72 Wn.App. 164, 864 P.2d 1 (1993);	6
<i>Brunet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 p. 23 1036 (1977)	7
<i>Clements v. Blue Cross of Washington & Alaska, Inc.</i> , 37 Wn.App. 544, 547, 682 P.2d 942, 945 (1984)	10
<i>Cox v. Spangler</i> , 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000)	11, 14
<i>Dennis v. McArthur</i> , 22 Wn.2d 33, 38, 158 P.2d 644 (1945)	11
<i>Doherty v. Municipality of Metropolitan Seattle</i> , 83 Wn.App. 464, 467, 921 P.2d 1098, 1100 (1996)	16
<i>Fugere v. Pierce</i> , 5 Wn.App. 592, 490 P.2d 132 (1971)	17
<i>Gammon v. Clark Equip. Co.</i> , 104 Wm.2d 613, 617, 707 P.2d 685 (1985)	15
<i>Gestson v. Scott</i> , 116 Wn.App. 616, 67 P.3d 496 (2003)	18
<i>In re Estate of Foster</i> , 55 Wn.App. 545, 548, 779 P.2d 272 (1989)	4
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 687-88, 132 P.3d 115 (2006)	7
<i>Russell v. Quigg</i> , 2 Wn.App. 294, 467 P.2d 618, <i>rev. denied</i> 78 Wn.2d 993 (1970)	17, 18
<i>Stevens v. Gordon</i> , 118 Wn.App. 43, 53, 74 P.3d 653 (2003)	11, 14
<i>Vanwagenen v. Roy</i> , 21 Wn.App. 581, 587 P.2d 173 (1987)	21
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons</i> , 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)	4

Wells v. City of Vancouver, 77 Wn.2d 800, 467 P.2d 292 (1970) . 10

Young v. Key Pharmaceuticals, Inc., 112 Wn. 2d 216, 770 P.2d 182
(1989)..... 20

CROSS-APPEAL

ASSIGNMENT OF ERROR

With no specific proof of negligence rather than a presumption, the trial court should have granted summary judgment removing the issue of Warmenhoven's third party fault.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A driver stops unexpectedly at an intersection after realizing he needed to make a left turn there, and a collision ensues when a driver farther behind him is unable to stop in time. At summary judgment, defendant asserts that the following driver was negligent but relies only on a legal presumption against the following car and provides no specific evidence of negligence, as required by the cases. Absent substantial evidence of any specific negligence on the part of the following driver, shouldn't the trial court have granted summary judgment and removed that issue from the trial?

STATEMENT OF THE CASE

With a green light Fedorchenko unexpectedly stopped at an intersection in a thru lane, and Hernandez safely stopped behind him, but Warmenhoven could not stop in time causing Hernandez' injury that ultimately required surgery.

To aid in understanding the dynamics of this collision Hernandez provides the following statement of the case.

20070321 PM 00
STATE OF TEXAS
COUNTY OF DALLAS

The intersection of 124th Street NE and Slater Avenue is controlled by stoplights. RP 10-14-08, pp. 12-13. 124th Street is a multi-lane major road running east and west through Kirkland and into Redmond. At the approach to Slater, the leftmost lane is a left turn only lane. RP 10-14-08, pp. 13-14. The other two lanes proceed straight through toward Redmond. RP 10-15-08, p. 133. An aerial view of the intersection is attached as Appendix A (essentially the same as the exhibit at trial).

Respondent Steven Hernandez traveled east bound in the left through lane. RP 10-15-08, p. 13. He was traveling behind Appellant Timofey Fedorchenko with one car between them RP 10-14-08, pp. 20-21. The light was green as they approached Slater. RP 10-15-08, p. 133. Wendy Warmenhoven was stopped in the right thru lane looking to move into the left lane to proceed, which she safely did. RP 10-16-08 pm, pp. 70-72.

Meanwhile, without warning, Fedorchenko stopped beneath the green light to turn left. RP 10-14-08, pp. 12-13. The car ahead of Hernandez had to stop and, with a quick hard-braking reaction, Hernandez was able to stop short without striking anyone. RP 10-15-08, p. 134. Unfortunately, Warmenhoven, now in that lane was

not so lucky. She collided with the rear of Hernandez' vehicle. RP 10-15-08, pp 134-135.

It turned out Fedorchenko realized too late he needed to make a left hand turn onto Slater. RP 10-14-08, p. 13. Instead of proceeding through the light and turning a block later, he negligently stopped in the thru lane, waiting to make an illegal left turn. RP 10-14-08, pp. 14 & 16. It also turns out that Fedorchenko's coworker was stopped at the front of the right thru lane, which created the impetus for Warmenhoven to move over to the left lane in the first place. RP 10-16-08 pm, p. 76.

Hernandez was far more susceptible to injury than average because he had a spinal fusion eight years before where the bone on one side had not fused and had only a fibrous connection on that side. RP 10-15-08, pp. 11 and 82. This condition is called a pseudoarthrosis or non-union. RP 10-15-08, p. 11. The problem is not "corrected" unless it is causing problems such as those after this collision. RP 10-15-08, p. 16-17 and 85. Hernandez eventually had a second surgery. RP 10-15-08, pp. 13 & 85. The results of the surgery would also be diagnostic. If the severe symptoms improved then it was because the spinal joint had become unstable and was the problem, but before surgery there was no way to be

sure the problems were not soft tissue and nerve related. RP 10-15-08, p 18.

ARGUMENT

A. The trial court did not abuse its discretion by excluding the defense doctor when after two special hearings the defendant still failed to provide any reasonable explanation for its failure to conduct the doctor's deposition or for its failure to comply with the court's last chance order to provide the witness far enough before trial.

A trial court's decision to sanction a party for discovery abuses is reviewed for abuse of discretion, regardless of whether it results from a violation of a court order. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993) and its progeny. "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Id* at 339. *Blair v. TA-Seattle East #176*, ___ Wn.App. ___, 210 P.3d 326, 328-29 (2009); *In re Estate of Foster*, 55 Wn.App. 545, 548, 779 P.2d 272 (1989).

Fedorchenko has never suggested monetary remedies could help plaintiff prepare for a medical witness on the eve of trial. The trial judge expressly considered a continuance as a remedy, and twice provided the defense oral argument not required under the rules. CP 90 and 901. The trial judge excluded the witness the week before trial without objection. CP 123.

As this Court has explained, “[s]anctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating, and educating a party or its attorney for engaging in discovery abuses.” *Johnson v. Jones*, 91 Wn.App. 127, 133, 955 P.2d 826 (1998). Exclusion of witness testimony is appropriate for (among other things) a violation of court orders without reasonable explanation. *Blair v. TA-Seattle East #176*, __ Wn.App. ___, 210 P.3d 326, 328-29 (2009); *In re Estate of Foster*, 55 Wn.App. 545, 548, 779 P.2d 272 (1989).

Both problems exist here. The defense doctor’s deposition was requested on August 8, 2008. CP 903-910. The defense made no attempt to produce him, and instead the defense sought a continuance. CP 854-899. The defense never tried to establish that Dr. Billington was not available. Instead the defendant falsely stated the doctor’s deposition had not been requested before September 3. CP 79. On September 3, the trial judge provided oral argument for the defense motion to continue, and ordered a last chance to produce the doctor within nine more days, even though that reduced Hernandez’ time to react to the testimony and try to find a treating doctor who could rebut the testimony only three weeks

before opening statement. CP 900-902. The defense did not comply.

In its motion for reconsideration of the continuance, defense offered a conclusory unsworn statement as an excuse that defense doctors are busy and it was “due to the doctor’s full schedule.” Appellants Opening Brief (hereafter “BA”), p. 16. Yet the defense actually provided no specific information about Dr. Billington’s availability. There was nothing stating when Dr. Billington was first contacted, when he was first asked to find a deposition date, what his conflicts were, if any, did he really have no time during the 35 days from the initial request to the last date the court allowed, or why the doctor could not have made time for a deposition during the nine days the trial court ordered. A violation of a court order without reasonable excuse is deemed willful. *Blair at 328-29 (2009)*; *Allied Financial Services, 72 Wn.App. 164, 864 P.2d 1 (1993)*; and *Gammon v. Clark Equip. Co., 38 Wn.App. 274, 686 P.2d 1102 (1984)*. With no reasonable excuse for the initial discovery failure and no reasonable excuse for the violation of the trial court’s order, the trial judge properly struck the witness.

The court’s only other option was the continuance, and it was expressly considered and denied. CP 901, no. 1. In this

instance that was not remotely fair or reasonable for plaintiff Hernandez. By then, it had been eight years since the collision. The lawsuit was 5-1/2 years old. CP 6. The case had been continued several times for both parties. *Eg.* CP 14. The last trial was stricken when the trial court first enforced a settlement with Fedorchenko then on reconsideration found there was no enforceable settlement. CP _____ (KCSC Sub No. 99; CP requested). During the following request for discretionary review, the trial judge (who was retiring at the end of that year) and the parties worked out the last continuance to October 2008.¹ CP _____ (KCSC Sub No. 99; CP requested).

Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 687-88, 132 P.3d 115 (2006), analyzed any requirement a court must explicitly consider lesser sanctions, as discussed in *Brunet v. Spokane Ambulance*, 131 Wn.2d 484, 933 p. 23 1036 (1977), especially when harsher remedies are considered. The trial court made such consideration here, but another difference is notable. In *Brunet*, the party seeking sanctions had themselves contributed to the other side's discovery problems. Fedorchenko complains that the treating

¹ The detailed saga of the settlement/non-settlement is found at Division I, in the Motion for Discretionary Review, Court of Appeals No. 60553-4-I.

surgeon Dr. Massey did not stay uninvolved forever, perhaps as if this was an equivalent to a plaintiff's discovery failing. BA 9. Dr. Massey's office had cut off communication with Hernandez's counsel, but after the last continuance direct communication was restored with Dr. Massey. CP 281. In fact, Hernandez fully complied with discovery obligations. Dr. Massey was produced for a second deposition in July 2008. CP 188. Hernandez played no role when the defense later did not produce its medical witness during August and mid-September.

Fedorchenko erroneously argues there was an abuse of discretion because the witness was timely listed, and the judge had no reasonable basis to exclude the doctor or to order the doctor's deposition on "such short notice." BA at pp. 16 and 18. The exclusion of the witness arose from not producing the defense doctor for 35 days - not the eight days Fedorchenko claims. It was the unexcused failure to make that discovery from August 8, to September 3, and then the unexcused failure to comply with the Court's September 3, order to have the deposition by September 12 - not because of any failure to disclose the witness. CP 901-902.

The trial court excluded the witness pursuant to a motion in limine the week before trial. Fedorchenko did not contest the

exclusion at that point, also raising clear questions of waiver. RP 10-9-08, pp. 13-14. There simply was no abuse of discretion.

B. Fedorchenko admitted at deposition that he suddenly stopped under the green light in the thru-only lane to wait to make an illegal left turn. The trial judge was correct to enter summary judgment.

Fedorchenko and the cars behind him were traveling in the left thru lane approaching a green light. RP 10-14-08, p. 13. Fedorchenko realized he wanted to turn left onto Slater only after it was too late to get into the dedicated left turn lane. RP 10-14-08, p. 14. Instead of continuing through the green light and turning at the next intersection, Mr. Fedorchenko admitted he suddenly stopped under the green light in the thru lane to wait and make what was an illegal left turn, *Id.* Reasonable minds could not conclude this was anything other than negligence.

Negligence is normally a question of fact but where reasonable minds cannot differ, summary judgment is appropriate. This is just as true where the jury will still consider questions of other party's negligence.

Even if we assume that the evidence considered by the trial court at summary judgment creates an issue of fact over whether Clements was negligent, the trial court properly entered summary judgment on the issue of Gaumer's negligence. ...It is well settled that contributory negligence does not bar recovery, it only diminishes proportionally the

amount of damages awarded. RCW 4.22.005. Therefore, while a plaintiff's negligence may reduce the amount of damages, perhaps even to nothing in an appropriate case, it does not preclude finding the defendant negligent. The trial court properly entered summary judgment on the issue of defendants' negligence.

Clements v. Blue Cross of Washington & Alaska, Inc., 37 Wn.App. 544, 547, 682 P.2d 942, 945 (1984).

Nor is the fact that no one hit Mr. Fedorchenko of any import. It was obviously foreseeable that anyone on or near the roadway in that vicinity could have been injured by such conduct, whether by smacking directly into Mr. Fedorchenko, or being hit from behind while stopping in that unexpected place. The trial judge had no choice but to grant summary judgment. *Wells v. City of Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970). Few foreseeability cases involve car accidents as the matter is so clear.

C. There was no judicial comment on causation in the Special Verdict Form because the language actually referred to negligence. Nor could it have possibly caused confusion – the jury did decide causation.

The language complained of is in Question No. 1 of the Special Verdict Form. See Appendix C. The language simply explains why the answer to Question No. 1 was already filled in as “YES”. Question No. 1 was about Fedorchenko’s negligence (“Was defendant Timofey Fedorchenko negligent?”). That statement was

the Trial Court's explanation. Stating that Fedorchenko "is negligent in this collision" does not express the judge's view about causation of the damages or anything else. It exists with and the comment expressly states, it is about negligence. In no way does that suggest the jury will not and should not determine whether either Mr. Fedorchenko or Ms. Warmenhoven was a cause or was the cause.

The test Fedorchenko did not meet to show an unconstitutional comment has not changed over the years:

To constitute a comment on the evidence, however, it must appear that the attitude of the court toward the merits of the cause must be reasonably inferable from the nature or manner of the questions asked and things said.

Dennis v. McArthur, 22 Wn.2d 33, 38, 158 P.2d 644 (1945)

Appellant alleges the explanation compromised causation.

But taken together the instructions provided no confusion about what the explanation referred to and that the jury must decide causation for both Fedorchenko and Warmenhoven's conduct. *Stevens v. Gordon*, 118 Wn.App. 43, 53, 74 P.3d 653 (2003), citing *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000).

The court's full instructions are in Appendix B. Instruction No. 1 told the jury the court had not meant to comment on any evidence and that the jury should disregard any apparent comment. Instruction No. 3 separately explained that the issue of negligence had already been established and that the answer was already filled in on the special verdict form. There was no statement regarding causation. Question No. 2 in the Special Verdict Form was a separate and distinct question: Was Fedorchenko's negligence "...a proximate cause of damages to the plaintiffs?" The jury did answer that question, and answered "YES". Question No. 4: "Were the acts of Ms. Warmenhoven you found negligent a proximate cause of damages to plaintiff?" The jury obviously knew it was to determine causation because it answered "YES" there also.

Nor did defense counsel act as if the judge had done anything untoward. Appellant has pointed to no mention to the trial judge about this supposed comment on the evidence, until weeks later in a motion for new trial. CP 785. Such delay is because the trial judge made no unconstitutional comment on the evidence.

D. The court's instructions allowed Fedorchenko to argue all supposed negligence of Warmenhoven, and the jury found her substantially at fault. The evidence did not support a

separate lane change instruction. The trial judge has substantial discretion how to phrase the instructions.

Fedorchenko and Hernandez passed Warmenhoven by and left the lane open. Warmenhoven moved it into the left thru lane before coming upon Hernandez. RP 10-16-08 pm, p.72. According to the accident reconstructionist, Warmenhoven was actually in the new lane long before any collision. RP 10-14-08, pp. 52-53. Fedorchenko himself advocated that Warmenhoven was a following car under the law in his attempt to defeat the summary judgment motion regarding her negligence. CP 51-77 at 53. Her sin, if there was evidence of one, was not perceiving and reacting quickly enough to the unexpected stop in her new lane, not the lane changing itself

Regardless, under the court's instructions Fedorchenko was able to argue that Warmenhoven was negligent in her lookout, for changing lanes, or any other way that the jury would decide violated ordinary care.

Where Wendy Warmenhoven changed lanes and was confronted with unusual or unexpected conditions there is no presumption of negligence and it is for you to determine whether in the exercise ordinary care she should have anticipated Timothy Fedorchenko's conduct or in some other way failed to exercise ordinary care.

Court's Instruction No. 6, Appendix B. (*Emphasis added*).

From this the jury did find Warmenhoven substantially at fault in the Special Verdict Form. Appendix C. This disposes of any claim of failure to give an instruction since instructions need only allow the party to argue their supported theories. *Stevens v. Gordon*, 118 Wn.App. 43, 53, 74 P.3d 653 (2003), citing *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000).

So what is the claimed error? Fedorchenko appears to say that even with proper instructions, without the mention of the word “statute” a new trial must be granted because with that “better” word a jury might have found even greater negligence for Warmenhoven. Fedorchenko's brief is silent for any support for such word “ranking.” No case or reference offered support that putting “statute” in Instruction No. 6 or elsewhere would have brought a larger negligence finding or that stronger words require a new trial. In reality when statutes are mentioned, juries are also informed that violations of a statute are only evidence of negligence, just like other negligence. WPI 60.03 (“The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence”). How that must create a greater impact in a special verdict answer is not explained.

A doctrine that different words that express similar ideas require a new trial because the party or even appellate judges believe some words might influence some jurors in assessing the percentage of negligence is completely unworkable and unsupported in Washington law. The trial judge “has considerable discretion in deciding how the instructions will be worded.” *Gammon v. Clark Equip. Co.*, 104 Wm.2d 613, 617, 707 P.2d 685 (1985). That is really the end of this issue. Washington simply does not allow “weighting” of words in instructions to overturn verdicts.

E. The trial judge was well within his discretion to exclude the extent of physical damage to cars or the claimed force of impact where that evidence affected no liability question and no expert would tie them to the injuries.

The trial court carefully considered whether Warmenhoven’s statement that there was only a “bump” and the like should be admitted. CP 117-121. The problem was not that it was lay opinion as attacked in Fedorchenko’s brief; the problem was the lack of expert testimony to connect such opinion to the question of injury and the potential to mislead or cause prejudice. Liability or who-hit-who-first was not an issue in this case. Further, there was none of the usual expert engineering or biomechanical testimony to provide the foundation to connect external damage or force of impact to the

forces exerted on occupants' bodies or what force is needed for injury. *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn.App. 464, 467, 921 P.2d 1098, 1100 (1996), dealt with expert qualifications to connect impact with injury. The Court overturned summary judgment only because plaintiff had an expert declaration regarding forces inside the vehicle.

Nor did Hernandez have the usual anatomical resistance threshold for injury. Hernandez had no disc and only a fibrous union on one side of his spine - which made him more vulnerable than most spines or even a fully fused spine. RP 10-15-08, pp. 11 and 82. With no expert to provide any link between external impact or speed and the forces inside needed for this man's injury, the potential for misplaced speculation and prejudice was obvious.

The court, however, still reserved ruling and asked for specific briefing from both sides. CP 122-126 at 123. There was ample law that lay observations are admitted where they bear on matters that affect liability. Fedorchenko found that, but provided no law that such evidence is directly admissible without more to affect injury damages. CP 153-155. There simply was no case law requiring such admission of the evidence with such a speculative connection between a bodily injury.

Fedorchenko now cites to *Fugere v. Pierce*, 5 Wn.App. 592, 490 P.2d 132 (1971). That case involved the almost simultaneous collision with plaintiff's car by two different cars. The issue was whether the ruptured liver that came from striking the steering wheel was caused by one or the other impacts or both and thus whether a segregation of damages instruction should have been given. Moreover, there was no objection to lay testimony about no front end damage to one car. This was because the testimony was not offered to show that the collision could not produce injury. To the contrary, it was offered so an expert doctor could opine about the motion of vehicles to support an opinion which vehicle threw plaintiff into the steering wheel. *Fugere* does not remotely support that over objection, vehicle damage had to be admitted in this case on the far different issue with no experts to explain its meaning.

Fedorchenko also cites *Russell v. Quigg*, 2 Wn.App. 294, 467 P.2d 618, *rev. denied* 78 Wn.2d 993 (1970). The case does not stand for any rule that such evidence is admitted to suggest no injury or small injury. In that case, the issue was the speed of defendant's vehicle. The evidence of flying debris was not objected to. It was a small part of the evidence the court used to determine that a sufficient question of speed existed under the circumstances

to instruct that the normally favored vehicle loses its status under Oregon law if driving too fast. The other evidence was much more significant:

After he had completed his turn and shifted from low into high gear he proceeded east for a distance which the investigating officer determined to be 111 feet, when his truck was struck from the rear by the Cochran automobile.

The force of the impact was such that the dual rear wheels of the Armstrong truck were sheared off and came to rest approximately 60 feet south of Highway 30. The Armstrong truck spun around 3 times. The first time both doors flew open; the second time Frank Russell was thrown out of the truck; and the third time Armstrong was thrown out, striking the guardrail at the S-curve at a point approximately 200 feet east of the intersection. The truck came to rest on Highway 30, facing southwest near the guardrail where Armstrong had been thrown from the truck. The Oldsmobile was completely demolished.

After the impact the Oldsmobile traveled in a semi-circle to the north for a distance of 195 feet. It made a gouge in the surface of the highway and left a furrow approximately 6 inches deep over the entire 195 feet. It came to rest after striking a parked car. Cochran, the driver of the Oldsmobile, was killed instantly. Russell, the passenger in the Armstrong truck, died as a result of his injuries.

Russell v. Quigg supra, at 296-297. This case too is no assistance.

Fedorchenko lastly cited to *Gestson v. Scott*, 116 Wn.App. 616, 67 P.3d 496 (2003). There the jury awarded the cost of an ER visit but no general damages and a new trial was ordered. Once

again admission of the lay evidence of impact was not an issue on appeal. The opinion dealt with the new trial and whether the verdict was within the evidence actually before the jury. The opinion did not address whether the defense evidence should have been in the trial over objection since there was no objection. In fact, plaintiff introduced and used the evidence for her own expert doctors to opine her neck injury was from the collision and not related to other preexisting arm and hand problem. Plaintiff's expert supplied a link for the jury, agreeing that greater impact more often lead to injury. Once again the case does not suggest that without proper expert connection the lay evidence of car damage or low speed "bump" must be allowed to infer no injury.

Other jurisdictions also agree that without the correct expert connection there should be no discussion of the impact or speed. See, for example, *Davis v. Maute*, ___ Del. Super. ___, 770 A.2d 36 (2001), and *Dicosola v. Bowman*, 342 Ill.App. 3d 530, 794 N.E.2d 875 (2003).

The trial judge was well within his discretion to prohibit this evidence that called for speculation and was potentially prejudicial. Nor has Fedorchenko made any showing that since plaintiff had a vulnerable non-union (for which Fedorchenko himself attempted to

make the medical cause of all plaintiff's problems), such evidence would have made the slightest difference in the outcome.

F. The trial court should have granted summary judgment regarding third-party fault because there was no evidence of specific negligence as required by case law.

Plaintiff's summary judgment called into question the sufficiency of Fedorchenko's evidence to support any negligence finding against Warmenhoven. CP 39-50. The defense had the burden of proof and had to produce substantial evidence that Warmenhoven was negligent or the issue of third party fault had to be stricken. It was not enough to raise facts that with others not provided could have shown Warmenhoven negligent. The facts had to be sufficient to support a finding or verdict that she was negligent. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989).

The defense opposition was that Warmenhoven was a following car and she hit Hernandez, so there was a presumption of negligence. RP 53-54. That is often true in following car cases. The collision implies the driver was either following too closely, going too fast, or not keeping a proper lookout ahead, and any specific negligence does not need to be proven. But, the

presumption does not apply where there is a sudden stop at a place where none is expected.

When the forward car's action is not reasonably anticipated, such as a sudden stop at a place where none is to be anticipated, then the trier of fact must find an affirmative act of negligence by the following driver before he can be called negligent even though he collided with the forward vehicle.

Vanwagenen v. Roy, 21 Wn.App. 581, 587 P.2d 173 (1987)

(emphasis added).

The court should not have relied on the presumption to deny summary judgment because of the unexpected stop in a thru lane under a green light. Nor was specific negligence supported in the opposition materials at CP 56-57. These cars passed her by in the thru lane and because the light was green she had a right to presume they would continue on. *Liesey v. Wheeler*, 60 Wn.2d 209, 373 P.2d 130 (1962). Warmenhoven was joining traffic flowing through a green light when she started moving. She did not drive right into Hernandez. He was coming to a stop a good distance down from where she started. RP 10-14-08, pp. 41 and 52-53. She was entitled to a reasonable reaction time to perceive and react to the unexpected stop in her new lane at such an unusual place. *Vanwagenen, supra*, at 587. How long is a reasonable reaction time for this setting? Fedorchenko's summary judgment material

did not say. How far behind Hernandez was Warmenhoven as he first hit his brakes while she was naturally accelerating before she could perceive and react? The summary judgment opposition did not say. She may have been trapped by this sudden and unexpected stop, or she may have been negligent in not seeing this unfold soon enough, but, the only way to determine on this record was to speculate. Had Hernandez still been suing Warmenhoven and produced the same record at summary judgment, is there any doubt the trial court would have dismissed his claim? With no expert and no specifics of distance and speed there would have been no choice. The same should have been true when Fedorchenko was acting as plaintiff against Warmenhoven. He did not provide sufficient facts.

The record at summary judgment required speculation to support any negligence by Warmenhoven. The motion for summary judgment should have been granted. Thereafter, Hernandez consistently urged the trial judge to exclude Warmenhoven's negligence. CP 934-937. The trial court should have entered judgment for the full amount of the verdict. The case should be remanded for entry of judgment for \$550,000 without reduction for Warmenhoven's negligence.

CONCLUSION

This Court should affirm the trial judge's discretionary rulings. After more than nine years since the collision, it is time for this matter to be concluded. This Court should also determine that summary judgment regarding Warmenhoven's negligence should have been granted and remand for entry of judgment for Hernandez for the full verdict of \$550,000.

RESPECTFULLY SUBMITTED, this 30th day of August, 2009.



Richard B. Kilpatrick, WSBA 7058
1750 112th Avenue NE #D-155
Bellevue, WA 98004
(425) 453-8161
kilpatrick.d@comcast.net
Co-Counsel for Respondents/Cross-Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that: I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On the date below, I caused to be served via e-mail and U.S. First Class Mail a copy of the attached document to the following:

Mary Fleck, Esq.
4409 California AVE SW #100
Seattle, WA 98116
Co-Counsel for Respondents/Cross-Appellants

James Cushing, Esq.
535 Dock Street, Suite 108
Tacoma, WA 98402
Attorneys for Appellants/Cross-Respondents

Russell C. Love, Esq.
Thorsrud Cane & Paulich
1325 4th AVE #1300
Seattle, WA 98101
Attorneys for Appellants/Cross-Respondents

I certify that the preceding statements are true and correct under the laws of the State of Washington and under penalty of perjury.

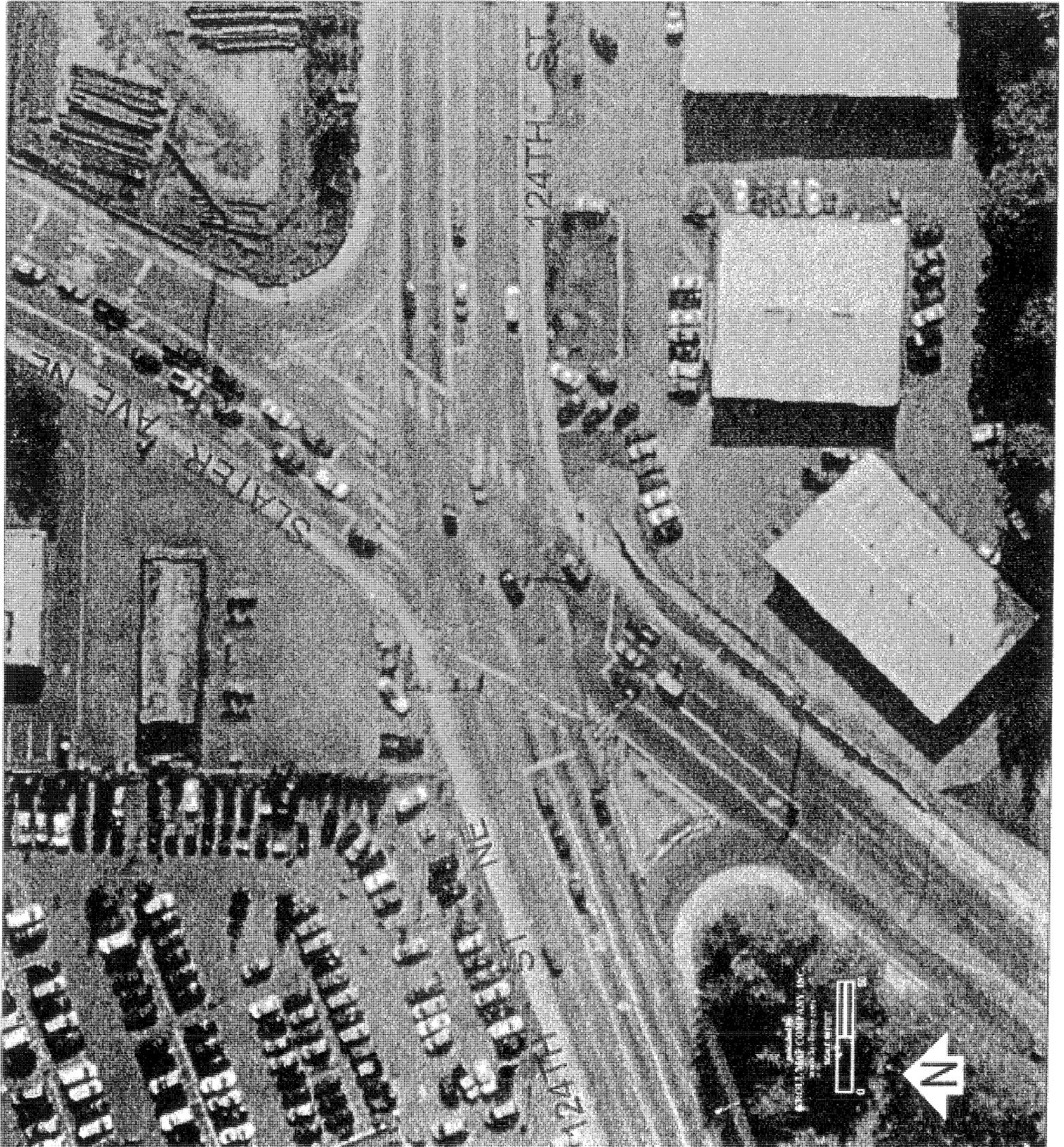
DATED this 30th day of August, 2009, at Bellevue,
Washington.


Richard B. Kilpatrick, Legal Assistant

2009 AUG 31 PM 12:00
STATE OF WASHINGTON
CLERK OF SUPERIOR COURT

E
→

N
↓



APPENDIX B

FILED
KING COUNTY, WASHINGTON

OCT 20 2008

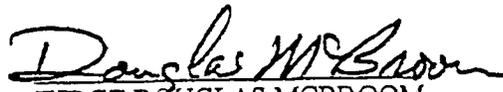
SUPERIOR COURT CLERK
GARY FOWLER
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STEVEN HERNANDEZ, et al.,)	
)	
Plaintiffs,)	03-2-24359-1 SEA
v.)	
)	
TIMOFEY FEDORCHENKO,)	
)	
Defendant.)	

Court's Instructions to the Jury

Dated: 20 day of October, 2008.


JUDGE DOUGLAS MCBROOM

Court's Instruction No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but not all will go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

Court's Instruction No. 2

The plaintiff has the burden of proving what damages were proximately caused by the defendant's negligence.

In addition, the defendant claims as an affirmative defense that the driver coming from the other lane was negligent and was the sole cause of the collision. The defendant has the burden of proving this defense.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

The negligence of defendant Timofey Fedorchenko has been established. Accordingly, the answer to Question 1 in the Special Verdict Form furnished to you, is "yes," and that answer has been filled in for you on the verdict form.

The plaintiff therefore has the burden of proving each of the following propositions:

First, that Steven Hernandez was injured; and,

Second that the negligence of the defendant was a proximate cause of damages to Steven Hernandez or to Cleona Hernandez.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

The defendant has the burden of proving each of the following propositions:

First, that Wendy Warmenhoven was negligent; and

Second, that Wendy Warmenhoven's negligence was a proximate cause of the damages to the plaintiff.

If you find that Wendy Warmenhoven was also negligent, you will determine what percentage of the total negligence is attributable to Timofey Fedorchenko and Wendy Warmenhoven that proximately caused the damages to the plaintiff. The court will provide you with a Special Verdict Form for this purpose. Your answers to the questions in the Special Verdict Form will furnish the basis by which the court will apportion damages, if any.

Court's Instruction No. 4

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

Court's Instruction No. 5

Every person has a duty to see what would be seen by a person exercising ordinary care.

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care including a reasonable reaction time, should know to the contrary.

Court's Instruction No. 6

Where Wendy Waimenhoven changed lanes and was confronted with unusual or unexpected conditions, there is no presumption of negligence and it is for you to determine whether in the exercise of ordinary care she should have anticipated Timofey Fedorchenko's conduct or in some other way failed to exercise ordinary care.

A cause of an event or injury is a proximate cause if it is related to the event or injury in two ways: (1) the cause produced the event or injury in a direct sequence and (2) the event or injury would not have happened in the absence of the cause.

There may be more than one proximate cause of an event or injury.

If you find that Timofey Fedorchenko was a proximate cause of injury or damage to the plaintiff, it is not a defense that the act of Wendy Warmenhoven who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was the act of Wendy Warmenhoven then your verdict should be for the defendant.

Court's Instruction No. 8

You have heard evidence which raises the issue of insurance generally. You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. For example, many health insurers or insurance programs seek to have their payments repaid from any jury award. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance, or some other form of coverage.

Court's Instruction No. 9

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

According to mortality tables, the average expectancy of life of a Male aged 42 years is 35.15 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

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

(1) before this occurrence Steven Hernandez had any bodily condition (including emotional makeup) that was not causing pain or disability; and

(2) because of this occurrence the pre-existing condition was lighted up or made active,

then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

On the other hand if your verdict is for the plaintiffs and you find that:

(1) before this occurrence Steven Hernandez had any pre-existing bodily condition (including emotional makeup) that was causing pain or disability, and

(2) because of this occurrence the condition or the pain or the disability was aggravated,

then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence;

However, you should not consider any disability or condition that may have existed prior to this occurrence, or from which Steven Hernandez may now be suffering, that was not either caused or contributed to by this occurrence.

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If you award damages, you must determine the damages for Cleona Hernandez and Steven Hernandez separately as if it were a separate lawsuit. The damage instructions apply to both plaintiffs unless a specific instruction states that it applies only to a specific plaintiff.

If your verdict is for the plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate each plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiffs you should consider the following past damages elements up to the present time:

The \$64,482.67 of necessary medical care, treatment, and services received to the present time;

The \$2,654.30 of earnings and salary lost to the present time;

The nature and extent of the injuries;

The disability experienced;

The loss of enjoyment of life experienced;

The physical and emotional pain experienced;

The inconvenience, anguish, suffering or aggravation experienced;

Cleona Hernandez' loss of society and companionship and loss of consortium.

If you find for the plaintiffs you should consider the following future damages elements to the extent that with reasonable probability any are to be experienced in the future:

The reasonable value of necessary medical care, treatment, and services;

The nature and extent of the injuries;

The disability;

The loss of enjoyment of life;

The physical and emotional pain;

The inconvenience, anguish, suffering or aggravation;

Cleona Hernandez' loss of society and companionship and loss of consortium.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as any ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

Plaintiffs,

v.

TIMOFEY FEDORCHENKO
Defendants.

No.: 03-2-24359-1SEA

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was defendant Timofey Fedorchenko negligent? YES

The Court has determined that Timofey Fedorchenko was negligent in this collision so the "Yes" answer has been filled in. You should proceed to QUESTION 2 and answer it.

QUESTION 2: Were the acts of Timofey Fedorchenko a proximate cause of damages to the plaintiffs?

ANSWER: YES (Yes or No)

(INSTRUCTION: If you answered "no" to Question 2 answer no more questions and sign this verdict form. If you answered "yes" to QUESTION 2, answer QUESTION 3)

QUESTION 3: Was Wendy Warmenhoven negligent?

ANSWER: YES (Yes or No)

(INSTRUCTION: If you answered "no" to Question 3, do not answer QUESTION 4 but move to QUESTION 5 and answer it. If you answered "yes" to QUESTION 3, answer QUESTION 4)

QUESTION 4: Were the acts of Ms. Warmenhoven you found negligent in Question 3 a proximate cause of damages to the plaintiffs?

ANSWER: YES (Yes or No)

(INSTRUCTION: Whether you answered "yes" or "no" to Question 4, move to QUESTION 5 and answer it.)

QUESTION 5: What do you find to be the plaintiffs' amount of damages?

ANSWER: Steven Hernandez \$ 500,000.00

Cleona Hernandez \$ 50,000.00

(INSTRUCTION: If you answered Question 5 with any amount of money, move to Question 6. If you found no damages in Question 5, sign this verdict form.)

QUESTION 6: If you did not find Wendy Warmenhoven negligent by answering "yes" in QUESTION 3 or did not find her acts were a proximate cause in QUESTION 4, do not answer this QUESTION 6 and sign this Special Verdict Form.

If you did find Wendy Warmenhoven negligent and also found that her conduct was a proximate cause of plaintiffs' damages in QUESTIONS 3 and 4, then assume that 100% represents the total combined negligence for she and Timofey Fedorchenko that proximately caused the plaintiff's damages. What part of this 100% is attributable to Timofey Fedorchenko and what part, if any, of this 100% is attributable to Ms. Warmenhoven, whose negligence was found by you in Questions 3 and 4 to have been a proximate cause of the damage to the plaintiff? Your total must equal 100%.

ANSWER:

To Timofey Fedorchenko: 15%

To Wendy Warmenhoven 25%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

DATE: 10/21/08

[Signature]
Presiding Juror

No. 62770-8-1

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

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

Respondents/Cross-Appellants.

vs.

TIMOFEY FEDORCHENKO and JANE DOE FEDORCHENKO,
husband and wife, and the marital community thereof,

Appellants/Cross-Respondents.

**ERRATA RE BRIEF OF RESPONDENTS
& CROSS-APPELLANTS HERNANDEZ**

Richard B. Kilpatrick, WSBA 7058
1750 112th Avenue NE #D-155
Bellevue, WA 98004
(425) 453-8161
kilpatrick.d@comcast.net
*Co-Counsel for Respondents/Cross-
Appellants*

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 31 AM 11:59

Attached is the correct final Brief of Respondent/Cross-Appellants Hernandez. The brief previously sent for filing by mail service was not the final version. We apologize for any inconvenience to staff, the Court, or opposing counsel.

For the benefit of counsel, the things different about the final version are that *Wells v. City of Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970) appears at the end of section B and several changes existed for improved syntax, clarity, and grammar.

RESPECTFULLY SUBMITTED, this 31ST day of August, 2009.



Richard B. Kilpatrick, WSBA 7058
1750 112th Avenue NE #D-155
Bellevue, WA 98004
(425) 453-8161
kilpatrick.d@comcast.net
Co-Counsel for Respondents/Cross-Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that: I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On the date below, I caused to be served via e-mail and U.S. First Class Mail a copy of the attached document to each of the following:

Mary Fleck, Esq.
4409 California AVE SW #100
Seattle, WA 98116
Co-Counsel for Respondents/Cross-Appellants

James Cushing, Esq.
535 Dock Street, Suite 108
Tacoma, WA 98402
Attorneys for Appellants/Cross-Respondents

Russell C. Love, Esq.
Thorsrud Cane & Paulich
1325 4th AVE #1300
Seattle, WA 98101
Attorneys for Appellants/Cross-Respondents

The original of this document and attached Brief of Respondents/Cross Appellants Hernandez, was delivered to the Court of Appeals, Division I, via ABC Legal Messenger.

I certify that the preceding statements are true and correct under the laws of the State of Washington and under penalty of perjury.

DATED this 31ST day of August, 2009, at Bellevue, Washington.



Charolette Mace, Legal Assistant