IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REBECCA LAWRENCE, Respondent, MARK LAWRENCE, Plaintiff, v. TRUGREEN LANDCARE, LLC, a Washington business; and CARMELO BALTAZAR ALEJO and JANE DOE BALTAZAR ALEJO, as husband and wife and the marital community composed thereof, Appellants.	)	NO. 67245-2-I DIVISION ONE UNPUBLISHED OPINION FILED: January 7, 2013

Leach, C.J. — Rebecca Lawrence sustained serious neck and back injuries from a rear-end automobile collision. TruGreen[1] admitted liability for injuries proximately caused by the collision, and this case proceeded to trial on causation and damage issues only. A jury awarded Lawrence $1,383,726 in damages. TruGreen appeals, arguing that the admission of improper evidence and improper closing argument by Lawrence's counsel, combined with improper jury instructions, caused the jury to make a duplicative and inflated award.

[1] For convenience, we use "TruGreen" to refer to all of the appellants.

The trial court correctly instructed the jury. Trugreen failed to preserve for appellate review the trial court's alleged evidentiary errors and has not provided this court with a verbatim record of the challenged closing argument. We affirm.

FACTS

On June 29, 2007, a Ford F-250 pickup truck owned by TruGreen and driven by its employee, Carmelo Baltazar Alejo, collided with the rear end of Rebecca Lawrence's car. Lawrence complained of neck and back pain at the scene. She went to the emergency room that day for tests and followed up with her family physician several days later. Her pain did not recede in the weeks after the accident. Over the next several years, a wide variety of medical professionals treated Lawrence. After conservative treatments failed to improve her condition, Lawrence underwent two surgical procedures, including the implant of a spinal cord stimulator in her back.

In 2009, Lawrence sued TruGreen and Alejo. Before trial, TruGreen admitted fault but did "not concede that plaintiffs' injuries, in part or in whole, were caused by the occurrence."[2] The case went to trial on the issues of causation and damages. While TruGreen acknowledged that the collision could have caused Lawrence's continuing neck pain, TruGreen maintained that it did not cause Lawrence's lower back pain, which led to the spinal surgeries.

[2] Mr. Lawrence was originally a plaintiff but was dismissed upon a stipulation of the parties.

Instead, TruGreen argued that Lawrence suffered from a preexisting mental health condition that led to a somatoform disorder, where she experienced pain with no apparent medical diagnosis. A psychologist who evaluated Lawrence before her second surgical procedure disputed TruGreen's characterization of Lawrence's condition. He provided his professional opinion that she suffered from a pain disorder—in which a legitimate physical problem brings on increased stresses that affect a person's perception of and ability to deal with pain.

The jury awarded Lawrence $1,383,726 in damages, allocated as follows: $253,655 in past economic damages, $1,070,071 in future economic damages, $50,000 in past noneconomic damages, and $10,000 in future noneconomic damages. Claiming that the verdict is excessive, TruGreen appeals.

ANALYSIS

TruGreen challenges several of the trial court's jury instructions, alleges that the trial court improperly admitted some evidence, and claims that the trial court failed to properly control closing argument. Because the challenged instructions accurately stated the applicable Washington law, Trugreen failed to preserve the asserted evidentiary issues for review, and Trugreen failed to provide a record adequate to permit review of closing argument, we affirm.

We review de novo the adequacy of challenged jury instructions.[3] "Jury

[3] State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law."[4] Where jury instructions correctly state the applicable law, "the court's decision to give the instruction will not be disturbed absent an abuse of discretion."[5]

First, TruGreen challenges the trial court's instruction on the measure of damages. It claims the court erred by "instructing the jury to consider the 'nature and extent' of injuries as a separate line item of damages on the verdict form as directed by the trial court's Jury Instruction No. 10." TruGreen claims the "nature and extent" language instructed the jury to award Lawrence "a recovery for the injury itself in addition to recovering for all of the elements of damages." We disagree.

Instruction 10 states,

> It is the duty of the court to instruct you as to the measure of damages.
>
> You must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the motor vehicle collision of June 29, 2007.
>
> You should consider the reasonable value of necessary medical care, treatment, and services received to the present time.
>
> In addition you should consider the reasonable value of necessary medical care, treatment, and services with reasonable

[4] Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

[5] Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).

> probability to be required in the future.
>
> In addition you should consider the following noneconomic damages elements:
>
> (1) The nature and extent of the injuries; and
>
> (2) The disability experienced and with reasonable probability to be experienced in the future; and
>
> (3) The loss of enjoyment of life experienced, and with reasonable probability to be experienced in the future.
>
> (4) The pain and suffering experienced, and with reasonable probability to be experienced, in the future.
>
> The burden of proving damages rests upon the plaintiff. 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.

(Emphasis added.) The challenged language is taken verbatim from Washington Pattern Instruction 30.04. The note on its use states, "For personal injury actions, insert this phrase in the appropriate damages instruction (WPI 30.01.01, 30.02.01, or 30.03.01) if the evidence justifies its use."[6]

The jury answered the special verdict form as follows:

> We the jury, answer the questions submitted by the Court as follows:
>
> QUESTION 1: Was the defendant's negligence a proximate cause of injury and/or damage to the plaintiff?
>
> ANSWER: yes (Write "yes" or "No")

[6] 6 Washington Practice: Washington Pattern Jury Instructions: Civil 30.04, at 294 (6th ed. 2012) (WPI).

(INSTRUCTION: If you answered "no" to Question [1], please sign this verdict form. If you answered "yes" to question 1 answer Question 2.)

QUESTION 2: What do you find to be the plaintiff's amount of damages?

(a) Past Economic Damages	$253,655.35
(b) Future Economic Damages	$1,070,071.00
(c) Past Non Economic Damages	$50,000.00
(d) Future Non Economic Damages	$10,000.00

TruGreen argues that jury instruction 10 and the special verdict form allowed the jury to double count the nature and extent of Lawrence's injuries as an element of damages, leading to an unjustifiably large and duplicative damage award. Specifically, TruGreen contends that the "nature and extent of the injuries" is not an element of damage separate and apart from the other elements described in instruction 10.

TruGreen relies primarily on Powers v. Illinois Central Gulf Railroad Co.,[7] in which the Illinois Supreme Court found similar, but different instructions to be improper. The differences in the instructions distinguish the cases. In Powers, the measure of damages instruction stated,

> "If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted, in whole or in part, from

[7] 91 Ill. 2d 375, 382, 438 N.E.2d 152, 63 Ill. Dec. 414 (1982).

the negligence of the defendant:

The nature, extent and duration of the injury.

The disability resulting from the injury.

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.

The value of earnings lost and the present cash value of earnings reasonably certain to be lost in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine."[8]

The Powers jury was provided the following verdict form:

"We, the Jury, find for the plaintiff and against the defendant. We assess the damages as follows:

Nature, extent and duration of the injury	$----------
Disability resulting from the Injury	$----------
Pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injury	$----------
The value of earnings lost and the present cash value of earnings reasonably certain to be lost in the future	$----------"[9]

The Powers jury awarded the plaintiff $50,000 for each of the first three

[8] Powers, 91 Ill. 2d at 377 (emphasis added).
[9] Powers, 91 Ill. 2d at 378.

line items and $150,000 for the fourth.[10] The Illinois Supreme Court reversed the award of $50,000 for the nature, extent, and duration of the injury because it was duplicative and otherwise affirmed the judgment on the jury's verdict. The court drew a distinction between instructions telling a jury to consider the nature, extent, and duration of the plaintiff's injuries in reaching a verdict and those instructing the jury to separately award for the nature, extent, and duration of the injury.[11] It concluded that the trial court erred because the verdict form provided a separate award for the nature, extent, and duration of injury, observing,

> The verdict form then told the jury in effect to enter a separate amount for each element of damage. . . . In these circumstances one cannot say that the error was not prejudicial to the defendant.
>
> Except for the listing of nature, extent and duration of the injury on the verdict form, as an element for compensation, we do not consider that the trial court erred in submitting the itemized verdict form to the jury. [12]

Here, unlike Powers, the court did not instruct the jury to find the "nature and extent" of Lawrence's injuries as an itemized line item of damages on the verdict form. Instruction 10 clearly states that the jury should consider the nature and extent of injuries as one of the multiple elements of any noneconomic damages award, and the special verdict form provides only "line items" for past economic damages, future economic damages, past noneconomic damages,

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[10] Powers, 91 Ill. 2d at 378.
[11] Powers, 91 Ill. 2d at 382-83.
[12] Powers, 91 Ill. 2d at 386.

and future noneconomic damages. This comports with Washington law, and we find no abuse of discretion in the trial court's decision to give it. We also note that the jury awarded total noneconomic damages of $60,000, less than 5 percent of its total award of $1,383,726. This strongly demonstrates that the challenged language in instruction 10 did not produce a duplicative verdict.

Next, TruGreen challenges the trial court's instruction about a preexisting condition and its failure to give the instruction requested. Trugreen claims that this alleged error caused the jury to be "instructed to award Lawrence *all* injuries and damages resulting from the automobile accident, even if those injuries were *greater* than those which would have been suffered by a normal person under the same circumstances." The trial court did not err in instructing the jury about a preexisting condition.

The trial court addressed Lawrence's preexisting condition with instruction 8:

> If your verdict is for the plaintiff, and if you find that:
>
> (1) before this occurrence the plaintiff had a 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 been 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.

This instruction was modeled on WPI 30.18.01. Before trial, Trugreen proposed its own instruction modeled on this same pattern instruction. After the presentation of evidence, Trugreen requested different instructions based upon WPI 30.17, Aggravation of Pre-Existing Condition, and WPI 30.18, Previous Infirm Condition.

The Washington Pattern Jury Instructions contain three instructions that deal with preexisting conditions. WPI 30.17 applies when a preexisting condition was causing pain or disability.[13] WPI 30.18 applies when an occurrence causes a preexisting condition that was not causing pain or disability to light up.[14] WPI 30.18.01 applies when "the pre-existing condition was a susceptibility that caused more serious consequences, rather than a dormant condition lighted up by the occurrence."[15] The idea of particular susceptibility refers to the "eggshell plaintiff." Thus, this instruction supports the notion 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."[16] When the parties dispute the evidence of preexisting pain or disability, the court should give both WPI 30.17 and WPI 30.18.

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[13] WPI 30.17, note on use at 322.
[14] WPI 30.18, note on use at 324.
[15] WPI 30.18, note on use at 324.
[16] Buchalski v. Universal Marine Corp., 393 F. Supp. 246, 248 (W.D. Wash. 1975).

The trial court considered all three possible instructions. TruGreen argues that because its evidence showed that Lawrence had a preexisting condition, the court should have given an instruction based on WPI 30.17, WPI 30.18, or both. It alleges that a note in Lawrence's chiropractic chart showed that the accident lit up a preexisting back injury. We disagree. The record in question describes a 2009 office visit to a new provider, after Lawrence had been seeking palliative care for more than two years. None of Lawrence's medical chart notes for treatment provided before the accident describes a preexisting condition. Even TruGreen's expert medical witness refused to say that there was evidence of a preexisting condition causing Lawrence's pain. The appellate record contains no evidence of a condition causing Lawrence pain and disability before the collision. Similarly, it contains no evidence of the lighting up of a dormant condition. With this evidentiary record, the trial court did not err by using WPI 30.18.01 to instruct on Lawrence's preexisting condition.

Next, TruGreen contends the trial court should have given a limiting instruction on the basis for expert opinion testimony from Rebecca Bellerive, Lawrence's life care planner. Bellerive stated that she relied on statements and records from Lawrence's primary care physician, who did not testify, to develop her opinion of Lawrence's future care costs. She did not testify as to the substance of those conversations, and TruGreen did not object to her trial

testimony. At the end of trial, TruGreen requested a limiting instruction on Bellerive's testimony.[17] The court declined. Instead, it instructed the jury, "To determine the credibility and weight to be given to this type of evidence, you may consider . . . the reasons given for the opinion and the sources of his or her information." Because the jury did not actually hear any testimony about what Lawrence's doctor said, there was no evidence to limit. Thus, the trial court did not err when it refused to give TruGreen's requested instruction.

TruGreen additionally alleges that the court erred by admitting testimony of the police officer who responded to the accident, as well as two of Lawrence's expert witnesses. Because TruGreen failed to object to any of this testimony at trial, it failed to preserve these alleged errors for review. Also, because TruGreen has not provided transcripts of the closing arguments, we cannot address its claim that Lawrence's closing argument violated the court's motions in limine and prejudiced the jury against TruGreen.[18]

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[17] The proposed instruction read,

> I allowed expert witness[es] to testify in part to records and articles and statements that may not have not been admitted in evidence. This testimony is allowed for a limited purpose. It is allowed so that the witness may tell you what he/she relied on to form his/her opinion[s]. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by this witness.

[18] Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

CONCLUSION

Because the trial court's jury instructions allowed both sides to argue their theories of the case, did not mislead the jury, and correctly stated Washington law, the court did not err in giving the challenged instructions and refusing to give those requested but not given. Trugreen failed to preserve its remaining issues for review. We affirm.

Leach, C.J.

WE CONCUR: