COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

JEAN K. PIERCE, individually and as Personal Representative of the ESTATE OF CHARLES L. PIERCE, and LaDAWN J. ADAMS, TANYA R. CONKLIN and KIMBERLY K. DICKEY,	)	**No. 28090-0-III**
Respondents,	)	
v.	)	**Division Three**
WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a/k/a WASHINGTON MOTORSPORTS, LTD., by and through Barry W. Davidson in his capacity as Receiver and as Acting Managing General Partner,	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Washington Motorsports Limited Partnership (WMLP) appeals the multi-million dollar wrongful death verdict entered against it following a bench trial. WMLP primarily argues that the trial judge was biased as reflected in her comments

while summing up the case. We disagree with that assertion, reject WMLP's other arguments, and affirm.

FACTS

WMLP owned and operated the Spokane Raceway Park (SRP). WMLP went into receivership; the Spokane County Superior Court appointed Barry Davidson as receiver and acting managing general partner effective July 1, 2005. Mr. Davidson employed Orville Moe as the general manager of SRP. James Tice replaced Mr. Moe in that role on June 1, 2006.

Mr. Tice had worked at SRP over the years. He was aware that the concrete grandstand at the facility had been crumbling for at least a decade. While preparing for the 2006 racing season, Mr. Tice found a lot of loose gravel and concrete particles in the grandstands. He had them cleaned before each racing event, using a fire hose to wash the crumpled concrete out of the stands.

The stairway at the grandstands is steep. There is an intermediate step between each level of seating. The intermediate steps were painted blue in mid-August at the recommendation of SRP's insurance carrier to increase their visibility.

Charles Pierce, age 59, attended the races at SRP for the first time on August 26, 2006. He was seated at the top of the grandstand. Angela Saunders and Jennifer Steele

were seated next to the stairway in the same row as Mr. Pierce. They had noted that he had no problems walking and appeared to be careful on the stairs. When he passed Ms. Saunders and her family, he advised them to be careful on the steps because they were not very safe.

Mr. Pierce made a final venture to the stairway, passing Ms. Saunders and Ms. Steele to do so. A group was headed down the stairway, so Mr. Pierce stepped down a half level to a blue step in order to let them pass. He then started to step back up. As he placed his foot down on the upper level of concrete, the stair crumbled. His raised foot fell back to the blue stair and his body pivoted; he lost balance. He began running down the stairs while trying to regain balance and arrest his momentum; he was unable to do so. He threw his hands up over his face shortly before he hit the concrete barrier at the bottom of the stairway. Ms. Saunders and Ms. Steele left their seats and went down the stairs after him.

Ms. Steele, a certified nursing assistant, found Mr. Pierce unconscious and bleeding from his face. He was taken to Sacred Heart Medical Center with severe head injuries. He was on life support for 23 days before the support was terminated. He died on September 17 without regaining consciousness. The cause of death was determined to be the injuries suffered in the fall at SRP.

The Spokane County Superior Court granted permission to Mr. Pierce's estate to commence and litigate a wrongful death action against WMLP. An amended complaint was filed presenting wrongful death and survivorship actions by Mrs. Pierce and her three daughters. Mr. Davidson was named as a party in his role as receiver and acting managing general partner. WMLP filed its answer and acknowledged that Mr. Davidson was acting as the managing general partner within the scope of the business partnership. WMLP presented 11 affirmative defenses, including a claim that Mr. Pierce was contributorily negligent for his fall. The answer did not plead assumption of the risk or quasi-judicial immunity.

The matter proceeded to bench trial. The court determined that WMLP had a duty to protect its business invitees and negligently failed to maintain its premises; that negligence proximately caused Mr. Pierce's death. The court also ruled that Mr. Pierce was not contributorily negligent.

The court awarded Mrs. Pierce $2,000,000 for loss of consortium and awarded each of the three daughters $200,000. The court awarded $216,317.92 as reasonable and necessary medical bills even though nearly $85,000 of that figure was written off as a result of a Medicare reimbursement. Finally, the court also awarded the estate $50,000 for Mr. Pierce's pain and suffering.

Written findings were entered in support of the bench verdict. WMLP sought a new trial pursuant to CR 59(a) and alternatively argued for a reduction of the verdict pursuant to RCW 4.76.030. The trial court denied both requests. WMLP then timely appealed to this court.

ANALYSIS

This appeal presents several issues, which we have grouped into six categories.[1] At argument, WMLP primarily contended that the verdict reflected judicial bias and violated the appearance of fairness doctrine. We will address those claims first.

Judicial Bias and the Appearance of Fairness. Seizing upon some of the court's oral remarks made while delivering the verdict, the respondent contends that the court was biased and considered evidence outside of the record. Reflections upon information obtained during the course of a lifetime are not evidence of judicial bias and do not constitute an appearance of fairness problem.[2]

This issue was presented to the trial court in appellant's CR 59(a) motion for a new trial.[3] We review rulings on such motions for abuse of discretion. *Kadmiri v.*

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[1] WMLP also raises a cumulative error argument that we do not address in light of our conclusion that no errors occurred.

[2] While WMLP treats these as separate arguments, we consider them to be one and so address them.

[3] WMLP relied specifically on subsections (1) (irregularity in proceedings); (5) (excessive damages resulting from passion or prejudice); (7) (insufficient evidence to support verdict); and (9) (substantial justice has not been done).

Claassen, 103 Wn. App. 146, 150, 10 P.3d 1076 (2000), *review denied*, 142 Wn.2d 1029 (2001). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The appearance of fairness doctrine requires that judges not only actually be unbiased, but that they also appear to be unbiased. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The trial court is presumed to perform its functions without bias or prejudice; in reviewing a bench trial, appellate courts will also presume that the trial judge based a decision solely on admissible evidence. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000).

A party alleging bias must provide evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618-619, 826 P.2d 172, 837 P.2d 599 (1992). Appellate courts apply an objective test, viewing the evidence as would a reasonable person familiar with all of the facts, to determine if there is the appearance of bias. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002). In the absence of evidence, the claim of bias must be rejected. *Post*, 118 Wn.2d at 619.

As evidence of bias, WMLP cites to three of the trial judge's comments during the recitation of the verdict. The first of them is found in the trial judge's initial discussion of how much the damage award would be:

So Washington Motorsports is liable to Mr. Pierce's estate and to his family for

the breach.

The Court noted, though, that even after Mr. Pierce's fall and his injury, they didn't close off the stairwell or even try to stop the public from using it that night. Instead, Mr. Tice testified that they cleaned up the mess and restarted the races and never closed off those stairs.

So damages are the remedy for people who are wronged by a breach in their duty, *and damages can, also, be used to deter future transgressions.*

However, in this case, that's not going to be an issue as they no longer own the property.

Report of Proceedings (RP) 551-552 (emphasis added).

WMLP argues that the trial court considered the possibility of punitive damages, a concept that the courts of this state have rejected since statehood. *E.g., Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891). Respondents contend that the trial court did not award punitive damages and did not include them in the written judgment, so the entire issue need not be considered. *Peterson v. Peterson*, 3 Wn. App. 374, 377, 475 P.2d 576 (1970).[4] While the general rule certainly is that the oral opinions of a court are not subject to challenge unless they have been incorporated into the written findings,[5] application of that principle to allegations of judicial prejudice is problematic since a judge's own statements are typically the only available evidence of prejudice. We will consider the court's remarks.

[4] "The assignments of error directed to the oral opinion of the court will not be considered. The written findings of fact are the proper subject of complaint by appellant, not statements in the oral opinion." *Peterson v. Peterson*, 3 Wn. App. 374, 377, 475 P.2d 576 (1970).

[5] *E.g., Huzzy v. Culbert Constr. Co.*, 5 Wn. App. 581, 583, 489 P.2d 749 (1971).

Nonetheless, for two reasons this challenged remark does not establish that the trial judge considered imposing punitive damages, let alone that she was prejudiced against WMLP. First, in context, this initial discussion of the damages issue notes that a damage award can both compensate a party for its loss as well as serve to deter the tortfeasor. The court recognized that deterrence would not occur here because WMLP had no incentive to repair the facility since it no longer owned the property. The recognition that there would be no deterrence from a damages award does not mean that the court considered awarding damages for the purpose of deterring future conduct.

Second, WMLP's argument assumes that only a punitive damages award can have a deterrent effect. We do not believe that is correct. Compensatory damages are designed to make a victim whole. *Spokane Truck*, 2 Wash. at 53. There are four recognized bases for punitive[6] damages: "compensation, punishment and deterrence, revenge, and promotion of justice." *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 699, 635 P.2d 441, 649 P.2d 827 (1981). Just as compensation can be a result of a punitive damage award, deterrence may result from an award of compensatory damages because the cost of making the victim whole creates an economic loss to the tortfeasor so that the cost of the tortious conduct outweighs any benefit received. An observation noted in

[6] The word derives from the Latin verb "punio" which means "to punish" or "to avenge." Casell's New Latin Dictionary 489 (1968).

Barr is apropos: "To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person." *Id.* (quoting Restatement (Second) of Conflict of Laws § 145, cmt. c, at 416 (1971)).[7]

The challenged comment about lack of deterrence did not mean that the trial court was considering punitive damages against WMLP. The statement is not evidence of judicial bias.

The two other challenged comments come from the same sentence near the end of the court's discussion of damages.

> Now, as far as society values life, I think we value it greatly. *In doing some research on a death penalty case, I was astonished to find that we spend between $200,000 and $400,000 for costs to make sure a defendant who is accused of a terrible crime doesn't die needlessly*, and before they're put to death, we've expended every resource that we have to make sure that it's right, *and I agree that our society spends millions to save a soldier who is missing in action*.

RP 554-555 (emphasis added).

WMLP challenges the first italicized portion of the sentence by claiming that the court relied upon evidence outside of the record. The latter emphasized portion is challenged because it allegedly shows that the court accepted an assertion made in argument by counsel for the Pierces. We address each contention in turn.

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[7] In a similar vein, restitution in a criminal case serves both to compensate the victim and deter future misconduct. *City of Walla Walla v. Ashby*, 90 Wn. App. 560, 563, 952 P.2d 201 (1998), *overruled in part on other grounds in State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999).

The comment about the expense of death penalty litigation referenced something the judge had learned in the performance of her judicial duties in another case. It was not outside research conducted for use in this case. As such, we believe this constituted "life experiences" of the judge rather than extrinsic evidence and was not misconduct. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003) (juror's experience with his wife's migraine headache symptoms was a life experience rather than extrinsic evidence).

Counsel for the Pierces had argued that our society highly values human life and stated that "we read in the newspapers and we watch on TV that this country will spare no money to rescue one of our armed forces personnel who is captured and is in need of our help." RP 502. The challenged comment showed the court's agreement with that sentiment. This, too, falls into the category of knowledge acquired during a lifetime and is not extrinsic evidence. There was no misconduct.

There are at least two other reasons why this argument fails. First, there simply is no evidence that any of the three challenged statements was actually relied upon in awarding damages. Expressions of shared sentiment do not equate to reliance upon extrinsic evidence. Second, this was a bench trial. As noted, we presume that judges consider only admissible evidence in reaching a decision. *Wolfkill Feed*, 103 Wn. App.

at 841. Nothing in this record suggests that the trial court relied upon inadmissible evidence in reaching its decision.

WMLP has not established that the trial judge was biased or appeared to be so. The court did not abuse its discretion in denying the CR 59(a) motion.

Contributory Negligence. WMLP challenges the court's determination that Mr. Pierce was not contributorily negligent. The factual component of this determination by the trial court is virtually unreviewable. The evidence also supports the court's legal determination.

We review a trial court's factual findings for substantial evidence, which is defined as "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). All evidence is viewed in the light most favorable to the prevailing party and deference must be given to the fact-finder. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993). An appellate court may not substitute its view of the evidence for that of the fact-finder. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). A trial court's legal determinations are reviewed *de novo*. *Sunnyside*, 149 Wn.2d at 880.

WMLP first contends that Mr. Pierce assumed the risk of harm in climbing the

stairs because he was aware that the steps were in bad shape and the incline was steep. Assumption of the risk is an affirmative defense. CR 8(c). However, WMLP did not include it among its 11 affirmative defenses. The claim is waived.[8] *E.g., Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976) (affirmative defenses are waived if not affirmatively pleaded).

The trial court found that Mr. Pierce "exercised reasonable care for his own safety when attempting to ascend the grandstand stairway." Clerk's Papers (CP) 279.[9] The court then ruled that Mr. Pierce was not contributorily negligent. CP 283.[10] WMLP first argues that the record does not support the factual determination. We disagree. Both Angela Saunders and Jennifer Steele testified that Mr. Pierce had no difficulty walking and was carefully stepping on the stairs. He also warned people that the stairs were dangerous. This evidence amply supports the determination that Mr. Pierce "exercised reasonable care for his own safety" in using the stairs.

The finding also supports the trial court's conclusion that Mr. Pierce was not contributorily negligent. Contributory negligence is a plaintiff's own failure to use due

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[8] The argument also would fail on the facts. There was evidence that a lay person such as Mr. Pierce could not appreciate the danger presented by the deteriorating step. There also was no evidence that he was aware that the step would disintegrate when he stepped on it. While he knew generally that the conditions were potentially unsafe, he did not assume the risk that a deteriorating step might send him falling to his death.

[9] Finding of Fact 27.

[10] Conclusion of Law 16.

care for his own protection. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 238, 588 P.2d 1308 (1978). The evidence showed that Mr. Pierce was taking care for his own safety and did nothing that contributed to his fall. If he is at fault here, it simply would have to be for deciding to use stairs that were not in optimal condition, just as the other patrons were doing. The trial court understandably concluded otherwise, and the evidence supported that conclusion.

The trial court did not err when it determined Mr. Pierce was not contributorily negligent.

Quasi-Judicial Immunity. WMLP next argues that since it was operating under a receiver who was entitled to judicial immunity, it also should be immune from suit. This novel claim proves too much. Judicial and quasi-judicial immunity apply to the function being performed, not the functionary in charge of proceedings.

Receivers, with exceptions generally relating to the handling of receivership property, are immune from liability. RCW 7.60.170.[11] Mr. Davidson was appointed to

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[11] RCW 7.60.170, Personal Liability of Receiver:

"(1)(a) The receiver is personally liable to the person over whose property the receiver is appointed or its record or beneficial owners, or to the estate, for loss or diminution in value of or damage to estate property, only if (i) the loss or damage is caused by a failure on the part of the receiver to comply with an order of the court, or (ii) the loss or damage is caused by an act or omission for which members of a board of directors of a business corporation organized and existing under the laws of this state who vote to approve the act or omission are liable to the corporation in cases in which the liability of directors is limited to the maximum extent permitted by RCW 23B.08.320.

be the acting general partner and run the business. To that end, Mr. Davidson employed Mr. Tice to operate the facility. WMLP argues that any liability it has was imputed to it through the actions of Mr. Davidson and/or his employees, and that since Mr. Davidson is immune from suit, it should be as well.

Washington applies a function-based analysis when considering claims of judicial or quasi-judicial immunity. Instructive is the decision in *Lallas v. Skagit County*, 167 Wn.2d 861, 225 P.3d 910 (2009). There a deputy sheriff took a man into custody at the direction of a judge. The deputy was walking him to the jail without the use of handcuffs when he bolted. In the course of the attempted escape, the prisoner injured a security

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"(b) A general receiver is personally liable to state agencies for failure to remit sales tax collected after appointment. A custodial receiver is personally liable to state agencies for failure to remit sales tax collected after appointment with regard to assets administered by the receiver.

"(2) The receiver has no personal liability to a person other than the person over whose property the receiver is appointed or its record or beneficial owners for any loss or damage occasioned by the receiver's performance of the duties imposed by the appointment, or out of the receiver's authorized operation of any business of a person, except loss or damage occasioned by fraud on the part of the receiver, by acts intended by the receiver to cause loss or damage to the specific claimant, or by acts or omissions for which an officer of a business corporation organized and existing under the laws of this state are liable to the claimant under the same circumstances.

"(3) Notwithstanding subsections (1)(a) and (2) of this section, a receiver has no personal liability to any person for acts or omissions of the receiver specifically contemplated by any order of the court.

"(4) A person other than a successor receiver duly appointed by the court does not have a right of action against a receiver under this section to recover property or the value thereof for or on behalf of the estate."

guard who tried to stop him. The security guard sued the deputy and the county. *Id.* at 863. The trial court granted summary judgment on the basis of quasi-judicial immunity. *Id.* The Court of Appeals reversed that ruling, and the Washington Supreme Court accepted review. *Id.* at 864.

The Court unanimously affirmed the Court of Appeals ruling. The Court reviewed previous cases on judicial immunity and expressly stated that the existence of immunity depends upon the function being performed. *Id.* at 865. Since transporting prisoners is not a judicial function, the Court determined that immunity did not shield the deputy's actions. *Id.* at 866. In view of that determination, the Court did not reach Skagit County's claim that it enjoyed vicarious immunity. *Id.* at 866-867.

Similarly here, operation of a racetrack and maintenance of facilities are not judicial functions. Judicial immunity did not attach here. Therefore, we too need not address the claim that WMLP shared immunity with the receiver.

No Partnership Responsibility for Receiver. In a related alternative argument, WMLP argues that it cannot be held responsible for any actions of the receiver since he was an agent of the court rather than of the partnership. This argument neglects the terms of the appointment, which are not, and cannot be, challenged in this appeal.

The trial court appointed the receiver to "act in the capacity as managing general

partner for WML under the terms of the Partnership Agreement and in accordance with RCW 25.05, *et seq*., and RCW 25.10, *et seq*." CP 469. The purpose of the partnership was to operate the raceway. The actions of the receiver in operating the track were within the scope of the partnership.

Disavowal of the receiver's authority is an implicit collateral attack on the original appointment, an argument that cannot be presented in this proceeding absent a showing that the appointment was void. *Mueller v. Miller*, 82 Wn. App. 236, 250-251, 917 P.2d 604 (1996); *see generally, Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994). It is without merit.

Amount of Medical Bills. WMLP also challenges the trial court's decision to award the estate the amount of the medical bills charged the estate rather than the amount accepted by the medical health care providers from Medicare. The trial court properly awarded the value of the services.

The parties agreed that the reasonable and necessary medical expenses incurred by the estate were $216,317.92. While that total was billed by the medical providers, nearly $85,000 of that figure was written off when they accepted payment from Medicare. WMLP argues that under the wrongful death statutes, it should only be responsible for the amount actually paid rather than the amount billed.

The wrongful death statute creates a cause of action for damages resulting from the victim's death. RCW 4.20.010. A limited class of beneficiaries may pursue damages for wrongful death. RCW 4.20.020. RCW 4.20.046 provides that causes of action accruing prior to death survive the victim's death. This statutory scheme essentially divides damages between those occurring before death and those resulting from the death itself. *Estate of Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). The wrongful death statutes permit recovery for "the actual pecuniary loss" resulting from the death. *Parrish v. Jones*, 44 Wn. App. 449, 453, 722 P.2d 878 (1986). Among other items, the survivorship statutes permit recovery for hospital and medical expenses. *Otani*, 151 Wn.2d at 756 n.3.

The collateral source doctrine provides that a tortfeasor's liability cannot be offset by an independent source, typically insurance, that compensates the plaintiff for the same injury. *Wheeler v. Catholic Archdiocese,* 124 Wn.2d 634, 640, 880 P.2d 29 (1994). Medicare payments constitute a collateral source payment. *Ciminski v. SCI Corp.,* 90 Wn.2d 802, 807, 585 P.2d 1182 (1978) (Medicare Part A benefits).

WMLP claims that the collateral source doctrine does not apply to wrongful death actions. While we disagree with that argument,[12] it is inapplicable here. The hospital and

[12] Life insurance proceeds are paid upon the death of the insured, yet we have no doubt that they are a collateral source payment and would not offset wrongful death damages.

other medical bills incurred in the valiant effort to save Mr. Pierce were accumulated prior to his death. They are subject to the survivorship statutes, not the wrongful death statutes. *Otani*, 151 Wn.2d at 756 n.3. The collateral source rule applies to preclude WMLP from offsetting the value of the medical services from the amount paid for them. *Ciminski*, 90 Wn.2d at 807.

Even if it were an open question, we think that this situation presents the same one raised in *Ciminski*. There the Court noted:

> We note, however, that to deny application of the rule in this instance would allow appellant the full benefit of the payments from the collateral source. Thus, the real question is not whether there is a windfall, but rather who is to get it. As between an injured plaintiff and a defendant, we have no hesitation in saying that the former is entitled to prevail.

Ciminski, 90 Wn.2d at 806-807.

The Medicare "windfall" does not inure to the benefit of the appellant. The trial court properly awarded the value of the "reasonable and necessary" medical expenses rather than the reduced sum paid by Medicare. There was no error.

Pain and Suffering. WMLP's final argument challenges the award of $50,000 for Mr. Pierce's pain and suffering. While this is a close issue, we believe the record supports the award.

WMLP challenges finding of fact 32, which states:

The Estate of Charles L. Pierce is entitled to an award for damages for the mental

pain and suffering and fear *probably* experienced by Charles L. Pierce prior to his death. From the time Charles L. Pierce slipped on the grandstand stairway until he fell head first near the bottom of the grandstands, he ran down approximately 26 concrete steps desperately trying to regain his balance and prevent his eventual fall. Charles L. Pierce was aware of and would appreciate the impending impact during the time which he ran down the grandstand stairway trying to regain his balance. This resulted in damages for the mental pain, suffering and fear experienced by Charles L. Pierce in the amount of $50,000.00.

CP 279-280 (emphasis added).

WMLP argues that there was no evidence that Mr. Pierce spoke or otherwise indicated an awareness of his situation while he plunged down the stairway; since he was rendered unconscious by the impact, WMLP concludes that there is no basis for finding that he suffered at all. WMLP also focuses on the trial court's use of the word "probably," arguing that the court only speculated that there was awareness of the impending impact.

As to the latter point, we believe the trial court used the word "probably" to indicate that it found that the estate had met its burden of showing that pain and suffering had occurred on a more probable than not standard. Any other reading of the word would be inconsistent with the finding that Mr. Pierce was aware of his situation. It also would conflict with the court's award.

While Mr. Pierce did not call out as he fought to save himself, we believe the evidence certainly supports the determination that he was aware of his precarious

situation. He unsuccessfully struggled to arrest his plunge toward the bottom. He was racing face first toward the bottom. As he neared the end of his fall, he threw his arms up in a futile effort to protect his head. These actions showed awareness of the danger that had befallen him; they were not merely the product of unthinking instinct. The trial court was within its power to credit this evidence. *Quinn*, 153 Wn. App. at 717. More importantly, this court cannot reweigh that evidence and reach a different conclusion. *Id.*

Giving due deference to the trier-of-fact's view of the evidence, it was sufficient to support this aspect of the judgment. Mr. Pierce was conscious and aware of his circumstances. He did experience pain and suffering.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.