Lesher v. Murphy

Court of Appeals of Washington, Division One

November 22, 2004, Filed

No. 52040-7-I

Reporter
2004 Wash . App. LEXIS 2829 *

JANET LESHER, Respondent, v. DYAN MURPHY and JOHN DOE MURPHY, wife and husband, Defendants, and STEVEN STUART and JANE DOE STUART, husband and wife, Appellants.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Prior History: Appeal from Superior Court of King County. Judgment or order under review Date filed: 01/21/2003. Judge signing: Hon. Terry Lukens.

Lesher v. Murphy, 124 Wn. App. 1018, 2004 Wash. App. LEXIS 3382 (2004)

Disposition: Affirmed.

Counsel: For Appellant(s): Marilee C. Erickson, Reed McClure, Seattle, WA.

For Respondent(s): Peter Malden Brown, Dawson, Brown, PS, Kenneth Wendell Masters, Attorney at Law Bainbridge Island, WA. Christopher Cyrus Pence, Law Offices of Christopher Pence, PLLC, Seattle, WA, Charles Kenneth Wiggins, Attorney at Law, Bainbridge Island, WA.

For Respondent Intervenor(s): David Lawrence Hennings, Wilson, Smith, Cochran, Dickerson, Martha E. Raymond, Wilson, Smith, Cochran, Dickerson, Seattle, WA.

Judges: Authored by Marlin J. Appelwick. Concurring: C. Kenneth Grosse, Faye C. Kennedy.

Opinion by: APPELWICK

Opinion

APPELWICK, J. - Janet Lesher suffered neck injuries in two unrelated car accidents. About a year after the second accident, Lesher needed neck and back surgery. She brought suit against both drivers, and settled with the first driver. She prevailed in a jury trial against the second driver, Steven Stewart. Stewart appeals, **[*2]** arguing that the trial court erred by refusing to admit evidence, by refusing to allocate fault, by determining proximate cause as a matter of law, by providing the jury with erroneous instructions, and by allowing prejudicial statements during closing arguments. We affirm.

FACTS

Lesher was rear-ended in two unrelated motor vehicle accidents. The first accident occurred on November 5, 1998, between Dyan Murphy and Lesher. The second accident occurred on January 26, 1999, between Stewart and Lesher. Lesher was not at fault in either accident.

Following the November 1998 accident, Lesher suffered pain in her neck, back, shoulders, and ribs. Her family doctor, Dr. Fleming, prescribed muscle relaxants, anti-inflammatories, and physical therapy. Lesher was still symptomatic at the time of the January 1999 accident, in which Stewart rear-ended Lesher's car at a stop light. Following the January 1999 accident, Dr. Fleming again prescribed muscle relaxants and anti-inflammatories for Lesher. Two days later, Dr. Fleming diagnosed Lesher with a hyperflexion injury to her neck muscles. He later also diagnosed Lesher with a concussion based on her complaints of dizziness and an inability **[*3]** to concentrate.

In July 1999, Lesher fell off of her bike, hitting her side, hand, hip and shoulder. She visited the emergency room, but did not complain to the emergency room doctors that she had hurt her back or her neck when she fell from her bike.

The neck pain which Lesher began experiencing following her two car accidents steadily worsened through the fall of 1999. Dr. Fleming referred her to a specialist, Dr. Nutter, who ordered a magnetic resonance imaging test (MRI). The MRI revealed that Lesher had two herniated disks. Upon Dr. Nutter's recommendation, Lesher visited Dr. Klein, a neurosurgeon, who recommended surgery to fuse the vertebrae surrounding the herniated disks. Lesher sought the opinion of two other neurosurgeons, both of whom also recommended surgery. In April 2000, Dr. Michael Calhoun (Dr. Calhoun) fused the disks between Lesher's fifth and sixth, and sixth and seventh, vertebrae. As a result of the surgery, Lesher's neck mobility is limited and she continues to suffer pain and stiffness in her neck. Lesher brought suit against Murphy and Stewart. Lesher and Murphy settled prior to trial.

Dr. James Green (Dr. Green), Stewart's orthopedic surgeon expert **[*4]** witness, and two plaintiff medical doctors testified at trial. Based on his *CR 35* examination of Lesher, Dr. Green concluded that Lesher had suffered mild cervical muscle strains from the November and January accidents.

He did not dispute that Lesher required surgery for her herniated disks. Dr. Green testified that Lesher's herniated disks were the result of progressive degeneration. The two car accidents, he stated, "were two of many things that contributed ultimately to the degenerative process. But there wasn't any documentation or awareness of how significantly those disks were changed by the accidents except to say that the disks didn't rupture at that time." According to Dr. Green, Lesher's condition was "the result of all the stresses put on her neck, including whatever happened in these two accidents and including whatever happened at the time of the bicycle accident she had after the two accidents."

Dr. Fleming, Lesher's family doctor, testified that the most common injury in a rear-end accident is a hyperflexion injury to the muscles, and that the mechanism for injury in such cases is a "sudden, violent stretch of the muscle fibers." Dr. Fleming also stated that a concussion **[*5]** results from "sudden deceleration" which causes "the brain [to] continue to move and can actually strike the - in this case, the frontal portion of the brain." He further explained that Lesher's concussion indicated there was significant, not trivial, force in the January 1999 accident, and that a trivial impact would not have caused a concussion.

Dr. Calhoun, the surgeon who performed Lesher's fusion operation, testified that both accidents caused Lesher's disc herniations because they injured the disks, even though the herniations themselves did not develop until later. He also testified that he could not delineate between the two accidents and that each accident equally contributed to Lesher's injuries.

Before trial, Lesher filed a motion in limine to exclude the testimony of Paul Moore (Moore), Stewart's mechanical reconstructionist, and any introduction or reference to photographs of Lesher's car, or damages estimates of Lesher's vehicle, "in the absence of qualified expert testimony relating them" to Lesher's injuries. [1] Moore had studied both accidents, and planned to testify that the second accident caused only a low and insignificant impact. Moore also planned to display **[*6]** and explain photographs of Lesher's and Stewart's vehicles, which showed they sustained minimal damage. The trial court excluded Moore's testimony and the photographs.

During trial, Stewart renewed his motion to introduce evidence about the severity of the impact. The trial court denied his motion.

The trial court also removed the issue of proximate cause from the jury, providing the following jury instruction:

> You are instructed that the collisions of November 5, 1998 and January 26, 1999 were each one proximate cause of plaintiff's disc [sic] herniations.

The trial court also did not give the jury Stewart's proposed instruction on fault allocation.

During Lesher's closing, her counsel argued that "the reason the case had reached the point it had, and why all the parties had just

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[1] Lesher also requested that the court exclude any opinions by Stewart's medical expert, Dr. Green, or by Moore, "if such opinions were not expressed at their discovery depositions."

spent the past several **[*7]** days in court, was because, unlike the co-defendant Murphy, who had settled, Mr. Stewart failed to settle his case when he had the opportunity." The court sustained Stewart's objection to the statement.

The jury returned a verdict awarding Lesher approximately $ 550,000. Stewart filed a motion for a new trial, which the trial court denied. Stewart appeals.

II. Proximate cause

Stewart asserts that Jury Instruction No. 6 was in error because it improperly directed a verdict on proximate cause.

We review challenged jury instructions de novo. *State v. Davis, 116 Wn. App. 81, 90, 64 P.3d 661 (2003)*. "Instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case." *Davis, 116 Wn. App. at 90*. The question of proximate cause is generally an issue of fact for the jury to decide. *Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)*. A court may enter judgment as a matter of law if the evidence or reasonable inference from the evidence leads to one conclusion. *Miller v. Payless Drug Stores, Inc., 61 Wn.2d 651, 653, 379 P.2d 932 (1963)*. **[*8]**

The trial court determined that "as a matter of law," the January accident was "a" proximate cause of Lesher's injuries. Accordingly, the trial court issued Jury Instruction No. 6, which stated:

> You are instructed that the collisions of November 5, 1998 and January 26, 1999 were each one proximate cause of plaintiff's disc [sic] herniations.

The record supports the trial court's decision to give Jury Instruction No. 6. Dr. Fleming, Dr. Calhoun, and Dr. Green all testified that both the November 1998 and the January 1999 accidents contributed to Lesher's injuries.

Dr. Fleming testified:

> I do not believe there is any medical basis to distinguish between the two accidents as to the relative contribution either made to Ms. Lesher['s] disc herniations.

Dr. Calhoun testified that:

> Both motor vehicle accidents combined to cause the disc herniation… I personally cannot delineate between the two accidents as to what is the cause and would consider them equally the cause.

> Similarly, Dr. Green, Stewart's expert medical witness, stated there was no medical basis to apportion between the two accidents the amount of their respective contribution **[*9]** to Lesher's injuries. Asked if he thought any doctor could apportion the fault, Dr. Green replied "Not logically." Thus, even Stewart's own medical expert agreed that segregation was not possible.

Stewart contends that although the evidence is undisputed that Lesher's disks were herniated, the evidence as to how and why is disputed. To support his assertion, Stewart points out that Dr. Calhoun admitted that disk herniations can occur

without any trauma, and that Dr. Green opined that the disk herniations were the culmination of multiple stresses on Lesher's neck over the course of time. Stewart reasons that, based on Dr. Green's and Dr. Calhoun's testimony, the jury could have concluded that Lesher would have developed herniated disks even if she had not been in two accidents. Therefore, he asserts, the trial court erred in directing a verdict on proximate cause.

Dr. Calhoun testified that disk herniations may occur even without trauma, but he also testified that Lesher's accidents contributed to her herniations. Jury Instruction No. 6 thus was not at odds with Dr. Calhoun's testimony. And, although Dr. Green did opine that Lesher had a degenerative disk condition, he also **[*10]** affirmatively stated that the two car accidents were among the causes of Lesher's disk herniations. Jury Instruction No. 6, in stating that the two collisions were each "a" proximate cause of Lesher's injuries, was thus faithful to Dr. Green's testimony. Moreover, the trial court also took into consideration Dr. Green's testimony in issuing Instruction 11, which stated that if the jury found that Lesher suffered from a pre-existing condition, then it should consider the extent to which the collisions aggravated the condition.

The undisputed evidence showed that the January 1999 accident was a proximate cause of Lesher's injuries. The trial court did not abuse its discretion when it removed the issue of proximate cause from the jury.

II. Attorney Fees Under *CR 37(c)* Stewart also assigns error to the trial court's award of *CR 37(c)* fees to Lesher. Lesher contends that she was entitled to fees under *CR 37(c)* because Stewart refused to admit that the January 1999 accident was a cause of her injuries even though his own medical expert testified that the accident was a cause of Lesher's injuries.

This court reviews a trial court's decision to grant or deny fees under **[*11]** *CR 37(c)* under an abuse of discretion standard *Willener v. Sweeting, 107 Wn.2d 388, 397-98, 730 P.2d 45 (1986)*.

CR 37(c) provides:

> If a party fails to admit … the truth of any matter as requested under *CR 36*, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

The purpose of *CR 37(c)* is to eliminate from a case matters that are not actually disputed. *Levy v. North American Co. for Life and Health Ins., 90 Wn.2d 846, 855, 586 P.2d 845 (1978)*. Thus, a party must admit an issue, even if central to

his case, if he will not dispute the issue at trial. *Levy, 90 Wn.2d at 855.* **[*12]**

Lesher filed a motion under *CR 37(c)* requesting $ 9,775.00 in attorney fees and $ 17,005.00 in expenses "incurred in proving the matters denied by [Stewart] in plaintiff's Request for Admission No. 7." Request for Admission No. 7 required Stewart's admission that Lesher's disk herniations resulted from the two accidents underlying the lawsuit. Stewart objected that Admission No. 7 was "beyond the scope of *CR 36*" and did not otherwise answer the request. [2] Initially, the trial court denied Lesher's motion for *CR 37(c)* fees, but stated, "[n]othing in this order shall be deemed to prevent plaintiff from seeking expenses under *CR 37(c)*" if causation was proved at trial. Causation was proved at trial. Following the trial, the trial court found that Stewart did not have reasonable grounds to deny the request for admission, and awarded Lesher $ 5,912.50 in fees and $ 7,702.85 in costs under *CR 37(c)*.

[*13] Stewart does not dispute that his witness, Dr. Green, in a deposition prior to trial, admitted that the January 1999 accident was one of the causes of Lesher's injuries. Nonetheless, Stewart denied Lesher's request for admissions as to causation. At trial, Dr. Green reiterated his position that the January 1999 accident was a cause of Lesher's injuries. The record supports the trial court's conclusion that Stewart failed to admit causation. Thus, the trial court did not abuse its discretion when it awarded *CR 37(c)* fees to Lesher.

III. Exclusion of Evidence

Stewart asserts that the trial court abused its discretion when it excluded relevant evidence.

Evidentiary rulings are reviewed for abuse of discretion. *Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572, 719 P.2d 569 (1986).* A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. *Davidson, 43 Wn. App. at 572*. Facts that tend to establish a party's theory or disprove an opponent's evidence are relevant and should be admitted. *Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976).* **[*14]** Excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *Grigsby v. City of Seattle, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975).*

Lesher filed a motion in limine to exclude Moore's testimony, the photographs and repair records, arguing that the evidence was misleading and irrelevant because Stewart had already admitted liability. At trial, Stewart sought to have admitted into evidence: 1) his own testimony that the impact of the January 1999 accident was not severe; 2) testimony from his accident reconstruction specialist, Moore; and 3)

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[2] ***CR 36*** provides that "[a] party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, […]."***CR 26(b)*** sets forth the scope of discovery, and states that in general, "[p]arties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."

photographs and repair records for the cars involved.

Stewart argues on appeal that testimony from Lesher and her medical expert, Dr. Fleming, opened the door to his proposed evidence by raising the notion of force or impact. [3] Dr. Fleming testified that there was a "significant force" in the January accident, that the accident was not a "trivial impact," and that the force was significant enough to cause Lesher's concussion. This evidence came in without objection from Stewart. However, Stewart renewed his efforts to introduce Moore's testimony. Moore would have testified **[*15]** that Stewart's car was traveling at about 2 mph. when it rolled into Lesher's car. [4]

The trial court deliberated at length as **[*16]** to the relevance of Moore's testimony on impact severity, asking:

> How though [is it relevant]? I mean, how is the accident reconstructionist able to say - I mean, you could have a situation where the car is demolished, and the person gets up and walks out of it, and there's no injuries at all. [I] don't know what the connection is . . . .

The trial judge also queried Stewart's counsel:

> But there's no connection; is there? What's the connection? If there's a tap on the rear-end, but it causes someone to be propelled forward, there could be little or no damage, and they could still suffer injury. And conversely, my other example, the car could be totaled, and they could walk out with[out] a scratch. Which happens. So that's why I don't - on the first question, I don't see how it bears any relationship other than an argument that this accident couldn't have caused these injuries. When that's not the issue; is it?
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> The trial court also weighed the benefit of Moore's impact testimony against Dr. Fleming's testimony. Ultimately, the trial court applied *ER 403* and found that:
>
> The prejudice of having [Stewart] testify that it was a light tap and then having **[*17]** you argue from that is - in light of any sort of connection, … far outweighs whatever probative value it might have.

The trial court concluded that it would not admit evidence of either impact severity or of Lesher's concussion. Because Lesher's counsel had mentioned Lesher's concussion during opening, the trial court agreed to instruct Lesher's counsel to make an affirmative statement during closing that she was not seeking concussion damages. Stewart requested a limiting instruction directing the jury to ignore the evidence regarding the concussion. The trial court denied his request. In light of the direct

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[3] Under the record citation Stewart quotes in his appellate brief, Lesher's testimony that her head "whipped back" and "whipped forward" concerning her November accident. Because this testimony does not concern her January accident involving Stewart, we do not address it.

[4] Stewart asserts that ***Ma'ele v. Arrington, 111 Wn. App. 557, 561, 45 P.3d 557 (2002)*** supports his position that Moore's testimony was admissible. In *Ma'ele*, another vehicle accident case, the court allowed testimony from a biomechanical engineer that the collision at issue was too trivial to have caused the plaintiff's injuries. The expert's testimony went toward whether the accident caused the plaintiff's injuries. *Ma'ele, 111 Wn. App. at 561-62*. *Ma'ele* is distinguishable. Whereas in *Ma'ele* causation had not yet been established, here, causation was established.

statement of Lesher's counsel that damages based on the concussion were not being sought, we conclude the denial of the limiting instruction was within the trial court's discretion.

The trial court did not abuse its discretion when it excluded Moore's testimony.

IV. Apportionment

Stewart also assigns error to the trial court's refusal to instruct the jury on allocation of fault. [5]

[*18] Lesher maintains that because Stewart did not specifically except to the trial court's failure to give a jury instruction, he is precluded from doing so on appeal under *CR 51(f)* which states:

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

The purpose of *CR 51(f)* is to afford the trial court a chance to correct mistakes in jury instructions before they are made. *Blaney v. Int'l Ass'n. of Machinists & Aerospace Workers, 114 Wn. App. 80, 85, 55 P.3d 1208 (2002)*.

While Stewart did not formally except to the jury instructions, he preserved the issue by raising it in his motion in limine. *CR 51(f)* thus does not deprive Stewart of an opportunity to raise the trial court's failure to give **[*19]** jury instructions on this appeal. Accordingly, we address Stewart's apportionment argument.

Jury instructions are sufficient if '"they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000)* (quoting *Hue v. Farmboy Spray Co. Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995)*. "On appeal, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." *Cox, 141 Wn.2d at 442*.

At trial, Dr. Calhoun testified that he could not delineate between the two accidents and that each accident equally contributed to Lesher's injuries. Stewart asserted this supported a 50-50 allocation of fault. The trial court disagreed with Stewart's assertion at trial that Dr. Calhoun's testimony provided support for allocation of fault, and found that Dr. Calhoun's testimony meant only that both accidents contributed to Lesher's injuries. Dr. Green testified that

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[5] *RCW 4.22.015* defines fault as including "acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages.

Lesher's herniations "were the result of **[*20]** all the stresses put on her neck," and that the interval between the two accidents and Lesher's herniations was "too long an interval to say that this is the one incident that caused [the herniations]." Based on testimony from the medical experts, the trial court granted Lesher's motion in limine to exclude Stewart's attempt to allocate or apportion fault.

At the close of trial, the trial court concluded that fault could not be apportioned and refused to give Stewart's proposed Jury Instruction No. 13, and his proposed special verdict form on the allocation of fault. Proposed Jury Instruction No. 13 stated:

> In an action involving the negligence of more than one entity, you must determine what percentage of the total negligence is attributable to each entity which proximately caused the damage to the plaintiff. The court will provide you with a special verdict form for this purpose.
>
> Entities may include the defendants or entities not party to this action.
>
> Your answer to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any, among the defendants.

Stewart asserts that Washington's Tort Reform Act, *RCW 4.22.070* **[*21]** , is governing, and that under that statute, liability must be apportioned. [6] " *RCW 4.22.070*, the centerpiece of the 1986 amendatory package, requires all liability be apportioned unless a listed exception applies in which case joint and several liability is retained." *Kottler v. State, 136 Wn.2d 437,*

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[6] *RCW 4.22.070* in entirety states:

> (1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:
>
> (a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.
>
> (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.
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> (2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under *RCW 4.22.040*, *4.22.050*, *and 4.22.060*.
>
> *(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.*
>
> *(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.*
>
> *(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.*

443, 963 P.2d 834 (1998). RCW 4.22.070 "generally abolishes joint and several liability", retaining it in only three areas. *Kottler, 136 Wn.2d at 446*. Two of these exceptions are irrelevant to this case. [7] We analyze whether the third exception, codified at RCW 4.22.070(1)(b) applies here, which states:

> If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

[*22]

Lesher was not at fault, so the relevant inquiry is whether "defendants", as used in RCW 4.22.070(1)(b), includes Murphy, the settling party. In *Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992)*, the court stated:

> Under RCW 4.22.070(1)(b), *only* defendants against whom judgment is entered are jointly and severally liable and only for the sum of *their* proportionate shares of the total damages. A defendant against whom judgment is entered is specifically defined by RCW 4.22.070(1) **[*23]** as 'each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense….' Thus, settling, released defendants do not have judgment entered against them within the meaning of RCW 4.22.070(1), and therefore are not jointly and severally liable defendants.
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> *Washburn, 120 Wn.2d at 294*; *Kottler, 136 Wn.2d at 447*. Because Murphy was a settling party, she could not be a jointly and severally liable defendant under RCW 4.22.070(1)(b). Accordingly, without a co-defendant there is no joint liability possible. Lesher's argument that Stewart was jointly and severally liable under RCW 4.22.070(1)(b) is in error.

Under RCW 4.22.070, liability is to be apportioned. In *Cox v. Spangler, 141 Wn.2d 431, 5 P.3d 1265 (2000)*, the Court stated:

> Once a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of those damages among themselves is upon the defendants; if the jury **[*24]** find[s] that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm.

Cox, 141 Wn.2d at 443 (quoting *Phennah v. Whalen, 28 Wn. App. 19, 29, 621 P.2d 1304*

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[7] First, modified joint and several liability is retained where the negligent parties were acting in concert or where there was a master/servant or principal/agent relationship at play. RCW 4.22.070(1)(a).

Second, full joint and several liability remains the rule in cases involving hazardous waste, tortious interference with business, and unmarked fungible goods such as asbestos. RCW 4.22.070(3)(a)-(c).

Kotter, 136 Wn.2d at 446.

(1980)). In this case, because Lesher's injuries were indivisible, under *RCW 4.22.070* fault cannot be apportioned. This makes *RCW 4.22.070* inapplicable to the facts of this case. The relevant statute is *RCW 4.22.030*, which states:

> Except as otherwise provided in *RCW 4.22.070*, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

"Persons", as used in *RCW 4.22.030*, necessarily means defendants. "One is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *City of Seattle v. Fontanilla, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996)* (citations omitted). Although Murphy was a defendant, **[*25]** she had already settled with Lesher, so judgment could not be entered against her. Stewart cannot be liable jointly for the indivisible harm on the judgment without a co-defendant. Under *RCW 4.22.030*, joint and several liability means the sole defendant, Stewart, is severally liable for the indivisible claim.

The trial court did not err when it refused to instruct the jury on the allocation of fault.

V. Motion for New Trial

Stewart also asserts that he was denied a fair trial because (1) Lesher's improper remarks at closing prejudiced him, and (2) the trial court's admonishment of his attorney before the jury further prejudiced him.

This court reviews a motion for a new trial for abuse of discretion. *Getzendaner v. United Pac. Ins. Co., 52 Wn.2d 61, 70, 322 P.2d 1089 (1958)*.

Stewart alleges that, during closing arguments, Lesher's counsel stated that the reason all parties had spent several days in court was because, unlike Murphy, who had settled, Stewart failed to settle when he had the opportunity. Stewart requested a transcription of closing arguments, for reasons not in the record the trial court did not order **[*26]** a verbatim record of closing arguments. However, Lesher does not deny Stewart's allegation. Stewart objected and the trial court sustained Stewart's objection.

Stewart's claim that opposing counsel's statement prejudiced him is based on notice to the jury that Murphy settled. However, the jury had knowledge of the settlement because Jury Instruction No. 7 instructed the jury that Lesher had settled with Murphy. [8] Stewart did not object to the instruction below, or assign error to it on appeal. On the facts of this case, we find that the statement of Lesher's counsel during closing was harmless error.

[*27] During closing, Stewart's counsel asserted that the case was a soft tissue case

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[8] Instruction No. 7 states:

> Plaintiff Lesher and defendant Dyan Murphy have entered into a settlement agreement and Murphy has been dismissed from this lawsuit. You are not to speculate regarding the amount, terms, or effect of this settlement agreement. Your duty is to determine the full amount of plaintiff Lesher's injuries and damages proximately caused by the two automobile collisions pursuant to these instructions, without regard to the Murphy settlement.

and suggested a $ 4,000 to $ 6,000 range for general damages. Lesher's counsel objected and requested a sidebar, arguing that Stewart's counsel had made improper arguments contrary to the jury instructions. Rather than requesting a mistrial, Lesher's counsel elected to have the trial court judge address the jury. The trial judge informed the jury that Stewart's counsel had improperly commented that the case was a soft tissue case. The evidence of injury supports the trial court determination. The trial court's comment to the jury merely clarified to the jury that the case was not a soft tissue case. The comment did not impugn Stewart's counsel. We find no error.

Affirmed.

/s/ Appelwick, J.

WE CONCUR:

/s/ Kennedy, J.

/s/ Grosse, J.
