

70609-8

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No. 70609-8-I

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

JAMES ENGLE, an individual,
Plaintiff/Respondent,

v.

JAY DEE MILLER and his separate property only,
Defendant-Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SNOHOMISH COUNTY
SUPERIOR COURT

The Honorable Joseph Wilson, Trial Judge

DEFENDANT-APPELLANT'S REVISED OPENING
BRIEF

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I. INTRODUCTION

This lawsuit was brought by James Engle, an Everett-area criminal, for damages allegedly sustained in September, 2009 when he received two superficial gunshot graze wounds. Mr. Miller was convicted of assault in the matter. He is serving a prison sentence.

The undisputed medical records submitted in this non-jury trial showed that the wounds were superficial. The trial judge awarded \$145,000.00 in general damages, an amount *16.4 times greater* than the total medical costs of \$8,837.00. The size of the award is not supported by sufficient evidence. This appeal followed.

II. ASSIGNMENT OF ERROR:

The trial judge erred by awarding \$145,000 in general damages.

Issues Pertaining to the Assignment of Error:

(1) After the incident, in the ER, the plaintiff had two graze wounds, one to his neck and one to the back of

his right shoulder. He reported no neck pain, chest pain or nausea. He had no neurologic symptoms. No surgery was done. He was discharged from the hospital the next day. Does the record support a general damages award *16.4 times greater* than the medical costs/specials?

(2) What is the appellate standard of review for a general damages award in a one-day non-jury trial where the ER 904 evidence of injury consists of a packet of records of the plaintiff's one-day stay in the hospital?

III. STATEMENT OF THE CASE

The complaint filed by plaintiff Engle sought damages arising from two graze gunshot wounds incurred during an incident in defendant Jay Miller's home. CP 27-35. Mr. Miller was prosecuted, asserted self-defense, was convicted at trial, and sentenced. The conviction was affirmed. *See State v. Miller*, 161 Wash.App. 1011, 2011 WL 1459805.

The civil case was defended and went to trial.¹ The trial was non-jury. No medical witness testified. The medical records for the plaintiff's one night stay in the hospital were considered pursuant to ER 904. CP 14-15, SCP² (Plaintiff's medical records, Exhibit 5, index pages 00001-000089, Sub. No.34). Those medical records state in pertinent part:

(1) Upon admission to the ER on 9-2-2009, the plaintiff had a graze gunshot wound "which does not seem to violate the skull." Report of Dr. Paul H. Kim, M.D. CP 14.³

(2) He has "another graze injury gunshot wound to the back of the right shoulder." CP 14.

(3) "Medics states [sic] very stable and doesn't fit any Trauma Criteria." SCP (Plaintiff's medical records,

¹ Summary judgment on the medical costs--\$8837.00—was granted. CP 18-20. That ruling is not at issue in this appeal.

² "SCP" refers to the Supplemental Clerk's Papers.

³ For the Court's convenience, a copy of Dr. Kim's ER report (Index pages 000010-11, CP 14-15) is attached as Appendix A herein.

Exhibit 5, index page 000015, Sub. No.34). There was “No neck pain. No loss of consciousness. No nausea, no vomiting. No abdominal pain, no chest pain, no shortness of breath. . . . No neurologic symptoms.” CP 14.

(4) “He has full range of motion, x-rays are also negative. He is neurovascularly intact distally.” CP 14.

(5) A CT scan was performed. “No intracranial foreign bodies noted. No skull fracture or defects were noted.” No surgical intervention was made. CP 14.

(6) The two wounds, both measuring 1.5 cm, were closed. CP 14.

(7) The plaintiff declined to list any emergency contact or relatives. He was not employed. SCP (Plaintiff’s medical records, Exhibit 5, index page 000007, Sub. No.34)

(8) A history of depression, schizophrenia and cocaine abuse was noted. SCP (Plaintiff’s medical records, Exhibit 5, index page 000016, Sub. No.34).

(9) The nursing assessment: neuro stated that the plaintiff is “alert and oriented x 3.” “Motor strength to all extremities are [sic] strong and equal.” SCP (Plaintiff’s medical records, Exhibit 5, index page 000017, Sub.

No.34).

(10) The nursing assessment primary survey stated:

“Patient’s breathing is normal. . . Patient’s circulation intact throughout with normal capillary refill time, Patient’s skin normal, warm and dry without hemorrhage noted. Patient is alert and oriented to person, place and time. Patient remembers events and denies loss of consciousness, cooperative and emotionally controlled.”

SCP (Plaintiff’s medical records, Exhibit 5, index page 000017, Sub. No.34).

(11) The nursing assessment secondary survey stated:

Evaluation of head and face includes, Head pain, Neck is atraumatic. C-spine is non-tender. Denies neck pain, Patient’s chest is atraumatic with normal expansion and no crepitus. Heart sounds normal. Denies pain to chest, Patient’s breath sounds are clear and equal bilaterally, Patient’s abdomen is soft, non-distended, and non-tender. Bowel sounds are present in 4 quadrants. Denies pain to abdomen . . . Denies pain to pelvis, Patient’s back is atraumatic and nontender. Denies pain to back, Color is normal. Temperature is normal. Radial pulse present, Patient states pain to shoulder, appears to be GSW grazing to right shoulder, Patient’s lower extremities atraumatic with CMS intact. No

deformities or pain to extremities noted.

SCP (Plaintiff's medical records, Exhibit 5, index page 000017-18, Sub. No.34).

(12) The 9-3-2009 discharge summary lists the diagnoses as: (1) a superficial GSW to the head; (2) a superficial GSW to the right shoulder; (3) depression; (4) schizophrenia; and (5) substance abuse. SCP (Plaintiff's medical records, Exhibit 5, index page 000009, Sub. No.34).

The trial court awarded \$145,000.00 in general damages. CP 6-8 (Judgment). No separate findings of fact or conclusions of law were entered. This appeal followed. CP 1-5.

IV. ARGUMENT: GIVEN THE RECORD, THE AWARD OF \$145,000.00 FOR GENERAL DAMAGES SHOULD BE REVERSED.

A. The Standard Of Review

This is an appeal from a one-day non-jury trial. The

trial court considered ER 904 documents, which included the medical records of the plaintiff's one day stay in the hospital, described above.⁴

Case law and a statute discuss the standard of review when a remittitur of a *jury's* damage award is sought. *See* RCW 4.76.030.

Bingaman [*Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wash.2d 831, 699 P.2d 1230 (1985)] clearly stated the rule for appellate remittiturs: "An appellate court will not disturb *an award of damages made by a jury* unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." 103 Wash.2d at 835, 699 P.2d 1230. This rule has not changed.

⁴ The ER 904 packet also included: (1) the state's sentencing memorandum, (2) the judgment and sentence, (3) the criminal case verdict form, (4) a doctor's declaration that the medical expenses incurred (\$8,837.00) were reasonable, and (5) the summary judgment order on the medical expenses.

See, e.g., Stevens v. Gordon, 118 Wash.App. 43, 54, 74 P.3d 653 (2003). This specific language does not mention any deference to the trial court and may suggest de novo review.

Bunch v. King County, 155 Wash.2d 165, 175, 116 P.3d 381 (2005) (emphasis added) (discussing case law and RCW 4.76.030).

The standard of review seems to be different if the appellate court is considering the amount of damages awarded in a non-jury trial. “[I]n *Malstrom v. Kalland*, 62 Wash.2d 732, 738–39, 384 P.2d 613 (1963), we remitted a trial judge’s award of damages because the facts did not support it.” *Bunch*, 155 Wash.2d at 174. The *Malstrom* court’s decisional paragraph stated: “Having reviewed the record, considered the facts found, and applied the rules discussed, we do not find the facts sufficiently persuasive to support the \$50,000 valuation placed upon the injury by the trial court.” *Malstrom*, 62 Wash.2d at 738.

In this case, the appellate court is in almost the same position as the trial judge sitting non-jury. This is so because “[f]ixing the amount of damages is actually a

conclusional finding based upon preliminary findings that certain damages were sustained.” *Malstrom*, 62 Wash.2d at 736.

Appellant contends that review of the trial judge’s *valuation* of the general damages here should be *de novo*. In the alternative, if this court does not apply the *de novo* standard, then we contend that this Court should determine whether the facts in the record support the amount selected by the trial judge. *See Malstrom*, 62 Wash2d at 738; *Bunch*, 155 Wash.2d at 174. The principle of proportionality between special and general damages should play a role here.

B. The Record Does Not Support The \$145,000 General Damages Award.

The plaintiff was in the hospital overnight. The medical costs were \$8,837.00. *The general damages award is 16.4 times larger than the special damages amount.*

The record does not disclose why the trial judge

picked a general damages figure so disproportionate to the specials. When seen at the hospital, the plaintiff denied pain in almost all of his body. He did not exhibit emotional distress. The wounds were described as “graze wounds” or as “superficial”, 1.5 cm in size. No body structure, such as an organ, a bone, or a muscle, was damaged.

It is true that the wounds came from gunshots. The firing of the gunshots is being addressed in the criminal justice system. The award of general damages here is for compensation for injury, not some other purpose. The record does not contain sufficient evidence to support the valuation of the general damages at over 16 times the total medical costs.

V. CONCLUSION

For the reasons stated, the award of \$145,000.00 for general damages should be reversed.

Dated this the 31st day of March, 2014.

Respectfully submitted,
MUENSTER AND KOENIG

By: S/ John R. Muenster
John R. Muenster
Attorney at Law, WSBA # 6237
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on or about the 31st day of March, 2014,
I caused a true and correct copy of this document to be
served on counsel of record via email and first class mail.

Dated this the 31st day of March, 2014.

S/ John R. Muenster
Attorney at Law

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Engle v. Miller, No. 70609-8-I
Appellant's Opening Brief
Appendix A

Report of Dr. Paul H. Kim, MD.

CP 14-15

Index pages 000010-11

PROVIDENCE REGIONAL MEDICAL CENTER-EVERETT

Name: ENGLE, JAMES F
DOB: 05/04/1964

ACCT#: 0924500512
MRN: 0001335724

EVT STAT ER ADMIT _1151611

ADDENDUM TO T SYSTEM

DATE OF ADMISSION: 09/02/2009 11:33 AM

HISTORY OF PRESENT ILLNESS: The patient is a 45-year-old gentleman who presents today after a gunshot wound. The patient was shot while running away, by a small-caliber gun, apparently. He has some gunshot wounds to the head and also to the right shoulder. He denies any fall. No neck pain. No loss of consciousness. No nausea, no vomiting. No abdominal pain, no chest pain, no shortness of breath. Please refer to T sheet for detailed history and physical examination and further details. He denies any headaches. No neurologic symptoms.

PHYSICAL EXAMINATION:

On arrival, the patient is in no acute distress. He has normal vital signs. Saturating well, 100% on room air. He was brought in with C-collar. However, C-collar was discontinued after clinical examination. He was alert and oriented x 3 and cooperative with examination.

On examination, he has 3 gunshot wounds to the head, as described on T sheet. 1 is what appears to be a graze gun shot wound and does not seem to violate the skull. He also has another gunshot wound, which is another graze injury to the back of the right shoulder. He has full range of motion. X-rays are also negative. He is neurovascularly intact distally.

CT scan of the head was performed, and it shows a small amount of acute right posterior parietal subarachnoid hemorrhage and small amount of subdural blood layering in the tentorium symmetrically. There are metallic foreign bodies in the soft tissue swelling, and soft tissue gas within the posterior parietal midline scalp, consistent with gunshot injury. No intracranial foreign bodies noted. No skull fracture or defects noted.

I discussed these findings with Dr. Sanford Wright, the neurosurgeon on-call, who reviewed the CT scan and felt that this could very well be artifact and did not feel that, especially with how stable and alert and oriented the patient was, there was significant injury or the patient needed surgical intervention at this point. However, due to the circumstances of the injury and these possible findings, we decided to admit the patient for further evaluation and treatment.

The patient's gunshot wounds were closed. He has 1 in the midline of occipital area and also 1 in the right occipital area, both measuring 1.5 cm. Local anesthesia was used, and they were cleaned, 2% lidocaine, and we used a total of 2.5 mL of lidocaine. The first laceration in the midline was closed with 2 staples, and the second laceration in the right occipital area was closed with 1 staple. The patient tolerated the procedure well. There were no complications.

The patient will be admitted to neurosurgical floor for further evaluation and treatment with Dr. Sanford Wright.

Clinical Impression:

CD 14
←

1. GUNSHOT WOUNDS TO THE HEAD.
2. POSSIBLE SUBARACHNOID, POSSIBLE SUBDURAL HEMORRHAGE.
3. RIGHT SHOULDER GUNSHOT WOUND.

PAUL H KIM, MD

MLS: 95440

cc: Sanford J Wright, M.D.

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Authenticated by Paul H Kim, MD On 09/05/2009 06:03:00 AM