

91266-1

No. 70609-8-I

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

**FILED**  
FEB 03 2015

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

CPB

JAMES ENGLE, an individual,  
Plaintiff/Respondent,

v.

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

X

APPEAL FROM THE SNOHOMISH COUNTY  
SUPERIOR COURT  
The Honorable Joseph Wilson, Trial Judge

DEFENDANT-APPELLANT'S PETITION FOR REVIEW

LATE

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**A. IDENTITY OF PETITIONER**

Jay Dee Miller, Appellant, asks this Court to accept review of the Court of Appeals decision designated below.

**B. COURT OF APPEALS DECISION**

Mr. Miller seeks review of the decision by a panel of Division One of the Court of Appeals filed November 10, 2014.<sup>1</sup> The decision used an incorrect standard of review. It affirmed a damages award by the trial court that was *16.4 times greater* than the medical costs/specials. The panel asserted that the award fell within a “range” which is not in the record.

In his oral decision, the trial judge stated that he had “reviewed numerous cases of gunshot wounds and shootings”. He stated that he had “experience in these types of cases”. Undersigned counsel could find no evidence to support these assertions.

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<sup>1</sup> A copy of the decision is reproduced in the Appendix, pages A-1 to A-4.

The Court of Appeals panel denied our motion for reconsideration on December 22, 2014.<sup>2</sup>

This Court should grant review, reverse the Court of Appeals, reverse the judgment, and remand to the Superior Court for further proceedings.

**C. Issue Presented For Review—Whether A Damages Award Can Be Upheld Where The Evidence Does Not Support The Existence Of A Claimed “Range”.**

(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) In his oral decision, the trial judge stated that he had “reviewed numerous cases of gunshot wounds and shootings”. He stated that he had “experience in these types

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<sup>2</sup> A copy of the order is reproduced in the Appendix, page B-1.

of cases”. Undersigned counsel could find no evidence to support these assertions. Did the appellate panel err by asserting that the award fell within a “range” which is not in the record?

(3) Does due process of law require that a trial judge enter reviewable findings and conclusions when he asserts that his damages award is based on cases and experience outside the record whose existence cannot be corroborated?

**D. Issue Presented For Review—Whether The Fixing Of The Amount Of Damages In A Non-Jury Trial Is A Conclusional Finding Which Should Be Reviewed De Novo.**

(1) Is *de novo* review supported by this Court’s decision in *Malstrom v. Kalland*, 62 Wash.2d 732 (1963)?

(2) Is *de novo* review supported by this Court’s decision in *Mason v. Mortgage America Inc.*, 114 Wash. 2d 842,850, 792 P.2d 142 (1990)?

## **E. 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 was sentenced. The conviction was affirmed. *See State v. Miller*, 161 Wash.App. 1011, 2011 WL 1459805.

**1. Trial evidence.** The civil case was defended and went to trial.<sup>3</sup> 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, SCP<sup>4</sup> (Plaintiff's medical records, Exhibit 5, index pages 00001-000089, Sub. No.34). Those medical records state in pertinent part:

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<sup>3</sup> Summary judgment on the medical costs--\$8837.00—was granted. CP 18-20. That ruling is not at issue in this appeal.

<sup>4</sup> "SCP" refers to the Supplemental Clerk's Papers.



(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.

(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, 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.

## **2. The trial judge’s damages ruling.**

The verbatim report of proceedings of the trial judge’s

oral decision is attached.<sup>5</sup>

In his oral decision, the trial judge states in pertinent part: “I have reviewed numerous cases of gunshot wounds and shootings to determine the quantum of evidence needed and to look at different areas of damages.” RP 3, lines 21-23; Appendix page A-16.

The trial judge also states in pertinent part:

“I am satisfied based upon my experience in these types of cases, my review of other cases, what jury verdicts and settlements have been, that an appropriate, fair, reasonable amount of damages should be in the amount of \$145,000.”

RP 5, lines 9-13; Appendix, page A-18.

Undersigned counsel could find no evidence to support the judge’s assertions regarding past experience or other cases, verdicts or settlements. *Declaration*, Appendix pages A-8 to A-10.

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<sup>5</sup> Exhibit B to the declaration of John Muenster in support of defendant-appellant’s motion for reconsideration (“*Declaration*”), Appendix pages A-13 to A-19.

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.

**F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED: THE DAMAGES AWARD SHOULD NOT BE UPHELD WHERE THE EVIDENCE DOES NOT SUPPORT THE EXISTENCE OF A CLAIMED “RANGE”.**

The decision of the Division One panel applies an incorrect standard of review. Review should be granted under RAP 13.4(b)(1) and (4).

The panel decision states: “This court will not disturb an award of damages made by the trier of fact unless it is ‘outside the range of substantial evidence in the record’ ...”. Appendix, page A-2. The panel decision does not indicate what “range” the panel had in mind. This raises certain questions: (a) what are the parameters of the “range”? (b) What “range”, if any, did the trial judge have in mind? (c) What case experience did he have in mind? (d) Assuming arguendo that the trial judge reviewed “other

similar cases”, CP 39, is Mr. Miller’s right to due process in a civil trial violated by the judge’s use of unspecified “other cases” to justify an award against him?

There appears to be no content to the concept of “the range” in this case. The only way the defense could make a record of what the trial judge had in mind would be to take his deposition post-trial to find out what his “experience” in “these types of cases” was, and to find out what “other similar cases” he reviewed. CP 39.

Here, undersigned counsel could not find any corroboration of the judge’s assertions about other cases, verdicts, settlements, or his experience. *Declaration, supra.*

Mr. Miller’s right to due process of law was violated by the panel’s reliance on an ephemeral “range” based on the trial judge’s unknown experience and cases outside the record whose existence is not corroborated. As is further discussed below, this court’s decisions properly require a structured analysis of a damages award under the circumstances here.

**G. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED—THE FIXING OF THE AMOUNT OF DAMAGES IN A NON-JURY TRIAL IS A CONCLUSIONAL FINDING WHICH SHOULD BE REVIEWED DE NOVO.**

The decision of the Division One panel applies an incorrect standard of review. Review should be granted under RAP 13.4(b)(1) and (4).

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 v. Kalland*, 62 Wash.2d 732, 736, 384 P.2d 613 (1963). Although cited by appellant, the panel did not cite or discuss *Malstrom*.

Appellant contends that review of the trial judge’s *valuation* of the general damages here should be *de novo*. Assuming solely for purposes of this petition that there was “evidence” of the “distrust”, “nervousness” and other phenomena on the part of the plaintiff cited in the panel decision, the appellate court should review, *de novo*, how

the trial judge chose a general damages figure *16.4 times larger* than the special damages figure.

The panel relied on generalized language in *Mason v. Mortgage America Inc.*, 114 Wash. 2d 842, 850, 792 P.2d 142 (1990), a breach of contract case. Close examination of that case shows it supports Appellant:

(1) The Supreme Court stated:

As finder of fact, *the trial court* concluded the purchasers were damaged in the amount of \$12,500, but *did not explain how that figure was calculated.*<sup>FN10</sup>

FN10. The eminent trial judge is now deceased. *It has proven possible, however, after a careful review of the record, to determine the elements of the trial judge's calculation of damages.*

*Mason*, 114 Wash.2d at 850 (emphasis added).

(2) The Supreme Court also stated:

We have made a thorough review of the record to ascertain *how* the trial court reached its \$12,500 award. . . . We thus conclude that while the damage award is sustainable, it must

be reduced by the amount of the contract between the lender and the purchasers.

*Mason*, 114 Wash.2d at 851. This appears akin to *de novo* review.

The *Mason* Court did not apply the generalized language (“outside the range”, “shocks the conscience”, “passion and prejudice”) cited by the panel in this case. We respectfully contend that, unlike the Supreme Court in *Mason*, the panel here did not conduct “a thorough review of the evidence” to ascertain *how* the trial judge reached his number, 16.4 times over the special damages. *Mason, supra*, at 850-851. Unlike the Supreme Court in *Mason*, the panel did not “determine the elements of the trial judge's calculation of damages.” *Ibid*.

The *Malstrom* case, cited by Appellant but not mentioned by the panel, also furnishes support for Appellant. “[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 v. King County*, 155 Wash.2d 165, 174, 116 P.3d 381(2005). The *Malstrom* court’s decisional paragraph

states: “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. The inquiry conducted by the Supreme Court in *Malstrom* was apparently not conducted by the panel here.

The record does not contain sufficient evidence to support the valuation of the general damages at over 16 times the total medical costs. The panel relied on an ephemeral concept of “range”. This conflicts with *Mason* and *Malstrom*.

There is no corroboration of the trial judge’s assertions about: (a) “numerous cases of gunshot wounds and shootings”, (b) the asserted prior verdicts, (c) the asserted prior settlements, or (d) his own asserted experience with civilian gunshot cases. The *de novo* standard is essential to achieve justice in this case and cases like it.



**H. CONCLUSION.**

For the reasons stated, this Court should grant review, reverse the appellate panel, reverse the judgment, and remand to the Superior Court for further proceedings.

DATED this the 28th day of January, 2015.

Respectfully submitted,  
MUENSTER & KOENIG  
By: S/John R. Muenster  
JOHN R. MUENSTER  
Attorney at Law, WSBA No. 6237  
Of Attorneys for Appellant Jay Dee Miller

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on or about the 28th day of January, 2015, a true and correct copy of the foregoing document was served via email and first class mail on opposing counsel.

S/John R. Muenster  
John R. Muenster

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES ENGLE, an individual, )  
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 Respondent, )  
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 v. )  
 )  
 JAY DEE MILLER, and his separate )  
 property only, )  
 )  
 Appellant, )  
 )  
 and )  
 )  
 JANIS DEE MILLER, as wife and )  
 the marital community composed )  
 thereof, )  
 )  
 Defendant. )

No. 70609-8-1  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: November 10, 2014

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2014 NOV 10 AM 9:27

TRICKEY, J. — The amount of damages is a question of fact to be decided by the fact finder, and will not be disturbed so long as the award is within the range of substantial evidence in the record. Because Jay Dee Miller fails to show that the trial court’s award was not based on substantial evidence, we affirm.

FACTS

The facts surrounding the incident at issue here are derived from the unpublished opinion of this court affirming Miller’s conviction for first degree assault with a firearm, State v. Miller, noted at 161 Wn. App. 1011, 2011 WL 1459805. Miller allowed James Engle, an acquaintance, to live temporarily in a trailer on Miller’s property. Because the trailer did not have a bathroom or running water, Engle frequently visited Miller’s house. On September 2, 2009, during one such visit, the two men got into an argument. According to Engle, Miller said, “Now you’re dead, fucker’ and shot Engle twice” with a handgun. Miller, 2011 WL

1459805, at \*1. One of the bullets grazed Engle's shoulder; the other struck him in the back of the head, producing entry and exit bullet wounds.

Engle sued Miller, alleging causes of action for assault and battery. On November 7, 2012, the trial court granted Engle's motion for summary judgment on the issue of liability and awarded Engle \$8,837.00 in medical expenses. The case proceeded to a bench trial on the issue of general damages. The trial court heard the testimony of two witnesses, including Engle, and reviewed 11 exhibits, including Engle's hospital records and photographs of his wounds. The trial court awarded Engle \$145,000.00 in general damages and entered a judgment against Miller for the total amount of \$153,837.00. Miller appeals the trial court's award of general damages only.

#### ANALYSIS

A fact finder has discretion to award damages within the range of competent evidence in the record. Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990). This court will not disturb an award of damages made by the fact finder unless it is "outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice." Mason, 114 Wn.2d at 850.

Citing Bunch v. King County Department of Youth Services, 155 Wn.2d 165, 176, 116 P.3d 381 (2005), Miller suggests that our review of the trial court's award should be de novo. But Bunch is clear that the de novo standard of review applies only when the trial court remits a jury's award. 155 Wn.2d at 176. Because here

there was no remittitur by the trial court, abuse of discretion is the appropriate standard of review. Bunch, 155 Wn.2d at 175.

The question is therefore whether the amount was outside the range of substantial evidence. Miller asserts that the evidence was insufficient to support an award of \$145,000.00 because Engle's wounds were merely superficial and Engle did not exhibit any emotional distress when he was initially admitted to the hospital.

However, in the absence of a full and complete trial record, it is not possible to review the challenged evidence in the context of the rest of the evidence presented. Miller failed to provide a verbatim report of proceedings of the trial and designated only one exhibit comprising Engle's hospital records from September 2 and 3, 2009. The trial minutes show there was evidence presented from which the trial court was "satisfied that the Plaintiff suffers from migraines, experiences 'white flashes,' has a heightened level of distrust and nervousness, has generally withdrawn from daily activities, and has suffered . . . physical damages related to the scarring."<sup>1</sup> A party seeking review bears the burden of perfecting the record on appeal, and an insufficient appellate record precludes review of the alleged errors. Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994); see also RAP 9.2(b) ("If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding."). Absent an affirmative showing of error, we presume a trial court's decision to be correct. State

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<sup>1</sup> Clerk's Papers at 39.

No. 70609-8-1 / 4

v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). Because the record is insufficient to show the award was outside the range of substantial evidence, we affirm the judgment of the trial court.

Trickey, J

WE CONCUR:

Uehling AG

Dryden J.

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

JAMES ENGLE, an individual, )  
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 Respondent, )  
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 v. )  
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 JAY DEE MILLER, and his separate )  
 property only, )  
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 Appellant, )  
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 and )  
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 JANIS DEE MILLER, as wife and )  
 the marital community composed )  
 thereof, )  
 )  
 Defendant. )

No. 70609-8-1

ORDER DENYING MOTION  
FOR RECONSIDERATION

The appellant, Jay Dee Miller, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 22<sup>ND</sup> day of December, 2014.

FOR THE COURT:

Trichey, J

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 DEC 22 PM 1:45

A-5

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No. 70609-8-1

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

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JAMES ENGLE, an individual,  
Plaintiff/Respondent,

v.

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

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APPEAL FROM THE SNOHOMISH COUNTY  
SUPERIOR COURT  
The Honorable Joseph Wilson, Trial Judge

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DECLARATION OF JOHN MUENSTER IN SUPPORT  
OF DEFENDANT-APPELLANT'S MOTION FOR  
RECONSIDERATION

---

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JOHN R. MUENSTER  
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Attorneys for Defendant/Appellant

A-6



STATE OF WASHINGTON )  
COUNTY OF KITSAP        ) ss

I, John R. Muenster, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

(1) I am retained counsel for the appellant, Jay Dee Miller, appellant herein, and make this declaration in that capacity. I am familiar with the records and files herein.

(2) I arranged for the verbatim report of proceedings of the trial judge's oral decision in this matter, April 24, 2013, to be transcribed by the court reporter.

(3) A copy of the notice of filing of the verbatim report of proceedings of the April 24, 2013 oral decision is attached hereto as Exhibit A and by this reference incorporated herein.

(4) A copy of the verbatim report of proceedings of the April 24, 2013 oral decision is attached hereto as Exhibit B and by this reference incorporated herein ("RP").

(5) In the oral decision, the trial judge states in pertinent part: "I have reviewed numerous cases of

gunshot wounds and shootings to determine the quantum of evidence needed and to look at different areas of damages.” RP 3, lines 21-23.

(6) In the oral decision, the trial judge also states in pertinent part:

“I am satisfied based upon my experience in these types of cases, my review of other cases, what jury verdicts and settlements have been, that an appropriate, fair, reasonable amount of damages should be in the amount of \$145,000.”

RP 5, lines 9-13.

(7) On information and belief, Judge Wilson took the bench in December, 2009. Undersigned counsel has not found any record of a personal injury case involving a civilian shooting<sup>1</sup> coming on for trial or settlement before Judge Wilson, other than this case.

(8) On information and belief, Judge Wilson apparently began his private practice in 1995. Undersigned

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<sup>1</sup> The term “civilian shooting” means a non-police shooting of one civilian by another.

counsel has not found any record of a personal injury case involving a civilian shooting prosecuted or defended by Judge Wilson while he was in private practice.

(9) Undersigned counsel was the director of the Snohomish County Public Defender Association in Everett from 1981-1984. Undersigned counsel practiced in a partnership with Everett attorney Mark Mestel from 1984 to 1994. During that time, we represented Snohomish county clients in two police shooting cases, one of which was a wrongful death case. Undersigned counsel also represented another Snohomish county family in another wrongful death/ police shooting case in the late 1990's. Undersigned counsel has appeared in Snohomish county cases on occasion since 2000, including trial of an aggravated murder case in 2004. Undersigned counsel is not aware of any civilian shooting personal injury case litigated in Snohomish county during the period 1981-2014, other than this case.

(10) Undersigned counsel contacted two prominent lawyers who have practiced in Everett since the late 1970's. Neither attorney is aware of a civilian shooting personal injury case filed, litigated or settled in Snohomish County Superior Court during their time in practice.

(11) In December, 2014, undersigned counsel contacted Jury Verdicts Northwest (JVN), a firm which tracks jury verdicts and settlements in Washington. I submitted a request to JVN to search their Washington database for verdicts and settlements involving a minor gunshot wound to the neck and shoulder, graze wound, with 1 day in the hospital, with approximately \$8,000 in medical bills. The email and search invoice/.pdf I received from JVN is attached as exhibit C and by this reference incorporated herein. No "hit" was found.<sup>2</sup>

Dated and signed this the 10<sup>th</sup> day of January, 2015.

Respectfully submitted,  
MUENSTER AND KOENIG

By:

  
John R. Muenster

Attorney at Law, WSBA # 6237  
Of Attorneys for Appellant

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<sup>2</sup> Two cases were located in which each plaintiff, a minor child, was shot in the eye with a BB gun, resulting in loss of the eye in one case and loss of vision in another.

Exhibit A

Notice of filing of verbatim report of  
4-23-2013 proceedings

*Engle v. Miller,*  
*Court of Appeals No 70609-8-1*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES ENGLE, )  
 )  
 Plaintiff, ) COURT OF APPEALS  
 ) CAUSE NO. 70609-8-I  
 vs. )  
 ) NOTICE OF FILING OF  
 JAY DEE AND JANIS DEE MILLER, ) VERBATIM REPORT OF  
 ) PROCEEDINGS  
 Defendant. )  
 ) (RAP 9.5)  
 )

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DECLARATION

I, DIANE RUGH, court reporter, filed the verbatim report of proceedings for April 24, 2013 and provided a copy to the party who arranged for transcription. The transcript was computer-generated.

CERTIFICATE OF SERVICE

I certify that on January 16, 2015, I caused a true and correct copy of this Notice to be served on the following:

John Muenster  
Court of Appeals

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DIANE RUGH, CRR, RMR  
Official Court Reporter

A-12

Exhibit B

Verbatim report of 4-23-2013  
proceedings

*Engle v. Miller,*  
*Court of Appeals No 70609-8-1*

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

JAMES ENGLE,  
Plaintiff,  
vs.  
JAY DEE AND JANIS DEE MILLER,  
Defendant.

)  
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)  
) Cause No. 10-2-06300-3  
)  
)  
)

REPORT OF PROCEEDINGS

THE HONORABLE JOSEPH P. WILSON  
Snohomish County Courthouse  
April 24, 2013

A P P E A R A N C E S

FOR THE PLAINTIFF: ERIC HOORT  
Attorney at Law

FOR THE DEFENDANT: JOHN R. MUENSTER  
(Present telephonically) Attorney at Law

DIANE M. RUGH, CRR, RMR, RPR  
Official Court Reporter  
CCR No. 29906-2399  
Snohomish County Superior Court  
3000 Rockefeller Avenue, M/S 502  
Everett, Washington 98201-4046  
(425) 388-3274



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PROCEEDINGS - April 24, 2013

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THE COURT: Thank you, please be seated.

MR. MUENSTER: Good morning, Your Honor, John Muenster appearing telephonically.

09:01

THE COURT: Good morning. We're here on the Court's decision on Engle versus Miller, 10-2-06300-3, basically a personal injury cause of action, plaintiff against the defendant, that arises from an incident on September 2, 2009, here in Snohomish County. In that incident plaintiff was assaulted by the defendant. He was shot in the back of the head at least two times by the defendant. The defendant was found guilty of assault first degree and currently is incarcerated. The case proceeded. The plaintiff was granted summary judgment on liability for basically assault and battery and was granted summary judgment to recuperate past medical expenses of \$8,837.

09:02

09:02

The plaintiff claims, essentially, in this cause of action emotional distress related to the shooting. In addition, he claimed he suffers from migraines and what are called white flashes, and generally a generalized fear that keeps him confined in his home and unable to participate in the day-to-day activities of a normal citizen. There is no claim for any wage loss, no claim for any future medical expenses, as indicated.

09:03

09:03

1 Essentially it's a claim for emotional damages.

2 Mr. Engle in this one-day trial presented no expert  
3 testimony regarding the emotional or psychological impact  
4 this shooting had on him. The testimony consists solely  
5 of one lay witness and Mr. Engle himself. The defense  
6 called no witnesses. A number of exhibits were admitted  
7 and considered. 09:04

8 While I generally do not comment on the witnesses that  
9 are presented to me, I think it's fair to say that the  
10 witnesses were unique in their presentation to the Court. 09:04  
11 But I am reminded of what I had stated previously, that we  
12 take folks that come in front of us as they are.

13 Mr. Engle was not a perfect plaintiff by any stretch of  
14 the imagination, historically or currently, but that's the  
15 nature of Mr. Engle. Some refer to these folks as 09:05  
16 eggshell plaintiffs. We must take them as they come to  
17 us. His friend, Mr. Muronek, while limited in what he  
18 could express to the Court, did support in some sense the  
19 differences that he has seen in Mr. Engle.

20 I have thought about this case every day since the 09:05  
21 close of testimony. I have reviewed numerous cases of  
22 gunshot wounds and shootings to determine the quantum of  
23 evidence needed and to look at different areas of damages.  
24 I am satisfied by a preponderance of the evidence that  
25 Mr. Engle has been damaged by this shooting. The 09:06

1 gentleman was shot in the back of the head at least twice  
2 with the saying that he was going to die. He was invited  
3 into a home, a trap was laid for him. That is outrageous  
4 and shocks the conscience.

5 I am satisfied based upon his testimony that he suffers  
6 from migraines. I am satisfied that he suffers from what  
7 he calls white flashes. I am satisfied that he suffers  
8 from a heightened level of distrust and nervousness that  
9 accompanies him throughout his days and will accompany him  
10 in the future. I am satisfied with his description of a  
11 general withdrawal from daily activities. I'm also  
12 satisfied with the physical damages related to the  
13 shooting, the scarring on his shoulder and in the back of  
14 his head.

15 The one drawback in Mr. Engle's case is the lack of any  
16 competent expert testimony in regards to the emotional or  
17 psychological impact, objectionable impact it has had on  
18 him. I reject the diagnosis of PTSD. It's not supported  
19 in the record. I do not know what his understanding of it  
20 is and I do not know, frankly, if a diagnosis was made,  
21 whether the professionals who made it have full history of  
22 Mr. Engle's schizophrenia, a full history of his  
23 hospitalizations, a full history of his apparent drug and  
24 alcohol use. It is unknown to me. So I have to reject  
25 that.

09:06

09:07

09:07

09:08

09:08

A-17

1 But clearly Mr. Engle has been damaged emotionally. He  
2 will suffer in the future to some extent. I think there  
3 are pathways or doorways available to him but he does not  
4 appear to be at a point in his life where he can be honest  
5 with himself and accept the help that's being offered to  
6 him or that is out there. He apparently is an individual  
7 who wants to remain in control of what he does. That is  
8 fine. We take plaintiffs as we see them.

09:09

9 I am satisfied based upon my experience in these types  
10 of cases, my review of other cases, what jury verdicts and  
11 settlements have been, that an appropriate, fair,  
12 reasonable amount of damages should be in the amount of  
13 \$145,000. A judgment will enter for the plaintiff in that  
14 amount against the defendant.

09:09

15 MR. HOORT: Thank you, Judge.

09:10

16 MR. MUENSTER: Your Honor, I couldn't hear the number  
17 that you ruled on.

18 THE COURT: \$145,000.

19 MR. MUENSTER: \$145,000?

20 THE COURT: Yes, sir.

09:10

21 MR. MUENSTER: Okay, thank you, sir. Thank you, Your  
22 Honor.

23 THE COURT: All right, thank you. You can present a  
24 judgment and you can coordinate with Mr. Muenster about  
25 that.

09:10

1 MR. HOORT: I will, Judge.

2 THE COURT: You can just present it ex parte, if that's  
3 all right.

4 MR. HOORT: Thank you for your time and consideration  
5 in this matter. We appreciate it.

09:10

6 MR. MUENSTER: Thank you, Your Honor.

7 THE COURT: Thank you, folks. We'll be in recess.

8 (Proceedings concluded.)

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CERTIFICATE OF OFFICIAL COURT REPORTER  
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COUNTY OF SNOHOMISH )

I, Diane Rugh, CSR, RPR, RMR, CRR, one of the official court reporters of the Superior Court of the State of Washington, in and for the County of Snohomish, do hereby certify that the Report of Proceedings in the foregoing cause was reported stenographically by me and reduced to computerized transcription under my direction;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the Report of Proceedings is a full, true, and correct transcript of the proceedings to the best of my ability.

\_\_\_\_\_  
Official Court Reporter

\_\_\_\_\_  
Date

A-20

Exhibit C

Jury Verdicts NW email and search  
invoice/.pdf  
12-24-2014

*Engle v. Miller,*  
*Court of Appeals No 70609-8-1*

**Subject:** Search Results  
**From:** "Melissa McCann" <mmccann@juryverdictsnw.com>  
**Date:** 12/24/2014 10:51 AM  
**To:** <jmkk1613@aol.com>

Dear Mr. Muenster,

Please be advised that there were no cases matching your search request in Washington. However, there were two cases involving BB guns, but involved significant eye injuries. I included these cases at no extra cost. Please let me know if you have any questions.

Thank you,  
Melissa

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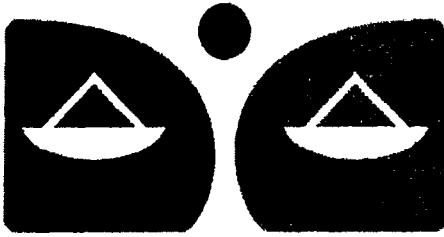
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John R. Muenster  
Muenster & Koenig  
14940 Sunrise Drive NE  
Bainbridge Island, WA 98110

Fax: 206-855-1027

Email: [jmkk1613@aol.com](mailto:jmkk1613@aol.com)

Re: Miller

DATE	SEARCH DESCRIPTION	CHARGE	PAYMENT	TOTAL BALANCE
12/24/14	Search – minor gunshot wound; neck and shoulder; graze wound; 1 day in Hosp.; meds \$8k approx.; WA only  No Hit	\$ 25.00 (no hit fee)	-0-	\$ 25.00

**To insure proper credit**  
**Please remit copy of invoice**

A-23

DECEMBER 2013

SETTLEMENT - CONFIDENTIAL COUNTY

JOHN DOE (MINOR CHILD) v. JOHN DOE AND JANE DOE

Settlement Date: 7/18/13

Plff Atty: Derek P. Radtke, Phillips Law Firm (Woodinville)  
Def. Atty: confidential

Plff Med.: Madigan Army Medical Center, Tacoma; Erickson Labs NW,  
Kirkland

Def. Med.: none

PREMISES LIABILITY

VISION INJURY; LOSS OF EYE

2/23/11 - Plff, minor male age 9, student. Plff was a guest in the home of Def. Jane Doe, and there to play with her son (age 6). The children were playing in the living room. While Def. Jane Doe was in a different room, her son pulled a BB Gun Rifle out from under the couch. Plff told the child to be careful with the gun. The child pointed the gun at Plff and pulled the trigger. Plff was hit in the left eye with a BB. The BB Gun belonged to Def. John Doe, the boyfriend of Def. Jane Doe. The two lived separately. Def. John Doe maintained, when interviewed by police, that the last time he saw the BB Gun, before the incident, it was in the trunk of his vehicle.

Injuries: Vision injury; loss of left eye. Plff's left eye was unable to be repaired, and it was removed at Madigan. Plff now has a prosthetic eye, and will require periodic evaluations of his eye and the prosthetic replacement.

Specials: Med. \$24,802.

Settlement: Demand: \$300,000 (policy limits). This case was defended under reservation of rights.

Result: PLAINTIFF SETTLEMENT for \$300,000.

A-24

SEPTEMBER 1999

SETTLEMENT - KITSAP COUNTY

BENJAMIN CORCELL v. DAVID PEARCE; GARRETT REITE & GLEN REITE  
(GARRETT'S FATHER)

Number: 99-2-00947-1

Settlement Date: 6/99

Plff Atty: Kim D. Zak of Shiers, Chrey, Cox, Caulkins, DiGiovanni  
& Zak (Port Orchard)

Def. Atty: Douglas F. Foley of Bullivant Houser Bailey for Def.  
Pearce (Vancouver); adjusters for Reite father and son

Insurance Co.: State Farm; American States (Garrett Reite);  
Farmers (Glen Reite)

Plff Med.: Todd Schneiderman MD (Ophthalmologist) Poulsbo

BB GUN ACCIDENT

EYE INJURY

11/11/96 - Plff, male age 13. Plff and his cousin Def. Garrett,  
age 12, were playing with a BB gun at their grandfather's summer  
home. Def. grandfather, David Pearce, allowed the boys to play  
with the guns unsupervised. Def. Garrett thought the chamber was  
empty when he pointed the gun at Plff and pulled the trigger. A BB  
was lodged in Plff's right eye. Plff was airlifted to Harborview  
and underwent surgery to remove the BB at the UW Medical Center.

Injuries: Loss of sight in right eye.

Specials: Med. \$34,300; Days in Hosp. - 4 days.

Settlement: Demand: \$735,000.

Result: SETTLEMENT for \$635,000. (\$500,000 Def. Pearce; \$100,000  
Def. Garrett; \$35,000 Def. Glen, noncustodial father.)

A-29

CERTIFICATE OF SERVICE

I certify that on or about the 22nd day of January, 2015, 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 22nd day of January, 2015.

S/ John R. Muenster

Attorney at Law

*[Faint, illegible text, possibly a stamp or signature]*

A-26