

62312-5

62312-5

No. 62312-5-I

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

FILED
COURT OF APPEALS, DIVISION 1
STATE OF WASHINGTON
2009 JUN -8 AM 11:04

**KMART OF WASHINGTON LLC, d/b/a KMART STORE #3413,
a Washington corporation,**

Appellant,

v.

**JADA AMY, individually and as Guardian ad litem for and on behalf
of I.O.A., a minor, D.M.A., a minor, and V.M.G., a minor,**

Respondent.

REPLY BRIEF

Averil B. Rothrock
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339
WSBA No. 24248

Heidi Mandt
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Ave., Suite 1700
Portland, OR 97204-3717
WSBA No. 26880

Attorneys for Appellant

ORIGINAL

TABLE OF CONTENTS

	Page
I. Because Kmart Has Made a Strong Showing of Abuse of Discretion And Shown That Plaintiff Got a Fair Trial and That Substantial Evidence Supports the Verdict, This Court Should Reverse the Grant of a New Trial.....	3
A. Because the Court Views the Evidence Most Favorably to Kmart, This Court Should Reverse.....	3
B. It Was an Abuse of Discretion to Reject the Jury’s Verdict Given Plaintiff’s Inadequate Evidence of Pain and Suffering from Four Months of Bruising and Kmart’s Defense.....	5
C. At the Least, Any New Trial Should Be Limited to the Issue of General Damages for Four Months of Bruising.....	9
D. <i>De Novo</i> Scrutiny of the Jury Verdict Form Shows the Jury Did Not Reach Interrogatory No. 3 Regarding General Damages, Requiring Reversal of the New Trial Grant Incorrectly Premised on Interrogatory No. 3.....	9
II. This Court Should Reverse the Sanction Award Because Plaintiff Offers No Record Citations or Rationale To Support It.	11
A. This Court Should Reverse for Inadequate CR 26(i) Certifications, Failings That Deprived the Trial Court of Authority to Consider the Motions and Grant Relief.....	12
1. This Court Can Decide the Certification Issue Pursuant to RAP 2.5(a)(1) and (2).....	12
2. It Does Not “Affirmatively Appear” That Plaintiff’s Counsel Met and Conferred With Regard to Either Motion.	14

a. First, the Motion for Sanctions Cannot Justify Any Sanctions Due to Its Silence On Certification, a Defect That Plaintiff Cannot Fix and That Requires Reversal of All Sanctions Beyond the Expense of the Motion to Compel.....15

b. Second, the Purported Certification in the Motion to Compel Is Inadequate.....17

B. Plaintiff Failed to Respond to Kmart’s Specific Arguments That the Sanctions Were Excessive and Fee Shifted.18

CONCLUSION..... 20

TABLE OF AUTHORITIES

STATE CASES

	Page
<i>Baxter v. Greyhound Corp.</i> , 65 Wn.2d 421, 397 P.2d 857 (1964).....	5
<i>Case v. Dundom</i> , 115 Wn. App. 199, 58 P.3d 919 (2002).....	15
<i>Clarke v. Office of Attorney General</i> , 133 Wn. App. 767, 138 P.3d 144 (2006).....	12, 16, 17
<i>Cox v. Charles Wright Academy</i> , 70 Wn.2d 173, 422 P.2d 515 (1967).....	vi, 8
<i>Fahndrich v. Williams</i> , 147 Wn. App. 302, 194 P.3d 1005 (2008).....	8
<i>Geston v. Scott</i> , 116 Wn. App. 616, 67 P.3d 496 (2003).....	1, 4, 5
<i>Hecker v. Cortinas</i> , 110 Wn. App. 865, 43 P.3d 50 (2002).....	13
<i>Lopez v. Salgado-Guadarama</i> , 130 Wn. App. 87, 122 P.3d 733 (2005).....	1, 4, 7
<i>Ma'Ele v. Arrington</i> , 111 Wn. App. 557, 45 P.3d 557 (2002).....	10, 11
<i>Neilsen ex rel. Crump v. Blanchette</i> , 149 Wn. App. 111, 201 P.3d 1089 (2009).....	13
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997).....	4, 5, 7, 8, 10, 11
<i>Rudolph v. Empirical Research System, Inc.</i> , 107 Wn. App. 861, 28 P.3d 813 (2001).....	12, 15, 16

<i>State v. Stivason</i> , 134 Wn. App. 648, 142 P.3d 189 (2006).....	13
--	----

COURT RULES

	Page
CR 26 through 37.....	16,18
CR 26(i)	12, 13, 14, 15, 16, 17, 18
CR 37(a).....	2, 12, 18
CR 37(b) through (d)	16
CR 37(d).....	19
CR 59(a).....	9
CR 59(a)(5)	8, 9
CR 59(f).....	9, 10, 11
KCLR 37(e)	2, 12, 13, 14, 15, 16, 17
KCLR 37(g)	19
RAP 2.5(a)	13
RAP 2.5(a)(1).....	13
RAP 2.5(a)(1) and (2)	12, 13

MISCELLANEOUS

3A Karl B. Tegland, Washington Prac., <i>Rules Practice</i> , CR 37(18) (5 th ed. 2006).....	19
--	----

“ . . . [T]he right of trial by jury shall be inviolate. Accordingly, the law gives a strong presumption of adequacy to the verdict. Regardless of the court’s assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages. When the evidence concerning injuries is conflicting, the jury decides whether the injuries are insignificant, minor, moderate, or serious, and it determines the amount of damages. Aside from the requirement that there be substantial evidence to support the verdict, the jury is the final arbiter of the effect of the evidence, for it determines the credibility of the witnesses, the weight of their testimony, and the consequence of all other evidence.”

Cox v. Charles Wright Academy, 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967) (citations omitted).

REPLY

Plaintiff's response offers only generalities. If the evidence is viewed favorably to Kmart as it must be, this Court should reverse the grant of a new trial. This Court should not reach the same result as in *Geston v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003), and *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 92, 122 P.3d 733 (2005), two analogous cases where the appellate court reinstated the jury verdict. Plaintiff's brief generally asserts that she offered evidence of pain, but fails to back up this assertion with evidence of compensable pain *during the four-month period at issue or related to the bruising*. Plaintiff makes no effort to distinguish evidence specific to her undisputed bruising (of which there was none or very little) from all of her evidence about pain relating to all of the *disputed* conditions she asserted including back injury, coccydynia, neck injury, and ongoing chronic pain. She indiscriminately cites to all of this general pain evidence as if it could justify the new trial, but it does not. This appeal concerns whether the evidence showed that Plaintiff suffered an injury for which compensable general damages *must have been awarded*. The evidence does not show this. This Court should reinstate the jury verdict.

Plaintiff also fails to cite evidence to justify the contention that the jury's verdict was tainted by passion and prejudice. The opposite is true. The jury made an effort to consider damage to which Plaintiff may have been entitled. This is shown by its jury note during deliberations. CP 1159. The jury was demonstrably open to compensating her, but

because she offered no supporting evidence, these amounts could not be awarded. Plaintiff ignores this evidence of the jury's fair-minded consideration of her case, while offering no evidence of passion or prejudice. Plaintiff had a fair trial.

Regarding the sanctions, this Court should also reverse. Based on Plaintiff's response, it is undisputed that (1) KCLR 37(e) required that the Motion for Sanctions be preceded by an in-person conference addressing the motion itself, (2) such a conference did not occur and (3) the Motion for Sanctions is silent on the issue of the required conference. Any surviving sanctions must, therefore, be premised on the Motion to Compel and authorized by CR 37(a), which limits the sanctions to the cost of the Motion to Compel. But even the Motion to Compel was inadequately certified. Plaintiff's assertions at the time, the contemporary documents and the testimony of Kmart's counsel lead to one conclusion: only the discovery at issue was discussed in the discovery conference. Plaintiff never raised her intent to move to compel and for sanctions as required by the rules.

If the superior court did have the authority to decide one or both of the motions, this Court should conclude that the superior court went beyond its authority and/or abused its discretion in the specific sanctions awarded. Plaintiff fails to specifically address Kmart's arguments against the specific amounts awarded. The sanctions are not supported by the rules under which they were purportedly awarded, were excessive, and resulted in impermissible fee-shifting.

I. Because Kmart Has Made a Strong Showing of Abuse of Discretion And Shown That Plaintiff Got a Fair Trial and That Substantial Evidence Supports the Verdict, This Court Should Reverse the Grant of a New Trial.

Plaintiff's brief does not adequately explain why the trial court was justified in rejecting the jury's verdict. Like the trial court, Plaintiff chooses to ignore Kmart's evidence and its impeachment of her credibility, particularly concerning pain reporting. Plaintiff recites evidence without distinguishing the evidence that was challenged from evidence that was not. *Resp. Brief*, pp. 2-7, 14-16, 18-21, 22-25. She addresses evidence of pain generally, without attempting to specify any evidence about pain within four months of the fall. *Id.* Plaintiff's approach is not helpful to the issue before this Court, which is whether the evidence viewed most favorably to Kmart supported the jury's verdict. It did.

A. Because the Court Views the Evidence Most Favorably to Kmart, This Court Should Reverse.

The parties agree that this Court reviews the grant of a new trial for abuse of discretion.¹ Plaintiff does not dispute that this Court must view the evidence in the light most favorable to Kmart. The trial court failed to take that view of the evidence, and Plaintiff urges this Court to take the same erroneous approach. When the Court views the evidence most

¹ *Opening Brief*, p. 15; *Resp. Brief*, p. 17. The single exception is this Court's *de novo* evaluation whether the trial court's CR 59(f) reasons premised on Interrogatory No. 3 support the new trial grant in light of the fact that the jury never reached that interrogatory. This legal issue is presented in the *Opening Brief*, pp. 25-28, and the *Reply Brief*, pp. 9-11.

favorably to Kmart, however, it should find that sufficient evidence supports the verdict. *See, e.g., Geston v. Scott, supra, and Lopez v. Salgado-Guadarama, supra.*

Whether the verdict was supported is not a close call. It was amply supported. The testimony of Dr. Joan Sullivan challenged all injury other than up to four months of bruising. She further demonstrated that other falls caused Plaintiff's ongoing complaints, and also challenged Plaintiff's credibility regarding her pain reporting. Kmart further challenged Plaintiff's credibility with surveillance video and cross-examination. The only witness present the night of the fall testified that Plaintiff did not complain about any pain. For her part, Plaintiff presented no substantial testimony of pain and suffering from the bruising. Her daughter never spoke to this issue. *See, infra*, p. 6. The medical records contain some complaints of pain, but not in sufficient detail or explanation to require compensation, especially where Plaintiff's credibility was compromised. Plaintiff herself never testified. Her case ignored the four-month period immediately after her fall. This record, viewed favorably to Kmart, supports the jury verdict. The jury was completely justified in coming to the conclusion it did.

Plaintiff argues that "heightened" deference applies to a decision to grant a new trial. *Resp. Brief*, p. 17, citing *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The courts do not use this terminology. Although the cases do state that "a much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than an

order denying one,” they also temper this language with recognition that courts only reluctantly interfere with a jury’s damage award, and that the evidence must be viewed most favorably to the nonmoving party. Plaintiff’s cited case *Palmer* clearly establishes this. *See Palmer, supra*, 132 Wn.2d at 197-98. *See also Geston, supra*, at 621.²

When the evidence is viewed most favorably to Kmart, it is apparent that the evidence supported the jury’s decision.

B. It Was an Abuse of Discretion to Reject the Jury’s Verdict Given Plaintiff’s Inadequate Evidence of Pain and Suffering from Four Months of Bruising and Kmart’s Defense.

As Kmart established in its Opening Brief, pp. 19-25, the only issue Kmart left undisputed was that, as a result of the fall at Kmart, Plaintiff was bruised up to four months. No person testified about Plaintiff’s pain during this time period. A jury could easily find that this minor injury did not warrant compensatory damages.

² *Geston* addresses *Palmer*, summarizing the applicable standards as follows:

“A much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than an order denying one because the denial of a new trial ‘concludes [the parties’] rights.’” *Palmer*, 132 Wn.2d at 197 (quoting *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 437, 397 P.2d 857 (1964)). But because determining damages is within the jury’s province, courts are reluctant to interfere with a jury’s damage award that is fairly made; “[w]here sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.” *Palmer*, 132 Wn.2d at 198.

Geston at 621.

Plaintiff's fourteen-year-old daughter's testimony did not establish any pain from bruising in the first four months after the fall. Her testimony concerned her mother's situation *at the time of trial in 2008*, not within four months of the fall. RP 8/14/08, pp. 56-62. The daughter contrasted her life in August 2008 with her life prior to the February 2004 fall. *See id.*, pp. 56-62. A typical example includes her explanation of how things are "now" as follows:

The responsibilities I had before was like I had to clean up my room, like that was about it. And after the incident, like **now** I have to like to dishes and do laundry for me and my brother and my sister, I have to clean up our room, the bathrooms. Sometimes I have to like cook for my brother and sister, **because my mom's like her back hurts** too much to do it, so yeah. That's about it.

Id., p. 59, lines 2-9 (emphasis added). In terms of Plaintiff's pain, the daughter mentions only back pain in 2008, not pain from bruising and not any pain within four months of the fall.

Plaintiff's claim that she submitted "an abundance of evidence to substantiate her pain and suffering," *Resp. Brief*, p. 23, rings hollow because the record is devoid of evidence of pain and suffering during the four-month period in question. Even the medical records, which contained some discussion of pain reporting, were rebutted by the fact that plaintiff's pain reporting credibility was called into serious question. Jury Instruction 15 read in part, "Your award must be based upon evidence and not upon speculation, guess or conjecture. In determining an award for

pain, suffering or disability, the law requires a reasonable basis for your computation.” CP 1156. No reasonable basis existed to award pain and suffering for Plaintiff’s bruising. At the least, Plaintiff’s minimal evidence did not *require* an award. The jury could, and did, reasonably decide not to award pain and suffering damages for the bruising when no individual, including the Plaintiff herself, gave witness to the nature, extent or quality of any pain and suffering during the period at issue.

Plaintiff’s other record citations do not support affirmance. For example, she cites the trial court’s Finding #10 that Amy’s injuries impacted her quality of life and activity participation (*see Resp. Brief*, p. 24, citing CP 1427), but this is not evidence from the record. This is merely the superior court’s challenged finding. Plaintiff cites the clearly contested opinion of Dr. Andersen regarding injuries asserted by Plaintiff beyond the four months of bruising. *Id.*, citing August 12, 2008 RP at pp. 101-06. Plaintiff cites Dr. Sullivan’s statement that if Plaintiff’s doctor saw a bruise in April 2004, Plaintiff would have had legitimate pain. *Id.*, citing CP 1220-21 and 1246. While this is a concession by Dr. Sullivan that opened the door for Plaintiff to make her case about pain from the bruising, Plaintiff did not seize the opportunity. Plaintiff offered no supporting evidence to demonstrate the degree or nature of pain to give the jury a reasonable basis to award a damage amount without speculating or guessing. As we know from *Lopez v. Salgado-Guadarama*, *supra*, and Plaintiff’s cited case *Palmer*, *supra*, 132 Wn.2d at 201-02, bruising and temporary pain do not require an award of general damages. In *Palmer*,

while the main case on appeal focused on Ms. Palmer's injuries, the appellate court affirmed the jury's decision not to award general damages to her son Shawn who had been diagnosed with a seatbelt contusion and had head pain from the car accident. *Id.* at 195, 201-02. No unchallenged evidence in the record required an award for pain from the bruising.

Plaintiff does not address *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 178, 422 P.2d 515 (1967), which recognizes that when the scope of injuries attributable to an accident are disputed, the evidence tends to "obscure or cloud all evidence of damages." Here, Plaintiff presented a case to the jury where she sought to show many injuries including coccydynia, back injury, neck injury and ongoing pain four years after her fall. Kmart disputed this evidence. As a result, Plaintiff overlooked evidence related to the undisputed bruising. She never demonstrated pain and suffering from her bruising.

Plaintiff cites *Fahndrich v. Williams*, 147 Wn. App. 302, 306, 194 P.3d 1005 (2008), a case with a large special damage award of \$25,000 in contrast to the modest \$5,217.24 award in this case, for the proposition that pain and suffering can be supported by testimony from family members and medical providers. *Resp. Brief*, pp. 19-20. Unlike in *Fahndrich*, Plaintiff did not present such testimony.

In addition, this Court should reject a new trial under CR 59(a)(5). In its Opening Brief, Kmart argued that the jury's inquiry whether it could award travel and time expense and travel times for Plaintiff's initial ER visits and diagnostic tests (that were negative), showed that there was no

passion or prejudice. *Id.* Plaintiff failed to rebut this argument that the record discloses fair consideration by the jury. Moreover, Plaintiff also failed to defend Kmart's challenges to Findings 8, 9, and 10.

C. At the Least, Any New Trial Should Be Limited to the Issue of General Damages for Four Months of Bruising.

Even if a new trial were warranted, it would have to be limited to the issue of general damages for the four-month period in question. While Plaintiff questioned whether authority supports such a result, *see Resp. Brief*, p. 26, CR 59(a) expressly does. It provides that a new trial may be granted "on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct." CR 59(a). In this case, the issue is clearly and fairly separable and distinct. Plaintiff should not be permitted to retry her failed case regarding coccydynia, neck injury, back injury, or ongoing chronic pain. Kmart effectively rebutted these alleged conditions. Moreover, no evidence of passion or prejudice sufficient to affirm a new trial under CR 59(a)(5) exists or was asserted in Respondent's Brief. This Court should not, therefore, sustain the grant of a new trial order based on CR 59(a)(5). The majority of the verdict should not be considered "tainted."

D. De Novo Scrutiny of the Jury Verdict Form Shows the Jury Did Not Reach Interrogatory No. 3 Regarding General Damages, Requiring Reversal of the New Trial Grant Incorrectly Premised on Interrogatory No. 3.

As explained in Kmart's Opening Brief, pp. 26-27, the jury never reached the special interrogatory regarding how much general damages to award because it found that Plaintiff suffered nothing more than nominal

injury. The trial court's reversal for failure to award general damages pursuant to Interrogatory No. 3 was error as a matter of law in light of the jury's response to Interrogatory No. 2 that Kmart's negligence was not a proximate cause of any additional damage to the plaintiffs. *See* CP 1135. The jury verdict form instructed the jury to stop, and not answer Interrogatory No. 3 which addressed the amount of general damages to be awarded. Plaintiff should not be able to claim error based on an "assumed" response to Interrogatory No. 3. Plaintiff does not dispute that she proposed the verdict form.

Plaintiff does not directly address the argument that she should not be able to claim error for the jury's act of following the instruction to stop after answering Interrogatory No. 2 negatively. Nor does she explain how the trial court's CR 59(f) reasons align with this verdict. Plaintiff does argue, however, that the answer to Interrogatory No. 2 was the same as awarding zero dollars for pain and suffering. *Resp. Brief*, p. 18 ("By determining that no additional damages were warranted, the jury necessarily found a general damage award for Amy in the amount of \$0."). Plaintiff is not correct. As explained in *Ma'Ele v. Arrington*, there is a difference between finding that an injury exists but awarding no general damages, and finding that only a nominal injury resulted, as follows:

Ma'ele cites many cases where the jury awarded special, but not general, damages. In each case, the plaintiff was entitled to a new trial because the jury found that the accident caused injuries but believed the plaintiff suffered no pain. *See, e.g., Palmer*, 132 Wn.2d at 203. The cases are distinguishable. The jury here found that the accident

did not injure Ma'ele. The only question is whether the evidence supports this conclusion. *Palmer*, 132 Wn.2d at 201-02. It does.

Ma'Ele v. Arrington, 111 Wn. App. 557, 562, 45 P.3d 557 (2002).

Similarly, the evidence here supports the conclusion that the fall at Kmart caused only nominal bruising, not a compensable injury. The trial court's reasons under CR 59(f) cannot be reconciled with the actual jury verdict.

Plaintiff attempts to distinguish *Ma'Ele v. Arrington*, 111 Wn. App. 557, 562, 45 P.3d 557 (2002), on the basis that in *Ma'Ele*, the plaintiff received no special damage award, whereas Plaintiff received a special damage award. *Resp. Brief*, pp. 21-22. This distinction makes no difference to the analysis of the verdict form. It also makes no difference to the outcome of this case. Because Kmart's negligence caused the fall, it is appropriate that Kmart should pay Plaintiff's special damages. The diagnostic tests confirmed that she was not injured. Plaintiff simply did not sustain a compensable bodily injury. The jury recognized this.

II. This Court Should Reverse the Sanction Award Because Plaintiff Offers No Record Citations or Rationale To Support It.

This Court should reverse the sanctions. The trial court had no legal authority to consider her motions. In addition, the trial court abused its discretion by over-sanctioning Kmart. Plaintiff fails to even respond to Kmart's specific objections.

A. This Court Should Reverse for Inadequate CR 26(i) Certifications, Failings That Deprived the Trial Court of Authority to Consider the Motions and Grant Relief.

This Court can and should take up the certification issue under RAP 2.5(a)(1) and (2). The purported certification was deficient because it failed to comply with the requirement discussed in *Clarke v. Office of Attorney General*, 133 Wn. App. 767, 138 P.3d 144 (2006), that the lawyers discuss the upcoming motion before making it, not discuss merely the discovery issues. This deficiency prohibited relief.

1. This Court Can Decide the Certification Issue Pursuant to RAP 2.5(a)(1) and (2).

Pursuant to RAP 2.5(a)(1) and (2), a party may raise at any time errors regarding lack of trial court jurisdiction and failure to establish facts upon which relief may be granted. This includes consideration of the trial court's authority to entertain a motion for sanctions pursuant to proper CR 26(i) certification. CR 26(i) and KCLR 37(e) impose an affirmative obligation that their requirements be met to establish the trial court's authority to entertain the motion. These rules also require that certain facts, i.e., the occurrence of a sufficient in-person conference discussing the impending motion, be established before relief can be granted. The issue is therefore subject to *de novo* review here under RAP 2.5(a)(1) and (2). *See also Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866-67, 28 P.3d 813 (2001) ("If counsel for the parties have not conferred with respect to a CR 37(a) motion to compel discovery, or if such motion does not include counsel's certification that the conference

requirements were met, the trial court does not have discretion to entertain the motion. The rule precludes the trial court from hearing such a motion if the conference requirements are not met.”); *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002) (“Cortinas did not raise this issue below; but because she challenges the trial court’s authority to enter the order, we address it. RAP 2.5(a).”) *Neilsen ex rel. Crump v. Blanchette*, 149 Wn. App. 111, 115, 201 P.3d 1089 (2009) (“[W]here, as here, the asserted error concerns the trial court’s authority to act, we may elect to review the issue. See RAP 2.5(a)(1) (appellate court may review issue of lack of trial court jurisdiction for first time on appeal).”)

Plaintiff is correct that Kmart did not raise this issue until it sought reconsideration, a motion in which Kmart disputed the CR 26(i) certification. CP 697-98. See also CP 710 (Kmart’s counsel’s testimony that, “At no time prior to filing of either the Motion to Compel or the Motion for Sanctions did plaintiffs’ counsel ever request a Rule 26(i) conference for the purpose of discussing an intent to take such action in this matter for any alleged discovery violations.”). Because these appealed issues relate to the trial court’s authority to entertain the motion and to whether Plaintiff established the facts required by CR 26(i) and KCLR 37(e) before relief could issue, this Court should review the issues.

If this Court were to hold that neither RAP 2.5(a)(1) or (2) apply, this Court should review based on its discretion. See *State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189 (2006) (under RAP 2.5(a), appellate court has discretion to consider issues not raised below). Kmart did raise

the issue with the trial court on reconsideration. CP 692 at #1; 697-698; 710. The trial court refused to reconsider its authority to consider the motions. CP 860. This was error and manifestly unreasonable because compliance with CR 26(i) and KCLR 37(e) is mandatory. The trial court had the opportunity to consider the validity of the certifications and its authority to grant relief.

2. It Does Not “Affirmatively Appear” That Plaintiff’s Counsel Met and Conferred With Regard to Either Motion.

Plaintiff does not show that the impending motions or the subject of sanctions were discussed in any discovery conference. Plaintiff’s citations and argument show only that the underlying discovery issues were the subject of a conference on July 15, 2008. This does not come close to what is required. The sworn statement of Mr. Torres, CP 21-22,³ and the contemporaneous documents, CP 108 (Exhibit 8 to Torres’s declaration), together with Kmart’s counsel’s direct testimony on reconsideration that the motions were never raised, CP 710, support the single conclusion that Plaintiff did not comply with CR 26(i).

³ In its Opening Brief, Kmart asserted that no sworn statement accompanied the Motion to Compel. The Motion to Compel contained an unsworn verification signed by Darrell Cochran. The response illuminated that Plaintiff’s other counsel Victor Torres provided a declaration. CP 21-22. Although the “certifier” Mr. Cochran did not submit a sworn statement, Mr. Torres did. Mr. Torres’s statement is insufficient because it does not establish that the impending motions or requests for sanctions were raised when only the underlying discovery was discussed.

a. First, the Motion for Sanctions Cannot Justify Any Sanctions Due to Its Silence On Certification, a Defect That Plaintiff Cannot Fix and That Requires Reversal of All Sanctions Beyond the Expense of the Motion to Compel.

The Motion for Sanctions fails to satisfy the requirements of CR 26(i) and KCLR 37(e). Regarding the certification required by CR 26(i), Washington courts follow a “strict interpretive approach to the rule.” *Case v. Dundom*, 115 Wn. App. 199, 203-04, 58 P.3d 919 (2002), citing *Rudolph v. Empirical Research Sys., Inc., supra*. *Rudolph* requires literal compliance, i.e., a certification in the motion.

While Plaintiff cannot argue that the Motion for Sanctions contains a certification, she argues that the certification in the Motion to Compel should act as a substitute. *Resp. Brief*, p. 30 (The Motion to Compel includes the certification “that he conferred with Kmart’s counsel about supplementing its prior discovery responses, including supplementing its response to Interrogatory No. 30, which was a basis for the Motion for Sanctions.”). Even if that certification were sufficient for the Motion to Compel, which it is not, it cannot be sufficient for the Motion for Sanctions. That certification does not address the Motion for Sanctions or the relief sought by it. It is not cross-referenced or incorporated. Plaintiff sought consideration of these stand-alone motions on different days. CP 110 (Motion to Compel hearing date 7/29/08); CP 141 and 419 (seeking hearing on Motion for Sanctions on 7/25/08). Plaintiff’s argument cannot stand in light of Washington’s strict interpretive

approach. Indeed, the substance of the Motion to Compel certification does not support it.

Kmart's position is consistent with the purpose of the rule which is "to facilitate non-judicial solutions to discovery problems by requiring the parties to conduct a conference before attempting to obtain a court order." *Clark, supra*, at 779. Each and every motion for a court order should be preceded by a conference discussing that motion, and should contain certification that the conference occurred.

Plaintiff halfheartedly argues that CR 26(i) does not apply to her Motion for Sanctions under CR 37(b) through (d) (*see Resp. Brief*, pp. 29-30; *see also* p. 34). This argument is not supported by the language of the rule or case law. The rule states, "The court *will not* entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection." CR 26(i). Because the Supreme Court used mandatory, not permissive, language, the conference is required. *See Rudolph v. Empirical Research Sys., supra*, 107 Wn. App. at 867 (applying CR 26(i) conference requirement to a motion requesting sanctions, not an order to compel). Moreover, Plaintiff admits in the next paragraph of her brief that KCLR 37(e) requires the certification. *Resp. Brief*, p. 30, and note 4. *See* KCLR 37(e) ("The court will not entertain any motion or objection with respect to Civil Rules 26 through 37, unless it affirmatively appears that counsel have met and conferred with respect thereto."). Plaintiff admits that her motion for sanctions was brought under CR 37(b) through (d). *Resp. Brief*, p. 34. Both CR 26(i) and KCLR

37(e) required a proper certification for the Motion for Sanctions. The certification was absent.

b. Second, the Purported Certification in the Motion to Compel Is Inadequate.

The record shows without doubt that Plaintiff never conferred regarding any motion to compel or for sanctions with Kmart's counsel. She never raised seeking this relief with Kmart. Plaintiff cites to no part in the record that mentions a conference with regard *to a motion* as opposed to a conference to address discovery responses. Plaintiff's purported certification in the Motion to Compel was fatally deficient under the rules and *Clarke v. Office of Attorney General*, 133 Wn. App. 767, 138 P.3d 144 (2006), which require that a conference occur *regarding the motion*.

Plaintiff argues, "Amy's counsel's certification in the Motion to Compel indicated that it [the discovery conference] was in regard to the specific discovery issues in the Motion to Compel." *Resp. Brief*, p. 29. Again, this does not satisfy the rule. Plaintiff never claims to have discussed impending requests for sanctions during the July 15th conference.⁴ Kmart's counsel's testimony is clear that impending motions

⁴ In the body of the motion, the signer Darrell Cochran purports to certify that he satisfied the applicable rules "by conferring with Defendant's counsel in an attempt to resolve the discovery issues presented by the motion." CP 112. Conferring to resolve discovery issues is no substitute to conferring about the motion itself. In the supporting declaration, Mr. Torres (not Mr. Cochran) swears: "On July 15, 2008, I conducted a Rule 26 conference with defense counsel. Attached as Exhibit 8 is a true and correct copy of defense counsel's email memorializing the discovery

for sanctions were not discussed on July 15, 2008, or at any time.⁵

Plaintiff lastly cites her bare assertion in a reply brief that counsel “has exceeded the CR 26(i) conference requirements.” *Resp. Brief*, p. 30, citing CP 529. This assertion is false. Plaintiff did no such thing. This requires reversal of the sanctions.

Even if the Motion to Compel was properly certified, then the sanctions were limited by CR 37(a) to the costs of that motion. Plaintiff does not address this argument, conceding this result.

B. Plaintiff Failed to Respond to Kmart’s Specific Arguments That the Sanctions Were Excessive and Fee Shifted.

Putting aside certification issues, the excessive sanction award should be reduced. First, Plaintiff fails to demonstrate that the \$10,000 “just because” sanction was within the trial court’s authority. Nor does she rebut the contention that the award constituted prohibited fee shifting.

conference.” CP 22. Notably absent is any mention that counsel discussed an impending motion to compel or any other motion under CR 26 through 37. A review of Exhibit 8 references the conference regarding the discovery, but also makes no mention of any impending motion to compel let alone motion for sanctions. CP 108.

⁵ As Kmart’s Motion for Reconsideration and supporting documentation show, impending motions for sanctions were not discussed with Kmart’s counsel. *See* CP 697-98, at 697 (“Plaintiffs failed to provide the certification that a discovery conference occurred on the subject matter. This is because plaintiffs have never requested or held a discovery conference on the topic of a motion to compel or for sanctions.”). *See also* CP 710 Declaration of Kmart’s Counsel (“At no time prior to filing of either the Motion to Compel or the Motion for Sanctions did plaintiffs’ counsel ever request a Rule 26(i) conference for the purpose of discussing an intent to take such action in this matter for any alleged discovery violations.”).

Plaintiff barely mentions this portion of the award. While Plaintiff talks about “Prolonged Discovery Abuses,” *Resp. Brief*, p. 26, this is a distortion of the record. Kmart responded initially to Interrogatory No. 30 that it would produce responsive information, CP 66; 75, and supplemented this response several times. This is not a case of failing to respond to discovery as contemplated by CR 37(d), which pertains to a complete lack of response. *See* 3A Karl B. Tegland, *Washington Prac., Rules Practice*, CR 37(18), p. 806 (5th ed. 2006) (“[T]he rule [CR 37(d)] is addressed to the rather egregious situation in which a party totally fails to respond.”).

Kmart provided the remodel information within the time for supplementation required by KCLR 37(g). Plaintiff does not and cannot dispute that Interrogatory No. 30 had never previously been the subject of a motion to compel or court order. Kmart does not dispute that the production was regrettably late, but this Court should reject Plaintiff’s attempt to exaggerate the conduct at issue. The \$10,000 amount drawn from the air to be added to an award for fees and costs above and beyond the expense of the motion is manifestly unreasonable. It violates Washington law, and constitutes fee shifting. This windfall to Plaintiff should be reversed.

Second, Plaintiff fails to address Kmart’s objections to specific fees included in the award. Kmart objected that \$8,408 of the fees awarded related to work not suitable for compensation, including the drafting of a stricken reply brief and denied motions to file an overlength

brief and shorten time. *Opening Brief*, p. 36. Plaintiff only generally defends “the sanctions,” *see e.g., Resp. Brief*, pp. 34-35, remaining silent on this issue. Plaintiff also does not respond to Kmart’s argument that awarding the totality of her expert’s expenses of \$3,857.44 was an abuse of discretion when the expert went on to testify in Plaintiff’s case at trial on issues of contributory negligence. *Opening Brief*, p. 36. Contrary to Plaintiff’s claim that the expert’s work was “nullified” by Kmart’s late disclosure, Plaintiff continued to utilize him, demonstrating that the award of all of his expenses was unreasonable.

CONCLUSION

This Court’s fundamental inquiry is whether Plaintiff received a fair trial. She did. Plaintiff’s response does not adequately explain why the trial court was justified in throwing out the jury’s verdict. At trial, Plaintiff chose not to testify and to argue that she sustained many injuries beyond the undisputed four months of bruising. She presented no evidence of pain and suffering from the bruising over the applicable period. Her credibility was compromised. This Court must view the record favorably to Kmart. In that light—indeed in any light—the jury was perfectly justified in its verdict.

Finally, the Court should reverse the legally improper and inordinate discovery sanctions.

Respectfully submitted this 5th day of June, 2009.



Averil B. Rothrock

SCHWABE, WILLIAMSON & WYATT, P.C.

1420 5th Ave., Suite 3010

Seattle, WA 98101-2339

WSBA No. 24248

Heidi Mandt

SCHWABE, WILLIAMSON & WYATT, P.C.

1211 SW 5th Ave., Suite 1700

Portland, OR 97204-3717

WSBA No. 26880

Attorneys for Appellant Kmart

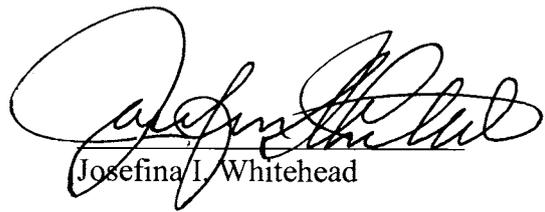
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2009, I caused to be served by first class mail the Reply Brief of Appellant on the following:

Darrell L. Cochran
Pfau, Cochran, Vertetis & Kosnoff PLLC
911 Pacific Ave Ste 200
Tacoma, WA 98402

Daniel T. L. Fasy
Pfau, Cochran, Vertetis & Kosnoff PLLC
701 Fifth Ave., Suite 4730
Seattle, WA 98104

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN -8 AM 11:04



Josefina I. Whitehead

No. 62312-5-I

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

2009 JUN -9 PM 4:06

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON

**KMART OF WASHINGTON LLC, d/b/a KMART STORE #3413,
a Washington corporation**

Appellant

v.

**JADA AMY, individually and as Guardian ad litem for and on behalf
of I.O.A., a minor, D.M.A., a minor, and V.M.G., a minor,**

Respondent

ERRATA TO REPLY BRIEF

Averil B. Rothrock
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339
WSBA No. 24248

Heidi Mandt
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Ave., Suite 1700
Portland, OR 97204-3717
WSBA No. 26880

Attorneys for Appellant

ORIGINAL

Appellant notes the following correction to its Reply Brief:

1. On page 1, deletion of the word “not” from the third sentence so that the sentence reads: “This Court should reach the same result as in *Geston v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003), and *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 92, 122 P.3d 733 (2005), two analogous cases where the appellate court reinstated the jury verdict.”

Respectfully and apologetically submitted this 9th day of June,
2009.



Averil B. Rothrock
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339
WSBA No. 24248

Heidi Mandt
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Ave., Suite 1700
Portland, OR 97204-3717
WSBA No. 26880

Attorneys for Appellant Kmart

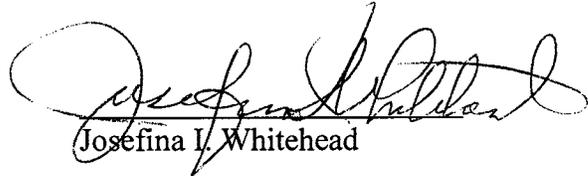
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2009, I caused to be served by first class mail the Errata to Reply Brief on the following:

Darrell L. Cochran
Pfau, Cochran, Vertetis & Kosnoff PLLC
911 Pacific Ave Ste 200
Tacoma, WA 98402

Daniel T. L. Fasy
Pfau, Cochran, Vertetis & Kosnoff PLLC
701 Fifth Ave., Suite 4730
Seattle, WA 98104

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2009 JUN - 9 PM 4: 06



Josefina I. Whitehead