

NO. 63958-7-1

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

RICHARD HUNT,

Appellant,

v.

DANILO SIJERA; COMCAST OF WASHINGTON IV, INC.; and
AMY THAYER,

Respondents.

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2010 MAR 31 PM 3:22

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I. RESPONSE

A. THE JURY'S DENIAL OF GENERAL DAMAGES WAS NOT CONSISTENT WITH THE EVIDENCE PRESENTED AT TRIAL. BECAUSE THE VERDICT WAS UNSUPPORTED BY THE EVIDENCE THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF A NEW TRIAL.

As a matter of law, where a verdict is unsupported by the evidence, a new trial must be granted. The Supreme Court explained in *Palmer* that:

“[a]lthough there is no per se ruled that general damages must be awarded to every plaintiff who sustains an injury, *a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages*. The adequacy of a verdict, therefore, turns on the evidence.

Palmer v. Jensen, 132. Wn.2d 193 (1997), at 201 (emphasis ours).

In this case the Plaintiff presented plenty of evidence that substantiated his pain and suffering. Dr. Walia, who was the Plaintiff's treating physician physically examined the Plaintiff and testified that the Plaintiff's pain level was 7/10 during his first appointment. (RP 135-136). Dr. Walia testified to the Plaintiff's pain daily during the time period of March 15, 2007 to September 10, 2007, as related to the pain scale used by doctors worldwide. For the first three months of treatment the Dr. testified the Plaintiff's pain level was consistent between 6-8/10. For the

remaining months the Dr. testified that the Plaintiff's pain slowly decreased from a 5/10 down to a rating of 2/10 by the last date of treatment. (RP 138-142). Dr. Walia testified that the Plaintiff's pain was exacerbated by Defendant Thayer's negligence in causing the second accident. (RP 144). At no time did Dr. Renniger, the Defendants' paid "expert," examine the Plaintiff to determine his extent of injuries. (RP 301).

Dr. Walia also testified that the Plaintiff initially had headaches, neck pain, shoulder pain and mid-low back pain. (RP 186). The Dr. explained the five week gap in seeking treatment was NOT unusual in side impact motor vehicle accident and that many people delay in getting treatment. (RP 187-188). The Dr. testified that it was not unusual for a person to treat at home, like the Plaintiff did, by stretching and icing, initially hoping the pain would subside so that they would not need to seek treatment at all. Dr. Walia testified the Plaintiff demonstrated pain at C-5 and at L-5 and tightness/decreased range of motion in the cervical and lumbar regions during examination. (RP 156-159). The Defendants' own expert confirmed that the Plaintiff displayed positive results during the foraminal compression test. (RP 297).

The Plaintiff's pain and suffering was also substantiated by the Plaintiff's boss, Tryg Saterlee. Mr. Saterlee testified that he observed the

Plaintiff both before, during, and after the Plaintiff was injured and that he witnessed the Plaintiff in pain during The time following the accidents. (RP 266). Although the Plaintiff did not seek lost wages because they would have been nearly impossible to calculate in this economy, Plaintiff's boss testified that the Plaintiff missed work as a result of the pain he suffered. (RP 266). Mr. Saterlee testified that the Plaintiff's injuries affected his ability to work because in the mortgage business you have to "look like you're doing well" and the Plaintiff was in enough pain he had a hard time pretending and wasn't "on his game." (RP 267-268).

The Plaintiff's pain and suffering was also substantiated by Derek Anderson, the Plaintiff's best friend. Mr. Anderson testified that the Plaintiff had played football on the team Mr. Anderson coached in the previous years but that he did not make the team in 2007 because he was unable to give 100% due to his pain. (RP 252). Mr. Anderson testified that he saw a change in the Plaintiff's attitude and that the Plaintiff was not as happy as he struggled through his pain. (RP 254-255) Mr. Anderson testified that he roomed with the Plaintiff during the trip to Miami and that the Plaintiff did not do much or seem to enjoy the trip. (RP 253-254). Mr. Anderson testified that he was with the Plaintiff at the Breast Cancer benefit at the Playboy Mansion and that the Plaintiff struggled with pain during that trip. (RP 254-255). Mr. Anderson also testified that he and the

Plaintiff normally went wake boarding many times throughout the summer and that he had not been able to do that with the Plaintiff until 2009 because of the pain the Plaintiff was in. (RP 254-255).

The Plaintiff also testified in court as to his pain and suffering. He explained that he originally told Defendant Sijera at the time of the accident that he wasn't hurt because he wasn't bleeding. (RP 227). But over time the Plaintiff's pain got worse and he was unable to do the things that he would normally do. The Plaintiff testified that before the first accident he led a very active life and that his pain inhibited his life socially and at work. (RP 220-222). He testified that because of his pain he was unable to do things he would have normally done, like water sports, football, and skydiving. (RP 217-219). The plaintiff testified that he owned a boat and normally spent much of his free time wake boarding but was unable to because of his pain. (RP 217-219). The plaintiff testified, as was substantiated by his boss Mr. Saterlee, that missing out on work and clients because of the pain added significant stresses to his life. (RP 220-222).

Although the Plaintiff was obligated to make some trips while he was injured, the Plaintiff testified that he had to cancel some trips because of the pain. (RP 217-219). He explained that the travel plans to Miami were made before the March accident. (RP 207-208). The Plaintiff

testified that his pain during the trip was at a 7/10 and that he was unable to do things he would have normally done in Miami, like scuba diving. (RP 209). The Plaintiff verified Mr. Anderson's testimony that the Plaintiff basically just laid around during his trip to Miami and would have done many more things had he not been in pain. (RP 215-216). The Plaintiff continued treatment upon return from Miami because he was still in pain. (RP 210).

The Plaintiff also verified Mr. Anderson's testimony when he testified that he was in pain during the trip to the Playboy Mansion. The Plaintiff testified he was obligated to go to the Playboy Mansion because he had prepaid \$1000 for a Breast Cancer benefit before the accident. He attended because it was an opportunity to network with other businessmen and was a once in a lifetime opportunity. The Plaintiff testified that he was in pain during the trip and that the plane trip was miserable. He testified he was only at the Mansion one night and that he stayed in his hotel room for the rest of the weekend. He testified the pain was so bad that the first thing he did when he got off the plane was go to Dr. Walia because his pain had become so severe. (RP 212-214, 232, 233, 235).

The Defendants' claim that the testimony of their experts shows the jury could conclude, free of passion or prejudice, that the Plaintiff did not suffer even \$1 of damages for his pain and suffering. However, Dr.

Renniger never examined the Plaintiff personally and based his ultimate opinion on medical records (specifically the massage therapy bills) that were not admitted into evidence. (RP 336). The trial court erred when it allowed the Jury to conclude that the Defendants' expert could base his opinion on the same medical records the Plaintiff was not allowed to enter into evidence. It is abuse of discretion allowing a Defendant to introduce Plaintiff's medical records as evidence that there was no injury but then deny Plaintiff the right to use those same records to show there was.

The Defendants' claim in their brief that Dr. Tencer testified to the fact that there were no injuries sustained by the Plaintiff due to the low speed/low impact nature of the accident. However, Dr. Tencer's testimony was limited in Motions in Limine that he could only testify to the forces involved in the accident, and NOT to determine injury. (Pg. 7 Comcast Brief, RP 323). Even in that capacity this "experts" testimony is inaccurate because he had to estimate the weight of the vehicle with the Plaintiff's rack on it so he never got a completely accurate account of the force and impact in this case. (RP 373). Dr. Tencer also testified that he has not done side impact testing, as was the case in the Plaintiff's accident. (RP 390). The Plaintiff, who was present during the accident, countered Dr. Tencer's opinion of the events. The Plaintiff estimated his speed to be 15-20 mph when Defendant Sijera hit him, (RP 201) and that he was hit with such

force as to lift his SUV off of the ground causing a second impact. (RP 202).

In this case Plaintiff substantiated his pain and suffering through medical doctors, his employer, his best friend, his own testimony, and to the extent discussed above even the Defendants' expert testimony. The only way a jury could conclude the Plaintiff didn't suffer even \$1 in pain and suffering is because the Defendants' playing upon their passion and prejudice of the Plaintiff and his lifestyle. Even the Defendants' Brief shows their contempt for the Plaintiff's trip to Miami and the Playboy Mansion. In closing Defense Counsel waived the picture of the Plaintiff at the Playboy mansion in front of the jury in the same contemptuous manner, arguing that one picture showed the Plaintiff never suffered any pain resulting from the accidents. Clearly, this arose such a passion and prejudice against the Plaintiff the jury did not award a single penny in suffering, discounting all of the contrary testimony discussed above.

B. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF THE ABILITY TO ARGUE FOR HIS MEDICAL COSTS FOR MASSAGE THERAPY.

The Plaintiff put on testimony from Dr. Walia that the massage therapy that the Plaintiff underwent to treat his injuries was reasonable and necessary given the extent of Plaintiff's injuries and he, in fact, prescribed the massage therapy for the Plaintiff. (RP 136). Neither of the Defendants

objected to the bills when they were introduced as Exhibits before the trial. (RP 329). In fact, the Defendants' own experts based their opinions upon these very records in making their conclusions. (RP 336). It is hard to imagine it not being an abuse of discretion for a trial court to allow the Defense to use documents from Plaintiff's treating medical professionals to determine there was no injury, but then not allow the Plaintiff to use that same evidence to show there was. If Dr. Renniger was allowed to base his ultimate expert opinion/conclusion on that evidence, then the Plaintiff should have been allowed to present it as evidence of injury to the Jury as well.

C. THIS APPEAL WAS NOT FRIVOLOUS AND COSTS SHOULD NOT BE AWARDED TO DEFENSE COUNSEL. IF ANYTHING, DEFENSE COUNSEL SHOULD BE REPRIMANDED FOR VIOLATING FEDERAL LAW DURING THE DISCOVERY PHASE OF THIS CASE.

As discussed above, this appeal is not frivolous. Counsel has a good faith argument for each argument made in the appeal. Defense Counsel violated federal criminal laws in obtaining discovery in this case, as noted in Motions in Limine, and should not be throwing stones when they themselves live in glass houses. There can be NO good faith argument for violating the law in an attempt to better their position at trial. The Motions in Limine in this case alone show the Defenses' only trial

strategy was to arise passion and prejudice against the Plaintiff. To do so they created a MySpace account, befriended the Plaintiff under false terms even though he was represented, and pulled photos from his account believing they would be able to use them at trial (under what foundational grounds is still unclear). Defense Counsel from Thayer's accident believed he would be able to refer to the Plaintiff during the trial using his MySpace name, Richie Rock\$tar. The only reason he would do this is to try to arise passion and prejudice against the Plaintiff. This appeal wasn't frivolous, considering neither Defendant denied liability and the Plaintiff wasn't seeking lost wages or any unreasonable damages, their defense and use of court time was frivolous.

II. CONCLUSION

For the foregoing reasons, Appellant-Plaintiff Richard Hunt respectfully requests that this Court to grant Plaintiff's Motion for Additur (CP98, Plaintiff's Motion for Additur) and award Plaintiff-Appellant Richard Hunt general damages and his medical expenses for massage therapy, or grant a new trial.

DATED this 31st day of March, 2010.

Respectfully submitted by:

LAW OFFICES OF HEIDI L. HUNT, PLLC

A handwritten signature in black ink, appearing to read "Heidi L. Hunt", written over a horizontal line.

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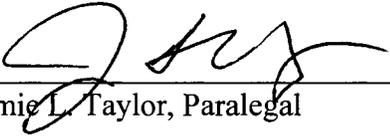
PROOF OF SERVICE

I declare that on March 21, 2010, I served a true and correct copy of the **Reply Brief of Appellant**, to the following attorneys via Next Step Legal Messenger Service:

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DATED at Everett, Washington, this 31st day of March, 2010.

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