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DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DAVID FAHNDRICH and CINDY FAHNDRICH, a marital community; and JENEE FAHNDRICH,

Plaintiffs/Appellants

v.

LINDA WILLIAMS and JOHN DOE WILLIAMS, a marital community; and CLIFFORD MULLINS and SHELLY MULLINS, a marital community

Defendants/Respondents

BRIEF OF RESPONDENTS LINDA AND JOHN DOE WILLIAMS

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I. ASSIGNMENT OF ERROR AND ISSUE PRESENTED

Jenee Fahndrich assigns error to the denial of her motion for a new trial. That assignment of error raises these issues:

1. If a party to a lawsuit contends that a jury verdict is not supported by the evidence, but does not raise that issue before the jury is discharged, does that party waive the right to seek a new trial?
2. If the issue presented by an appeal is whether a verdict is contrary to the evidence, must the appellate record include all of the evidence presented to the jury?
3. If the cause of an injury is disputed, is the plaintiff necessarily entitled to general damages for any pain and suffering resulting from the injury?

II. STATEMENT OF THE CASE

Fahndrich sued Williams and Mullins to recover damages for injuries she allegedly sustained in two separate auto accidents. CP 2, pp. 3-7. Her claims against both defendants were tried to a jury, which heard live and perpetuated testimony from numerous witnesses over the course of four days. CP 171-175. Pertinent to the issues presented by this appeal,

the evidence showed:

On April 19, 2000, a vehicle operated by Fahndrich collided with a vehicle operated by Linda Williams. RP 101-103 Shortly after that accident, Fahndrich was examined by chiropractor Kelly Smith, D.C., who concluded that Fahndrich had sustained cervical and lumbar strains in the accident. Dr. Smith treated those conditions until September 2000. CP 445. At that time, it was Mr. Smith's opinion that Fahndrich's accident-related soft-tissue injuries had largely resolved, and that she could expect to continue recovery with the passage of time. CP 446-449 However, because Fahndrich was experiencing headaches, Dr. Smith referred her to a neurologist, Dr. Bruce Bell. CP 21. Dr. Bell's diagnosis was myofascial pain syndrome secondary to the April 2000 auto accident. *Id.*

Fahndrich returned to Dr. Smith in early November 2000, following a second accident in which a vehicle that she was riding in was rear-ended by a vehicle operated by Shelly Mullins. CP 22. Dr. Smith concluded that the second accident exacerbated the prior strains, and had caused a more pronounced whiplash injury that manifested as pain and spasms in her temple and jaw. CP 23. Dr. Smith treated those injuries until May 21, 2001. CP 488-489.

At about the time Dr. Smith was ending his treatment, Fahndrich was examined by her primary care dentist, Dr. David Nutter, who prescribed a bite guard. CP 26-27. When her jaw pain and headaches did not resolve. Dr. Nutter referred Fahndrich to Dr. Gregory W. Boice, DMD, an oral and maxillofacial surgeon. CP 27. He too diagnosed myofascial pain dysfunction. *Id.*

In mid-July 2002, Fahndrich resumed treating with Dr. Smith following a third motor vehicle accident. CP 435-436. She received 16 treatments by Dr. Smith after that event. *Id.* Fahndrich also received conservative treatment for her jaw condition from Dr. James A. Rademacher, DMD. CP 27-30.

In February 2004, Fahndrich began treating with Dr. Gary Martel, DDS. CP 267. Her chief complaints to him were chronic headache, and tempo mandibular joint (TMJ) pain. CP 268-269. After administering a series of tests, Dr. Martel concluded that Fahndrich did not have a TMJ disorder, but was instead suffering from a myofascial pain disorder. CP 288. Fahndrich's reports of pain were purely subjective. CP 323.

Dr. Martel referred Fahndrich to Dr. Cara Lee Rozell, a neurologist who specializes in the treatment of headaches. CP 95; 286. Although it is

not approved for treatment of headaches. Dr. Rozell gave Fahndrich a series of Botox injections. CP 98; 102-104. Fahndrich reported that those provided limited headache relief. CP 107. Dr. Rozell noted that headaches secondary to soft tissue trauma typically resolve when the soft tissues heal. CP 121. She also noted that there was a history of migraines in Fahndrich's family. CP 123-124. Fahndrich told Dr. Rozell that her TMJ problems started within one-week of the November 2000 accident. CP 124.

Three medical professionals expressed opinions on the cause of Fahndrich's various conditions. Dr. Smith concluded that each motor vehicle accident caused a portion of Fahndrich's injury and need for treatment. He allocated 20 percent of the cause to the April 2000 accident; 5 percent of the cause to the July 2002 accident; and the balance to the November 2000 accident. CP 439-441.

Dr. Eugene O. Kelley, M.D., a board certified maxillofacial surgeon, examined Fahndrich in 2003, and reviewed her medical history. CP 18; 60. He concluded that the November 2000, accident was the primary cause of Fahndrich's TMJ pain and dysfunction. CP 44-45; 69. However, he believed that her myofascial pain dysfunction syndrome was

precipitated by the April 2000 accident, and exacerbated by the November 2000 accident. CP 44.

Dr. Stephen Thomas, Jr., M.D., an orthopedic surgeon, did not treat Fahndrich, but reviewed her medical history. CP 342. He concluded that the November 2000 accident caused Fahndrich's TMJ symptoms. CP 350. He concluded that no more than 50 percent of her cervical injury and treatment related to the April 2000 accident. CP 353. Finally, he related that none of the medical treatment that Fahndrich received after September 2000 related to the April accident. Rather, all of the injuries caused by the April 2000 accident resolved before the November 2000 accident. CP 361-362.

After all of the evidence was in, the jury returned a verdict that found Williams and Mullins liable for causing some of Fahndrich's injuries and damages. The jury awarded Fahndrich $22,500 of economic damages on her claim against Williams, and $2,500 of economic damages on her claim against Mullins. CP 178-80.

The court polled the jurors to verify the verdict. Counsel for Fahndrich was present at that time. After the jury was polled, the trial court asked the trial lawyers whether the jury could be excused. No one

objected. RP 192-193.

III. ARGUMENT

Because there was evidence that she experienced pain and suffering, Fahndrich contends that she was entitled to non-economic damages. Because the jury did not award any, Fahndrich contends that the verdict was contrary to the evidence, entitling her to a new trial.

As explained below, Fahndrich waived this argument, and did not present an adequate record for review. Even if the error was preserved and the record is adequate for review, the trial court did not abuse its discretion by denying Fahndrich's motion for a new trial.[1]

A. Fahndrich Waived Her Right to Seek a New Trial

If a curable error occurs during a trial, the aggrieved party must bring the error to the trial court's attention or the right to seek a new trial because of the error is waived.

> Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.,* 91 Wash.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a). * * * The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.

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1. In support of this response, Williams incorporates by reference the brief to be filed by Respondent Mullins.

Smith v. Shannon, 100 Wash.2d 26, 37, 666 P.2d 351 (1983). This rule also prevents the aggrieved party from gambling on the outcome of a case and taking an appeal only if the verdict is unfavorable. *Creso v. Philips*, 97 Wash. App. 829, 831, 987 P.2d 137 (1999); *aff'd by Haywood v. Aranda*, 143 Wash.2d 231, 19 P.3d 406 (2001) (recognizing that waiver rule should apply to prevent aggrieved party from gambling on outcome).

If, as Fahndrich contends, the verdict was erroneous, that error was apparent before the jury was polled. Any such error was also curable at that time. If Fahndrich had objected to the verdict before the jury was discharged, the trial court could have reinstructed and resubmitted the matter to the jury. Because the allegedly erroneous verdict was both apparent and curable, the general rule – that an untimely objection waives the error – applies with equal force here. Fahndrich did not object to the verdict until the jury was discharged. That being so, she waived the right to seek a new trial based on the allegedly erroneous verdict. There is no Washington case directly on point, but there are analogous in-state authorities, and out-of-state cases, that support this conclusion.

The analogous Washington authority is *Gjerde v. Fritzsche,* 55 Wn. App. 387, 777 P.2d 1072 (1989), *rev. den.* 113 Wash.2d 1038, 785

P.2d 826 (1990). That was a malpractice case using a special verdict form, as in the case at hand. The jury found no negligence on the defendant, but went on to find that plaintiff was 45% negligent. Plaintiff did not take exception to the verdict before the jury was discharged, but sought a new trial arguing the verdict was inconsistent, and the jury must have found that defendant was 55% at fault, requiring a new trial. Division I concluded that plaintiff waived that argument by not raising the issue before the jury was discharged:

> We decline to consider this challenge to the jury interrogatories, because Gjerde waived the issue below by failing to bring the inconsistency in the answers to the interrogatories to the attention of the court at the time the jury was polled. * * * * *
>
> No Washington cases have decided whether the failure to object to inconsistencies in jury interrogatories constitutes a waiver. The majority of federal courts analyzing the identical provision of FRCP 49(b) have held that the failure to object to inconsistencies in the verdict before the discharge of the jury waives any objection on appeal [citation omitted]. While these cases involve both inconsistencies among the jury interrogatories and inconsistencies between the special and general verdicts, we conclude that the absence of a general verdict makes no difference. We agree with the reasoning of the Court of Appeals in *Strauss v. Stratojac Corp.*, 810 F2d 679, 683 (7th Cir. 1987).
>
> "When the jury returned its verdict, the magistrate permitted counsel to examine the replies to the

> interrogatories. If counsel who had submitted the questions saw no inconsistency and raised no objection to the discharge of the jury, we can, at least under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury. Proper respect for the jury verdict and for the court's responsibility to manage its caseload fairly and expeditiously militate against such a course."
>
> In this case, Gjerde's counsel recognized the inconsistency in the jury interrogatories and yet remained silent, seeking to "try his luck with a second jury." Such silence in the face of actual knowledge of an inconsistency at a time it could be cured waives the issue on appeal. The situation is analogous to the failure to object to evidence or a jury instruction, which waives the issue for appeal.

55 Wn. App. at pp. 393-94.

Court's outside of Washington apply this preservation/waiver rule broadly to any defect in a verdict that might be cured by reinstruction and resubmission. The Oregon Supreme Court succinctly observed:

> Plainly, a litigant who wishes to present the contentions offered by this appeal [i.e., that the verdict is defective because it awards economic damages, but lacks a substantial award of non-economic damages] must object promptly when he observes the irregularity or forfeit his right to object. Rights to object which have been waived cannot be reclaimed and revived by resort to a motion for new trial.

Building Structures, Inc. v. Young, 328 Or. 100, 110, 968 P.2d 1287 (1998), *quoting Fischer v. Howard*, 201 Or. 426, 463, 271 P.2d 1059

(1954). The rule was also recognized and applied in *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665 (2000):

> One of this court's "primary objective[s]" is to promote the "efficient administration of justice." *Eberhard Mfg. Co. v. Baldwin,* 97 Nev. 271, 273, 628 P.2d 681, 682 (1981). The efficient administration of justice requires that any doubts concerning a verdict's consistency with Nevada law be addressed before the court dismisses the jury. *Carlson v. Locatelli*, 109 Nev. 257, 262-63, 849 P.2d 313, 316 (1993). "Where possible, the verdict should be salvaged so that no new trial is required." *Id.* at 263, 849 P.2d at 316-17. In furtherance of this goal, we have formulated the policy that "failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury" constitutes a waiver of the issue of an inconsistent verdict. *Eberhard,* 97 Nev. at 273, 628 P.2d at 682. *See also Brascia v. Johnson*, 105 Nev. 592, 596 n. 2, 781 P.2d 765, 768 n. 2 (1989); *Carlson,* 109 Nev. at 262-63, 849 P.2d at 316-17.

The courts of Missouri are in accord. *See Day Advertising Inc. v. Devries And Associates, P.C.*, 217 S.W.3d 362 (Mo. App. W.D., 2007)

Fahndrich did not object to the verdict before the jury was discharged. Following the foregoing authorities, Fahndrich is not entitled to try her luck with another jury. Rather, her failure to timely object waived any irregularity in the verdict, and justified the denial of her motion for a new trial.

B. Fahndrich Did Not Present an Adequate Record

"The party seeking review has the burden of perfecting the record

so that this court has before it all of the evidence relevant to the issue. RAP 9.2(b); *State v. Jackson,* 36 Wash. App. . 510, 516, 676 P.2d 517 (1984), *affirmed,* 102 Wash.2d 689, 689 P.2d 76 (1984)." *Allemeier v. University of Washington*, 42 Wash. App. 465, 472, 712 P.2d 306 (Div. I, 1985); *rev. den.* 105 Wash.2d 1014 (1986); *accord Olmsted v. Mulder*, 72 Wash. App. 169, 183, 863 P.2d 1355 (Div. I, 1993), *rev. den.* 123 Wash.2d 1025, 875 P.2d 635 (1994). Fahndrich asserts that the verdict is contrary to the evidence. To evaluate that contention, this court must examine all of the evidence that bears on the issues of damages and causation. Much of that evidence is not in the appellate record.

The record does not include the testimony of Linda Williams or Shelly Mullins, both of whom presumably testified about the circumstances of the accidents. CP 171-173. That testimony could bear on the credibility of Fahndrich's complaints of pain and discomfort. The record also does not include the testimony of Fahndrich's expert, Wayne Slagle, and defense expert, Larry Tompkins, both of whom presumably had something relevant to say about the significance of the impacts that could bear on the issues of causation and damages. CP 173-174. The appellate record is also missing the testimony of witnesses Terence

Honikman and Dr. Michael Freeman, and omits numerous exhibits. *Id.;* CP 176-177.

Perhaps the most glaring, and significant, omission is the evidence concerning Fahndrich's economic damages. In her brief, Fahndrich asserts that the only economic damages she requested were $29,000 in medical bills. Appellant's Brief, p. 22. However, the complaint alleges that Fahndrich also incurred wage loss and impairment of earning capacity. CP 3-7. To substantiate that allegation, Fahndrich presented testimony from an expert economist, Professor Michael Haynes, and a vocational expert, Hank Lageman. *See* Jury Trial Minutes; CP 174. Presumably, these experts testified about economic damages other than medical expenses. Nevertheless, Fahndrich did not include their testimony in the appellate record. Thus, it is impossible to substantiate Fahndrich's assertion that she only sought $29,000 of economic damages.

That is an important assertion, because the jury awarded $25,000 in economic damages. In *Singleton v. Jimmerson*, 12 Wash. App. 203, 205, 529 P.2d 17 (1974), the court observed that "where the jury verdict approximates the amount of undisputed special damages and the injury and its cause is clear, the court has little hesitation in granting a new trial."

Based on this authority, Fahndrich asserts that the near parity between the economic damages and the verdict warrants a new trial.

The problem with this argument is that Fahndrich sought economic damages in addition to the medical expenses. As noted above, Fahndrich also sought economic damages for wage loss and impairment of earning capacity, and she offered testimony from two experts to substantiate her claim for those damages. Because she did not include all of the damages evidence in the appellate record, it is impossible to determine the total amount of economic damages that Fahndrich requested, or the ratio between what was requested and what was awarded. It is also impossible to determine whether the amount of the economic damages was disputed, or whether the cause was clear. That being so, the record is inadequate for review.

Even if only medical expenses were at issue, the appellate record does not disclose that Fahndrich incurred approximately $29,000 of undisputed medical expenses. Although the appellate record contains evidence of some medical expense damages, it does not include evidence of all of those damages.

Although Fahndrich asserts that the economic damages awarded were less than her medical expenses, she does not assert that the award of economic damages was inadequate, or contrary to the evidence. Thus, there must have been some evidence to controvert the reasonableness or necessity of the claimed economic damages. That same evidence could have some bearing on whether her claim for non-economic damages was justified. If there was evidence that Fahndrich did not suffer; or that her suffering was caused by one of the accidents but not the other; or that the suffering caused by one accident was *di minimis;* or that her suffering was caused by the third accident in 2002 or by some other traumatic event, a verdict that failed to award non-economic damages would be supported by the evidence. *See Palmer v. Jensen*, 132 Wash.2d 193, 202, 937 P.2d 597 (1997) (evidence that plaintiff experienced pain, but did not require follow-up treatment supported specials only verdict). Because the court cannot tell from the record presented whether the evidence pertaining to non-economic damages was controverted, the record is inadequate for review.

In an appeal involving an alleged evidentiary error, the appellate court must consider all of the evidence presented to the trier of fact to determine if there was error and, if so, prejudice. This case is analogous. "Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict." *Palmer,* 132 Wash.2d at 197. To determine whether Fahndrich was entitled to non-economic damages, the appellate court must consider all of the evidence that bears on the issue of damages and their cause. Because Fahndrich did not include all of that evidence in the appellate record, she cannot prove error or prejudice.

C. The Trial Court Did Not Abuse its Discretion

Even if the court were to consider the one-sided record presented by Fahndrich, there is sufficient evidence to support the verdict. A verdict that awards only economic damages is supported by the evidence if there is a dispute about the nature of an injury, its cause, or the defendant's responsibility. *See, e.g., Cox v. Charles Wright Academy, Inc.*, 70 Wash.2d 173, 177, 422 P.2d 515 (1967) (court erred in granting additur when evidence showed that the plaintiff had been in four accidents that

clouded all of the evidence of damages).

The evidence in the appellate record shows that Fahndrich had been in three motor vehicle accidents within a two-year time span. The symptoms that arose from her first accident were waning before the second accident, and all of her problems reportedly worsened after the third. Her symptom complex presented a diagnostic mystery, resulting in treatments by a chiropractor, two neurologists, and two dentists. She even received experimental treatment with Botox injections. Despite all of the treatment, Fahndrich related that she was still experiencing debilitating headaches and jaw pain. From the first treatment, Fahndrich's symptom complex was wholly subjective. Fahndrich underwent numerous medical tests, including two MRI's and other imaging studies. Those revealed no objective cause for her symptoms.

Not surprisingly, the medical experts did not agree on diagnoses, prognoses, treatment plans or causation. Dr. Smith, D.C., allocated 20 percent of the cause of Fahndrich's injury to the April 2000 accident; 5 percent to the July 2002 accident; and the balance to the November 2000 accident. Dr. Kelley, M.D., concluded that the November 2000, accident was the primary cause of Fahndrich's TMJ pain and myofascial pain

dysfunction. However, he believed that her myofascial pain dysfunction syndrome was precipitated by the April 2000 accident, and exacerbated by the November 2000 accident. Dr. Thomas, Jr., M.D., concluded that the November 2000 accident caused Fahndrich's TMJ symptoms, and that no more than 50 percent of her cervical injury and treatment related to the April 2000 accident. Finally, he related that none of the medical treatment that Fahndrich received after September 2000 related to the April accident.

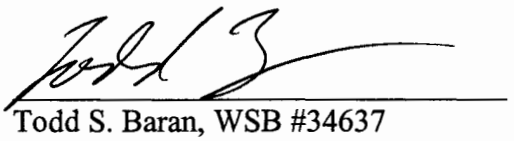
The conflicting expert testimony concerning the nature, cause and prognosis of Fahndrich's conditions; coupled with the evidence of multiple traumatic events; coupled with the wholly subjective nature of the complaints and symptoms; coupled with the evidence that Fahndrich gave inconsistent histories of the onset of symptoms, clouded and obscured, the true nature and extent of Fahndrich's damages. Thus, here, as in *Cox*, it was wholly within the province of the jury to determine and assess damages. That being so, Fahndrich was not entitled to a new trial. There was no error.

IV. CONCLUSION

Fahndrich waived her right to seek a new trial by not objecting to the verdict before the jury was discharged. Fahndrich also failed to

prepare a record adequate for appellate review. Even if adequate, the record shows that the damages evidence was clouded and obscured. For any of these reasons, this court should affirm.

DATED this 15th day of May, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2008, I served the BRIEF OF RESPONDENTS LINDA AND JOHN DOE WILLIAMS upon the attorneys for all parties by depositing in the United States Post Office, Portland, Oregon, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their names:

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