

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
7/13/2010  
COURT OF APPEALS, DIVISION II  
No. 44871-8-II *W*

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TAMMY D. KARTHAUSER and VON KARTHAUSER,  
wife and husband,

Plaintiffs/Respondents,

v.

MACKENZIE ADAMS,

Defendant/Appellant.

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REPLY BRIEF OF APPELLANT

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Respondent Karthausser devotes much of her brief to issues not raised by Appellant Adams. Karthausser argues that Adams failed to preserve issues for appeal, but they are issues from which Adams is not appealing. Adams does not wish to waste time or resources repeating all of her arguments set forth in the Brief of Appellant, and instead, incorporates those arguments herein, along with the Statement of Facts, and submits the following brief reply.

**I. ADAMS' MOTION FOR A NEW TRIAL  
SHOULD HAVE BEEN GRANTED**

A new trial should be granted on the basis of an excessive damages award when the amount of the verdict is so excessive, and outside the range of evidence, as unmistakably to indicate the verdict was the result of passion or prejudice. *E.g., Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 93, 231 P.3d 1211 (2010). Additionally, a verdict must be supported by substantial evidence, which requires more than a mere scintilla of evidence. Instead, there must be evidence of a character which would convince an

unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Id.* at 82.

Although Karthausser put on a parade of predictably sympathetic nuclear family members as “before and after” witnesses (her mother, her stepfather, her sister, and two of her daughters), certain facts cannot be escaped or ignored. Karthausser sustained soft tissue, whiplash-type injuries only in the subject accident. Karthausser received healthcare treatment for her alleged injuries for only a few months, and she had not received treatment of any kind or nature for a couple of years prior to the time of trial. (RP 76; Ex. 9A) Karthausser did not miss even one day of work from her allegedly physical job as a caregiver for a 300-pound individual, and in fact, testified that with the exception of transfers from the bathtub, she was able to perform all of her job duties. (RP 138, 149-50) Oddly, although Karthausser testified her son helped her with the bathtub transfers, her son did not testify at trial. Although a plaintiff, Karthausser’s husband similarly did not testify at trial. No healthcare provider advised Karthausser not to work, nor did any healthcare

provider place any restrictions on Karthausser's employment or leisure activities.

A physical therapist testified that Karthausser's neck and shoulder complaints had resolved with treatment, but noted Karthausser had some residual low back/hip discomfort at the time she ceased physical therapy. (RP 82-83) The therapist did not, however, place any restrictions on Karthausser's activities, take her off work, restrict her to light duty work, or restrict her leisure activities in any way whatsoever. There was absolutely no medical testimony as to any permanent impairment, disability or restrictions that, on a more-probable-than-not basis, would or should be imposed on Karthausser as a result of the subject accident. The medical evidence was confined to testimony by the physical therapist, and medical records of a few months of treatment a couple of years before trial.

Despite these undisputed facts, and despite incurring less than \$11,000 in medical expenses for a few months of mostly physical therapy treatments after the accident, the jury returned a verdict in

favor of Karthausser in the amount of \$165,000. (CP 26) That jury award is not based on substantial evidence, and is so outrageously excessive as clearly to be the result of passion or prejudice.

In her response brief, Karthausser argues that her past medical treatment, and Adams' admission that that limited treatment was reasonably incurred as a result of the car accident, necessarily leads to the conclusion that future medical treatment is necessary and reasonably likely to occur. Here, Adams simply conceded that the couple of doctor visits and physical therapy which Karthausser received in the few months following the accident, were reasonably and necessarily incurred as a result of the accident. Approximately two years passed with absolutely no medical evaluation or treatment by Karthausser, and with Karthausser continuing to perform her allegedly physical job. There was no testimony, either in Karthausser's ER 904 submission, or at trial, that future medical treatment was recommended, or was reasonable and necessary as a result of the accident. Accordingly, there was also no testimony regarding how much treatment was needed, the type of treatment,

the duration of treatment, or the like. An individual who does not seek any medical treatment for two years is unlikely suddenly to start receiving medical treatment. There is no evidence, beyond pure speculation, from which the jury could determine an award for future medical expenses. There was no evidence or testimony to guide the jury in that regard.

Similarly, there was no evidence, but rather simply pure speculation, regarding Karthausers alleged diminishing earning capacity. Karthausers did not miss any work or sustain any wage loss as a result of the accident. Although she testified to difficulty with bathtub transfers for her 300-pound client, she did not testify, nor did anyone else, that she could not obtain a position with similar duties for an individual weighing less than 300 pounds. It certainly is not common for individuals to weigh 300 pounds. There was no evidence or testimony that Karthausers could not continue doing the same type of job she was doing both before and after the subject motor vehicle accident. There was no testimony that her condition had been getting worse. Instead, Karthausers testified she was not

getting better, despite medical records submitted with her ER 904 Notice, and testimony by her physical therapist, which indicated to the contrary. Although Karthausser's attorney told the jury in closing argument that Karthausser was "wearing out," his statement was not supported by the evidence.

The jury's verdict clearly included a sizable general damages award. Although there was testimony to a reduction in Karthausser's leisure activities, the evidence also established that Karthausser continued to work on a regular basis, needing no time off from work, and did not perform her recommended home exercise program because she was too busy living her life. (RP 150-51) In light of the nature of her injuries, the limited special damages, and her admitted activities, a large general damages award was not supported.

Thus, substantial evidence does not exist to support the jury's verdict, with the exception of past medical expenses. The verdict is so far outside the evidence and reasonable inferences from the evidence, to compel the conclusion that it is the result of passion or prejudice.

Karthauser's attorney's comments during closing argument likely had a large bearing on the jury's award in this case. Indeed, in her brief, Karthauser states that the jury did exactly what her attorney asked them to do. What he asked them to do was award a large sum of money to Karthauser so the taxpayers would not have to pay for her very existence (and likely that of her dependent family members). Although Adams' objection to the improper and highly prejudicial statement was sustained, the words and implications cannot be removed from the minds of the jury. Adams did not seek a curative instruction, but to have done so would simply have further highlighted that statement. A curative instruction would not have eliminated the prejudice caused by counsel's argument. *See Carabba v. Anacortes School Dist. No. 103*, 72 Wn.2d 939, 953-54, 435 P.2d 936 (1968) (the lodging of any objection cannot be deemed to constitute a waiver; curative instruction from court would not have cured harm). Counsel's argument did not occur in a vacuum. It occurred in a time of economic difficulties throughout the United States, and a depressed economy in the county where this action was

pending. The last thing taxpayers want is to add Karthausser to their dependents. Indeed, the jury apparently *did* do exactly what Karthausser's attorney requested: it awarded her more money than the evidence established as damages, to keep her off the public assistance rolls.

As a result of the above, Adams' motion for a new trial, or remittitur, should have been granted. Substantial justice was not done.

## **II. THE POST-TRIAL MOTIONS SHOULD HAVE BEEN DECIDED BY THE TRIAL JUDGE**

In her response brief, Karthausser seems to contend that Adams did not properly preserve for appeal, the issue of whether the post-trial motions should have been heard by the trial judge who presided over the case. Adams properly preserved this issue for appeal by noting her motion for a new trial, or in the alternative, remittitur, before the trial judge, Judge Sullivan, and not before the county's sitting judge, Judge Warning. (CP 72-73) Additionally, Adams filed an objection to

entry of judgment, *specifically requesting referral of the matter to Judge Sullivan for resolution.* (CP 27-29) Contrary to the statements in Karthausser's brief, Adams did not simply object to entry of the judgment. Adams objected to any judge, other than the trial judge, presiding over the post-trial motions. The trial court, however, refused to make arrangements to have Judge Sullivan complete his presiding over the trial, with the hearing of the post-trial motions, and instead referred the matter to Judge Warning, who did not observe the trial, including any of the witnesses, nor did he have a transcript of the trial for review. CR 63 makes clear that the trial judge is supposed to preside over post-trial motions, barring some disability, death, or the like. Additionally, in ruling on a motion for a new trial or remittitur on the basis that the verdict was excessively high in light of the evidence, so as clearly to be the result of passion or prejudice, it is important for the judge personally to have

observed the testimony, the argument, witnesses' behavior and credibility, and the like. *See Coppo v. Van Wieringen, et al.*, 36 Wn.2d 120, 124, 217 P.2d 294 (1950). Unlike Judge Warning, Judge Sullivan observed the entire trial, including all witness testimony, the actions of counsel, and the reaction of the jury to comments by counsel. It was error for the trial court to have any judge other than Judge Sullivan rule on the post-trial motions.

**III. ADAMS' MOTION FOR JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED**

For the reasons set forth in Section I, above, the trial court erred in denying Adams' motion for judgment as a matter of law, at the close of the evidence, on the claims for future medical expenses and diminished earning capacity. There simply was insufficient evidence, taking the issues beyond pure speculation, for the jury to make an informed and reasonable, rationally-based award. Again, there was no testimony at trial that future medical treatment was recommended, the nature and extent of any such treatment, the

length of such treatment, or anything along those lines. There was no testimony that any restrictions would or should be, or had been, placed on Karthausers activities, either employment or leisure. There was no testimony that she could not continue doing the exact same job, albeit perhaps with a less heavy client, as a result of the accident. There was no evidence her condition was worsening. Accordingly, there was neither substantial evidence nor reasonable inferences from the evidence to sustain a verdict awarding future medical expenses and/or diminished earning capacity. Instead, the jury engaged in pure speculation. Allowing the jury to do so was an error of law by the trial court, and should be reversed. Although precise proof of every dollar and cent of damage is not required, calculation with reasonable certainty, with an absence of speculation and conjecture, is required.

#### **IV. ATTORNEY'S FEES**

In her brief, Karthausers requests an award of attorneys fees and costs incurred in this matter, should she prevail, citing RAP 18.1(b) and RCW 4.84.080. If she prevails, Karthausers might be

entitled to some statutory costs; however, she is not entitled to an award of attorney's fees. RCW 4.84.080 provides as follows:

**When allowed to either party**, costs to be called the attorney fee, shall be as follows:

- (1) In all actions where judgment is rendered, two hundred dollars.
- (2) In all actions where judgment is rendered in the Supreme Court or the Court of Appeals, after argument, two hundred dollars.

(emphasis added). Similarly, RAP 18.1(a) states, “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review,” the party must request such fees or expenses in its opening brief. Courts have interpreted the “when allowed” language to require a contractual or statutory basis, or other legal basis, allowing an award of attorney's fees. Citation to RCW 4.84.080 is insufficient to support an award of attorney's fees. *E.g.*, *Snyder v. Haynes*, 152 Wn. App. 774, 783-84, 217 P.3d 787 (2009). There is no legal basis for Karthaus, or Adams, to recover attorney's fees. Accordingly, even if she is the prevailing party, Karthaus is not entitled to recover her attorney's fees.

V. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, this Court should reverse the rulings below, and remand the case for new trial.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of December, 2013.

  
CHERYL R.G. ADAMSON, WSBA #19799  
Attorneys for Defendant/Appellant  
MacKenzie Adams

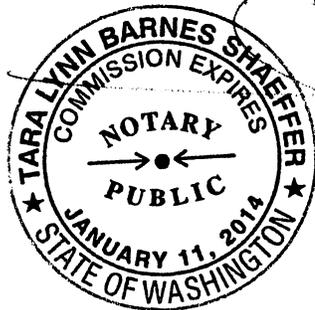


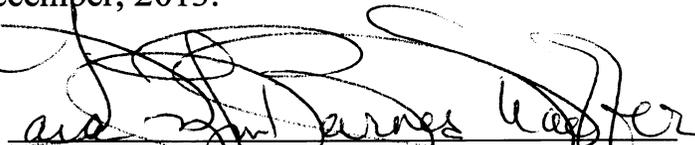
That I am over the age of 18 years; that on or about the 6<sup>th</sup> day of December, 2013, I served a true and correct copy of Reply Brief of Appellant upon Duane Crandall, attorney for plaintiffs/respondents, at CRANDALL, O'NEILL, IMBODEN & STYVE, P.S., P. O. Box 336, Longview, Washington 98632, by depositing same with the United States Postal Service, in properly addressed, postage prepaid package.



REBEKAH E. HARRIS

SUBSCRIBED AND SWORN to before me this 7<sup>th</sup> day of December, 2013.



  
NOTARY PUBLIC, in and for the State of Washington, residing at: Kennewick  
My Commission Expires: 1/11/14