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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 49667-4-II

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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MONICA ANAYA,

Respondent,

v.

ERNST MEINHART and CHRISTINE MEINHART,

Appellants.

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**APPELLANTS' REPLY BRIEF**

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## I. RESTATEMENT OF FACTS

Ernst Meinhart and Christine Meinhart rely upon the statement of facts set out in their opening brief under the caption “Statement of the Case”, which is incorporated as if fully set forth herein.

## II. ARGUMENTS IN REPLY

In their opening brief the appellants alleged that the jury verdict was contrary to the evidence presented under factual patterns that were virtually identical, if not even more compelling, than those of *Palmer v. Jensen*, 132 Wash. 2d 193, 937 P.2d 597 (1997); and *Fahndrich v. Williams*, 147 Wash. App. 302, 194 P.3d 1005 (Ct. App. 2008) cases. It is significant that the response brief of the defendant Anaya made no effort to distinguish the Meinhart verdicts from said case authority. Indeed, the response brief only cursorily mentioned *Palmer*,<sup>1</sup> and it totally ignored *Fahndrich*, both of which are controlling.

This court in its *Fahndrich* decision at 307-309 succinctly stated the issues and the facts we submit as being directly attributable to the Meinhart verdict:

“Here, the jury specifically found only economic damages, entering zero for non-economic damages on its verdict form. Thus, we address only whether the evidence supports the jury’s failure to award non-economic damages. ...

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<sup>1</sup> Respondent’s Brief, Pgs. 1 and 10

...

Whether a jury is justified in deciding not to award non-economic damages depends on the evidence presented at trial. ...

Here, *Fahndrich* presented extensive evidence of her pain and suffering, and Williams and Mullins presented no evidence to contradict it. ...

As in *Palmer*, *Fahndrich* is entitled to a new trial because 'the jury found that the accident caused injuries but believed the plaintiff suffered no pain.' (Citation omitted) The evidence does not support the conclusion that *Fahndrich* suffered no pain or disability as a result of her collisions with Williams and Mullins. Thus, the trial court abused its discretion in denying her a new trial.

We reverse and remand for a new trial on damages."

By comparison, in the Meinhart trial the defendant even admitted that both Ernst and Christine Meinhart were injured;<sup>2</sup> the jury awarded neither of them pain and suffering damages;<sup>3</sup> the Meinharts presented extensive evidence of pain and suffering;<sup>4</sup> and the defendant presented no evidence or argument to contradict said evidence. Not only did the defendant not challenge this fact by presenting any evidence that neither

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<sup>2</sup> RP Vol. II, Pg. 111 Lines 19-21

<sup>3</sup> CP 35 (Verdict Form)

<sup>4</sup> Ex. 4 and 5; Ernst Meinhart - RP Vol. I, Pg. 31 Lines 17-19, Pg. 32 Lines 15-18, Pg. 35 Line 8 - Pg. 36 Line 21; Christine Meinhart - RP Vol. II, Pg. 121 Lines 16-20, Pg. 125 Line 24 - Pg.126 Line 16; Dr. Finlayson - RP Vol. II Pg. 14 Line 11 - Pg. 16 line 6, Pg. 18 Lines 12 - 23, Pg. 21 Line 12 - Pg. 22 Line 13, Pg. 25 Line 19 - Pg. 26 Line 5, Pg. 26 Line 19 - Pg. 29 Line 13.

Ernst Meinhart nor Christine Meinhart suffered pain and suffering, the trial judge even acknowledged and pointed that fact out.<sup>5</sup>

Moreover, in the instant matter on appeal before this court, the Meinharts are entitled to have their claims individually considered in the light of the evidence presented in the trial affecting their respective claims even though both claims were tried in the same trial. Therefore, even if there was a scintilla of evidence that might inferentially support a defense against one of the Meinharts, it would not necessarily apply to the other, and yet both suffered the same fate which inherently raises significant issues to consider under CR59 whether either, or both, of the Meinharts received a fair trial. The Meinharts obviously submit that they did not. With specific reference to CR 59(a)(7) there is simply no evidence, or any reasonable inference from the evidence, to justify the verdict which is obviously contrary to the law of this state. Here, the Meinharts submitted overwhelming evidence that they were each injured, and gradually recovered over a period of many months, albeit not totally, from the MVA injuries they sustained.

Anaya's response brief appears to attempt to deflect this court's attention away from the fundamental issues expressed above herein and in

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<sup>5</sup> RP, Motion for New Trial Pg. 8 Line 22 - Pg. 9 Line 2

the Meinharts' opening appeal brief. For example, pointing out that an airbag did not deploy in a pick-up truck that was struck from the rear is irrelevant.<sup>6</sup> There was simply no evidence submitted in the Meinhart trial to even infer that an airbag existed in the back of the pick-up; nor that a rear-end impact would cause a front airbag to deploy; nor that even if an airbag did exist and would have deployed, that it would have prevented pain from the injuries the respondent admitted that the accident inflicted upon each of the Meinharts.

Similarly, whether Mr. Meinhart was wearing his seatbelt,<sup>7</sup> or had a headrest in his vehicle, is not substantial evidence that would stand to prove that he did not suffer pain as a result from being struck from behind, particularly in an impact that had sufficient force that it bent the steel bumper.<sup>8</sup> Furthermore, said arguments do not even apply as evidence to deny Christine Meinhart compensation for her pain and suffering since such evidence was non-existent as to whether she was wearing a seatbelt or had a headrest.

Whether the police were called to the scene, or whether Mr. and Mrs. Meinhart went home following the accident as alleged by the

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<sup>6</sup> Respondent's Brief Pg. 3

<sup>7</sup> Respondent's Brief Pg. 3

<sup>8</sup> Ex. 2 and 3; RP Vol. I, Pg. 30 Lines 1-15 (The question at line 4 misidentified the exhibits being offered as 3 and 4, but it was clearly exhibits 2 and 3 that were actually presented to the witness and admitted without objection at the time.)

respondent<sup>9</sup> is also not substantive evidence establishing that neither Ernst nor Christine suffered pain as a result of the injuries the respondent has admitted were sustained by each of them.

The respondent's argument that "Meinhart" was awarded less than the total amount of special damages claimed is also misleading.<sup>10</sup> First of all, there were two Meinharts, and it is un rebuttable that Christine Meinhart received 100% of her claimed special damages so that argument wouldn't even apply to her.<sup>11</sup> Secondly, Mr. Meinhart received (99%) of his special damages claimed through June 6, 2014, with the exception of \$60.00 (1%).<sup>12</sup> Irrespective of the ambiguity as to this minor discrepancy, the fact remains that both Ernst and Christine Meinhart received far more than the respondent had admitted was reasonable and necessary.

The respondent's argument that the Meinharts did not "seek" treatment for a week is also misleading.<sup>13</sup> There is more than a mere semantical distinction between the words to "seek" and to "obtain". The evidence before the jury was that the Meinharts actually obtained treatment on October 30, 2013, which was not an unreasonable delay under the circumstances and certainly did not constitute substantial

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<sup>9</sup> Respondent's Brief Pg. 3

<sup>10</sup> Respondent's Brief Pg. 8

<sup>11</sup> CP 35; Ex. 9 and 11

<sup>12</sup> CP 35; Ex. 8 (M-000005) and Ex. 10

<sup>13</sup> Respondent's Brief Pg. 3

evidence that they each did not suffer pain as a result of the accident in which they were admittedly injured. The testimony was that they waited a couple of days to see if their symptoms would subside and then they sought treatment at the Browns Point Chiropractic Center near their home, which was only open certain days of the week and the doctors' office was "booked out".<sup>14</sup> Such evidence simply does not rise to the level of constituting substantial evidence that neither Ernst nor Christine Meinhart suffered pain as a result of the injuries that the defendant Anaya's own expert admitted the Meinharts sustained; and for which said expert, Dr. Sutton, also testified that several months of treatment were reasonable and necessary for the treatment thereof.

As stated previously, the respondent did not even try to discuss, let alone distinguish *Fahndrich* and *Palmer*. Rather, the respondent chose instead to reference decisions that are very distinguishable from the Meinhart facts. The first of these was *Lopez v. Salgado-Guadarama*, 130 Wash. App. 87, 122 P.3d 733 (2005). The *Lopez* decision involved a district court trial in which the jury awarded some medical specials, but nothing for pain and suffering. That is where the *Lopez* case stops having any similarity with the *Palmer* (and Meinhart) case facts. There, at 92-93,

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<sup>14</sup> RP Vol. I, Pg. 31 Line 16 – Pg. 32 Line 7

the Court of Appeals in Division III noted that in *Palmer* the defendant did not introduce any evidence to dispute the Ms. Palmer's claim of pain; whereas in *Lopez* the defense disputed every aspect of *Lopez's* damage claim:

"The defendant in *Palmer* did not introduce any evidence disputing the mother's damages. *Id* at 196.

...

Here, the jury's failure to award damages for pain and suffering was consistent with the evidence. In contrast to the facts presented in *Palmer*, the defense disputed every aspect of Mr. Lopez's damages. Defense experts testified no objective medical findings supported Mr. Lopez's extensive complaints of pain. Dr. Sears opined that Mr. Lopez should have recovered from any injuries quickly after the accident.

...

Additionally, Mr. Lopez's credibility was at issue. He originally testified he was carried to the ambulance, but when questioned regarding who carried him, he admitted he walked. He also had a difficult time remembering the details of the accident and how much time he took off work."

Conversely to the facts of *Lopez*, both Ernst Meinhart and Christine Meinhart, were fault free, and liability was admitted by the defendant Anaya. Further, the credibility of Mr. and Mrs. Meinhart was never subjected to any evidentiary or argumentative challenge. Moreover, Anaya's own doctor, Sutton, openly admitted that both Ernst and Christine

Meinhart had suffered injury in the accident;<sup>15</sup> and finally, the jury actually awarded more for economic damages than the defendant Anaya's own doctor admitted as being reasonable and necessary.<sup>16</sup>

Next, the respondent relies upon *Gestson v. Scott*, 116 Wash. App. 616, 67 P.3d 496 (2003). Scott had been in a bank drive-through line when she decided to enter the bank on foot. Scott backed up while looking through her rear window but did not see Gestson in a two-seater convertible sports car. Under the facts, Scott's "rear bumper contacted Gestson's front bumper, causing minimal damage." *Id.* at 618.

Gestson immediately went to a hospital emergency room where she was diagnosed with a lower back strain and chronic lower back pain and released. She also went to a separate urgent care facility that same day, and started chiropractic treatments the next day. It was noted that throughout the prior decade (1990s) Gestson had experienced chronic and significant back pain and was on a 35-lbs weight restriction at work. Six months after the MVA she was diagnosed with a C5-6 disk herniation and a month later went through surgery. At the time of trial Gestson claimed pain and suffering from physical injuries, lost wages, lost conjugal rights

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<sup>15</sup> RP Vol. II, Pg. 95 Lines 16-23; RP Vol. II, Pg. 101 Lines 9-19

<sup>16</sup> Ex. 8 and 10 (Re: Ernst Meinhart) and 9 and 11 (Re: Christine Meinhart); CP 35; RP Vol. II, Pg. 88 Line 2 – Pg. 89 Line 4 ; and RP Vol. II Pg. 102 Line 22 – Pg. 103 Line 12

and loss of consortium totaling \$48,661.41, but the jury awarded only \$458.34 for the initial emergency room visit.

The trial court granted a new trial, but this court reversed it. Among the many distinctions, it should be noted that there was no evidence of pain or suffering or inconvenience associated with Gestson's visit to the ER (which is similar to the denial of pain and suffering for the Palmer child as opposed to his mother's claim). As in *Palmer*, this court agreed that the contact between the vehicles created a possible need for Gestson (and the Palmer child) to visit the ER for a well-being check-up, but a visit to the ER does not imply substantial proof of pain and suffering associated with seeking a physical check-up.

Of more importance, the *Gestson* court noted at 623:

"But the *Scotts'* evidence and cross-examination of the Gestson's witnesses raised doubts as to the causal connection between the accident and Gestson's neck injury. ..."

The appellate court at 624 noted that Gestson's doctors admitted in cross-examination that they had relied upon the symptomatic information Gestson provided to them:

"They acknowledged that inaccuracies in the symptomatic information they received from Gestson might produce inaccuracies in their opinions.

Given the *Scotts'* evidence that (1) the vehicular impact may be have been less than Gestson described to her

medical providers; and (2) Gestson experienced neck pain and stiffness, numbness in her arms and headaches before the accident, the jury could properly disregard the opinions of the Gestsons' experts. ...”

Here again a case cited in the response brief as supportive is actually not. First all, in the Meinhart trial, there was no evidentiary challenge that there were inaccuracies in the symptomatic information provided by either Ernst or Christine Meinhart to either of the testifying doctors. The only challenge was whether they had reached maximum medical improvement by March 5, 2014, to such an extent that continued treatment through June 6, 2014, was unreasonable and unnecessary. Further, because the fact of injuries was admitted, there was no causal issue. Still further, even though there was some evidence that Christine Meinhart had a prior disputed history,<sup>17</sup> Ernst Meinhart had absolutely no prior history, so there wasn't even a pre-existing health condition issue possible as to his claim.<sup>18</sup>

Moreover, any impact in *Gestson* was clearly from a vehicle backing into the party alleging injury as opposed to the Meinhart scenario which the vehicle was rammed from the rear. The biomechanics are completely different for the human body which flexes forward much more easily than it extends backwards. Although biomechanics were not

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<sup>17</sup> RP Vol. II, Pg. 121 Lines 21-24, Pg. 124 Lines 6-19, Pg. 125 Lines 16-23

<sup>18</sup> RP Vol. I, Pg. 32 Lines 15-18, Pg. 33 Line 25 – Pg. 34 Line 4

discussed factually in the *Gestson* decision, in the Meinhart trial there was significant testimony offered by the Meinharts' doctor, Finlayson, in discussing the biomechanics of the injuries suffered by the Meinharts.<sup>19</sup> Still further, the significant force of the impact to the Meinhart vehicle is plainly visible in the photographs admitted as exhibits 2 and 3, whereas the impact in the *Gestson* decision was described at page 618 as being "minimal" and at page 623 noted that "the accident slightly disfigured Gestson's front bumper by denting it in two places at the license plate attachment."

*Gestson* simply doesn't apply in the Meinhart scenario.

The respondent also cited *Usher v. Leach*, 3 Wn. App. 344, 474 P.2d 932 (1970), for the proposition that the grant of a new trial was improper where the jury awarded only \$13.00 in general damages over and above the special damages. The first difference between *Usher* and Meinhart is that the appellate court noted "A much stronger showing an abuse of discretion will be required to set aside an order granting a new trial than one denying it." (Pg. 346) The Meinhart appeal is based upon the failure of the trial court to grant a new trial.

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<sup>19</sup> RP Vol. II, Pg. 35 Line 5 – Pg. 36 Line 15

A second distinction is that in *Meinhart* the defendant admitted injuries and the reasonable necessity of treatment thereof for a substantial period of time<sup>20</sup> (the latter of which the jury disregarded by awarding even more on a special verdict form).<sup>21</sup> *Usher* apparently didn't involve a special verdict form, nor is there indication in the record of allegations pertaining to pain and suffering. Therefore, the record did not reflect any breakdown of what the jury based its verdict on. The appellate court therefore disagreed with the trial court that the verdict indicated passion or prejudice.

Anaya's response brief herein seems to imply from *Usher* that proof of passion or prejudice is always required. Not true. In the *Palmer* decision the Supreme Court cited the case of *Daigle v. Rudebeck*, 154 Wash. 536, 537, 282 P. 827 (1929), as authority to the contrary. In *Daigle* the trial court granted a new trial in which it opined:

“[T]he said motion for new trial is granted upon the ground of insufficiency of the evidence to justify the verdict in that the amount awarded by the jury is not in conformity with the evidence produced at the trial and is inadequate, though not so far inadequate as to indicate passion or prejudice.”

The 1929 Supreme Court approved at 540 as follows:

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<sup>20</sup> RP Vol. II, Pg. 88 Line 2 – Pg. 89 Line 4; RP Vol. II, Pg. 102 Line 22 – Pg. 103 Line 12  
<sup>21</sup> CP 35

“From the order which we have quoted, it will be seen that the trial court in this instance granted the motion, not only upon the ground of the inadequacy of the verdict, but upon the further and additional ground that the evidence was insufficient to justify the verdict in that the amount awarded by the jury is not in conformity with the evidence adduced at the trial. On those grounds, and particularly when, as here, there was substantial undisputed evidence calling for an award for general damages, we think the trial court cannot be said to have abused his discretion.”

Respondent also cited *Richards v. Sicks' Rainier Moving Co.*, 64 Wn.2d 357, 391, P.2d 960 (1964), in which the plaintiff was involved in an accident on November 13, 1960.

The issue in *Richards* revolved around a claim that the MVA may have caused or aggravated a hernia. However, Richards was immediately taken post-accident to a Longview hospital for an ER check-up which reported no complaints regarding a hernia. Then he traveled later to Portland to have stitches removed from his face by a physician there and again he made no complaint concerning a hernia. Still later he returned to Seattle and was examined by his own physician on November 19<sup>th</sup>, six days post-accident, at which time he primarily complained of pains in his chest. During the course of the examination his Seattle doctor discovered a small area of tenderness caused by the hernia on the margin of the old incision for gall-stones that took place six months before the accident, at which time he was experiencing a small hernia at the site of the gall-stone

incision. The appellate court noted that there was testimony that incisional hernia's are quite common after a gall-bladder operation even without strain or trauma and the testimony further disclosed that the plaintiff admitted on cross-examination that a hernia was developing prior to the collision that his body was particularly susceptible to hernias and that he was actually experiencing another hernia in the same area at the time of the trial.

The special damages associated with the medical expenses were \$1,375.07 and the jury awarded a verdict of \$1,800.00. The trial court ruled under this evidence that the jury had the right to disbelieve the testimony most favorable to the plaintiff and could have concluded that the medical expenses for repair of the hernias did not result from the accident.

*Richard* is not at all similar to the *Meinhart* evidence wherein the fact of personal injury was admitted, and Ernst Meinhart had no pre-existing history of any spinal complaints.

### **III. CONCLUSION**

This is a case of admitted liability, admitted injury, substantial evidence of pain, and admissions by the defendant's expert that treatment of said injuries was reasonable and necessary for several months post-accident. There was no challenge made by evidence or argument to the

fact that either or both Ernst and Christine Meinhart suffered pain. It is completely illogical and outside the evidence therefore to rationally conclude that the treatments were reasonable and necessary to treat injuries that were not even causing any pain. At trial, the defendant didn't so argue, the evidence doesn't support such a conclusion, and logic and common sense simply do not support the verdict.

As in *Palmer* and *Fahndrich* a new trial should be granted.

Respectfully submitted this 22<sup>nd</sup> day of March, 2017.

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BY  DEPUTY

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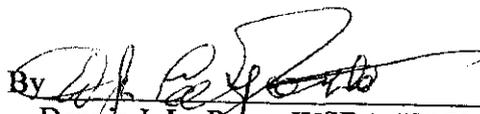
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DATED this 22<sup>nd</sup> day of March, 2017.

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