

FILED

NOV - 3 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 324621-III

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

RANDY L. BECHARD,

Plaintiff/Respondent,

v.

JOYCE DALRYMPLE,

Defendant/Appellant.

RESPONDENT'S BRIEF

Submitted by:

**RUSSELL J. MAZZOLA, WSBA #5440
Mazzola Law Offices
314 N. 2nd Street
Yakima, WA 98901
(509) 575-1800
Attorney for Respondent**

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	11
A. STANDARD OF REVIEW	11
B. THE TRIAL COURT DID NOT ERR IN GRANTING A NEW TRIAL AND OVERTURNING THE VERDICT OF THE JURY EVEN THOUGH DEFENDANT CONTESTED THE NATURE AND EXTENT OF PLAINTIFF’S INJURIES	12
C. THE TRIAL COURT DID NOT ERR IN GRANTING A NEW TRIAL SOLELY ON THE ISSUE OF GENERAL DAMAGES	25
V. CONCLUSION	33

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Baker v. English</i> 134 Or.App 43, 48-49, 894 P.2d 505 (1995)	32, 33
<i>Bullock v. Philip Morris USA, Inc.</i> 159 Cal.App.4 th 655, 696-699, 71 Cal.Rptr.3d 775 (2008)	31
<i>Daigle v. Rudebeck</i> 154 Wn. 536, 282 P. 827 (1929)	16
<i>Fahndrich v. Williams</i> 147 Wn.App. 302, 194 P.3d 1005 (2008)	11, 21
<i>Ide v. Stoltenow</i> 47 Wn.2d 847, 289 P.2d 1007 (1955)	24
<i>In Re Estate of Black</i> 153 Wn.2d 152, 102 P.3d 796 (2004)	29
<i>Krivanek v. Fibreboard Corp.</i> 72 Wn.App. 632, 865 P.2d 527 (1993)	11
<i>Lanegan v. Crauford</i> 49 Wn.2d 562, 304 P.2d 953 (1956)	16
<i>Lopez v. Salgado-Guadarama</i> 130 Wn.App. 87, 122 P.3d 733 (2005)	12, 22, 23
<i>McCurdy v. Union Pacific Railroad Company</i> 68 Wn.2d 457, 471 (1961)	32
<i>Mcune v. Fuqua</i> 45 Wn.2d 650, 277 P.2d 324 (1954)	13
<i>Palmer v. Jensen</i> 132 Wn.2d 193, 937 P.2d 597 (1997)	12, 13, 14, 15, 19, 20, 25

<i>Shaw v. Browning</i> 59 Wn.2d 133, 367 P.2d 17 (1961)	15, 16
<i>State v. Vasquez</i> 148 Wn.2d 303, 59 P.3d 648 (2002)	29
<i>Swanson v. Sewall</i> 183 Wn. 462, 48 P.2d 939 (1935)	16
<i>Turnbow v. K.E. Enterprises, Inc.</i> 155 Or.App. 59, 962 P.2d 764 (1998)	32
<i>Williams v. Leone & Keeble, Inc.</i> 171 Wn.2d 726, 254 P.3d 818 (2011)	28, 29

Other Authorities

15 Wash. Prac., Tegland at 62-64, 508-509 (2009)	27, 28
CR 59(a)(5), (7), (9)	2, 11, 13, 26, 33

I. INTRODUCTION

This case arises out of a two-car collision occurring on July 19, 2007, in the City of Yakima, Washington. The Defendant was exiting from a hospital complex onto Tieton Avenue and struck a van driven by Plaintiff's wife. Plaintiff was in the passenger front seat at the time of the collision. The impact, which was on the passenger side of the van, was so significant it knocked the van into the adjoining lane.

The Plaintiff did not immediately seek medical attention hoping he would heal within a short time. His medical condition became worse and he sought medical treatment approximately a week later. His condition was diagnosed as acute thoracic strain. Unfortunately, the Plaintiff's condition never reached a point where he became pain free. He continued to seek treatment from the time of the accident until shortly before trial. His medical bills presented at the time of the trial were in the sum of \$57,545.40. Plaintiff was self-employed. His business was selling and distributing propane gas. To accommodate his pain and discomfort, Mr. Bechard worked fewer hours each day and more days each week. After several years

he could no longer hunt, was limited in his hobbies, and had difficulty performing the handyman duties he provided for the benefit of his family, including his mother.

At the conclusion of the trial, the jury, upon special verdict determined that the Plaintiff was entitled to \$57,545.40 in special damages (the exact amount he sought), zero for future economic expenses, and zero for past and future non-economic damages.

Washington law has long held that where a jury has either disregarded the instructions of the court concerning damages or the amount awarded by a jury was so inadequate as to indicate it was a result of passion or prejudice, a trial court will not hesitate to order a new trial.

On December 13, 2013, the Plaintiff moved for a new trial or in the alternative amendment of judgment pursuant to CR 59. The Defendant opposed Plaintiff's motion. The trial court issued its opinion letter on December 23, 2013, granting the Plaintiff's motion for a new trial on the issue of general damages. The Defendant moved for reconsideration. As an alternative, the Defendant requested the Court award an additur between \$25,000 and \$35,000

in lieu of a new trial. After argument, the Court declined to award an additur and on April 25, 2014, entered an order granting Plaintiff's Motion for a New Trial on the issue of general damages and a Partial Judgment on Special Verdict.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Plaintiff/Respondent's Brief does not include Assignments of Error as the Trial Court did not err. Plaintiff's Brief does address Defendant/Appellant's issues pertaining to Assignments of Error as submitted by Defendant.

III. STATEMENT OF THE CASE

This case arises out of a two-car collision on July 19, 2007. At the time, the Plaintiff, Randy Bechard, was a passenger in a van driven by his wife, Linda Bechard. The Bechard van was struck by the Defendant, Joyce Dalrymple. (CP 3-5). The impact was so powerful it knocked the van into the next lane. (RP 93). Liability was admitted by the Defendant. (CP 95).

Mr. Bechard had soreness in his neck and was a little stiff after the collision. (RP 17). Approximately a week later, he sought medical attention at an emergency room. (RP 18). The attending

physician diagnosed Mr. Bechard's condition as acute thoracic strain. (CP 31).

Witnesses called at the time of the trial on behalf of the Plaintiff were the Plaintiff, (RP 4-87, 348-353), his wife Linda Bechard, (RP 88-110), his mother Barbara Bechard, (RP 110-119), his daughter Trish Guier, (RP 212-228), Dr. Daniel Seltzer, (RP 127-212), and the Defendant Mrs. Dalrymple, (RP 233-236). The defense recalled Mrs. Dalrymple, (RP 242-448), and a new witness, Dr. James Blue. (RP 237-339).

The Plaintiff submitted as exhibits the photos of the Bechard van post collision (Ex 1, 2, and 3), medical billings of the Plaintiff (Ex 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14), Plaintiff's medical records (Ex 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28), and photos of the Defendant's vehicle post collision (Ex 29 and 30). The Defendants had no exhibits admitted. (CP 11-12).

The Plaintiff testified that before the accident he had no history of neck or back problems. (RP 10). Exhibits 1, 2, and 3 are photographs showing the damage to the Bechards' van. (RP 13). Plaintiff testified the bumper of the Defendant's vehicle rode up over

the Bechards' van. (RP 12-15). The impact knocked the Plaintiff back onto the console of the van. (RP 12). The Plaintiff was sore in his neck and a little stiff after the accident. (RP 17). The soreness in his back started the next day. (CP 18). When the soreness did not go away, Mr. Bechard went to the emergency room. (RP 18-19). He was diagnosed with "acute thoracic strain". (CP 31).

He thereafter began a regimen of treatment, trying to eliminate the pain. (RP 20, 23, 24, 29, 31-46). The pain level increased with activity. (RP 21, 26-27). The Plaintiff testified that he had pain from the date of the accident to the time of trial. (RP 26). The pain occurred between his shoulder blades, like a toothache. (RP 27). He described the pain on a scale of 1 to 10 as being on a level 2 with little or no activity and up to a level 6 with activity. (RP 28-29, 48-49). The pain was worse on the days he drove his truck making propane deliveries. (RP 22, 29). He altered his work schedule by working more days and fewer hours to better tolerate the pain. (RP 53-54).

Mr. Bechard testified he incurred the medical expenses reflected in Exhibits 4 through 14. (RP 58-59). Before the accident,

Randy Bechard enjoyed hunting, fishing, camping and restoring antique cars. (RP 9). His recreational activities and general activities were affected as a result of the accident. (RP 54, 55, 65-67, 87).

Linda Bechard testified as to the Plaintiff's pre-accident hobbies of hunting, fishing and working on his vehicles. (RP 96-97). She confirmed that her husband did not have any back problems before the accident. (RP 97). Mrs. Bechard testified as to the difficulties Mr. Bechard has had performing activities post-accident. (RP 98-100, 105-106). Mrs. Bechard described the pain that Mr. Bechard has and his difficulty of sleeping. (RP 98).

The Plaintiff's mother, Barbara Bechard, testified as to the help her son provided her in helping maintain her home and working on her car. (RP 115). She testified that her son had no medical problems before the accident. (RP 116). Barbara Bechard testified as to the difficulties the Plaintiff has had after the accident attempting to make repairs and the signs of pain he showed when making those repairs. (RP 116-117).

Mr. Bechard's daughter, Trish Guier, testified as to the projects her father worked on around the house before the accident.

(RP 216-219). She stated those projects included building a game room/bowling alley, building a gazebo, remodeling the house, including installing new hardwood floors, working on cars, mowing the lawn, and keeping up with yard work. (RP 217-218). She described his pre-accident work on older cars. (RP 220). She described the changes in her dad's activities after the accident. She stated he doesn't complete projects like he used to and that he hadn't built anything around the house or even maintained things like he had, including keeping up the yard and keeping things cleaned up, like he normally would do. He had not completed the bowling alley and was still working on it. She stated he still had lots of pain. (RP 224-225). She described the change in her father's demeanor. She described him as still being pleasant, but stated he gets irritable and grumpy because he hurts. (RP 227-228).

The Defendant presented testimony from Dr. Daniel Seltzer. Dr. Seltzer performed a medical examination of the Plaintiff on January 12, 2012. (RP 138-139). Dr. Seltzer was retained to evaluate the Plaintiff, determine his physical condition, and determine whether he had a permanent-partial impairment. (RP 134).

Dr. Seltzer's diagnosis was that the Plaintiff was suffering from a sprain and strain of the thoracic spine; meaning the muscles and ligaments that hold the bones and joints together had been stretched or injured. (RP 145). Dr. Seltzer further testified that, even more significantly, the Plaintiff had suffered an aggravation of his underlying thoracic disk disease. Dr. Seltzer stated he believed Mr. Bechard had some problems with at least two of the disks in his mid-back before the accident. As a result of the accident, those disks got inflamed or aggravated. He believed the aggravation was the source of Mr. Bechard's discomfort. (RP 145). Dr. Seltzer described what happens to ligaments when there is a strain. He testified they can be stretched to the point where there is a tearing of those ligaments or they get deformed to the point they don't have their normal elasticity. (RP 146-147, 155). He further testified in some instances, such a strain would create chronic pain. (RP 147). He did not think Plaintiff's condition would improve. (RP 148). Dr. Seltzer testified it would be understandable the Plaintiff would suffer pain from being jarred when riding in his propane truck. (RP 150). Dr. Seltzer believed the MRI scan of Plaintiff's mid-back was an objective

finding. (RP 155). Dr. Seltzer opined that the Plaintiff's condition was causally related to the automobile accident of July 19, 2007. (RP 156). He testified that the medical bills of \$57,545.40 were necessary and within the norm of charges statewide. (RP 155-156). Dr. Seltzer testified that Plaintiff had an impairment rating of eight percent (8%) of the whole body, based upon the condition in his thoracic spine. (RP 157).

Dr. James Blue was called by the defense. Dr. Blue, on behalf of the Defendant, performed a medical examination of Randy Bechard. Dr. Blue testified as follows: There were no abnormalities of range of motion. There was some tenderness, upon touch. (RP 246). That he concurred with the diagnosis reached by the emergency room physician, Dr. Eglin, on July 27, 2007. (RP 248, 249). That he did not do an impairment rating on Mr. Bechard, as he's not trained to do so. (RP 284, 285). That when a patient complains of pain, it's certainly appropriate to treat the pain—there is nothing wrong with that. (RP 285). That the Plaintiff's diagnosis was thoracic strain. That "...The term strain means that soft tissue, and the soft tissue consists of muscle, tendons. That's what connects

muscles to the bone, ligaments. That's what holds bones together, those big bands that hold your ankle and so forth, bones, together.

Those structures, they're flexible anyway, but they've been stretched beyond their normal elastic limit. When that occurs you can actually tear it in two . . ." (RP 288). Dr. Blue agrees that when you have a soft tissue injury, whether its ligaments or muscles, there are microscopic tears that occur in the ligaments and muscles. (RP 293).

That the Plaintiff should have healed within three (3) months. (RP 290, 331, 332). That he did not assess the Plaintiff's ability to engage in his work and activities of daily living. (RP 290). He did not refute that Mr. Bechard was having pain in his thoracic area. (RP 313). He acknowledges that Dr. Atteberry, a neurosurgeon, opined that the disk bulges in the thoracic spine could be causing the pain. (RP 318). Dr. Blue agrees that there was an injury to the Plaintiff as a result of the accident on July 19, 2007, and that his prognosis was guarded at the time of trial. (RP 329, 330). Dr. Blue agreed there was damage to the structure of Mr. Bechard's spine as a result of the strain. (RP 298).

After argument, the jury returned a verdict on a special verdict form in the sum of \$57,545.40. The award was for economic damages only. (CP 10).

IV. ARGUMENT

A. STANDARD OF REVIEW

CR 59 allows a trial court to grant a new trial for several reasons, including “that there is no evidence or reasonable inference from the evidence to justify the verdict . . . or that it is contrary to law.” *Fahndrich v. Williams*, 147 Wn.App. 302, 305, 194 P.3d 1005 (2008). An Appellate Court reviews a trial court’s ruling on such a motion for abuse of discretion. *Fahndrich*, at 306. It is an abuse of discretion for a trial court to unreasonably find a damage award to be within the range of evidence. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 637, 865 P.2d 527 (1993). “A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds.” *Krivanek*, at 636.

Because denial of a motion for a new trial concludes the parties’ rights, *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. *Lopez v. Salgado-Guadarama*, 130 Wn.App. 87, 91, 122 P.3d 733 (2005). See also *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). (emphasis added).

B. THE TRIAL COURT DID NOT ERR IN GRANTING A NEW TRIAL AND OVERTURNING THE VERDICT OF THE JURY EVEN THOUGH DEFENDANT CONTESTED THE NATURE AND EXTENT OF PLAINTIFF'S INJURIES.

At the conclusion of the trial, the Trial Court instructed the jury. The verdict form (CP 10) requested the jury to consider three questions:

We, the jury, find for the plaintiff in the following sums:

1. For past expenses for medical care, treatment and services received to the present \$ _____
2. For future economic expenses \$ _____
3. For past and future non-economic damages \$ _____

Date: _____
Presiding Juror

The jury answered Question No. 1 by inserting the exact amount of the Special Damages sought by the Plaintiff, that is, the sum of \$57,545.40. The jury answered Question No. 2 by placing a zero on the award line. The jury answered Question No. 3 by placing a zero on the award line.

The Plaintiff timely filed his Motion For New Trial Or In The Alternative Amendment Of Judgment Pursuant To CR 59. (CP 13).

Certain causes provide a trial court authority to vacate a verdict and grant a new trial. Three of those causes pertinent here are:

CR 59(a)(5):

Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.

CR 59(a)(7):

That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.

CR 59(a)(9):

That substantial justice has not been done.

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 v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Citing *Mcune v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954).

In Palmer v. Jensen, 132 Wn.2d 193, 201, 937 P.2d 597 (1997) the Plaintiff, Palmer, was driving a Volkswagen Rabbit when her car was rear-ended by a minivan driven by Thomas Jensen. Palmer's son, then age three and one-half, was riding in the backseat restrained in his car seat. Palmer filed an action for personal injuries alleging general and special damages. The jury found Jensen to be negligent, but concluded Palmer was twenty-five percent contributorily negligent. The jury awarded Palmer and her son damages in amounts exactly equal to the special damages: \$8,414.89 for Mrs. Palmer and \$34.00 for her son, Shawn. Those amounts were reduced to account for Palmer's contributory negligence.

Shawn's pediatrician diagnosed "Seat Belt Contusion" but did not prescribe further medical care.

Susan Palmer was diagnosed by her physician as having "Acute Cervical Lumbar Strain of a Mild Degree" and prescribed physical therapy, pain medication, x-rays, and follow-up care. Palmer was treated by her doctor and physical therapist regularly until her family moved to Boise, Idaho, approximately a year after the accident. She was treated by a doctor and physical therapist in

Boise. Each believed her back problems were likely a result of the accident. Medical testimony at trial was that the special damages claimed by Palmer were reasonable and necessary. Medical records reflect that Palmer continued to experience pain in her low back more than two years after the accident.

The defendant presented no evidence to refute the medical opinions offered. Instead, counsel for the defendant contended in closing argument that the evidence presented by the plaintiffs failed to prove that Palmer was injured and, alternatively, only a portion of the two and one-half year treatment was justified.

Palmer moved for a new trial, arguing that the verdict was insufficient because it failed to include general damages. The trial court denied the motion. Palmer appealed. The Court of Appeals affirmed the trial court.

The *Palmer* court held at pages 200-201:

We have held in numerous other cases that the court can assume the jury failed to award damages for pain and suffering where the verdict is equal to or less than uncontroverted special damages. In *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1961), we found it "very clear that the jury did not intend to compensate" plaintiff for pain and suffering

where the verdict was in the exact amount of special damages. *Shaw*, 59 Wn.2d at 135. In *Daigle v. Rudebeck*, 154 Wn. 536, 538-39, 282 P. 827 (1929), we similarly found the jury allowed nothing for general damages where the verdict was almost the exact amount of uncontroverted special damages. See also *Lanegan v. Crauford*, 49 Wn.2d 562, 568, 304 P.2d 953 (1956) ("[i]t seems reasonably clear" that only \$381 was awarded for general damages where items of special damage "seem to be beyond the field of legitimate controversy."); *Swanson v. Sewall*, 183 Wn. 462, 466, 48 P.2d 939 (1935) (verdict for amount less than special damages in auto accident case "grossly inadequate").

Given that there was no legitimate controversy regarding special damages and that the jury's verdict exactly equaled the plaintiffs' special damages, we hold the jury's verdict included no compensation for pain and suffering.

Here, because of the verdict form, there is no need for an analysis of whether the jury's verdict included general damages. It did not. The jury's award was only for special damages in the amount of \$57,545.40.

In this case there were eleven exhibits of medical records and chart notes submitted to the jury as evidence. Those records conclusively establish that the Plaintiff was reporting the pain and

suffering he had from the date of the accident through November 8, 2012. A sampling of the medical records submitted to the jury follow:

EXHIBIT 17: YAKIMA VALLEY MEMORIAL HOSPITAL

- July 27, 2007 – He does not think he had loss of consciousness but he said that he might have been startled for a few seconds. He had the immediate onset of a little bit neck pain, and stiffness but this has been relatively minor. He comes in because he was having pain in the mid thoracic area of his spine that has become increasingly severe since the accident. Final Diagnosis: Acute thoracic strain.
- May 20, 2008: Dr. Quave states: He was involved in a motor vehicle accident as a passenger on 07/15/07, and was hit from the right side while wearing his seatbelt. He has had pain in the mid back ever since. Assessment: Thoracalgia, Thoracic disk degeneration with bulging disks noted at T6- T7, T7-T8.
- June 12, 2008: Randy presents today with pain in the mid thoracic spine centrally.
- June 24, 2008: Today he has pain in the left upper back that on examination seems to be over the left upper to mid thoracic Z-joints.

**EXHIBIT 20: PACIFIC CREST FAMILY MEDICINE –
DUANE E. TEERINK, D.O.**

- September 20, 2007: He has had fairly persistent mid back pain since just after the accident and has problems with the mid back spasms that sometimes will affect his sleep. Minimal tenderness over the spinous processes of T4-6; he has significant paraspinal muscle spasms bilaterally. Assessment: Thoracic sprain.
- November 11, 2007: Still with some pain in thoracic spine.
- September 19, 2012: His pain interferes with his daily activities at work, as well as interferes with sleep.

- May 31, 2013: Randy continues to have persistent mid thoracic pain

EXHIBIT 21: PRO MOTION PHYSICAL THERAPY

- November 8, 2007: His chief complaint is pain in the midline thoracic spine, intermittent stiffness right side cervical spine, and right upper trapezius. Physician Assessment: Paracervical muscle spasm and pain secondary to MVA.
- November 12, 2007: The patient notes some increased aching in the low back, midline and right side when he gets up from a seated position.
- January 24, 2008: Assessment: Status post thoracic sprain as a result of an MVA. The patient continues to complain of mild aching in the mid thoracic region, especially with driving.

EXHIBIT 22: CENTRAL WASHINGTON REHABILITATION

- February 27, 2008: Mr. Bechard is complaining of pain in the T6-9 region that is center and leftward.
- April 7, 2008: The muscle is tight, tender, and tends to radiate pain up and down with palpation on either side as does his pain do the same thing when I palpate over the spinous process of T8. Assessment/Plan: Chronic pain.

EXHIBIT 23: YAKIMA REGIONAL MEDICAL CENTER

- February 29, 2008: Indication For Exam: Mid back pain. MVA July 2007.

EXHIBIT 24: MEDICAL CENTER PHYSICAL THERAPY

- March 3, 2008: Driving propane truck increases pain.
- March 25, 2008: Patient drove 3 hours and back over the weekend. All T-spine pain increased as expected.

EXHIBIT 25: AEGIS PHYSICAL THERAPY

- November 16, 2010: Patient presents with thoracic spine pain affecting his function and quality of life.
- December 1, 2010: Patient says that his pain continues.

EXHIBIT 26: UNIVERSITY OF WASHINGTON

- July 23, 2010: Assessment: Thoracic pain, facet syndrome and status post facet rhizotomy at upper thoracic levels.
- September 17, 2010: Mr. Bechard is 53-year-old gentleman who has had left axial thoracalgia for up to 3 years with multiple interventional procedures that have been ineffective.

EXHIBIT 27: FRONTIER NEUROSURGERY – DAVE ATTEBERRY, M.D.

- October 25, 2012: He stated that since 2007 he has had constant aching pain with stabbing, sharp pain into his back at about the level of his mid back. He comes to me with a diagnosis of 2 disk herniations, 1 at T6-7 and 1 at T7-8.

Even the Defendant’s witness, Dr. Blue, did not challenge the fact that the Plaintiff was suffering pain. (RP 313)¹.

Dr. Seltzer testified that the Plaintiff’s medical condition was a result of a prior latent condition being “lighted up” as a result of the accident. (RP 145). Dr. Seltzer testified that the medical bills were reasonable and necessary. (RP 155-156).

The court in *Palmer* went on to rule at page 203:

¹ It was Dr. Blue’s opinion that the Plaintiff’s pain was unrelated to the accident, except for the first three months.

Upon discharging Palmer after two months because she could no longer afford physical therapy, Ms. Leccese noted Palmer was still experiencing episodes of pain, but found the pain was controllable with active exercises.

The medical evidence substantiates Pamela Palmer's claim that she experienced pain and suffering for over two years after the accident. We hold the jury's verdict providing no damages for Palmer's pain and suffering was contrary to the evidence. The trial court therefore abused its discretion when it denied Palmer's motion for a new trial.

The medical evidence presented by Plaintiff consisting of medical chart notes, medical billings, his own testimony, the testimony of his lay medical witnesses, and the medical testimony of Dr. Seltzer, as in *Palmer*, substantiate Plaintiff's claim that he was experiencing pain and suffering for more than six years. Plaintiff's complaints of pain and limitations were testified to by his spouse, (RP 88-100, 105-109), his mother, (RP 110-119), and his daughter, (RP 212-228). While Defendants did challenge the extent of the Plaintiff's medical injuries, even their medical witness, Dr. Blue, conceded that the Plaintiff's injuries were reasonably treated for at least three months (RP 331). Defendant in closing argument

suggested the jury should award general damages between \$25,000 and \$35,000. (CP 53).

In *Fahndrich v. Williams*, 147 Wn.App 302, 194 P.3d 1005 (2008) the court, after reviewing the facts, held at page 308.

Here, Fahndrich presented extensive evidence of her pain and suffering, and Williams and Mullins presented no evidence to contradict it. Fahndrich, as well as friends and family members, testified about the changes in Fahndrich's life as a result of the accidents. And she sought virtually continuous treatment for her pain from several treatment providers during the six years between the April 2000 accident and trial. While the medical witnesses disagreed about the diagnosis to attach to her subjective reports of neck pain and headaches, the defendants did not seriously challenge that Fahndrich had the symptoms or that the April and November 2000 accidents caused them. Moreover, as we have discussed above, the jury award of \$25,000 in special damages eliminates the possibility that it found Fahndrich's injuries "minimal" and, therefore, not warranting an award for general damages.

Here the jury awarded special damages of \$57,545.40—more than twice that found in *Fahndrich*. Following the reasoning of *Fahndrich*, such an award eliminates the possibility that the jury found the Plaintiff Randy Bechard's injuries minimal. A court

should have little hesitation in granting a new trial when “the jury verdict approximates the amount of undisputed special damages and the injury and its cause is clear.” *Lopez v. Salgado-Guadarama*, 130 Wn.App. 87, 91, 122 P.3d 733 (2005).

The Defendant relies extensively on *Lopez v. Salgado-Guadarama*, 130 Wn.App. 87, 122 P.3d 733 (2005) and even argues that *Lopez* is binding precedent and demonstrates that the Trial Court erred (Defendant’s Brief, pp. 15). *Lopez* is distinguished from the case at hand.

In *Lopez* the Defense testified there was no objective medical finding that supported Mr. Lopez’s extensive complaints of pain. Dr. Stephen Sears, an orthopedist who conducted an independent medical examination of Mr. Lopez on behalf of the Defendant, Ms. Salgado-Guadarama, testified that Mr. Lopez suffered a shoulder contusion, a minor injury. *Lopez* at 92. From the Appellate Court’s opinion it appears that Mr. Lopez’s vehicle sustained no damage. The opinion refers to Mr. Lopez receiving treatment but it appears no medical testimony was presented on his behalf. *Lopez* at 89. Dr. Sears testified that Mr. Lopez should have quickly recovered from

his injuries after the accident. *Lopez* at 92. Perhaps, most importantly the Court found that Mr. Lopez's credibility was at issue as he originally testified he was carried to an ambulance, but when questioned regarding who carried him he admitted he walked and had difficulty remembering the details of the accident. *Lopez* at 93.

The *Lopez* Court held that *Palmer* gives juries a measure of discretion to decline to award damages for pain and suffering in cases where the pain is minimal or transitory. *Lopez* at 93. However, *Fahndrich* precludes a finding of "minimal" when the award of special damages is at the level awarded here – that is, \$57,545.40.

Our case can be distinguished from *Lopez*. The impact of the collision was so severe that it knocked the Bechard vehicle into the next lane. The impact was on the passenger side of the van where the Plaintiff was seated. (RP 93). (Ex 1-5). The Plaintiff was diagnosed with acute thoracic strain. (CP 31). Mr. Bechard's medical witness, Dr. Seltzer, testified to the effects of strain on the ligaments. That is minor tears occur that affect the elasticity of the ligaments. (RP 145). Dr. Blue, the Defendant's medical expert, concurred. (RP 288). The impact on Plaintiff caused an exacerbation of his disk disease. (RP

145). The Plaintiff was in constant pain for more than six years. (RP 26).

The medical testimony presented by the Appellant conceded that the Plaintiff's injuries would have lasted at least three months. (RP 290, 331-332).

In *Ide v. Stoltenow*, 47 Wn.2d 847, 289 P.2d 1007 (1955), the plaintiff was trapped inside a car which, after a collision, had turned over on its side and spun on the pavement. She suffered a scalp laceration and multiple bruises and contusions. *Ide* at 850.

Defendant may argue that the jury could simply have disbelieved all of the testimony concerning pain, injury, mental and physical disability and loss of enjoyment of life. The court in *Ide*, however, dealt with that argument as follows at page 851:

“We recognize that it can be said that the jury could have disbelieved all of plaintiff's experts and also disbelieved or disagreed with the conclusion of the defendant's expert whose testimony we have quoted. The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.”

The Trial Court's ruling to grant a new trial was correct.

C. **THE TRIAL COURT DID NOT ERR IN GRANTING A NEW TRIAL SOLELY ON THE ISSUE OF GENERAL DAMAGES.**

The Appellants contend that the Supreme Court in *Palmer v. Jensen* 132, Wn.2d 193, 937 P.2d 597 (1997) remanded for a new trial on the issue of *all* of the Plaintiff's damages (Appellant's Brief, pp. 25). Such is not the case. The Supreme Court's ruling in *Palmer* simply states:

We hold the jury's verdict providing no damages for Palmer's pain and suffering was contrary to the evidence. The trial court therefore abused its discretion when it denied Palmer's motion for a new trial. We remand for a new trial on the issue of Pamela Palmer's damages only.

Palmer at 202. There is no discussion by the *Palmer* court as to whether it was remanding for a new trial on all damages or just general damages. The opinion provides no guidance as to whether such an issue was even raised by the parties. Likewise, this issue was not addressed by the *Fahndrich* court as implied by Appellant (Appellant's Brief, pp. 25).

CR 59(a) is as follows: **Grounds for new trial or reconsideration.**

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, *or on some of the issues when such issues are clearly and fairly separable and distinct*, or any other decision or order may be vacated and reconsideration granted . . . (emphasis added)

Here, the issue of damages “is clearly and fairly separable and distinct.” By use of the special verdict form (CP 10) the trial court determined the jury specifically found for the Plaintiff for the special damages sought in the sum of \$57,545.40. The special verdict form listed zero for general damages. There is no benefit to be gained by retrying the case a second time on the issue of special damages when the jury clearly resolved the issue by making its award.

Liability was admitted by the Defendant. (CP 95). The jury properly considered and made its award of the economic damages. The only error claimed on the part of the jury is on the issue of noneconomic damages. For consistency of a verdict and economic and judicial economy a new trial should be ordered only on the issue of general damages.

In 15 Wash. Prac., Tegland, at 62-64 (2009), the author discussed the application of a partial new trial. There he stated:

The granting of a new trial does not necessarily mean that the whole case must be tried anew. Where the issues are all settled by one verdict and there has been no separation of the issues in the trial a complete new trial may be the only relief that can be granted. *But where the issues are separate and the grounds urged for a new trial relate only to some, and not all of them, the new trial may be limited to the issues affected by the errors in the original trial.* (emphasis added).

Here, the jury's error related to the failure to award general damages not to the issue of special damages. In filling out the Special Verdict Form, the jury was clear as to their intent with respect to special damages. It is only as a result of their error in failing to award general damages that the Court granted the Motion for a New Trial. The jury had the opportunity to hear and evaluate the testimony of both physicians, the testimony of the Plaintiff and lay medical witnesses, and to fully evaluate the evidence.

In 15 Wash. Prac., Tegland, at 508-509 (2009), the distinction between res judicata and collateral estoppel was discussed.

The term *res judicata* refers to restrictions on re-litigating the same claim, or cause of action. It is often referred to as the rule of claim preclusion.

The effects of *res judicata* are often described as merger and bar. Upon entry of judgment, all claims and defenses merge with the judgment, and both parties are thereafter barred from reasserting such claims and defenses as between themselves.

The term *collateral estoppel* refers to restrictions on re-litigating a particular issue in a subsequent case involving different claims and defenses but the same parties. It is often referred to as the rule of issue preclusion.

The term *direct estoppel* is used in those relatively rare circumstances in which a judgment is given conclusive effect, as to matters actually litigated, in a subsequent suit based upon the original claim, although the original claim was not extinguished by *res judicata*.

The principles of *res judicata* and judicial economy support the Trial Court's ruling to not retry the issues of general damages. *Res judicata* applies when a prior judgment has the concurrence of identity in four respects to a subsequent action. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818 (2011). "Res judicata applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties,

and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication.” Citing *In Re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Unlike here, res judicata generally applies when a new filing occurs.

However, the doctrine of collateral estoppel does apply. Collateral estoppel is a doctrine of issue preclusion. It bars re-litigation of issues of ultimate fact that have been determined by a final judgment. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002). “Collateral estoppel requires that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) precluding re-litigation of the issue will not work an injustice.” *Williams v. Leone & Keeble* at 731. Principles of res judicata and collateral estoppel are designed to prevent repeat litigation of the same matters. A successful party should not have to spend the time and money twice to prove the same damage. By appropriately limiting the issues, the second trial could be shortened and simplified. Inconsistent determinations can

be avoided and prevailing parties are protected from re-litigating issues already correctly decided while judicial economy is promoted.

Applying the concepts of claim or issue preclusion to our case the following facts apply: The issue of special damage was decided during the trial. The prior adjudication resulted in a final judgment on the merits. (CP 76-77). Estoppel is sought against the same party as in the prior litigation, that is, the Appellant Joyce Dalrymple. To preclude re-litigation of the issue serves no injustice to the Defendant. The Defendant had ample opportunity to present its defense and did so. The Defendant presented its contrasting Independent Medical Examination testimony through Dr. Blue, (RP 237-339), had opportunity to cross-examine the Plaintiff's physician, Dr. Seltzer, (RP 175-196, 203, 211), and had the opportunity to cross-examine Plaintiff (RP 66-87) and Plaintiff's lay medical witnesses (RP 101-105, 106-107, 119, 228).

There is nothing new to add by way of evidence. The jury considered the evidence presented by both parties and determined Plaintiff's special damages. Liability was admitted, (CP 95), and special damages were properly awarded.

Defendant cites *Bullock v. Philip Morris USA, Inc.*, 159 Cal.App.4th 655, 696-697, 71 Cal.Rptr.3d 775 (2008) as illustrative of the majority view that questions the appropriateness of limiting a new trial solely to the issue of damages. Defendant is incorrect. *Bullock* supports the trial court order entered here limiting the new trial only to the issue of general damages. In *Bullock*, the court affirmed the judgment of compensatory damages, but reversed with directions to conduct a new trial limited solely to punitive damages.

The *Bullock* court found (citing other authorities) at page 698-699:

Upon a retrial of the issue of exemplary damages the jury can maintain that reasonable relation between general and exemplary damages without having to determine for itself the amount of general damages. The amount of general damages has been properly determined by the first jury. Upon a retrial of the issue of exemplary damages it is only necessary for the second jury to be advised of the amount of general damages already awarded in order that it may maintain a reasonable relation between such damages and the exemplary damages, if any, that it awards.

Our Supreme Court has not hesitated to limit an issue on a new trial:

[C]ourts have the authority to limit issues on a new trial in those cases where it clearly appears that the original issues were distinct and separate from each other and that justice does not require resubmission of the whole case to the jury.

McCurdy v. Union Pacific Railroad Company, 68 Wn.2d 457, 471 (1961).

As of yet, it appears there is no published appellate decisions in Washington addressing the issue raised by appeal—may the trial court limit a retrial to general damages on the facts presented here? However, the Oregon Court of Appeals has done so twice. In *Turnbow v. K.E. Enterprises, Inc.*, 155 Or.App. 59, 962 P.2d 764 (1998), the Court, in discussing the scope of a jury's award of economic and noneconomic damages relied on *Baker v. English*, 134 Or.App. 43, 48-49, 894 P.2d 505 (1995), *rev'd on other ground* 324 Or. 585 (1997), and held at page 9:

[T]his case is an appropriate one for a limited remand. The denial of discovery bears directly only on emotional distress damages, which could only have been part of the jury's award of noneconomic damages. The liability and economic damages findings are not connected with the emotional distress or discovery issues, and the issues of liability and economic damages, to which no

independent error was assigned by defendant on appeal, are no longer viable issues in the case.

Reversed and remanded on issue of noneconomic damages.

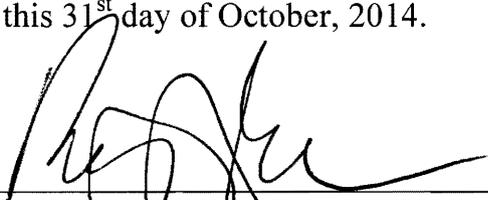
The fact that the jury failed to award general damages was contrary to the law and in error. That error should be corrected by a limited trial on the issue of general damages.

V. CONCLUSION

The Court should affirm the Trial Court's order granting a new trial in all respects. The Court's Order granting Plaintiff's Motion for a New Trial, (CP 79), correctly found there was no evidence, or reasonable inference from the evidence, to justify the verdict and that substantial justice was not done.

Pursuant to CR 59 the Trial Court had authority to limit the new trial to the issue of general damages only. The doctrine of issue preclusion is designed to prevent repeat litigation of the same matter. Plaintiff should not be required to re-litigate his claim for special damages when the parties have already fully litigated the issue. The Trial Court's Order Granting Plaintiff's Motion for a New Trial should be affirmed in its entirety.

Respectfully submitted this 31st day of October, 2014.



RUSSELL J. MAZZOLA (WSBA 5440)
Attorney for Respondent/Plaintiff

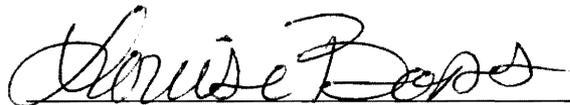
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **RESPONDENT'S BRIEF** on the following individuals:

Robert C. Tenney
MEYER, FLUEGGE, & TENNEY
230 S. 2nd Street
Yakima, WA 98901
Attorneys for Defendant/Appellant

via personal delivery on October 31st, 2014.

DATED this 31st day of October, 2014.

A handwritten signature in cursive script, appearing to read "Louise Boss", written over a horizontal line.

Louise Boss, Legal Assistant to
RUSSELL J. MAZZOLA