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COURT OF APPEALS  
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COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON  
Case No. 65509-4-I

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MELINDA KINSLEY, a married woman

Appellant,

vs.

JAMES C. BARNETT and RITA L.  
BARNETT, husband and wife

Respondents.

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. ISSUE PRESENTED.....	1
III. STATEMENT OF THE CASE .....	1
IV. ARGUMENT.....	2
V. CONCLUSION.....	5
DECLARATION OF SERVICE .....	6

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

Gestson v. Scott, 116 Wn. App. 616, 67 P.3d 496 (2003).....2, 3

Fahndrich v. Williams , 147 Wn. App. 302, 194 P.3d 1005, (2008)..... 3, 4

Palmer v. Jensen, 132 Wn.2d 193, 937 P.2d 597 (1997)..... 3, 4

## **I. INTRODUCTION**

The trial court abused its discretion when it denied Melinda Kinsley's motion for a new trial. Under CR 59, the trial court should have ordered a new trial when the jury refused to award general damages based on stipulated medical bills of \$8,700.00 and wage loss of \$269.68.

## **II. ISSUE PRESENTED**

Did the trial court err by declining to order a new trial pursuant to CR 59 when the jury awarded \$8,700.00 in stipulated medical bills and \$269.68 for wage loss, but failed to award general damages?

## **III. STATEMENT OF THE CASE**

Defendants' Statement of the Case is misleading. The medical bills of \$8,700 were stipulated to by the defense. The court's instruction to the jury provided as follows: "...Your verdict must include the following undisputed past economic damages: Medical care, treatment and services through the end of treatment, 2004: \$8,700. . . ." CP 41. Defendants have not appealed from the

instructions given to the jury. Nor have Defendants appealed from the Verdict Form that included the \$8,700.00 as undisputed past economic damages.

Thus, the jury was instructed that the verdict must include \$8,700 as “. . . damages as you find were proximately caused by the negligence of the defendant.” CP 41. Defendant’s statement that the jury could have concluded somehow that the bills were not reasonable and necessary is patently untrue in light of the jury instructions.

#### **IV. ARGUMENT**

The Jury’s award of \$8,700.00 in medical bills and \$269.68 in wage loss without any award for pain and suffering related to the injuries for which the medical bills were incurred shows that the jury verdict was contrary to the evidence.

The case cited by Defendants, Gestson v. Scott, 116 Wn. App. 616, 67 P.3d 496 (2003) is inapposite. Gestson does not apply because the plaintiff in that case presented no evidence of pain, suffering or inconvenience. The Gestson court noted as follows:

Gestson presented no evidence of pain, suffering, or inconvenience associated with her visit to the emergency room; nor did she establish the length or value of the time she spent during her emergency room visit. Thus, the record supports the jury award of only special damages or the expenses related to the emergency room visit; it was error to grant a new trial on the basis that the law does not permit a jury to award only special damages. Gestson v. Scott 116 Wn. App. 616, 621, 67 P.3d 496, 498 (2003).

The court in Fahndrich v. Williams , 147 Wn. App. 302, 308, 194 P.3d 1005, 1008 - 1009 (2008) distinguished Gestson as follows: Whether a jury is justified in deciding not to award non-economic damages depends on the evidence presented at trial. See Palmer, 132 Wn.2d at 201, 937 P.2d 597. For instance, in Gestson v. Scott, 116 Wn. App. 616, 621, 67 P.3d 496 (2003), the court held that the jury was entitled to deny noneconomic damages relating to an emergency room visit because the plaintiff had simply "presented no evidence of pain, suffering, or inconvenience" associated with that visit."

The court went on to note that Fahndrich had presented evidence of pain, suffering and disability, and reversed and remanded for a new trial on damages. Fahndrich, 147 Wn. App. at 308-309.

Defendants also misapply Palmer v. Jensen, 132 Wn.2d 193, 937 P.2d 597 (1997). It is correct that the court found that because Shawn Palmer's injuries were minimal (his medical bills were \$34), the jury could reasonably have concluded that he was not entitled to an award for pain and suffering. Palmer, at 202. However, the court went on to find that Pamela Palmer had proved that she had suffered pain and disability and the jury's award of \$8,414.89 for medical bills without awarding damages for pain and suffering was contrary to the evidence. Accordingly, the Supreme Court found that the trial court had abused its discretion when it denied the motion for a new trial. The Supreme Court reversed and remanded for a trial on damages. Palmer, at 203.

Just like Pamela Palmer, Melinda Kinsley was awarded her medical bills for the treatment she needed as a result of the injuries inflicted upon her by the defendant. Just like Pamela Palmer, the record showed that Melinda Kinsley suffered pain and disability as a result of the injuries. Unlike Pamela Palmer, Melinda Kinsley was also awarded wage loss.

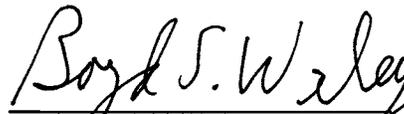
Thus, Melinda Kinsley's case is even more compelling that the failure to award pain and suffering was contrary to the evidence. Because that failure of the jury to award pain and suffering damages was contrary to the evidence, the trial court abused its discretion in denying a new trial on damages.

#### V. CONCLUSION

The jury verdict awarding Melinda Kinsley \$8,700 for past medical bills; \$269.68 for wage loss, and -0- for pain and suffering was contrary to the evidence. The trial court abused its discretion in denying the motion for a new trial. This court should reverse and remand for a new trial on damages.

Respectfully submitted this 25<sup>th</sup> day of October, 2010.

WILEY LAW OFFICES, PLLC

A handwritten signature in cursive script that reads "Boyd S. Wiley". The signature is written in black ink and is positioned above a horizontal line.

Boyd S. Wiley, WSBA #18817  
Attorney for Appellant

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury according to the laws of the United States and the State of Washington that, on 10/25/10, I caused to be served in the manner noted below a copy of this document on the following individual(s):

Michael Taylor, WSBA #14553  
Murray, Dunham, & Murray  
PO Box 9844  
200 West Thomas, Suite 350  
Seattle, WA 98109

Via Regular Mail

Dated this 25 day of October, 2010.

Lisa M. Wiley

Printed Name: Lisa M. Wiley

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