

65509-4

65509-4

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

---

MELINDA KINSLEY, a married woman

Appellant,

vs.

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

Respondents.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2010 SEP 29 PM 3:05

---

**RESPONDENT'S BRIEF**

---

Michael K. Taylor, WSBA #14553  
Jason E. Soderman, WSBA #31111  
Of Attorneys for Respondents  
MURRAY, DUNHAM & MURRAY  
200 West Thomas, Ste. 350  
PO Box 9844  
Seattle WA 98109-0844  
Phone: (206) 622-2655  
Fax: (206) 684-6924

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii, iii

I. INTRODUCTION .....1

II. ISSUE PRESENTED .....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....5

    A. Standard of Review.....5

    B. Washington Law Strongly Favors Upholding Jury Verdicts....6

    C. Substantial Evidence Supported the Jury's Verdict.....7

    D. Appellant Received a Fair Trial.....14

V. CONCLUSION.....15

CERTIFICATE OF SERVICE.....17

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967).....6

*Fahndrich v. Williams*, 147 Wn. App. 302, 194 P.3d 1005 (2008).....10

*Geston v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003).....9, 14

*Hendrickson v. Konopaski*, 14 Wn. App. 390, 396, 541 P.2d 1001 (1975).....7

*Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995).....15

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).....6

*James v. Robeck*, 79 Wash.2d 864, 870-71, 490 P.2d 878 (1971).....8

*Joyce v. State Dept. of Corrections*, 116 Wn. App. 569, 75 P.3d 548 (2003).....7

*Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).....5, 7, 15

*Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 562 P.2d 1276 (1977).....14

*Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001).....5, 15

*Locke v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d 705 (2007)..6

*Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005).....13

<i>Nord v. Shoreline Sav. Ass'n</i> , 116 Wn.2d 477, 805 P.2d 800 (1991) (quoting <i>Cowsert v. Crowley Maritime Corp.</i> , 101 Wn.2d 402, 405, 680 P.2d 46 (1984)).....	6
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997).....	6, 7, 11, 12, 13
<i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989).....	8
<i>Singleton v. Jimmerson</i> , 12 Wn. App. 203, 205, 529 P.2d 17 (1974).....	6, 11
<i>Stevens v. Gordon</i> , 118 Wn. App. 43, 74 P.3d 653 (2003).....	5
<i>Thogerson v. Heiner</i> , 66 Wn. App. 466, 832 P.2d 508 (1992).....	14
<i>Washington State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 330, 858 P.2d 1054 (1993).....	5
<i>Wooldridge v. Woolett</i> , 96 Wn.2d 659, 668, 638 P.2d 566 (1981)....	8

**OUT OF STATE CASES**

<i>McKinzie v. Fleming</i> , 588 F.2d 165 (1979).....	12
---	----

**OTHER AUTHORITY**

**RULES**

Civil Rule 59.....	1, 8, 15
--------------------	----------

***I. INTRODUCTION***

The trial court did not abuse its discretion when it denied Appellant's motion for a new trial. The jury found that Appellant's sustained a de minimis injury and awarded \$269.68 in special damages. The jury was not required to award general damages in this case due to the de minimis nature of the injury. The evidence at trial construed in favor of Respondent, as required by Washington law, does not establish that the jury verdict was inadequate for any reason under CR 59.

***II. ISSUE PRESENTED***

Whether the trial court abused its discretion in denying Appellant's motion for new trial when the evidence at trial, viewed in the light most favorable to Respondent, established that the jury's verdict was supported by that evidence.

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

This case was tried before the Honorable Judge Jay White over four (4) days from Monday, December 14, 2009 until Thursday, December 17, 2009. CP 49-54. During trial, Respondent vigorously disputed the nature and extent of Appellant's alleged accident-

related injuries and treatment and presented testimony from Dr.

James Green and Dr. Arnel Brion establishing the following:

(1) Appellant sustained, at most, a mild strain in the December 2003 accident. CP 49-54.

(2) Any injury resolved within a few weeks of the December 2003 accident. CP 49-54.

(3) Appellant had a two-year treatment gap. CP 49-54.

(4) Appellant's pain complaints were unrelated to the December 2003 accident. CP 49-54.

(5) Appellant's treatment from 2006 through 2009 was unrelated to the December 2003 accident. CP 49-54.

(6) Appellant does not require any future treatment. CP 49-54.

(7) Appellant continued to work at her same job for almost three years after the accident. CP 49-54.

(8) Appellant only missed thirteen (13) hours of work. CP 49-54.

Furthermore, during trial, the jury was informed that Respondent had previously paid all bills incurred before the two-year

treatment gap. CP 49-54. Respondent never agreed that the bills paid were reasonable and necessary. VRP 26. Contrary to Appellant's claim, Respondent only stipulated at trial that all bills before Appellant's two-year treatment gap had already been paid. CP 49-54; VRP 4, 24.<sup>1</sup> The jury was never told that the bills were reasonable and necessary; they were simply told that they had been paid. VRP 26. In fact, the amount already paid by Respondent was written in for the jury by the court. VRP 4.

On December 17, 2009, after deliberating, the jury returned a verdict awarding Appellant only \$269.68 in past economic damages. CP 30. The jury did not award Appellant any of her requested medical specials and did not award general damages. CP 30.

Thereafter, Appellant moved for a new trial. CP 46-48. On February 5, 2010, the trial court heard arguments on Appellant's motion for a new trial and stated the motion was denied. VRP 33. In reaching its decision to deny Appellant's motion for a new trial, the trial court noted that the following:

---

<sup>1</sup> References to the Verbatim Report of Proceedings herein will be designated "VRP".

(1) The jury heard ample medical evidence from Respondent that would allow them to reduce Appellant's claim down to a minimal injury.

(2) The jury followed the court's instructions and simply awarded the pre-gap medical bills because they were told to award them.

(3) The jury listened to contested arguments and only awarded Appellant \$269.68 for thirteen (13) hours of wage loss.

(4) The jury was entitled to believe the testimony of the defense doctor.

(5) The jury did not find Appellant to be credible.

(6) The jury's verdict was within the range of the evidence.

(7) Appellant did not meet her burden of proof at trial regarding damages and the verdict was not the result of passion or prejudice.<sup>2</sup>

On June 4, 2010, an order denying the plaintiff's motion for a new trial was entered. CP 64. Plaintiff now appeals that order. CP 65-67. Respondent respectfully requests the Court affirm the trial

---

<sup>2</sup> VRP 34-36, 38.

court's ruling on the motion for a new trial because the jury's verdict was supported by substantial evidence.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

An appellate court reviews a trial court's denial of a motion for new trial for abuse of discretion. *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 931 P.2d 911 (1997). A jury's role in determining noneconomic damages is essential, and appellate review must be narrow and restrained. *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003). Furthermore, an appellate court will not disturb a jury's damage award unless it is outside the range of substantial evidence, shocks the conscience, or appears to have been arrived at as a result of passion or prejudice. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 330, 858 P.2d 1054 (1993).

In reviewing the trial court's ruling on motion for a new trial based on insufficient evidence, Court views the evidence in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. *Lian v.*

*Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001); *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). Evidence is substantial when it is of sufficient quantity to “convince an unprejudiced, thinking mind of the truth of the declared premise.” *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 805 P.2d 800 (1991) (quoting *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405, 680 P.2d 46 (1984)).

**B. Washington Law Strongly Favors Upholding Jury Verdicts.**

The law strongly presumes that the jury verdict is adequate. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967). Determining the amount of damages is within the jury's province, and courts are reluctant to interfere with a jury's damage award. *Locke v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d 705 (2007) (quoting *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)). Where the amount of special damages and the injury and its cause are disputed, courts have been reluctant to disturb the jury's finding. *Singleton v. Jimmerson*, 12 Wn. App. 203, 205, 529 P.2d 17 (1974).

The trial court must determine whether the evidence was sufficient to support the verdict, viewed in the light most favorable to the verdict. *Palmer*, 132 Wn.2d at 197-98, 937 P.2d 597; *Hendrickson v. Konopaski*, 14 Wn. App. 390, 396, 541 P.2d 1001 (1975). To determine if the record supports the jury's verdict for the purpose of deciding a motion for a new trial, the court must view the evidence in the light most favorable to the nonmoving party. See *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997). A verdict will be overturned only if it is flagrantly outrageous and shocks the conscience of the court. *Joyce v. State Dept. of Corrections*, 116 Wn. App. 569, 75 P.3d 548 (2003).

**C. Substantial Evidence Supported the Jury's Verdict.**

Where the proponent of a new trial argues that the verdict was not based on the evidence, we look to the record to determine whether sufficient evidence, viewed in the light most favorable to the non-moving party, supports the verdict. *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997). When the verdict is within the range of credible evidence, the trial court has no discretion to find

that passion or prejudice affected the verdict. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989).

Alleged passion or prejudice on the part of the jury is not grounds for granting a new trial under CR 59(a)(5) unless the record indicates that the verdict was not within the range of proven damages. *James v. Robeck*, 79 Wash.2d 864, 870-71, 490 P.2d 878 (1971). If a jury award is within the range of evidence, it is error to rule that juror passion or prejudice motivated the award. *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981).

In this case, Appellant cannot establish that the jury's verdict was the result of passion or prejudice since the verdict was within the range of proven damages. Furthermore, Appellant cannot establish that the verdict was against the weight of the evidence under CR 59(a)(7) because Respondent presented substantial evidence at trial to support the jury's verdict. In other words, the weight of the evidence presented at trial strongly supported the jury's verdict. Since Washington law mandates that this evidence must be viewed in the light most favorable to the verdict and to the non-

moving party (i.e. Respondent Barnett), Appellant's motion for a new trial was properly denied.

In our case, the jury only awarded Appellant \$269.68. CP 30; CP 49-54. As such, this case is analogous to *Geston v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003). In *Geston*, the jury awarded only \$458.00 in special damages and did not award any general damages. Plaintiff moved for a new trial and the trial court granted the motion for a new trial.

The Court of Appeals, however, reversed the granting of a new trial and held that the trial court erred in ruling the jurors should have awarded general damages because they awarded special damages. Furthermore, the Court of Appeals held that the trial court erred in finding that the verdict must have been the result of passion or prejudice. In reversing the trial court's granting of the motion for a new trial, the Court of Appeals held that substantial evidence supported the verdict and, given the evidence in the case, the jury could award special damages but no general damages. Likewise in this case, Respondent presented substantial evidence to support the jury only awarding Appellant \$269.68.

Appellant cites two Washington cases to support her motion for a new trial. Those two cases, however, are easily distinguishable from the facts and evidence presented in this case. In *Fahndrich v. Williams*, 147 Wn. App. 302, 194 P.3d 1005 (2008), the Court found that the jury's omission of general damages was contrary to the evidence because the defendants did not introduce any evidence disputing damages at trial. The Court also noted that the high jury award of \$25,000 in special damages eliminated the possibility that it [the jury] found the plaintiff's injuries to be minimal and not warranting general damages.

In this case, unlike *Fahndrich*, Respondent contradicted Appellant's evidence and vigorously disputed damages at trial. Furthermore, the jury in this case did not award high medical specials. In fact, the jury did not award the plaintiff any medical specials. CP 30; CP 49-54. The jury was aware that Respondent had already paid \$8,700 and was entitled to an offset. CP After hearing all the evidence and deliberating, and having the \$8,700 already included in the verdict form, the jury only awarded the plaintiff

\$269.68 for past economic damages. CP 30; CP 49-54; VRP 34-34, 38.

This amount coincides with the evidence presented by Respondent and likely represents the time Appellant took off work (i.e. 13 hours) to allegedly seek treatment. As such, this case is similar to *Singleton v. Jimmerson*, 12 Wn. App. 203, 205, 529 P.2d 17 (1974). In *Singleton*, the Court reasoned that in view of the uncertainty and the subjective nature of the plaintiff's injuries, the jury could have found no pain and suffering attributable to the injuries awarding only medical expenses that the plaintiff incurred to find out whether she was injured. *Singleton*, 12 Wn. App. at 207, 529 P.2d 17. Accordingly, the Court of Appeals held that the jury's verdict in the exact amount of special damages was not so inadequate as to require a new trial.

Appellant's reliance on *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997) is also misplaced. Once again, the Court in that case found the omission of general damages, as to one plaintiff, was contrary to the evidence because the defendant did not introduce any evidence disputing damages at trial. In this case, however,

Respondent introduced substantial evidence disputing the Appellant's alleged damages at trial. CP 49-54.<sup>3</sup>

Appellant fails to recognize that the Supreme Court also held that a jury may award special damages and no general damages when "the record would support a verdict omitting general damages." *Palmer*, 132 Wn2d at 202, 937 P.2d 597 (upholding a jury's verdict awarding only special damages of \$34 to a car accident victim for the cost of a medical office visit when the record showed that his injuries were minimal and that he required no further medical care). The evidence in this case, as in *Palmer*, supports the award of only limited special damages. Furthermore, contrary to Appellant's claim, the jury did not find that the pre-gap medical bills were reasonable and necessary. The jury was simply told that those bills had already been paid by Respondent and that amount was entered on the verdict form by the court, not the jury.

---

<sup>3</sup> Appellant's reliance upon *McKinzie v. Fleming*, 588 F.2d 165 (1979), a 5<sup>th</sup> Circuit case interpreting Texas law, is equally unpersuasive. In *McKinzie*, the plaintiff's evidence was undisputed. Once again, in this case, Respondent vigorously challenged Appellant's evidence and presented substantial evidence upon which the jury could base its verdict of \$269.68.

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. As previously noted, Respondent presented evidence at trial establishing that the plaintiff's alleged injury, if any, was mild and short-lived. CP 49-54. Furthermore, Respondent presented evidence establishing that Appellant's complaints were unrelated to the 2003 accident and that any treatment incurred after her two-year treatment gap was neither reasonably nor necessarily related to the remote 2003 accident. CP 49-54. Finally, Respondent challenged Appellant's credibility as well as her injury and wage loss claims and presented evidence that Appellant only missed thirteen (13) hours of work. CP 49-54. Therefore, the evidence at trial was both substantial and sufficient to support the jury's verdict.

In light of the fact that the evidence must be weighed in favor of upholding the verdict and in favor of Respondent, the jury could have reasonably concluded that Appellant was not entitled to damages for pain and suffering. *See Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005) (superior court improperly

reversed district court judgment based on jury's award of economic damages only; the jury was entitled to deny non-economic damages because the defendant presented medical testimony that the plaintiff should have recovered from any injuries quickly after the accident); *Geston v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003) (trial court erred in ruling that verdict was result of passion or prejudice since jury, which awarded only \$458 in special damages, should have awarded general damages because they awarded special damages); *Thogerson v. Heiner*, 66 Wn. App. 466, 832 P.2d 508 (1992) (automobile accident plaintiff was not entitled to new trial on ground of inadequate damages; there was evidence that plaintiff's injuries were not as serious as claimed, and damage award was within range of proof).

**D. Appellant Received a Fair Trial.**

The primary question presented by a motion for a new trial is whether losing party received a fair trial. *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 562 P.2d 1276 (1977). There is no disputing the fact that Appellant received a fair trial. Both parties presented evidence and testimony over four (4) days. CP 49-54. Washington

law dictates that motions for a new trial under the catch-all “substantial justice” provision, CR 59(a)(9), should rarely be granted. *See Lian v. Stalik*, 106 Wn. App. 811, 25 P.3d 467 (2001); *Kohfeld v. United Pacific*, 85 Wn. App. 34, 931 P.2d 911 (1997); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995). Appellant’s failure to meet her burden of proof does not mandate that substantial justice was not done in this case.

V. CONCLUSION

Respondent respectfully requests the Court affirm the trial court’s denial of Appellant’s motion for a new trial. Washington law strongly supports upholding jury verdicts. The evidence, when construed in favor of Respondent, does not establish that the verdict was inadequate for any reason under CR 59. The jury had the right to believe Respondent’s substantial evidence in this case and find that Appellant’s damages were only \$269.68.

///

//

/



**CERTIFICATE OF SERVICE**

I, Tami L. Foster, declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 29<sup>th</sup> day of September, 2010, I caused the original of Respondent's Brief to be filed with the Clerk of the Court, Court of Appeals Division I by Washington Legal Messenger. I also caused a copy to be served on the below listed counsel as follows:

**VIA ABC LEGAL MESSENGER**

***Appellant's Attorney***

Boyd S. Wiley  
Wiley Law Offices, PLLC  
12515 Meridian E, Suite 101  
Puyallup, WA 98373  
[bwiley@puyallup-law.com](mailto:bwiley@puyallup-law.com)  
253-200-2100; 253-841-2886 Fax  
WSBA #28300

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 29<sup>th</sup> day of September, 2010 in Seattle, King County, Washington.

  
Tami L. Foster