

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

MELINDA KINSLEY, a married woman,

Appellant,

and

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

Respondent.

BRIEF OF APPELLANT

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2010 AUG 30 PM 1:32
 COURT OF APPEALS
 DIVISION I
 CLERK OF COURT

ORIGINAL

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OTHER

CR 59	4
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1. Introduction

Appellant asks this court to reverse the trial court's order denying the motion for a new trial when the jury awarded \$8,700.00 in stipulated medical bills and \$269.68 for wage loss, but failed to award general damages.

2. Assignment of Error

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

3. Statement of the Case

Melinda Kinsley was injured in an automobile collision on December 1, 2003. The defendant stipulated that \$8,700 of medical bills were related to the collision. The defense also stipulated to liability.

The \$8,700 included medical bills from the day of the collision, December 1, 2003, through June, 2004. Ex. 8. The hospital noted pain from on the day of the collision to Melinda's right neck to back and right back and hip pain. Ex. 1. When she followed up with physical therapy on December 10, 2003, Melinda continued to suffer pain. Ex.2. On December 18, 2003, Melinda continued to suffer pain down her arm. Ex.2. On December 23,

2003, Dr. Griggs noted that she has pain in the back of the neck, down the mid back and pain radiating to the left posterior deltoid. She also had slight numbness in the lateral upper arm and numbness along the left ulnar forearm. She also had pain in the mid and lower back which hurt more as the day goes on. App. G, Ex. 3.

On December 30, Melinda reported that work was a aggravating with sitting and computer; she had 1st and 5th digit numbness, and inability to grip. App. D, Ex.2. On January 14, 2004, she had thoracic ache; her 5th rib was tender. App. E, Ex. 2. On January 17 and 21, 2004 she had pain in her neck and right hip and leg. App. F, Ex. 2. February 24, 2004 Dr. Griggs noted point tenderness in the vertebral spine, muscle spasm and tenderness, and numbness, tingling and pain radiating down the right arm. Dr. Griggs also noted that the physical therapy was making her worse. App. H, Ex. 3.

Melinda also had medical acupuncture with Mark Tomski, M.D. , who noted she still had ongoing mid back pain and arm numbness. App. G, Ex. 5. By April 15, 2004 Melinda noted that she still had complaints across her back and shoulders. App. J, Ex. 5. By May 27, 2004, Dr. Tomski noted that Melinda was still suffering from cervical, thoracic and lumbosacral strain/dysfunction syndrome and that she had ongoing dysfunction of her

spine. App. K, Ex. 5.

The Jury returned a verdict of \$8700 for medical costs, \$269.68 for wage loss, and nothing for past and future noneconomic damages. CP 30. Plaintiff moved for a new trial, CP 46-48, and the court denied that motion. CP 64.

4. Argument

The court should reverse the trial court's denial of the motion for new trial and should remand for a new trial.

A. Standard of Review

The appellate court reviews the grant or denial of a new trial for abuse of discretion. Fahndrich v. Williams, 147 Wn. App. 302, 305, 194 P.3rd 1005 (2008). The reviewing court looks to the record to determine whether sufficient evidence viewed in the light most favorable to the non-moving party supports the verdict. Fahndrich, 147 Wn. App. at 306, citing, Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

The trial court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence. Fahndrich, 147 Wn. App. at 306, citing, Palmer, 132 Wn.2d at 198. A much stronger showing of abuse is required to reverse the granting of a motion for new trial than the denial of

a motion for new trial because the denial of such a motion concludes the parties' rights. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

B. The Court of Appeals should reverse the denial of the motion for new trial.

The Court of Appeals should reverse the denial of the motion for a new trial because the trial court abused its discretion.

CR 59 provides the framework for motions for a new trial.

CR 59(a)(5) allows for a new trial when damages are so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice. CR 59(a)(7) provides that a new trial may be granted where 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) allows a new trial when substantial justice has not been done.

In Fahndrich the plaintiff presented evidence of pain and suffering and there was no evidence from the defendant to contradict the evidence of pain and suffering. Fahndrich, 147 Wn. App. at 307. The court held that the plaintiff was entitled to a new trial on damages.

In Palmer, the jury awarded the amount of the medical bills, but did not award special damages. Palmer, 132 Wn.2d at 195. The trial court denied a motion for a new trial and the court of appeals affirmed. The

Supreme Court reversed. Palmer, 132 Wn.2d at 196.

In Palmer, there were two plaintiffs, Pamela Palmer and her son, Shawn. Pamela had medical bills of \$8,414.89 and Shawn had \$34.00. Palmer, 132 Wn.2d 195. The court held that the minimal amount of medical care and injuries to Shawn allowed the jury to reasonably conclude that he was not entitled to damages for pain and suffering. Palmer, 132 Wn.2d at 202.

As to Pamela Palmer, the court concluded that the medical evidence substantiated Pamela Palmer's claims that she experienced pain and suffering and the jury verdict providing no damages for that pain and suffering was contrary to the evidence. Therefore, it was an abuse of discretion for the trial court to deny a new trial. Palmer, 132 Wn.2d at 202.

Other Courts have addressed facts where medical bills are stipulated but the jury fails to award general damages. Thus, in McKinzie v. Fleming, 588 F.2d 165 (5th Cir. 1979), the court addressed a verdict where the medical bills were stipulated as reasonable and necessary. They were \$2,242.72 medical expenses for Judy McKinzie, \$167.44 medical expenses for Stuart McKinzie. The jury awarded nothing for pain and suffering. McKinzie, 588 F.2d at 166. The court stated as follows:

“Although the jury could have concluded that the injuries were not serious, the fact of injury with some resulting pain and suffering is inescapable. Under Texas law when the undisputed evidence reveals injury with resulting pain and suffering, the jury's answer of “0” damages is considered so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust, that reversal is required.”

McKinzie, 588 F.2d at 167.

Similarly in this case, the evidence is undisputed that the medical bills of \$8,700 were reasonable and necessary and related to the collision. It is also undisputed that the seven months of treatment, including the emergency room visit, primary care physician treatment, physical therapy, EMG, MRI, and medical acupuncture were related to the injury and the collision.

Consequently, the jury verdict is so inadequate as to show passion or prejudice under CR 59(a)(5); against the weight of the evidence under CR 59(a)(7) and has failed to do substantial justice under CR 59(a)(9).

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5. Conclusion.

The court should grant a new trial because the jury verdict was so inadequate as to show passion or prejudice under CR 59(a)(5); against the weight of the evidence under CR 59(a)(7) and has failed to do substantial justice under CR 59(a)(9).

RESPECTFULLY SUBMITTED this 13th day of August, 2010.

A handwritten signature in black ink, appearing to read "Boyd S. Wiley", with a large, stylized initial "B" and "W". To the right of the signature, the number "#32218" is written.

Boyd S. Wiley, WSBA # 18817,
of Campbell, Dille, Barnett,
Smith & Wiley, PLLC
Attorney for Appellant

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned sent to the Attorney of Record for Respondent a copy of this document via e-mail pursuant to an agreement between the parties.

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

PLACE	DATE	SIGNED
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APPENDIX

Exercise/Procedures	12-9-03	Time	12/10/03	Time	12-13-03	Time		Time
IE		✓	Held					
Manual therapy			<ul style="list-style-type: none"> 1) Supine - - Dis MFR - or distal - STM @ 9/5 power 2) Segmental c/s glides 3) Prem - - MFR c/s → T15 - - CPM'S T6-12 - 		<ul style="list-style-type: none"> 1) SCS @ UT rhamboid 2) gentle c/s traction 3) C16-7 N R L SR 4) segmental c/s glides 5) thoracic scan - T3-6 (2) mt. 35' 			
MHP Supine -			pre H (Supine)		pre' supine	10'		
IE i MHP -			p Ax (Prem) 12 -		post supine	15'		
Home Program Issued								
Re-Eval Completed								
Pt. Consented To Plan Of Care								
Initials			al		A.T.			

12.4.03 ale/index, Kinsley reports following MVA on 12.1.03 with CTL Spvan / Stran Sr's. Adygs status includes IE and T.E.D. See I.E. for POC. Al Hall

12-13-03 s: "trying to do the exercises but can feel worse - Saturday was the worst day i pain from c/s → STS. Drivng in car 9's sex - first thing in AM is the best. O-be/flow sheet - id ex's keef - manual therapy + modalities to help ↓ me guardy + pain A/P: Mnd → sure guardy from c/s → uT10 - relaxed with indmt techniques - Support me guardy in raising pain + id ment further. Put c' Ax to l term, r' Ax function as able - / paper after

DEC 13 2003 s: fit reports m.d. has new orders - no ex. at this time - ex's previously given were Ting her pain. Reports feeling better after last visit - T possibility experiencing (L) UE pain & numbness into (L) hand / little finger. O: Treatment today of man. for soft tissue restrictions ROM & c5-6-7 dysfunction. A: aide to elevate (L) arm ↓ WNL of (R), v (L) hand Sx's, ↓ mm tone (L) UT P: Cont POC 3xwk - focus on ↓ing mm tone, ↓ing (L) UE neurox's. worse ROM

Patient Name: Kinsley, Melinda Next Dr. Visit 1/16/04 Coverage Limitations _____

exercise/Procedures	12/18/03	Time	12/20/03	Time	12-22-03	Time	Time
	holding ex's per MD orders!				hold		
Manual therapy	Septu 1) MFR2 Supari - 2) MFR4 distal - 3) OA release 4) C/S side glides on 2-3 5) T/S CPA's - 6) MFR2 Th - 7) JTM Phrenic - UTJ-	1) ✓ 2) ✓ 3) ✓ 4) ✓ 5) ✓ 6) ✓ 7) ✓			1) ✓ 2) (B) SCS LT 3) OA release 4) C/S side glides UPA's CPA's C 3-6 5) Thoracic scan T 10-12 (B) rotation		
MP Supari -	per Rx	10'			✓	12'	
MP Ar -	per MHP	12'		15'			
Time Program Issued							
Re-Eval Completed							
Pt. Consented To Plan Of Care							
Initials	(K)		ll		AT		

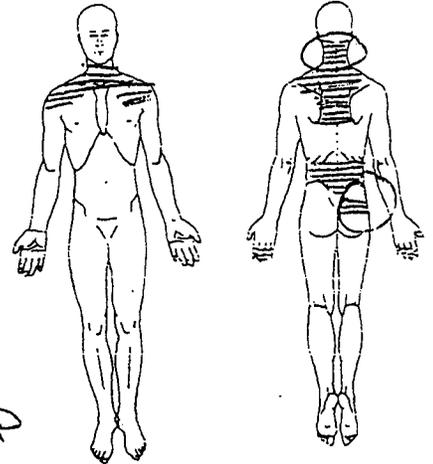
DEC 18 2003 S: MD report was on 12/11 - next report on 1/16. Had a moment of C/S vertebrae - this resulted in a flat of pain down arm. "Feels like a pinched nerve in C/S." O: R: / flow sheet - ephors remains a 1% → Ths Rom - ↓ in ms guardy + pain - A: excellent relief - T'd function / ment following Rx - P: Cat to work a T'd quality of C/S motion - ↓ in ms guardy - quite about a tolerable - (fagant / persister)

DEC 20 2003 P: had some relief in neck + upper back last visit - allowed for ↑ sleep. P: cb LBP beginning yesterday, a migration of pain from (C) shoulder to (C) shoulder. L: Rx ad per FS / Noted some rotation + side bend + rotation to (C) in upper T-spine in neutral prone position. Addressed to UPA's. A: Pt - having some (B) response to Rx though not sustained as yet. P: Continue PT 2x/wk

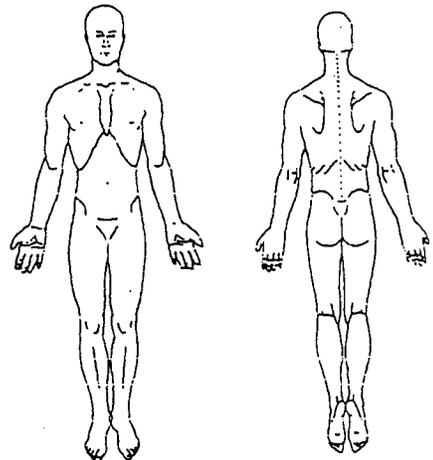
12-22-03 S: Felt she needed more aggressive treatment last visit - reports segmental PA's were very helpful - felt "really good" following day O: can't do manual therapy as per M.D. - P: continue as per plan - sees M.D. tomorrow - ? resume ex. if OK in M.D. visit

Patient Name: Melinda Kinsley Consent For Tx & Date: 1/15/04 MASSAGE THERAPY NOTES

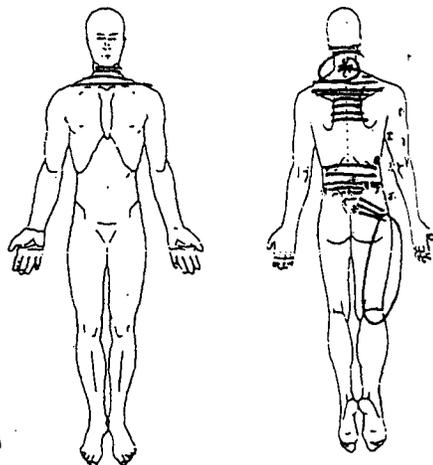
Date: 1/17/04
 S: Location / Symptoms / Intensity / Frequency / Δ
neck & shlds. (P) m-s const. *
LB Ten. Lt - m const.
(P) siatic region (P) m-s occ.
* treatment was helping (P) returning P/C siatic (P)
coming back since about a week ago.
 O: HT: mt BL Lev. Scap. m BL AL's
 m BL Rhombas mt (P) Piriformis
 m BL Scalenes mt BL Pec minor
 A: ↓ HT ↑ relax
 P: SW (P) P/S ↑ H₂O ice/heat By: J. A. LMP



Date: 1/19/04 Patient R/S for 1/21/04
 S: Location / Symptoms / Intensity / Frequency / Δ



Date: 1/21/04
 S: Location / Symptoms / Intensity / Frequency / Δ
neck & shlds. (P) m + mt const.
LB Ten. Lt + m - const.
(P) leg (P) m-s occ. A: sitting
* Patient states having trouble breathing deeply & (P) ribs
hurts per results on MRI yet.
 O: HT: mt BL Rhombas m BL Lev. scap. m BL AL's
 mt Upper Trape m + BL erector's m (P) Piriformis
 A: ↓ HT ↑ relax ↑ Ten.
 P: Vascular flush 1 min. cold / 3 min. hot 3x
 SW (P); DT; P/S homework. ice By: J. A. LMP

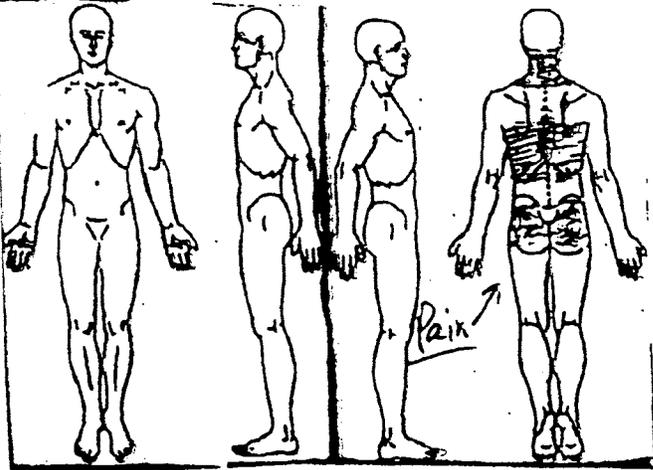


X Adhesion • Tender Point * Inflammation ∪∪ Rotation ≡ Hypertonicity
 # Trigger Point ○ Pain ≈ Spasm ↑ Elevation

DOB: 6/24/53
Chart#

Age:

Date: 12-~~10~~03



11
12-~~10~~-03
Continued.
from other side

Name: Kinsley, Melinda
Chart #: 50462
DOB: 6/24/53
A: 50

W: 163#
H:
BP: 120/80
P: 72
T:

December 23, 2003

SUBJECTIVE:

Follow up on MVA from December 1st. Continuing physical therapy at Apple. Naprosyn is making her retain fluid and get puffy and Flexeril makes her mouth dry. She is feeling better. A week ago, while laughing, she extended her neck and she had increased pain in the back of the neck, down the mid back, and some pain radiating to the left posterior deltoid. She has slight numbness in the lateral upper arm and some numbness along the left ulnar forearm, along the ulnar hand and the fifth finger. She does also have continuing pain in the mid and lower back, which hurt more as the day goes on.

OBJECTIVE:

She has tenderness in the mid posterior cervical spine. She has slight decreased sensation over the left deltoid and the left fifth finger. She has continuing weakness of the left deltoid, although it has improved over the last visit.

PLAN:

Continue physical therapy. Begin strengthening and stretching muscles around the neck and especially the left deltoid, but continue to avoid forced extension of the neck. She can stop her Naprosyn and Flexeril. Follow up in three weeks. Will continue EMG nerve conduction study of left upper extremity if not improving.

David N. Griggs, MD

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Name: Kinsley, Melinda
Chart #: 50462
DOB: 6/24/53
A: 50

W: 162#
H:
BP: 114/80
P: 72
T:

February 24, 2004

IBJECTIVE:

Reviewed normal MRI of the cervical spine and EMG nerve conduction study of the upper extremities was essentially negative for any evidence of radiculopathy.

OBJECTIVE:

On examination, she has very localized point tenderness over the vertebral spine at about T6 and she has muscle spasm and tenderness over the upper back muscles, medial to the scapula and over the scapular spine. She complains of numbness, tingling, and pain radiating down the right arm, related to neck, back, or arm movements. Physical therapy emphasizing scapular range of motion exercises makes her back pain worse.

ASSESSMENT:

Vertebral pain and tenderness around T6, status post MVA on December 1, 2003.

PLAN:

1. X-ray of the T-spine for possible fracture around T6.
2. D/C physical therapy at this time.

David N. Griggs, MD





Mark A. TOMSKI, M.D.
Physiatrist

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Diplomate of The American Board of
Physical Medicine & Rehabilitation

OUTPATIENT RECHECK

March 15, 2004

MELINDA L. KINSLEY

Melinda returns today for a follow-up visit after last being seen on Friday. Overall, she is doing better. She is active and able to continue to have some basic range of motion of her shoulders. Her arm did go numb on Saturday, but now it's doing better. Overall, she is pleased with the range of motion and the more activities, and her pain is diminishing. She still has complaints of mid-back pain.

PHYSICAL EXAMINATION: On physical exam, reflexes and motor power are intact. She still has marked hypertonus in the cervical/thoracic/lumbosacral spine. There is limited range of motion of her neck and shoulders.

TREATMENT PROVIDED: The patient was treated to her head, neck, mid-back, pelvis, pubis, and rib cage with a combination of cranial and myofascial release approaches

IMPRESSION: Cervical/thoracic/lumbosacral strain/dysfunction syndrome.

RECOMMENDATIONS:

1. She can be scheduled for a series of medical acupuncture.
2. The patient was instructed in stress breathing.
3. The patient was given practice brochures on the practice of cranial osteopathy and medical acupuncture.

Mark A. Tomski, M.D.

MAT/pdo

cc: Dr. Griggs



Mark A. Tomski, M.D.

Physiatrist

Diplomate of The American Board of
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Fax (253) 770-5677

OUTPATIENT RECHECK

April 15, 2004

MELINDA KINSLEY

Date of Injury: 12/1/03

Melinda returns today for a follow up visit after completing a series of six visits of medical acupuncture. Overall, she has done quite well. She doesn't have numbness into her arms when laying down. She has less symptoms. Unfortunately, her job station at work needed to be adjusted because of her abnormal posture before coming in to see me.

She has not needed any further pain medicines. She is working. She is sleeping better, and overall she has made progress in her refractory spinal pain/dysfunction syndrome.

She does have complaints primarily across her back and shoulders, but they are minimal compared to what they once were. She is not having further headaches or vertigo.

TREATMENT PROVIDED: Patient is treated with a combination of myofascial release, cranial approaches to her head, neck, mid-back, bilateral shoulders and rib cage.

IMPRESSION:

1. Improving cervical/thoracic/lumbosacral strain/dysfunction syndrome.

RECOMMENDATIONS:

1. Four visits of physical therapy focusing on problem solving, job station and proper posture.
2. See me in about a month.

Mark A. Tomski, M.D.

MAT/vld

cc: Dr. Griggs



Mark A. Tomski, M.D.

Physiatrist

Diplomate of The American Board of
Physical Medicine & Rehabilitation

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OUTPATIENT RECHECK

May 27, 2004

MELINDA KINSLEY

Date of Injury: 12/1/03

Melinda returns today for a follow-up visit after last being seen on April 15, 2004. Overall, she is doing better. She has good days and bad days. She is able to have no further right upper extremity numbness after lifting many boxes. She is able to fly on an airplane without symptoms. She is beginning to work on fitness. She is working towards eliminating repetitive stress symptoms on the job. The physical therapist would like to see her for one final physical therapy visit to upgrade her program.

PHYSICAL EXAMINATION: On physical examination, she still has some residual somatic dysfunction of the cervical/thoracic/mid-thoracic spine.

TREATMENT PROVIDED: The patient was treated with a combination of cranial and myofascial approaches to her head, neck, mid-back, bilateral shoulders, and rib cage.

IMPRESSION:

1. Steady improvement in cervical/thoracic/lumbosacral strain/dysfunction syndrome.

RECOMMENDATIONS:

1. Complete physical therapy.
2. Consistent home program and postural modifications.
3. Melinda is now released back to the care of Dr. Griggs for all of her general medical care. I will see her back only on an as-needed basis.

Thank you very much for allowing me to participate in the care of this most pleasant lady.

Mark A. Tomski, M.D.

MAT/pdo

cc: Dr. David Griggs

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

MELINDA KINSLEY, a married woman,

Appellant,

vs.

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

Respondents.

No. 65509-4-I

**DECLARATION OF
SERVICE OF
APPELLANT'S
BRIEF**

THE UNDERSIGNED, being first duly sworn on oath, deposes and says:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the ~~30~~³¹ day of August, 2010, I sent by ABC Legal Messenger true copies of the Brief of Appellant, Supplemental Designation of Exhibits and this Declaration of Mailing/Service in the above matter addressed to the following:

Michael K. Taylor
Murray, dunham & Murray
200 W. Thomas St., Ste 350
Seattle, WA 98109

Washington State Court of Appeals
Division I
600 University St.
One Union Square
Seattle, WA 98101

ORIGINAL

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

Signed at Puyallup, Pierce County, Washington this 30th day of August, 2010.


Melinda L. Leach