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No. 68346-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

BENJAMIN GONZALEZ-MENDOZA; PEDRO GONZALEZ-
MENDOZA; AND EFRAIN TAPIA-CRUZ,

Appellants,

v.

ANNSIANNE S. BURDICK AND DOES 1-10,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAMES CAYCE

BRIEF OF RESPONDENT BURDICK

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I. STATEMENT OF THE CASE

The testimony reflects that the Appellants were involved in a rear end motor vehicle accident on September 25, 2007. RP II 9: 8-14, 11: 20-23.¹ None of the Appellants sought medical treatment until five weeks after the accident. RP III 12: 7-9, 20: 7-10, 26: 10-14. After seeking the advice of an attorney, to assist in obtaining a better settlement for an alleged property damage claim, all three Appellants commenced treatment with a chiropractor whose name was given to them by the attorney's office. RP II 27: 2-5, 50: 1-10, 55: 9-12. The Appellants received chiropractic treatment and massage for approximately three months and were discharged at the end of the treatment. RP III 18: 16-21, 26: 3-6, 28: 23-24. The chiropractor, Dr. Romero, testimony showed an admitted referral relationship with the Appellants attorney's office. RP III 56-57.

Bradley Probst, biomechanical engineer testified that the defendant's speed at impact resulted in a 3.3MPH Delta-V change to Appellants' vehicle. RP III 115: 14. This resulted in a maximum force on the plaintiffs' bodies was 1.5 g's, similar to many activities of daily living. RP III 117: 5.

¹ Respondent will follow Appellants' citations to the Report of the Proceedings: RP I for December 7, 2011; RP II for December 12, 2011; RP III for December 13, 2011; and RP IV for December 14, 2011.

At the close of the case the jury was instructed on damages, both special and non economic and was given Special Verdict forms for each plaintiff requesting the amount for medical damages and non economic damages. CP 140-142. The jury was allowed to ask questions during trial and did so. No questions were asked during deliberations.

A. TRIAL COURT HAS THE DISCRETION TO INCLUDE TESTIMONY OF BRADLEY W. PROBST

1. Standards of Review

This court reviews de novo questions of admissibility under *Frye*. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

If the questioned methodology or theory passes the *Frye* test, this court then reviews a trial court's decision to admit or exclude expert testimony for abuse of discretion. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

2. Probst's Opinion Testimony Meets the Standards Required by *Frye* and is Generally Accepted in the Relevant Scientific Community.

Washington courts rely on the *Frye* test to determine the admissibility of scientific evidence. *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923). Under *Frye*, novel scientific

evidence is admissible “only if that theory or principle has achieved a general acceptance in the relevant scientific community.” *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151, 1157 (2000). In this case, the evidence clearly demonstrates that Mr. Probst’s work is generally accepted in the relevant scientific community and therefore, is admissible under *Frye*.

In *Ma’ele v. Arrington*, 111 Wn. App. 557, 563, 45 P.3d 557 (2002) the trial court was faced with the identical issue this court is faced with. In *Ma’ele* the defendant was at fault for causing a rear end accident. The plaintiff claimed that this rear-end accident resulted in injury to her and called several chiropractic doctors to testify that she was injured. In response to this claim the defendant called a chiropractor, who testified the plaintiff sustained some injury but that he was not seriously or permanently injured, and Dr. Tencer, who testified that he would not expect a person to be injured in such a low-energy accident. The jury found that the accident was not the proximate cause of the plaintiff’s injuries. The plaintiff appealed.

Among the issues the plaintiff raised on appeal was whether the trial court erred in allowing Dr. Tencer to testify that an accident

like the one the plaintiff was involved in generally does not cause injury. The plaintiff argued that Dr. Tencer's research was not generally accepted in the scientific community and that therefore, his testimony was not admissible pursuant to *Frye*. The Court of Appeals rejected this argument and found that:

Tencer has been studying low-speed impacts for five years. His conclusions have been "pretty much" accepted. Report of Proceedings at 278-79. He teaches at the University of Washington Medical School, he has received a federal grant for his research, and he has written a number of articles about the likelihood of injuries in low-speed accidents. Although Dr. Woodburn, a chiropractor, testified differently about the forces involved in low-speed collisions, other researchers around the world have reached conclusions similar to Tencer. The trial court did not err in ruling that Tencer's work on low-speed collisions is generally accepted in the scientific community.

Ma'ele, 111 Wn. App. at 563.

Appellants complain that Probst is not qualified to render the opinions he has been asked to give. Mr. Probst is a biomechanical engineering expert. Mr. Probst has a Bachelor's Degree in Mechanical Engineering, a Master's Degree in Biomedical Engineering, and is a Ph.D. candidate in Mechanical Engineering. CP 78. For his Ph.D. dissertation at Tulane, Mr. Probst developed

the most advanced kinematic model of the human cervical spine known to date. CP 78. This unique model will be used to make technological advances to Naval pilot ejection and recovery systems. CP 78. In addition, Mr. Probst has also done advanced course work in the fields of biomaterials, materials engineering, biosolid mechanics, mechanisms of bodily functions, and advanced finite element analysis. CP 78. He has also lectured extensively and shared teaching responsibilities for courses in biomedical engineering and design and analysis at Tulane University. CP 78.

Appellants also allege that that Mr. Probst's methodology are not accepted in his own community. The critique appears to rest on the assumption that Mr. Probst utilized photos of car alone to come to arrive at his conclusions of the Delta-V. This is unfounded when the evidence is reviewed. In his analysis, Mr. Probst reviewed and came to his conclusions after using the vehicle damage, incident data, energy-based crush analysis, engineering analyses, and testimony of Respondent Burdick. CP 85. See also RP IV 114: 5 - 115: 19.

Furthermore, Mr. Probst is not simply presenting to the Court that his methodology is generally accepted in a single statement. In his report he cites many peer reviewed studies for support of his

methodologies. CP 83–89. RP IV 77-78. He further relates the forces to the forces beyond a mere injury threshold and compares them to the personal tolerance of the Appellants as manual laborers. CP 86.

3. Probst’s Opinions are Relevant to the Forces Involved in the September 25, 2007, Accident Regardless of Whether He is a “Non-medical Witness”

The Appellants argue that Probst cannot testify concerning medical causation because the relationship between an auto accident and an injury requires medical testimony. This same issue was raised in the Court of Appeals case of *Ma’ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). The court in *Ma’ele* rejected the plaintiff’s argument and reliance on *O’Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968) and *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961). Interestingly these are the same two cases Appellants rely upon in arguing that Probst cannot testify regarding causation. The Court of Appeals in *Ma’ele* distinguished these two cases and held that:

In both *O’Donoghue* and *Miller*, the medical expert testified that he could not say with any certainty what caused the plaintiff’s injuries. *O’Donoghue*, 73 Wn.2d at 821; *Miller*, 58 Wn.2d at 885-86. Medical causation must be established by a more-likely-than-not

standard. *Miller*, 58 Wn.2d at 886. To offer testimony that something *could* have been a cause forces the jury to impermissibly speculate. *Miller*, 58 Wn.2d at 886.

In contrast, Tencer [a biomechanical expert] opined that the maximum possible force in this accident was not enough to injure a person.

And this was not a medical opinion; Tencer expressed no opinion about Ma'ele's symptoms or possible diagnosis from those symptoms. He did not say that Ma'ele was uninjured in the crash, although the jury was entitled to infer that from his testimony. See *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961). Tencer simply testified about the nature of forces involved in low-speed collisions and the likelihood of injury from such forces.

Ma'ele, 111 Wn. App. at 563-64.

The case of *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1996) does not stand for the proposition a mechanical engineer could not testify as to causation of injury. A close reading of the case and the court's opinion results in the conclusion that under the specific facts of *Doherty* a biomechanical engineer could not testify regarding the causation of injury because a proper foundation as that specific biomechanical engineer had not been laid. The affidavit provided by Dr. Carley

Ward, the biomechanical engineer in question, was in response to the defendant's motion for summary judgment regarding causation. By footnote, the court observed "Metro concedes, and we tend to agree, that if Doherty had supplied a 'revised or supplemental affidavit,' setting for in greater detail the nature of Ward's training, the affidavit would likely to have been admissible." *Doherty*, 83 Wn. App. at 469, fn 4. The court did not hold, as insinuated by the plaintiff, that a biomechanical engineer was unqualified to testify regarding "anatomical, physiological or medical sciences." Here, Mr. Probst has provided this Court with his background and exactly why he is qualified to render an opinion as to whether the forces exerted on the plaintiff in this accident were sufficient to have caused injury.

Mr. Probst's testimony is clearly relevant to the issue the jury needed to decide. Was this accident sufficient to have caused plaintiff's claimed injuries? This issue is not limited to medical testimony as argued by the plaintiff. The jury is entitled to consider all evidence presented on this issue, including the testimony of Mr. Probst, the photographs of the vehicles, the repair estimate of plaintiff's vehicle and the parties' testimony. *See Ma'ele*.

B. JUDGMENT AS A MATTER OF LAW PROPERLY DENIED

1. Standard of Review

In reviewing a trial court's decision to deny a motion for judgment as a matter of law (previously known as directed verdict), this court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). Judgment as a matter of law is appropriate if, when viewing the material evidence most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Id.*

2. Proximate Causation is a Question for the Jury.

Proximate causation is a question for the jury. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). The jury was properly allowed to hear and judge the credibility of both expert opinions.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. WPI 2.10 (Expert Testimony). The jury is not, however, required to accept his or her opinion. To determine credibility and weight to be given to this type of evidence, the jury considers, among other things, the education, training, experience,

knowledge, and ability of the witness. The jury may also consider the reasons given for the opinion and the sources of his or her information, as well as considering factors already given to them for evaluating the testimony of any other witness. WPI 2.10; *Talley v. Fournier*, 3 Wn. App. 808, 479 P.2d 96 (1970). It is for the jury to determine what weight should be given expert-testimony. *Gerberg v. Crosby*, 52 Wn.2d 792, 329 P.2d 184 (1958); *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 42-43, 931 P.2d 911 (1997).

The standard applied for plaintiffs to meet the threshold for medical testimony does not eliminate the jury's role in weighing the credibility of expert evidence. Expert's opinions are not dispositive, but are subject to cross-examination; the trier of fact can then determine what weight, if any, it will give to their testimony. *State v. Mitchell*, 102 Wn. App. 21, 997 P.2d 373 (2000). In *Clevinger v. Fonseca*, the jury was permitted to consider testimony from a treating physician who diagnosed the plaintiff with a fracture based on the standard for medical testimony on a more probable than not basis, but the case does not stand for the proposition that the matter should be taken from the jury's hands. 55 Wn.2d 25, 32, 345 P.2d 1098 (1959) (overruled on other grounds, *Danley v. Cooper*, 381 P.2d 747, 749, 62 Wn.2d 179, 182 (1963)).

Determining damages is a question for the jury. *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993). In *Ma'ele v. Arrington*, evidence from a biomechanical engineer that a low speed collision did not produce enough force to injure a motorist was sufficient to support a jury verdict that the collision was not the proximate cause of injuries. The engineer gave expert testimony, contrary to both the plaintiff and defense medical experts, based on extensive study of low-speed collisions, calculated the maximum force that could have impacted the motorist, and concluded that such force does not injure people. 111 Wn. App. 557, 562, 45 P.3d 557 (2002)(citing *Cox v. Charles Wright Acad. Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967)). The jury returned a defense verdict. *Id.*

C. A NEW TRIAL ON DAMAGES WAS PROPERLY DENIED

1. Standard of Review

This court reviews a trial court's decision denying a motion for a new trial for abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

2. New Trial was Properly Denied.

The law gives a strong presumption that the verdict is adequate. *Singleton v. Jimmerson*, 12 Wn. App. 203, 207, 529 P.2d

17 (1974).

The grounds for a new trial are set forth in CR 59:

(a) Grounds for New Trial or Reconsideration. On the motion of a 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. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: ... (5) Damages so excessive or *inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice*; ... (7) That there is *no evidence reasonable inference from the evidence to justify the verdict or the decision*, or that it *is contrary to law*; (9) That *substantial justice has not been done*. CR 59 (emphasis added).

In reviewing the record upon motion for new trial, the jury verdict is presumed correct unless the award is so excessive as to unmistakably indicate that it resulted from passion or prejudice. *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007); *Manzanares v. Playhouse Corp.*, 25 Wn. App. 905, 611 P.2d 797 (1980). Juries have considerable latitude in assessing damages, and a damage award will not be lightly overturned. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 329–30, 858 P.2d 1054 (1993); *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967) (“[T]he law gives a strong presumption of adequacy to the verdict.”).

Although courts have discretion to grant a motion for a new trial if a damage award is not based on, or is at odds with, the evidence, the motion must be denied if the verdict is within the range of the credible evidence. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161–62, 776 P.2d 676 (1989); *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981); *Herriman*, 142 Wn. App. at 232. In reviewing a court's exercise of discretion on such motions, the evidence is reviewed in the light most favorable to the verdict. See *Palmer*, 132 Wn.2d at 197–98. “[T]here is no per se rule that general damages must be awarded to every plaintiff who sustains an injury.” *Palmer*, 132 Wn.2d at 201. Rather, the adequacy of a verdict on general damages “turns on the evidence.” *Id.*

The decision in *Lopez v. Salgado–Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005), is instructive. Lopez sued for injuries allegedly sustained in an automobile accident and presented evidence of a hospital visit, extended care from a chiropractor, an orthopedist, a physical therapist, and three days of lost wages. The jury awarded all of the economic damages in the amount of \$3,536.80, but awarded nothing for alleged pain and suffering. In denying Lopez's motion for additur or a new trial, the court

concluded that he “failed to sustain his burden in proving that the collision and injuries, if any, were of such consequence to award any damages for pain and suffering.” *Id.* at 90. The evidence allowed the jury “to conclude that any pain Mr. Lopez felt as a direct result of the accident was short-lived.” *Id.* at 93. “[T]he jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages.” *Id.* at 93 (emphasis added). The court affirmed the denial of Lopez’s motion for a new trial because “the jury’s failure to award damages for pain and suffering was consistent with the evidence.” *Id.* at 92.

In *Geston v. Scott*, 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. 116 Wn. App. 616, 621, 67 P.3d 496 (2003).

The amount of general damages is not governed by the economic damages at trial, and the jury may omit general damages even after awarding economic losses. *Geston*, 116 Wn. App. at 620 (quoting *Palmer*, 132 Wn.2d at 202). In *Geston*, the trial court erred

in ruling that passion or prejudice compelled the jurors to award no general damages despite awarding special damages of \$458.34 for one emergency room visit. *Id.* In *Usher v. Leach*, the grant of a new trial was improper where the jury awarded only \$13.00 in general damages because there was no definite act, occurrence or incident which could lead a jury to err for which immediate action was timely requested or against which remedial action would have been futile. 3 Wn. App. 344, 474 P.2d 932 (1970).

There is no passion or prejudice, nor is it contrary to law, when the jury gives little weight to the plaintiff's medical experts. In *Singleton*, a vehicle passenger had a low back problem that predated the automobile accident that she failed to disclose to two physicians, and each testified that the low back problem was caused by the accident based on the fact that passenger did not have any prior low back problems. 12 Wn. App. 203. The award in the amount of special damages was not so insufficient as to require a new trial. *Id.* In *Cox*, plaintiff's motion for new trial where the jury awarded only the approximate amount of special damages was reversed because the plaintiff's prior accidents rendered it difficult to ascertain whether the prior accidents caused present injuries. 70 Wn.2d at 176. In *Richards v. Sicks' Rainier Moving Co.*, the court

properly denied a new trial where the verdict approximated the claimed special damages because the jury had a right to disbelieve testimony favorable to the plaintiff. 64 Wn.2d 357, 357, 391 P.2d 960 (1964).

It is entirely within the province of the jury to determine that the plaintiff incurred medical expenses unnecessarily, awarded those costs, and then found that the plaintiff sustained no pain and suffering. In *Bliss v. Coleman*, the plaintiff did not seek medical attention until 8 days after the accident, and the jury was justified in finding that expenses were unnecessary because the plaintiff did not seek medical attention until eight days after the accident, and it was an abuse of discretion to award a new trial on grounds of inadequacy of damages. 11 Wn.App. 226, 522 P.2d 509 (1974).

In this matter, the Appellants cannot identify any procedural irregularity for which they sought a remedy at trial. The jury questions were answered in a manner consistent and upon agreement of the parties. Jury instructions were largely stipulated to by counsel, reviewed and approved by the Court. The jury award should not be revisited simply because the plaintiffs are unsatisfied with the jury's determination that they did not meet their burden of proof.

It would not be persuasive of passion or prejudice to find that the Appellants sustained limited or no pain and suffering following the accident. The Appellants' delay was even more egregious than that shown in *Bliss*. They waited five weeks rather than a mere 8 days to pursue treatment. RP III 12: 7-9, 20: 7-10, 26: 10-14. The jury determined that the Appellants did not meet their burden of proof as to general damages taking into account the gap in treatment and the circumstances of their referral to Dr. Romero. As in *Richards*, it would be reasonable for the jury to disbelieve or give less weight to Dr. Romero's testimony based upon the fact that he was seen five weeks after the accident on recommendation of a legal office handling a property damage dispute for the Appellants. RP II 27: 2-5, 50: 1-10, 55: 9-12.

Further in the present case, the jury awarded the Appellants less than one-third of their medical special damages after deliberation and upon instruction of the Court. CP 140-142. The Court instructed the jury upon agreement of counsel to rely upon the instructions given to them prior to deliberations. CP 120-139. They awarded no general damages. CP 140-142. There is no indication in the record that this decision was "unmistakably" because of passion or prejudice.

Also, the credible evidence supports an award of no general damages, especially given the Appellants' failure to seek any immediate medical care and failure to commence any care for five weeks; and then only after consulting an attorney for dissatisfaction with the property damage settlement. RP II 27: 2-5, 50: 1-10, 55: 9-12. If the Appellants were in pain following the accident, they should have treated for the pain.

The jury was entitled to determine that the Appellants were not credible or exaggerated their alleged pain and suffering. The evidence would support a finding that they exaggerated their symptoms. Likewise, the jury was entitled to determine that Dr. Romero was biased, as the record shows a referral relationship with the attorney's office. RP III 56-57. The evidence would support a jury finding that given the delay in treatment and the referral by their attorney's office that the Appellants complaints to Dr. Romero were convenient and unconvincing.

The jury could give as much weight or as little weight as it felt appropriate with regard to expert testimony as instructed by the Court. CP 120-139. They could still determine Dr. Romero's credibility based upon the cross examination questions documented in the transcript and other evidence presented in the

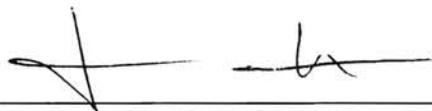
case. Finally, every aspect of Appellants' claims were challenged by the causation testimony of Bradley Probst. For the foregoing reasons, the verdicts were within the range of the credible evidence and the motion for new trial was properly denied.

III. CONCLUSION

Based on the arguments above, Respondent respectfully requests that the Court deny Appellants appeal and affirm the trial court's rulings.

DATED this 14th day of September, 2012.

LAW OFFICES OF KELLEY J. SWEENEY



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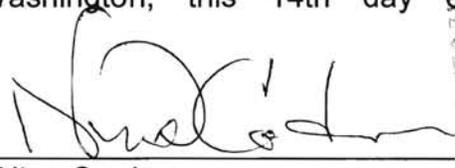
DECLARATION OF SERVICE

I certify that on September 14, 2012, I caused to be filed with the Court of Appeals of the State of Washington, Division One, the foregoing Respondent's Brief, and caused to be delivered, via Legal Messenger, a true and correct copy to:

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

Executed in Seattle, Washington, this 14th day of
September, 2012.



Nina Cordova

SEP 14 4:39 PM '12
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA