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No. 68617-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION 1

KATHLEEN KUK and DAVID KUK, individually and as husband and wife,

Respondents,

v.

JASON SMITH and JANE DOE SMITH, individually and the marital community thereof, and UNITED PARCEL SERVICE, INC.,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION TO REPLY

Appellants Jason Smith and United Parcel Services, Inc ("UPS and Smith") have briefed three principal issues for the court to consider. The first and most central matter at issue on this appeal presents an issue of law and policy.

The jury's award of medical expenses without any general damages where UPS and Smith did not question Ms. Kuk's entitlement to those damages was patently inconsistent with Washington law. Such a situation arises frequently in automobile accident litigation. The Court needs to fashion a rule to promote fairness and judicial economy.

Pursuant to CR 49[1], Ms. Kuk waived her right to move for new trial when she did not object to the inconsistent verdict at the time the verdict was rendered. She was obliged by that rule and the cases following it to ask the court to continue the jury's deliberations in order to make an award of general damages.

Recognizing the application of CR 49 to the case at bar embodies a sensible policy of judicial economy and fairness. The Court should decide this issue in favor of UPS and Smith and remand the case to the trial court for entry of a judgment on the jury's verdict.

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[1] The rule is set out verbatim in the Appendix to this reply brief. RAP 10.4(c).

Only if the Court disagrees with the position of UPS and Smith on CR 49 and the requirements of Washington law does the Court need to consider the second and third issues. If the Court does not find waiver, then justice requires that it should remand the case to the trial court for a full new trial on damages and liability.

The jury's verdict was so inconsistent with the law and evidence as to justify a complete retrial. Complete retrial would serve the policy that a finding of waiver would serve. It would deter future efforts to manipulate a jury verdict or seek a piecemeal resolution of an otherwise straightforward personal injury case.

Upon remand for a new trial, the Court should also correct the evidentiary and discovery sanction rulings made by the trial court so that admissible evidence comes in and irrelevant evidence stays out of any re-trial of the matter. These three issues are taken up in the balance of the reply.

II. CIVIL RULE 49 AND THE *PALMER v. JENSEN* RULE

A. Standard of Review of a Matter of Law.

Ms. Kuk does not appear to dispute that this court should review the decision of the trial court *de novo* and fashion the best policy ruling for guidance to litigants in future cases. *See, Cox v. General Motors,* 64 Wn. App. 823, 825-26, 827 P.2d 1052 (1992):

> The standard of review applied in reviewing an order granting a new trial depends upon the reason given for granting the motion. . . . [I]f the reason for the new

> trial was predicated upon an issue of law, then the appellate court reviews the record for error in application of the law rather than for abuse of discretion.

Ms. Kuk simply refuses to recognize the importance of the *Palmer* decision for cases like hers. While the facts of each case vary, litigation over automobile accidents with resulting injuries is ever-present in the Washington court system. The state of the law in Washington recognizes the reality that a plaintiff is entitled to some award of general damages when the defendant does not contest the existence of pain and suffering, only the extent of it. In this case, the ruling of the trial court ignores well-established law that governs many of these cases and utilizes an out-of-date, case-by-case rule that promotes piecemeal litigation and gamesmanship.

In her brief, Ms. Kuk implies that *Palmer v. Jensen,* 132 Wn.2d 193, 937 P.2d 597 (1997), is just another case of inadequate damages, in which the Court, utilizing a case-by-case analysis, merely ordered a new trial on damages. Thus, she concludes that outcome is the proper one here. Her analysis is simply wrong. It is wrong for several reasons.

First, the *Palmer* court found under the circumstances that the verdict was "contrary to the evidence." 132 Wn.2d at 203. As detailed in the opening brief of UPS and Smith, the clause "contrary to the evidence" is more consonant with the term "inconsistent," as it is used in CR 49, than with the term "inadequate." *See*

Appellants' brief at 20. The plain meaning of Civil Rule 49[2], addressing what is to be done with "inconsistent verdicts," and the case law support the position of UPS and Smith.

Second, the *Palmer* court announced the policy of the state of Washington in future cases to provide for an award of general damages in any case where a defendant does not contest the plaintiff's injuries and their causation. 132 Wn.2d at 201-203. UPS and Smith did not try to avoid the operation of the rule. Instead, UPS and Smith contested their liability and the extent of the damages, not the fact that the accident caused Ms. Kuk some damage.

Ms. Kuk sought to avoid the jury whose verdict she was entitled to receive. Entitled to general damages in this case, Ms. Kuk received no award from her jury. But she remained silent. Rather than asking for that jury who had heard her case to return a verdict that comported with undisputed law governing her case, she waited and then moved for a new trial on damages only.

Civil Rule 49 is designed to avoid this gamesmanship where a verdict is "inconsistent." The interpretation of CR 49 and its application to the situation presented where the *Palmer* rule governs is a matter of law that this court can correctly decide.

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[2] See, Appendix

B. Trial Court Decision Failed To Correctly Recognize for Purposes of CR 49 that the Verdict was Inconsistent with the *Palmer* Rule in this Case

The trial court misconstrued the rule enunciated in *Palmer*. The court regarded *Palmer* as establishing nothing more than that a verdict awarding no general damages is merely inadequate.

On March 16, 2012, Judge McKeeman convened a post-trial hearing to consider UPS and Smith's motion for entry of judgment, CP 136-147, and the motion for new trial of Ms. Kuk. CP 63-74[3] In deciding this first issue concerning waiver against UPS and Smith, the court held:

> The general rule of this state is that where there are special damages, there does not need to be general damages; that basically the evidentiary issue is whether there was sufficient evidence to warrant those general damages.
>
> And in a situation where it is true you must have general damages when there are specials, then I think a number zero would be inconsistent. But here, where the rule is that there is no need to have general damages, I don't see it as inconsistent for the jury to find zero.
>
> It may not be consistent with the evidence. That's a separate issue. And it may be inadequate based on the evidence. But I don't think it's an inconsistent verdict that triggers CR 49.

3/16/2012 RP at 11-12.

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[3] The hearing was held in the juvenile court. No reporter was present. The electronic recording was transcribed after the time for the opening brief, but the hearing and points made there are noted in Appellant's brief at 14 n.2 and 23 n.5. This part of the reply brief remains in strict reply. The transcript of the 3/16/2012 hearing, however, is now available for citation and for the court's reference.

The court erred as a matter of law. Under the circumstances of this case, as the parties agreed and as the jury was instructed, an award of general damages was required. The award was required by *Palmer, supra*.

In this case, the defense did not contest the fact that Ms. Kuk's claimed medical expenses were caused by the accident. The issue in the case was whether, or to what percentage extent, the defendants were liable. The agreed instructions in this case demonstrate that was the position of UPS and Smith. *See,* CP 177. This instruction was Plaintiff's Proposed Jury Instruction 13 based on WPI 30.03.01. *See,* CP 273-274.

The jury considered general damages and entered the null set, no award, a zero, on the line provided for the jury's insertion of a sum for general damages. CP 151. Such a verdict is just as inconsistent as the verdict considered in *Gjerde v. Fritzsche,* 55 Wn. App. 387, 393, 777 P.2d 1072 (1989), *rev. denied,* 113 Wn.2d 1038, 785 P.2d 826 (1990).

Ms. Kuk states that in this case there is no internal inconsistency, as there was in *Gjerde,* 11 Wn. App. at 393 (*see,* Respondents' brief at 26). The award of nothing for general damages is as inconsistent in this case as it was for the jury to incorrectly assign percentages of fault. An award of no general damages does not add up when the special medical damages and pain and suffering of a plaintiff are conceded by the defense.

The *Gjerde* case predated *Palmer*. After *Palmer,* the Court of Appeals, Division Two, decided *Minger v. Reinhard Dist. Co., Inc.*, 87 Wn. App. 941, 943 P.2d 400 (1997). In *Minger*, the Court found that plaintiffs waived any objection to the verdict based on an inconsistency by failing to bring it to the attention of the trial court at the time the jury was polled and before the jury was discharged. 87 Wn. App. at 946. The substantive law rule applied there constitutes the only difference between that case and this case. The procedural setting is the same.

In that case the inconsistency alleged was the lack of general damages. In the employment law setting, however, no rule like that in *Palmer v. Jensen, supra,* required an award of general damages. *Id.* at 947. The Court affirmed the denial of a new trial, holding that the employees had waived the inconsistency. The Court remanded for the purpose of awarding nominal damages in the amount of $100 as mandated by controlling case law. *Id.*

Ms. Kuk barely addresses *Gjerde*; she mentions *Minger* not at all. Instead, for the most part she raises cases decided prior to the enunciation of the bright line rule of *Palmer*. The one recent case cited by her, *Washburn v. City of Federal Way,* 169 Wn. App. 588, 283 P.3d 567 (2012), is readily distinguishable.

In *Washburn* the City did not raise the issue of waiver. This Court did not consider the question, despite considering the *Palmer* rule. The Court's consideration of the *Palmer* rule actually

demonstrates that it is a bright line rule that should be vindicated when the opportunity exists to correct the jury's verdict and eliminate any inconsistency with the rule before the jury is discharged.

Where there is no dispute that a plaintiff has suffered compensable injuries, she is entitled to general damages. In *Washburn* there was no suggestion that the verdict was the result of a compromise. The issue there was whether any duty existed. *Washburn* is not instructive.

When a jury does not return a verdict consistent with the *Palmer* rule, under the circumstances of this case, the plaintiff must object. If the plaintiff timely objects before the jury's discharge, the trial court should require that the jury return to deliberate and to render an award of general damages.

C. The *Palmer* Rule is the Law of the State Governing Cases Where Parties Agree Plaintiff Can Substantiate Pain and Suffering

In *Palmer*, a mother and son were injured in a car accident. 132 Wn.2d at 195. At the conclusion of their trial, the jury awarded Palmer and her son $8,414.89 and $34, respectively, in special damages, and no general damages. *Id.* Palmer moved for a new trial and the trial court denied her motion. *Id.* at 196. The court of appeals affirmed. *Id.* On review, the Supreme Court recognized that "[a]lthough there is no per se rule that general damages must

be awarded to every plaintiff who sustains an injury**, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages**." *Id.* at 201 [emphasis added].

The trial court judge in this case got it wrong when he stated:

> And in a situation where it is true you must have general damages when there are specials, then I think a number zero would be inconsistent. **But here, where the rule is that there is no need to have general damages**, I don't see it as inconsistent for the jury to find zero.

3/16/2012 RP at 11-12[emphasis added].

The *Palmer* court made it plain that it rejected the Court of Appeals decision of the new trial issue which examined whether the damages were "inadequate:"

> The Court of Appeals limited its analysis to whether the verdict was so inadequate as to indicate passion or prejudice under CR 59(a)(5) and neglected to analyze whether there was evidence to support the verdict under CR 59(a)(7). The court neither discussed CR 59(a)(7) nor referred to the evidence adduced at trial. The court accordingly failed to undertake an independent review of the record to determine whether the verdict was contrary to the evidence.

Palmer, 132 Wn.2d at 198.

The defendants UPS and Smith at trial in this case did not contest that Ms. Kuk was entitled to general damages. UPS and Smith recognized that Ms. Kuk could substantiate her pain and suffering to some degree. Indeed, as detailed needlessly in the

respondent's brief, Ms. Kuk put on evidence of her medical expenses and her pain and suffering. Under those circumstances, the jury must award some amount for general damages. *C.f., Washburn v. City of Federal Way,* 169 Wn. App. at 617 (defense presented no evidence, but argued the jury could still conclude there were no general damages suffered by two of the several plaintiffs.)

D. The Distinctions in the Cases Cited by Ms. Kuk

This case differs from the other cases cited by Ms. Kuk. In none of those cases was the court presented with the situation where both sides agreed that an award of general damages was appropriate.

In this case, in his closing argument, counsel for UPS and Smith suggested the amount of $10,000 in general damages, and asked the jury to consider whether that was an appropriate award. *See,* 3/16/2012 RP at 5. The defendants conceded some award was required under the facts of the case, and agreed to an instruction to that effect. *See,* CP 177. The jury should have made an award, but it did not. This refusal contravened the well-established requirement of *Palmer* requiring the jury to award general damages. Obviously before *Palmer* was decided the case law was subject to much more uncertainty.

Another difference between this case and *Washburn* is that in this case, UPS and Smith have argued that Ms. Kuk waived her right to move for a new trial on damages only. The provisions of CR 49 and cases decided under that rule recommend finding a waiver under these circumstances.

In *Washburn,* the City did not make a CR 49 waiver argument. Instead, the City trotted out the time-worn argument that suggested how the jury might have simply ignored the uncontroverted evidence. The Court rejected that argument based on *Palmer. Washburn, 169 Wn. App. at 617-618. Washburn* offers no support to the plaintiff for her failure to raise the inconsistency before the jury was discharged. The defendant in that case did not make the argument. The case was not one that is commonly recurring situation like the automobile accident here. The common situation presents more opportunity for mischief and for wasting the trial court's resources with requests for new trial where the jury who heard the case should simply be instructed to make an award.

In this case, the plaintiff could have pointed out the mistake immediately to the trial court at the time the jury was convened and asked for the jury to make an award, but she did not do so. The trial court erred in granting a new trial and rejecting the CR 49 argument of UPS and Smith. The policy of this Court should reflect the law of the state.

Where all the parties agree that a jury should award general damages, the jury who has heard the case should be required by the trial court to award general damages. Where, as here, the jury certainly considered damages and awarded nothing, the plaintiff should not be given the opportunity to send that jury away to go for a second chance to argue the case to a different jury and hope for a better outcome.

Her failure to object when the issue could have been cured should preclude her ability to request a new trial, as a matter of law and sound judicial policy.

To wait to complain until long after the jury has been dismissed denigrates the jury's deliberative efforts. It wastes the trial court's time and resources. This Court should take the opportunity to make clear that judicial policy of CR 49, as interpreted and applied in *Gjerde v. Fritzsche,* 55 Wn. App. at 393, *supra,* should be honored when an inconsistency as clear as this is presented.

The trial of this matter took a full week of the Court's time and resources, as well as the time and attorney's fees of the parties. Ms. Kuk's approach simply casts aside all the effort put in on a case which otherwise was fully heard and decided by a jury of her peers. Her approach promotes waste of the court's time and talent. Ms. Kuk's argument and the trial court's erroneous acceptance of it, that this is a case of an "inadequate" verdict, not

an inconsistent one, constitutes an error of law that this court can correct and clarify.

The jury's "award" of nothing, "empty set," "Ø" for pain, disability and loss of enjoyment of life was not simply inadequate, it was non-existent. *See,* verdict form, CP 151. That failure to award is inconsistent with the rule in *Palmer, supra,* thus subject to the resubmission rule of CR 49 and cases decided thereunder. The plain meaning of the words of the rule and the holding of *Palmer v. Jensen* directs the Court to the proper decision.

E. This Rule Would Not Impair CR 59 Motion for New Trial

UPS and Smith do not understand the argument in section F at page 32 of the respondents' brief. The rule advocated for this case would not require a modification of any time limits for a motion for new trial. Instead, the rule would harmonize the provisions of CR 49 with those of CR 59 in this particular situation.

The courts in other jurisdictions have faced this identical situation and seen fit from a policy perspective to find a waiver where general damages are not awarded and the plaintiff does not object. *See* cases collected and discussed in Appellants' brief at 25-28. Ms. Kuk ignores the policy underpinnings of the waiver rule as much as she ignores the provisions of CR 49 as it relates to this matter of inconsistency in the verdict.

III. IN THE ALTERNATIVE, FULL NEW TRIAL WARRANTED; NOT MERELY NEW TRIAL ON DAMAGES ONLY

Smith and UPS are convinced that the trial court erred as a matter of law and that Kuk waived her right to request a new trial for the reasons set out above. If this Court disagrees, however, Smith and UPS ask the Court to remand for a complete new trial on liability as well as damages.[4]

The position of UPS and Smith is detailed in its opening brief. Ms. Kuk ignores the argument made about the trial court's faulty consideration of *Crawford v. Miller,* 18 Wn. App. 151, 566 P.2d 1264 (1977). The case does not stand simply for the proposition the trial court attributed to it. The trial court's simplistic misapplication of the case constitutes an abuse of discretion as to the scope of the new trial. The court in *Crawford* holding was more perceptive

> Heretofore, when contributory negligence was a total defense, the practice was to grant a retrial of the damage issue when the error concerned liability in a close case because of the likelihood of a compromise verdict. . . . That problem has been eliminated, it is said, by the adoption of the comparative negligence formula, RCW 4.22.010, and use of the special verdict form. [citations omitted] **Justice does not require resubmission of the entire case to the jury where the award is not so low as to, by itself, justify a new trial,** because the jury has the opportunity to

[4] In a separate section of appellants' brief, and in this reply, UPS and Smith have detailed the evidentiary rulings that should be reversed as well. The court need not reach any of these issues if it finds that Kuk waived her right to move for new trial.

> decide the liability and damage issues separately without facing the uncomfortable results often required by the application of the harsh contributory negligence rule.

18 Wn. App. at 154

The experience of the courts since the adoption of comparative fault practically speaks to the fact that compromise verdicts still exist. Parties continue to shop for favorable outcomes. If "zero is a number"[5] then the court should recognize that zero is "so low as to, by itself, justify a new trial." *Id.*

The verdict as finally rendered represented an obvious compromise by the jury. They awarded Ms. Kuk's special damages, but gave her no amount of general damages. The trial court implicitly found that the jury's decision on the one issue was the result of passion or prejudice, but that the jury decided the liability issues reasonably.

Such a ruling does not recognize how the jury's determination of Ms. Kuk's credibility was inextricably intertwined with the liability and damages questions the jury had to answer. The trial court abused his discretion under all the circumstances of the case. The decision to remand for a new trial on damages only was a decision on "untenable grounds [] for untenable reasons."

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[5] This was the statement made on behalf of Ms. Kuk in arguing that the lack of any general damages award was merely inadequate not inconsistent with the law in *Palmer*. 3/16/2012 RP at 10.

State ex. rel. Carroll v. Junker 71 Wn.2d 12, 26, 482 P.2d 775 (1971)

Although the verdict was undesirable for Ms. Kuk, and the jury could have been asked to deliberate further, plaintiffs remained silent both when the verdict was read and when the jury was polled. As set forth above, the failure to challenge the verdict at the time set up the opportunity for her to receive a more receptive jury on retrial of damages only. Clearly, by moving for a new trial on damages alone, Ms. Kuk sought a jury isolated from any cross-examination testimony of Ms. Kuk on liability issues that would show her as less than forthcoming. She could also avoid other witnesses' testimony that could lead a jury to conclude Ms. Kuk was embellishing her testimony describing her pain and suffering.

The Court should not allow such a "have your cake and eat it too" strategy.[6] *See Grow v. Ruggles,* 860 P.2d 1225, 1227 n.1 (1993)(addressing the desirability of requiring the original jury to determine the damages issues at the time of the trial, not on a new trial). If a new trial is ordered, the new trial must be on all matters of liability and damages, and not merely damages alone, in order to prevent a miscarriage of justice.

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[6] A finding of waiver under the circumstances of this case provides a clear-cut prophylactic rule that would avoid this type of case-by-case analysis.

IV. EVIDENTIARY ISSUES

The trial court erroneously entered a discovery sanction against UPS based upon spoliation with no consideration of whether spoliation had in fact occurred. The trial court instead merged the issue of a lost driver training file with the issue of a late production of certain documents that had little, if any, bearing on the trial.

Two different items were under consideration on the eve of trial:

> (1) The quarantined e-mail information, which when it was found was produced. Those documents turned out to be innocuous. They had nothing to do with training. RP 41-42.
>
> (2) The training documents supposedly provided the reason for sanctions, on which the court entered its order. CP 153-155. Those documents never have existed to the knowledge of UPS since the institution of the litigation. RP 42.

See Appellant's Brief at 36.

Ms. Kuk admits in her respondent's brief that it was the missing driver training file that caused the trial court to enter the sanction against UPS. Respondent's brief at 42. She fails to establish to this Court that spoliation occurred to justify the trial court's sanction.

Ms. Kuk claims that the missing driver training file was "extremely" important to her case and that the sanction entered by the trial court was appropriate for spoliation of evidence.

Respondent's Brief at 42-44. Yet Ms. Kuk cannot provide this Court with any evidentiary finding that UPS's loss of the driver training file was intentional, willful or improperly motivated, as required by Washington law.

Ms. Kuk did not make the required showing of culpability or fault of UPS concerning the driver training file. During the discovery phase of the litigation, UPS responded to Ms. Kuk's request for driver training materials by stating that UPS "conducted a diligent search of its files and cannot locate documents responsive to this request." CP 838; *see also,* RP 11-12. UPS further offered to make its risk management supervisor available for a deposition concerning the diligent search he undertook to locate the materials. CP 838.

Ms. Kuk ignored the offer and made no further inquiry of the matter. Presumably, Ms. Kuk was content with the documents she did receive from UPS, namely, the UPS accident report of the accident in question, the auto accident investigation summary from UPS, the UPS record of safety ride with the driver following the accident, and UPS's correspondence with the driver following the accident. CP 838.

Ms. Kuk remained silent on the issue of the driver training materials for seven more months, until the eve of trial. When motions in limine were filed, Ms. Kuk filed her companion motions for discovery sanctions. CP 539-551, 652-662.

During this entire time Ms. Kuk made no effort to substantiate a basis for her late-stage claim of spoliation. Instead, she relied solely on the absence of the driver training file as the basis for seeking sanctions.

UPS's actions concerning the driver training file were innocent and devoid of bad faith. UPS informed Ms. Kuk and the trial court that it had performed a diligent in-house search for the materials and had also searched its document repository, Iron Mountain, Inc. CP 504-505. UPS also offered Ms. Kuk the deposition of its risk management supervisor, who had personally searched for the materials and would testify regarding his efforts to locate the driving training file. Ms. Kuk ignored UPS's response to discovery and its offer of a deposition, and instead chose to wait until the eve of trial when the opportunity for discovery into UPS's conduct was closed.

The trial court, faced with Ms. Kuk's eleventh-hour motion for sanctions, was presented with no evidence of any culpability or fault by UPS concerning the driver training file. Therefore, the trial court's imposition of discovery sanctions was erroneous under *Henderson v Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996).

If the court finds that a new trial is warranted, the new trial should involve all relevant and admissible evidence. This Court should allow Mr. Smith to testify, as any other percipient witness could, about his observations of the speed of the plaintiff. The

Court should exclude the prejudicial "letter of discipline" for the reasons stated in the opening brief.

If the court does not adopt a bright line waiver rule, it should correct the discovery sanction rulings and corresponding establishment/preclusive evidentiary rulings by the trial court. The existence of these additional errors provides another reason why retrial of the entire case is called for.

V. CONCLUSION

The Court should reverse the trial court's order granting a partial new trial and remand with instructions that the trial court enter judgment in favor of Ms. Kuk on the jury verdict. The Court find a waiver where the jury returned a no general damages verdict under the circumstances of this case where the parties agreed Ms. Kuk had experienced pain and suffering and was entitled to the medical special damages related to her injuries.

If this Court does not find wavier, the Court should reverse and remand for a full new trial on liability and damages and vacate the trial court's sanction orders to allow Jason Smith to testify as to his perception of the speed of the vehicle and to exclude evidence of the "letter of reprimand."

Respectfully submitted, this 13th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing

1. Appellants Reply Brief;

to be served on the following parties in the manner indicated below on the 13th of February, 2013:

Counsel for Plaintiffs Kathleen Kuk and David Kuk:
Crystal Grace Rutherford, Esq
Law Office of Crystal Grace Rutherford
2217 NW Market Street, Suite 26
Seattle, WA 98107

X **Via Messenger**
___ **Via Facsimile –**
___ **Via U.S. Mail, postage prepaid**

DATED this 13th day of February, 2013.

By _____
Joan L. Kattenhorn, Legal Assistant

APPENDIX

RULE CR 49
VERDICTS

(-) General Verdict. A general verdict is that by which the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or defendant.

(a) Special Verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his rights to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(c) Discharge of Jury.

(1) Without Verdict. (Reserved. See RCW 4.44.330.)

(2) Effect of Discharge. (Reserved. See RCW 4.44.340.)

(d) Court Recess During Deliberation. (Reserved. See RCW 4.44.350.)

(e) Proceedings When Jurors Have Agreed. (Reserved. See RCW 4.44.360.)

(f) Manner of Giving Verdict. (Reserved. See RCW 4.44.370.)

(g) Ten Jurors in Civil Cases. (Reserved. See RCW 4.44.380.)

(h) Jury May Be Polled. (Reserved. See RCW 4.44.390.)

(i) Correction of Informal Verdict. (Reserved. See RCW 4.44.400.)

(j) Jury To Assess Amount of Recovery. (Reserved. See RCW 4.44.450.)

(k) Receiving Verdict and Discharging Jury. (Reserved. See RCW 4.44.460.)

(l) Any Juror Verdict. When a jury decides a verdict, any juror may vote on any of the questions posed. It is not necessary that the same ten jurors agree on every answer, as long as each answer is agreed to by any ten or more jurors.

[Adopted July 1, 1967; amended effective September 1, 2001.]]