

70609-8

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

JAMES ENGLE, an individual,

Plaintiff/Respondent,

v.

JAY DEE MILLER and his separate property only,

Defendant/Appellant.

*On Appeal from Snohomish County Superior Court
Cause No. 10-2-06300-3
The Honorable Joseph Wilson, Trial Judge*

BRIEF OF PLAINTIFF/RESPONDENT

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TABLE OF CONTENTS

I. ISSUES..... 1

II. ARGUMENT..... 1

 A. The Standard of Review 1

 B. The Trial Court’s Award of \$145,000 is Fair and Reasonable 3

III. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

<i>224 Westlake, LLC v. Engstrom Properties, LLC</i> , 169 Wn.App. 700, 281 P.3d 693 (2012).....	2
<i>Bingaman v. Grays Harbor Community Hospital</i> , 103 Wn.2d 831, 699 P.2d 1230 (1985).....	2,3
<i>Bunch v. King County</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	3,4
<i>Harmony v. Madison</i> , 143 Wn.App. 345, 177 P.3d 755 (2009).....	1
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	2

Statutes

RCW 4.76.030	3
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I. ISSUES

Appellant's opening brief essentially raises two issues. First, what is the appropriate level of deference an appellate court should afford to the trial court when deciding remittitur issues? Secondly, whether the Court of Appeals should reduce the trial court's award of noneconomic damages because it thinks the award unsupported by evidence, the result of passion and prejudice, and shocking to its conscience.

II. ARGUMENT

THE AWARD OF NON-ECONOMIC DAMAGES DOES NOT APPEAR TO BE THE RESULT OF PASSION OR PREJUDICE, IS NOT SO FLAGRANTLY OUTRAGEOUS AS TO SHOCK THE CONSCIENCE, NOR IS IT OUTSIDE THE REALM OF SUBSTANTIAL EVIDENCE ON THE RECORD.

A. The Standard of Review

Washington law is clear in articulating that abuse of discretion is the appropriate standard of review when contemplating appellate remittiturs of an award of damages. This standard remains the same whether the fact finder that awarded the damages took the form of a jury or, as in the case before this Court, the form of a trial court judge presiding over a bench trial.

“Whether the amount of a damage award is reasonable is a question of fact, which we review for abuse of discretion.” *Harmony v. Madison*, 143 Wn.App. 345, 358, 177 P.3d 755 (2009).

The Washington Supreme Court defined this standard and set forth the clear rule for appellate remittiturs in *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 699 P.2d 1230 (1985):

An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.

Bingaman, id., at 835.

Moreover, the Court has extended this standard of review to cases in which the trial court judge sits as the fact finder rather than a jury.

An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, shocks the conscience, or appears to have been arrived at as the result of passion of prejudice. (Emphasis added.)

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn.App. 700, 729, 281 P.3d 693 (2012), citing, *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142 (1990).

Despite clear case law articulating an abuse of discretion standard of review, appellant contends that review of the trial judge's valuation of general damages should be *de novo*. However, case law is clear that the statutory standard of review (*de novo*) applies only when a trial court actually remits an award. A trial court order remitting a jury's award of damages is reviewed *de novo* as it substitutes the court's finding on a question of fact. When a trial court remits an award it invades the constitutional province of the jury, making the less deferential standard of

review appropriate. RCW 4.76.030; *Bunch v. King County*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005). Since there was no remittitur by the trial court, *de novo* review is not appropriate in this case.

The issue thus becomes whether the size of the award for general damages is outside the range of substantial evidence in the record, shocks the conscience of the court, or was the result of passion or prejudice. Stated another way, were the damages flagrantly outrageous and extravagant? *Bingaman, id.*, at 837.

B. The trial court’s award of \$145,000 in general damages is fair and reasonable.

Appellant attempts to oversimplify this case by relying solely on a multiplication of the medical expenses to illustrate an abuse of discretion by the trial court judge. Tellingly, this position is not supported by law. However, settled case law is clear in that “...a verdict does not carry its own death warrant solely by reason of its size.” *Bunch, id.*, at 183.

Instead, Washington case law illustrates that the proper approach is to analyze the facts of the case under the “abuse of discretion” standard, clarified by the three-pronged test as set forth in *Bingaman. Bingaman, id.*, at 836.

First, giving proper deference to the trial court judge as the fact finder in this case, the award for non-economic damages was within the

range of substantial evidence presented in the trial. Large medical bills are not necessary to substantiate evidence of anguish and distress. Such evidence can be provided by the plaintiff's own testimony. *Bunch, id.*, at 181. It is up to the jury, or in the case at bar the trial court judge, to weigh the credibility of the witness and determine the amount of mental anguish and distressed involved.

In the case before this Court, the trial court was satisfied by a preponderance of evidence and by witness testimony that the plaintiff/respondent was damaged by the shooting. The court was satisfied that the plaintiff/respondent suffers from migraines, experiences "white flashes," has a heightened level of distrust and nervousness, has generally withdrawn from daily activities, and has suffered the physical damages related to the scarring. CP 39. These conclusions were drawn not only from medical records, but from witness testimony taken in front of the fact finder. The trial court judge, acting as the fact-finder, was in the position to hear the testimony, assess credibility, and assign weight to the testimony. Therefore, it is clear that the award was based on and within a range of substantial evidence presented at the trial.

Second, it is the respondent's position that the award is not so flagrantly outrageous and extravagant as to shock the conscience of the court. The honorable trial judge based the general damage award upon his

“experience in these cases and review of other similar cases....” CP 39. As the trial judge is experienced in presiding over civil tort cases and routinely sees such cases, there is no reason to believe that the award of \$145,000 is flagrantly outrageous and extravagant.

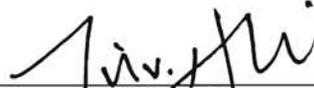
Lastly, there is no evidence in the record to suggest that the general damages award was a result of passion or prejudice. Again, the trial court judge routinely presides over civil tort cases and is experienced in hearing a variety of cases involving negligent acts and intentional torts and the harm that results from those acts. Nothing in the record gives any indication that the award was influenced by passion or prejudice.

As explained above, the size of the verdict is within a wide range of evidence presented at trial, is not so flagrantly outrageous as to shock the conscience, and was not made under the grip of passion or prejudice. In sum, the appellant has failed to meet the very high burden of showing that the trial court judge abused his discretion when acting as the fact finder.

III. CONCLUSION

For each of the reasons stated herein, the appellant’s request that the general damages award be reversed should be denied, and the Court should dismiss this appeal.

RESPECTFULLY SUBMITTED this 28th day of March, 2014.



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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2014, I caused a true and correct copy of this document to be served on counsel of record via first class mail.

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Dated this 28 day of March, 2014.


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