

63958-7

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NO. 63958-7-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RICHARD HUNT,

Appellant,

v.

DANILO SIJERA; COMCAST OF WASHINGTON IV, INC.; and
AMY THAYER,

Respondents.

BRIEF OF APPELLANT

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- Black's Law Dictionary,
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- Edson R. Sunderland,
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A. INTRODUCTION

The Court must first recognize that, where liability is established, a plaintiff suffering personal injury is entitled to both general and special damages. This premise is necessary to support the right of a plaintiff to challenge the sufficiency of a general verdict which consists of only special damages.¹

A second threshold consideration is the standard of appellate review that applies to an order denying a new trial when a plaintiff challenges the verdict based on *insufficient evidence*, as opposed to a generalized claim of “passion or prejudice” or “lack of substantial justice.” See, CR 59 (a) (5), (7), (9).

Once the above preliminary issues are resolved, the Court must identify the circumstances under which special damages are deemed “established” so that a verdict may be said to include only such damages, and indicate the consequences that flow from such a determination.

The following arguments explore the state of the law with respect to each of these issues, and further addresses whether, when there is a colorable dispute concerning special damages, a plaintiff who unsuccessfully proposed

¹ The phrase “general verdict”, as used in this brief, includes not only the classic general verdict indicating simply the ultimate determinations on liability and damages, but also any special verdict form that does not differentiate between special and general damages. See e.g., WPI 45.02.

use of a special verdict form segregating special and general damages should receive any procedural benefit.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the plaintiff an award for general damages.
2. The trial court erred in entering the Order of July 1, 2009, denying the plaintiff motion for a new trial.
3. The trial court erred in denying the plaintiff an award for the costs of massage therapy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Does a jury verdict equal to or less than the amount of established special damages demonstrate on its face the jury failed to award any general damages, thus entitling plaintiff to a new trial? (Assignment of Error 2.)

In the context of a challenge to such a verdict, what significance should attach to the fact that the plaintiff unsuccessfully proposed a special verdict form segregating special and general damages? (Assignment of Error 1.)

Did the trial court properly deny of admission of massage therapy costs into evidence when there was sufficient testimony from witnesses to their necessity, hence not putting those damages before the jury? (Assignment of Error 3.)

D. STATEMENT OF THE CASE

This case arises out of two automobile accidents, the first occurred on February 6, 2007 and the second occurred on April 12, 2007. On February 6, 2007, Plaintiff was lawfully operating his vehicle, making a right-hand turn onto NE 45th Street, when defendant Danilo Sijera, driving his employer's van (defendant Comcast), went against the right-hand only lane he was in and proceeded to drive straight into the Plaintiff's vehicle (RP 12-25, 121; RP 1-3, 122). On April 12, 2007, two months later, Defendant Amy Thayer rear-ended the Plaintiff when stopped at a red light. CP1 (Complaint for Damages). The Plaintiff suffered neck and back pain, low back pain, headache, and right shoulder pain as a result of the first collision (RP 3-4, 134; RP 24-25, 134; RP 1-8, 135) and then his condition was aggravated by the second collision (RP 10-12, 3; RP 11-19, 144; RP 12-17, 175).

As a result of suffering injury in the above accidents, Appellant-Plaintiff Richard Hunt brought this action for personal injury against Respondents. CP1 (Complaint for Damages). At trial the Defendants from both the February 2007 collision ("Sijera/Comcast") and Defendant from the April 2007 collision ("Thayer") conceded liability (RP 22-23, 57; RP 21-22, 58), but disputed the nature and extent of injuries to Plaintiff (RP 8-17, 3; RP 16-20, 9; RP 18-19, 10; RP 11-16, 19; RP).

The jury returned a verdict for the Plaintiff on June 12, 2009, for chiropractic expenses only, in the amount of \$6,990. The jury denied the expenses for massage therapy in the amount of \$3,610. The jury also did not award any general damages. CP91 (Verdict).

The Plaintiff then moved for a new trial or alternatively an additur based on the inadequacy of the verdict. CP98 (Plaintiff's Motion for New Trial or Additur). The trial court denied the motion and entered judgment on the verdict. CP108 (Order Denying Plaintiff's Motion).

E. SUMMARY OF ARGUMENT

Where a jury finds liability and awards a plaintiff special damages for personal injury, plaintiff is entitled to recover general damages for the same injury. A jury verdict that fails to provide general damages in such circumstances is not supported by sufficient evidence and is contrary to the jury's obligation to provide full and fair compensation. As a matter of law, the verdict is unsupported by the evidence, and under CR 59 (a) (7), the court must order a new trial.

It is clear that a jury fails to award general damages when its undifferentiated verdict is equal to or less than the amount of established special damages. Special damages are "established" when they are undisputed, conceded, or proven beyond legitimate controversy. Mere argument by defense counsel is insufficient to introduce legitimate

controversy. In this narrow circumstance, the usual presumption the jury fulfilled its obligation and that the verdict represents the total amount of plaintiff's damages does not apply; the verdict will be deemed to consist of only special damages.

Even when there is a colorable dispute between the parties whether special damages are “established” so as to require a new trial, the Court should recognize a corollary to the rule above and resolve the issue in favor of a plaintiff who unsuccessfully proposed use of a special verdict form segregating special and general damages. This approach is supported by considerations of fairness and judicial economy — fairness to a litigant who anticipates a potential problem and provides a means to avoid it, and judicial economy in recognizing a legitimate way to diminish the need for appellate review.

F. ARGUMENT

I. Once Liability is Established, A Plaintiff Suffering Personal Injury is Entitled to Recover General Damages as a Matter of Law.

General damages compensate an injured person for the intangible aspects of an injury—pain and suffering, loss of enjoyment of life, disability and disfigurement. These components of injury are as real as medical bills incurred for treatment, or wages lost as a result of the injury. See, Daigle v. Rudebeck, 154 Wash. 536, 539, 282 Pac. 827 (1929) (noting pain and

suffering and loss of enjoyment of normal life activities “constituted a real substantial damage for which [plaintiff] was entitled to compensation”). General damages are commonly regarded as damages “the law itself implies or presumes to have accrued from the wrong complained of . . . such as necessarily result from the injury.” Black’s Law Dictionary, 391 (6th ed. 1991). For this reason, this Court has long recognized that, where a jury finds plaintiff suffered personal injury due to defendant’s negligence and awards special damages, general damages for the same injury must also be awarded. See, Dyal v. Fire Companies Etc., Inc., 23 Wn.2d 515, 521-22, 161 P.2d 321 (1945) (holding full compensation includes general as well as special damages); Ide v. Stoltenow, 47 Wn.2d 847, 850, 289 P.2d 1007 (1955) (noting with respect to general damages, “there remain certain things which cannot be brushed aside or disregarded”).

This rule is based on common sense. If an injury is severe enough to warrant medical treatment as special damages, then plaintiff suffered at least some compensable pain and suffering, loss of life's enjoyment, or disability. See, Ide, at 850 (in light of injuries, “some shock and emotional upset were clearly established”); Shaw v. Browning, 59 Wn.2d 133, 135, 367 P.2d 17 (1961) (noting plaintiff suffered physical injuries making it “indisputable that she sustained pain and suffering”); Hills v. King, 66 Wn.2d 738, 741, 404 P.2d 997 (1965) (affirming new trial where jury gave no damages for

pain, suffering, or disability resulting from injury); see also, Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 177, 422 P.2d 515 (1967) (commenting that plaintiff's injuries in Shaw presented "clear and undeniable proof of general damages"); Kasparian v. Old Nat'l Bank, 6 Wn. App. 514, 518, 494 P.2d 505 (1972) (holding verdict "inadequate per se" where no allowance made for pain and suffering); but see, McUne v. Fuqua, 45 Wn.2d 650, 653, 227 P.2d 324 (1954) (finding jury could award no general damages for head injury requiring five sutures, where evidence was in conflict whether this injury was "inconsequential").²

More fundamentally, the rule rests on the significant interest a plaintiff has in receiving compensation for injuries caused by a defendant's negligence. See, Hunter v. North Mason Sch. Dist., 85 Wn.2d 810, 814, 539 P.2d 845 (1975) (recognizing the right to be indemnified for personal injuries is a "substantial property right"). This includes all elements of damage, both general and special, supported by the evidence. Daigle, 154 Wash. at 540-41; Dyal, 23 Wn.2d at 521-22; see also, Swanson v. Sewall, 183 Wash. 462, 465-66, 48 P.2d 939 (1935). The court instructs the jury to the effect that it must "reasonably and fairly compensate the plaintiff for the

² This aspect of the McUne decision is inconsistent with the other authorities referenced in the main text and has been questioned as *dicta*. See, Ide, 47 Wn.2d at 851 (portion of McUne stating that scalp laceration could be found inconsequential "was not necessary to a decision of the case", since plaintiff had waived any claim for damages for this injury). Characterization of general damages as "inconsequential" would appear inconsistent with the very nature of such damages, as identified in the Ide line of cases.

total amount of damages.” See e.g., WPI 30.02. Where the jury fails to provide general damages for established injuries, “it is apparent that the jury erroneously disregarded the law and failed to follow the court’s instruction.” Daigle, at 541; cf., James v. Robeck, 79 Wn.2d 864, 868-70, 490 P.2d 878 (1971) (discussing “constitutional bounds” of jury as trier of fact to assess damages in accordance with instructions and the evidence).

Proof of physical injury entitling plaintiff to special damages for medical care *necessarily* amounts to proof of at least some pain and suffering. Ide, 47 Wn.2d at 850; Shaw, 59 Wn.2d at 135; Daigle, 154 Wash. at 538-39; see also, Cleva v. Jackson, 74 Wn.2d 462, 465-66, 445 P.2d 322 (1968).

In Wooldridge v. Woolett, 96 Wn.2d 659, 638 P.2d 566 (1981), the Court affirmed a trial court decision denying a new trial on the ground that the jury verdict awarding no damages for lost future earnings was supported by the evidence, since plaintiff had a “spotty” work history and no record of savings. 96 Wn.2d at 668-69. Wooldridge was a survival action under RCW 4.20.046, and the Court’s principal holding was that the statute did not allow damages for decedent’s lost enjoyment of life. Id., at 666-67. Consequently, the only “general” damages at issue involved lost future

earning capacity. Id., at 667.³ Given substantial evidence that the decedent would not have accumulated any future earnings, plaintiff failed to prove these “general” damages. Id. Significantly, Wooldridge did not concern the type of general damages that necessarily accompany a physical injury, such as pain and suffering, since these are not compensable in a survival action. See, id.

Sebers v. Curry, 73 Wn.2d 358, 438 P.2d 616 (1968), is similarly inapposite. In the context of a statutory wrongful death action, the Court affirmed denial of a new trial because the evidence supported the jury’s apparent conclusion that the decedent child’s services would not exceed the cost of his maintenance and support. Sebers, 73 Wn.2d at 359-60. The court’s instructions, not objected to by plaintiff, limited future damages to loss of services, for which there was a “paucity of testimony”; there was no claim for general damages. Id., at 359.

Nor do Lipshay v. Barr, 54 Wn.2d 257, 339 P.2d 471 (1959) and Cowan v. Jensen, 79 Wn.2d 844, 490 P.2d 436 (1971) suggest a jury is free to disregard general damages where it finds plaintiff suffered related special damages due to personal injury. In both these cases, there was significant dispute as to the amount of special damages, allowing the jury to find a

³ The Court in Wooldridge characterizes lost future earning capacity as a form of “general” damages, without attaching particular significance to this label. 96 Wn.2d at 668-69 Since such damages are economic in nature, WSTLA questions this description.

significant portion of such damages unwarranted. Lipshay, 54 Wn.2d at 259; Cowan, 79 Wn.2d at 846-47. As a result, the Court could surmise in Lipshay that “the verdict reflects an award of general as well as special damages . . .” Lipshay, at 259; see also, Cox, 70 Wn.2d at 177 (reversing order granting new trial since evidence did not provide “clear-cut picture” that no general damages had been awarded); Singleton v. Jimmerson, 12 Wn. App. 203, 205, 529 P.2d 17 (1974) (noting disputed evidence of damages and distinguishing cases involving established special damages); Bliss v. Coleman, 11 Wn. App. 226, 522 P.2d 509 (1974) (noting disputed evidence of causation as to plaintiff husband’s injuries and lack of medical testimony linking plaintiff wife’s injuries to the accident); Smithline v. Chase, 1 Wn. App. 589, 591, 463 P.2d 177 (1969) (concluding evidentiary dispute would have allowed jury to find plaintiff “sustained no compensable physical injury”).

The implicit premise throughout these cases is that general damages would have been required had the jury found compensable physical injury. Lipshay, 54 Wn.2d at 258 (“[h]ad the evidence of special damages been uncontroverted, the argument of the plaintiffs would be highly persuasive”); accord, Cox, at 177; Singleton, at 205; Smithline, at 591. This is consistent with Washington State Supreme Court’s holdings expressly addressing the issue. See, Ide, 47 Wn.2d at 850-51; Shaw, 59 Wn.2d at 135. There is no

suggestion in the “failure of proof” cases that general damages may be granted or withheld at the whim of a court or jury. Where a jury finds physical injury and awards special damages, the very evidence it presumably accepted in recognizing the injury necessarily requires it to award related general damages. When this does not occur, the verdict is irreconcilable with the evidence and contrary to law. See, CR 59 (a) (7).

In light of this principle, the question of practical significance is how the court determines whether or not the jury failed to award general damages to which a plaintiff is entitled by law.

II. A Jury Verdict in the Amount of Established Special Damages Reveals the Jury Failed to Award Any General Damages.

A motion for new trial necessarily requires the court to examine the jury verdict, albeit with restraint. As a general principle the determination of damages is within the province of the jury, and courts are appropriately reluctant to interfere with the conclusions of the jury when fairly reached. Bingaman v. Grays Harbor Comm. Hosp., 103 Wn.2d 831, 835-37, 699 P.2d 1230 (1985); Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 329, 858 P.2d 1054 (1993). This principle reflects the constitutional right to trial by jury, and the statutory presumption that a jury verdict following a fair trial is adequate. Wash. Const., Art. 1 § 21; RCW 4.76.030.

Notwithstanding the deference accorded a jury's conclusions, under CR 59 a jury verdict will be vacated and a new trial ordered where it is clear the substantial rights of a party have been prejudiced. Granting a new trial in such situations reinforces rather than undermines the integrity of jury verdicts. It serves as an appropriate check on the power of the jury, assuring it remains within its "constitutional bounds", dispassionately deciding the facts and rendering a decision that comports with the applicable law and the evidence. James, 79 Wn.2d at 868; see, CR 59.

(i) Overview of CR 59 and Standards of Review.

CR 59 allows a party to challenge a verdict on a number of grounds, including several involving a challenge to a jury's damage award. First, a new trial will be granted if the verdict is so inadequate or excessive as to unmistakably indicate the jury was moved by "passion or prejudice." CR 59 (a) (5). Additionally, the court will vacate a jury verdict that is unsupported by the evidence or contrary to law. CR 59 (a) (7). Finally, there remains the general oversight of the court to direct a new trial where "substantial justice has not been done." CR 59 (a) (9). As an alternative to ordering a new trial under CR 59 (a) (5), the court may grant an additur or remittitur. RCW 4.76.030.

CR 59 does not prioritize or otherwise reconcile the various provisions under which a new trial may be sought with respect to a jury's

award of damages. It would appear, however, that a natural sequence is suggested according to the *degree of specificity* of the argument advanced for granting a new trial. The most general argument is that there was a failure of “substantial justice.” CR 59 (a) (9). Since this is a broad-based notion, involving an overall assessment of the fairness of the trial, aspects of which may not appear on the record, great deference is given to the trial court’s assessment of the issue. See, generally, Philip A. Trautman, *New Trials for Failure of Substantial Justice*, 37 Wash. L.Rev. 367 (1962). A closely related ground for seeking a new trial is the “passion or prejudice” basis specified in CR 59 (a) (5), concerning the size of the verdict itself. See, *Bingaman*, 103 Wn.2d at 835-37; see also, *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 268-69, 840 P.2d 860 (1992). This Court has observed that CR 59 (a) (5) and (9) present essentially the same inquiry where a challenge to the adequacy of the verdict is at issue. *James*, 79 Wn.2d at 869. Under both sections, a number of factors within and outside the record may be relevant in assessing entitlement to a new trial, and there is an understandable deference to the trial judge’s assessment of these factors. See, *Bingaman*, at 835; *Washburn*, at 269; *Fisons*, 122 Wn.2d at 330.

A different situation exists when a motion for new trial is based on grounds that there is insufficient evidence to support the verdict and it is contrary to law. CR 59 (a) (7). The question in such circumstances is very

specific – upon review of the record, is the verdict irreconcilable with the evidence or applicable legal principles? See, Ide, 47 Wn.2d at 848; McUne, 45 Wn.2d at 652. The deference accorded the trial judge’s decision with respect to questions of passion and prejudice or substantial justice does *not* come into play, and the appellate court will “look to the record to determine whether *in [its] opinion* there was sufficient evidence to support the verdict of the jury.” McUne, at 652 (emphasis added); accord, Ide, at 848. If there was, then the trial court abused its discretion in granting a new trial. Id. Conversely, if the verdict is not supported by sufficient evidence, then an order denying a new trial must be reversed.

When a plaintiff challenges a verdict on the basis that the jury failed to award general damages to which plaintiff is entitled, the argument is most precisely “directed to whether there was sufficient evidence to sustain the verdict of the jury.” Ide, at 848; accord, McUne, at 652. The court does not reach the more general claims of “passion and prejudice” or “substantial justice” unless it first finds the verdict was supported by sufficient evidence. McUne, at 652. A review of the cases in this area reflects that this principle is consistently followed, even if the sequential analysis of the issues under CR 59 is not always clearly articulated. See e.g., Fisons, 122 Wn.2d at 330-33 (finding verdict not outside range of substantial evidence before addressing question whether size of award shocked court’s conscience or

indicated passion or prejudice); see also, James, at 868-70 (and cases cited therein); Himango v. Prime Time, 37 Wn. App. 259, 267, 680 P.2d 432, *review denied*, 102 Wn.2d 1004 (1984) (noting “first step” in reviewing trial court order on new trial is to determine if substantial evidence supports damages award).

(ii) A Verdict Equal to or Less Than the Amount of Established Special Damages Is Deemed Not to Include General Damages.

Generally, the Court will not dissect a jury verdict to identify its internal parts. See, McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) (“[w]e cannot now dissect the jury’s general verdict, nor can we disregard it”). This does not mean the verdict is impenetrable, however. When the verdict on its face reflects an award equal to or less than the amount of established special damages, it can be deemed to include only such damages, with no allowance for general damages to which plaintiff is entitled by law. See, Daigle, 154 Wash. at 538 (new trial granted where verdict of \$1018.10 was “almost the exact amount which the jury was instructed might be allowed as special damages, a little less in fact”); Ide, 47 Wn.2d at 849 (accepting lowest possible figures for special damages, verdict of \$1246.24 left only \$120 for general damages and was clearly inadequate); Shaw, 59 Wn.2d at 134-35 (\$813.43 verdict was in exact amount of medical bills enumerated in court’s instruction plus conceded damage to plaintiff’s

car, necessitating new trial). In such cases, the close resemblance between the verdict and plaintiff's special damages is itself sufficient to provoke inquiry whether the verdict contains only these damages. See, Ide, at 850-51.

The nature of this inquiry involves an assessment of the evidence in the record regarding damages, since "the trial court and this court are entitled to accept as established those items of damage which are conceded, undisputed, and beyond legitimate controversy." Id., at 851. Damages have been deemed "established" in this context when the *amount* of particular losses is not in dispute, Shaw, 59 Wn.2d at 135 (hospital bills enumerated in court's instructions and cost of car repair conceded), or the medical testimony is uncontroverted that the medical treatment incurred by plaintiff was reasonable and necessary, Hills, 66 Wn.2d at 741. It is also significant to the Court's analysis whether there is an issue of medical causation or pre-existing injury. Shaw, 59 Wn.2d at 135; see also, Cleva, 74 Wn.2d at 465 (noting "the causes of [plaintiff's] disabilities were not obscured"); compare, Cox, 70 Wn.2d at 178 (substantial evidence of pre-existing conditions); Bliss, 11 Wn. App. at 228 (jury could find cause of injuries not attributable to accident).

The court's prerogative to deem evidence of special damages "established" extends beyond a party's capacity or willingness to concede or

stipulate to these matters. See, Ide, at 851; Shaw, at 135; Hills, at 741-42. This point is clear from Hills, in which the defendant's strategy was to simply question the special damages claimed by the plaintiff. 66 Wn.2d at 739 (“[i]t was the defendant's position that the plaintiff was not seriously injured and, except for her imagination, there would have been little or no need for most of these special damages incurred.”) Nonetheless, this Court concluded that the medical testimony as to the reasonableness and necessity of the bills was “uncontroverted”, leaving “no legitimate controversy respecting the amount of special damages.” 66 Wn.2d at 741.⁴ App. at 153.

In Cowan, this Court upheld an order denying a new trial on the ground that the evidence of special damages (medical bills, property damage, and lost earnings) was not beyond the range of controversy. See, 79 Wn.2d at 846-47. While the medical bills of \$290.50 were admitted without objection, the only evidence regarding both property damage to the plaintiff's vehicle and lost earnings was specifically tied to the reliability and credibility of plaintiff's uncorroborated opinions on these matters. Id. This Court recognized that the jury was not bound by plaintiff's valuations and estimates of these items, and could assess the weight to be given to his testimony. Id., at 847. The jury verdict of \$750 was otherwise sufficient to

⁴ The court below similarly identifies the medical testimony as to the reasonableness and necessity of Palmers' medical bills as “uncontroverted.” Palmer, 81 Wn. App. at 150.

cover the uncontested medical bills with a reasonable allowance for general damages, and therefore could not be deemed to include only established special damages. Id. It was not determinative in the Court's analysis that there was no concession or stipulation as to the damages. Cowan should not be read as inconsistent with the Ide line of cases.

Moreover, were a defendant able to put an issue in legitimate "dispute" simply by refusing to make a concession or enter a stipulation, then it would never be possible to determine a minimum amount of damages supported by the evidence. No meaningful review of whether a jury exceeded its constitutional bounds could exist. As the Court noted in Ide:

We recognize that it can be said that the jury could have disbelieved all of the plaintiffs' experts and also disbelieved or disagreed with the conclusion of the defendants' expert whose testimony we have quoted. The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.

47 Wn.2d at 851. The situation would be even more difficult if mere argument by defense counsel questioning the existence of special damages could suffice to bring the matter into legitimate controversy, particularly in the face of undisputed evidence as to the amount and reasonableness of such damages.

This is not to say that the jury is bound by every piece of testimony which is not directly disputed. It may discount interested testimony, draw inferences from the surrounding circumstances, and otherwise consider the totality of the evidence. Nearhoff v. Rucker, 156 Wash. 621, 626, 287 Pac. 658 (1930).

Moreover, assessment of the weight and credibility of the evidence remains within the jury's province. Washburn, 120 Wn.2d at 269. Nonetheless, it is the court's function to review the evidentiary record and, where items of damages are established beyond legitimate controversy, to read the verdict as necessarily including these. When this is done, the court is able to conclude, from the face of the verdict, that an award of damages equal to or less than the amount of established special damages does not contain any general damages. Under the principles discussed above, such an award is irreconcilable with the evidence and thus contrary to law. Ide, at 851. The plaintiff in such circumstances is entitled to a new trial.

III. Even When a Marginal Dispute Exists Whether Special Damages are "Established" in Deciding if an Undifferentiated Verdict Contains General Damages, A Plaintiff Who Unsuccessfully Proposes a Special Verdict Form Segregating Damages Should Be Entitled to a New Trial.

Under the rule discussed above, the Court will read a jury verdict in the amount of established special damages as not including general damages, and grant a new trial on this basis. This rule places no particular significance

on whether the party seeking a new trial proposed a verdict form segregating special and general damages. See, Hills, 66 Wn.2d at 742 (Ott J., dissenting; criticizing majority interpretation of general verdict as “pure conjecture” since “there was no request for special interrogatories to be answered by the jury”). Nor is a party entitled to use of a special verdict form, since the decision whether or not to submit special interrogatories to the jury rests in the sound discretion of the trial court. Hawley v. Mellem, 66 Wn.2d 765, 405 P.2d 243 (1965); see, CR 49.⁵

Undeniably, use of a special verdict form segregating special and general damages would avoid the problem that arises in cases such as this, by allowing the Court to identify conclusively whether the verdict omits an element of damages to which plaintiff is entitled. For this reason, a plaintiff who proposes such a form should be afforded some benefit for taking this action. A legitimate means of providing a procedural benefit is to recognize a corollary to the rule above that would resolve any doubt in such a plaintiff’s favor when there is a colorable, but marginal, dispute whether special damages are in fact “established.” In practical terms, this means that, based on the record, if it is a close call whether the amount of special

⁵ The court of appeals decision in Honegger v. Yoke’s, 83 Wn. App. 293, 297-99, 921 P.2d 1080 (1996), may be read to suggest that the failure to propose use of a special verdict form constitutes “invited error” in some contexts. However, in this particular circumstance involving segregation of general and special damages, the Court has not imposed such a requirement, but has reviewed the sufficiency of general verdicts on the merits. See e.g., Hills, 66 Wn.2d at 741-42.

damages is “uncontroverted” or “established beyond legitimate dispute”, and the verdict is equal to or less than those damages, the verdict should be deemed not to include general damages, and a new trial should be granted.

The chief justification for taking this approach is fairness to a litigant who attempts to avoid an anticipated post-trial problem by timely proposing a workable solution. A basic injustice occurs when at trial a plaintiff is denied use of a verdict form segregating special and general damages, and then on post-trial review is denied relief because the court cannot discern from the general verdict whether it consists of both categories of damages.

According a procedural benefit to a plaintiff who proposes a special verdict form in circumstances such as this may serve to encourage use of special verdicts. The advantages of special verdicts have long been celebrated by judges and scholars. See, Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54 (2d Cir. 1948) (extended *dicta* by Judge Jerome Frank exploring the history of special verdicts and advocating their use); see also, Samuel M. Driver, A Consideration of the More Extended Use of the Special Verdict, 25 Wash. L.Rev. 43 (1950) (praising the special verdict as “much to be preferred to the crude, unfair, and childishly unrealistic general verdict.”); see generally, Edson R. Sunderland, Verdicts General and Special, 29 Yale L.J. 253 (1920). Advocates note that requiring the jury to answer specific questions provides a hedge against the possibility that the jury will

completely disregard the court's instructions. See, Skidmore, 167 F.2d at 57-59. It may also simplify the deliberation process by allowing the jury to focus on answering specific questions of ultimate fact. Driver, supra, at 47-48. Most important for present purposes, a special verdict segregating special and general damages eliminates the need for speculation into the damages awarded by the jury, making it possible to "localize error" so that "sound portions of the verdict may be saved." Samuel M. Driver, The Special Verdict-Theory and Practice, 26 Wash. L.Rev. 21, 22 (1951).

The impenetrable quality that is so often praised in the general verdict is also the source of motions for new trial (or additur or remittitur requests), and consequent appeals that may be avoided. Since an unsegregated jury award may or may not contain all elements of damages plaintiff is entitled to by law, the trial court and appellate courts must comb the trial record, and evaluate whether various hypothetical readings of the verdict are supported by sufficient evidence or whether the jury's fact-finding necessarily involved determinations as to the weight and credibility of the evidence. These inquiries can be avoided, or at least simplified, when the verdict makes clear its constituent parts. This Court's opinion in Dyal illustrates this fact. On appeal from a bench trial, where plaintiffs challenged the sufficiency of the damage award, this Court had the advantage of particularized findings on each element of damages. Dyal, 23 Wn.2d at 519-

21. Having adequate insight into the *nature* of the damage award, it was a fairly simple task to assess whether the award was supported by the evidence. Id. Dyal illustrates that judicial economy, as well as fairness to a litigant who proposes a special verdict form segregating damages, supports creating an incentive for use of this procedure. The approach outlined here affords such an incentive, operating as a corollary to the general rule discussed above in order to avoid the basic unfairness that results when a litigant is denied a new trial due to the very problem a proposed special verdict form could have avoided.

IV. Medical Bills shown to be Both Necessary and Reasonable are Admissible.

In Patterson v. Horton, 84 Wn.Ap. 531, 929 P.2d 1125 (1997), at trial the plaintiff elide in testimony from the records custodians of various medical providers to authenticate the records and bills Plaintiff did not provide any additional evidence or testimony that the treatment and bill were reasonable and necessary. The trial court admitted all the bills into evidence and the verdict awarded past medical damages based on those bills. The defendant appealed, and the appellate court ruled “medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and bills were both necessary and reasonable.” Id. at 53, 1130. The trial court erred in admitting the bills into evidence

without any showing that the bills were reasonable and necessary by expert testimony and the case was remanded for a recalculation of damages.

In the present case, Dr. Walia, plaintiff's treating chiropractor, testified that he believed the massage therapy was reasonable and necessary and that he prescribed it. (RP 25, 136; RP 1-11, 137; RP 6-12, 143; RP 11-19, 144) The defense expert, Dr. Renninger, also testified that he too would prescribe massage therapy as a reasonable and necessary treatment (RP 14-18, 308).

The trial court erred in denying the plaintiff's motion to introduce the bills for massage therapy into evidence and by not awarding the expenses for massage therapy treatment.

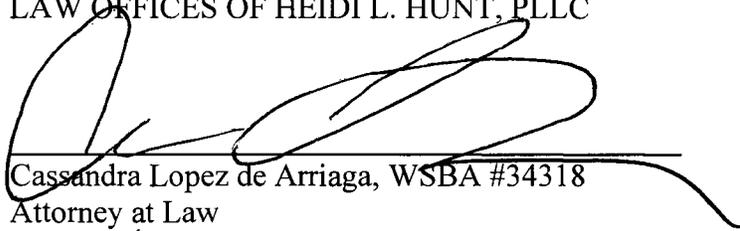
G. CONCLUSION

For the foregoing reasons, Appellant-Plaintiff Richard Hunt respectfully requests that this Court to grant Plaintiff's Motion for Additur (CP98, Plaintiff's Motion for Additur) and award Plaintiff-Appellant Richard Hunt general damages and his medical expenses for massage therapy.

DATED this 15th day of January, 2010.

Respectfully submitted by:

LAW OFFICES OF HEIDI L. HUNT, PLLC

A handwritten signature in black ink, appearing to read 'Cassandra Lopez de Arriaga', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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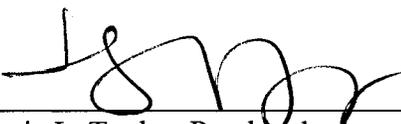
PROOF OF SERVICE

I declare that on December 29, 2009, I served a true and correct copy of **Brief of Appellant Richard Hunt**, first class postage prepaid, to the following attorneys via U.S. Mail:

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By: 

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