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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON

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No. 63958-7

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION ONE

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RICHARD HUNT,

Appellant,

vs.

DANILO SIJERA; COMCAST OF WASHINGTON I, INC.,  
a Washington corporation; AMY THAYER aka  
AMY THAYER FELICIANO,

Respondents.

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BRIEF OF RESPONDENTS SIJERA AND  
COMCAST OF WASHINGTON I, INC.

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## I. INTRODUCTION

This appeal arises out of a jury trial that occurred in Judge Timothy Bradshaw's courtroom in June 2009. Plaintiff Richard Hunt sued for personal injuries he allegedly suffered as a result of two motor vehicle accidents. The first accident occurred on February 6, 2007, and involved defendant Danilo Sijera, a Comcast employee. The second accident occurred two months later, on April 12, 2007, and involved the defendant Amy Thayer.

On June 12, 2009, the jury returned a verdict in favor of the plaintiff and against Comcast in the amount of \$6,990. The jury declined to award the plaintiff any non-economic or general damages. The jury did not award any damages against the defendant Thayer.

The plaintiff filed a Motion for New Trial or, in the alternative, Additur. On July 1, 2009, Judge Timothy Bradshaw entered an Order denying Plaintiff's Motion for New Trial. This appeal followed.

Appellant contends that the jury was required to award the plaintiff general damages and, therefore, that the trial court erred in denying his Motion for New Trial. Plaintiff also contends that the trial court erred by declining to admit into evidence the bills for massage therapy.

Appellant's arguments on appeal are utterly without merit. *First*, Appellant misstates applicable law. Relying entirely on case law that predates *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997)<sup>1</sup> -- the seminal case pertaining to the issue of general versus special damages -- the Appellant erroneously states 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." Brief of Appellant at page 6.

In *Palmer v. Jensen*, the Supreme Court held that "**there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury.**" *Palmer*, 132 Wn.2d at 201. As the Supreme Court explained, "[t]he adequacy of a verdict . . . turns on the evidence." *Palmer*, 132 Wn.2d at 201.

The jury's verdict in this case is entirely consistent with the evidence presented at trial.<sup>2</sup> This is not a case in which the plaintiff's damages evidence was uncontroverted. To the contrary, the defendants presented credible expert testimony rebutting almost every aspect of the plaintiff's injury claims.

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<sup>1</sup> This is explained by the fact that the bulk of the Appellant's Brief is taken -- verbatim -- from an Amicus Brief submitted to the Supreme Court after the Court accepted review in the case of *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997). This is why Appellant's brief includes the Court of Appeals citation -- not the Supreme Court citation -- for *Palmer v. Jensen*. This also explains why the Appellant fails to cite a single case decided on this issue in the thirteen years since *Palmer v. Jensen*.

In addition, plaintiff's *own* testimony cast doubt on his claims. The evidence at trial established that during the brief period of time that the plaintiff treated for his alleged injuries, he traveled to Miami, Florida; partied at the Playboy Mansion in Los Angeles; and spent 10 days on Maui. Under these circumstances, the trial court properly determined that "[t]he jury's decision to not award general damages is consistent with the credible evidence presented at trial." CP 555.

*Second*, the trial court properly denied Plaintiff's Motion for New Trial or Additur relating to the massage therapy bills because the plaintiff failed to establish that those bills were reasonable or necessary under *Patterson v. Horton*, 84 Wn. App. 531, 929 P.2d 1125 (1997). Respondents respectfully request that this Court affirm the trial court's denial of plaintiff's Motion for a New Trial.

Respondents also ask the Court to award attorneys fees and costs for having to defend against this frivolous appeal. Appellant misstates applicable law, and fails to cite to *any* case law pertaining to the issue presented on appeal decided in the last thirteen years. Moreover, conspicuously absent in Appellant's brief is a single citation to the evidence in the record that he claims

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<sup>2</sup> In his Brief, Appellant does not cite to the evidence or portions of the record that he claims would have supported an award of general damages in this case

would have supported a general verdict in this case. This is a frivolous appeal, and the defendants respectfully request an Award of Fees pursuant to RAP 18.9.

## II. ISSUES

1. Did the trial court abuse its discretion in *denying* plaintiff's motion for a new trial, or in the alternative for additur, when the jury's award of damages was consistent with the evidence presented at trial?

2. Did the trial court properly *exclude* the massage therapy bills when the Plaintiff failed to establish that those bills were reasonable and necessary?

## III. STATEMENT OF THE CASE

### A. The Jury's Verdict Was Consistent With The Evidence Presented At Trial.

Plaintiff's claims in this lawsuit arise from two separate motor vehicle accidents: the first accident occurred on February 6, 2007, and involved the Plaintiff and Defendant Danilo ("Danny") Sijera, a Comcast employee; the second accident occurred on April 12, 2007 and involved Plaintiff and Defendant Amy Thayer. CP 221-224. Plaintiff claimed various soft tissue injuries in connection with both accidents.

Defendants presented expert testimony establishing that the two motor vehicle accidents were low-speed, low-impact accidents. Dr. Allen Tencer, a

bio-mechanical engineer, testified that the forces involved in the two accidents were within the range found tolerable in testing performed on human subjects, and within the range of forces experienced in normal, everyday life.

In addition to Dr. Tencer's testimony, Dr. Renninger, a chiropractor, testified that in his opinion, the plaintiff did not sustain any injuries in the accidents that would have required medical treatment. Dr. Renninger further opined that any injuries the plaintiff did suffer would have resolved before the plaintiff first sought medical treatment in connection with the accident in February 2007.

The testimony at trial also established that the Appellant initially denied any injuries in connection with the first accident. Indeed, Appellant did not seek any medical treatment at all for five full weeks following the first accident. Moreover, as Judge Bradshaw observed in his Order denying plaintiff's Motion for a New Trial, "[t]here was a dearth of evidence that plaintiff could not perform daily functions or any credible evidence that pain disrupted his life."

Based on the evidence presented at trial, the jury was entitled to conclude that the plaintiff failed to meet his burden of proof with respect to general damages. The jury's verdict was consistent with the evidence, and the trial court did not abuse its discretion in denying plaintiff's Motion for a New Trial.

**1. The Evidence At Trial Established the Low-Speed, Low-Impact Nature of the Two Motor Vehicle Accidents.**

At approximately 5:00 p.m. on February 6, 2007, Appellant Richard Hunt was traveling on I-5 in the northbound direction. He exited the freeway at the 45<sup>th</sup> Avenue North exit and merged onto 7<sup>th</sup> Avenue North. RP 197.

Comcast employee Danny Sijera was driving a Comcast van and exited I-5 at the same location. Michael Waite, Danny's co-worker, was a passenger in the van. The Comcast van stopped at a red light at the intersection of 7<sup>th</sup> Avenue North and 45<sup>th</sup> Avenue North. RP 121

At this location, 7<sup>th</sup> Avenue North has two lanes in the northbound direction. The Comcast van was in the right hand lane, which is a "turn only" lane. RP 122. Plaintiff Richard Hunt was in the left hand lane, which is an optional turn lane. While they were waiting for the light to turn, Mr. Waite told Danny that he needed to proceed straight through the intersection at 45<sup>th</sup> Avenue North. RP 122. Not realizing he was in a right turn only lane, Danny proceeded through the intersection in a northbound direction when the light turned green. RP 122.

Mr. Hunt initiated a right hand turn onto 45<sup>th</sup> Avenue North. RP 199. The Comcast van struck the plaintiff's vehicle on the right side, scraping the

paint and part of the right front bumper. RP 124. Danny estimated that his speed at impact was approximately 5 miles per hour. RP 126.

Dr. Tencer testified that based on the types of vehicles involved in the accident and the damage to the vehicles, he estimated the speed at impact to be 4.8 miles per hour. RP 360. Dr. Tencer testified that in his opinion the forces involved in the accident were within the range of forces experienced in day to day life. RP 360.

The evidence presented at trial also established that the April 2007 accident was a low-speed, low-impact accident. RP 348-356. Based on the types of vehicles involved in that accident and the lack of significant damage to the vehicles, Dr. Tencer testified that the speed of the vehicle being driven by Ms. Thayer could not have been more than approximately four miles per hour just before she rear-ended Mr. Hunt's car. RP 353. Dr. Tencer testified that the forces that would have been experienced in this type of accident are similar to those forces experienced in the normal activities of everyday life. RP 354-355.

**2. Appellant Initially Stated That He Was Not Injured As A Result of the February 2007 Accident.**

Immediately after the February 2007 accident, both vehicles pulled into a parking lot. Michael Waite called the police and then contacted his supervisor, Saul Chapparo. Mr. Sijera testified that the plaintiff was joking

around, and did not appear to be injured. RP 126-127. When Danny asked Mr. Hunt if he was okay, Mr. Hunt said that he was fine:

Q: You asked Mr. Hunt if he was okay?

A: Yes.

Q: And what did he say?

A: He said he was fine.

RP 126-127.

Mr. Hunt likewise told Comcast Supervisor Saul Chaparro that he was okay:

Q: You talked to Mr. Hunt then?

A: Yes.

Q: Okay. And did you ask Mr. Hunt if he was okay?

A: Yes.

Q: And what did he say?

A: He said he was okay. He would just -- wanted his vehicle fixed.

That's -- those were his words.

Q: He wanted to have the Range Rover fixed?

A: Yes.

RP 276. Mr. Hunt similarly told the investigating police officer that he was okay: "I'm not bleeding, I don't require medical attention." RP 227.

**3. The Plaintiff Did Not Seek Any Medical Attention For Five Weeks After the First Accident.**

Appellant did not receive any medical attention on the date of or immediately after the February 2007 accident. He never consulted his primary care physician at all about any injuries caused by the accident. RP 117. Five weeks after the accident -- on March 15, 2007 -- plaintiff presented to a chiropractor for the first time in connection with his alleged injuries. RP 228.

This gap in treatment placed any injuries from the first accident squarely into question. Moreover, the plaintiff did not present the type of testimony that would typically support a claim for general damages. Absent in this case was any testimony regarding the plaintiff's inability to perform daily functions, testimony regarding the debilitating nature of the pain, or any credible evidence that such pain disrupted the plaintiff's daily activities or enjoyment of life.

To the contrary, the evidence presented at trial established that during the brief period of time the plaintiff treated for his alleged injuries, he traveled to Miami, Florida; partied at the Playboy Mansion in Los Angeles; and spent 10 days vacationing on the island of Maui. RP 229-231.

Indeed, plaintiff based his claim for pain and suffering almost entirely on his own discredited testimony, and on the testimony of his best friend, Derek Anderson. Plaintiff introduced into evidence a picture of himself at the Playboy Mansion, taken two days after the April 2007 accident, posing

between two Playboy “bunnies”. Incredibly, Mr. Hunt testified that had he not been injured, he would have been smiling much more enthusiastically in the picture:

Q: Okay. Aside from being in a picture with the Playboys, were you feeling a hundred percent -- or were you feeling any pain --

A: Well, you can see the picture. Usually I would have a much bigger smile on my face.

RP 213.<sup>3</sup> Based on this testimony alone, the jury was entitled to conclude that it simply did not believe plaintiff’s claim for pain and suffering.

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<sup>3</sup> Derek Anderson similarly testified that Mr. Hunt would have been smiling much more enthusiastically in the picture from the Playboy Mansion had he not been injured:

Q: With the ten years experience that you have with Mr. Hunt, doing these things, wakeboarding, the fun things, traveling, would you expect that perhaps he would have a much bigger smile on his face --

A: Yeah, he --

Q: -- at this point?

A: -- he’s pushing that one out. But I mean, you’re at the Playboy Mansion, you’ll drag yourself there with no legs. I had --

Q: but you’d expect something a little more than that?

A: I would, yeah.

RP 254

**4. The Defendants Presented Credible Evidence Challenging the Extent of Plaintiff's Injuries.**

The defendants presented expert testimony disputing plaintiff's damages claims. RP 285-310; RP 338-399. Dr. Renninger, a chiropractor, testified that, in his opinion, the plaintiff did not sustain any injuries from the two accidents that required either chiropractic care or massage therapy. RP 291, 298. Dr. Renninger further testified that any injuries the plaintiff did suffer likely would have resolved quickly, before the plaintiff first sought treatment in connection with the accident in February 2007. RP 298-299.

The jury also heard the testimony of Dr. Tencer, who analyzed the forces involved in the two accidents, and compared those forces to impacts experienced in everyday life. RP 333-398. Dr. Tencer opined that the forces involved in the two accidents were within the range found tolerable in testing performed on human subjects, and within the range of forces experienced in everyday life. RP 360-361.

**5. The Trial Court Did Not Abuse its Discretion in Denying Plaintiff's Motion for a New Trial.**

The jury was provided a special verdict form.<sup>4</sup> CP 516-517. With respect to defendants Comcast and Sijera, the jury awarded \$6,990.00 in past

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<sup>4</sup> Appellant devotes nearly nine pages of his Brief to the question of how the reviewing court determines if an award includes general damages when the verdict form used is a general verdict form. Because the verdict form used in this case was a special verdict form, this entire discussion is moot.

economic damages. The jury declined to award any general damages. CP 517.

The jury's decision not to award general damages in this case was consistent with the evidence presented at trial. The jury was properly instructed that the burden was on Mr. Hunt to establish his claim for pain and suffering. CP 530, 531, 533. The jury's conclusion that any pain Mr. Hunt experienced as a result of the accident either was non-existent or, at most, short-lived was entirely consistent with the evidence presented at trial. The trial court therefore did not abuse its discretion in denying Appellant's Motion for a New Trial.

**B. The Trial Court Properly Refused To Allow the Massage Therapy Bills Into Evidence.**

Appellant argues that the trial court erred when it ruled that the massage therapy bills were not admissible into evidence. The trial court, however, properly excluded the massage therapy bills because the plaintiff failed to establish that these bills were reasonable and necessary.

In his brief, Appellant argues that "Dr. Walia, plaintiff's treating chiropractor, testified that he believed the massage therapy was reasonable and necessary and that he prescribed it." Brief of Appellant at page 24. What the appellant does *not* say, however, is that Dr. Walia was not asked nor did he give any testimony regarding the reasonableness or necessity of the massage therapy bills themselves. RP 131-145. In fact, Dr. Walia did not know what

treatment was provided by the massage therapist, let alone what the massage therapist charged for that treatment. RP 183. Dr. Walia testified that he never received a report from the massage therapist, and did not review his records:

Q: Does the massage therapist report to you?

A: No.

Q: So you send them out and they don't send a report back to you?

A: Yeah, I don't get a report from them.

Q: Oh. So you don't know what they did?

A: No.

Q: You don't know what Mr. Knopf did for Richard Hunt?

A: Well, I mean, I (inaudible) specifically I have not looked at Mr. Knopf's records.

Q: Okay. And he does not send you a periodic report as he goes through the treatment?

A: No.

RP 183.

Appellant also states that Dr. Renninger testified that "he too would prescribe massage therapy as a reasonable and necessary treatment." Brief of Appellant at page 24. Dr. Renninger, however, did *not* testify that the massage therapy treatment in this case was necessary or that the bills themselves were

reasonable. To the contrary, Dr. Renninger testified that, in his opinion, there were “no injuries from those accidents [the accidents occurring in February and April of 2007] that would require any chiropractic care or massage therapy.” RP 291.

Plaintiff failed to offer expert testimony regarding the necessity or reasonableness of the massage therapy bills. Under *Patterson v. Horton*, the trial court properly excluded those bills from evidence.

#### IV. ARGUMENT

##### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR.

“Denial of a new trial on grounds of inadequate damages will be reversed only where the trial court abuses its discretion.” *Palmer v. Jensen*, 132 Wn.2d at 197. A trial court abuses its discretion in granting a new trial if sufficient evidence exists to support the jury’s verdict.” *Palmer v. Jensen*, 132 Wn.2d at 198.

##### 1. The Jury’s Verdict Was Consistent With The Evidence Presented at Trial.

In Washington, a jury verdict is presumed to be correct unless the award is so excessive or inadequate as to unmistakably indicate that it was the result of passion or prejudice. *Manzanares v. Playhouse Corp.*, 25 Wn. App. 905, 611 P.2d 797 (1980); *see also, Cox v. Charles Wright Academy, Inc.*, 70

Wn.2d 173, 176, 422 P.2d 515 (1967)(the law strongly presumes the adequacy of the verdict). A Court may not substitute its judgment for that of the jury on the amount of damages unless there is no evidence supporting it. *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000). “Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.” *Palmer*, 132 Wn.2d at 198, citing *McUne v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954).

Appellant argues that because the jury awarded special damages in this case, it was required to also award general damages.<sup>5</sup> Appellant misstates the law. In *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997), the Supreme Court explicitly stated that “there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury.” *Palmer*, 132 Wn.2d at 201. As the Court explained, “[t]he adequacy of a verdict . . . turns on the evidence.” *Palmer*, 132 Wn.2d at 201.

In *Palmer*, plaintiff Pamela Palmer brought a lawsuit for injuries that she and her young son sustained in an automobile accident. At trial, Palmer’s doctor testified that the special damages claimed by Palmer were reasonable and necessary. Both the doctor and plaintiff’s physical therapist testified that Mrs. Palmer experienced back pain for more than two years after the accident.

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<sup>5</sup> Appellant relies on case law that predates the Supreme Court’s opinion in *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997).

The jury awarded Palmer and her son damages in amounts that equaled their medical specials. Palmer moved for a new trial, arguing that the verdict was insufficient because it did not include general damages. The trial court denied the Motion for New Trial. The Court of Appeals affirmed, holding that it is not an abuse of discretion to deny a new trial on grounds that the jury failed to award general damages. The Supreme Court accepted review. The Court stated:

“[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. The adequacy of a verdict, therefore, turns on the evidence.

*Palmer*, 132 Wn.2d at 201.

The evidence presented to the jury in the *Palmer* case, however, was uncontroverted. Plaintiff Pamela Palmer presented evidence that the medical treatment she received was related to the accident, and was reasonable and necessary. The defendant did not present any evidence calling the medical testimony into question. *Palmer*, 132 Wn.2d at 201. Under those circumstances, the Supreme Court held that the jury’s failure to award Pamela Palmer damages for pain and suffering was directly contrary to the undisputed evidence presented at trial.

With respect to Pamela Palmer's son, however, the Supreme Court held that the record supported the verdict omitting general damages:

Shawn's pediatrician noted the child was experiencing pain in the back of the head on the day of the accident, but did not prescribe further medical care. The total cost of Shawn's medical care was \$34 for this office visit. Given that Shawn's injuries were minimal, and that he required virtually no medical care, the jury could reasonably have concluded he was not entitled to damages for pain and suffering.

*Palmer v. Jensen*, 132 Wn.2d at 202.

When the evidence pertaining to damages is disputed, Washington Courts have not hesitated to hold that a jury's decision *not* to award general damages is a matter exclusively within the province of the jury. For example, in *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005), Division III of the Court of Appeals upheld a verdict in which the jury awarded special, but not general, damages to the plaintiff on grounds that the verdict was consistent with the evidence presented at trial.

In that case, the defense presented evidence disputing plaintiff's damages claim. The defendant presented expert testimony pointing out the lack of objective medical findings supporting plaintiff's extensive complaints of pain. The defense medical expert also opined that the plaintiff should have recovered from any injuries quickly after the accident. Noting also that the

plaintiff's credibility was at issue, the Court concluded that the jury's failure to award general damages was consistent with the evidence presented at trial:

The jury was further instructed it should not base its damage award on "speculation, guess or conjecture." **Given the evidence, the 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.**

*Lopez*, 130 Wn. App. at 93 (emphasis added). Thus, a jury may decline to award general damages when the evidence presented at trial is disputed and supports the inference that the plaintiff did not experience pain or suffering.

In *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003), Division II of the Court of Appeals similarly held that a jury may award special damages and no general damages when the record supports such an award. In that case, as in *Lopez*, the jury awarded special damages to the plaintiff but declined to award general damages. The defendant had introduced evidence disputing the seriousness of the accident and claimed injuries. Under those circumstances, the court held that the jury's decision to award some special damages but no general damages was supported by the evidence presented at trial.

Here, the defendants presented evidence disputing almost every aspect of plaintiff's damages claim. The defendants presented the testimony of two

Comcast witnesses who testified that the plaintiff stated he was not hurt as a result of the accident. In addition, the five week delay in treatment cast doubt on the seriousness of plaintiff's injuries. The jury also heard the testimony of Dr. Renninger, who opined that any injuries the plaintiff received would have resolved quickly, *before* he sought treatment five weeks after the first accident. Dr. Tencer similarly testified that the forces involved in the accident were consistent with the forces experienced in life's daily activities.

The jury also heard evidence that during the brief period of time the plaintiff was receiving treatment for his injuries, he traveled 3,000 miles to Miami, Florida, partied at the Playboy Mansion in Los Angeles, and spent 10 days vacationing on Maui. Under these circumstances, the jury was entitled to - and did in fact -- conclude that the plaintiff failed to meet his burden of proving general damages. The verdict in this case was consistent with the evidence presented at trial, and the trial court did not abuse its discretion in denying plaintiff's Motion for a New Trial.<sup>6</sup>

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<sup>6</sup> Plaintiff alternatively asked the trial court for an additur in the amount of \$3,000.00 for general damages. This amount appeared to be calculated solely to avoid plaintiff's exposure for costs, because the amount of the verdict was less than defendants' offer of judgment (\$9,500.00) before trial. Plaintiff failed to establish that the verdict was the product of passion or prejudice, and the trial court properly denied his motion for additur.

**2. The Trial Court Properly Excluded the Massage Therapy Bills Because Plaintiff Failed to Establish the Necessary Foundation for Those Bills to Come Into Evidence.**

Appellant argues that the trial court erred in ruling that the massage therapy bills were inadmissible. However, the massage therapy bills were inadmissible for the simple reason that the plaintiff did not establish the necessary foundation for those bills to come into evidence.

Appellant argues that Dr. Walia, his chiropractor, testified that the treatment and charges were reasonable and necessary. This statement is not true. Although Dr. Walia testified that he referred the plaintiff to massage therapy, he also testified that did not receive any reports from the massage therapist, and does not know what treatment was provided. Dr. Walia was not asked whether the charges for the massage therapy treatments were reasonable and necessary. RP 131-145.

A plaintiff is entitled to the “reasonable value of necessary medical care, treatment and services received to the present time.” WPI 30.07.01. Medical bills and records alone do not establish that the treatment was reasonable and necessary. *Patterson v. Horton*, 84 Wn. App. 531, 929 P.2d 1125 (1997).

In *Patterson*, the defendant challenged the admission of certain medical bills and records claiming that the trial court improperly shifted the burden to the defendant to prove the charges unreasonable or the treatment unnecessary. *Patterson v. Horton*, 84 Wn. App. at 542. Specifically, the defendant pointed

to the trial court's adoption of the plaintiff's argument that payment of the bills created a presumption that they were reasonable and necessary, stating, "if [Hundley] can show that [the bills are] not reasonable and necessary and not causally related to this accident, so be it." *Patterson v. Horton*, 84 Wn. App. at 542.

At trial, the plaintiff relied on the testimony of records custodians to establish that the medical records were kept in the ordinary course of business "but the custodian offered no testimony regarding the relevancy of the records." *Patterson v. Horton*, 84 Wn. App. at 542. Finding that the plaintiff failed to meet his burden of proof, the Court of Appeals remanded the matter back to the trial court for recalculation (and exclusion) of certain claimed medical expenses, ruling that there was no evidence to support portions of the award for past medical damages. *Patterson v. Horton*, 84 Wn. App. at 542. Specifically, it found:

A plaintiff in a negligence case may recover only the reasonable value of medical services received, not the total of all bills paid. *Torgeson v. Hanford*, 79 Wash. 56, 58-59, 139 P. 648 (1914). Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills. *Nelson v. Fairfield*, 40 Wash.2d 496, 501, 244 P.2d 244 (1952); *Carr v. Martin*, 35 Wash.2d 753, 761, 215 P.2d 411 (1950); *Trudeau v. Snohomish Auto Freight Co.*, 1 Wash.2d 574, 585-86, 96 P.2d 599 (1939); *Torgeson*, 79 Wash. at 58-59, 139 P. 648. **In other words, medical records and bills are relevant to prove past medical expenses only if supported by**

**additional evidence that the treatment and the bills were both necessary and reasonable.**

...Here, [the plaintiff] made no showing of reasonableness and necessity and, thus, never fulfilled the condition. Thus, the trial court erred when it admitted the documents as proof of past medical expenses and when it shifted to [the defendant] the burden of proving that the costs and care were unreasonable and unnecessary.

*Patterson v. Horton*, 84 Wn. App. at 542. (Emphasis added.)

Here, Dr. Walia testified that the referral to massage therapy treatment was reasonable and necessary, but gave no testimony regarding the reasonableness and necessity of the bills themselves. He did not even know what was done by the massage therapist, let alone what was charged. Under these circumstances, the trial court properly excluded these bills from evidence.

**B. RESPONDENTS REQUEST AN AWARD OF ATTORNEYS FEES UNDER RAP 18.9.**

RAP 18.9 authorizes an award of attorneys fees against a party who files a frivolous appeal. *See, Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and there is no reasonable possibility of prevailing on the appeal. *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

Here, Appellant's entire appeal is based on what is either a misstatement or a woeful misunderstanding of applicable law. Appellant's argument that "[w]here a jury finds liability and awards a plaintiff special damages for personal injury, plaintiff is entitled to recover general damages for the same injury", simply misstates Washington law. As stated by the Supreme Court in *Palmer v. Jensen*, there is no per se rule requiring a general damage award in every case.

Moreover, the Appellant does not even cite the evidence -- or those portions of the record -- that he claims would support an award of general damages in this case. Appellant has presented no debatable points of law, and his appeal lacks merit. Respondents respectfully request that the Court award fees and costs.

## V. CONCLUSION

Article I, section 21 of the Washington Constitution provides that "the right to a jury trial shall remain inviolate." The right to a trial by jury has been jealously guarded by the courts." *Auburn Mechanical v. Lydig Constr.*, 89 Wn. App. 893, 897, 951 P.2d 311, *review denied*, 136 Wn.2d 1009 (1998).

A jury verdict is presumed to be correct. It is the rare case that calls upon the Court to set aside a verdict, and this is not such a case. The jury's

verdict in this case was supported by the evidence, and the trial court did not abuse its discretion in denying plaintiff's Motion for a New Trial.

DATED this 25 day of February 2010.

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