

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' BRIEF

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I. INTRODUCTION

This appeal follows the trial of an intersection collision. “What color was the light?” The two drivers contradicted each other as to when the other driver entered the intersection. The jury heard the plaintiff Kathleen “Kat” Kuk testify that she drove through the intersection and beat a red light, insisting that the light was yellow. The jury heard contradictory testimony from an eye witness stopped at the intersection and from the defendant driver Jason Smith that the light was red for the plaintiff.

Ms. Kuk suffered a broken a finger in the accident. No one disputed she incurred medical expenses to repair the painful injury. The jury reached its verdict considering all of the evidence about liability and damages, and the demeanor of the witnesses.

The jury found 50% fault on the part of the plaintiff Ms. Kuk (collectively with her husband, “Kuk”) and 50% fault on the part of the driver Mr. Smith. The jury awarded past medical expenses to Ms. Kuk, and property damage, as well as property damage to the defendant UPS.

The jury, however, did not award any general damages to Ms. Kuk. That verdict is inconsistent with the evidence and the law in Washington since *Palmer v. Jensen*, 132 Wn.2d 193, 202, 937 P.2d 597 (1997)(where medical special damages undisputed, jury verdict providing no general damages “contrary to the evidence”).

When this verdict was rendered, the plaintiff did nothing to cure the inconsistency. Instead, Ms. Kuk moved for a new trial on damages ten days following the verdict. The trial court erroneously granted her request.

The court's grant of a new trial under the circumstances constitutes reversible error. The court mistakenly ruled the verdict was merely inadequate, not inconsistent.

Pursuant to CR 49, the plaintiff waived the right to later request a new trial when she failed to object to the inconsistent verdict before the jury was discharged. If she had objected, the court would have instructed the jury to deliberate and return an award of general damages as mandated by the very law plaintiff later cited to support a request for new trial on damages.

This case should not be in this court on appeal. This appeal could have been avoided by plaintiff's simple request that the jury return to deliberate and award general damages, as required by Washington law. The plaintiffs' failed to object to the verdict when the Court could have instructed the jury to cure the verdict's inconsistency. The plaintiffs waived any right to bring a motion for new trial.

If this Court does not find waiver under the circumstances, this Court should reverse the trial court order as to the scope of the new trial and remand for a trial on liability and damages. Well-established law in Washington holds that where a new trial is

ordered in a case involving closely-contested liability, justice requires a new trial upon the entire case. The jury's consideration of all of the plaintiff's testimony, as to what happened on the day of the accident as well as the injury she suffered in the accident is relevant to her credibility and to a proper verdict on her case.

The full new trial on liability and damages should proceed only after this Court vacates the trial court's pre-trial sanction orders in two respects: (1) to allow the defendant Jason Smith to testify as to his perception of the speed of the oncoming vehicle driven by plaintiff Ms. Kuk, and (2) to exclude evidence of a reprimand letter sent to Smith by UPS management as part of a collective bargaining function.

The trial court entered the preclusion/sanction order on an incorrect basis. A proper analysis of the discovery issues reveals the court abused its discretion in fashioning the sanctions. The jury did not hear all the relevant evidence about the accident. Any retrial should include all relevant evidence, and exclude evidence that is not otherwise admissible.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error

1. Defendants Jason Smith and United Parcel Service, Inc. (collectively "UPS") assign error to the court's Minute Order entered on March 16, 2012 (CP 24); which found that the jury

“arrive[d] at an inadequate verdict with regard to damages.” *Id.* The verdict is inconsistent with the authority of *Palmer v. Jensen, supra*. The court did not find that Kuk waived the right to complain by failing to raise it before the jury was discharged.

2. UPS assigns error to the court’s Memorandum Decision on Motion for Additur or for a New Trial on Damages entered on March 23, 2012 (CP 22-23) in two respects:

(a) The court did not find waiver by Kuk of her right to seek a new trial, by her failure to ask the court to reconvene the jury to reconsider an award of non-economic damages.

(b) Waiver aside, the court erred when it did not remand for a new trial on liability as well as damages.

3. UPS assigns error to the court’s Order Granting Plaintiff’s Motion for Relief re: Discovery Violations entered February 17, 2012 (CP 153-155).

4. UPS assigns error to the court’s Order on Plaintiffs’ Motions in Limine entered February 14, 2012, precluding Jason Smith’s testimony as to his perception of the speed of the oncoming vehicle. RP 58; CP 246-255.

5. UPS assigns error to the court’s denial of Defendants motion in limine to exclude a letter of discipline sent by UPS to Mr. Smith dated May 12, 2008 which expressed the opinion that the accident was “avoidable.” CP 153-155; RP 58.

B. Issues on Appeal

1. In light of the requirement that a jury award general damages when it is not legitimately disputed that painful injuries resulted from an accident, may a plaintiff who receives a verdict that does not award general damages but does award the costs of the medical expenses for treating those painful injuries simply ignore the inconsistency and request a new trial on damages only, preserving the liability finding in her favor, claiming the award is inadequate as a matter of law?

2. Is a jury verdict "inconsistent," as that term is used in CR 49 and case law construing the rule's requirement, and not merely "inadequate," where the verdict awards medical expenses for injuries related to an accident but awards no general damages for pain and suffering and there is no legitimate dispute that the plaintiff experienced some pain and suffering from the injury? (assignment of error 1 and 2)

3. Under CR 49 and case law decided thereunder, did Ms. Kuk waive her right to move for a new trial where she received a verdict which did not include non-economic damages, allowed the jury to be discharged, and then moved for a new trial on damages only, all without requesting that the court instruct the jury return to deliberate and return an award of non-economic losses which award is indisputably required by *Palmer v. Jensen*. (assignments of error 1 and 2)

4. Did the trial court err in granting the motion for new trial solely on the issue of damages where the testimony of the parties with respect to the facts of the accident bears on the witnesses' credibility, all the evidence is relevant to any award of non-economic damages, and the burden on the court would not be meaningfully increased? (assignment of error 2)

5. Did the trial court err in precluding the defendant Jason Smith from testifying as to his training in general, and to the speed of Ms. Kuk's oncoming vehicle in particular, as a sanction for UPS failure to produce certain peripheral and unrelated employment file documents, where no showing of willfulness was made, and under the circumstances exclusion of the testimony was an abuse of discretion? (assignments of error 3 and 4)

6. Did the trial court err in similarly allowing admission of a reprimand letter as a discovery sanction, where no showing of willfulness was made, and where the letter would not otherwise be admissible? (assignment of error 3)

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This case arises out of an automobile accident on May 7, 2008, at 4th Avenue North and Mariner Square, north of 128th, in Snohomish County, an intersection controlled by a traffic signal light. CP 972-976; RP 377. The defendant Jason Smith, driving for

UPS, approached the intersection coming from the north, heading southbound, in his UPS package car and waited for traffic to clear so that he could make a left hand turn. RP 444. After determining that he was clear to turn, Mr. Smith began making his left hand turn. RP 435.

As Mr. Smith turned, plaintiff Kathleen "Kat" Kuk approached from the south, traveling northbound. RP 435. An eyewitness to the accident, Daisy Christopherson, approaching the intersection, had slowed down to stop after noticing that her light was yellow. RP 380. Ms. Christopherson stopped at the intersection in the inside lane, adjacent to Ms. Kuk's lane of travel. She described Ms. Kuk traveling faster than the speed limit. RP 381 ("She just flew up the street"). Ms. Christopherson testified that Ms. Kuk ran the red light:

Q: And what was obvious to you that had happened?

A: That she was [*sic*] ran the red. It was red when she hit the truck.

RP 384.

Contradicting the eyewitness, Ms. Kuk saw the eyewitness's vehicle braking in the lane adjacent to hers, but Ms. Kuk stated the light was yellow as she drove into the intersection in order to pass through the intersection before the red light. RP 304. She admitted she hit the UPS truck without braking. RP 304. As he entered the

intersection, Ms. Kuk's attention was on the traffic light and the car in the lane next to her, not the UPS truck in front of her. RP 304.

As she was driving through the intersection, Ms. Kuk held her cell phone to her ear with her right hand and her steering wheel with the left hand. RP 327. She was on the phone with KVI talk radio (station 570 a.m.). RP 303. After the accident, Ms. Kuk told Mr. Smith that she was not injured, but she subsequently noticed that her right pinky finger was bent. This finger was on the hand holding the cell phone. RP 305. The injury to her pinky finger is the only injury plaintiff claims to have suffered in the accident. RP 305.

Mr. Smith testified that as he proceeded out into the intersection, before beginning his left turn, RP 417, he saw cars braking, including the witness Christopherson, RP 418. After seeing the red light, he began his left turn. RP 419. Suddenly, Ms. Kuk was in the intersection and the front of Ms. Kuk's vehicle struck the right mid-section of his vehicle. RP 419-420.

Mr. Smith left UPS's employment a month and a half after the accident for reasons unrelated to the accident. RP 473. Sometime after that, certain files of UPS related to Mr. Smith's training as a UPS driver were lost or destroyed. But files related to the accident investigation were retained. See, RP 2-3.

UPS and Smith were sued by Ms. and Mr. Kuk on October 8, 2009, well after Mr. Smith left UPS. CP 972.

B. STATEMENT OF PROCEEDINGS

The matters from the pretrial of the case that concern this appeal include certain discovery responses by UPS and the court's rulings on motions brought by Kuk to compel and for sanctions. An illness suffered by her first lawyer led to delay and continuance of the trial, as well as delay in developing plaintiff's discovery demands to defendants.¹

1. The Discovery Responses of UPS Engendered Discovery Motions and Related Pretrial Rulings.

In response to written discovery asking for UPS driver Jason Smith's employment file, UPS responded, "Defendant UPS has conducted a diligent search of its files and cannot locate the employment file." CP 433-434.

UPS located and produced its accident investigative materials relating to the May 7, 2008 accident involving its driver Jason Smith and the plaintiff Kathleen Kuk. CP 841. UPS never recovered any of the hard copy materials regarding Mr. Smith's job training. See, CP 446.

On June 27, 2011, after UPS responded to this written discovery and unbeknownst to current UPS counsel, an email containing an attachment of Mr. Smith's human resources materials

¹ At the time of the motion for continuance, plaintiff moved to compel, CP 1329-35, while UPS moved for a protective order from further discovery. CP 1260-1270. The court denied the motion for protective order, and required discovery answers. CP 1149.

was received. CP 427. The email was never sent to or received by counsel for UPS and Smith. CP 506-507. The email was sent to an associate's and a staff member's email quarantine due to the format of the attachment. CP 443. A staff member, who no longer works at the firm, but was assisting on this case at that time, reportedly attempted to open the file. *Id.* A search of UPS counsel's computer servers indicates that the quarantined document was neither saved to either the file or the system. *Id.*

On August 12, 2011, counsel for UPS reiterated that Mr. Smith's employment file was lost and not in UPS's possession. CP 815. During this discovery conference, UPS counsel explained that Milt Crafton, risk management supervisor for UPS, had conducted a diligent search for Mr. Smith's employee and accident files. *Id.* She also explained to plaintiff's counsel the UPS policy of separately maintaining personnel files and accident investigation files. *Id.* To satisfy concerns regarding the good faith effort of UPS to respond to plaintiff's discovery requests, counsel offered to make Mr. Crafton available for deposition to address such concerns regarding the search for Mr. Smith's records. *Id.* Plaintiff's counsel did not take UPS up on its offer, and never pursued a deposition with Mr. Crafton.

Kuk did not file a motion to compel based upon her second set of discovery requests until January 10, 2012. CP 948-963. UPS again explained that the employment file for Mr. Smith had

been lost. See, CP 833-842. A hearing on plaintiff's motion to compel was held on January 30, 2012. RP 1-29. UPS again in good faith asserted that Mr. Smith's employment record had been lost. RP 2.

UPS was ordered to produce to plaintiffs the UPS training materials for 2008 that related to the training of UPS drivers generally. CP 759-761.

After the hearing on January 30, counsel began working with UPS to gather the driver training materials to produce to the plaintiffs. During this process, on January 31, 2012, counsel for UPS was forwarded the quarantined email Mr. Crafton had sent in June 2011. CP 424. Counsel began investigation into the origin of the email because the quarantined attachment was never previously reviewed by UPS counsel or saved into the case file. *Id.*

Immediately, counsel for UPS explained the inadvertent error to Kuk's counsel, and disclosed the attachment. CP 443-444. She explained the recent discovery of the previously quarantined documents and why counsel was never aware that these specific documents existed or were not previously produced. *Id.*

The documents were innocuous. The documents included, generally, Mr. Smith's job application, his signed pledge to follow UPS's anti-harassment and drug/alcohol policies, his medical information, driver certification, employment history and references, road test reports and a fingerprint application. *Id.* These records

did not contain Smith's specific training documents that were previously requested by plaintiff's earlier motion to compel. RP 43. Those records no longer existed. RP 41. Evidence of the innocuous nature of the lately discovered and produced documents is the fact that plaintiffs never sought to introduce any of them at trial.

On February 3, 2012, per the Court's January 30th order, UPS supplemented its discovery responses with additional training/education materials used by UPS for all drivers like Mr. Smith. CP 446-447. Although some of the typical training programs used by UPS do not include educational materials, UPS also provided all the materials that it was able to locate. *Id.*

On February 6, 2012, Mr. Hale filed two motions on behalf of Plaintiff concerning the foregoing developments: Motion for Relief Re: Discovery Violations (CP 539-551) and Motion for Relief Re: Spoliation (CP 652-662).

2. Motion in Limine and Court's Ruling on Pretrial Matters.

On February 3, 2012, Ms. Kuk filed motions in limine. CP 692-720. Included in the set was matter no. 12, to exclude lay witnesses, including Mr. Smith, from testifying as to their perception of speed. CP 712-713. On the same day, Defendants moved in limine, including a request that the court exclude evidence of UPS reports and investigation summaries, as well as a letter of discipline

sent by UPS to Mr. Smith dated May 12, 2008 which expressed the opinion that the accident was “avoidable.” CP 667-671.

The court convened a hearing on February 13, 2012. RP 30-58. The court ruled that the defendants should be sanctioned. RP 58. The court excluded any testimony as to the training Mr. Smith received, including his ability to testify as to an estimate of speed of Ms. Kuk’s vehicle, while the court allowed the admission of the “letter of discipline” of May 12, 2008. *Id.*

3. Trial Testimony

At trial the plaintiff Ms. Kuk and the witnesses testified as to the events on the day of the accident. Experts on each side offered opinions to assist the jury in its deliberations. RP 132-232; 451-461. Witnesses testified as to the pain and suffering Ms. Kuk endured and the impact of the accident on her life, including her husband who had a loss of consortium claim. *See, e.g.*, RP 233-275. The treating physician testified by video deposition. *See*, RP 374-375.

Mr. Smith testified as to his version of the accident. Following the court’s sanction order he was prevented from testifying about his estimate of Ms. Kuk’s speed or his own driver training. *See*, RP 412. UPS presented his testimony and that of Milt Crafton to explain the context of the letter of discipline and to try to defuse its negative impact. RP 466.

After three days of testimony, the parties agreed on a set of jury instructions (CP 156-179) and a special verdict form that included several interrogatories for the jury to answer. CP 52.

After finding defendant negligent, the jury awarded \$21,966.10 for past medical expenses. On the line reserved for an amount for pain, disability and loss of enjoyment of life, the “empty set” ∅ was written. CP 151. Plaintiffs’ counsel went silent regarding the jury’s verdict; and the Court discharged the jury.

4. Post-Trial Motions led to a Grant of New Trial on Damages Only.

Ms. Kuk moved for new trial. CP 63-74. She argued that the special verdict was “inadequate.” UPS opposed, arguing a failure to award general damages under the circumstances was inconsistent and required the court to return the jury to deliberate and make an award. CP 52. After receiving a reply, the court ruled on March 16, 2012, that the verdict was “inadequate as to damages.” CP 22-23. At a later hearing, RP*², the court granted a new trial on damages only. CP 23. The order reiterated the court’s conclusion on inadequacy as opposed to inconsistency. *Id.*

² The hearing was held in the juvenile court. The reporter did not have it timely as a result. Once transcribed, she will file it as part of the record of proceedings and this reference will be supplied pursuant to RAP.

IV. SUMMARY OF ARGUMENT

This appeal presents an important decision for the Court from a policy perspective. All parties agree that a jury must award general damages when the parties do not dispute that a plaintiff suffered painful injuries in an accident. In this case, Ms. Kuk received a verdict that did not award general damages, but did award the costs of the medical expenses for treating those painful injuries. She simply ignored that inconsistency and requested a new trial on damages only, leaving in place the liability finding in her favor.

CR 49 and the case law construing it require a party to request that the jury hearing the matter resolve such an inconsistency in the damages awarded before it is discharged. The court in this case, however, characterized the inconsistency as a merely inadequate finding of damages and ordered a new trial solely on damages.

This precedent if allowed to stand would allow a plaintiff to shop for a favorable jury finding on liability while enabling the plaintiff to seek a partial new trial with a different jury on damages. The trial court's ruling invites waste of the court's scarce resources, while ignoring how simple it would have been to have the same jury continue deliberations and return with some award of general damages.

The Court should recognize waiver, reverse the trial court's order granting a new trial, and remand for entry of judgment in accordance with the verdict.

Even if this Court refuses to find waiver, the Court should see that the trial court abused its discretion and ignored controlling, persuasive precedent when it ordered a new trial solely on damages. If the court does not reverse and remand for a judgment on the verdict, the court should order a complete new trial.

Finally, at the new trial, the relevant admissible testimony of Mr. Smith's opinion and perception of the speed of the plaintiff should be allowed. The inadmissible letter of discipline he received from UPS should be excluded. The trial court erred as a matter of law in entering these sanctions. Any new trial should proceed with those errors corrected.

V. ARGUMENT

A. PLAINTIFFS' FAILURE TO OBJECT TO THE VERDICT WAIVES ANY RIGHT TO A NEW TRIAL

1. Standard of Review for Post-Trial Decisions

The standard of review for the decisions under review is well-settled:

The standard of review applied in reviewing an order granting a new trial depends upon the reason given for granting the motion. As a general rule, the trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal absent a showing

of a clear abuse of discretion. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 561, 815 P.2d 798 (1991). However, if 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. *Schneider v. Seattle*, 24 Wn. App. 251, 255, 600 P.2d 666 (1979), *review denied*, 93 Wn.2d 1010 (1980).

Cox v. General Motors, 64 Wn. App. 823, 825-26, 827 P.2d 1052 (1992); *see also*, *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005).

The premise underlying the abuse of discretion standard is to find the acceptable range of decisions in a particular situation. In this case, “the proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 492 P.2d 775 (1971). The court should look at the factual underpinnings of the trial court’s decisions (“untenable grounds”) and the legal standard the court applied (“untenable reasons”) and conclude the court abused its discretion.

The question whether the plaintiff waived her right to request a new trial is a legal question subject to de novo review. This court answered the legal question definitively 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). This controlling precedent mandates

reversal of the trial court's order and entry of judgment for Kuk on the verdict rendered by the jury in her case.

2. The jury's award of medical expenses without any General Damages was patently inconsistent with Washington Law; Kuk waived her right to move for New Trial.

In *Palmer v. Jensen*, 132 Wn.2d at 197, the Washington Supreme Court recognized that juries have considerable latitude in assessing damages, and a jury verdict should never be lightly overturned. With that backdrop, the *Palmer* court proceeded to clarify in no uncertain terms a black-letter principle of law applicable in future personal injury litigation in Washington State.

First, the court found that the uncontroverted evidence established that all of Palmer's medical treatment was related to the accident.³ 132 Wn.2d at 199. Then the court decided that the award of a dollar amount equal to the medical specials implied unequivocally that the jury awarded no general damages. *Id.* at 201. On facts less certain than those present here the court decided that the jury verdict 'included no compensation for pain and suffering.' *Id.* The *Palmer* court held under those circumstances that a jury verdict awarding no damages for pain suffering "was contrary to the evidence." *Id.* at 203.

³ Here, UPS and Smith agreed that if the jury found the defendants negligent it should award the medical specials. See, CP 177.

Ms. Kuk argued that the jury's failure to award Ms. Kuk general damages in the face of its award of special damages constitutes, a "shockingly inadequate verdict." CP 69. The trial court agreed: "The court finds the jury did arrive at an inadequate verdict with regard to damages." CP 24. Ms. Kuk and the court were wrong. The jury's failure was inconsistent, not just inadequate. As the court in *Palmer* concluded, such an award is "contrary" to the evidence. See, 132 Wn.2d at 203.

The plaintiffs' failure to object to the verdict's inconsistency before the discharge of the jury waived their right to make the argument in a motion for new trial. Ms. Kuk failed to comply with CR 49, which states in pertinent part:

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. ... 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. [Emphasis added.]

Under the law enunciated in *Palmer, supra*, a jury award of undisputed medical expenses for an accident-related injury coupled with no award of special damages must be inconsistent as a matter of law. Under *Palmer*, such an award was "contrary to the evidence." See, 132 Wn.2d at 203.

Simple reference to a dictionary of the English language reveals the identity of the meaning of the holding in *Palmer*, and the CR 49 requirement of “inconsistency.” Inconsistent is defined as “not compatible with another fact or claim.” “Contrary” is defined as “a fact or condition incompatible with another.” *Compare, e.g.*, <<http://www.merriam-webster.com/dictionary/inconsistent>>; with <<http://www.merriam-webster.com/dictionary/contrary>>.

“Inadequate,” on the other hand connotes an insufficiency, not incompatibility. See, <<http://www.merriam-webster.com/dictionary/inadequate>>. The no-general-damage award is not compatible with an award of medical special damages. Washington law since *Palmer* requires a jury to award general damages under the circumstances of this case. An award of “zero”⁴ is not an award of general damages.

If a party fails to bring an inconsistency in the verdict to the attention of the court at the time the jury is polled, the party waives the issue. *Gjerde v. Fritzsche*, 55 Wn. App. at 393. In *Gjerde*, the jury returned its verdict on a special verdict form. *Id.* at 390. The jury found against the plaintiff on her claim of negligence, but went on to find for the defendant on contributory negligence. *Id.* The form did not tell the jury to stop at that point. The jury specified

⁴ The jury foreman actually inserted the symbol for the “empty set” \emptyset (see, <http://mathworld.wolfram.com/EmptySet.html>) rather than a “zero” on the line for general damages, CP 151, as if to emphasize their decision to award nothing to Ms. Kuk in this category.

45% negligence for the plaintiff. *Id.* The verdict was received without counsel for the plaintiff raising the obvious inconsistency by inquiry to the jury or the court. *Id.* Plaintiff moved for a judgment notwithstanding the verdict or for a new trial, both of which were denied. *Id.* at 391.

On appeal, this Court refused to consider plaintiff's challenge to the inconsistent verdict, ruling that under CR 49(b) plaintiff waived the issue below by failing to bring the inconsistency in the verdict's questions to the attention of the court at the time the jury was polled. *Id.* at 393. The Court reasoned that a party's failure to object while the jury remained seated was analogous to the failure to object to evidence or a jury instruction, which waives the issue for appeal. *Id.*

The *Gjerde* court, analyzing the majority of federal courts faced with the same issue, found that the failure to object to inconsistencies in the verdict before the discharge of the jury waives any objection on appeal:

The majority of Federal courts analyzing the identical provision of Fed.R.Civ.P. 49(b) have held that the failure to object to inconsistencies in the verdict before the discharge of the jury waives any objection on appeal. [internal citations omitted] While these cases involve both inconsistencies among the jury interrogatories and inconsistencies between the special and general verdicts, we conclude that the absence of a general verdict makes no difference. We agree with the reasoning of the Federal Court of

Appeals in *Strauss v. Stratojac Corp.*, 810 F.2d 679, 683 (7th Cir. 1987):

[W]hen the jury returned its verdict, the magistrate permitted counsel to examine the replies to the interrogatories. If counsel who had submitted the questions saw no inconsistency and raised no objection to the discharge of the jury, we can, at least under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury. Proper respect for the jury verdict and for the court's responsibility to manage its caseload fairly and expeditiously militate against such a course.

Gjerde, 55 Wn. App. at 393-394 (citing *Strauss, supra*, *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1422-23 (10th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 647, 93 L.Ed.2d 702 (1987), *Skillin v. Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981), *Stancil v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974). *See also, Minger v. Reinhard Dist. Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997) (plaintiffs waived any objection to the verdict based on the alleged 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).

Ms. Kuk should have brought the lack of any award of general damage to the attention of the trial court prior to the discharge of this jury. The inconsistency in the verdict was open and obvious. This is not a case where the damage award is merely "inadequate." The special verdict form showed the error on its face.

This case was not as difficult as the facts of *Palmer* where the general damage verdict was simply identical to the medical expenses which were not in dispute. This jury awarded Ms. Kuk's special damages but awarded Ms. Kuk "empty set" \emptyset ⁵ *i.e.* no general damages. CP 151.

In an effort to avoid unnecessary disputes and present an error-free case, and to minimize objections, Smith and UPS conceded that Kuk had incurred damages in the form of medical expense related to the broken little finger. The jury was instructed to award those medical special damages if it found that the defendants were negligent. CP 177.

Ms. Kuk's failure to object to the jury's verdict of no general damages at the time it was returned or when the Court polled the jury waived her right to later object and characterize the inconsistency as merely inadequate damages. As the court held in *Gjerde*, the failure to raise the issue at trial is akin to a party's failure to object to evidence or to a jury instruction, which waives the issue for appeal. 55 Wn. App. at 394 (citing *In re Penelope B.*, 104 Wn.2d 643, 659, 709 P.2d 1185 (1985); *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988).

⁵ The empty set is defined as "The set containing no elements, commonly denoted \emptyset . . ." <<http://mathworld.wolfram.com/EmptySet.html>>. This belies the argument of Ms. Kuk post-trial that "Zero is a number;" and the damages award was inadequate, not inconsistent. RP* *see*, note 2 *ante*.

Ms. Kuk will argue that in *Palmer, supra*, the court ordered a new trial on damages so that is the proper outcome here. That argument ignores the simple fact that until *Palmer*, the law was not settled with authority that an award of general damages is required where the defense does not contest the fact that medical expenses were caused by an accident and the issue in the case is whether the defendants are liable. The agreed instructions in this case demonstrate that was the position of UPS and Smith. See, CP 177.

Ms. Kuk had ample opportunity at trial when the verdict was returned and the jury was polled to raise the verdict's inconsistency with the Court. Instead Kuk remained silent and allowed the jury to be dismissed. Her failure to object when the issue could have been cured should preclude the ability to request a new trial, as a matter of law and sound judicial policy.

The proper remedy for Kuk's dissatisfaction with the verdict would have been to call the Court's attention to the inconsistency at the time the verdict was given so as to allow the jury a chance to correct it. 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, 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. If not remedied, Ms. Kuk's gamesmanship would breezily discard 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 scarce resources. Kuk's argument and the court's erroneous acceptance of it, that this is a case of an "inadequate" verdict, not an inconsistent one, exemplifies semantic sleight-of-hand that this court should not condone under the circumstances.

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. Such a result can only be described as inconsistent with the rule in *Palmer*, 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. Reference to case law from other jurisdictions facing the same set of facts confirms the wisdom of reversal as a matter of law and sound judicial policy.

In *Cohn v. J.C. Penny Co. Inc.*, 537 P.2d 306, 311-12 (Utah 1975), the court faced this precise situation. It held when a verdict has been returned that is inconsistent in awarding medical special damages without general damages, the trial court must require the

jury to return for further deliberation. *Id.* Failure to request such a correction waives the right to complain about the insufficiency. *Id.*

In *Cohn*, just as in the present case, the jury awarded special damages but no general damages. Plaintiff made no objection at trial, but subsequently moved for a new trial on the basis that the verdict was inadequate. The Supreme Court of Utah disagreed, holding:

It is well established by numerous authorities that, when a verdict is not in the proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected.

* * *

In the instant matter there was not merely an inadequate award of general damages – there was no award at all. The verdict was deficient in form, and counsel had an opportunity to have the jury sent back for further deliberations. This he did not do, perhaps fearing that the jury might either award some nominal amount or even change the verdict and award nothing to the plaintiff. It would be a smart trial tactic if he could have had a new trial on damages only before a jury which would not be acquainted with the weakness of plaintiff's cause of action.

Id.; accord, *Grow v. Ruggles*, 860 P.2d 1225, 1226 (Alaska 1993) (“The pain and suffering award was not merely inadequate—there was no award at all.”)

Kuk's verdict suffers from the same fatal inconsistency as the verdicts in *Cohn* and *Grow*, *supra*. The trial court's post-trial

decision characterizing the verdict as “inadequate” is wrong as a matter of law. The general damages were not inadequate. An award of some damages, but not enough is “inadequate,” or insufficient. The verdict was inconsistent; contrary to the evidence; incompatible with the law of Washington.

Under *Gjerde, supra*, the cure for inconsistency is waived if it is not raised at the trial court with the jury whose decision is inconsistent. Kuk had the opportunity to have the jury sent back to fix the inconsistency. The failure to do so constituted a waiver of their right to now object.

Whether or not Ms. Kuk was fearful of what the jury might do upon further deliberations, such as award her nothing, does not matter at this juncture. It is possible that had Ms. Kuk properly raised the issue at the time the jury may have awarded only nominal general damages, or they may have rendered some other decision. Clearly, Ms. Kuk could not have been pleased with a decision that awarded only one-half of admitted special damages and nothing more. Clearly, she was not interested in having that same jury make any further determinations. What that jury would have done is pure speculation at this point in time because she never objected to the inconsistent verdict.

What does matter, however, is the cautionary language from the cases unanimously observing that a party’s failure to timely object when the issue could be cured should not be rewarded with

a new trial. The Alaska court facing the same issue reached the same conclusion:

To achieve the efficiency the waiver rule is designed to promote, and to avoid the jury shopping it is designed to prevent, counsel must do more than simply poll the jury; he/she must also ask the jury to re-examine its decision. We affirm the trial court's denial of Ruggles' motion for a new trial.

Grow, 860 P.2d at 1227. The court also noted:

When a party does not move to resubmit a question before the jury is discharged, the suggestion of an ulterior motive arises. A litigant who receives an undesirable verdict may postpone challenging the verdict until the jury is discharged, hoping to receive a more receptive jury on remand. **This court and other courts have cautioned against this type of "having your cake and eating it too" strategy. A litigant cannot "be permitted to take advantage of what was probably a tactical move on [his/her] part.** By silence [he/she] chose to accept the benefit of the jury verdict; [he/she] must also accept any detriment which flows therefrom." *Nordin Constr. Co.*, 489 P.2d at 472.

Grow, 860 P.2d at 1227 n.1 [emphasis added].

Ms. Kuk's jury obviously reached a compromise verdict on a very close case of liability. Under those circumstances, plaintiffs should not be allowed a new trial on damages alone "before a jury which would not be acquainted with the weakness of plaintiff's cause of action." *Cohn*, 537 P.2d at 312. This Court should prevent such an injustice. The order for new trial should be reversed.

B. IF A NEW TRIAL IS ORDERED IT MUST BE ON THE ENTIRE CASE

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.⁶ Many of the same considerations discussed above apply.

Where a party argues that a new trial is warranted, the court must start with the presumption that the verdict was correct. *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 138, 856 P.2d 746 (1993). Juries have considerable latitude in assessing damages, and a jury verdict should never be lightly overturned. *Palmer v. Jensen*, 132 Wn.2d at 197; *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967).

As stated above, the trial court's decision to grant or deny a new trial will be reviewed for abuse of discretion. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. at 561. The court should look at the factual underpinnings of the trial court's new trial decision ("untenable grounds") and the legal standard which governs the ruling ("untenable reasons") and conclude the trial court abused its discretion ordering a new trial on damages only.

⁶ In a separate section, UPS and Smith point out certain evidentiary rulings that should be reversed as well. But the court need not reach any of these issues if it finds that Kuk waived her right to move for new trial.

As shown, *Palmer* holds that under the circumstances of this case, the jury was obliged to return some award of general damages. "Empty set," \emptyset , no general damages is not an award. The record reflects that the jury had a very difficult time reaching a consensus on Ms. Kuk's verdict. See, CP 60. The jury deliberated for several hours and, at times, quite boisterously. *Id.* At least one juror became very agitated and wanted to end the deliberations. *Id.*

It is very likely that the jury had a difficult time agreeing on any liability by defendants. It is quite possible and not at all improbable that several jurors doubted defendants' liability, but surrendered such doubts in favor of a small verdict. The jury probably compromised. They awarded Ms. Kuk special damages because they were undisputed by defendants; the jury was instructed it had to make that award. The jury awarded no general damages because they did not believe Ms. Kuk or other witnesses who testified about her pain and suffering.

Defendants, in fact, introduced ample evidence that plaintiff testified untruthfully. See, RP 324-353. The jury was instructed that it was the sole judge of witness credibility. CP 172-173. Much of Ms. Kuk's claim of general damage was tied up in her own testimony. See, RP 358-359. When viewed in the light most favorable to the non-moving party, the jury's verdict is closely tied up with the totality of the evidence that came in at trial, the facts of liability as well as damages.

Where a claim of inadequacy of damages is joined with the facts of a close case on the issue of liability, justice requires a new trial upon the entire case. *Cyrus v. Martin*, 64 Wn.2d 810, 812-13, 394 P.2d 369 (1964), citing *Zerr v. Spokane City Lines, Inc.*, 58 Wn.2d 196, 361 P.2d 752 (1961); *Vaughan v. Bartell Drug Co.*, 56 Wn.2d 162, 351 P.2d 925 (1960). In *Cyrus*, an auto accident case, the jury returned a verdict awarding the plaintiff only \$500 in general damages. The plaintiff was granted a new trial on the grounds that the verdict was inadequate and the trial court ordered the new trial on damages only. On appeal, the Washington Supreme Court reversed, holding that “where the inadequacy of damages is coupled with a close case on the issue of liability, justice requires a new trial upon the entire case.” The Court further held:

There was evidence of contributory negligence in this case, and the jury's verdict suggests the possibility that it was the result of compromise. Consequently, it would be unjust to the defendants to limit the issues upon a new trial.

Id. at 813.

Similarly, in *Myers v. Smith*, 51 Wn.2d 700, 321 P.2d 551 (1958), an auto accident resulted in personal injuries to the plaintiff. The plaintiff appealed what she believed to be an inadequate verdict and the trial court granted a new trial on damages only.

Once again the Washington Supreme Court reversed and held that a retrial limited only to the question of damages would be prejudicial to the defendant:

Here the evidence on both sides of the liability issue is substantial and conflicting in every respect. There is testimony of disinterested witnesses both of [defendant's] liability and of his freedom from fault.

* * *

Where the inadequacy of damages is coupled with a very close case on the issue of liability, justice, for obvious reasons, requires a new trial upon the entire case.

Id. (quoting *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912)).

The trial court grounded its decision to award a new trial on damages only on “the untenable grounds” (*Coggle v. Snow, supra*) that the award of damages was merely “inadequate.” CP 24, 22-23. The trial court misconstrued the relevant authority on that point (as demonstrated in part A) and also on the scope of new trial. In pertinent part, the court order granting new trial on damages only stated:

However, *Crawford v. Miller*, 18 Wn. App. 151 (1997) noted that the concerns that supported the holdings in *Cyrus* and *Myers* have been eliminated by the adoption of the comparative negligence formula and the use of special verdict forms.

* * *

Here, the jury divided liability evenly between the parties. This result was reasonable based upon the evidence produced at trial. The jury separately determined that the plaintiff incurred past medical damages. The jury also determined that the plaintiff incurred no non-economic damages. In light of the evidence, this was clearly an inadequate verdict. It can only be explained by jury passion or prejudice and there is no substantial evidence or reasonable inference from the evidence to justify that portion of the verdict. As a result, CR 59 provides for that portion of the verdict to be set aside.

CP 23.

In the *Kuk* trial, liability was hotly contested. There were significant issues of contributory fault such as Ms. Kuk's use of her cell phone while driving in rush hour traffic and the evidence that she was speeding at the time of the crash. Furthermore, there was eye witness testimony from a disinterested witness, Daisy Christopherson, who testified that Ms. Kuk was speeding and ran the red light, striking the UPS package car. CP 382. Mrs. Christopherson witnessed the accident and stayed at the accident scene in order to support the UPS driver by giving her account of what happened. RP 376, 384, 395. Defendants introduced evidence that plaintiff was untruthful. See, RP 330-333.

Crawford v. Miller, 18 Wn. App. 151, 566 P.2d 1264 (1977), does not stand simply for the proposition the trial court attributed to it. The court's misapprehension of the case law supplies the "untenable reasons" that constitute 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. *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1961). It was felt that in such a case, the jury fashioned its own comparative negligence rule. V. Schwartz, *Comparative Negligence* § 21.1 (1974). 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. Prosser, *Comparative Negligence*, 51 Mich.L.Rev. 465 (1953); Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 Ore.L.Rev. 38 (1969). **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 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 [emphasis added]. In this case, zero general damages would appear to be “so low as to, by itself” suggest that the jury’s decision on liability influenced the determination of liability and that they did not properly consider liability and damages issues separately.⁷

When the verdict was finally rendered, it contained an obvious compromise by the jury. They awarded Ms. Kuk’s special

⁷ All of this could have been cured by asking the jury to return to deliberate on an appropriate award of general damages. See, argument section A *ante*.

damages, but gave her no amount of general damages. To find that the jury's decision on the one issue was the result of passion or prejudice, but that the jury decided the other issues reasonably, 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. This approach by the trial court represents an abuse of 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."

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 hopes to get a jury that will not be allowed to hear the cross-examination of Ms. Kuk on liability issues that show her to be less than forthcoming. It also renders irrelevant other witnesses' testimony that could lead a jury to conclude Ms. Kuk was embellishing her testimony on her pain and suffering.

The Court should not allow such a "have your cake and eat it too" strategy.⁸ If a new trial is ordered, the new trial must be on all

⁸ 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.

matters of liability and damages and not merely damages alone in order to prevent a miscarriage of justice.

C. Discovery Sanction Decisions Should be Corrected in the Event of a New Trial

The trial erroneously applied discovery sanctions to the situation presented by the fact that the requested training documents from Mr. Smith's UPS personnel file do not exist. While not willful or even knowing, the loss of the file materials probably preceded the litigation. Mr. Smith had left the employ of UPS long before the litigation was instituted.

Two different items were under consideration.

(1) The quarantined e-mail information⁹, 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.

Discovery sanctions require a failure to respond to discovery. In this case, UPS has consistently answered discovery that the requested documents did not exist. RP 11-12; CP 838. The motion practice reviewed in the Statement of the Case concerned the plaintiff's claims around the UPS files that were lost

⁹ See, statement of proceedings, *ante*.

and never found prior to litigation. See, CP 948-963, 833-842, 771-775.

While the court may have engaged in the appropriate analysis if it were properly considering a discovery sanction for the failure to produce documents in existence, the fact remained the documents did not exist. The inquiry should have been whether spoliation was demonstrated. The two motions were taken up together; the court conflated the issues; and the resulting order should be reversed if the case is remanded for a new trial.¹⁰

1. Plaintiffs' claim of spoliation fails because Plaintiffs cannot establish that UPS discarded Mr. Smith's employment file let alone that UPS engaged in the willful destruction or obstruction of evidence.

Spoliation is the "intentional destruction of evidence." *Henderson v. Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). The *Henderson* court looked at two factors in determining whether it was proper to assess spoliation sanctions: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. The Court added that an important consideration was whether the missing evidence resulted

¹⁰ All of the following argument is moot if the court finds that Kuk waived her right to move for new trial. If the court finds that a new trial is warranted, however, the new trial should involve all relevant and admissible evidence, and as such the Court here should allow Mr. Smith to testify as any other percipient witness could his observations about the speed of the plaintiff, and the Court should exclude the prejudicial "letter of discipline."

in an “investigative advantage” for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence.

Admissibility turns on a finding of bad faith; *i.e.*, destruction that is both willful and with an improper motive. A party's innocent loss or destruction of evidence carries no suggestion that the party thought he or she had a weak case. McCormick on Evidence, §265 (two volume, 6th ed.); Wright & Miller, Federal Practice and Procedure: Evidence §5178; *Henderson v. Tyrell*, 80 Wn. App. at 609.

Henderson requires the court to first consider whether UPS knew the lost evidence was relevant to some issue in litigation. Jason Smith stopped working for UPS approximately one month after the accident on May 7, 2008. Kuk did not file suit until October 8, 2009, sixteen months after Jason Smith ended his employment with UPS. Certainly, UPS did not know during this time that any information in Jason Smith's file was relevant to some issue at trial, when there was no demand for compensation, much less a lawsuit for almost a year and a half. RP 43.

Henderson also requires a showing of "willful conduct." UPS sends most of its former employee files, including the portion that is missing here, to a third party records repository, Iron Mountain Inc. CP 504-505. UPS searched for the records of Jason Smith's training internally and at Iron Mountain a third party records

custodian. *Id.* Iron Mountain was also unable to locate those records. *Id.* Therefore, it was error to conclude that UPS "willfully" lost or destroyed any records.

The court in this case should have properly analyzed the companion motions and concluded that there was no spoliation. Plaintiff cannot prove bad faith. UPS's actions with regard to the employment file have been innocent. The employment file for Mr. Smith that contained his training materials was simply lost after his employment with UPS ended. While Mr. Smith's human resources materials were found, the materials showing Mr. Smith's completion of various training exercises was lost. It is this hard copy file that has never been found, despite plaintiffs' accusations. CP 446.

This was a simple negligence action. Ms. Kuk was obliged to prove that UPS (1) owed a duty of care to plaintiffs; (2) the duty was breached; (3) plaintiffs were injured; (4) damages were incurred as a proximate result of breach of duty. *Jackson v. City of Seattle*, 158 Wn. App. 647, 244 P.3d 425 (2010). Negligence is the relevant issue in this litigation. The lost employment file was irrelevant to proving the defendants' liability in this case.

In *Walker v. Herke*, 20 Wn.2d 239, 147 P.2d 255 (1944), a plaintiff argued that the alleged intentional destruction of a memo supplied substantive evidence of a pre-existing contract that absolved plaintiff's duty under a second contract. The Washington

Supreme Court clarified the application of the spoliation doctrine as follows:

Spoliation creates an inference to be considered in weighing the effect of the evidence applicable to the question in dispute. The effect of such spoliation is persuasive rather than probative, and cannot be invoked as substantive proof of any fact essential to appellant's case, certainly not where, as in this case, secondary evidence was obtainable to prove the fact.

Walker, 20 Wn.2d at 249. The Court further clarified its holding: "The rule has been stated that the presumption will not supply a missing link in an adversary's case, and cannot be treated as independent evidence of a fact otherwise unproved." *Id.* (citing 70 A.L.R. 1326).

Coupling the discovery sanction motion with a motion regarding spoliation, Ms. Kuk conflated the issues about discovery for the trial court. The court abused its discretion by failing to parse out the differences in the separate issues that were presented, and resolving them independently.

2. Sanctions were not appropriate.

If the court had correctly considered the separate matters at issue in the companion motion for sanctions, it should have imposed the least severe sanction adequate to serve the purpose. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

UPS produced to plaintiffs, in accord with the Court's Order compelling discovery, the 2008 training driver materials that it could locate and these provide plaintiffs with the types and kinds of training Mr. Smith actually received. Because of the "spoliation" issues, however, UPS could not produce the documents that were used by Mr. Smith which would have been placed in his individual file. They did not exist.

The documents produced by UPS included Mr. Smith's job application, Mr. Smith's signed drug and alcohol policy form, medical examination information, Mr. Smith's driver certification and driving record, Mr. Smith's signed professional conduct and anti-harassment policy form, employment history and references, road test reports, and a fingerprint application. CP 586-587.

None of these documents, the documents initially misplaced in a quarantined email, was probative of the issue of UPS's liability in this straightforward auto accident negligence action. These documents had no bearing on plaintiffs' burden of proving all of the elements of negligence against Jason Smith in order to succeed on their claims. These documents were irrelevant as to both as to Jason Smith and UPS's liability in this matter.¹¹

Under *Fisons*, the court should have imposed the least severe sanction for the chosen purpose, e.g., to deter, to punish, to

¹¹ Kuk did not plead a claim for negligent hiring, training or supervision.

compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong. *Fisons Corp.*, 122 Wn.2d at 299. In a word, to “let”. “Let the punishment fit the crime.” The court felt that it was doing the right thing by sanctioning UPS and Smith on matters arguably related to Smith’s training by UPS. The problem with the court’s approach is that the training matters were not properly sanctionable under the discovery sanction regime. That training file for Smith was what never existed. Those were the lost documents. They were not subject to the order compelling discovery and thus sanctions for violating that order were not proper.

Because UPS acted in good faith and provided all of the materials immediately upon the discovery of Mr. Smith’s other human resources materials, sanctions are not appropriate for that failure either. The documents were not germane to the case. They were innocuous. The file contained only Mr. Smith’s job application and job qualification forms, all of which are standard for UPS employees. Admittedly, Mr. Smith’s human resources materials which did exist should have been provided at the soonest opportunity. Thus, UPS was willing to stipulate to the documents’ authenticity pursuant to the ER 904 submissions which were already on file.

The sanction of precluding the defendant Mr. Smith from testifying to the speed of the oncoming vehicle as he perceived it

exceeded the scope of a permissible sanction under the circumstances of the discovery issue surrounding the late production of the information from the misplaced quarantined e-mail. Allowing the plaintiff to introduce the letter of discipline had no relationship to the claimed discovery violations.

VI. CONCLUSION

The court should reverse the trial court's order granting a new trial. Ms. Kuk waived the right to later request a new trial when she failed to object to the inconsistent verdict before the jury was discharged. If she had objected the court would have instructed the jury to deliberate and return an award of general damages as mandated by the very law plaintiff later cited to support a request for new trial on damages. This appeal could have been avoided by plaintiff's simple request that the jury return to deliberate and award general damages, as required by Washington law.

If this Court does not find waiver under the circumstances, this Court should reverse the trial court order as to the scope of the new trial and remand for a new trial on liability and damages.

The full new trial on liability and damages should proceed only after this Court vacates the trial court's pre-trial sanction orders in two respects: (1) to allow the defendant Jason Smith to testify as to his perception of the speed of the oncoming vehicle driven by

plaintiff Ms. Kuk, and (2) to exclude evidence of "the letter of discipline."

Respectfully submitted this 25th day of September, 2012.

~~PREG O'DONNELL & GILLETT PLLC~~

By

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Attorneys for Defendants Michelle Clark
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CERTIFICATE OF SERVICE

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

1. Appellants Brief;

to be served on the following parties in the manner indicated below
on the 25th of September, 2012:

Counsel for Plaintiffs Kathleen Kuk and David Kuk:

Crystal Grace Rutherford, Esq
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Via Messenger
 Via Facsimile –
 Via U.S. Mail, postage prepaid

DATED this 25th day of September, 2012.

By Joan L. Kattenhorn
Joan L. Kattenhorn, Legal Assistant