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NO. 68617-8-1

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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FILED  
APR 18 2011  
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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 SERVICES, INC.

Appellants.

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

This is a matter appealed from a jury trial held at Snohomish County Superior Court in Everett, Washington. At the week-long jury trial evidence was presented about the how the automobile collision of May 7, 2008 occurred and the injuries respondent Kathleen (“Kat”) Kuk suffered. Using a special verdict form the jury found each party to be 50% percent at fault for the collision, awarded all the special damages to Ms. Kuk but nothing for general damages.

Previous to the trial, respondent sought the employment and training records of the driver Jason Smith, and any documents pertinent to the investigation of the collision by United Parcel Service (hereinafter “UPS”). Appellants refused to respond and respondents had to file a motion to compel. Appellants filed a cross-motion seeking a protective order which was denied. The court ordered appellants to produce the requested discovery but only a handful of records were produced. A second motion to compel was filed and appellants requested oral argument. On January 30, 2012, the motion to compel was largely granted. Two days after the hearing of the second motion to compel on February 1, 2012, and after claiming for nine months that the employment and training records of Jason Smith were lost, respondents were served with some documents, mostly pertaining to handling of hazardous materials which were irrelevant to the case at hand. The documents that were produced on February 1, 2012, had been in appellant’s counsel possession since June of 2011.

A motion for spoliation was filed and oral argument was granted. The court found spoliation under *Magana v. Hyundai Motor AM.*, 167 Wn.2d 570, 220 P.3d 191 (2009) and as a sanction it allowed into evidence a letter in which the appellant UPS stated that its driver, Jason Smith had used unsafe driving practices and to not allow any testimony regarding his training. Appellants have made the court's decision an issue on appeal.

After the trial, respondents timely filed a motion for additur or for a new trial on damages based on the jury's verdict of granting all of respondent's special damages but none of her special damages. The court declined additur and ordered a new trial solely on damages in accord with CR 59 and *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.3d 597 (1997). Appellants have also made that an issue on appeal.

## **II. STATEMENT OF THE CASE**

### **A. STATEMENT OF MATERIAL FACTS**

On May 7, 2008, on 4<sup>th</sup> Avenue West in Everett, Washington Respondent Kathleen ("Kat") Kuk was traveling northbound in the lane next to the center line. RP 299. With her was her thirteen year old daughter Maria Kuk. RP 334. It was after 4 p.m. and rush hour had begun, so traffic was heavy. RP 299. Respondent Kuk testified that she was traveling with the flow of traffic. RP 355. Ms. Kuk remained in the same lane and she crossed 128<sup>th</sup> Street and neared the intersection at Mariner Square, the traffic signal changed from green to yellow. RP 302,

Ex. 105. Ms. Kuk was only about a car length away from the intersection, so she did not slow down but sped up to clear the intersection before the light changed to red. RP 350. The car driven by Daisy Christopherson was also traveling northbound in the lane to the right of and adjacent to Plaintiff Kuk. Ms. Christopherson, who was slightly ahead of Ms. Kuk, chose to brake and stop while the light was green in anticipation for the red light. RP 350. This distracted Ms. Kuk to look to see why Ms. Christopherson's car was braking and when she looked back to the intersection, the traffic signal light was yellow. RP 302 and 349.

Defendant Jason Smith, an employee of Defendant United Parcel Service, who was acting within the scope of his employment, was driving his employer's van heading southbound on 4<sup>th</sup> Avenue. RP 411. Southbound 4<sup>th</sup> Avenue has two lanes and a left hand turn lane onto Mariner Square. In addition to the usual three color traffic signal, there is also a turn arrow for traffic making a left hand turn onto Mariner Square. The traffic signal lights were the same for the traffic traveling northbound and southbound. In other words, when the light was green for Mr. Smith, it was also green for Ms. Kuk; if it was yellow for Ms. Kuk, it was also yellow for Mr. Smith and so on. RP 144-45; RP 165; RP 476.

When Defendant Jason Smith arrived at the intersection with Mariner Square, he stopped to wait for oncoming traffic to clear. RP 411.

Ms. Kuk, seeing nothing obstructing her from crossing the intersection proceeded to cross the intersection. RP 350. She did not notice the UPS van sitting to the side, waiting for traffic. RP 351. Mr. Smith started to make his left hand turn, and did not notice Ms. Kuk's car until right before it entered the intersection. RP 437. It was too late for either driver to avoid the collision. RP 166-167. Ms. Kuk's front left side of her car struck the UPS van first at the base of the stairs right behind the front wheels of the right side of the van. RP 302.

Ms. Kuk sought immediate medical help at the Everett Clinic. After she arrived at the clinic, the pain had manifested itself and grew in intensity. Ex. 1 (*KUK 000003*). X-rays revealed a complicated comminuted and displaced fracture and extended into the joint space of her small finger of her right hand. CP 287-99 (pg. 13), Ex. 1 (*KUK 000003*). Ms. Kuk was referred to Dr. Dagmar Rhese, a surgeon that specializes in hand injuries. Ex. 1 (*KUK 000003-04*). Initially the finger was splinter but a few weeks later it had to be surgically set with three pins which protruded from her finger. Her ring finger was bound to the pinky. Ex. 1 (*KUK 000024-25*).

Respondent's primary injury was a comminuted and displaced fracture to her small finger of her dominant hand which led to a succession of casts and therapy that lasted months resulted in permanent. Ex. 1. Additionally, her ring finger was also injured and remains permanently affected. There is no evidence disputing that plaintiff suffered a

permanent injury as a result of the motor vehicle collision that left Respondent Ms. Kuk, loss of range of motion and loss of strength to her dominant hand. CP 287-299.

Importantly, it is undisputed that Respondent's respective medical specials were reasonable and necessary to treat her collision related injuries. In addition there is substantial evidence in the record that Respondent Kathleen Kuk incurred noneconomic damages for pain and suffering, both mental and physical, loss of enjoyment of life and inconvenience. RP 236-238, RP 242-43, RP 246, RP 250-255, RP 264, RP 266-268 and Plaintiff Exhibits 1 and 2. Respondent testified that it takes her longer to do mundane tasks. RP 318-320. She can no longer make a full fist with her right hand since both her small and ring fingers do not have sufficient range of motion. RP 318 *see also* Dr. Rhese's testimony pages 26-30 at CP 287-299. With both her pinky and ring finger compromised, the side of her hand necessary for pulling and grasping lacks the strength to it once it enjoyed so lifting heaving bags with only her hands is difficult or impossible. RP 371. These limitations were supported by Dr. Rhese's testimony and the chart notes showing that grip strength only being 32% of what it is on the left. Even almost two years post collision, the grip continued to considerably less. CP 287-299 and Ex. 1 (*KUK 000075 and 93*).

Over the next few months, Ms. Kuk experienced a great deal of intense pain and there were complications from the cast on her hand. Ex. 1 (*KUK 000126 to 135*). Her hand swelled after the surgery which also led to increased pain. Ex. 1 (*KUK 000041*). The cast had to be cut-off from her hand which caused additional complications. Ex. 1 (*KUK 000041*). In fact Ms. Kuk had to submit to several casts for many months after the crash and tenderness and swelling were observed. Ex. 1 (*KUK 000041, 43, 48, 49, 50-51*). It was not until mid-August that Ms. Kuk could control the intense and unrelenting pain with over the counter medications rather than the narcotics she had had to take. Ex. 1 (*KUK 000058*).

The pain and discomfort was amply documented at the trial with the medical chart notes contained in Exhibit 1. For example the chart note dated May 19, 2008 stated that “the patient was in a lot of pain and having to take more pain pills.” This is followed by further notes regarding having the refill her medication to attempt to control the pain. Ex. 1 (*KUK 000126 to 135*).

There were difficulties with the casts. They would become too snug due to the swelling and would have to be removed. Ex. 1 (*KUK 00036 to 39*).

Ms. Kuk underwent physical therapy but both her small and ring fingers had lost their range of motion so that simple every-day actions such as sweeping crumbs from a table were difficult. The therapy led to

increased pain and the therapist noted this as well that five months post injury Ms. Kuk was “terrified of bumping small finger and experiences severe pain if she does bump it without her splint on. Therapy very limited at this point due to high pain levels.” CP 287-299 and Ex. 1 (*KUK 00050; 57, 62, 63,67-68, 81, 82*) . Additionally, Ms. Kuk’s right hand had lost most of its grip strength and she found that she could not bow-hunt as before, nor could she engage in her hobby of doing plant castings made from cement. RP 250-255; Ex. 1 (*KUK 000056 and 000089*).

Dr. Rhese testified as follows:

18 A. She appeared to be in a significant amount of  
19 pain. I see many digit fractures, and they are typically  
20 quite painful. Even after getting them reduced, they can  
21 remain painful. She also had the additional insult of  
22 having pins placed, which can be painful as well. So  
23 sometimes it's difficult to separate the pain from the  
24 external hardware from the fracture itself.

Page 16

18

4 Yeah. So this is her -- so this is her --  
5 actually, I think this one was taken because she was having  
6 significant pain, and I wanted to make sure that her  
7 fracture remained stable.

...

18 You said she was still in pain as well?

19 A. And she was having a significant amount of pain,  
20 which is another reason why I would take the image on the  
21 7th of June, to make sure that she wasn't showing any signs  
22 of a bone infection. She was having enough pain that I was  
23 considering that.

24 Q. Did you prescribe medication to control her pain?

25 A. I prescribed medication to attempt to control her

1 pain.

2 Q. What was the medication you prescribed?

3 A. I believe -- I have to refer to my record for that  
4 because I don't recall off the top of my head. So I  
5 initially prescribed her Percocet -- or excuse me -- the ER  
6 initially prescribed her Percocet. I postoperatively  
7 prescribed her Extra-Strength Vicodin and then tried to  
8 decrease the level of medication, the narcotics, that she  
9 was taking, but she was still taking more than the average  
10 digit fracture that I treat.

11 Q. Was it -- was there -- was -- so it was unusual  
12 that she --

13 A. It was an unusual amount of narcotics that I was  
14 prescribing.

15 Q. Did you have any indication whatsoever that  
16 Kat Kuk was abusing?

17 A. No. No. She always gave me the impression when I  
18 was examining her that she was legitimately having pain.

19 Q. Okay. Can you explain to the jury why a hand  
20 injury would give so much pain, especially in such a small  
21 digit?

22 A. Well, everybody has a different perception of pain  
23 too --

24 Q. Uh-huh.

25 A. -- but in general the hand is a very important

20

1 portion of the body. It's the -- it's very well innervated.  
2 It is pre -- it's a finely-tuned machine, so there's a fair  
3 bit of dedication from the brain and from the body to the  
4 hands, and so I think that even a small cut on the finger --  
5 everybody's experienced a paper cut -- that's a perfect  
6 example of how can such a little tiny cut be so painful, but  
7 it's because there's so much innervation and so much  
8 dedication to the hands from the --

9 Q. When you mean innervation, do you mean -- what do

10 you mean by that?

11 A. Nerve -- nerve supply.

12 Q. There are lots of nerves in that?

13 A. There are lots of nerves.

14 Q. Lots of nerves?

15 A. Uh-huh.

16 Q. Now, that's -- so that you're saying because  
17 there's so many nerves, the -- it's compared to other parts  
18 of the body -- please explain.

19 A. I can only try.

20 Q. Okay.

21 A. But I think that an injury to the hand can -- it  
22 can be quite devastating because of the amount -- well,  
23 partly because of the amount of use that we have with our  
24 hands. So we're trying to use them all the time, but also  
25 just, again, I think the amount of nerve supply that's

21

1 dedicated to the hands as well as the -- when there's an  
2 injury, the hand doesn't work well, as well as it used to,  
3 so oftentimes we have muscles that are trying to overwork to  
4 compensate for the injury, something that we call  
5 co-contraction, which can actually aggravate the injury  
6 pattern, but it's something that is not controlled by the  
7 body.

8 Q. Uh-huh.

9 A. There -- the other part with an injury is that  
10 there's an inflammatory response to that injury, and that  
11 inflammatory cascade is probably partly the -- or probably  
12 contributing the largest to our interpretation of pain, and  
13 that inflammatory cascade is going to be significant from  
14 any small injury, but interpreted largely by what's going on  
15 in your brain.

CP 287-299.

Dr. Rhese testified about the significant amount of pain that Kathleen Kuk was in and the efforts to control that pain. It was Dr. Rhese's opinion on a more likely than not basis that the motor vehicle collision was the cause of Mrs. Kuk's fracture to her hand. Additionally, it is Dr. Rhese's opinion that Ms. Kuk's condition is permanent. CP 287-299.

Additionally, several lay witnesses testified as to their own observations of Ms. Kuk's injuries and how they affected her. There was ample evidence beyond Ms. Kuk's own testimony. RP 242-43; 246; 250-255; 264; and 250-255.

#### **B. PROCEDURAL FACTS.**

The collision took place on May 7, 2008 and suit was filed October 8, 2009. CP 972-977. Jason Smith was served on October 9, 2009, and UPS was served on December 16, 2009.

The parties exchanged discovery. CP 847 Shortly thereafter, Appellants sought and obtained a trial date. Unfortunately, counsel for respondents became gravely ill with sepsis in the fall of 2010 and a motion was made to postpone the trial. CP 1158-60. As the new trial date neared, counsel for respondents became gravely ill again, this time with cancer. A motion was made to postpone the trial once again which was granted. CP 1137 to 1140. Respondents' original attorney withdrew and was substituted with new counsel on August 10, 2011. See case docket and CP 843.

Respondents served second discovery requests on counsel for Appellants on March 24, 2011. On April 25, 2011, counsel for appellants sent a letter denying all need to answer the outstanding discovery requests. CP 1221-22. On April 28, 2011, counsel on a CR 26(i) conference on the record. CP 907-910. On May 4, 2011, respondent's First Motion to Compel was filed and served on counsel for appellants. On May 5, 2011 Appellants filed a cross motion for a protective order and claimed that defendant Jason Smith's employment file was lost. CP 1150-53. The motion was heard on May 12, 2011 and respondent's motion to compel was granted and appellants' cross motion was denied. CP 916-918. Respondents received the compelled responses to their discovery requests on May 13, 2011, with the claim that Jason Smith's employment file was lost but does produce some a few documents. CP 918-932.

Appellant UPS claimed repeatedly in its pleadings, in argument before the court and in letters that it "lost" Mr. Smith's employment file and the records that would have been contained in it. CP 833-842. In its responses, defendant UPS stated that it cannot locate Mr. Smith's employment records, which are lost. CP 885-897, RP 11. However, UPS produced a handful of documents which included only one that was directly related to this accident, wherein a UPS manager disciplined Mr. Smith for not using safe driving methods and avoiding the collision that gives rise to this litigation which was a letter dated May 12, 2008, from UPS Business Manager to Mr. Smith. CP 899. The letter states:

On May 7, 2008, you failed to use proper safe driving methods as you were trained and instructed. You have an obligation to drive in a safe and professional manner utilizing the training you have received. On this day you did not and it resulted in an avoidable accident.

Therefore, pursuant to Article 28 of the Western Region Supplemental Agreement, I find it necessary to officially warn you. Future infractions will result in more severe disciplinary action up to and including discharge.

CP 899

The letter references Mr. Smith's training and states that he did not follow his training, and if had he done so, the accident that is the subject of this case could have been avoided. In responses to respondent's requests for those training documents, UPS states that it has lost his employee file and cannot find it. The respondent was thus denied access to relevant and vital evidence for her case, and UPS clearly used this to gain an unfair advantage in the litigation.

Nonetheless much of the discovery respondents sought remained unanswered as UPS had responded to many of the requests with only boiler plate objections and assertions of privilege did not have privilege logs. CP 920-933. A second CR26(i) discovery conference was held on August 12, 2011, which was memorialized by a letter written by Matthew Hale. CP 942. Appellant was steadfast in her assertions that that the documents related to Mr. Smith's file remained lost and that other documents requested would not be produced. CP 942.

A second motion to compel was filed on January 10, 2012. CP 948-963. Defendants requested an oral argument which was heard on January 30, 2012. RP 1-28. At the hearing, appellant's counsel again reiterated that the documents were lost. RP 2. After listening to both sides, the trial court issued an order to compel some of the documents. CP 153-55.

On Wednesday, February 1, 2012, defendant UPS produced documents that were purported to be Mr. Smith's employment file and training records. CP 586. This was clarified by correspondence from UPS on Friday, February 3, 2012, where defense counsel explained that in fact Mr. Smith's training records that should have been kept in his employment file have been lost. CP 583-84. February 3, 2012 Letter from defense counsel attaching discovery responses.

I wanted to note that the Jason Smith file containing his recorded completion of such training/education continues to be missing from UPS's files. The Profile is a record of the Profile is a training/education Mr. Smith received, but does not contain the paperwork and other documents signed by Mr. Smith upon his completion of each training/education session. Although not all trained/education required a completion form to be signed by the driver, some did and UPS would keep these documents in a file. As previously stated, UPS has been unable to locate these materials for Mr. Smith.

CP 583-84.

These records would have provided vital evidence to the respondents' case that Mr. Smith "failed to use safe driving methods" as he was trained to do by UPS. There is now no way of confirming or showing exactly what training Mr. Smith received.

Not only has UPS lost Mr. Smith's training records, but it cannot locate certain education and training materials that would have been provided to Mr. Smith. Here again, defense counsel then admitted that it has not located all of the training records related to Mr. Smith's training, as Ms. Tinglum stated:

By way of clarification, certain of the documents included with the responses are training/education materials used by UPS for drivers such as Jason Smith. These materials correspond to Mr. Smith's UPS Employee Profile History that was provided to you with my letter of January 31, 2012. UPS has produced all training/education materials identified in Mr. Smith's Profile **that it was able to locate.**

February 3, 2012 letter to Plaintiff's Counsel from Britt Tinglum, emphasis added. CP 583-84

UPS continued to claim that it cannot even locate basic training/education materials that were provided by Mr. Smith. This letter has served as another admission that UPS failed to retain documents. As near as the respondent can determine from the records that have been provided, UPS has failed to provide the following documents that it was ordered to provide (this is not an exhaustive list, but is aimed at what appears to be the most relevant documents):

1) The UPS Policy Book, referenced in the employment files of Jason Smith;

2) The following training materials, referenced in Mr. Smith's employment files have not been provided despite the Court's order:

- a) SPACE AND VISIBILITY
- b) DAMAGE CALL TAG DIAD TRAINING
- c) YARD CONTROL CERTIFIED EMP
- d) COOL SOLUTIONS
- e) DELIVERY INTERCEPT TRAINING
- f) DR CERT/RE-CERT
- g) DCASR PROCEDURES TRAINING
- f) BODYMECHANICS
- j) LOCKOUT AFFECTED
- k) REWRAP, DAMAGE, OG'S PROCEDURES.

Jason Smith Employee History Profile. CP 641 After reviewing defendants' supplemental responses, respondent was provided with the Record of Safety Ride, Record of Safe Work Methods, General Yard Safety Rules, Conveyor Securing Test, Hazardous Materials/Emergency Response Training. CP 573-645. It was impossible for respondent's counsel to know what information the non-produced training records would hold, but it is known that this information could not be used for trial, and it was impossible to know what information was not provided.

Respondents file a motion for relief due to appellants' discovery violations on February 9, 2012. CP 539. The trial court heard the motion

for spoliation on February 13, 2012. The court weight various options including striking appellants' answer and entering an order of default or monetary sanctions, but opted for the least onerous remedy. CP 153-55, RP 35.

This case was then tried to a jury who gave their verdict on February 17, 2012. In their verdict they found Kathleen Kuk to be 50% negligent. The jury also awarded the full amount of the special damages of \$21,996.90 for medical treatment and \$12,000 for automobile loss, but gave nothing for general or noneconomic damages.

Respondent's counsel filed a Motion for Additur or a new trial on damages on March 9, 2012. The motion was heard by the trial judge on March 16, 2012, and his decision was filed on March 23, 2012. The trial court declined additur but ordered a new trial on damages. CP 22-23. Appellants filed their Notice of Appeal on April 13, 2012.

### **III. ARGUMENT**

#### **A. Appellants Mistake and Misinterpret the law regarding inconsistent verdicts as there was no need for Respondent to Object to a Verdict that was internally consistent under CR59**

The court may vacate a verdict and grant a new trial "to all or any of the parties, and on all issues, or on some the issues when such issues are clearly and fairly separable and distinct." CR 59(a). The rule provides several bases upon which the Court can exercise its discretion to set aside the jury's verdict in this case. CR 59(a)(5) allows a trial court to set aside the jury's verdict where the damages are so inadequate as unmistakably to

indicate that the verdict must have been the result of passion or prejudice. CR 59(a)(7) allows the Court to set aside the jury's verdict where there is no substantial evidence or reasonable inference from the evidence to justify the verdict.

Instruction No. 7 to the jury stated in part that:

The plaintiff has the burden of proving each of the following propositions;

Second, that the plaintiff was injured and plaintiff's property was damaged;

Additionally, Instruction No. 20 to the jury stated in part that:

If you find for the plaintiff, your verdict must include the following undisputed items:

\$21,966.90 for medical treatment

\$12,000 for property loss

In addition you should consider the following noneconomic damages elements:

The nature and extent of the injuries;

The disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future;

The losses and harms both mental and physical, including but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress loss of relationship, experienced and with reasonable probability to be experienced in the future.

CP 177. Docket No. 184

When a verdict indicates that a jury disregarded the Court's instructions, a new trial is proper. *Zorich v. Billingsley*, 52 Wn.2d 138, 141, 324 P.2d 255 (1958); *see also State v. Davenport*, 100 Wn.2d 757, 763-65, 675 P.2d 1213 (1984). Reviewing plaintiff's medical specials and the jury's verdict in which they in fact awarded Respondent Kathleen Kuk the full amount of her special damages. The jury having concluded that plaintiff was injured in the collision thereafter departed from the evidence and returned a shockingly inadequate verdict on general damages based upon its own speculation and prejudice rather than only medical evidence before it.

Washington courts have had little hesitancy in granting a new trial when the jury fails to award the items of damages that are undisputed, conceded, or beyond legitimate controversy. Appellants presented no evidence to contradict the medical and lay witnesses' assertions of the damages respondent Kuk suffered.

In *Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965), the Washington State Supreme Court affirmed a trial court's decision granting a new trial because that jury's verdict was the result of passion or prejudice. In *Hills* the defendant rear-ended the plaintiff but disputed liability. The plaintiff's undisputed medical specials were \$1,751.80 but the jury awarded \$1,550. The trial court found, and the Supreme Court

agreed that the jury's verdict was the result of passion or prejudice because it failed to award any general damages and in fact reduced Hills' proven special damages. "The medical testimony is uncontroverted that these medical expenses were reasonable and necessary, resulting from the accident." *Id.* at 741. A new trial was ordered.

In *Ide v. Stolenow*, 47 Wn.3d 847, 289 P.2d 1007 (1955), the Washington State Supreme Court held that the jury's verdict was clearly inadequate and not sustained by the evidence. The jury awarded \$1,246.24 though the special damages were \$1,465.47. The court speculated that the jury may have concluded that the plaintiffs were attempting to capitalize on the collision, but the Court reasoned that certain facts in the record could not be brushed aside or disregarded, including among others, the uncontradicted medical evidence on damages. The court concluded:

We recognize that it can be said that the jury could have disbelieved all of the plaintiff's' experts . . . The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was not contradiction or dispute.

It is our view that, in determining whether a new trial should be granted because of inadequate damages, the trial court and this court are entitled to accept as established those items of damages, the trial court and this court are

entitled to accept as established those items of damages which are conceded, undisputed, and beyond legitimate controversy.

*Id.* at 851. *Accord Palmer v. Jenson*, 132 Wn.2d 193, 199-200, 937 P.3d 597 (1997).

The jury is required to accept such items of damages as well. “Where special damages are undisputed, and the injury and its cause clear, the court has little hesitancy in granting a new trial when the jury does not award these amounts . . . We reserve a jury award of damages which is outside the range of substantial evidence in the record.” *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 636, 865 P.2d 527 (Div. I 1994).

Similarly, the evidence in the record stated that the plaintiff’s medical specials were reasonable and necessary to treat her finger shattered in the collision. CP 294. Expert testimony from a medical professional is required to establish the existence of an injury and the necessity and reasonableness of treatment. *Miller v. Stanton* 58 Wn.2d 879, 886, 356 P.2d 333 (1961). That proof was provided by Dr. Rhese’s testimony that on a medically more probable than not basis, that the treatment she had received, including the surgery, multiple casts and therapy were reasonable and necessary to treat the shattered finger. This

was the *only* medical evidence at the trial. The jury did in fact award the full amount of the medical specials. CP 150-52.

**B. That the Jury Award Respondent Kuk Zero for General Damages is an Inadequate but not an Inconsistent Verdict**

The jury did not award any non-economic damages whatsoever. *See Special Verdict Form.* CP 15-152. This decision defies the undisputed evidence in the record. CR 59(a)(7). Substantial justice was not done as per CR 59(a)(9). Appellants are arguing is that because the special verdict's award for general damages is inconsistent with the law, rather than internally inconsistent, that CR 49 applies. However, the case law of this state does not support their position.

Our Supreme Court does not hesitate to grant a new trial when a jury's failure to award non-economic damages defies the evidence in the record. The case of *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997), arose from a motor vehicle collision in which the jury award the plaintiff the exact amount of the medical special but not general damages. As in the present case, the defendant presented no medical evidence to refute the medical opinions.

The Supreme Court held that because the uncontradicted medical evidence substantiated the plaintiff's claim that he experienced pain and suffering, the jury verdict providing no non-economic damages contrary

to the evidence. *Palmer* 132 Wn.2d at 203. The court's discussion of the legal standard governing a jury's failure to award non-economic damages is instructive:

Although 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. See *Hills v. King*, 66 Wash.2d 738, 404 P.2d 997 (1965) (no abuse of discretion to grant new trial where jury awarded nothing for pain and suffering but plaintiff experienced pain for at least 17 months after the accident); *Shaw v. Browning*, 59 Wash.2d 133, 367 P.2d 17 (1961) (where "indisputable" that plaintiff sustained pain and suffering and jury failed to award general damages, new trial upheld); *Ide v. Stoltenow*, 47 Wash.2d 847, 850, 289 P.2d 1007 (1955) (no abuse of discretion to grant new trial where verdict of less than \$500 for general damages was "so inadequate as to shock the conscience of the court"); *Cleva v. Jackson*, 74 Wash.2d 462, 465, 445 P.2d 322 (1968) (new trial upheld where trial court found nominal amount for pain and suffering "clearly was unjustified under the evidence introduced at the time of trial").

We therefore review the record to determine if the omission of general damages was contrary to the evidence.

*Palmer* 132 Wn.2d at 201-202.

In reviewing the record, the court highlighted that the plaintiff's treating provider noted that she was experiencing neck pain, low back pain, headaches, and sleep difficulties. The court also referenced trial

testimony from the plaintiff's treating health care providers that she was very tender in the neck and back as well as indicated constant low back pain that varies in intensity from dull to sharp. *Id.* The court held that:

[t]he medical evidence substantiates Pamela Palmer's claim that she experienced pain and suffering . . . . We hold the jury's verdict providing non damages for Palmer's pain and suffering was contrary to the evidence. The trial court therefore abused its discretion when it denied Palmer's motion for a new trial.

*Palmer* 132 Wn.2d at 203.

The evidence in the present record similarly substantiates Respondent Kathleen Kuk's respective claims for pain and suffering. Dr. Rhese's testimony and the chart notes substantiate the experienced pain and disability. CP 287-299 and Plaintiff's Exhibit 1. Therefore, the jury verdict providing no general damages for Respondent Kathleen Kuk's pain and suffering is contrary to the evidence. Notably, Appellants are conceding that the jury verdict gave no general damages, which is contrary to law under *Palmer v. Jensen and therefore* erroneous as a matter of law;

The case of *Palmer v. Jensen* is also similar to this case in that it was a disputed liability case. Like here, the *Palmer* jury found the plaintiff to have comparative fault and awarded only their special damages. *Id.* at 195. Also like the case here, the defendants in *Palmer* did not provide opposing medical testimony. The Court in *Palmer* notes

that additur or new trial is appropriate where the record shows categorically that special damages alone were awarded in spite of undisputed evidence of general losses. *Id.* at 199 citing *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 177, 422 P.2d 515 (1967).

In fact, this case is even stronger than *Palmer* which only used a general verdict form. Here a special verdict form which separated generals from special damages. In the case at hand it is clear that the no general damages were awarded. CP 150-152.

A plaintiff who substantiates her pain and suffering with evidence is entitled to general damages. While there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages. *Id.* 201. Respondent Kathleen Kuk did so, through medical testimony, through the medical records (Plaintiff's Trial Exhibit 1); through her treating physician Dagmar Rhese, M.D. (CP 287-99); through her husband David Kuk and through several lay witnesses (Karen Nelson, Jeff Sautell, Dayna Sautell, and Lynn Harding) who testified as to their personal knowledge of how Respondent's injury affected her life. CP 264 and 266-67CP 236-38; CP 242-43; CP 246; and CP 250-55 respectively.

**C. Appellants Avoid the Obvious – that the Jury Ignored Its Instructions Creating an Inadequate Verdict for General Damages Only**

Appellants seek to confuse the terms “inadequate” with “inconsistent.” Appellants erroneously rely on *Gjerde v. Fritsche*, 55 Wn.App. 387, 777 P.2d 1072 (1989) for the proposition that respondents waived the right to ask for relief in the form of additur or new trial because the jury was polled.

Notably a court can poll the jury on its own initiative without either counsel requesting that it be done. All that polling does is to clarify that in fact, the written verdict read by the court clerk conforms that it is in fact the jury’s verdict. According to the logic of the defense, should the jury give plaintiffs a million dollar verdict, then upon polling the defense would have waived any right to post-judgment relief.

The issue in *Gjerde* involved a verdict form in which the jury was asked whether the defendant was negligent to which the jury answered “no.” Then the jury proceeded to respond further in the special verdict form by allocating fault to the defendant as 55%. Importantly, the holding in *Gjerde*, is a narrow one:

When the answers [to the jury interrogatories] 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.

*Gjerde*, 151 Wn.App. at 393. The only opportunity to clarify this internal inconsistency within the verdict form itself was at the time the jury was polled. Here there is no such internal inconsistency, so there was nothing else to do but confirm that the members of the jury that in fact that was their verdict.

Importantly, *Palmer* did not address any failure, much less find any error, on the part of the plaintiff in to request that the jury be sent back to deliberate under CR 49 for it cites CR 59 as applicable. *Palmer* 132 Wn.2d at 599. The *Palmer* court in fact does cite precedent in cases such as *Shaw v. Browning* 59 Wash.2d 133, 367 P.2d 17 (1961), *Daigle v. Rudebeck*, 154 Wash. 536 538-39, 282 P. 827 (1929), both cases which the Supreme Court itself described in *Palmer* as cases in which no general damages were awarded despite awards of special damages and which address **inadequate** verdicts. This case which mirrors *Palmer* is, by the Court's own description, an **inadequate verdict which was contrary to the evidence**.

In fact courts have been ordered to provide additur. In the employment case of *Malarkey Asphalt Company v. Wyborne*, 62 Wn.App. 495, 943 P.2d 400 (Div. 1 1991), the court was ordered to recalculate the attorney's fees even though it considered and rejected *Gjerde*.

Nonetheless, the case law that is most aligned with this matter is *Palmer v. Jensen*, which notably came after *Gjerde*. In *Palmer* as well as here, involved a personal injury case tried to a jury. Like here, the *Palmer* jury found contributory negligence. Like here, in *Palmer* there was no dispute as to the injuries the plaintiff suffered. Like here the *Palmer* jury award all the special damages and like here no general damages were awarded. Like here the *Palmer* court had to either give additur or provide for a new trial as the jury failed to give any award for plaintiff's losses of pain and suffering. *Palmer* 132 Wn.2d at 600-602. The trial court followed the law and the civil rules and there was no abuse of discretion.

**D. CR 49 Does Not Apply to a Verdict that is Internally Consistent.**

The verdict provided by the jury in this case is mathematically logical. The appellants spent a lot of time in their opening brief trying to parse out the terms "inconsistent" and "inadequate." However, there are no contradictions or inconsistencies *within* the verdict form itself. CP 153-55. The only contradiction is as to the law which the jury decided for its own reasons to ignore. To give any opinion as to what was in the mind of the jury is merely speculation. Nonetheless, a special verdict form was submitted to the jury. CP 150-52. The court read jury instruction No. 20 based on the WPI 30.06.01 to the jury as part of the

instructions before they were released to deliberate their verdict. CP 177 and CP 222-23. CR 49(a). Notably CR 49(b) which applies to general verdict accompanied by answers to interrogatories states that:

When answer 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 or its answers and verdict or **shall order a new trial**. CR 49(b) Emphasis added.

In this case the court determined the answers of the jury on the special verdict form were consistent with each other. The issue is not that the decisions of the jury be consistent with the law, but to each other. Also, notably the trial court did enter an order for a new trial on damages.

The case that most approximates this is *Palmer v. Jensen, supra*, which makes no mention of CR 49. There was no requirement that the respondents take any action under CR 49. Another case that has been remanded based on CR 49 is the recent case of *Washburn v. City of Federal Way*, 283 P.3d 567, 169 Wn.App. 588 (Div. I 2012).

Notably, appellants have to search outside Washington's jurisdiction to find some authority for their proposition. There is no need to look at Utah and Alaska when the issue is clearly settled here in Washington with *Palmer v. Jensen*. An inconsistency at law is the same as an internal inconsistency. CR 49 simply does not apply to this case or the facts at hand.

**E. Respondent Kuk Provided Adequate Evidence for an Award of General Damages**

Even though Ms. Kuk remained optimistic that she would eventually recover, the objective findings of Dr. Rhese were irrefutable. CP 287-299. Ms. Kuk's shattered small finger and injured ring finger suffered permanent disability. All through the chart notes provided as Plaintiff's Exhibit No. 1, are notations of the difficulty in controlling the pain and the need for narcotics for many months after the collision. CP 287-299, Ex 1. Dr. Rhese further explained in her perpetuation deposition that because the hands contain so many nerves, high levels of pain were not surprising. CP 287-99, Ex. 1. Dr. Rhese further testified that it was her personal observation that Ms. Kuk was in high degree of pain. CP 287-299, (pages 16-19).

Defendants in their brief opposing a new trial on damages made the bold faced assertion that they introduced evidence that "that plaintiff was untruthful" and when on to imply that Kathleen Kuk did not suffer pain and that she healed quickly. CP 60. There is absolutely no evidence for that assertion. Rather it was the undisputed medical testimony was that plaintiff did not heal quickly and suffered a great deal of pain. Dr. Rhese Testified:

4 How long were they in there?

5 A. Longer than usual because her bone healing was  
6 longer than usual. Generally speaking, they come out at  
7 about six weeks, but hers stayed in longer because of in --  
8 because of my perception of her healing.

9 Q. Why was -- what was the issues?

10 A. On x-rays after procedure to reduce the fracture  
11 or just allow the fracture to heal, we are looking for  
12 several signs of healing including decreased what we call  
13 lucency of the fracture.

14 Q. Uh-huh.

15 A. So if the fracture appears very obvious, then that  
16 generally would imply that the fracture's not healing well.

17 We also look for things like bony callus, which is  
18 extra bone on the outside of the fracture, which also is a  
19 sign of bone healing.

20 Q. Uh-huh.

21 A. And then motion of the fracture fragments. While  
22 she didn't have motion of her fracture fragments, she didn't  
23 have evidence of bone healing, and she didn't have a nice  
24 significant callus formulation, and her fracture lines  
25 remained quite distinct.

1 Q. Now, these were seen -- how did you know that?

2 A. I evaluated that on x-ray.

3 Q. Can you give us an example?

4 A. Yeah. So this is her -- so this is her --

5 actually, I think this one was taken because she was having

6 significant pain, and I wanted to make sure that her

7 fracture remained stable.

8 Q. When were these taken?

9 A. This was on the -- on June 7th. And it looked

10 okay. All of her pins looked stable, and I was happy with

11 that film, but then on the 25th of June --

12 Q. Uh-huh.

13 A. -- I was expecting to see healing, and I did not

14 appreciate significant callus. I did not appreciate that

15 her fracture fragments had healed well enough or

16 consolidated well enough that I felt comfortable taking out

17 her pins.

18 Q. You said she was still in pain as well?

19 A. And she was having a significant amount of pain,

20 which is another reason why I would take the image on the

21 7th of June, to make sure that she wasn't showing any signs

22 of a bone infection. She was having enough pain that I was

23 considering that.

**F. CR 59 Provides that Respondent's Motion for Additur or a New Trial was Timely**

CR 59(b) which provides grounds for a new trial states that the time to bring this motion is "not later than 10 days after the entry of the judgment." There is no mention anywhere in the rule that it is necessary to object in open court while the jury is still seated. Such a significant change as advocated by Appellants would surely have resulted to a change of the civil rules and procedures.

**G. A New Trial Solely on Damages is Appropriate.**

In fact this court has reviewed verdicts for insufficiency and remanded them for new trials solely on damages such as the recent case of *Washburn v. City of Federal Way*, 283 P.3d 567, 169 Wn.App. 588 (Div. I 2012). Appellants are unhappy with the verdict and seek to retry the entire matter. They also claim that respondent was entirely untruthful because she remembered at trial the small detail having thrown her cell phone down when she saw the UPS van split second prior to impact, which ultimately did not affect the collision. RP 166-167, RP 331. However, there is no requirement that a driver must have both hands on the steering wheel at all times. RP 172. None of her other testimony was outright impeached or contradicted.

Contrary to appellants' contentions, respondents are not happy with the verdict regarding liability because they contend that Ms. Kuk

entered the intersection on a yellow light and as the favored driver, Jason Smith should not have turned into her van. Even if the traffic signal had turned red as she cross the stop bar, the law is clear that a driver turning left must yield to an oncoming driver who is the favored driver. RCW 46.61.185. The primary duty to avoid the collision is on the disfavored driver, in this case Jason Smith. *Mossman v. Rowley* 229 P.3d 812, 154 Wn.App. 735 (2009) citing *Doherty v. Municipality of Metro, Seattle*, 83 Wash App 464, 470, 921 P.2d 1098 (1996). A driver turning left must yield to an oncoming vehicle, even if it can be shown that the oncoming vehicle was proceeding unlawfully. *Doherty v. Municipality of Metro, Seattle*, 83 Wash App at 470, (citing *Mendelsohn v. Anderson*, 26 Wash App 933, 937, 614 P.2d 693 (1980)) (excessive speed on the part of oncoming favored driver will not excuse disfavored driver's duty to yield); *State v. Carty*, 27 Wash App 715, 620 P.2d 137 (1980) (defendant who turned left into path of oncoming car guilty of failure to yield, even though oncoming car was speeding). A motorist turning left in front of an approaching vehicle is under an affirmative duty to look out for such automobile and to give it the right of way. *Vance v. McCleary*, 168 Wash 296, 11 P.2d 823 (1932). The primary duty to avoid a collision is on the disfavored turning driver. *Mendelsohn v. Anderson*, 26 Wash App 33, 614 P.2d 693 (1980). A left turning driver is bound to know that approaching motorists could lawfully be approaching at maximum speed allowed by the law.

*Jamieson v. Taylor*, 1 Wn.2d 217, 95 P.2d 791 (1939). In seeking additur or a new trial, respondents were simply following the rule laid down in *Palmer v. Jensen* 132 Wn.2d 200-203.

Nonetheless, the cases cited by appellants for the proposition for a trial on the entire case were prior to 1977 and the decision of *Crawford v. Miller* 18, Wn.App. 151, 566 P.2d 1265 (1977). Before the adaptation of comparative negligence, contributory negligence was a complete defense. In close cases juries would fashion their own comparative negligence rule with compromise verdicts. With the adoption of the comparative negligence and the use of special verdict forms that concern surrounding close cases was eliminated. *Crawford* 18 Wn.App. at 154.

A new trial may be limited to specific, distinct issues and justice does not require that resubmission of the entire case to the jury. *Mina v. Boise Cascade*, 104 Wn.2d 697, 710 P.2d 184 (1995) citing *McCurdy v. Union Pac. R.R.* 68 Wash.2d 457, 413 P.2d 617 (1966).

In this case, the jury was properly instructed on damages and the special verdict form contained separate questions relating to liability and damages. Further, each party had an opportunity to present evidence on the damages question. There is no need to speculate about the jury thought as it is plain on the Special Verdict Form. CP 150-152. Zero is still a number whether it is written in a way to distinguish it from the vowel "O" or as the mathematical empty set. The verdict was not

adequate as to general damages. The trial court was within its discretion to order a new trial on the entire case or on specific issues. The trial court decided to order a new trial on damages as it was within its discretion.

**H. Discovery Sanctions of Allowing the Letter of Reprimand Admitted and Prohibition of Testimony Regarding Training of Jason Smith were Entirely Appropriate**

***1. Standard of Review***

Washington's discovery rules give trial courts broad discretion to sanction parties for discovery violations. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Snedigar v. Hodderson*, 114 Wn.2d 153, 169, 786 P.2d 781 (1990); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002) (*Behr*). Discovery sanctions are reviewed under an abuse of discretion standard for it is necessary to (1) give the trial court wide latitude in determining appropriate sanctions, (2) reduce trial court reluctance to impose sanctions, and (3) recognize that the trial court is in a better position to determine this issue. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (*Fisons*). The use of sanctions should not be disturbed absent a clear showing that a trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Burnet*, 131 Wn.2d at 494. A decision is untenable if it is based on unsupported facts or an incorrect legal standard,

or if no reasonable person would adopt the same view as the trial court. *Mayer*, 156 Wn.2d at 684.

Appellants argue that the grounds the trial court based its sanctions on are “untenable grounds” or “untenable reasons.” However, the court articulated the facts as well as current legal authority with which it based each of its orders. CP 6-11 and 22-24.

### **2. *Spoliation Defined***

In the past and under most circumstances, Washington courts have recognized that spoliation is the “intentional destruction of evidence.” *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 94 n.5, 173 P.3d 959 (2007); *Marshall v. Ballys Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999); *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). To remedy spoliation, a court may apply a rebuttable presumption that shifts the burden of proof to the party who destroys or alters important evidence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. at 381, *Henderson*, 80 Wn. App. at 605, 910 P.2d 522.

### **3. *Bad Faith is Not a Requirement for a Finding of Spoliation***

However, bad faith is not a prerequisite to a finding of spoliation, which only requires a finding of “improper” actions. *Magana v. Hyundai Motor AM.*, 167 Wn.2d 570, 220 P.3d 191 (2009). In *Magana*, the Washington State Court held that a corporation has an affirmative duty to maintain evidence and have an evidence retrieval system:

“A corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery.” The Supreme Court went on to agree with the trial court that **“Hyundai had the obligation not only to diligently and in good faith respond to discovery efforts, but to maintain a document retrieval system that would enable the corporation to respond to plaintiff’s requests.”**

*Magana* 167 Wn.3d at 586 (*emphasis added*). Thus, UPS had an affirmative duty to maintain its records and “losing” those records is spoliation. In other words, UPS had a duty to maintain the records in a way that would allow UPS to respond to discovery. Allowing a corporation such as UPS to simply explain away missing records with an explanation of, “oops, we lost them” would give incentive to corporations to lose unfavorable evidence. UPS had a strong duty to preserve Mr. Smith’s entire employment file including his training records that have gone missing, and to preserve the education/training material used to train its drivers. UPS failed to do so and as a result the plaintiff has been deprived of the potentially compelling evidence that Mr. Smith’s driving violated his training as provided by UPS.

Nonetheless, UPS has not acted in good faith. Respondent had to obtain multiple orders compelling the requested records. CP 759-61 and 1146-1148. Respondents answered and supplemented their discovery responses several times over the course of the litigation. CP 1287-1302. When none of the records requested by respondents were provided, UPS counsel assured respondents’ counsel that a diligent search had been made

and they could not be found. CP 833-42 and CP 885-97. When respondent's counsel later sought another order to compel and an order of spoliation, only then did some records materialize. CP 586. Nonetheless, most of the training documents provided pertained to hazardous material handling which was not pertinent. Appellants have admitted that they had records in their possession and it not conceivable that those documents were emailed from their client without some other form of communication with counsel. In fact, counsel assured that respondent's attorney that a diligent search was conducted which in and of itself requires communication with UPS. RP 11; CP 918-32, 833-42 and 885-97.

In fact, Appellant's conduct regarding the non-production is considered to be willful which our courts have defined to be with "without reasonable excuse." *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002); *Behr* 113 Wn.App.at 327. Appellants have never, throughout all these proceedings given any explanation for the lost employment file and training record. The only explanation they have offered is why they kept records from June 2011 to February 1, 2012 after they were ordered to produce them. Even the explanation is odd for the UPS could not have emailed those records without speaking to its counsel for it had to know the email address as well as the documents being sought. If UPS was being so diligent and took the discovery requests seriously, it must have been in communication with its counsel. It certainly was communicative about its efforts to comply with

the discovery request. There is simply no reasonable explanation for the documents being lost. Appellant's conduct is willful and therefore sanctionable.

**4. *UPS had a Duty to Preserve the Relevant Evidence.***

In its brief, Appellant blames one of its previous attorneys for not being diligent in obtaining the documents demanded in discovery. However, the defense of this case has been handled by the firm of Preg O'Donnell & Gillett from the inception. In fact, Mr. Eric Gillett's name has been on practicably every pleading filed and served since the beginning of this matter. *See for example:* Answer dated October 28, 2009 CP 966-970.

The Rules of Professional Conduct are instructive. Comment 2 under RPC 1.10 states:

(a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

That an associate attorney left the firm, does not negate the firm's and its clients' responsibility to respond to discovery and to keep documents that may be needed in the litigation.

UPS was in exclusive control of Mr. Smith's employment file and UPS had a duty to preserve Mr. Smith's training records and the preserve

training/educations materials used in the conduct of its business. UPS claims that it has “conducted a diligent search of its files and cannot locate any documents responsive to this request.” CP 929. UPS has failed to meet the standards required by the courts of a large sophisticated corporation such as UPS. UPS itself bragged in its own responses that “UPS employs 330,600 people in the United States and delivers 15.6 million packages and documents daily. CP 926. Arguably UPS is of comparable size, if not bigger than Hyundai. The UPS fleet is comprised of 93,464 package cars, vans, tractors and motorcycles.” CP 926. Despite all of this, UPS somehow loses its training records for the driver who caused the collision in this case and in fact was involved in another collision the week prior. CP 922. There is no reasonable explanation for losing records of an employee who is involved in a lawsuit filed in October of 2009, within sixteen months of the collision which gave rise to the lawsuit and Mr. Smith leaving UPS.

Just like Hyundai, UPS has the obligation not only to diligently and in good faith respond to discovery efforts, but to *maintain* a document retrieval system that would enable the corporation to respond to the Plaintiff’s requests in this case. Thus, UPS had a duty to maintain Mr. Smith’s employment records.

Furthermore, specific laws and regulations both in Washington law and federal law require UPS to keep and maintain employee records. For example:

- WAC 192-310-050 requires employers to keep records relating to wages, the cause for any discharge where a worker was separate from the job due to discharge; or the cause of any quit where a worker quit the job if the cause for the quit was known. (This information was not included in the portions of the employment file that were produced.)
- WAC 296-126-050 requires the employer to keep all records related to payroll information for 3 years.
- 29 C.F.R. § 1627.3(b)(1)(ii) and 29 C.F.R. §1602.14 requires an employer to keep all personal records for at least 1 year.

These examples are not exhaustive and are offered as authority for the fact that UPS was required not to “lose” any employment records, including the training records of an employee who was involved in multiple collisions on the job and was disciplined for behavior that can result in litigation.

Therefore, given the fact that only 5 days following the collision, UPS was aware that this was a preventable accident and that Jason Smith had failed to use “safe driving methods”, UPS was on notice that this accident was likely to lead to litigation and that Mr. Smith’s employment with UPS would be an issue. UPS knew it was important to keep Mr. Smith’s training records and yet failed in its duty to do so.

***5. UPS's Failure to Maintain Mr. Smith's Training Records or to Maintain the Training/Education Materials that it used to Train Mr. Smith and Deprived Respondents of Convincing Evidence of Mr. Smith's Negligence and Potentially UPS's Negligence.***

From the letter disciplining Mr. Smith, it is clear that any evidence related to Mr. Smith's training is important for the plaintiffs to prove their case. The letter explains that Mr. Smith failed to follow his training. In written discovery, plaintiffs requested Mr. Smith's training records but were denied. CP 1221-22, 833-42, 885-97, RP 2. Upon losing the second motion to compel, appellant UPS suddenly produced some employment records, though the critical training records remained "lost." CP 586. No explanation was ever given as to why these records were lost. Nonetheless Respondent was deprived of any training documents that could have provided evidence of appellant's UPS training as well as Mr. Smith's failure to follow his training. This failure would be reflected in any investigation records which were requested in discovery. CP 920-932. Further, the respondent was deprived of the opportunity to cross examine Mr. Smith related to his training and his driving methods the day of the collision. Instead, this information was not available to the plaintiff for trial, which provided an unfair advantage to appellant UPS, which was the entity claimed to have "lost" the file. Therefore, UPS obtained an unfair advantage from its neglect to properly maintain evidence.

## **6. Spoliation Must be Remedied**

The purpose of sanctions is to educate, punish and deter. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997); *Fisons*, 122 Wash.2d at 355-56. In the leading Washington Supreme Court case on spoliation, *Pier 67, Inc. v. King County*, the Supreme Court described the basic remedy for spoliation:

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

*Pier 67, Inc v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977); *see also Marshall v. Bally Pac West, Inc.*, 94 Wash.App. 372 at 381, 972 P.2d 475 (1999). In determining whether to apply the rebuttable presumption, a court considers “(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.” *Marshall*, 94 Wash.App. at 381, (quoting *Henderson*, 80 Wash.App. at 607). In this case, the missing training records related to Mr. Smith’s training were important and relevant to plaintiff’s case.

## **7. The Missing Evidence was Extremely Important to Respondents’ Case.**

Whether the missing evidence is important or relevant depends on the particular facts and circumstances of the case. *Henderson*, 80 Wn.App. at 607. In weighing the importance of evidence, a trial court considers whether the party was afforded adequate opportunity to examine the

evidence. *Henderson*, 80 Wn.App. at 607. In the instant case, respondent was denied any opportunity to examine the evidence, or to use the evidence at trial, which would have help respondent prove her case at trial.

The letter to Mr. Smith made clear that the spoliated evidence was extremely important to the respondent's case. The letter explains that Mr. Smith failed to follow his training and to use safe methods of driving. All of the information regarding Mr. Smith's training has been claimed to be lost, and it is impossible to now know or develop evidence that Mr. Smith violated his training at UPS. Responded could not show what Mr. Smith's training was, how it was violated, and what other violations of his training occurred because UPS has now "lost" the evidence. UPS has stridently denied liability in this case, yet its own records—the ones that have not been lost—show that in fact, UPS believed that Mr. Smith failed to follow safe driving practices. CP 899. The letter further demonstrates that UPS believed that had Mr. Smith used safe driving practices, then this accident would have been avoided. Therefore, the lost evidence was extremely important to the plaintiff's case.

***8. The Trial Court Imposed the Least Severe Sanction Available***

A trial court has broad discretion in how it fashions a remedy to spoliation. A sanction for the discovery violations was important because it served to alleviate the unfair prejudice to the plaintiff and not allow UPS glean an advantage through the spoliation of evidence In order to remedy

the prejudice, Respondent requested an order that would strike the Answer and Counterclaims of appellants and entry of a default judgment. The court rejected that sanction. CP 10. Respondents argued that it was reasonable to obtain an order that 1) that plaintiffs are entitled to refer to the inference that the evidence would have been unfavorable to the party of disposed of it in closing argument; and 2) Shifting the burden of proof to UPS that Jason Smith did not fail to use proper safe driving methods as he was trained and instructed. CP 899. Another alternative sanction proposed was a monetary sanction, which the court also rejected. RP 34.

Appellant UPS provided some documentation that indicates Mr. Smith failed to follow his UPS training in safe driving methods, and that UPS in fact believed that this collision was avoidable had Mr. Smith used safe driving practices. However, Mr. Smith's training records, which would have provided respondents with important evidence of such, has been "lost." CP 833-42, 885-97, RP 2. UPS claims that it simply lost the documents, despite that multiple Washington laws requires businesses such as UPS to maintain its documents in a manner that allows them to respond to discovery requests. UPS failed in its duty to maintain Mr. Smith's training records and caused them to disappear. The lost information deprived the plaintiff of important evidence it could have used at trial.

While the trial court granted Respondent's motion by ruling that UPS spoliated the evidence and fashioned an order to remedy the unfair prejudice to the plaintiff, the remedy was mild. Rather than determining

liability or fining UPS monetarily, it only ordered that the letter admonishing Appellant Smith be admitted as evidence and that no testimony be given regarding Jason Smith's training. No other sanctions were imposed, no spoliation instruction was given. CP 10. The trial court chose the lightest sanction to alleviate undue prejudice to respondents.

Additionally, the letter at issue would have been admissible as a statement against interest by a party opponent under ER 801 and ER 401. ER 801(d)(2) provides that an admission by a party of opponent is not hearsay. The document was created by an agent of UPS who had the authority to make the statement on UPS's behalf. This qualifies the statements contained within the letter as an admission against interest by UPS. *Lockwood v. SC&S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987).

The letter expresses the opinion by UPS that the collision was avoidable by Mr. Smith. While it is true that this document does not prove negligence, it was relevant evidence for the jury to consider that Jason Smith was in fact negligent under ER 401. Additionally the letter was not a remedial measure because it does not fit the definition under ER 407 it did not "make the event less likely to occur" This letter is not evidence of policy changes, changes to training or other possible remedial measure being taken. The letter does not prevent future accident. *See* for example *Complaint of Consolidation Coal, Co.*, 123 F.3d 126 (3<sup>rd</sup> Cir. 1997).

***9. Order Prohibiting Testimony about Training was an Appropriate Sanction and within the Trial Court's Discretion.***

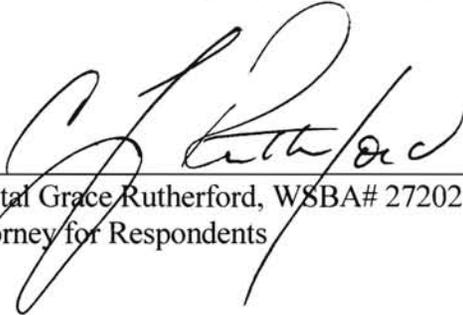
None of the pertinent training documents requested in discovery were provided by appellants in spite of two orders compelling their production. Yet appellants clearly intended to call various witnesses, including defendant Jason Smith to testify about his training. So, on one hand appellant argued that Jason Smith's training as a driver was irrelevant or "marginally relevant" and then provide a trial brief in which states that they intend to provide testimony related to his training. RP 32, 41, and 45. The prejudice to respondents was plain. The respondents were denied any opportunity to work up anything related to the training UPS provided Mr. Smith or be able to rebut any evidence appellants intended to use at the trial regarding Mr. Smith's training. The training of a professional delivery driver who was involved in a collision is important. Appellant Jason Smith intended to testify that his training and that it allowed him to be able to estimate speed of other drivers. The trial court considered the prejudice to respondents especially since what documents appellants finally produced were not provided until February 1, 2012 with the trial less than two weeks away. RP 55-56. The trial court appropriately, as part of its discovery sanctions, struck any testimony regarding the training UPS provided Mr. Smith. CP 10.

#### IV. CONCLUSION

The trial court orders are reviewed on an abuse of discretion standard. There is nothing on the record indicating that the trial court based any of its decision on untenable reasons or grounds. In this case, neither the pretrial discovery sanction of allowing the reprimand letter be admitted and prohibiting appellants from testifying as to Mr. Smith's training, nor the post-trial order granting a new trial for damages should be disturbed.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> of December, 2012.

By

  
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Attorney for Respondents

NO. 68617-8-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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 SERVICES, INC.

Appellants.

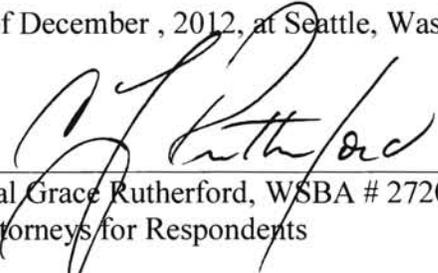
DECLARATION OF SERVICE

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I HEREBY DECLARE under penalty of perjury under the Laws of the State of Washington that on the below date, I had hand delivered a copy of the Respondents' Brief to:

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SIGNED this 13 th day of December, 2012, at Seattle, Washington.

  
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Of Attorneys for Respondents