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APPEAL NO. 69800-1-I

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

(Whatcom County Court Case No. 11-2-02885-9)

JAMES WRIGHT and SUSAN WRIGHT,

Appellants,

vs.

KEVIN BEDLINGTON and JANE DOE BEDLINGTON,

Respondents.

Appellant Wrights' Appeal Brief

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I – INTRODUCTION

On May 27, 2009, on his way to work, James Wright (Wright), a 44 year old married father of three young sons, ages 8, 5 and 2, was rear ended by defendant Kevin Bedlington (Bedlington). It was just two days before the ten (10) year anniversary of his marriage to Susan Wright. CP 4; RP 60-1. Bedlington, in his Answer, admitted that his negligence was the sole cause of the accident. CP 10-11.

At trial, the Jury heard from Wright, Susan Wright, Virginia Sullivan, Chris Haugen, Joye Crabtree and Jayna Cassavant regarding the effect of the accident and injuries upon Wright. Their testimony included observations of pain behavior, changes in activities, the effect upon Wright's normal activities and their observations of the major differences in Wright since the accident. Sullivan, Haugen, Crabtree and Cassavant were not cross examined by Bedlington. RP 94; RP 150; RP 157; RP 160.

At trial, two treating doctors testified by way of deposition; Dr. Baker and Dr. Dickson. Dr. Braun, who conducted two independent medical exams, in 2010 and 2012, also testified. Wright's treating neurosurgeon Dr. Goldman's two reports,

including his conclusions were admitted as Exhibits 4 and 5. When Wright did not recover as expected from his injuries and was still having a lot of problems with his neck, four months after the accident, a physician friend suggested to Susan Wright that her husband should see a specialist. RP 100-01. Dr. Dickson referred Wright to Dr. Goldman, Board Certified in Neurosurgery. Exhibit 4. Dr. Goldman opined that Wright had a traumatic disc herniation at C5-6 caused by the accident on a more probable than not basis. Dr. Goldman's prognosis was that because of the severity of the whiplash, Wright would likely continue to have symptoms over the next two years that would not likely resolve completely. Id.

Dr. Braun testified that Wright, at the time of the trial, had a permanent impairment of the whole person, in part caused by the accident. RP 236-7. In Dr. Braun's opinion, as a result of the accident, Wright was left with substantial restrictions on activities and advised against lifting more than 25 pounds, working with his arms at shoulder level or above, or any type of jarring activities. Dr. Braun, similar to Dr. Goldman, concluded that Wright's ongoing left arm weakness and episodes of paresthesias were caused by the accident. RP 238-9.

Bedlington offered the deposition testimony of Dr. Baker and Dr. Dickson. Dr. Dickson expected Wright to fully recover, but on August 19, 2009, the last time he saw Wright, Wright had not yet fully recovered. CP 98. Dr. Dickson recommended Wright see Dr. Goldman. CP 99. Dr. Dickson relied on Dr. Goldman to determine whether Wright's continued pain and limitations and Dr. Goldman's findings were significant and whether they were caused by the auto accident. Id. Dr. Goldman concluded they were.

Dr. Baker, Dr. Goldman's partner, treated Wright briefly in 2010 for brachial plexus neuritis. Dr. Goldman concluded the brachial plexus neuritis was not caused by the 2009 auto accident. However, in 2010, Dr. Baker concluded Wright also had ongoing problems with his neck caused by the auto accident. RP 140. Dr. Baker advised Wright that Dr. Baker expected Wright's recent brachial plexus neuritis would resolve, but that Wright would continue to have ongoing pain as a result of his motor vehicle accident. CP 141.

In his opening statement Bedlington admitted:

But I'm not here to say anybody's malingering. I acknowledge there was a whiplash injury to the neck, a neck strain from this accident. And I'm not here to say

anything negative about the plaintiffs in this case. I agree he has an ongoing problem.

RP 50-1.

Before the accident, Susan Wright golfed, skied, ran, and hiked with her husband. RP 163. Since the accident, due to what she believed to be his pain, she observed that her husband did not do the things with her he used to do. RP 167. The changes required her to adapt and take on more responsibilities than she used to have. RP 167-8. As a couple, they no longer did as many things as they used to do together. His activities with his three young sons were much different. Id.

Wright is an attorney, licensed to practice law in Washington since 1991. RP 58-9. He is a partner in the Lynden, Washington firm of Smith Kosanke and Wright. Dr. Braun testified Wright's reasonable and necessary medical expenses related to the auto accident were just under \$10,000.00 (\$9,767.28). RP 248-49. The jury returned damage verdicts for Susan Wright of zero and James Wright for \$8,200.50. CP 172; CP 174.

II – ASSIGNMENTS OF ERROR

No. 1. The jury erred in awarding no damages for Susan Wright.

No. 2. The jury erred in entering its damage verdict for James Wright.

No. 3. The trial court erred in denying Wrights' Motion for Additur or a New Trial.

III - ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The following issues are raised by this appeal:

No. 1. Was there substantial evidence or reasonable inferences from the evidence to justify the verdicts?

No. 2. Are the damages awarded by the jury so inadequate as unmistakably to indicate that the verdicts must have been the result of passion or prejudice?

No. 3. Did the trial court abuse its discretion in denying Wright's motion for additur or a new trial?

IV – STATEMENT OF THE CASE

Virginia Sullivan, mother of Susan Wright and Wright's mother-in-law, testified as follows:

Q. Did you see your son-in-law enough times to determine whether prior to the May 2009 accident he had any physical limitations and physical problems?

A. I never saw anything. He was very skilled in trying to build things. Every Friday he would go out and he'd wash that car to make sure everything was just neat and trim and took care of things. He lived in a condo and he would take it upon himself to mow the lawn every few days because he liked things nice. And he just really had to be busy. He used to ride the bike all the time. He would take the boys on the bike with him. Or pull them. They would go hiking. He was very active.

RP 92, lines 1-12.

Q. Have you seen any changes in him since the May 2009 accident?

A. Oh, I have seen tremendous changes.

Q. What type of changes?

A. Um, I've seen that he couldn't lift up his babies. I have seen that he couldn't lift up his arms sometimes. He was only able to use maybe three fingers on one hand. Getting to work was difficult. He couldn't work on his house anymore. He couldn't play ball with his boys. I remember one thing that really sticks in my mind and he wasn't even aware of this, I was in the vicinity, and he went to get my daughter Susan a hug and instead he just had to lean down to give her a kiss on the forehead. It just kind of broke my heart.

RP 93, lines 5-19.

Q. Has he required help from family members like you and your husband?

A. Oh, he really has. We have gone up and helped him cut wood for his fireplace because they heat most of

their house with wood. I see that he walks the floor until three in the morning because he couldn't lay down. We bought him a chair that he could sleep in. His little boy at eight was having to mow the lawn because Jim couldn't. We bought a ride-on mower so Jim could try and mow their lawn that way. He couldn't do the housework, finishing some of the ceilings that he had been working on. My son and sons-in-law have been up trying to help them cut up some wood. I have seen a big change. Jim probably is the least complainer I have ever known in my life. I have never heard him say I hurt. . . It's been very difficult to watch him.

RP 93-94, lines 20-25 and 1-12.

Chris Haugen, Chief of Police for Sumas, Washington, testified as follows:

Q. What kind of changes have you seen?

A. Mostly what I have seen is what I would describe as upper body limitations in his range of motion. When he comes to court there's a box that he brings that is full of forms and paperwork needed for court. Sometimes I will carry that in for him where before I didn't need to do that. You can tell that is painful for him. I have seen it before where he usually will set it up on a high cabinet where it usually resides and he is not able to lift it to that position. And that's probably the biggest thing I have seen. He's real limited with what he can do with his upper body.

RP 147, lines 11-22.

A. We had some time after court and he came in my car with me and we at times need to go look at things for city issues, a zoning problem or problem with whatever the case may be that the city might have to deal with, so he was in my car with me as

the passenger. We were driving around starting to look at things, and as he was starting to turn he just became unable to turn his neck. He told me how painful it was and he really couldn't do that any longer. And it got to the point at some of these places we were looking at I would actually physically point my car in a straight direction so he could look rather than having to turn to look at it.

RP 148, lines 3-15.

Joye Marie Crabtree, a legal assistant at the firm of Smith

Kosanke and Wright, testified as follows:

Q. How would you describe Jim Wright's physical condition before the accident?

A. Really good. Yeah. For his age, yeah.

RP 153, lines 23-25. Prior to the collision, she did not see any signs of limitations or pain in Jim Wrights' neck and upper shoulders, but that had changed since the accident. RP 154, lines 1-9.

Q. Has that changed since May of 2009 due to the accident?

A. Yes, considerably.

Q. How has it changed?

A. That I can tell that he is in pain?

Q. What you have seen.

A. I mean, if I look in there he's always sitting there like rubbing his head or his neck or something. He never did anything like that before. Never. Never. And I've had migraines most of my life and I know how debilitating a headache can be when you have them

like this. You can see when somebody has a headache the way they rub or whatever and rub their neck. I can see that. I can just look in there and see that.

RP 154, lines 8-20.

Jayna Cassavant, also a legal assistant at the law firm of Smith Kosanke and Wright and the legal assistant to Jim Wright, testified as follows:

Q. Prior to the auto accident of May of 2009, did you observe Mr. Wright in the office on a daily basis? Did you observe him having any limitations or any problems?

A. No. When I first started working and he was young, new, hadn't been married yet, hadn't had a family yet, very workable. He was there first thing in the morning and the last one to leave.

Q. Did that change after he got married?

A. No.

Q. Did it change after he had children?

A. No.

Q. Did it change after he was in the auto accident?

A. Yes.

Q. How has it changed since he was in the auto accident?

A. He comes in still early, gets there first thing but he can't stay the whole day. Oftentimes I will see that he is tired. Or I can tell if he is rubbing his neck or holding his arm he's just had enough for the day.

RP 158-59, lines 17-25 and 1-9.

Q. Do you see him at any time during the day when he appears to be in pain?

A. Yes, I do.

Q. What is he exhibiting that makes you believe he appears to be in pain?

A. I kind of see a look on his face. He is always a happy guy but I catch him rubbing his neck or holding his arm. I will say oh, are you hurting today? He will say he didn't sleep last night or things like that, had a rough night.

RP 159, lines 13-22.

Susan Wright testified as follows:

Q. So you say you can tell he is in pain. What does he look like or what do you see that leads you to believe that sometimes these activities are causing pain?

A. Oh, multiple ways I can tell. Just how he holds his neck. He kind of - - not a normal up propped like I have my neck. A lot of times he has to lean it forward. He can't sit for very long. He stands a lot if he is in a position that he can stand. He rubs his arms. That's one thing I can tell when the pain is bad. Even when he is driving he will put his arms, he will drive with one hand and put his arm down. When we would go on a long trip I have had to drive because he is in pain. And he doesn't like me driving that much, so when he asks me to drive I know the pain is severe where he can't drive anymore.

RP 166, lines 5-19.

Q. Has his accident changed the lifestyle or quality of life?

A. Yes.

Q. In what way?

A. He is not my husband. We don't do the things that we used to do.

RP 167, lines 14-19.

Q. Last question I have, have you seen changes in Jim Wright's ability to perform functions around the house that he used to perform before this accident?

A. Yes.

Q. What are the changes?

A. He doesn't do, or very rarely does he mow the grass. Our son has taken over that. And a lot of times my brother-in-law has come up and mowed the grass. Kind of doing various activities around the house. A lot of times, or not activities, a lot of maintenance on the house on the upkeep outside of the house or inside the house. Lot of times he will have his dad come up and do it. Or help him do it, I should say.

RP 170 , lines 8-20.

Bedlington's cross-examination of Susan Wright did not address the above testimony. RP 170-76.

By report, Dr. Goldman, five (5) months after the accident, provided the following evidence to the jury: Wright continued to have severe local neck pain that often caused headaches. Wright complained of diffuse aches, heaviness in his upper extremities and passing episodes of hand weakness. Upon examination Wright had decreased range of motion of the neck and paresthesias in the arm. Exhibit 4. Wright was diagnosed by Dr. Goldman with a severe cervical strain causing lingering neck pain and headaches. Dr. Goldman's review of an MRI disclosed a traumatic disc

herniation at C5-6, which Dr. Goldman believed was caused by the 2009 auto accident on a more probable than not basis. Id.

Dr. Braun, conducted two independent medical exams of Wright. His trial testimony was as follows:

Q. How did you phrase it in your report?

A. I said Diagnosis number one, which was cervical strain with cervical disc, is due to the motor vehicle accident on a more probable than not basis. This would include the abnormalities on the MR scan, in brackets, (disc protrusion). He has yet to reach maximum medical improvement. At a minimum he has a category III for cervical impairment using AMA Guides to the Evaluation of Permanent Impairment Fifth Edition.

Q. So in August of 2010 you believed he had a measurable cervical impairment but you didn't know where it was going to go?

A. Correct.

Q. What is a category III cervical impairment according to the guides?

A. The fifth edition, it is, I believe, 10 to 15 percent impairment.

RP 224. Dr. Braun examined Wright a second time in 2012, as Wright had then reached maximum medical improvement from the 2009 auto accident. RP 227. On September 11, 2012, Wright's ongoing complaints were summarized by Dr. Braun as follows:

At the time, he was seen a month ago, his main complaint continued to be his neck. It hurts on a daily basis, he notices it all time. The pain was localized to the neck. That means right here. There's no radicular-type pain. Now he didn't state that but that's mine. I

said do you have pain going down one arm or the other? Do you have numbness or weakness in a certain distribution? If you cough or sneeze does that cause pain going down the arm? That would suggest that a nerve is being pinched by a disc. And that was negative. He is no longer on any narcotic pain medicine. He took Advil four a day for a week when it was symptomatic. It did vary. He took Flexeril one at night probably once a week. That's a muscle relaxant. He was able to come off lorazepam to help him sleep but had to take Tylenol several times a week but didn't find that helpful. He still found sleep difficult. He used heat frequently and hot showers, occasionally used ice. He had to adjust his computer screen at work to make some accommodations.

RP 229.

Q. Did you make a determination as to whether or not his complaints that he was talking about were consistent with his physical examination?

A. I did and they were.

RP 230.

Q. Do you attribute these findings that you're finding in the test to the automobile accident?

A. Yes.

Q. On a more probable than not basis?

A. Yes.

Q. And with a reasonable degree of medical certainty?

A. Yes.

RP 232.

Dr. Braun concluded his testimony describing Wright's

future as follows:

Q. His setbacks and recoveries will depend in large part on what he chooses to try to do with his family and around home and with his work, right?

A. Yes, sir.

Q. And his future as regards absence pain to a great deal will depend on what he chooses to eliminate from his life?

A. Yes.

Q. But any treatment from this day forward would be palliative and not curative?

A. Correct.

Q. And palliative means?

A. Makes you feel better.

Q. Or reduces pain?

A. Reduces pain.

Q. And allows you to return to at least some base level?

A. Correct.

RP 250-51.

V – SUMMARY OF ARGUMENT

In this matter, the jury awarded Jim Wright \$8,200 of total damages, apparently accepting the obviously incorrect and wholly unsupported argument of defendant that Jim Wright's cervical injury and ongoing pain and disabilities were not caused by the accident. Jim Wright's damages and injuries were caused by the accident, and defendants failed to meet any burden (apart from speculation and conjecture), that his cervical injuries were the result of any intervening causes. Further, the jury awarded Susan Wright nothing for her loss of consortium claim. Clearly, the jury

decided damages without proper reflection on the evidence and jury instructions.

The jury was properly instructed on the law for them to apply to the above facts. The law applicable to their decisions, misunderstood and obviously misapplied by the jury, was:

- Their decision on damages must be based upon the evidence
- The only evidence is testimony and exhibits
- All instructions, including the damage instructions, must be applied by the jury regardless of their personal beliefs
- The jury must consider all the evidence
- Each party is entitled to the benefit of all the evidence
- Argument is not evidence

CP 106-07. WPI 1.02. The jury is not entitled to disregard all evidence in reaching its verdict. They are instructed to the contrary, including the instruction that they are to disregard that evidence the court instructed them to disregard. The evidence presented in this matter could not persuade a fair minded, rational juror that neither James Wright nor Susan Wright suffered any

general damages. *Douglas v. Visser*, 295 P.3d 800, 803 (Div. I, 2013).

The jury was instructed that proper damage verdicts required damages for all damages proximately caused by the auto accident, including Wright's loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; his past, present and future pain and suffering; and any disability experienced and with reasonable probability to be experienced in the future. CP 116. Jury Instruction No. 9. Where the jury verdict is only the amount of the special damages and the injury's cause is clear, courts have "little hesitancy in granting a new trial." *Singleton v. Jimmerson*, 12 Wn.App. 203, 205, 529 P.2d 17 (1974).

Where the uncontroverted evidence supports an award of general damages, the jury is obligated to award general damages:

The supreme courts analysis in *Palmer v. Jensen* controls here. There, Jensen argued that Palmers special damages were still a matter of legitimate dispute because the jury could have concluded some of Palmers treatment was unnecessary.- But the defense presented no evidence to call the treatment into question. The supreme court held that, because the uncontroverted evidence at trial established that all of Palmers medical treatment was related to the accident, was necessary, and was reasonable, a new trial should

be granted on the issue of damages only. (Citations omitted).

Washburn v. City of Federal Way, 169 Wn.App 588, 617, 283 P.3d 567 (Div. 1, 2012).

The difficulty where a defendant argues that the jury could have concluded that some damages were not warranted, is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.

Id. at 618.

Wright, from the time of the accident until the time of trial, was impaired by the accident. He suffered bodily injury due to Bedlington's negligence. Susan Wright was deprived of many of his prior services and activities. The jury was properly instructed that their verdict for Susan Wright "**should include**" damages for her loss of emotional support, care, services, companionship and assistance from her husband. (Emphasis added.) CP 118. Providing no damages to Susan Wright required the trial court to continue the centuries of discrimination directed at women warned of in *Lundren v. Whitney's Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272 (1980). "While the loss of consortium action is dependent on the

occurrence of an injury to another, [Susan Wright suffered] . . . an original injury that is the subject of the action." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774, 733 P.2d 530 (1987).

VI – ARGUMENT

In entering its post trial Order, the trial court wrote: "IT IS HEREBY ORDERED that Plaintiffs' Motion for an Additur or a New Trial is denied. **If the court had the power under the law to grant an additur it would do so.**" (Emphasis added.) CP 286.¹ The trial court had both the authority and the obligation to grant a new trial as Bedlington presented absolutely no evidence on what was causing Wright's ongoing neck problems, other than the collision.

A. Standard of Review

Trial court decisions granting or denying motions for new trials are reviewed for abuse of discretion. *Palmer v. Jensen*, 132

¹ MR. SHEPHERD: That's correct. That's why Dr. Goldman in his report had to say the condition I was treating him for at that time was caused by the accident. That's why Dr. Braun has to say I examined him on this date well after the accident and the condition he presently is in is caused by the accident. THE COURT: But they ignored that obviously.

MR. SHEPHERD: If they have other testimony. . . .

THE COURT: Well, I feel fairly confident that based upon the evidence that was presented that – let me say this. I will put this in an order for you, Mr. Shepherd. If I had the authority under the law to grant an additur or a new trial I would do it. You can put that in the order. RP 410-11.

Wn.2d 193, 198, 937 P.2d 597 (1997). “[I]t is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence.” *Id.* A new trial is appropriate if the damages awarded are “outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” 103 Wn.2d at 835.” *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 175, 116 P.3d 381 (2005). However, a lengthy discussion in *Bunch* describes the duty of the appellate courts to review “the evidence to determine whether sufficient credible evidence existed . . . which would factually support a verdict of the size rendered.” *Id.* at 178.

Denial of a new trial on grounds of inadequate damages will be reversed where the trial court abuses its discretion. A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds. 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 damage which are conceded, undisputed, and beyond legitimate controversy. Where special damages are undisputed, and the injury and its cause are clear, the court has little hesitancy in granting a new trial when the jury does not award these amounts. We reverse 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. 1, 1993). (Citations omitted).

B. Argument of Counsel.

The jury was properly instructed that counsel's arguments were not evidence and of their duty to Wright to "disregard any remark, statement, or argument that is not supported by the evidence." CP 106. Instruction No. 1. In opening statement Bedlington admitted that Wright had ongoing neck pain and problems. RP 50-1. However, Bedlington argued that the ongoing problems were not from the car accident. *Id.* Bedlington then continued, in opening, to describe what happened to Wright after he had brachial plexus neuritis in 2010. RP 54. Bedlington concluded his opening by arguing that Wright presently has brachial plexus neuritis and that it is the real cause of all Wright's ongoing pain and limitations. RP 55. After opening, Bedlington failed to produce a single witness to support his theory of causation.

Dr. Baker testified that he expected Wright to fully recover from the brachial plexus neuritis, and to return to where he was

before the neuritis episode. CP 140. He expected the neuritis to be an acute problem. CP 141. And, he expected after the neuritis went away Wright would continue to have pain as a result of his motor vehicle accident. CP 141. This testimony was offered by Bedlington.

Bedlington also offered the testimony of Dr. Shibata. Dr. Shibata's testimony on Wright's current condition was as follows:

Q. (By Mr. Western) Do you have an opinion, Doctor, as to whether he did or didn't have a neck whiplash soft tissue injury?

A. Yes. I would say on the images I have seen that can be either excluded or diagnosed.

Q. Say that one more time.

A. I don't think it could be excluded. . . .

RP 309.

Q. How much pain is Mr. Wright in presently?

A. I don't know.

Q. Can you tell by looking at the documents you have reviewed?

A. Well, specifically I don't know the latest in terms of the most recent notes. So I would, again I have to say that I don't know.

RP 310.

Q. How much do we have to move that protruding disc before it starts to cause a problem?

A. I would say it's uncertain.

Q. It's uncertain. So the way we determine whether the movement is now causing problems would at least

start by having a history from the patient, right?

A. Yes.

Q. Then you would watch if there's symptoms that start to move past the neck down into, say, the left hand or the left side?

A. Yes.

RP 315.

Q. Do you think there's any doubt in this case that there were ligaments of Mr. Wright's that were damaged in this accident.

A. As a radiologist I can say we didn't see any evidence of that on the MR scan.

Q. Did we see it in his history and in his treatment record?

A. My understanding he may have had some kind of muscular strain injury. Whether it was actually torn ligaments I think that's hard to say.

Q. Are muscle injuries typical of the aging process?

A. I would say --

Q. Or typical of whiplash?

A. More typical of some kind of stress or trauma than I think normal aging.

Q. Are torn ligaments caused by the aging process or more particularly by a whiplash injury?

A. I would say again more likely relating to some kind of stress or trauma, although I would also say as you get older you may be more prone to such injuries.

RP 319-320.

Without any evidentiary support Bedlington continued the full recovery argument into his closing.

I have one theory from the very beginning of the case that we put forward. This was a mild whiplash injury to the neck that improved with time and falls within Dr.

Braun's 90 to 95 percent of cervical strains healing in three to six months.

RP 369.

The brachial plexus neuritis which is not due to this accident is a very unusual, rare condition and when it strikes and when it affects you you tend to think, well, car accident.

RP 370.

I never asked them (any lay witness) a question because I agree there's problems, and the reason there's problem is the brachial plexus neuritis.

RP 370.

This erroneous argument was advanced by Bedlington in opening statement and continued through closing without any evidentiary support.

C. Bedlington's Testimony.

In his motions in limine, Bedlington moved the court for an order "prohibiting counsel from making such an argument or other irrelevant references to . . . personal history or experiences which may be used to gain jury sympathy." CP 44. Bedlington inappropriately volunteered, in response to counsel's first question, "tell us about yourself:" "And at this point I'm currently unemployed pursuing new employment in

lending.” RP 330. Wright objected to the testimony and asked that it be stricken, which request was granted by the trial court. RP 335-38. However, the verdict demonstrates sympathy for the defendant and that the oral instruction to ignore this prejudicial testimony was not followed by the jury.

D. CR 59.

“The trial court, in passing upon a motion for new trial based upon the ground that the verdict of the jury is inadequate or excessive, will consider the evidence, and, if that court is of the opinion that substantial justice has not been done, it will in the exercise of its duty, grant a new trial.” *Brammer v. Lappenbusch*, 176 Wash. 625, 631, 30 P.2d 947 (1934).

“Substantial evidence” has been described as evidence “sufficient ... to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises. *Green Thumb, Inc. v. Tiegs*, 45 Wn.App. 672, 676, 726 P.2d 1024 (Div. 3, 1986); *see also Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 545 P.2d 1193 (1976).

The courts, however, have often stated that an opinion based upon conjecture and speculation, if admitted, may not be viewed as substantial evidence by an appellate court. "The rule is that an expert opinion must be based upon facts in the case and not upon conjecture and speculation." *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn.App. 544, 549, 682 P.2d 942 (Div. 1, 1984); *see also Prentice Packing and Storage Co. v. United Pacific Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940). "The law demands that verdicts rest upon testimony, and not upon conjecture and speculation." *Prentice Packing and Storage Co. v. United Pacific Ins. Co.*, 5 Wn.2d at 164.

VII – CONCLUSION

This Court should determine that the jury's verdicts require that defendant accept an additur or a new trial. In the alternative, this Court should order new trial pursuant to CR 59.

Respectfully submitted this 6th day of May 2013.

SHEPHERD AND ABBOTT

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