

No. 36967-2-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

DAVID FAHNDRICH and CINDY FAHNDRICH, a marital  
community and JENEE FAHNDRICH, an individual,

Appellants,

v.

LINDA WILLIAMS and JOHN DOE WILLIAMS, a marital  
community; and CLIFFORD MULLINS and SHELLY  
MULLINS, a marital community,

Respondents.

BRIEF OF MULLINS  
RESPONDENTS

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## I. INTRODUCTION

Appellant Jenee Fahndrich<sup>1</sup> was involved in four automobile accidents between 1999 and 2002. (CP 80; 8/2/07 RP at 101, 105; Sub # 140 at 8<sup>2</sup>) She filed this lawsuit seeking damages allegedly arising from two of these accidents—(1) a collision on April 19, 2000, with a vehicle operated by Linda Williams that totaled both vehicles, and (2) and a collision on November 2, 2000, with a vehicle operated by Shelly Mullins that caused no damage to either vehicle. (CP 3-7; 8/2/07 RP at 85, 104; Trial Exhibits 22-54) This brief is submitted on behalf of respondents Clifford and Shelly Mullins.

The jury awarded Fahndrich \$22,500 in economic damages for the April accident and \$2,500 for the November accident for a total award of \$25,000. (CP 243-

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<sup>1</sup> Jenee's parents, David and Cindy Fahndrich, are also appellants. For convenience, reference is made only to Jenee Fahndrich.

<sup>2</sup> Mullins respondents have designated additional portions of the record in a Supplemental Designation of Clerk's Papers filed contemporaneously with this brief, in accordance with RAP 9.6(a). Once the additional documents have been paginated by the trial court, respondents will submit an amended brief incorporating the "CP" page numbers.

45) The verdict form does not list an award of non-economic damages for either accident. (*Id.*) Fahndrich did not object to the verdict at the time it was entered; instead she subsequently filed a motion for new trial, asserting she was entitled to an award of non-economic damages. The trial court denied Fahndrich's motion.

The issue on appeal is whether the trial court abused its discretion in denying Fahndrich's motion for a new trial.<sup>3</sup> As explained below, Fahndrich has failed to show that the jury's damage award against Mullins is not supported by substantial evidence, and therefore neither the trial court nor this Court may overturn that award. The evidence submitted at trial established that (1) Fahndrich was still suffering from the effects of the April 19 accident when the November 2 accident occurred (8/2/07 RP at 113); (2) the November 2 accident occurred at a very low speed and caused no damage to either vehicle (CP 79; 8/2/07 RP at 85; Trial Exhibits 22-54); (3) Fahndrich complained of the same symptoms before and after the November 2

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<sup>3</sup> Brief of Appellants at 1.

accident (8/3/07 RP at 179); (4) Fahndrich's subsequent TMJ<sup>4</sup> symptoms did not arise until several months after the November 2 accident (*Id.* at 161); and (5) the jury determined Fahndrich was entitled to only \$2,500 in economic damages for the November 2 accident. (CP 244-45) Under these circumstances, the trial court did not abuse its discretion in refusing to grant a new trial, and its decision should therefore be affirmed.

## **II. ASSIGNMENT OF ERROR**

Fahndrich assigns error to the trial court's September 6, 2007, Order Denying Plaintiff's Motion for New Trial.

## **III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

An award of non-economic damages is not required in every case in which a jury awards economic damages. In this case, the evidence supported the jury's apparent determination that Fahndrich was not entitled to non-economic damages in connection with the November 2

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<sup>4</sup> "TMJ" stands for "temporomandibular joint." "TMD" refers to "temporomandibular joint disorder."

accident. Did the trial court abuse its discretion in denying Fahndrich's motion for a new trial on the damages issue?

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

###### **1. April 19, 2000, Accident**

On April 19, 2000, Fahndrich was driving a 1982 Hyundai traveling at approximately 35 miles per hour when she noticed Williams pull up in her Suzuki Swift to exit a parking lot. (CP 78; 8/2/07 RP at 101, 103) According to Fahndrich, Williams looked to her right, but Williams apparently did not notice Fahndrich approaching on her left. (8/2/07 RP at 101) Williams pulled out into traffic in front of Fahndrich's vehicle. (*Id.*) Fahndrich slammed on her brakes in an attempt to avoid the collision, but she was unable to do so. (*Id.*) According to Fahndrich, her head whipped back and forth, and she struck the headrest with the back of her head. (CP 78-79; 8/2/07 RP at 103) Both cars were totaled in the collision. (8/2/07 RP at 104-05)

After the accident, Fahndrich was examined by EMT's but she did not go to the hospital. (*Id.* at 104-05)

The next day, she went to see chiropractor Kelly Smith for treatment. (*Id.* at 109) She complained of neck pain, headaches, mid-back pain, and lower back pain. (CP 401) Smith treated her for several months, but her neck pain and headaches did not resolve. (CP 79) In September 2000, Smith referred Fahndrich to a neurologist, who diagnosed her with myofascial pain syndrome with headaches secondary to a car accident. (*Id.*) Fahndrich visited her primary care physician on October 20, 2000, and he confirmed the diagnosis. (*Id.*; Trial Exhibit 21)

## **2. November 2, 2000, Accident**

On November 2, 2000, Fahndrich was involved in a collision with a Ford Taurus operated by Shelly Mullins. (CP 4, 79; 8/2/07 RP at 105-06) Fahndrich was a passenger in a 1998 Toyota driven by the Fahndrichs' foreign exchange student, and the girls were on their way to school. (8/2/07 RP at 105-06) The Fahndrich vehicle was stopped at the top of an exit ramp when the Mullins vehicle hit it from behind while traveling at a low rate of speed. (CP 79)

There was no damage to either car.<sup>5</sup> (8/2/07 RP at 85; Trial Exhibits 22-54)

Fahndrich did not feel like she was injured in the collision and, after exchanging information with Mullins, she continued on to school. (8/2/07 RP at 106-07)

The next day, Fahndrich returned to the chiropractor, complaining of neck and headache pain similar to that sustained in the first accident. (CP 79) She told the chiropractor she did not strike anything within the vehicle when the collision occurred. (CP 473) The foreign exchange student did not receive any medical treatment in connection with the accident. (8/2/07 RP at 86-87, 176)

### **3. TMJ Symptoms**

In late January or early February 2001, Fahndrich began complaining of TMJ symptoms. (8/3/07 RP at 161) She first reported the symptoms to her dentist during her regular exam, and he began treatment in April 2001 (CP 80;

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<sup>5</sup> Fahndrich testified that her car might have sustained a small scratch to the rear bumper (8/2/07 RP at 174-75), but her father testified that the car was not damaged, and the photographs of the vehicle do not show any damage. (8/2/07 RP at 85; Trial Exhibits 22-54)

Sub # 140 at 72). She subsequently visited various medical professionals for evaluation and treatment of her TMJ issues, and, in August 2003, Dr. Eugene Kelley conducted an independent medical examination of Fahndrich. (CP 77, 79-80) The only notable findings revealed by Dr. Kelley's examination were Fahndrich's subjective complaints of tenderness upon palpation and a minor limitation regarding Fahndrich's ability to open her mouth. (CP 60) The examination revealed no clicking, crepitus, or internal derangement, and Dr. Kelley's intraoral examination was normal. (CP 61-62) MRI and X-ray findings also were normal. (CP 63)

Kelley diagnosed Fahndrich with, among other things, myofascial pain dysfunction syndrome, the same diagnosis Fahndrich received before the November 2, 2000, accident. (CP 79, 85)

Fahndrich was subsequently referred to Dr. Gary Martel, a TMD specialist. (CP 261, 267) Dr. Martel first treated Fahndrich on February 23, 2004. (CP 267) His exam showed Fahndrich had normal range for opening her

mouth and normal ability to move her mouth. (CP 271) She did not have any catching or locking sensation with her jaw joints, nor did she have any deviations or deflections in the TMJ structure. (CP 272) The only objective finding was a slight crepitus, that apparently developed after Dr. Kelley's exam, which Martel deemed insignificant. (CP 271, 310) Martel testified that TMJ pain usually manifests itself within a week or two of a trauma. (CP 302)

Fahndrich also was examined by Dr. Thomas Albert, on March 16, 2005. (CP 286) Dr. Albert did not find any clinical evidence "of any significant articulating disk disorders on either the left or the right." (CP 287) Nor could he "localize any signs or symptoms specifically to the temporomandibular joint areas." (*Id.*)

**B. Procedural Background**

Fahndrich filed suit against Williams and Mullins on October 10, 2002, asserting defendants were negligent in causing the April 19, 2000, and November 2, 2000, car accidents. (CP 3-7) Following a five-day trial, the jury awarded Fahndrich a total of \$25,000 in economic

damages—\$22,500 for the April accident and \$2,500 for the November accident. (CP 243-45) The verdict form states the jury did not award non-economic damages for either accident. (*Id.*)

Fahndrich filed a motion for a new trial asserting, among other things, that the jury's damage award was insufficient. (CP 184-97) The trial court denied Fahndrich's motion, and she now appeals this decision. (CP 236-37)

## V. ARGUMENT

### A. Fahndrich cannot prevail unless she establishes that the trial court abused its discretion in denying her motion for a new trial.

Fahndrich assigns error to the trial court's denial of her motion for a new trial. As she acknowledges, this decision is reviewed for abuse of discretion.<sup>6</sup> In determining whether the trial court has abused its discretion, the appellate court should consider whether

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<sup>6</sup> Brief of Appellants at 1; *Locke v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d 705 (2007); *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

“such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.”<sup>7</sup> As the Washington Supreme Court explained:

If a jury’s verdict is tainted by passion or prejudice, or is otherwise excessive, both the trial court and the appellate court have the power to reduce the award and order a new trial.<sup>8</sup> Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, on the other hand, is tied to the written record and partly for that reason rarely exercises this power.<sup>9</sup>

Thus, an appellate court will not disturb a jury’s damage award unless “it is 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

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<sup>7</sup> *Alcoa v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

<sup>8</sup> Obviously, the same principle applies if the jury’s verdict is inadequate. *See* RCW 4.76.030.

<sup>9</sup> *Bingaman*, 103 Wn.2d at 835.

passion or prejudice.”<sup>10</sup> In determining whether the verdict is supported by the evidence, the evidence must be viewed in the light most favorable to the non-moving party.<sup>11</sup>

Here, Fahndrich does not assert that the jury’s award of damages shocks the conscience of the court or was the result of passion or prejudice. She argues only that the award is not supported by the evidence.<sup>12</sup> As explained in Section C below, there was ample evidence in the record to support a determination that Fahndrich was not entitled to non-economic damages in connection with the November 2, 2000, accident. The trial court did not abuse its discretion in denying Fahndrich’s motion for a new trial, and its decision should therefore be affirmed.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Hendrickson v. Konopaski*, 14 Wn. App. 390, 396, 541 P.2d 1001 (1975).

<sup>12</sup> Brief of Appellant at 19.

<sup>13</sup> Moreover, by failing to timely object, Fahndrich has waived her right to challenge the jury’s apparent decision not to award non-economic damages. Fahndrich did not seek a jury instruction on this issue nor did she object at the time of the verdict. If she had done so, any error by the jury could have been corrected at the time of trial.

Moreover, Fahndrich failed to provide this Court with a sufficient record to allow the Court to determine whether the trial court abused its discretion. As noted above, she contends the jury's apparent decision not to award economic damages is not supported by substantial evidence. The Court cannot determine whether this is so without reviewing all of the relevant evidence. Fahndrich has provided only portions of the trial testimony. She did not include the testimony of Williams or Mullins, explaining the circumstances surrounding the April 19, 2000, and November 2, 2000, accidents. Nor did she include the testimony of expert witnesses regarding how the accidents occurred and the forces involved. Fahndrich bears the burden of providing the Court with all of the evidence relevant to the issues she raised.<sup>14</sup> Because she failed to do so, the Court cannot fully evaluate whether the jury's

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<sup>14</sup> See *St. Hilaire v. Food Servs. of Am., Inc.*, 82 Wn. App. 343, 352, 917 P.2d 1114 (1996) (party seeking review has burden of perfecting the record so the appellate court has before it all relevant evidence); *Noble v. Ogborn*, 43 Wn. App. 387, 391, 717 P.2d 285 (1986) (court declined to consider challenge to jury's damage award when cross-appellant failed to supplement the record with the evidence adduced at trial).

verdict is supported by substantial evidence, and the trial court's ruling must therefore be affirmed.

**B. The determination of damages is primarily within the province of the jury, and the jury's damage award is presumed to be correct.**

In accordance with Washington's Constitution, the determination of the amount of damages is an issue to be decided by the jury, and this is particularly true with respect to non-economic damages.<sup>15</sup> "Regardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages."<sup>16</sup>

The law gives a strong presumption of adequacy to a jury verdict.<sup>17</sup> Thus, a jury's determination regarding

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<sup>15</sup> *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992) (quoting *Bingaman*, 103 Wn.2d at 835).

<sup>16</sup> *Cox v. Charles Wright Acad.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967); see also *Locke*, 162 Wn.2d at 486 (courts are reluctant to interfere with jury's damage award when fairly made); *Reiboldt v. Bedient*, 17 Wn. App. 339, 343, 562 P.2d 991 (1977) (trial court may not substitute its damages determination for that of the jury absent a showing of passion or prejudice).

<sup>17</sup> *Cox*, 70 Wn.2d at 176; see also *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007) ("Juries have considerable latitude in assessing damages, and a jury verdict will not be lightly overturned."); *Green v. McAllister*, 103 Wn. App. 452,

damages should be overturned only in extraordinary circumstances.<sup>18</sup> The jury's verdict is strengthened where, as here, the trial court has denied a motion for a new trial.<sup>19</sup>

In this case, the jury awarded Fahndrich \$2,500 in economic damages for the November 2, 2000, accident and apparently determined she was not entitled to recover non-economic damages. As explained in Section C below, Fahndrich has failed to establish that the jury's verdict was not supported by substantial evidence, and the verdict therefore should not be overturned by this Court.

**C. The jury is not required to award non-economic damages, and Fahndrich bears the burden of establishing that the jury's apparent failure to award such damages is not supported by substantial evidence.**

The Washington courts have repeatedly recognized that a jury is not required to award non-economic damages

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461, 14 P.3d 795 (2000) (appellate court begins with presumption that jury verdict is correct).

<sup>18</sup> *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 138, 856 P.2d 746 (1993); *Miller v. Yates*, 67 Wn. App. 120, 124, 834 P.2d 36 (1992).

<sup>19</sup> *Washburn*, 120 Wn.2d at 271; *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 476, 17 P.3d 641 (2001).

simply because it awards economic damages.<sup>20</sup> Instead, whether non-economic damages should be awarded depends upon the evidence in a particular case.<sup>21</sup>

This rule is illustrated in the Washington Supreme Court's decision in *Palmer v. Jensen*,<sup>22</sup> a case relied upon by Fahndrich. In *Palmer*, the plaintiff and her son sought damages for injuries they allegedly sustained when the plaintiff's car was rear-ended by a minivan driven by the defendant.<sup>23</sup> The jury awarded the plaintiff and her son damages exactly equal to the cost of their medical treatment.<sup>24</sup> The plaintiff moved for a new trial, asserting the verdict was insufficient because it did not include any non-economic damages. The trial court denied the motion,

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<sup>20</sup> See, e.g., *Palmer*, 132 Wn.2d at 201; *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496, 498 (2003).

<sup>21</sup> *Palmer*, 132 Wn.2d at 201; *Gestson*, 116 Wn. App. at 620.

<sup>22</sup> *Palmer v Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

<sup>23</sup> *Palmer*, 132 Wn.2d at 195.

<sup>24</sup> *Id.*

and the plaintiff appealed. This Court affirmed, and the plaintiff sought review by the supreme court.<sup>25</sup>

The supreme court noted that it could assume the jury did not award non-economic damages because the verdict exactly equaled the amount of economic damages and there was no legitimate controversy regarding the amount of such damages.<sup>26</sup> The court recognized that the law does not require that non-economic damages be awarded to every plaintiff who sustains an injury; instead, the award of such damages depends upon the evidence.<sup>27</sup>

In the case before it, the evidence established that the plaintiff's son experienced pain following the accident for which he received medical treatment. However, the evidence also showed that his injuries were minimal and required little medical care. Thus, the jury could properly

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<sup>25</sup> *Id.* at 196.

<sup>26</sup> *Id.* at 201.

<sup>27</sup> *Id.*

have concluded he was not entitled to damages for pain and suffering.<sup>28</sup>

With respect to the plaintiff, the medical evidence substantiated her assertion that she experienced pain and suffering for over two years following the accident. Accordingly, the jury's failure to award non-economic damages was not supported by the record, and the plaintiff was entitled to a new trial.<sup>29</sup>

Fahndrich asserts that, like the plaintiff in *Palmer*, the evidence presented at trial established that she was entitled to non-economic damages. Fahndrich fails to appreciate two significant distinctions between this case and the *Palmer* case, however. First, although Fahndrich asserts the jury's award reflects the amount of her medical expenses less those incurred in connection with the July 2002 accident,<sup>30</sup> this assertion is not supported by a citation to the record. In fact, the record does not reflect the

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<sup>28</sup> *Id.* at 202.

<sup>29</sup> *Id.* at 203.

<sup>30</sup> Brief of Appellants at 22.

amount of economic damages sought by Fahndrich, so it is impossible for this Court to determine the precise basis for the jury's award and whether that award may, in fact, include non-economic damages.<sup>31</sup> Accordingly, the Court should presume the evidence supported the jury's award.<sup>32</sup> Moreover, the fact that the jury simply awarded Fahndrich a round number—\$25,000—indicates it did *not* simply award Fahndrich her medical expenses, as she now claims.

Second, the evidence in *Palmer* established that the plaintiff had been involved in only one accident that caused her injuries. The *Palmer* court specifically distinguished its earlier decision in *Cox v. Charles Wright Academy*,<sup>33</sup> in which the plaintiff, like Fahndrich, had been involved in previous accidents. The court noted, “Unlike this case,

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<sup>31</sup> For example, it is impossible to determine whether the \$2,500 awarded for the November 2, 2000, accident was for one health care visit, a series of health care visits, or a combination of health care visits and non-economic damages.

<sup>32</sup> *Friedl v. Benson*, 25 Wn. App. 381, 391, 609 P.2d 449 (1980) (appellate court affirmed trial court's determination of damages because much of the factual basis for the damage award was not included in the appellate record).

<sup>33</sup> *Cox v. Charles Wright Acad.*, 70 Wn.2d 173, 422 P.2d 515 (1967).

there was substantial evidence in *Cox* that the plaintiff's injuries were not attributable to the accident."<sup>34</sup> Here, as in *Cox*, there was substantial evidence that the November 2, 2000, accident caused only minimal injuries to Fahndrich, as reflected by the jury's award of only \$2,500 for that accident. Instead, the evidence supported the jury's determination that Fahndrich's injuries arose primarily from the more serious accident on April 19, 2000. In particular, the evidence presented to the jury showed:

- Fahndrich suffered from headaches and neck pain following the April 19, 2000, accident. (8/2/07 RP at 105, 110)
- She continued to suffer headaches for several months, requiring a referral to a neurologist in September 2000. (*Id.* at 113; CP 79, 414, 418)
- The neurologist diagnosed Fahndrich with myofascial pain syndrome with headaches, a diagnosis confirmed by Fahndrich's primary care physician on October 20, 2000. (CP 79; Trial Exhibit 21)
- Fahndrich's friends and family testified that she continued to experience headaches and neck pain during the entire

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<sup>34</sup> *Palmer*, 132 Wn.2d at 199.

period between the first and second accidents. (7/31/07 RP at 5, 16; 8/1/07 RP at 67)

- Unlike the April 19, accident, the November 2, 2000, accident occurred at a low speed and caused little or no damage to the vehicles involved. (CP 79, 8/2/07 RP at 85; Trial Exhibits 22-54)
- An individual usually sustains less serious injuries from a low-speed accident or when a vehicle is stopped. (CP 471)
- The driver of Fahndrich's vehicle did not require any medical treatment. (8/2/07 RP at 86-87; 8/3/07 RP at 176)
- Fahndrich did not seek medical treatment immediately following the November 2 accident but instead continued on to school. (8/2/07 RP at 106-07)
- Fahndrich subsequently sought treatment for the same symptoms as those following the April 19 accident. (8/3/07 RP at 179)
- Fahndrich was diagnosed with myofascial pain syndrome following the November 2 accident, the same diagnosis she had been given shortly before the accident. (CP 79, 85)
- Fahndrich did not complain of TMJ symptoms until several months after the November 2 accident, and such symptoms typically manifest themselves within a week or two of an accident. (CP 302; 8/3/07 RP at 161)

- Results of examinations showed no clinical evidence of TMD. (CP 60, 63, 271, 272, 287)

Thus, in this case, there is ample evidence to support the jury's apparent conclusion that Fahndrich was not entitled to non-economic damages in connection with the November 2, 2000, accident, and the trial court's refusal to grant a new trial on this basis should therefore be affirmed.

The other cases relied upon by Fahndrich are equally distinguishable. For example, Fahndrich cites two cases in which the appellate court concluded the trial court did not abuse its discretion in *granting* a new trial.<sup>35</sup> Here, of course, the issue is whether the trial court abused its discretion in *denying* Fahndrich's motion for a new trial. The other case cited by Fahndrich, *Singleton v. Jimmerson*,<sup>36</sup> actually supports Mullins' position.

Fahndrich cites *Singleton* for the proposition that, "Where the jury verdict approximates the amount of undisputed

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<sup>35</sup> See *Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965); *Ide v. Stoltenow*, 47 Wn.2d 847, 289 P.2d 1007 (1955).

<sup>36</sup> *Singleton v. Jimmerson*, 12 Wn. App. 203, 529 P.2d 17 (1974).

special damages and the injury and its cause is clear, the court has little hesitation in granting a new trial.”<sup>37</sup> The *Singleton* court added, “However, where the amount of special damages is disputed and the injury and its cause uncertain, the court has been reluctant to disturb the finding of a jury.”<sup>38</sup> The court concluded the jury’s award of only the undisputed amount of special damages did not require a new trial because, among other things, the plaintiff’s medical problems pre-dated the accident.<sup>39</sup> The court explained:

In view of the uncertainty surrounding the precise cause of plaintiff’s present low back condition, her questionable credibility and the subjective nature of her injuries, we are unable to conclude that the verdict was so inadequate that this court should hold that the trial judge who heard and saw the witnesses and denied the motion for new trial should be reversed.<sup>40</sup>

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<sup>37</sup> Brief of Appellants at 19 (quoting *Singleton*, 12 Wn. App. at 205).

<sup>38</sup> *Singleton*, 12 Wn. App. at 205-06.

<sup>39</sup> *Id.* at 208.

<sup>40</sup> *Id.*

In this case, as discussed above, Mullins disputed the amount of economic damages attributable to the November 2, 2000, accident, the jury did not award the exact amount of economic damages claimed by Fahndrich, and Fahndrich's medical problems pre-dated the November 2 accident. Thus, under the reasoning in *Singleton*, the trial court's decision denying Fahndrich's motion for a new trial on the ground of inadequacy of damages should be upheld.

Fahndrich also cites cases she claims are distinguishable; in fact, they are not. For example, in *Cox v. Charles Wright Academy*,<sup>41</sup> the court ruled the plaintiff was not entitled to additional damages where the evidence established that he had been in two previous automobile accidents and that he was still suffering from and under medical treatment for injuries sustained in those accidents.<sup>42</sup> Similarly, the evidence in this case established that Fahndrich was still suffering from and being treated

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<sup>41</sup> *Cox v. Charles Wright Academy*, 70 Wn.2d 173, 422 P.2d 515 (1967).

<sup>42</sup> *Cox*, 70 Wn.2d at 174-75.

for injuries sustained in the April 20, 2000, accident at the time the November 2, 2000, accident occurred.

In *Lopez v. Salgado-Guadarama*,<sup>43</sup> the court upheld an award of economic damages where the defendant disputed the plaintiff's evidence regarding damages and presented evidence showing the plaintiff's complaints were not supported by objective medical findings. In this case, Mullins presented evidence showing Fahndrich's complaints were not supported by objective medical evidence and that her claims of headache and neck pain pre-dated the November 2, 2000, accident.

Perhaps the most persuasive authority on this issue can be found in this Court's decision in *Gestson v. Scott*.<sup>44</sup> In *Gestson*, the Court concluded the trial court abused its discretion in granting a motion for new trial after the jury awarded economic damages but no non-economic damages.

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<sup>43</sup> *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005).

<sup>44</sup> *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003).

The facts in *Gestson* are quite similar to the facts of the November 2, 2000 accident. In *Gestson*, the defendant backed up while in a parking lot and hit the front bumper of the plaintiff's car, causing minimal damage. The plaintiff went to the emergency room immediately following the accident and was diagnosed with lower back strain and lower back pain. She began chiropractic treatments the next day.<sup>45</sup> The plaintiff and her husband subsequently filed suit seeking medical expenses, damages for pain and suffering, lost wages, loss of conjugal rights, and loss of consortium. At trial, the plaintiff presented evidence of medical expenses of \$438.34 for the emergency room visit and \$48,661.41 in other medical expenses. The jury awarded only the cost of the initial emergency room visit.<sup>46</sup>

The plaintiff then filed a motion for a new trial, which the trial court granted. However, this Court

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<sup>45</sup> *Gestson*, 116 Wn. App. at 618.

<sup>46</sup> *Id.* at 619.

concluded substantial evidence supported the jury's verdict and reversed.<sup>47</sup>

The Court began its analysis by recognizing, "A jury may award special damages and no general damages when 'the record would support a verdict omitting general damages.'"<sup>48</sup> The Court then considered the evidence before it and concluded the record supported the jury's award of only limited special damages.

The Court looked to the evidence to determine a connection between the car accident and the plaintiff's complaints:

Gestson testified that (1) while she was looking down in her wallet, Scott's van hit her car 'pretty hard,' causing her body to move forward and then backward . . .; (2) immediately afterward she suffered substantial lower back pain and spasms shooting down her legs; (3) later that night, she developed a severe headache and her neck began bothering her; (4) the next day, she visited Powers, a chiropractor, complaining of neck pain; and (5) she continued to see Powers for treatment of her back and neck pain. Powers testified that Gestson

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<sup>47</sup> *Id.* at 618.

<sup>48</sup> *Id.* (quoting *Palmer*, 132 Wn.2d at 202).

complained of neck pain and stiffness throughout her treatment.

Bank teller Lisa Smith, who observed the accident, testified that Scott did not roll but reversed into Gestson's car and Gestson complained of neck pain immediately afterward. Van Fleet, a chiropractor who had treated Gestson for lower back pain several times during the months preceding the accident, testified that Gestson had never complained to him about experiencing neck pain during that period. And Gestson presented several experts who each gave an opinion on a more probable than not basis that the car accident caused Gestson's neck injury.

But the Scotts' evidence and cross-examination of the Gestson's witnesses raised doubts as to the causal connection between the accident and Gestson's neck injury. Scott testified that (1) she only traveled 'like half a car length maybe,' at '[m]aybe one mile an hour,' without having 'time to put [her] foot on the gas pedal'; (2) she 'didn't feel any impact or anything,' but just bumped into Gestson and her van stopped, without jostling or bouncing her; and (3) Gestson 'wasn't crying or anything' immediately after the accident. . . . And Scott's passenger, Debbie Fittro, testified that she was not bounced or jostled by the impact, describing it as feeling like the van had bumped into a curb.

Scott introduced photographs of her van, which was undamaged by the accident, and of the minor damage her van caused to Gestson's car. Powers acknowledged that, in his opinion, a car accident involving a greater impact is generally

more likely to injure a person than one involving lesser impact.<sup>49</sup>

The factual similarities in the *Gestson* case are strikingly similar to the facts of this matter. The plaintiff in *Gestson* had pre-existing low back symptoms, although her chiropractor testified she had no neck symptoms. In this case, Fahndrich had pre-existing neck, back, and headache complaints, although she represented no pre-existing jaw complaints. The plaintiff in *Gestson* had physicians associate her complaints on a “more probable than not” basis to the subject accident, as did Fahndrich’s health care providers in this action.

In fact, the evidence in *Gestson* was even stronger than the evidence here with respect to an award of non-economic damages. The plaintiff’s vehicle in *Gestson* had evidence of an impact. There was no such evidence here with respect to the November 2, 2000 accident. The plaintiff in *Gestson* had complaints at the accident scene. Fahndrich had none. The plaintiff in *Gestson* received

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<sup>49</sup> *Id.* at 622-23.

treatment on the date of the incident. Fahndrich did not. Thus, although the decision to award non-economic damages is dependent upon the facts of each particular case, this Court's decision in *Gestson* certainly supports the jury's apparent determination that Fahndrich was not entitled to non-economic damages in connection with the November 2, 2000, accident.

In sum, as the trial court correctly recognized, the jury was under no obligation to award non-economic damages to Fahndrich. Instead, the issue is whether an award of such damages is supported by the evidence in a particular case. Here, Fahndrich failed to carry her burden of showing that the jury's damage award was not supported by substantial evidence, and she therefore is not entitled to a new trial on this issue.

## **VI. CONCLUSION**

For the reasons set forth above, Mullins respectfully requests that the trial court decision denying Fahndrich's motion for a new trial be AFFIRMED.

DATED this 15th day of May, 2008.

BULLIVANT HOUSER BAILEY PC

By  Matthew J. Sebitt,  
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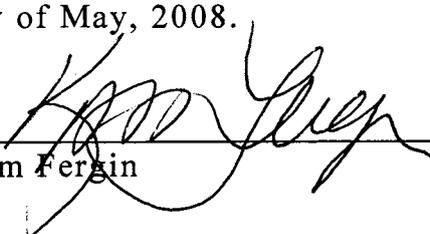
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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served the foregoing document on the attorneys of record for said parties via the methods listed below:

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DATED this 15<sup>th</sup> day of May, 2008.

  
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Kim Fergin

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