

No. 44871-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

TAMMY D. KARTHAUSER and VON KARTHAUSER,  
wife and husband,

Plaintiffs/Respondents,

v.

MACKENZIE ADAMS,

Defendant/Appellant.

BY  
*[Signature]*  
DEPUTY

STATE OF WASHINGTON

2013 SEP -6 PM 1:25

FILED  
COURT OF APPEALS  
DIVISION II

---

BRIEF OF APPELLANT

---

Cheryl R.G. Adamson  
Attorney for Defendant/Appellant  
MacKenzie Adams

RETTIG OSBORNE FORGETTE, LLP  
6725 W. Clearwater Avenue  
Kennewick, WA 99336  
Phone: (509) 783-6154  
Fax: (509) 783-0858

PHIL VUCI

TABLE OF CONTENTS

ASSIGNMENTS OF ERROR ..... 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

STATEMENT OF THE CASE .....2

ARGUMENT .....13

    A.    The Trial Court Should Have Granted a New Trial or Remittitur.....13

        1.    Standard of Review..... 14

        2.    The Jury’s Verdict Is Not Supported by Substantial Evidence ..... 16

        3.    The Jury’s Verdict Is the Result of Passion or Prejudice .....19

    B.    The Post-Trial Motions Should Have Been Heard by the Trial Judge,  
            and Not by a Judge Unfamiliar With the Trial Evidence .....20

    C.    The Trial Court Should Have Granted Judgment as a Matter of Law  
            as to Karthausser’s Claims for Future Medical Expenses and  
            Impaired Earning Capacity .....23

CONCLUSION .....25

TABLE OF AUTHORITIES

**Cases**

*Bohnsak v. Kirkham*  
72 Wn.2d 183, 186-87, 432 P.2d 554 (1967).....15

*Collins v. Clark County Fire Dist. No. 5*  
155 Wn. App. 48, 81, 231 P.3d 1211 (2010) .....15,16

*Conrad v. Alderwood Manor*  
119 Wn. App. 275, 281, 78 P.3d 177 (2003) .....24

*Coppo v. Van Wieringen, et al.*  
36 Wn.2d 120, 124, 217 P.2d 294 (1950) .....22

*McLimans v. City of Lancaster*  
15 N.W. 194, 195 (1883) .....22

**Statutes/Court Rules**

RCW 4.76.030.....14

CR 59 .....13

CR 63 .....22

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Appellant's motion for a new trial or remittitur.
2. The court erred in having post-trial motions heard and decided by a judge who did not preside over the trial.
3. The trial court erred in denying Appellant's motion for a directed verdict on claims for future medical expenses and impaired earning capacity.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court should have granted Appellant's motion for a new trial or remittitur, when the jury's verdict was based on speculation, not supported by substantial evidence, was grossly excessive, and was the result of passion and/or prejudice, denying Appellant substantial justice?
2. Whether Appellant did not receive fair hearing, evaluation and ruling on her post-trial motions, when said motions were heard and decided by a judge who did not preside over the trial,

and who was entirely unfamiliar with the trial witnesses and evidence, denying Appellant substantial justice?

3. Whether the trial court should have granted Appellant's motion for a directed verdict on claims for future medical expenses and impaired earning capacity, when there was no medical testimony to support those claims, no wage loss, and no evidence of disability?

### **III. STATEMENT OF THE CASE**

This case arises from a motor vehicle accident that occurred March 29, 2011, in Cowlitz County, Washington. (CP 3-4) A vehicle driven by Plaintiff/Respondent Tammy Karthausser ("Karthausser") collided with a vehicle driven by Defendant/Appellant MacKenzie Adams ("Adams"). (*Id.*) The accident occurred at a "T" intersection in which Karthausser was the favored driver. Specifically, Adams drove into the path of Karthausser, and the impact occurred. (RP 131-34) Adams denied liability, (CR 5-7), because she blacked out immediately

before the intersection, likely as a result of her pregnancy, resulting in the collision. (RP 165-67) The case was tried to a Cowlitz County jury and visiting Judge Michael Sullivan on March 12 and 13 of 2013, with issues of both liability and damages being presented. *See* Report of Proceedings.

Karthauser claimed soft-tissue injuries to her neck, right shoulder and low back/hip from the accident. (RP 82) She did not present the testimony of even a single physician at the time of trial. Instead, in addition to her own testimony, she presented testimony from a treating physical therapist and from five family members who provided before-and-after witness testimony. Karthauser's medical treatment consisted of two physician appointments in the first month or two after the accident, 28 physical therapy treatments, with the last treatment occurring July 21, 2011, and 10 massage therapy treatments, with the last treatment occurring August 1, 2011. (RP 76; Ex.

9A) Accordingly, at the time of trial, Karthausser had not treated for nearly two years for any injury she attributed to the accident.

Darryl Kent, PT, the therapist who provided physical therapy to Karthausser, testified that Karthausser responded well to therapy. (RP 77) Mr. Kent was unaware whether Karthausser ever returned to pre-injury status. (RP 78) Mr. Kent testified that with additional physical therapy and an exercise program, Karthausser could get better on a permanent basis. (RP 79-80) He did not, however, recommend any particular amount or frequency of therapy, nor did he provide a reasonable cost of such therapy. During the therapy treatments, Karthausser's shoulder and neck complaints resolved. Residual low back and hip complaints existed. (RP 82-83)

Karthausser admitted that she often did not do her home exercise program prescribed by Mr. Kent because she was too

busy with her household duties, job, children, daily activities, and the like. (RP 150-51) Again, there were no impartial witnesses who provided testimony regarding Karthausers' alleged limitations from the accident; only she and her family members provided such testimony.

No medical testimony was presented at the time of trial, and accordingly, no medical expert testified to any permanent impairment, disability, or restrictions imposed on Karthausers.

During trial, Karthausers did not claim any lost income or wages, because she continued to do her same job as before the accident, providing in-home care to a 300-pound man. (RP 149) This was consistent with Karthausers' Interrogatory answers that she did not lose time from work as a result of the accident. (CP 51) Although she testified to some difficulty assisting the man getting out of the bathtub, (RP 138), as he weighs 300 pounds, she was otherwise able to care for him, do his laundry,

take him to appointments, pick up his prescriptions, and the like. (RP 149-50) No evidence was presented as to Karthausers typical wages.

Karthausers presented a claim for medical expenses of \$10,845.43, which amount was admitted, subject to a determination of liability. She also claimed mileage expense of \$516.12, a towing bill of \$506.80, and lost value to her 1996 Honda Passport of \$1,790.00. (Exhibit 9A, p. 83) Again, she did not make a claim for any wage loss, past or present, nor did she present any physician testimony as to the need for future medical treatment, permanent impairment, or disability.

At the close of the presentation of evidence, Adams moved for "directed verdict" [judgment as a matter of law] with regard to Karthausers claims for future medical expenses and impairment or diminution of earning capacity. (RP 185) Adams' counsel noted that in answers to discovery requests,

Karthauser had not identified a claim for diminished earning capacity or future medical expenses<sup>1</sup>, and further, no medical testimony or competent evidence was presented during the trial as to a specific need for future medical treatment or as to any permanent impairment, specific restrictions imposed on Karthauser, or any other substantive evidence. (RP 34-35, 38, 185-86)

Moreover, Adams argued any award of such future economic damages would be based on pure speculation. Although Mr. Kent testified that Karthauser would benefit from additional physical therapy, he did not testify as to how much physical therapy she could or should receive. (RP 79-80) Additionally, Adams again pointed out that until right before trial, Karthauser had never given notice of a claim for future medical expenses or diminished earning capacity. (RP 188-89)

---

<sup>1</sup> Indeed, in her interrogatory answers, Karthauser denied “permanent scars, disfigurement or disability.” (CP 56)

Further, there was no evidence of any specific difficulties Karthausser had performing her job other than bathtub transfers for a 300-pound man. The Court denied Adams' motion for judgment as a matter of law. (RP 192)

Prior to the court giving the jury instructions on the law, Adams objected to the giving of Instruction No. 10, the damages instruction, to the extent it directed the jury that it could award damages for future medical expenses and impaired earning capacity. (RP 192-93) (CP 10-25) Instruction 10 was given over Adams' objection.

During closing arguments, Karthausser's attorney, Duane Crandall, made inappropriate and inflammatory statements, including the following:

We know that [Karthausser] can't be an in-house caregiver to people who weigh more than she does . . . we know that if you gave her a lump sum, she might well be able to open a cleaning business . . . because if she doesn't get anything and she continues to deteriorate, us [sic] taxpayers are

going to be paying for her. *Do you want to pay for her?*

(RP 229) (emphasis added).

In addition to there being no testimony or other evidence that Karthausser could not provide in-home care to “anyone who weighs more than she does” (the only testimony being that she had difficulty helping a 300-pound man transfer from a bathtub), nor any evidence of deterioration in her condition, Karthausser’s attorney’s appeal to the pocketbooks of the taxpayers is clearly improper and inflammatory, and the very type of argument that generates passion and prejudice in the minds of the jurors, who certainly do *not* want to pay for Karthausser (and presumably her family). Although counsel for Adams objected, and the objection was sustained, irreversible damage had been done. (RP 229)

Following the trial, the jury returned a verdict in favor of Karthausser, awarding past economic damages of \$13,658 and

future economic damages of \$151,342. There was no apparent award for noneconomic damages. (CP 26)

After issuance of the verdict, it was recognized by counsel for the parties that the verdict form contained several errors. Unfortunately, those errors were not noticed by the court or counsel prior to jury deliberations and dismissal. The verdict form did not give the jury the option of finding Adams not liable for the accident, although liability was contested. The form's numbering was in error and was corrected by handwritten notations. Importantly to this appeal, the damages question provided lines to award past economic damages, future economic damages, and past and future *economic* damages. It appears that the third line should have referenced past and future *non-economic* damages. As a result, there was confusion as to what the jury intended to award. Karthausser obtained a declaration from the Presiding Juror, Robert Portner. (CP 81-

83) That declaration states that upon beginning deliberations, the jury recognized that the verdict form was flawed in that it did not provide a space to award non-economic damages (although the jury did not inform the court of this discovery). Eleven of the jurors decided to use the space for future economic damages and future non-economic damages, including future medical expenses. Mr. Portner could not recall how much the jury intended to award for any specific category of damages. (*Id.*)

Following return of the verdict, Adams filed a motion for a new trial, or in the alternative, remittitur, (CP 30-38), and noted the motion hearing before visiting Superior Court Judge Michael Sullivan, who presided over the civil trial. (CP 72-73) On the same date, Adams filed an Objection to Entry of Judgment, specifically requesting referral of the matter to Judge Sullivan for resolution. (CP 27-29)

Despite Adams' noting of the motion for a new trial or remittitur to be heard by the trial judge, and objection to entry of judgment by a judge other than the trial judge (especially in light of the verdict form problems), the court directed the matter be heard by the Honorable Stephen Warning, who did not observe any of the trial, nor did he have a transcript of the trial to review. Judge Warning denied Adams' motion for a new trial or remittitur, (CP 102-03), and entered judgment on the verdict in the amount of \$165,000, using Mr. Portner's clarification to determine the amount of judgment that should be entered. (CP 84-85) Judge Warning stated: "The verdict might be large in comparison to the bell curve, but I don't think that I've got anything in front of me that shows it's a result of passion or prejudice, as that is defined, so I will deny the motion." Adams subsequently filed her Notice of Appeal. (CP 107-13)

#### IV. ARGUMENT

A. The Trial Court Should Have Granted a New Trial or Remittitur.

Although captioned Defendant's Motion for a New Trial Pursuant to CR 59, the motion sought a new trial, or alternatively, remittitur. CR 59 provides in pertinent part as follows:

**(a) Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

\* \* \*

(3) Accident or surprise which ordinary prudence would not have guarded against;

\* \* \*

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

\* \* \*

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

CR 59. Additionally and alternatively, Washington statutory authority allows a judge, considering a motion for a new trial, to instead order remittitur of the verdict, if the amount awarded is so excessive as to have necessarily been the result of passion or prejudice:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive ... as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction ... of such verdict.

RCW 4.76.030.

**1. Standard of Review.**

An order granting or denying a motion for a new trial is reviewed for abuse of discretion. A much stronger showing of abuse

of discretion is required to set aside an order granting a new trial, than one denying a new trial. *See, e.g., Bohnsak v. Kirkham*, 72 Wn.2d 183, 186-87, 432 P.2d 554 (1967). “We review a trial court’s denial of a new trial more critically than we do its grant of a new trial because a new trial places the parties where they were before, while a decision denying a new trial concludes their rights. Denial of a motion for remittitur also strengthens the verdict.” *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010) (citations omitted). Accordingly, the lesser showing of abuse of discretion is required here.

To grant a motion for a new trial based on an excessive damages award, the damages must be so excessive as unmistakably to indicate that the verdict was the result of passion or prejudice. Absent such passion or prejudice, the damages award must be so excessive as to be outside the range of evidence. There must be no reasonable evidence or inference from the evidence to justify the award. *Id.* at 293.

When reviewing a trial court's ruling on a motion for remittitur, an appellate court will not disturb a jury's damages 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 a result of passion or prejudice," after viewing the evidence in the light most favorable to the non-moving party. When the party seeking a new trial contends that the verdict was not based on the evidence, the reviewing court reviews the record to determine whether there was sufficient evidence to support the verdict. A trial court's denial of remittitur is reviewed for abuse of discretion. *Collins*, 155 Wn. App. at 82. The substantial evidence standard requires more than a "mere scintilla" of evidence to support the verdict, but rather evidence of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Id.*

2. **The Jury's Verdict Is Not Supported by Substantial Evidence.**

The jury's large award of future economic (and perhaps some

non-economic) damages is not supported by substantial evidence of a character that would convince an unprejudiced, thinking mind that such damages were proved. The evidence showed that Karthauser sustained soft-tissue injuries only in the subject accident, received healthcare treatment for alleged injuries attributable to that accident for only several months, had not treated for a couple of years prior to the date of trial, and did not lose any time from her physical job as a result of the injuries allegedly sustained in the accident. Further, the only healthcare professional who testified for Karthauser, her physical therapist, testified that her neck and right shoulder complaints had resolved with therapy, leaving only some residual low back/hip pain, and that additional physical therapy along with an exercise program would likely result in permanent improvement. Of note, at no time did the physical therapist take Karthauser off of work otherwise place restrictions on her work activities, let alone her leisure activities. There was no medical testimony as to any permanent impairment, disability, or restrictions that, on a more-probable-than-not basis, should be imposed on her, as a result of the

subject motor vehicle accident. Indeed, there was no medical testimony that the symptoms of which Karthausser continued to complain were caused by the motor vehicle accident.

The only work-related limitation to which Karthausser testified was assisting a 300-pound man from the bathtub. She did not testify that any other aspect of her job was problematic, nor did she testify to any difficulty obtaining in-home care job for individuals weighing less than 300 pounds. There was some testimony that her occasional leisure activities had been affected, but that is a typical general damages-type claim asserted in most personal injury cases.

Here, there was absolutely no evidence, beyond pure speculation, from which a jury could determine an award for future medical expenses, there being no concrete testimony to guide the jury in that regard, nor for diminished earning capacity, especially of the amount awarded here. Indeed, with less than \$11,000 in medical bills, only several months of treatment, no physician testimony, and no wage loss, the jury's award of over \$150,000 on top of the

medical bills is outrageous, outside the range of evidence, and shocks the conscience.

3. **The Jury's Verdict Is the Result of Passion or Prejudice.**

The jury's verdict in this case was so excessive as to compel the conclusion that it is based on passion and/or prejudice. In addition to the matters set forth in Section 2, above, Attorney Crandall's statements during closing argument, essentially threatening the jury, as taxpayers, with having to pay for Karthaus's economic needs for the rest of her life if they did not give her a lot of money, especially in this day of frequent references to, and dissatisfaction with, the "handout society" that many believe has become the United States, and the fear of increasing taxes in economically uncertain times, created significant prejudice against Adams in this case. Statements such as that made by Attorney Crandall, even after objection is sustained, cannot be undone. As the saying goes, "you cannot unring the bell." The jury went into the jury deliberation room knowing that they had two choices: give

Karthauser a lot of money, more than she had proved was owed, or have Karthauser, and likely her family, on the taxpayer-funded public assistance rolls, for the rest of her life expectancy, which is several decades. Adams' motion for a new trial should have been granted, as the verdict was a result of passion and/or prejudice, and substantial justice was not done.

**B. The Post-Trial Motions Should Have Been Heard by the Trial Judge, and Not by a Judge Unfamiliar With the Trial Evidence.**

The visiting judge, the Honorable Michael Sullivan, presided over the trial, including motions *in limine*, presentation of the evidence, instructing the jury, and all other aspects of the trial. *See* Report of Proceedings. Despite Adams' request that Judge Sullivan hear and rule on the motion for a new trial, as well as the proceeding for entry of judgment on the verdict, the court scheduled the hearing before the Honorable Stephen M. Warning. Judge Warning had not observed any portions or aspects of the jury trial. Despite this, he denied the motion for a new trial or remittitur, and entered judgment against Adams.

In ruling on a motion for a new trial, particularly one based on the assertion that the verdict was not supported by substantial evidence, and that the verdict was so excessively high as to clearly be the result of passion or prejudice, resulting in justice not being done, it is important for the judge to have personally observed the testimony, the argument, witnesses' behavior and credibility, and the like. It is important for the judge not only to know what evidence is in the record, but also the matters not in the record, such as witness demeanor.

The judge before whom this cause was tried heard the testimony, observed the appearance and bearing of the witnesses and their manner of testifying, and was much better qualified to pass upon the credibility and weight of their testimony than this court can be. *There are many comparatively trifling appearances and incidents, lights and shadows, which are not preserved in the record, which may well have affected the mind of the judge as well as the jury in forming opinions of the weight of the evidence, the character and credibility of the witnesses, and of the very right and justice of the case.* These considerations cannot be ignored in determining whether the judge exercised a reasonable discretion or abused his discretion in granting or refusing a motion for a new trial.

*Coppo v. Van Wieringen, et al.*, 36 Wn.2d 120, 124, 217 P.2d 294 (1950) (quoting *McLimans v. City of Lancaster*, 15 N.W. 194, 195 (1883)). Here, although Adams noted the motion for a new trial before Judge Sullivan, and objected to the hearing on entry of judgment be before any judge other than Judge Sullivan, who observed the trial, the motion was heard by an entirely different judge who did not have the benefit of a complete record, let alone personal observations of the witnesses. Because of this, Adams' motion for a new trial was not fairly and completely evaluated, and the rulings should be reversed.

CR 63 provides as follows:

**(b) Disability of a Judge.** If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the Court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

CR 63.

Thus, the Court Rules make clear that the judge who presided over the trial should similarly preside over all post-trial motions, absent illness, death or other disability. Here, there is no evidence that Judge Sullivan was not available. The court simply did not allow Judge Sullivan to hear the post-trial motions. Judge Warning did not have the information and personal observations necessary to evaluate fairly the merits of Adams' post-trial motions. Accordingly, the hearing on, and denial of, Adams' motion for a new trial or remittitur was unfair and invalid, and this Court should reverse.

C. **The Trial Court Should Have Granted Judgment as a Matter of Law as to Karthauser's Claims for Future Medical Expenses and Impaired Earning Capacity.**

A court should grant a motion for judgment as a matter of law when, viewing the evidence in the light most favorable to the non-moving party, the court can conclude as a matter of law that there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party. The evidence must be sufficient to

persuade a fair-minded, rational person of the truth of an offered premise. An appellate court applies the same standard in reviewing the granting or denial of a judgment as a matter of law as the trial court. *See, e.g., Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281, 78 P.3d 177 (2003).

After initially alerting the court to the fact that Adams was not made aware until the day before trial of Karthausers intention of asserting a claim for future medical expenses and future diminished earning capacity, despite their being no wage loss claim and despite Adams having requested supplementation of all discovery responses prior to trial, Adams moved for a directed verdict at the close of all evidence on the claims for future medical expenses and diminished earning capacity. The only "medical" testimony at trial was from a physical therapist, whom the court had previously limited to testifying only as a physical therapist, without the ability to testify as to medical opinions such as permanency and impairment. (RP 38-40) The physical therapist testified that the therapy had been helpful to Karthausers, had resolved her neck and shoulder complaints, and

that her residual complaints would likely improve permanently with additional therapy and exercise. There was no testimony, however, from any physician or medical expert regarding the nature and extent of treatment that would be reasonably and necessarily incurred by Karthausser in the future to help her condition, nor was there any medical or expert testimony regarding restrictions or limitations placed on Karthausser, permanent impairment, disability, or the like, caused by the motor vehicle accident. Indeed, there was no testimony based on reasonable medical probability that Karthausser's alleged then-current condition at the time of trial was caused by the motor vehicle accident. Accordingly, there was no substantial evidence or reasonable inference from the evidence to sustain a verdict awarding future medical expenses and/or diminished earning capacity. Instead, the jury engaged in pure speculation. Allowing the jury to do so was an error in law by the trial court, and should be reversed.

## **V. CONCLUSION**

For the reasons set forth above, Judge Sullivan should have

presided over the post-trial motions. Additionally, the trial court should have granted Adams' motion for a new trial, or alternatively, remittitur, because the verdict was not supported by substantial evidence, was the result of passion and/or prejudice and pure speculation by the jury, and substantial justice was not done. Finally, the claims for future medical expenses and diminished earning capacity should not have gone to the jury, but rather, the trial court should have granted Adams' motion for a directed verdict/judgment as a matter of law with regard to those claims.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2013.

  
CHERYL R.G. ADAMSON, WSBA #19799  
Attorneys for Defendant/Appellant  
MacKenzie Adams

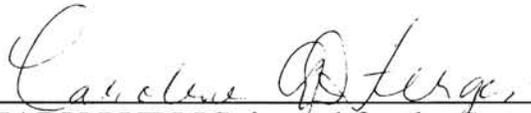


Brief of Appellant upon Duane Crandall, attorney for plaintiffs/respondents, at CRANDALL, O'NEILL, IMBODEN & STYVE, P.S., P. O. Box 336, Longview, Washington 98632, by depositing same with the United States Postal Service, in properly addressed, postage prepaid package.



REBEKAH E. HARRIS

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of September, 2013.



NOTARY PUBLIC, in and for the State of Washington, residing at: Bozco, WA  
My Commission Expires: 05/01/2017

