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COURT OF APPEALS
DIVISION III
SEATTLE, WASHINGTON
By _____

No. 324621-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

RANDY L. BECHARD,

Plaintiff/Respondent,

v.

JOYCE DALRYMPLE,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The issues presented in this appeal are really quite simple. The law imposes a strong presumption in favor of the sanctity of jury verdicts. This Court's ruling in Lopez v. Salgado-Guadarama, 130 Wn. App. 87, 122 P.3d 733, review denied 157 Wn.2d 1011 (2005) controls and establishes that jury verdicts awarding special damages but no general damages will not be overturned where, as here, the claimed damages are contested. The trial court erred in substituting its own will for the verdict of the jury where there was sufficient evidence to support the verdict. The Palmer and Fahndrich cases are distinguishable and are not controlling. The decision of the trial court should be reversed and the verdict reinstated.

II. REPLY ARGUMENTS

A. THE COURT SHOULD REINSTATE THE VERDICT OF THE JURY AWARDING NO GENERAL DAMAGES BECAUSE SUFFICIENT EVIDENCE EXISTS TO SUPPORT IT

1. There Is A Strong Presumption in Favor of the Jury's Verdict

Plaintiff misconstrues and therefore misapplies the law in his response. First and foremost, Plaintiff fails (and the trial court failed) to recognize a critical and fundamental concept. There is a “strong presumption” that a jury’s determination of the amount of damages is valid. Bunch v. King Cnty. Dep’t of Youth Servs., 155 Wn.2d 165, 173, 116 P.3d 381 (2005).

Regardless of the trial court’s assessment of a plaintiff’s damages, after a fair trial it may not substitute its own conclusions for those of the jury with regard to the amount of damages. See Tolli v. School Dist. No. 267 of Whitman County, 66 Wn.2d 494, 495, 403 P.2d 356 (1965). The jury must remain the final arbiter of the value and effect of the evidence, including determining the credibility of the witnesses, the weight of their

testimony, and the ultimate consequence of the evidence. Scanlan v. Smith, 66 Wn.2d 601, 603, 404 P.2d 776 (1965).

Thus, on review, this Court must begin its analysis with the presumption that the jury's verdict was correct. Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156 (2007). A new trial must be denied if the verdict is within the range of credible evidence. See Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989). If there is any justifiable evidence upon which reasonable minds could reach conclusions to sustain the verdict, then the jury's verdict must stand. Lockwood v. A C & S, Inc., 109 Wn.2d 235, 243, 744 P.2d 605 (1987).

Plaintiff asks the Court to ignore this well-recognized presumption and allow the trial court to set aside the verdict of a jury after a fair trial simply because the decision to award \$0 in general damages did not sit well with the trial court judge. (See 3/21/14 RP 14-15).

2. Lopez Is the Controlling Case and Mandates Reversal of the Trial Court's Order

The jury's verdict was not contrary to the evidence. If the evidence at trial calls into question the cause, degree, or credibility of alleged pain and suffering, a verdict awarding medical expenses without general damages may be within the range of evidence. This is the holding in Lopez, which is directly on point and controls the legal issues here.

Plaintiff's attempts to distinguish Lopez fail. The severity of the impact is not relevant. (Br. of Respondent at 23). No one disputes that Plaintiff presented evidence of an injury to the jury. That is not dispositive. The critical fact is that the defense challenged the nature and extent of the injuries throughout the trial, like the defendant in Lopez and unlike the defendants in Palmer and Fahndrich.

Likewise, Plaintiff's suggestion that his credibility was not an issue below is incorrect. (Br. of Respondent at 23). Plaintiff's credibility was at issue. Plaintiff admitted he remained able to

continue his physically demanding profession after the accident and missed no work because of the accident. (RP 71). He acknowledged he continued his physically demanding activities, including hunting, restoring old cars, and camping, after the accident and had given up no activities. (RP 66-71). His family stated he has continued to cut, bale, and sell hay, as well as work on constructing a bowling alley. (RP 106-109, RP 217-218).¹

This testimony allowed the jury to reasonably conclude that his ongoing pain complaints were overstated or untrue. This Court should defer the credibility of witnesses to the jury. Kadmiri v. Claassen, 103 Wn. App. 146, 151, 10 P.3d 1076 (2000) (“In denying the motion for a new trial, the court pointed out that the jury likely had concerns about Mr. Kadmiri’s credibility. Because Mr. Kadmiri’s injuries and treatment were contested, the evidence supported the jury’s award.”).

¹ Contrary to Plaintiff’s response, Dr. Blue did opine as to Plaintiff’s ability to engage in his job and activities, finding no indication for any restrictions. (RP 290-291).

Contrary to Plaintiff's argument, the facts here are strikingly similar to those in Lopez, in which evidence at trial from Dr. Sears called into question the cause, degree, or credibility of alleged pain and suffering.

Unlike Palmer, in which "[t]he defendant presented no evidence to refute [plaintiff's] medical opinions," Ms. Dalrymple presented expert medical opinions contradicting the claimed damages. As in Lopez, Dr. Blue testified that no objective medical findings supported Plaintiff's extensive complaints of pain. (RP 284-285). He opined that Plaintiff should have recovered from any injuries quickly after the accident. (RP 283, 289-290). He was adamant there is no relationship between the pain Plaintiff reported and the accident. (RP 283, 284-285). His testimony is almost identical to that of Dr. Sears in Lopez. As in Lopez, the jury was entitled to agree with Dr. Blue and find that Plaintiff's testimony was not credible.

Another case that supports the conclusion in Lopez is Herriman v. May, 142 Wn. App. 226, 174 P.3d 156 (2007). In

Herriman, this Court concluded that the trial court erred in overturning the jury's verdict and ordering a new trial where, as in Lopez and here, the defense contested the nature and extent of the claimed injuries.

Herriman involved a motor vehicle accident. The plaintiff sued the defendant after a collision. Unlike here, the plaintiff was immediately taken to the emergency room and treated for bruises. Id. at 228-229. As in this case, the defendant admitted liability and the matter was tried on damages alone. Id. at 229.

At trial, the plaintiff presented testimony that the accident changed her life for the worse: "She claimed her life changed dramatically after the accident: she experienced chronic pain, suffered vision and balance loss, was no longer able to engage in family activities, had to limit her chores, and was unable to return to work." Id. As in this case, her family testified that the accident negatively impacted her life. Id. Her physician expert testified that the accident was the cause of physical and emotional problems. Id.

And, as in this case, the defense presented contrary expert opinion and evidence. The defense's orthopedic surgeon expert independently evaluated Ms. Herriman and testified that her claimed pain was exaggerated and that she did not have an objective basis for her complaints or need future medical care. Id. at 230, 233. He also stated that "the muscular impact of the collision could have lasted three weeks at most." Id. at 230. Those opinions are similar to the opinions provided by Dr. Blue.

The trial court in Herriman granted an additur, ruling that the evidence did not support the claim that the plaintiff's pain was nonexistent or exaggerated. Id. at 231. This Court reversed, noting that the jury was entitled to agree with the defense expert and to reject the plaintiff's testimony as not credible. Id. at 233. This Court held that the record contained sufficient evidence to support the jury's award. Id. at 233-34.

Lopez and Herriman are dispositive and controlling here.² Since Plaintiff's alleged pain and suffering were disputed, there was sufficient evidence to support the jury's verdict awarding no general damages. Like the plaintiff in Lopez, Plaintiff suffered minimal injuries and is not entitled to general damages. Based on Plaintiff's own testimony, his family's testimony, and Dr. Blue's testimony, the jury was entitled to conclude that Plaintiff failed to carry his burden of proving general damages. In striking down the verdict, the trial court inappropriately interfered with the decision of the jury and substituted its own will.³

²Plaintiff also seems to impliedly argue as follows: (1) the special damages awarded here are greater than in Lopez; (2) therefore Lopez does not apply. The law does not support that argument. Moreover, it fails as a matter of policy because it asks the Court to create an arbitrary number over which verdicts are proper and under which they must be vacated. ³ Ide v. Stoltenow, 47 Wn.2d 847, 289 P.2d 1007 (1955) does not support Plaintiff's position. In Ide the Supreme Court addressed the use of conjecture to decipher an ambiguous verdict, a situation not present here. Id. at 848-49. More fundamentally, Ide dealt with undisputed damages, unlike here. The Supreme Court held that the trial court is "entitled to accept as established those items of damage that are conceded, undisputed, and beyond legitimate controversy." Id. 851. In Ide the defense expert was unable to deny that the injuries were related to the motor vehicle accident. Id. at 850. Conversely, here damages were disputed.

3. **Palmer and Fahndrich Are Inapposite and Not Controlling Here**

Plaintiff relies almost exclusively on Palmer v. Jensen, 132 Wn.2d 193, 937 P.2d 597 (1997). Plaintiff argues that the fact that he presented medical exhibits and evidence substantiating that he suffered pain means that the jury's verdict was improper. (Br. of Respondent at 16-20). This is simply a thinly disguised version of the argument that Plaintiff is entitled to general damages simply because he was injured and claims he experienced pain and suffering.

The defense has already pointed out the fallacy of that argument. There is no per se rule that general damages must be awarded to every plaintiff who sustains an injury. Palmer, 132 Wn.2d at 201. In fact, a "jury may award special damages and no general damages when 'the record would support a verdict omitting general damages.'" Gestson v. Scott, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (quoting Palmer, 132 Wn.2d at 202).

Thus, the fact that Plaintiff presented evidence and exhibits at trial showing that he was injured in the accident is not dispositive or even particularly relevant to the Court's inquiry. Again, no one disputes that Plaintiff presented evidence he was injured. But that is not the legal issue. What matters is that the countervailing evidence was presented challenging the claimed pain and suffering. The jury was entitled to—and did—believe that evidence.

Plaintiff's continued reliance on Palmer is misguided. Palmer does not assist Plaintiff. The critical fact in Palmer, as Plaintiff acknowledges, is that the defense did not challenge the damages or causation in any way, and only argued in closing that the plaintiff failed to prove he was injured. Palmer, 132 Wn.2d at 196; (Br. of Respondent at 15). The Supreme Court found that, in the absence of contradicting testimony, the uncontroverted evidence demonstrated that the plaintiff experienced pain and suffering related to the accident, and the jury's failure to provide general damages was contrary to the evidence. Id. at 203. Under

these limited circumstances, the Supreme Court determined that a new trial was appropriate. Id.

Conversely, unlike Palmer, and as in Lopez and Herriman, Ms. Dalrymple presented evidence and testimony from Dr. Blue challenging the nature and extent of Plaintiff's complaints of pain and injuries. In addition, Plaintiff's own testimony established that his damages were minimal. Thus Palmer is easily distinguishable.

Plaintiff's reliance on Fahndrich v. Williams, 147 Wn. App. 302, 194 P.3d 1005 (2008) is also misplaced. As with Palmer, Fahndrich is not controlling here because, unlike here, the defense presented no expert medical evidence to contradict the plaintiff's claims. Id. at 308. It clearly is inapposite.

**B. THE TRIAL COURT ERRED IN DIRECTING A
NEW TRIAL SOLELY ON THE ISSUE OF
GENERAL DAMAGES**

The only outcome supported by the law and evidence is reversal and reinstatement of the verdict. However, if the Court declines that relief, it should award a new trial on all damages.

Plaintiff admits there are no Washington cases supporting his position and the trial court's order. (Br. of Respondent at 32). On the other hand, several cases, including the Palmer case Plaintiff relies on in this appeal, show that the trial court erred.⁴ That alone should be sufficient basis for reversal.

Plaintiff completely misreads Palmer and Fahndrich. His interpretation of those cases asks the Court to ignore their unambiguous rulings. Both cases awarded new trials on all damages. The Supreme Court in Palmer stated: "We remand for a new trial on the issue of Pamela Palmer's damages only." Palmer, 132 Wn.2d at 203. The Court of Appeals in Fahndrich held: "We reverse and remand for a new trial on damages." Fahndrich, 147 Wn. App. at 309.

⁴ Plaintiff cites a case from Oregon. (Br. of Respondent at 32). Oregon law is not binding precedent, and it is not even relevant here, where Washington authority indicates that special and general damages should be retried together. Plaintiff also argues that Bullock v. Philip Morris USA, Inc., 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775 (2008) supports separation of damages. Plaintiff misreads that case. Bullock stands for the general proposition that any doubts as to whether a new trial limited to damages is appropriate should be resolved in favor of a complete new trial. It does not even address the issues of general and special damages. Instead, it addressed punitive damages, which are not even recoverable in Washington.

Plaintiff's interpretation reads ambiguity into those unambiguous statements. However, the language from the two cases could not be clearer. Words must be given their common and ordinary meaning. HomeStreet, Inc. v. State, Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The decisions granted new trials on "damages" only, as distinct from new trials on damages and liability. The word "damages" is a legal term of art: it does not mean "general damages" or "special damages." It is inclusive and means both types of damages as well as punitive damages. See Black's Law Dictionary 351-352 (5th ed. 1979). The courts in Palmer and Fahndrich did not limit the new trials to general damages only. That argument is contrary to their plain language.

Most of Plaintiff's response relies on collateral estoppel. That doctrine has no application in this case. Collateral estoppel operates only as to issues that were actually litigated and determined in a prior lawsuit. State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300 (2002). Indeed,

Mr. Tegland acknowledges in the portion of *Washington Practice* cited by Plaintiff that the doctrine only refers to re-litigating an issue in a subsequent case “involving different claims and defenses but the same parties.” (Br. of Respondent at 28).

Collateral estoppel does not apply here because this case does not involve an attempt to raise an issue that was decided in a prior lawsuit involving different claims and defenses. The issue is whether, in the same case with the same parties, claims, and defenses, a new trial should include general and special damages. Defendant is unaware of any law applying collateral estoppel under similar circumstances, and Plaintiff cites none.

Plaintiff also argues special and general damages are separable and distinct because the verdict form listed them separately. That missed the point. If a jury is to consider whether Plaintiff is entitled to general damages for his alleged injuries, Ms. Dalrymple must be allowed to introduce evidence and challenge the nature and extent of those alleged injuries. That

requires the issue of special damages to be addressed. It is not possible for the jury to properly assess general damages without hearing evidence of medical expenses.

Plaintiff argues the jury considered and evaluated all the evidence and testimony and got special damages right. In the same breath, he argues the jury considered and evaluated all the evidence and testimony but got general damages wrong. This argument is logically self-contradictory. Logically it makes little sense to argue that the jury was correct as to special damages, but was prejudiced as to general damages. If the jury was prejudiced, every decision it made is suspect. Defendant submits it makes no sense to say that the jury's verdict was partly reasonable yet at the same time partly unreasonable. It is either one or the other, as evidenced in the Palmer and Fahndrich cases, where new trials were awarded on all damages.⁵

⁵ The argument for judicial economy also fails. There is no reason to believe that trying both special and general damages at the same time will waste more resources than trying just one.

III. CONCLUSION

The trial court made a fundamental error when it ignored the strong presumption in favor of jury verdicts, and substituted its own will for the will of the jury despite sufficient evidence to support the jury's verdict. Binding precedent from this Court in Lopez mandates reversal of the trial court's decision and reinstatement of the verdict. If the Court grants this relief, the other issue on appeal is moot.

The trial court also erred in ordering a new trial solely on the issue of general damages despite the absence of any legal support for its ruling. Washington law has not segregated special and general damages for the purposes on ordering a new trial. The trial court's order was reversible error. In the event the Court decides not to reverse the trial court's granting of the new trial, the Court should reverse the trial court's decision to limit the new trial to general damages, and award a new trial on all damage issues.

Respectfully submitted this 26th day of November, 2014.

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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned sent to the attorneys of record a copy of this document addressed to the following:

For Plaintiff: Russell J. Mazzola, Esq. Mazzola Law Offices 314 N. Second Street Yakima WA 98901	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input type="checkbox"/> via e-mail <input type="checkbox"/> via hand delivery
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Executed this 20th day of November, 2014, at

Yakima, Washington.



DEANNA M. BOSS