

W 8346-2

W 8346-2

COURT OF APPEALS
DIVISION I
JUL 11 2019

Court of Appeals No. 68346-2-I

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

Benjamin Gonzalez-Mendoza; Pedro Gonzalez-Mendoza;
and Efrain Tapia-Cruz,

Appellants,

v.

Annsianne S. Burdick and Does 1-10,

Respondents.

APPELLANTS' REPLY BRIEF

Diana F. Chamberlain, WSBA #38216
Attorney for Plaintiffs-Appellants

and

Elena E. Tsiprin, WSBA #30164
LAW OFFICES OF ELENA E. TSIPRIN
14670 NE 8th Street, Suite 210
Bellevue, Washington 98007
Telephone: (425) 614-4744
Facsimile: (425) 614-4745

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. ARGUMENT 1

A. CONTRARY TO DEFENDANT’S ASSERTION,
MA’ELE IS NOT CARTE BLANCH APPROVAL
OF PROBST’S TESTIMONY 1

1. *Ma’ele* Does Not Support Defendant’s
Assertion that Probst’s Methodologies
are Generally Accepted 1

2. *Ma’ele* Does Not Support Defendant’s
Assertion that Probst is Qualified under ER 702 ... 3

3. *Ma’ele* Does Not Support Defendant’s
Assertion that Probst’s Opinions are
Relevant 4

4. Defendant’s Brief Does Not Challenge
Challenge Plaintiffs’ Arguments that
Probst’s Testimony is Prejudicial 5

B. JUDGMENT AS A MATTER OF LAW SHOULD
HAVE BEEN MADE ON THE AMOUNT OF
PLAINTIFFS’ MEDICAL SPECIALS 5

C. A NEW TRIAL ON DAMAGES SHOULD
HAVE BEEN GRANTED 7

1. In Defendant’s cited cases finding
Verdict within Range of Evidence,
Expert Medical Testimony Disputed
Damages 7

2. In Defendant’s cited cases finding
Verdict within Range of Evidence,
No Clear Cause of Injury 9

3.	The Evidence Established that the Jury's Inadequate Verdict is the Result of Passion or Prejudice, is Contrary to Law, and Substantial Justice has not been done	10
II.	CONCLUSION	13

TABLE OF AUTHORITIES

Washington Cases

<i>Bliss v. Coleman</i> , 11 Wn. App. 226, 522 P.2d 509 (1974)	9-10
<i>Cleva v. Jackson</i> , 74 Wn.2d 462, 445 P.2d 322 (1968)	8, 12
<i>Cox v. Charles Wright Academy, Inc.</i> , 70 Wn.2d 173, 422 P.2d 515 (1967)	9
<i>Geston v. Scott</i> , 116 Wn. App. 616, 67 P.3d 496 (2003)	9
<i>Herriman v. May</i> , 142 Wn. App. 226, 174 P.3d 156 (2007)	8
<i>Hills v. King</i> , 66 Wn.2d 738, 404 P.2d 997 (1965)	11-12
<i>Ide v. Stoltenow</i> , 47 Wn.2d 847, 289 P.2d 1007 (1955)	7, 12
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn. App. 632, 865 P.2d 527 (1994)	12
<i>Lopez v. Salgado-Guadarama</i> , 130 Wn. App. 87, 122 P.3d 733 (2005)	8
<i>Ma'ele v. Arrington</i> , 111 Wn. App. 557, 45 P.3d 557 (2002)	1-2, 3, 4
<i>Miller v. Stanton</i> , 58 Wn.2d 879, 365 P.2d 333 (1961)	4, 6, 11
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997)	8, 12

<i>Patterson v. Horton</i> , 84 Wn. App. 531, 929 P.2d 1125 (1997)	6
<i>Richards v. Sicks' Rainier Moving Co.</i> , 64 Wn.2d 357, 391 P.2d 960 (1964)	9
<i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989)	8
<i>Singleton v. Jimmerson</i> , 12 Wn. App. 203, 529 P.2d 17 (1974)	9

Other Cases

<i>Clemente v. Blumenberg</i> , 705 N.Y.S.2d 792 (1999)	2
<i>Schultz v. Wells</i> , 13 P.3d 846 (Col. App. 2000)	2
<i>Tittsworth v. Robinson</i> , 252 Va. 151, 475 S.E.2d 261 (1996)	2
<i>Whitting v. Coultrip</i> , 324 Ill.App.3d 161, 755 N.E.2d 494 (2001)	2

Rules

CR 50(a)(1)	6-7
CR 59(a)(5)	11
CR 59(a)(7)	11, 12
CR 59(a)(9)	11, 12
ER 403	5
ER 702	3-4

I. ARGUMENT

Plaintiffs-Appellants Benjamin Gonzalez-Mendoza, Pedro Gonzalez-Mendoza, and Efrain Tapia-Cruz (“Plaintiffs”) respectfully reply to Defendant Annsianne S. Burdick’s (“Defendant”) brief.

A. CONTRARY TO DEFENDANT’S ASSERTION, *MA’ELE* IS NOT CARTE BLANCHE APPROVAL OF PROBST’S TESTIMONY

Defendant’s brief arguing in favor of the trial court permitting Probst’s testimony at trial boils down to reliance on one case, *Ma’ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). With all due respect to Division Two, *Ma’ele* stands only for the fact-specific that for that case and that expert, it was not error for that trial court to permit Dr. Tencer to testify. Contrary to Defendant’s assertions, *Ma’ele* does not provide carte blanche approval of Probst’s testimony.

1. *Ma’ele* Does Not Support Defendant’s Assertion that Probst’s Methodologies are Generally Accepted.

Instead of actually conducting a *Frye* review, the *Ma’ele* court unpersuasively affirmed that “Dr. Tencer’s work on low-speed collisions is generally accepted in the scientific community.” *Id.* at 563. In fact, Division Two merely accepted Dr. Tencer’s carte blanche statement that his conclusions have been “pretty much” accepted. Further, instead of actually conducting a *Frye* review, Division Two merely reviewed Dr.

Tencer's resume and qualifications. The *Ma'ele* decision simply does not provide carte blanche approval for Mr. Probst's methodologies.

Rather, cases from other jurisdictions that actually conducted a *Frye* review strongly support Plaintiffs' argument that Mr. Probst's methodologies – delta V and injury threshold – are not generally accepted in the relevant scientific community. See Plaintiffs' Brief ("Pl. Br.") at 13-17, citing *Whitting v. Coultrip*, 324 Ill.App.3d 161, 755 N.E.2d 494 (2001); *Schultz v. Wells*, 13 P.3d 846 (Col. App. 2000); *Clemente v. Blumenberg*, 705 N.Y.S.2d 792 (1999); *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996).

In her brief, Defendant's sole basis for her assertion that Mr. Probst's methodologies are generally accepted is that, in his report, "he cites many peer reviewed studies for support of his methodologies." Defendant's Brief ("Def. Br.") at 10. Yet, the cases cited in Plaintiffs' opening brief and the critiques Plaintiffs provided to the trial court specifically discredit the use of these studies as Mr. Probst does. Pl. Br. at 13-14, 15-17.

On de novo review, the evidence in the record and the case law establish that neither Mr. Probst's delta v theory or Mr. Probst's injury threshold theory are generally accepted in the relevant scientific

community. The trial court erred in denying Plaintiffs' motion to exclude Probst's testimony at trial.

2. **Ma'ele Does Not Support Defendant's Assertion that Probst is Qualified under ER 702.**

The *Ma'ele* court affirmed that Dr. Tencer was qualified. 111 Wn. App. at 563. Contrary to Defendant's assertion, *Ma'ele* does not provide blanket support for the trial court's finding that since Dr. Tencer was qualified, then Mr. Probst must be as well.

In her brief, Defendant's sole basis for her assertion that Mr. Probst is qualified is a review of his resume. Def. Br. at 8-9; CP 78. Yet, Mr. Probst's resume establishes that he is no Dr. Tencer. Dr. Tencer completed his Ph.D. program. Mr. Probst did not. Dr. Tencer teaches at the University of Washington Medical School. Mr. Probst is not and never has been a professor. Dr. Tencer actually studied low-speed impacts. Mr. Probst studied Naval pilot ejections.

Nothing in Mr. Probst's resume supports the trial court's finding that he is qualified under ER 702. Further, nothing in his resume comes close to what Division Two relied on in reviewing Dr. Tencer's background to affirm the *Ma'ele* trial court's finding that Dr. Tencer was qualified in that case. *Id.*

The trial court abused its discretion in finding Mr. Probst was qualified under ER 702.

3. **Ma'ele Does Not Support Defendant's Assertion that Probst's Opinions are Relevant.**

The *Ma'ele* court stated that it was not error to permit Dr. Tencer to testify about the nature of forces involved in low-speed collisions and the likelihood of injury from such forces. 111 Wn. App. at 564. Again, *Ma'ele* does not provide blanket support for Mr. Probst's testimony.

Dr. Tencer testified that he would not expect a person to be injured in the collision involved in that case. He does not go further and say it is statistically impossible. Yet, that is exactly what Mr. Probst does. Mr. Probst's ultimate opinion is that the force exerted on Plaintiffs' vehicle was insufficient to have produced an injury mechanism. CP 29. Translation: it is statistically impossible for Plaintiffs to have been injured in the September 25, 2007, collision. Mr. Probst is saying Plaintiffs could not have been injured in this collision. This is a medical opinion. Only a medical doctor is permitted and qualified to testify as to injury causation. *Miller v. Stanton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (expert testimony from a medical professional is required to establish the existence of an injury and proximate cause). The trial court abused its discretion in permitting Mr. Probst to testify at trial.

4. **Defendant's Brief Does Not Challenge Plaintiffs' Arguments that Probst's Testimony is Prejudicial.**

Plaintiffs argued that Mr. Probst's "injury mechanism" and "injury threshold" testimony is irrelevant and inadmissible. Pl. Br. at 18. Plaintiffs also argued that even if marginally relevant, the danger of unfair prejudice, confusion of the issues, and misleading of the jury far outweighs any marginal relevance. Pl. Br. at 19. As Tegland explains, ER 403 gives the court discretion to exclude evidence that is likely to be overvalued by the jury:

The dangers of confusion and overvaluation have often led courts to exclude many other kinds of evidence, including evidence that may be unduly impressive because it sounds too official or too scientific.

Tegland at § 403.4 (emphasis added).

Nowhere in Defendant's brief does she address this argument. The prejudicial effect of Mr. Probst's testimony far outweighs any marginal relevance. ER 403. The trial court abused its discretion by allowing his irrelevant and prejudicial testimony at trial.

B. JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN MADE ON THE AMOUNT OF PLAINTIFFS' MEDICAL SPECIALS

Defendant argues that the undisputed amount of Plaintiffs' respective medical specials was properly left to the jury because a jury decides proximate cause and damages. Def. Br. at 13-15. On the

contrary, when facts are undisputed with respect to an issue, even proximate cause or damages, there is nothing for the jury to decide and the court may grant judgment as a matter of law. CR 50(a)(1).

In her answer to Plaintiffs' complaint, Defendant disputed the extent of Plaintiffs' respective damages. CP 5-8. The reasonableness and necessity of medical treatment, or lack thereof, can only be established by expert medical testimony. *See, e.g., Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997); *see also Miller v. Stanton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (expert testimony from a medical professional is required to establish the existence of an injury, proximate cause, and the necessity and reasonableness of treatment). Once Plaintiffs presented expert medical testimony that their medical bills and treatment were reasonable and necessary, the burden shifted to Defendant to produce competent medical testimony to dispute such evidence and create an issue for the jury to decide. Defendant presented absolutely no expert medical testimony regarding the reasonableness and necessity of Plaintiffs' respective medical care.

Defendant suggests that even when a fact is undisputed, because such fact was established through expert testimony, it is for the jury to determine what weight should be given to such testimony. Def. Br. at 14. If true, granting judgment as a matter of law, or summary judgment for

that matter, would always be error because even if there are no contrary facts, a jury could disbelieve the expert. Our Supreme Court specifically rejected this theory. *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955).

Based on the undisputed medical testimony of Dr. Romero, “there is no legally sufficient evidentiary basis” for a jury to not award the full medical specials to each Plaintiff. CR 50(a)(1). Judgment as a matter of law as to the amount of each Plaintiff’s medical specials should have been granted.

C. A NEW TRIAL ON DAMAGES SHOULD HAVE BEEN GRANTED

Defendant argues that the jury’s verdict was within the range of the evidence; therefore, she argues it was not contrary to law and was not the result of passion or prejudice. Def. Br. at 17-23. Acknowledging that the answer to this issue turns on the evidence, Defendant nonetheless relies on cases that are clearly distinguishable from Plaintiffs’ case.

1. In Defendant’s cited cases finding Verdict within Range of Evidence, Expert Medical Testimony Disputed Damages.

There is no dispute that Defendant failed to present expert medical testimony at trial to dispute the cause, nature, and extent of Plaintiffs’ injuries. Yet, in arguing that the jury’s verdict was within the range of the

evidence, Defendant relies on several cases where the reason those verdicts were within the range of the evidence was precisely because those defendants presented expert medical testimony disputing those plaintiffs' claims.

In *Robinson v. Safeway Stores, Inc.*, defendant presented expert medical testimony that plaintiff's injuries were not all related to the incident. 113 Wn.2d 154, 776 P.2d 676 (1989). In *Herriman v. May*, defendant presented expert medical testimony that plaintiff's injuries were exaggerated. 142 Wn. App. 226, 174 P.3d 156 (2007). In *Lopez v. Salgado-Guadarama*, defendant presented the testimony of an orthopedist who opined that Mr. Lopez sustained a shoulder contusion, a minor injury. 130 Wn. App. 87, 122 P.3d 733 (2005). On review, these verdicts were held to be within the range of the evidence.

In this case, Defendant failed to produce expert medical testimony to dispute any or all of Dr. Romero's expert opinions on causation, reasonableness of medical bills, necessity of medical care, and Plaintiffs' respective pain and suffering. Unlike the cases Defendant relies upon, Plaintiffs' case more closely aligns with *Palmer v. Jenson*, 132 Wn.2d 193, 937 P.2d 597 (1997), and *Cleva v. Jackson*, 74 Wn.2d 462, 445 P.2d 322 (1968), where uncontradicted medical evidence substantiated those plaintiffs' medical specials and pain and suffering, and the Supreme Court

held that those inadequate jury verdicts were not within the range of the evidence. *See* Pl. Br. at 33-36.

2. **In Defendant's cited cases finding Verdict within Range of Evidence, No Clear Cause of Injury.**

The remainder of the cases relied upon by Defendant are distinguishable because those cases, unlike Plaintiffs', involved muddled injury causation issues.

In *Cox v. Charles Wright Academy, Inc.*, plaintiff had been involved in four motor vehicle collisions in four years, thus making it difficult to determine if plaintiff's complaints were caused by the collision. 70 Wn.2d 173, 422 P.2d 515 (1967). In *Richards v. Sicks' Rainier Moving Co.*, plaintiff's own medical expert testified that the hernia could possibly have been caused by something other than the car collision. 64 Wn.2d 357, 391 P.2d 960 (1964). In *Geston v. Scott*, plaintiff had chronic low back pain and prior similar injuries, permitting that jury to find only an emergency visit reasonable and necessary. 116 Wn. App. 616, 67 P.3d 496 (2003). In *Singleton v. Jimmerson*, plaintiff had a prior low back injury that she failed to disclose to two treating physicians, permitting that jury to find her medical experts' opinions unreliable. 12 Wn. App. 203, 529 P.2d 17 (1974). In *Bliss v. Coleman*, Mrs. Bliss sought medical care eight days after a motor vehicle collision, but no medical

testimony connected her injury to the collision, permitting that jury to not award her any compensation. 11 Wn. App. 226, 522 P.2d 509 (1974). On review, these verdicts were held to be within the range of evidence.

In this case, there is a clear cause of Plaintiffs' injuries. The only expert medical testimony at trial established that the September 25, 2007, motor vehicle collision caused Plaintiffs' respective injuries. RP III 17:25-18:3, 19:23-20:6, 23:7-10, 26:3-9, 28:11-15, 29:20-30:3, 31:9-14. Plaintiffs did not have prior similar injuries. RP II 16:25, 17:1-4; 42:18-19; 57:25, 58:1-2. This was Plaintiffs' first motor vehicle collision. Ex. 1, 3, 5. Defendant's cited cases do not support her argument that the jury's verdict was within the range of evidence. Rather, they confirm that the jury's verdict was clearly inadequate based on the evidence in the record.

3. **The Evidence Established that the Jury's Inadequate Verdict is the Result of Passion or Prejudice, is Contrary to Law, and Substantial Justice has not been done.**

Defendant suggests that because Plaintiffs delayed seeking medical care for their collision-caused injuries and because their treating chiropractic doctor had a referral relationship with Plaintiffs' attorney, the jury's verdict was within the range of evidence and thus not the result of passion or prejudice or contrary to law. Def. Br. at 21-22. While these two facts may certainly be taken into consideration, the evidence in the

record as a whole evidences how inadequate the jury's verdict is. CR 59(a)(7).

First, the undisputed evidence in the record established that Plaintiffs' medical specials, both chiropractic care and massage therapy, were reasonable and necessary to treat their collision-caused injuries. Expert testimony from a medical professional is required to establish the existence of an injury, causation, and the necessity and reasonableness of treatment. *Miller v. Stanton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961). Dr. Romero testified on a medically more probable than not basis, the legal standard for this element of Plaintiffs' claims, that Plaintiffs' approximately 3.5 months of chiropractic care and massage therapy were reasonable and necessary to treat their collision-caused injuries. RP III 17:25-18:3, 19:23-20:6, 23:7-10, 26:3-9, 28:11-15, 29:20-30:3, 31:9-14. This was the only medical evidence at trial.

The jury's inadequate award on medical specials is not supported by the evidence in the record and is contrary to law. CR 59(a)(7). Plaintiffs' injuries and their cause are clear. The reasonableness and necessity of their medical specials are undisputed. The jury's failure to award the full amount of Plaintiffs' chiropractic care, while awarding the full amount of their massage therapy bills, evidences its prejudice. CR 59(a)(5). Substantial justice has not been done. CR 59(a)(9). *Hills v.*

King, 66 Wn.2d 738, 742, 404 P.2d 997 (1965); *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 637, 865 P.2d 527 (1994).

Second, the evidence in the record substantiates Plaintiffs' respective claims for pain and suffering. Dr. Romero's testimony and the chart notes substantiate that Plaintiffs experienced pain and stiffness; that their pain was frequent, burning, and aching; that their pain interfered with work, daily activities, and sleep; that their pain worsened with sitting, standing, walking, bending, lying down, and twisting; and that on physical examination, Plaintiffs were tender, had myospasms and subluxations, and had reduced range of motion. RP III 12:22-13:11, 20:12-21, 26:18-27:1; Ex. 1-6. This medical evidence substantiates each Plaintiff's claim and own testimony that he experienced pain and suffering.

The jury's failure to award noneconomic damages is not supported by the evidence in the record and is contrary to law. CR 59(a)(7). Substantial justice has not been done. CR 59(a)(9). *Palmer v. Jenson*, 132 Wn.2d 193, 203, 937 P.2d 597 (1997); *Cleva v. Jackson*, 74 Wn.2d 462, 465, 445 P.2d 322 (1968).

The trial court abused its discretion by failing to grant a new trial on damages.

II. CONCLUSION

The trial court erred in failing to exclude the testimony of Bradley W. Probst at trial. The trial court erred in failing to grant judgment as a matter of law on the limited issue of the amount of Plaintiffs' respective medical bills. The trial court erred in failing to order a new trial on damages. These errors, individually and cumulatively, have greatly prejudiced Plaintiffs. Judgment on the jury's verdicts should not have been entered, and Plaintiffs respectfully request that the Court grant their appeal and remand their case for a new trial on damages.

DATED this 11th day of October, 2012.

Respectfully submitted,

LAW OFFICES OF ELENA E. TSIPRIN



Diana F. Chamberlain, WSBA #38216
Elena E. Tsiprin, WSBA #30164
Attorneys for Appellants-Plaintiffs

DECLARATION OF SERVICE

I certify that on October 11, 2012, I caused to be filed with the Court of Appeals of the State of Washington, Division One, the foregoing Appellants' Opening Brief, and caused to be delivered, via U.S. Mail, a true and correct copy to:

Jason J. Hoelt
Law Offices of Kelley J. Sweeney
1191 Second Avenue, Suite 500
Seattle, Washington 98101
Attorney for Respondent-Defendant

I declare under penalty of perjury under the law of the State of Washington that the foregoing is true and correct.

Executed in Bellevue, Washington, this 11th day of October, 2012.


Diana F. Chamberlain, WSBA #38216