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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' OPENING BRIEF

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COURT OF APPEALS
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I. INTRODUCTION

For nearly five years, Plaintiffs-Appellants Benjamin Gonzalez-Mendoza, Pedro Gonzalez-Mendoza, and Efrain Tapia-Cruz (“Plaintiffs”) have been trying to obtain the reasonable compensation they deserve for damages caused by Defendant Annsianne S. Burdick (“Defendant”) when she negligently rear-ended Plaintiffs’ van. After a jury trial on the issues of causation and amount of damages, the jury found for Plaintiffs. However, leading up to, during, and after trial, the trial court committed several errors that, individually and cumulatively, have prevented Plaintiffs from receiving reasonable compensation for the injuries they sustained.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to exclude the testimony of Bradley W. Probst at trial. (November 1, 2011, Order Denying Plaintiffs’ Motion to Exclude Testimony of Bradley W. Probst; December 2, 2011, Order Denying Plaintiffs’ Motion to Reconsider Denial of Motion to Exclude Bradley W. Probst and Granting Plaintiffs’ Motion to Amend Decision).

2. The trial court erred by failing to grant Plaintiffs’ motion for judgment as a matter of law as to the amount of each Plaintiff’s medical specials. (December 14, 2011, oral decision).

3. The trial court erred by failing to grant Plaintiffs a new trial on the issue of damages. (January 24, 2012, Order Denying Plaintiffs' Motion for Additur or New Trial).

4. The trial court erred by entering judgment on the jury's verdicts. (February 9, 2012, Judgment for Plaintiffs).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to exclude Mr. Probst's testimony when his methodology is not generally accepted in the relevant scientific community; he is not qualified under ER 702; his testimony is not helpful to the jury as required by ER 702; and his testimony is unfairly prejudicial, misleading, and confusing to the jury, and caused improper jury speculation?

2. Did the trial court err in failing to grant Plaintiffs' motion for judgment as a matter of law on the limited issue of the amount of their respective medical bills when the undisputed medical testimony established that their medical care was reasonable and necessary?

3. Did the trial court err in failing to grant Plaintiffs a new trial on damages when the jury's verdict was inadequate due to passion and prejudice, was contrary to law, was not justified based on the evidence at trial, and because substantial justice was not done?

4. Should Plaintiffs' attorney's fees and costs incurred for this appeal be included in an ultimate award of attorney's fees and costs under MAR 7.3?

IV. STATEMENT OF THE CASE

Plaintiffs filed this action for personal injuries and property damage sustained in a motor vehicle collision caused by Defendant when she collided with the rear of Plaintiffs' van in Seattle, Washington, on September 25, 2007. CP 1-4. As a result of the collision, Benjamin felt pain in his low back, mid back and right wrist; Pedro felt pain in his low back; and Efrain felt a crack in his neck and pain in his neck and upper back. RP II 14:10-16; 36:19-22; 54:2, 8-12.¹ Plaintiffs tried to self-treat their injuries with Tylenol and home remedies. RP II 14:17-22; 37:20-24; 54:13-18. However, when their injuries did not resolve, they sought help from Chiropractic Physicians, Inc. RP II 16:4-9; 40:8-11.

At his initial evaluation, Benjamin complained of back pain and stiffness that was aching and burning. RP III 12:22-13:6; Ex. 1. He described his pain as frequent and indicated that his injuries interfered with work, sleep, and his daily routine. RP III 13:6-8; Ex. 1. His pain worsened with sitting, bending, lying down, and twisting. RP III 13:9-11;

¹ Plaintiffs' citations to the Report of Proceedings will be RP I for December 7, 2011; RP II for December 12, 2011; RP III for December 13, 2011; and RP IV for December 14, 2011.

Ex. 1. After taking a medical history, performing a physical exam, and taking x-rays, Benjamin was diagnosed with moderate sprain/strain injuries to his thoracic and lumbar spine with associated joint subluxation complexes and myospasm. RP III 14:2-21; Ex. 1. He was also diagnosed with a sprain/strain injury to his right wrist. RP III 14:14-15; Ex. 1. Benjamin testified about how his injuries and pain affected his life. Most important were the limitations on his ability to do his job as a roofer. He worked slowly and had to take more breaks. RP II 15:22-23; 16:19-24; 19:2-8. As the sole provider for his family (he is married with two daughters), Benjamin's job worries were paramount. RP II 19:9-24. Benjamin's injuries also prevented him from doing activities with his family, like walking their dogs and playing with his daughters. He also was unable to perform his household chores, like taking out the garbage and mowing the lawn. RP II 20:2-24.

At his initial evaluation, Pedro complained of back pain and stiffness. RP III 20:12-17; Ex. 3. He indicated his pain was frequent, was worsening, and interfered with work, sleep, and daily routine activities. RP III 20:18-25; Ex. 3. His pain worsened with sitting, standing, bending, laying down, pushing, pulling, and twisting. RP III 20:19-21; Ex. 3. After taking a medical history, performing a physical exam, and taking x-rays, Pedro was diagnosed with subacute, moderate sprain/strain injuries to his

lumbar spine and sacroiliac region with associated joint subluxation complexes and myospasm. RP III 21:15-19; Ex. 3. An additional diagnosis of sprain/strain injury to the thoracic spine was added on November 6, 2007. Ex. 3. Pedro also testified about how his injuries and pain affected his life. Most important to him as well was his ability to do his job as a roofer and provide for his family (he is married with three children). RP II 38:5-10; 43:7-14. Pedro's injuries prevented him from playing soccer. He played on an organized team before the collision, but he is no longer able to play. RP II 44:1-8. He also played for fun with his son, but his injuries prevented him from doing this as well. RP II 43:23-25.

At his initial evaluation, Efrain complained of neck and back pain and stiffness that was burning as well as right finger numbness. RP III 26:18-23; Ex. 5. He described his pain as frequent and indicated that his injuries interfered with work, sleep, and his daily routine. RP III 18:23-25, 27:1; Ex. 5. His pain worsened with sitting, standing, walking, bending, lying down, and twisting. Ex. 5. After taking a medical history, performing a physical exam, and taking x-rays, Efrain was diagnosed with subacute, moderate sprain/strain injuries to his cervical and thoracic spine with associated joint subluxation complexes and myospasm. RP III 28:3-7; Ex. 5. Efrain testified about how his injuries and pain affected his life. Most important was his ability to do his job as a roofer. He worked slowly and

had to take more breaks. RP II 57:2-6. As the sole provider for his family (he is married with four children), Efrain's job worries were paramount. RP II 57:7-14. Efrain's injuries also prevented him from doing activities with his family, like going for walks and playing with his children in the park. RP II 57:15-24.

None of the Plaintiffs had prior neck or back injuries. RP II 16:25, 17:1-4; 42:18-19; 57:25, 58:1-2.

Plaintiffs' medical providers recommended conservative chiropractic care, massage therapy, and home exercises. RP III 18:7-19:5, 23:12-18, 28:16-22; Ex. 1, 3, 5. As Plaintiffs' injuries improved with their individual treatment plans, their doctors reduced the frequency of care. In mid-February 2008, about 4.5 months after the collision and after about 3.5 months of treatment, each Plaintiff was determined to have reached maximum medical improvement and was placed on a return as needed basis. RP III 19:13-19, 25:23-24; Ex. 1, 3, 5. Dr. Romero instructed his patients to self-treat if they experienced any flare-ups, but to return to the clinic if that did not work. RP III 19:20-22, 25:18-22; Ex. 1, 3, 5. None of the Plaintiffs returned for additional care. RP III 57:15-18.

On October 24, 2011, Plaintiffs filed a motion to exclude the testimony of Bradley W. Probst, a biomedical engineer retained by Defendant. CP 11-66. The basis of Plaintiffs' motion was that Mr.

Probst's methodology and theory do not pass the *Frye* test for admissibility; that Mr. Probst is not qualified as an expert and his testimony is not helpful or reliable under ER 702; that Mr. Probst's testimony is irrelevant to the issues the jury would have to decide; and that even if marginally relevant, Mr. Probst's testimony was unfairly prejudicial and would mislead and confuse the jury under ER 403. CP 11-66, 90-103. The trial court denied the motion. CP 106-108.

Defendant stipulated to liability prior to trial, leaving only Plaintiffs' damages and proximate cause as issues for the jury. CP 104-105. In their case in chief, Plaintiffs presented the testimony of Leonardo Romero, DC, chief of staff of Chiropractic Physicians, Inc. RP III 3:14-59:21. Dr. Romero testified about each Plaintiff's pain and limitations complaints, physical examination, diagnoses, treatment plan, recovery, and prognosis. Dr. Romero testified, on a medically more probable than not basis, that Plaintiffs' diagnosed injuries were caused by the September 25, 2007, collision. RP III 17:25-18:3; 23:7-10; 28:11-15. Dr. Romero testified, on a medically more probable than not basis, that Plaintiffs' recommended treatment plans were necessary to treat their collision-caused injuries. RP III 19:23-20:6; 26:3-9; 29:20-30:3. Finally, Dr. Romero testified, on a medically more probably than not basis, that the charges for this medical care were reasonable. RP III 31:9-14.

In her case in chief, Defendant presented the testimony of Bradley W. Probst, a biomedical engineer. RP III 72:3-146:12. Mr. Probst is not a medical doctor and is not qualified nor allowed to diagnose injuries or opine as to causation.² Mr. Probst testified about his calculation of the forces involved in this collision, the basis for his calculations, and his opinion that there was no mechanism of injury in this collision.

Significantly, Defendant did not present any medical expert testimony to refute Dr. Romero's medical opinions. At most, the defense cross-examined Dr. Romero on other possible causes for the diagnosed injuries and suggested, despite absolutely no evidence, prior neck and back pain due to the fact that Plaintiffs are employed as roofers. RP III 36:14-37:5, 47:4-15.

After Defendant rested, Plaintiffs recalled Dr. Romero as a rebuttal witness. Dr. Romero has had extensive education, training, and continuing education in kinematics, biomechanics, and accident traumatology. RP III 4:16-7:12, 150:11-25. Dr. Romero testified about the different types of forces that act on a vehicle occupant's body during a collision – extension, both horizontal and vertical, compression, sheering –

² See *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).

and that these forces cause injury. RP III 152:9-153:2. Dr. Romero testified that extrinsic risk factors, such as lap belt only, lack of a head rest, improper seated position, unawareness of an impending collision, and scoliosis, all increase injury potential in a collision. RP III 149:2-25.

Based on the evidence presented at trial and the lack of medical testimony to refute Dr. Romero's opinions on injury diagnosis and causation, Plaintiffs moved for a directed verdict as to the reasonableness and necessity of their medical care. RP IV 20:11-22:5. Plaintiffs requested that the Court write the full amount of their medical specials - \$3,615.70 for Benjamin, \$3,378.15 for Pedro, and \$3,118.50 for Efrain - into the verdict forms that found for each plaintiff. RP IV 21:4-15. This would leave the issues of proximate cause and general damages for the jury. Although the trial court recognized the danger of an inadequate verdict, the trial court decided to see what the jury would do and then address any issues in a motion for new trial and for additur. RP IV 21:18-25:5. The trial court stated that if the jury awarded more in medical specials than say, just the initial chiropractic evaluation, we could surmise that the jury found that Plaintiffs were injured and that their injuries were caused by the collision. RP IV 24:10-15. At that point, it would be reasonable and proper to increase the jury's verdict to include the full

amount of the medical specials based on the evidence presented at trial.
RP IV 24: 1-8.

The jury returned a verdict in favor of each plaintiff on their respective bodily injury claims.³ The jury awarded Benjamin \$923.55 in medical specials. The jury awarded Pedro \$1,055.55 in medical specials. The jury awarded Efrain \$956.55. The jury did not award any Plaintiff noneconomic damages. CP 140-142.

In examining the amounts of the jury's verdicts, it is clear that it awarded to each Plaintiff his initial chiropractic evaluation and the full amount of his massage therapy treatment, treatment that spanned about three months. CP 140-142; Ex. 1-6.⁴ By awarding more than just the initial doctor visit, the jury concluded that Plaintiffs sustained their diagnosed injuries and that those injuries were caused by the September 25, 2007, collision and Defendant's negligence.

³ The jury also awarded Plaintiffs \$400.00 on their property damage claim. Plaintiffs believe this verdict was within the range of the evidence and do not challenge it on appeal.

⁴ For Benjamin, the initial evaluation, \$263.55, plus his massage therapy bills of \$660.00, equals the jury's verdict of \$923.55. CP 140; Ex. 1, 2. For Pedro, the initial evaluation, \$263.55, plus his massage therapy bills of \$792.00, equals the jury's verdict of \$1,055.55. CP 141; Ex. 3, 4. For Efrain, the initial evaluation, \$263.55, plus his massage therapy bills of \$693.00, equals the jury's verdict of \$956.55. CP 142; Ex. 5, 6.

Based on the inadequacy of the jury's verdicts and the trial court's statements directly on this issue, Plaintiffs filed a motion for new trial or additur. CP 148-161. On January 24, 2012, the trial court denied the motion. CP 187-188.

V. SUMMARY OF THE ARGUMENT

Each error committed by the trial court led to and compounded the subsequent errors made. First, after failing to first conduct a *Frye* review and then abusing its discretion, the trial court failed to exclude the testimony of Bradley W. Probst. Because Mr. Probst's inadmissible, unhelpful, unreliable, and prejudicial testimony was permitted at trial, the trial court erroneously denied Plaintiffs' motion for judgment as a matter of law on the limited issue of the amount of their respective medical specials. Because the issue of Plaintiffs' past medical specials was improperly left to the jury, it reached an inadequate verdict on the amount of each Plaintiff's damages. Then, to top it all off, the trial court failed to grant Plaintiffs a new trial or additur despite its express acknowledgment that such could be necessary if the jury's verdict showed that it found that Plaintiffs sustained injury as a result of the collision. As a result of each of these errors, individually and cumulatively, Plaintiffs have been greatly prejudiced and substantial justice has not been done.

VI. ARGUMENT

A. BRADLEY W. PROBST'S TESTIMONY SHOULD HAVE BEEN EXCLUDED

1. Standards of Review

This court reviews de novo questions of admissibility under *Frye*. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

If the questioned methodology or theory passes the *Frye* test⁵, this court then reviews a trial court's decision to admit or exclude expert testimony for abuse of discretion. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

2. Probst's Methodologies and Theories Do Not Meet the Frye Test.

The *Frye* test requires that the scientific principles from which a proffered expert's opinions are based must be generally accepted in the relevant scientific community as reliable and accurate. *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984); *see also State v. Gore*, 143 Wn.2d 288, 302, 21 P.2d 262 (2001) (the primary goal is to determine whether the evidence offered is based on established scientific theory and methodology). "If there is a *significant* dispute among *qualified* scientists

⁵ The Supreme Court recently reaffirmed that "only after novel scientific evidence is found admissible under *Frye* does the court turn to whether it is admissible under ER 702." *Anderson*, 172 Wn.2d at 603.

in the relevant scientific community, then the evidence may not be admitted.” *Gore*, 143 Wn.2d at 302 (emphasis in original).

a. Delta V Method

Using vehicle photographs and repair estimates and assuming vehicle speed, Mr. Probst comes up with the alleged delta v, change in velocity, and acceleration for Plaintiffs’ vehicle under the theory of conservation of momentum. CP 24-25. Numerous courts have rejected this methodology as unreliable and not generally accepted in the scientific community. *See, e.g., Whitting v. Coultrip*, 324 Ill.App.3d 161, 168, 755 N.E.2d 494, 499 (2001) (finding no evidence that use of photographs and repair estimates is a generally accepted method in the field of engineering for determining G-forces); *Tittsworth v. Robinson*, 252 Va. 151, 155, 475 S.E.2d 261, 263 (1996) (same, finding result to be pure speculation); *see also Clemente v. Blumenberg*, 705 N.Y.S.2d 792, 800 (1999) (after extensive review of methodology, concluded that using repair costs and photographs to calculate change in velocity of two vehicles is not generally accepted in any relevant field of engineering or under the laws of physics).

Professional engineers within the relevant scientific community have also invalidated this methodology. In *Damage Only, It Doesn’t Work – Minor Damage Doesn’t Mean No Injury*, professional engineers

invalidated the underlying math and physics used and concluded that discounting injuries based on lack of vehicle damage is not supported by either the laws of physics or the available empirical data. CP 44-49. The authors also highlighted the fact that the calculations are susceptible to mathematical, statistical, and computer errors and are easily manipulated. CP 48.

On the issue of admissibility under *Frye*, Defendant presented absolutely no evidence beyond Mr. Probst's blanket statement attesting that his methodology is "generally accepted in the automotive industry." CP 83. Our courts never rely on the statements of one individual to determine the reliability of scientific procedures. *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995); *see also Santos v. Nicolos*, 879 N.Y.S.2d 701 (2009) (purpose of *Frye* hearing is to determine whether expert opinion properly relates existing data, studies, or literature to the plaintiff's situation or whether, instead, it is connected to existing data only by the ipse dixit of the expert).

Further, Defendant relied solely on a Division Two case that permitted a biomechanical engineer in that case to testify. *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). However, *Ma'ele* does not stand for the proposition that the testimony of a biomechanical engineer is always admissible or that Mr. Probst's delta v method is

generally accepted in the relevant scientific community. Rather, the *Ma'ele* court looked at that expert's research into low speed collisions, and instead of conducting an actual *Frye* review, merely accepted that expert's statements that his conclusions "have been pretty much accepted." *Id.* at 562-63. *Ma'ele* is not a blanket endorsement for admitting testimony based on the delta v method in all cases.

On de novo review, the evidence in the record and the relevant case law establish that Mr. Probst's underlying delta v theory and methodology are not generally accepted in the scientific community.

b. Injury Threshold Theory

Mr. Probst follows-up on his calculation of delta v and g-forces by asserting that such force is insufficient to have produced an injury mechanism for Plaintiffs' respective injuries. CP 28-29. Mr. Probst bases his theory of an injury threshold on alleged lack of injuries sustained by volunteers in small-sample, biased, controlled crash test studies. CP 26-28.

The Colorado Court of Appeals, in analyzing a similar injury potential theory, rejected it for several reasons. *Schultz v. Wells*, 13 P.3d 846 (Col. App. 2000). First, the court affirmed that the test results "are inadequate for the purpose for which they are being offered." *Id.* at 851. In other words, extrapolating the results of a four-volunteer study aimed at

improved seat design to “prove that a particular person was not injured or was likely not injured” in a specific car collision is invalid and misleading. *Id.*

Second, “there is no agreement, far from it, in the Engineering field or in the automobile industry concerning whether there is such a threshold [of injury].” *Id.* at 852. In fact, several critiques have been published condemning use of these studies, as Mr. Probst does, to allege that such a threshold exists. *See, e.g., A Review and Methodologic Critique of the Literature Refuting Whiplash Syndrome*, 24 *Spine* 86 (1991). CP 55-65.

Third, these studies themselves are flawed. The critiques and the *Schultz* court highlight that the statistical samples of the tests are “extremely low”; there were “no controls among and between the experiments with regard to age, physical conditions, [and] actual position of the body”; there is the “expectation factor” of a volunteer knowing he is about to be hit; and the studies have biased results as the volunteers were associated with the authors or their sponsors. *Schultz*, 13 P.3d at 852; CP 55-65. Further, these tests used healthy adults and controlled environments with the express purpose of avoiding injury. None of the tests accounted for factors that actually cause injury, such as head/body/seat/seatbelt/headrest position, pre-collision health of occupant,

angle of impact, and whether the occupant was aware of the impending collision. CP 55-65.

Again, on the issue of admissibility under *Frye*, Defendant presented absolutely no evidence beyond Mr. Probst's blanket statement attesting that his methodology is "generally accepted in the automotive industry." CP 83.

On de novo review, the evidence in the record and the relevant case law suggest that Mr. Probst's injury threshold theory, the basis for his opinion for lack of an injury mechanism, is not generally accepted in the scientific community.

3. **Even if *Frye* is Not Implicated, Probst's Testimony Should Have Been Excluded under ER 401, 402, 403, and 702.**

As noted above, a trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). "A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds." *Id.* The trial court's decision to allow Mr. Probst to testify was based solely on the holding and rationale found in *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). CP 118-119. The trial court's decision was manifestly unreasonable and based on untenable grounds.

a. Probst's Causation Testimony is Irrelevant and Prejudicial

Mr. Probst is not a medical doctor. He is not qualified to provide an expert opinion on whether the September 25, 2007, motor vehicle collision caused Plaintiffs' respective injuries. Only a medical doctor can do that. *Miller v. Stanton*, 58 Wn.2d 879, 866, 365 P.2d 333 (1961) ("The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture); *see also O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968) ("Medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical [injury] resulting therefrom).

Mr. Probst tries to make his opinions on causation relevant by calculating delta v and g forces and then opining, and trying to convince the jury, that such were insufficient to 'produce an injury mechanism.' Translation: the collision did not cause Plaintiffs' injuries. Mr. Probst ultimately testifies about issues on which he is not qualified to give an opinion under our case law, because the relationship between collision and injury requires medical evidence. *Id.*

Mr. Probst's non-medical opinion on causation via his 'injury mechanism' testimony is irrelevant and inadmissible. ER 401, 402. Any

marginal relevance that Mr. Probst's testimony may have is far outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury. ER 403. Tegland explains that 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). A discussion of delta v, acceleration, g's, and 'injury mechanism not present' sounds impressive and scientific, but it is meaningless on the issue of injury causation in the absence of expert medical testimony that Plaintiffs were not injured. All of the medical testimony in this case concluded that Plaintiffs were injured as a result of the September 25, 2007, collision. 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. Probst is Not Qualified under ER 702

The trial court's sole reliance on *Ma'ele* to find that Mr. Probst is qualified under ER 702, without conducting its own analysis, was an abuse of discretion.

Mr. Probst is no Dr. Tencer, the biomechanical engineer whose testimony was at issue in *Ma'ele*. Dr. Tencer had a Ph.D. in biomechanical engineering, taught at UW Medical School, performed federally funded research, and his testimony would be helpful to the jury in understanding the forces involved in the crash. In contrast, Mr. Probst never obtained his Ph.D and only holds a master's degree in biomedical engineering, not biomechanical engineering. CP 78-81. He has not taught in medical schools. CP 78-81. He has not spent years researching low impact collisions. CP 78-81. He does not have Dr. Tencer's pedigree in terms of published literature. CP 78-81. He simply lacks the professional credentials and publications of Dr. Tencer.

c. Probst's Causation Testimony is Not Helpful

In implicitly finding Mr. Probst's causation testimony helpful and reliable, the trial court relied solely on the *Ma'ele* court's rationale for permitting Dr. Tencer to testify as to his opinions in that case on those facts. CP 118-119. This was an abuse of discretion.

Mr. Probst's ultimate causation opinion is that, according to his calculations, the force on Plaintiffs' vehicle was insufficient to have produced an injury mechanism for any of Plaintiffs' respective injuries. CP 29. In other words, Mr. Probst's opinion is that it is statistically impossible for Plaintiffs to have been injured in the September 25, 2007,

collision. This opinion goes well beyond Dr. Tencer's opinion – that he would not expect a person to be injured in that collision – deemed within the court's discretion to admit in *Ma'ele*. 111 Wn. App. at 564. The trial court's blind reliance on *Ma'ele* was manifestly unreasonable and based on untenable grounds.

Further, the trial court failed to analyze the helpfulness and reliability of Mr. Probst's causation testimony specific to this collision and these Plaintiffs. The inference from Mr. Probst's opinion on injury mechanism is that the statistical probability that Plaintiffs sustained their respective injuries was zero. The Supreme Court rejected the application of 'average' or 'generally-applicable' theories to determine whether a specific individual suffered an injury from a specific event. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 81, 51 P.3d 793 (2002). In that case, Boeing attempted to use a "median-based" allocation method regarding age-related hearing (ARHL) loss to find a "norm" and then apply that norm to Mr. Heidy. The Court's description of that methodology is strikingly similar to Mr. Probst's methods here:

Dr. Dobie's testimony summarizes the flaw with the median-based allocation method; it does not assist a doctor in determining the actual extent to which an individual suffers from ARHL. At best, it allows a doctor to compare an individual's age and hearing loss percentage with a smoothed-date chart based on information not intended to be used to assess individuals.

Id. at 85. Using language that is directly applicable to the issues involved here with Mr. Probst, the Court held: “Statistical studies showing tendencies within given age groups do not help triers-of-fact determine the actual extent of workers’ individual work-related diseases.” *Id.* The Court made it clear that the jury may not use expert opinion evidence based on averages or general tendencies to speculate about what happened to a particular individual in a particular incident.⁶

Extrapolating data from flawed studies then applying the ‘average’ to Plaintiffs did not help the jury decide what it had to decide: the degree to which these specific Plaintiffs were injured in this specific car collision. ER 702. Rather, Mr. Probst’s opinion that the forces Plaintiffs experienced in this collision were below the level of force which Mr. Probst has incorrectly determined to be “generally tolerable,” was nothing more than an invitation for the jury to improperly speculate.

4. Conclusion

On de novo review, Mr. Probst’s underlying methodology and theory do not meet the *Frye* test. His testimony should have been excluded at trial.

⁶ A close reading of Mr. Probst’s report reveals that the likelihood of injury is not zero. He cites various studies involving volunteers who participated in multiple rear-end impacts. Those studies actually report resultant minor neck pain or note lack of severe neck injury. CP 23-29; 55-65.

Even if Mr. Probst's underlying evidence meets *Frye*, the trial court's decision permitting his testimony at trial was manifestly unreasonable and based on untenable grounds because such testimony was not rubber-stamped as admissible by the *Ma'ele* decision and should have been excluded under ER 401, 402, 403, and 702.

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

1. Standard of Review

In reviewing a trial court's decision to deny a motion for judgment as a matter of law (previously known as directed verdict), this court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). Judgment as a matter of law is appropriate if, when viewing the material evidence most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Id.*

2. Undisputed Medical Testimony Established the Reasonableness and Necessity of Plaintiffs' Medical Bills.

At the close of Defendant's case, Plaintiffs moved for judgment as a matter of law on the limited issue of the amount of their respective medical bills. RP IV 20:11 – 22:5. "If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient

evidentiary basis for a reasonable jury to find ... for that party with respect to that issue, the court may grant a motion for judgment as a matter of law.” CR 50(a)(1).

As part of his negligence case, a plaintiff must prove that medical costs and related medical treatment were reasonable and necessary. WPI 30.07. To do that, he must present expert medical testimony. *See, e.g., Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). Similarly, to dispute the reasonableness or necessity of medical care, a defendant must present expert medical testimony. *See, e.g., Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001).

Leonardo Romero, DC, testified on Plaintiffs’ behalf. RP III 4:1 – 59:22. With respect to each Plaintiff, Dr. Romero testified that their medical treatment and medical bills 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. With his testimony, Plaintiffs met their burden of establishing the reasonableness and necessity of their medical care.

Defendant presented absolutely no expert medical testimony regarding the reasonableness and necessity of Plaintiffs’ respective medical care.

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).

In requesting judgment as a matter of law, Plaintiffs did not ask the trial court to rule that they were injured or that the jury had to find for them. Rather, all Plaintiffs asked was that if the jury found that Plaintiffs were injured by using the verdict forms finding for Plaintiffs, that the amount of Plaintiffs’ respective medical bills be written onto those verdict forms. RP IV 21:4-15. Indeed, had Defendant designated her CR 35 exam chiropractor as a consulting witness prior to the local rule deadline for bringing a summary judgment motion, Plaintiffs would have gotten this issue resolved on summary judgment instead of having to wait to bring a CR 50 motion at the close of Defendant’s case. The same evidentiary and legal standards apply, and the result should have been the same. The trial court erred in denying Plaintiffs’ CR 50(a)(1) motion on the limited issue of the amount of their respective medical bills.

C. A NEW TRIAL ON DAMAGES SHOULD HAVE BEEN GRANTED

1. Standard of Review

This court reviews a trial court's decision denying a motion for a new trial for abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

2. The Jury's Verdicts were Shockingly Inadequate, Contrary to Law, Not Based on the Evidence, and Substantial Justice Has Not Been Done.

A trial court may vacate a verdict and grant a new trial "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." CR 59(a). The rule provides several bases upon which the court can exercise its discretion to set aside the jury's verdict in this case. CR 59(a)(5) allows the court to set aside the jury's verdict where the damages are so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice. CR 59(a)(7) allows the court to set aside the jury's verdict where there is no substantial evidence or reasonable inference from the evidence to justify the verdict. CR 59(a)(9) allows the court to set aside the jury's verdict where substantial justice has not been done.

Prior to submitting the case to the jury, the parties and the court had a long discussion regarding the proper damages instruction and the

potential for an inadequate verdict if the jury found that Plaintiffs sustained injuries in the collision but failed to award the full medical specials and general damages. RP IV 9:8-17:8, 20:11-25:8. The trial court acknowledged the problem:

MS. CHAMBERLAIN: And I think this would avoid any sort of problem if they find they were injured, but let's only give them a thousand dollars for their medical treatment. Well, then I'm going to have to do a new trial at that point. So I just think it solves that point.

THE COURT: Or additur. In other words, they could say, we heard jurors during voir dire that said they got a free first visit and each visit was only \$40, so we're going to award those amounts rather than what we heard this chiropractor say --

MS. CHAMBERLAIN: And that's not evidence.

THE COURT: -- which is obviously improper.

RP IV 21:19-22:5. The court also noted:

THE COURT: ... But if the jury doesn't believe the plaintiffs, then they don't award anything. If they do believe the plaintiffs were injured, then there's no contrary evidence in terms of the amount or the reasonableness.

RP IV 23:4-8. The court concluded:

THE COURT: ... I'm struggling a little bit because I tend to agree with her that they could say it is reasonable to go in and get an assessment but not believe that they were injured and then not award any further treatment expenses. So I think at this point we need to see what the jury does.

MS. CHAMBERLAIN: Okay.

THE COURT: And consider additur, depending on what they do.

MS. CHAMBERLAIN: Okay.

THE COURT: If they -- if they awarded, for instance, half of what the chiropractor charged, at that point I do think you're entitled to the full amount because the medical testimony -- I mean, at that point, they had to have found they were injured more than just needing an assessment. And then I think I would essentially grant summary judgment pretrial or your motion for directed verdict.

RP IV 24:1-17.

Reviewing Plaintiffs' respective medical specials and the jury's verdicts, the jury awarded the cost of each Plaintiff's initial evaluation at Chiropractic Physicians and awarded each Plaintiff the full amount of their massage therapy bills⁷ — treatment that spanned approximately three months. CP 140-142; Ex. 1-6. The jury, having concluded that Plaintiffs were injured in the collision and needed several months of treatment, thereafter departed from the evidence and returned a shockingly inadequate verdict based upon its own speculation and prejudice rather than upon the only medical testimony and evidence before it.

After the jury's verdicts were read, the court stated with respect to the issue of additur or a new trial: "And we'll have to deal with any remaining issues by written motion, I think." RP IV 47:1-2. Despite acknowledging that a new trial or additur would be a possible necessity

⁷ For Benjamin, the initial evaluation, \$263.55, plus his massage therapy bills of \$660.00, equals the jury's verdict of \$923.55. CP 140; Ex. 1, 2. For Pedro, the initial evaluation, \$263.55, plus his massage therapy bills of \$792.00, equals the jury's verdict of \$1,055.55. CP 141; Ex. 3, 4. For Efrain, the initial evaluation, \$263.55, plus his massage therapy bills of \$693.00, equals the jury's verdict of \$956.55. CP 142; Ex. 5, 6.

based on what the jury had done, the court abused its discretion in failing to grant Plaintiffs' motion for new trial or additur.

a. Inadequate Medical Specials

The jury's award of medical specials is shockingly inadequate and evidences its passion or prejudice. CR 59(a)(5). The jury awarded the full amount of Plaintiffs' respective massage therapy bills – approximately three months of treatment. The jury clearly found that Plaintiffs sustained their diagnosed injuries and that such injuries were caused by the collision.⁸ The jury clearly found that several months of massage therapy treatment was reasonable and necessary to treat Plaintiffs' injuries.

However, the jury only awarded the cost of the initial chiropractic evaluation. This does not make any sense and evidences the jury's prejudice against chiropractic care. Indeed, it was on referral from the chiropractor that Plaintiffs even received massage therapy. It is nonsensical to award the cost of corollary care but not the cost of the primary care. This jury, whether because of speculation, conjecture, or its

⁸ A court has the authority to limit issues on a new trial when the original issues were distinct and separate from each other and justice does not require the resubmission of the whole case to the jury. *Nelson v. Fairfield*, 40 Wn.2d 496, 501, 244 P.2d 244 (1952). The issue of proximate cause for Plaintiffs' injuries has been decided by the jury. This issue is distinct and separate from the amount of their resultant damages and has been established.

own biases, ignored the evidence in the record and allowed prejudice to color its decision.

Our courts have had little hesitancy in granting a new trial when the jury fails to award items of damage that are undisputed, conceded, or beyond legitimate controversy. In *Hills v. King*, the Supreme Court affirmed a trial court's decision granting a new trial because that jury's verdict was the result of passion or prejudice. 66 Wn.2d 738, 404 P.2d 997 (1965). King rear-ended Hills but disputed liability. Hills' property damage was limited to the bumper, and the defense argued that Hills was not seriously injured and had little need for the medical expenses incurred. Hills' undisputed medical specials were \$1,751.80. The jury awarded \$1,550.00. The trial court found, and the Supreme Court agreed, that the jury's verdict was the result of passion or prejudice because it failed to award any general damages and in fact reduced Hills' proven special damages. "The medical testimony is uncontroverted that these medical expenses were reasonable and necessary, resulting from the accident." *Id.* at 741. A new trial was ordered.

In *Ide v. Stoltenow*, the Supreme Court held that the jury's verdict was clearly inadequate and not sustained by the evidence. 47 Wn.2d 847, 289 P.2d 1007 (1955). The jury awarded \$1,246.24. Specials damages in the case were \$1,465.47. The court speculated that the jury may have

concluded that the plaintiffs were attempting to “capitalize” on the collision, but the court reasoned that certain facts in the record could not be brushed aside or disregarded, including among others, the uncontradicted medical evidence on damages. The court concluded:

We recognize that it can be said that the jury could have disbelieved all of the plaintiffs’ experts The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was not contradiction or dispute.

It is our view that, in determining whether a new trial should be granted because of inadequate damages, the trial court and this court are entitled to accept as established those items of damage which are conceded, undisputed, and beyond legitimate controversy.

Id. at 851; *accord Palmer v. Jenson*, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997) (uncontroverted evidence at trial established all medical treatment reasonable, necessary, and related to the collision; defense argument, that special damages still a matter of legitimate dispute because jury could conclude some treatment unnecessary, wrong where defense presented no evidence to call treatment into question; cited to *Ide*). The jury is required to accept such undisputed items of damage as well. “Where special damages are undisputed, and the injury and its cause clear, the court has little hesitancy in granting a new trial when the jury does not award these amounts We reverse a jury award of damages which is

outside the range of substantial evidence in the record.” *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 636, 865 P.2d 527 (1994).

Similarly, 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 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). The trial court abused

its discretion by failing to grant a new trial on damages. *Hills*, 66 Wn.2d at 742; *Ide*, 47 Wn.2d at 851; *Krivanek*, 72 Wn. App. at 637.

b. Inadequate Noneconomic Damages

The jury did not award any noneconomic damages. CP 140-142. Its choice defies the evidence in the record. CR 59(a)(7). Substantial justice has not been done. CR 59(a)(9).

Our Supreme Court does not hesitate to grant a new trial when a jury's failure to award noneconomic damages defies the evidence in the record. *Palmer v. Jenson* is the case on point. 132 Wn.2d 193, 937 P.2d 597 (1997). Palmer was rear-ended by Jenson. The jury awarded a general verdict of the exact amount of Palmer's medical specials. Palmer's doctor had testified at trial that her medical specials were reasonable and necessary. Similar to Defendant here, Jenson presented no medical evidence to refute these medical opinions. Instead, Jenson's counsel argued that Palmer was not injured, or alternatively, that only a portion of her couple years of medical care was justified.

The Supreme Court held that because the uncontradicted medical evidence substantiated Palmer's claim that she experienced pain and suffering, the jury's verdict providing no damages for her pain and suffering was contrary to the evidence. *Id.* at 203. The court's discussion

of the legal standard governing a jury's failure to award noneconomic damages is instructive:

Although there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages. The adequacy of the verdict, therefore, turns on the evidence. *See Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965) (no abuse of discretion to grant new trial where jury awarded nothing for pain and suffering but plaintiff experienced pain for at least 17 months after the accident); *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1961) (where "indisputable" that plaintiff sustained pain and suffering and jury failed to award general damages, new trial upheld); *Ide v. Stoltenow*, 47 Wn.2d 847, 850, 289 P.2d 1007 (1955) (no abuse of discretion to grant new trial where verdict of less than \$500 for general damages was "so inadequate as to shock the conscience of the court"); *Cleva v. Jackson*, 74 Wn.2d 462, 465, 445 P.2d 322 (1968) (new trial upheld where trial court found nominal amount for pain and suffering "clearly was unjustified under the evidence introduced at the time of trial").

We therefore review the record to determine if the omission of general damages was contrary to the evidence.

Id. at 201-202. In reviewing the record, the court highlighted that Palmer's treating provider noted that Palmer was experiencing neck pain, low back pain, headaches, and sleep difficulties. Follow-up visits revealed cervical and lumbar pain with gradual improvement. *Id.* at 202. The court also referenced trial testimony from Palmer's treating providers that she was very tender in the neck and back; chart notes that stated Palmer was very uncomfortable in the neck and back and that she had great difficulty

sleeping; and chart notes indicating constant low back pain that varies in intensity from dull to sharp. *Id.* The court held that:

[T]he medical evidence substantiates Pamela Palmer's claim that she experienced pain and suffering We hold the jury's verdict providing no damages for Palmer's pain and suffering was contrary to the evidence. The trial court therefore abused its discretion when it denied Palmer's motion for a new trial.

Id. at 203.

The evidence in the present record similarly 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 verdict providing no damages for each Plaintiff's pain and suffering is contrary to the evidence. *Id.*

The case of *Cleva v. Jackson* is remarkably similar to Plaintiffs' case. 74 Wn.2d 462, 445 P.2d 322 (1968). Cleva was struck in an intersection by Jackson, who testified he had slowed from 25 MPH to around 2 to 4 MPH. There was no extensive damage to either car and the drivers had no apparent injuries at the scene, although Cleva testified she was tossed about and shaken up. The medical testimony established that Cleva sustained injuries causing pain that were caused by the collision. The jury awarded Cleva \$1,500.00 (medical expenses of \$1,027.00 plus other economic damages left only \$129.08 for pain and suffering). On a motion for new trial, the trial court entered an order that unless the defendant would accept an additur of \$5,500.00 (for a total of \$7,000.00), a new trial would be granted on the issue of damages only. The Supreme Court agreed that the verdict was clearly inadequate based on the evidence at trial. *Cleva*, 74 Wn.2d at 405.

Similarly, our 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). The trial court abused its discretion by failing to grant a new trial on damages. *Palmer*, 132 Wn.2d at 203; *Cleva*, 74 Wn.2d at 405.

D. PLAINTIFFS REQUEST ATTORNEY'S FEES UNDER MAR 7.3

Pursuant to RAP 18.1(b), Plaintiffs request that the Court award them attorney's fees and costs incurred on appeal. Plaintiffs' case was subject to mandatory arbitration. Defendant appealed the arbitration award and requested trial de novo. Pursuant to MAR 7.3, if Defendant does not ultimately improve her position on trial de novo, the trial court shall award Plaintiffs their reasonable attorney's fees and costs incurred from when Defendant's request for trial de novo was filed.

If this Court grants Plaintiffs' appeal, and after the new trial, it is possible that Defendant will not ultimately improve her position over the arbitration award. If so, Plaintiffs will be entitled to their reasonable attorney's fees and costs incurred since Defendant filed for trial de novo. That time period does and should include the attorney's fees and costs incurred on appeal.

Pursuant to RAP 18.1(i) and MAR 7.3, Plaintiffs request that the Court direct the trial court to determine the amount of Plaintiffs' attorney's fees and costs, including those incurred in this appeal, if Defendant ultimately fails to improve her position from the arbitration award.

VII. 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 16th day of July, 2012.

Respectfully submitted,

LAW OFFICES OF ELENA E. TSIPRIN



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DECLARATION OF SERVICE

I certify that on July 16, 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 Hand Delivery, a true and correct copy to:

Jason J. Hoelt
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1191 Second Avenue, Suite 500
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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 16th day of July, 2012.


Diana F. Chamberlain, WSBA #38216