

72525-4

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CAUSE No. 72525-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ANDREA LISTER, Appellant,

v.

RYAN PHAN and JANE DOE PHAN, husband and wife and the marital community
composed thereof, Respondents.

BRIEF OF RESPONDENTS

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Appellant received a jury verdict in her favor and was awarded monetary compensation for her alleged damages. Did the trial court act within its discretion in accepting the jury's verdict in favor of appellant?

Should the appellate court decline to consider the merits of the appellant's assignments of error where the appellant has failed to designate and cite to relevant portions of the record?

II. STATEMENT OF THE CASE

A jury trial was held in this case in September 2014, and the jury returned its verdict on September 16, 2014. CP 444-445. Respondents Ryan Phan and Jane Doe Phan admitted at trial that Ryan Phan was negligent. CP 459. As a result, the jury was instructed to "decide what injuries and damages, if any, to plaintiff were proximately caused by the defendant's negligence and what amount, if any, plaintiff should recover." CP 461.

The jury found that Ryan Phan's negligence was a proximate cause of injuries and/or damage to Appellant Andrea Lister. CP 444. The jury awarded Lister \$3,500.00 in past

economic damages. CP 445.

III. ARGUMENT

A. Standard of Review

A trial court judge “possesses broad discretion” in managing a trial. State v. Njonge, 181 Wn.2d 546, 558, 334 P.3d 1068 (2014). A trial court’s admission or exclusion of evidence is reviewed for manifest abuse of discretion:

The trial court’s decision to admit or exclude evidence and the court’s balancing of probative value against prejudicial effect are entitled to a ‘great deal of deference, using a “manifest abuse of discretion” standard of review.’

Degroot v. Berkley Const., Inc., 83 Wn. App. 125, 128, 920 P.2d 619 (1996), quoting State v. Luvane, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). An order denying a new trial will not be reversed except for abuse of discretion. Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

Whether a jury instruction reflects an accurate statement of the law is reviewed de novo. Terrell v. Hamilton, 190 Wn. App. 489, 498, 358 P.3d 453 (2015). “But a trial court’s decision

regarding how to word an instruction or whether to give a particular instruction is reviewed for an abuse of discretion.”

Terrell, 190 Wn. App. at 498.

B. Appellant Has Failed to Designate a Record Sufficient for the Court’s Review

Appellant Lister designated only a few brief excerpts from the trial proceedings. Because Lister did not designate all relevant portions of the trial proceedings, the Court cannot consider Lister’s arguments regarding alleged errors at trial. Reed v. Pennwalt Corp., 93 Wn.2d 5, 604 P.2d 164 (1979) (record failed to show objections regarding instructions); State v. Mannhalt, 33 Wn. App. 696, 658 P.2d 15 (1983) (pro se brief assigned error to motions and orders not included in record; thus, alleged errors could not be considered).

“A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.” Dash Point Village Associates v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1148 (1997). “An insufficient record on appeal precludes review of the alleged errors.” Bulzomi v. Dept. of Labor and Industries, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). A court need not review issues where the appellant has

failed to designate an adequate record or to cite to the record provided:

An appellant seeking review of a trial court's decision must provide the necessary record. If he or she does not, or if the briefs on appeal do not properly cite to such record as may have been provided, the issues need not be reviewed.

State v. Lough, 70 Wn. App. 302, 335, 853 P.2d 920 (1993), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995). See also St. Hilaire v. Food Services of America, Inc., 82 Wn. App. 343, 917 P.2d 1114 (1996) (court would not consider appellant's challenge to sufficiency of evidence due to appellant's failure to include with appeal papers enough of trial court record to make review possible); Olmsted v. Mulder, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993) ("We cannot reach the merits of Mulder's arguments because he has failed to provide us with a sufficient trial record.").

Lister has entirely failed to create an adequate record on appeal. She is apparently claiming that the trial court made improper rulings and that the jury did not award her sufficient damages, yet she designated only a few brief excerpts from the trial proceedings. With such an inadequate record the Court cannot reach the merits of Lister's arguments.

Lister does not indicate that she requested from the trial court the relief she now seeks on appeal. She does not cite to any document or proceeding showing that she filed a motion for additur with the trial court or otherwise requested that the trial court award her additional damages. Thus, there is no trial court decision regarding the amount of damages that this Court can review.

In addition, Lister did not cite to any document or proceeding in her brief showing that she timely objected to the jury instructions. As a result, the Court is unable to consider her objections to the instructions on appeal. Civil Rule 51 expressly allows the parties the opportunity to object to the jury instructions chosen by the trial court:

Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction....

CR 51(f). Our Supreme Court has held that a party's failure to show that the party timely objected to an instruction is fatal to a claim that the instruction was improperly given or refused:

CR 51(f) requires that objections to the giving of an instruction or to the refusal to give a requested

instruction must be timely and specifically made to the trial court. Compliance with this rule is so important that we have enforced the rule sua sponte. Bitzan v. Parisi, 88 Wash.2d 116, 558 P.2d 775 (1977).

The appeal record here fails to show what, if any, exceptions or objections were made to the allegedly erroneous instructions given the trial jury or to the court's refusal to give requested instructions. Without a record that shows that exceptions were taken under CR 51(f) on the grounds urged on appeal, we are unable to pass upon the merits of the plaintiff's case....

Reed v. Pennwalt Corp., 93 Wn.2d 5, 6-7, 604 P.2d 164 (1979).

See also RAP 10.3(g) ("A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number.").

Lister has similarly failed to make appropriate citations to the portions of the record that she did designate. Lister did not cite to any Clerk's Papers or Verbatim Report of Proceedings in her opening brief, as required by the Rules of Appellate Procedure: "Reference to the record must be included for each factual statement." RAP 10.3(a)(5). The argument section is to include the following: "The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). "[A] contention

unsupported by legal argument is deemed waived.” In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). Without Lister’s references to the record and proper support for her contentions, Phan cannot adequately respond to Lister’s allegations, and the Court has no means by which to review Lister’s claims.

Moreover, Lister cannot place the burden of sifting through the record on the Court. “We are not required to search the record for applicable portions thereof in support of the plaintiffs’ arguments.” Mills v. Park, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). See also In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (“If we were to ignore the rule requiring counsel to direct argument to specific findings ... and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel.... This we will not and should not do.”).

Further, Lister cannot make supplemental arguments on these topics in her reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) (issue raised and

argued for the first time in a reply brief is too late to warrant consideration).

Finally, Lister is not entitled to an exemption from the laws and rules merely because she is pro se. A pro se litigant is bound by the same rules of procedure and substantive law as are parties represented by counsel. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). See also In re Marriage of Wherley, 34 Wn. App. 344, 349, 661 P.2d 155, review denied, 100 Wn.2d 1013 (1983) (“the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.”)

C. There Is No Evidence of Abuse of Discretion or Extraordinary Circumstances at Trial

Even though Lister entirely failed to provide an adequate record on appeal, support her arguments with references to the record, or clearly articulate her claims or the relief she is seeking, Phan will attempt to respond to Lister’s apparent concerns.

1. Damages

Lister claims that the damages awarded by the jury were insufficient and did not fully compensate her for her alleged

damages. However, Lister does not point to any document or proceeding to support her claim. Lister does not point to any part of the record indicating that she filed a motion for additur with the trial court or otherwise requested that the trial court award her additional damages.

If Lister requested that the jury award her damages over \$3,500.00, she has not demonstrated this to the Court by designating or citing to the relevant portions of the record. Lister devotes much of her brief to her claim that the subject accident caused great damage to her life in general, but she does not cite any part of the record showing that either she made these arguments to the jury or that the trial court declined to allow her to make such arguments to the jury. Even if she had made citations to the record showing that she presented evidence to the jury that her damages were more than \$3,500.00, she has not shown that the jury failed to award her more damages for an inappropriate reason. Ultimately, the jury is not required to accept all claimed damages presented to it. Rather, the jury has considerable freedom in determining damages.

Litigants have an inviolate right to a trial by jury. Const. art. I, § 21. Under the Washington Constitution, there is a strong

presumption that a verdict is adequate. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967). Unwarranted exercise of a trial court's authority may constitute a violation of the right to a jury trial. Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795 (2000).

Matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the jury. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990). The jury has considerable leeway in assessing damages, and its verdict will not be lightly set aside. Cox, 70 Wn.2d at 176. The trial court may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages. Cox, 70 Wn.2d at 176.

The trial court has no discretion to modify a verdict if the verdict is within the range of the credible evidence. Green, 103 Wn. App. at 461. The court should not alter a verdict unless the record unmistakably indicates that the jury was prejudiced against a party or its reasoning was overcome by passion. Jacobs v. Calvary Cemetery & Mausoleum, 53 Wn. App. 45, 765 P.2d 334 (1988). The jury is the appropriate assessor of damages, and its determination should not be overturned except in the most

extraordinary circumstances. Miller v. Yates, 67 Wn. App. 120, 834 P.2d 36 (1992).

There are simply no extraordinary circumstances in this case that would warrant reversal of the jury's verdict. Phan admitted negligence at trial, so the only issues for the jury were proximate cause and damages. After weighing all of the evidence, the jury concluded that the subject accident proximately caused damages to Lister in the amount of \$3,500.00. The fact that the jury ruled in Lister's favor certainly shows that the jury was not prejudiced against her.

Furthermore, Lister's request for "exemplary damages" is in reality a claim for punitive damages, and punitive damages are not allowed in Washington except as permitted by statute in cases that do not apply here. Even if such damages were allowed, Lister does not point to any portion of the record showing that she sought permission from the trial court to ask for exemplary damages or that she asked the jury to award her exemplary damages. Thus, Lister's claim that she should have been awarded exemplary damages should be disregarded.

"Exemplary damages are punitive in nature." Kadorian by Peach v. Bellingham Police Dept., 119 Wn.2d 178, 188, 829 P.2d

1061 (1992). Washington courts have “consistently disapproved punitive damages as contrary to public policy.” Dailey v. North Coast Life Ins. Co., 129 Wn.2d 572, 574, 919 P.2d 589 (1996). “Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.” Dailey, 129 Wn.2d at 574. Rather, “compensatory damages fully compensate the plaintiff for all injuries to person or property, tangible or intangible....” Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wn.2d 692, 700, 635 P.2d 441 (1981). Because punitive damages are not allowed in the instant case, Lister’s claim that she should have been awarded exemplary damages fails.

Ultimately, it was within the province of the jury to award Lister \$3,500.00 in damages. Washington follows the “cardinal principle that juror deliberations must remain secret.” State v. Elmore, 155 Wn.2d 758, 770, 123 P.3d 72 (2005). As a result, we cannot inquire as to how the jury reached its verdict. Regardless, Lister has not cited to any extraordinary circumstances that warrant a reversal.

2. Witnesses

Lister claims that she was “denied more time with witnesses.” She is apparently referring to Daniel Wiseman, who testified at trial. Lister designated a portion of Mr. Wiseman’s trial testimony (VRP 4-14), but not his entire trial testimony. Without Mr. Wiseman’s full trial testimony, the Court cannot properly review Lister’s claims.

The trial court is granted considerable discretion in managing the entire trial proceedings. State v. Njonge, 181 Wn.2d 546, 558, 334 P.3d 1068 (2014). This discretion certainly includes the amount of time given to any particular witness. The VRPs relating to Mr. Wiseman’s testimony show that the trial court gave Lister considerable leeway in questioning Mr. Wiseman. The subject matter of Lister’s line of questioning of Mr. Wiseman was related to an unrelated loan he had given to her. Any further testimony by Mr. Wiseman as to this unrelated loan would have been irrelevant and would not have provided the jury with any additional evidence of the injuries and damages Lister claims to have experienced as a result of the subject accident. The trial court undoubtedly acted within its broad discretion in limiting the amount of time Lister had to question Mr. Wiseman.

3. Jury Instructions

Our Supreme Court summarized the law regarding jury instructions in Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002):

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. Even if an instruction is misleading, it will not be reversed unless prejudice is shown.

Keller, 146 Wn.2d at 249 (internal citations omitted).

As Phan described above, an appellant who wishes to have a court review the giving or denial of a jury instruction must cite the instruction or proposed instruction and cite to that portion of the record showing that the appellant timely objected to the giving or denial of the instruction. Lister has entirely failed to do so. Thus, the Court is unable to consider the merits of Lister's claims regarding the jury instructions.

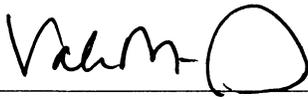
Moreover, Phan cannot properly respond to Lister's claims because Phan does not know to which instructions or proposed instructions Lister is referring. Without being placed on notice of the instructions or proposed instructions to which Lister assigns error, Phan cannot adequately present an argument as to why any

particular instruction was correctly given or refused. Because Lister has not described which jury instructions or proposed instructions she is asking the Court to review, or show that she timely objected on the record, Lister's claim regarding the jury instructions necessarily fails.

IV. CONCLUSION

Respondents Ryan Phan and Jane Doe Phan respectfully request that the Court affirm the trial court's rulings and the verdict in this case. Lister did not designate all relevant portions of the record and did not cite to any part of the record in her brief. As a result, the Court cannot reach the merits of Lister's arguments. Moreover, there is no evidence that the trial court abused its discretion. Therefore, the trial court's rulings and the verdict should be affirmed.

RESPECTFULLY SUBMITTED this 8 day of
February, 2016.

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DECLARATION OF SERVICE

I declare that I served the foregoing BRIEF OF
RESPONDENTS on the Appellant below:

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

Executed at Bellevue WA on this 8th day of
February, 2016.



Jill Skinner