No. 1036311

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Dominique M. Keimbaye, Petitioner v. Kimberly A. Exe, Respondent

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On Appeal From

Division I of the Court of Appeals of the State of Washington
No. 845039-I

The Superior Court of the State of Washington in and for King County – Honorable Adrienne McCoy
No. 21-2-07543-2 SEA

RESPONDENT KIMBERLY A. EXE'S ANSWER TO MOTION FOR JUDGMENT ON ALL REMAINING COMPENSATORY DAMAGES

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I. IDENTITY OF RESPONDENT

The Respondent is Kimberly A. Exe.

II. INTRODUCTION

This matter stems from an admitted rear-end motor vehicle collision between Petitioner Dominique Keimbaye ("Keimbaye") and Respondent Kimberly A. Exe ("Exe") in June 2018.

Unsatisfied with the result at trial, Keimbaye appealed this matter to Division One of the Court of Appeals of The State of Washington ("Court of Appeals"); the Court of Appeals affirmed the trial court judgment.

Keimbaye then filed a petition with the Washington State Supreme Court ("Supreme Court"). Exe filed an answer, which did not raise any new issues. Nevertheless, Keimbaye filed a reply to Exe's answer in violation of RAP 13.4(d). Keimbaye's reply included a motion requesting the Supreme Court enter judgment on all remaining compensatory damages.

The Clerk filed a motion on its own volition to strike Keimbaye's reply and set a briefing schedule for Keimbaye's new motion for judgment on all remaining compensatory damages. Exe requests this Court deny Keimbaye's motion.

III. CITATION TO COURT OF APPEALS DECISION

On September 30, 2024, in Case No. 845039-I, Division One of the Court of Appeals of The State of Washington issued an Unpublished Opinion affirming the decision of the trial court. On October 24, 2024, the Court of Appeals entered an Order Denying Petitioner Dominique Keimbaye's Motion for Reconsideration.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should Keimbaye's Motion for Judgment on All Remaining Compensatory Damages be denied because it does not meet the criteria outlined in RAP 10.4(d) and RAP 17.4(d)?

2. Should Keimbaye's Motion for Judgment on All Remaining Compensatory Damages be denied because the

Supreme Court does not have the power to award the relief Keimbaye seeks?

3. Should Keimbaye's Motion for Judgment on All Remaining Compensatory Damages be denied because the trial court was in the best position to weigh the evidence and enter judgment accordingly?

V. COUNTER STATEMENT OF THE CASE

This case arises from Keimbaye's claim for personal injuries incurred in a motor vehicle collision with Exe on June 18, 2018. The case was tried to a jury from July 11, 2022 – July 14, 2022. Exe admitted liability for the collision at trial and was the only defendant. During trial, Keimbaye called himself as the sole witness for his case-in-chief. Keimbaye rested his case without presenting any medical testimony to substantiate his injury claims.

After Keimbaye rested his case, Exe moved for Judgment as a Matter of Law under CR 50(a)(1) as to Keimbaye's past and future medical expenses. Exe's motion was granted. In

granting Exe's motion, the trial court ruled that Keimbaye had failed to meet his burden of proving both that his alleged injuries were caused by the collision and that the past medical treatment and associated expenses were reasonable and necessary. Because Keimbaye failed to meet his burden of proof with respect to his medical expenses, the issue of his past medical special damages was not submitted to the jury. The only issues submitted to the jury were Keimbaye's wage loss and general damages claims. The jury awarded Keimbaye $0 in past economic damages, $0 in future economic damages, and $20,000 in past and future noneconomic damages.

Unsatisfied with the result of the July 2022 trial and the unpublished September 2024 Court of Appeals decision affirming the trial court judgment,[1] Keimbaye filed Appellant's

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1 The Court of Appeals' Opinion noted "Keimbaye has appended to his brief of appellant a 'MOTION FOR REVERSAL/REQUEST FOR ADDITUR," but that motion is not properly before this court and is hereby denied." *See* Ex. 1 to Appendix to Answer at 8.

Petition for Review & Request for Relief ("Petition") with the Supreme Court on November 21, 2024, seeking review of the Court of Appeals' unpublished decision pursuant to RAP 13.4(b)(1), (3), and (4).

On January 10, 2025, Exe filed Respondent Kimberly A. Exe's Answer to Petition for Review & Request for Relief ("Answer"). In her Answer, Exe did not seek review of any issues not raised in Keimbaye's Petition.

Even though Exe did not raise any new issues in her Answer and a reply was therefore prohibited by RAP 13.4(d), on January 24, 2025, Keimbaye filed Petitioner's Reply to Respondent's Answer to Petition for Review & Request for Relief and Motion for Judgment on All Remaining Compensatory Damages ("Reply").

Also on January 24, 2025, the Supreme Court Clerk ("Clerk") wrote the parties advising that "it is unlikely that the Petitioner is entitled to file a reply," and that "a Clerk's motion to strike the reply, excluding the section which pertains to the

motion for judgment on all remaining compensatory damages,[2] will be set for consideration without oral argument by a Department of the Court at the same time that the Court considers the pending petition for review." Additionally, the letter from the Clerk set forth a briefing schedule for Keimbaye's Motion for Judgment on All Remaining Compensatory Damages ("Motion").

Keimbaye's Motion requested this Court:

> "enter direct judgment on all outstanding compensatory damages, including (1) medical expenses wrongfully excluded, (2) loss of earnings, (3) reasonable emotional distress and general damages, and (4) other statutory or discretionary relief as described here:
>
> 1) Past and future Medical Expenses documented: $30,000.00
>
> 2) Past and Future Wage Loss: $40,407.36

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2 While not explicitly stated by the Clerk, Exe presumes Keimbaye's Motion is being treated as a motion within a brief pursuant to RAP 10.4(d) and RAP 17.4(d) as the Motion was included within Keimbaye's Reply.

3) Non-Economic Damages (Significant pain due to a broken bone, Suffering, Emotional Distress): $150,000.00

4) Attorney Fees and Court Costs: In accordance with RAP 18.1, RCW 4.84.010, and RCW 4.84.185 if applicable: $18,595.35

5) Prejudgment and Post judgment Interest: Under RCW 4.56.110 and RCW 19.52.020, and at 12% annum beginning from the date of injuries on June 18, 2018 until compensatory damages paid in full. [3]

6) Sanctions and Punitive[4] Relief---Respondent's counsel

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[3] RCW 4.56.110 provides that interest shall accrue "from the date of entry" of the *judgment*, not the date of the accident.

[4] "Since its earliest decisions, [the Supreme Court] has consistently disapproved punitive damages as contrary to public policy. 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 v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589, 590 (1996) (internal citations omitted); *Grays Harbor Cnty. v. Bay City Lumber Co.*, 47 Wn.2d 879, 882, 289 P.2d 975, 977 (1955) ("[P]unitive damages are not recoverable in the absence of a statute expressly authorizing them..."); *Anderson v. Dalton*, 40 Wn.2d 894, 898, 246 P.2d 853, 855 (1952) ("[The Supreme Court] early committed itself to the view that the doctrine of exemplary, or punitive, damages is unsound in principle, and that such damages cannot be recovered except when explicitly allowed by statute.") Keimbaye has not identified any statute that provides for the award of punitive damages in this personal injury action.

engaged in conduct warranting sanctions under CR 11[5] and RAP 18.9(a)[6]: $100,000.00."

Motion at 21-24. The total amount requested in Keimbaye's Motion is $339,002.71. *Id*. at 24.

VI. ARGUMENT

A. Keimbaye's Motion Does Not Meet the Criteria Outlined in RAP 10.4(d) and RAP 17.4(d) and Must be Denied

RAP 10.4(d) and 17.4(d) both provide, in relevant part, "A party may include in a brief only a motion which, if granted,

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5 Keimbaye believes CR 11 sanctions are warranted for "Mischaracterizing legal precent and improperly influencing the trial court's exclusionary rulings prejudiced Petitioner's case." *See* Motion at 22-23. Keimbaye already had the opportunity to raise these arguments and they are not appropriately raised here.

6 RAP 18.9(a) provides that the appellate court may order a party or counsel "who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages..." Keimbaye has not identified any delay or rules violation by Exe. To the contrary, Keimbaye has not complied with the Rules of Appellate Procedure by failing to include the required appendix documents in his Petition pursuant to 13.4(c)(9), filing a Reply to Exe's Answer in violation of RAP 13.4(d), and including the subject Motion in his Reply in violation of RAP 10.4(d) and 17.4(d).

would preclude hearing the case on the merits." RAP 10.4(d); RAP 17.4(d); *Brower v. State*, 137 Wn.2d 44, 76, 969 P.2d 42, 60 (1998) (declining to consider a motion contained in a brief when the motion would not preclude hearing this case on the merits); *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308, 1310 (1986) (declining to address a motion which would "not preclude hearing this case on the merits"); *Money Mailer, LLC v. Brewer*, 194 Wn.2d 111, 130, 449 P.3d 258, 268 (2019).

A Motion "raised in a reply brief, is improper under RAP 17.4(d), which permits a motion in an opening or responsive brief, to which the opposing party has an opportunity to reply." *Hays Elliott Properties, LLC v. Horner*, 25 Wn. App. 2d 868, 875, 528 P.3d 827, 832 (2023).

Keimbaye's Motion must be denied because 1) if granted, it would not preclude deciding this case on the merits, and 2) it was not filed in his Petition; rather, it was included in his Reply, the filing itself of which was improper pursuant to

RAP 13.4(d). Keimbaye's Motion should accordingly be denied on these grounds.

B. The Supreme Court Does Not Have the Power to Grant the Relief Keimbaye Seeks

"We do not think [the Supreme Court] has the power to increase an award made by a jury as a part of its appellate jurisdiction, except, in a case where it appears upon the face of the record by a process of mathematical computation the amount of the award was an error, and even then the better practice might be to remand the case to the trial court to make such computation." *Baum v. Murray*, 23 Wn.2d 890, 903, 162 P.2d 801, 807 (1945).

Here, Keimbaye has not made any claims of mathematical computational errors with regard to the trial court judgment. As the Supreme Court does not have the power to increase the amount awarded by a jury absent a mathematical computational error, Keimbaye's Motion should be denied. The relief he seeks is outside the province of this Court and therefore improperly before it.

C. The Court of Appeals Found the Judgment of the Trial Court was Supported by the Evidence, and the Court of Appeals' Opinion Should be Affirmed

Appellate courts are "not in a position either to take evidence or to weigh contested evidence and make factual determinations." *State v. Walker*, 153 Wn. App. 701, 708, 224 P.3d 814, 818 (2009), *as amended on reconsideration* (Feb. 11, 2010) *abrogated on other grounds in State v. Peltier*, 181 Wn.2d 290, 296, 332 P.3d 457, 460 (2014). Where there is "substantial evidence, or reasonable inference from evidence, to support the verdict of the jury ... it must be sustained." *Swartley v. Seattle Sch. Dist. No. 1*, 70 Wn.2d 17, 23–24, 421 P.2d 1009, 1014 (1966); *Lantis v. Pfarr*, 67 Wn.2d 994, 995, 410 P.2d 900, 901 (1966) ("It is not our province to weigh the testimony, and we will not substitute our views on disputed facts for those of the jury or of the trial court where their findings are sustained by substantial evidence."); *Dyal v. Fire Companies Adjustment Bureau*, 23 Wn.2d 515, 522, 161 P.2d 321, 324 (1945) ("The question [of the measure of damages] is therefore one for the

trier of fact, usually a jury, to determine from all the facts and circumstances of the particular case.")

"Factual disputes are to be resolved by the trial court. The Washington constitution, by art. IV, § 6, vests that power exclusively in the trial court. The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. If we were so disposed, but we are not, we are not authorized to substitute our judgment for that of the trial court." *Stringfellow v. Stringfellow*, 56 Wn.2d 957, 959, 350 P.2d 1003, 1004, *opinion amended on denial of reh'g*, 56 Wn.2d 957, 353 P.2d 671 (1960); *Oil Heat Inst. of Wash. v. Town of Mukilteo*, 81 Wn.2d 7, 9, 498 P.2d 864, 866 (1972). "The function of ultimate fact finding is exclusively vested in the trial court. The power of [the Supreme Court] is appellate only." *Edwards v. Morrison-Knudsen Co*., 61 Wn.2d 593, 599, 379 P.2d 735, 739 (1963).

"[T]he function of [the Supreme Court] is different [from the trial court], and the ruling of the trial court upon the motion will not be disturbed upon appeal, unless it can be said that the verdict is so far inadequate or so excessive as to be without support in the evidence, or it must appear that the verdict was the result of some extrinsic consideration, such as bias, passion, or prejudice on the part of the jury." *Dyal, supra,* at 515. "The trial court not only heard the evidence, but also saw the injured complainants, observed their physical actions, and had its attention drawn specifically to the injured parts of their persons. That court was therefore eminently better qualified than are we to determine the character, extent, and effect of the injuries and the length of time the appellants had actually lost as the result of those injuries." *Id*. at 523–24.

The trial court here was in the best position to weigh the evidence in this matter and come to a decision. In its Opinion, the Court of Appeals affirmed that the decision of the trial court was supported by the evidence. *See* Ex. 1 to Appendix to

Answer at 1 ("Keimbaye now asserts pro se that numerous erroneous decisions of the trial court precluded a fair jury from considering relevant evidence supporting those damages. We disagree and affirm.").

Keimbaye did not identify any claimed bias, passion, or prejudice by the trial court, nor has he shown that the verdict was not supported by the evidence. Even assuming this Court has the power to do so, it would not be appropriate for this Court to arbitrarily enter judgment in favor of Keimbaye for an amount nearly seventeen times the amount of the trial court award when both the trial court and Court of Appeals already determined that the trial said award was supported by adequate evidence.

VII. CONCLUSION

Keimbaye's Motion should be denied at the outset because it does not meet the criteria identified in RAP 10.4(d) and RAP 17.4(d). Moreover, because the Supreme Court does not have the power to award Keimbaye the relief he seeks, and

because the trial court was in the best position to weigh the evidence and, pursuant to the Court of Appeals' Order did so adequately, Exe respectfully requests this Court deny Keimbaye's Motion.

I certify that this memorandum contains 2480 words in compliance with RAP 18.17.

DATED this 7th day of February, 2025.

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CERTIFICATE OF SERVICE

I, Judith Hong, hereby certify that I filed the foregoing with the Court of Appeals – Division I, State of Washington, and served same upon the following counsel of record:

Via Electronic Service via Washington State Appellate Court's Portal and Email Service

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DATED this 7th day February, 2025.

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February 07, 2025 - 2:55 PM

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Appellate Court Case Title:	Dominique Keimbaye v. Kimberly A. Exe

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