IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD HUNT, Appellant, v. DANILO SIJERA; COMCAST OF WASHINGTON IV, INC., a Washington corporation; AMY THAYER aka AMY THAYER FELICIANO, Respondents.	)	No. 63958-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 25, 2010

Grosse, J. — If substantial evidence is presented on both sides of an issue, the jury's finding on that issue is final, and the trial court abuses its discretion by granting a new trial. Here, the defense disputed every aspect to Richard Hunt's damages and presented expert testimony on the issue. The jury was presented with both sides of the issue of Hunt's damages. Any inconsistency in the evidence was for the jury to resolve. The jury's verdict finding that Hunt incurred medical expenses but did not incur general damages was within the ranges of the evidence and the trial court, therefore, did not err in denying Hunt's motion for a new trial. Nor did the trial court err in refusing to admit into evidence bills for Hunt's massage therapy because he failed to meet his burden of showing that the bills were both reasonable and necessary. Accordingly, we affirm the trial court's order denying Hunt's motion for a new trial.

FACTS

This appeal involves two motor vehicle accidents in which Richard Hunt was involved. The first accident occurred at the intersection of N.E. 45th Street and 7th Avenue N.E. in Seattle, near the N.E. 45th Street off-ramp from Interstate 5 (I-5) north. Danilo Sijera, a Comcast employee driving a Comcast van, was stopped in the right lane, which is a right-turn only lane; Hunt was stopped in the left lane, in which drivers can either turn right or proceed straight. When the light turned green, Hunt turned right, and Sijera drove straight through the intersection, at the direction of his co-worker who was in the van's passenger seat. The Comcast van struck the right side of Hunt's vehicle, damaging the van's bumper and scratching the passenger side and bumper of Hunt's vehicle.

The second accident occurred in Bellevue. Hunt alleged that, while he was stopped at an intersection, Amy Thayer rear-ended his vehicle.

At trial, Hunt's chiropractor, Dr. Jas Walia, testified that he referred Hunt to massage therapy. During Hunt's testimony, his counsel moved to admit the bills from the massage therapist who treated Hunt, Dr. Knopf LLC. Thayer's counsel objected, arguing that in order to be admissible, an expert must testify that the bills were reasonable and necessary. The trial court sustained the objection, and the massage therapy bills were not admitted.

The jury returned a special verdict form, finding that Thayer's negligence was not a proximate cause of Hunt's injuries, but that Sijera's and Comcast's negligence was a proximate cause. The jury awarded Hunt $6,990 in past

economic damages against Sijera and Comcast and $0 against Thayer, attributing 100 percent of the negligence to Sijera and Comcast. The jury awarded no non-economic, or general, damages. The trial court denied Hunt's motion for a new trial.

ANALYSIS

Damages Award

Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award when fairly made.[1] The law strongly presumes the adequacy of the verdict.[2]

We review an order denying a motion for a new trial for abuse of discretion.[3] Here, Hunt moved for a new trial on three of the grounds enumerated in CR 59:

> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
> . . .
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
> . . .
> (9) That substantial justice has not been done.

Where the party moving for a new trial argues that the verdict was not based upon the evidence, we look to the record to determine whether there was

[1] Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 329, 858 P.2d 1054 (1993).
[2] Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 176, 422 P.2d 515 (1967).
[3] Sommer v. Department of Soc. and Health Servs., 104 Wn. App. 160, 170, 15 P.3d 664 (2001).

sufficient evidence to support the verdict.[4] If sufficient evidence to support the verdict exists, it is an abuse of discretion to grant a new trial.[5] "A trial court has no discretion to disturb a verdict within the range of evidence."[6]

A trial court may grant a motion for an award of additur if it finds that "the damages awarded by a jury [are] so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice."[7] Where the jury's verdict is within the range of credible evidence, a trial court has no discretion to find that passion or prejudice affected the verdict for the purpose of ordering additur.[8]

The Supreme Court in Palmer v. Jensen[9] stated:[10]

> 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 a verdict, therefore, turns on the evidence.

The trial court, in deciding whether to grant a motion for a new trial, is entitled to accept as established those items of damage that are conceded, undisputed, and beyond legitimate controversy.[11] But, if substantial evidence is presented on both sides of an issue, the finding of the jury is final, and a new

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[4] McUne v. Fuqua, 45 Wn.2d 650, 652, 277 P.2d 324 (1954).
[5] McUne, 45 Wn.2d at 653.
[6] Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007).
[7] RCW 4.76.030.
[8] Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989).
[9] 132 Wn.2d 193, 202, 937 P.2d 597 (1997).
[10] Because Hunt bases his argument regarding general and special damages on a decision from the Court of Appeals, which the Supreme Court overturned, we decline to address it here. Palmer, 132 Wn.2d at 203.
[11] Ide v. Stoltenow, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955).

trial is not warranted.[12]

The evidence regarding Hunt's pain and suffering presented at trial consists of the following. Dr. Walia, the chiropractor, testified using a pain scale. Dr. Walia saw Hunt a total of 57 times between March 15 and September 10, 2007. During the first visit, Hunt reported that his pain was a 7 out of 10. He reported that his pain level increased to an 8 out of 10 after the second accident, and toward the end of his 57 visits with Dr. Walia, Hunt reported that his neck pain was a 2 out of 10, his low back pain was 3 out of 10, and his right shoulder pain was a 2 out of 10.

Hunt testified that his pain level was a 7 after the accident with Sijera. He flew to Miami after this accident and did not feel able to go scuba diving. Shortly after the second accident, Hunt attended a benefit at the Playboy Mansion and testified that he felt "miserable" during the trip and, when shown a photograph of him smiling with two "bunnies," testified that he would have been smiling much more broadly in the photograph had he been feeling well. In May 2007, Hunt took a trip to Maui and testified that during this trip, his pain level was between a 6 and 9 out of 10, depending on his activity. He also testified that he did not wakeboard during June, July, or August 2007 because it was too painful.

Derek Anderson, Hunt's friend, testified that Hunt was less active when he was wakeboarding after the accidents and that he failed to make the flag football team the season after the accidents. Anderson also testified that Hunt

[12] Thompson v. Grays Harbor Cmty. Hosp., 36 Wn. App. 300, 308-09, 675 P.2d 239 (1983).

complained about pain during the trip to Miami and agreed that Hunt would have been smiling more broadly in the photograph from the Playboy Mansion had he not been in pain. Tryg Saterlee, Hunt's employer, testified that after the accidents, Hunt was not at "his hundred percent like he usually is."

The defense presented Dr. Thomas Renninger, a chiropractor. He testified that in his opinion, after reviewing Dr. Walia's records and the reports of the defense biomechanical expert, Dr. Alan Tencer, neither accident in which Hunt was involved caused him injuries that would require any chiropractic care or massage. Dr. Renninger noted that Hunt did not seek treatment from Dr. Walia until five weeks after the first accident, that Dr. Walia made no positive objective findings, and that Hunt's complaints of pain to Dr. Walia were not consistent with the type of injury he received in the accidents. Dr. Renninger opined that any possible injury Hunt suffered because of the accident should have resolved within five weeks. Dr. Renninger testified that, in his opinion, neither Dr. Walia's charges nor the massage therapist's charges were reasonable or necessarily related to the two accidents.

The information from Dr. Tencer that Dr. Renninger reviewed was related to the forces involved in the two accidents given, for example, the weights of the vehicles involved, the speed at the time of impact, etc. Dr. Tencer opined that the accident between Thayer and Hunt had a force of 2.4G, and the accident with Sijera had a force of 2.9G. By comparison, Dr. Tencer testified that the daily activity of walking rapidly will induce a force of 2 to 3G, and soccer and flag

football will induce a force of up to 5G. Defense counsel asked Dr. Tencer, "So is it fair to conclude that this is not a significant force acting upon the occupants of the vehicles in the accident?" He replied, "Let's say that – well, it's within range of their daily experienced forces. I'll leave it at that."

Given the evidence presented, this is not a case where the jury refused to believe testimony about general damages even where there was no contradiction or dispute, such as in Palmer, where the defendant did not introduce any evidence disputing the plaintiff's damages.[13] Rather, the testimony presented in this case as to Hunt's pain and suffering is similar in nature to that presented in Lopez v. Salgado-Guadarama[14] in that the defense disputed every aspect of Hunt's claimed damages, the defense experts testified to no objective medical findings in support of the plaintiff's extensive complaints of pain, and an orthopedist offered by the defense opined that the plaintiff should have recovered from any injury quickly after the accident. In Lopez, in affirming the trial court's denial of the plaintiff's request for a new trial or additur, the court concluded: "Given the evidence, the jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages."[15]

The same conclusion can be reached here. The jury's verdict was within the range of the evidence presented and the trial court, therefore, had no

[13] See Palmer, 132 Wn.2d at 200 (citing Ide, 47 Wn.2d at 851).
[14] 130 Wn. App. 87, 122 P.3d 733 (2005).
[15] 130 Wn. App. at 93.

discretion to disturb it.[16] Any inconsistencies in the evidence are matters affecting weight and credibility and, as such, are matters within the exclusive province of the jury.[17] Accordingly, the trial court did not abuse its discretion in denying Hunt's motion for a new trial or additur.

Massage Therapy Bills

The trial court sustained Thayer's counsel's objection to the introduction of Hunt's massage therapy bills on the ground that such evidence is admissible only upon expert testimony that the expense was reasonable and necessary. Hunt argues that the medical bills were admissible.[18]

A trial court has broad discretion in ruling on evidentiary matters, and we review the trial court's decision on evidentiary matters only for abuse of discretion.[19]

With regard to medical bills:

> A plaintiff in a negligence case may recover only the reasonable value of medical services received, not the total of all bills paid. Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills. In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable.[20]

Here, Hunt presented no evidence that the massage therapy bills were

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[16] Herriman, 142 Wn. App. at 232.
[17] Herriman, 142 Wn. App. at 232.
[18] In his reply brief, Hunt claims that neither defendant objected to the bills when they were introduced as exhibits prior to trial. Hunt's counsel acknowledged that Thayer's counsel objected during trial to the introduction of the bills and that the trial court sustained that objection.
[19] Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).
[20] Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997) (internal citations omitted).

necessary and reasonable. Although Dr. Walia testified that he referred Hunt to massage therapy, neither he nor any other witness testified as to the reasonableness or necessity of the massage therapy bills. In fact, Dr. Walia was not aware of what treatment Hunt received at the massage therapist.[21] Because Hunt did not meet his burden as to the admissibility of the massage therapy bills, the trial court did not abuse its discretion in refusing to admit the bills into evidence.

Attorney Fees

Sijera and Comcast request an award of attorney fees under RAP 18.9 on the ground that Hunt's appeal is frivolous. An appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal.[22] Notwithstanding Hunt's initial reliance on the Court of Appeals opinion in Palmer that the Supreme Court reversed, his appeal is not frivolous under the foregoing standard. Sijera and Comcast are not entitled to an award of attorney fees under RAP 18.9.[23] We deny their request for an award of attorney fees.

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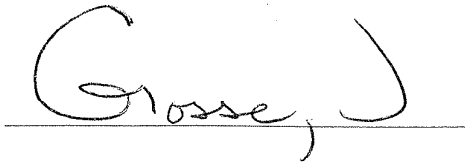
[21] In his reply brief, Hunt insinuates that the defense expert, Dr. Renninger, testified that he would have referred Hunt to massage therapy had he been treating him. However, two of Hunt's citations to the record in support of his assertion are to statements of counsel, not Dr. Renninger. The other citation is to Dr. Renninger's testimony that he has referred some patients to massage therapy. Dr. Renninger did not testify that he would have referred Hunt to massage therapy. To the contrary, as discussed, Dr. Renninger opined that the treatment Hunt received was neither reasonable nor necessary.

[22] Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003).

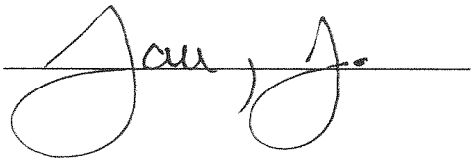
[23] In his reply brief, Hunt not only argues against Sijera's and Comcast's request for fees, but also accuses their counsel of violating unspecified federal criminal laws in obtaining discovery. He also accuses Thayer's counsel of wanting to refer to Hunt by his MySpace screen name and asks that defense counsel "be

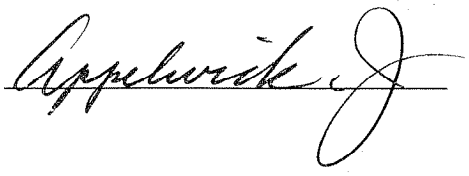
We likewise deny Thayer's request for an award of attorney fees. Her entire request is, "Thayer asks for attorney fees involved in this appeal pursuant to MAR 7.3 and RCW 7.06.060." Both argument and citation to authority are required under RAP 18.1 to advise the court of the appropriate grounds for an award of attorney fees.[24] Thayer provides no argument. In addition, RAP 18.1(b) requires the requesting party to devote a section of its brief to the request for fees. Thayer does not do so.

We affirm the trial court's order denying Hunt's motion for a new trial and its refusal to admit his massage therapy bills into evidence. We deny Sijera's, Comcast's, and Thayer's requests for awards of attorney fees.



WE CONCUR:





reprimanded." Hunt's argument is unsupported by legal authority or citations to the record and we do not address it.

[24] Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC, 138 Wn. App. 443, 462, 158 P.3d 1183 (2007).