IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NADEZHDA PANITKOVA, individually, and NELLI PANITKOVA and DENIS PANITKOVA, minor children and herein represented by their natural parent and legal guardian, NADEZHDA PANITKOVA, Appellants, v. PAVEL PANITKOV, individually, and KIM KUHNHAUSEN and "JOHN DOE" KUHNHAUSEN, individually and/or the marital community composed thereof, Respondents.	)	No. 64596-0-I UNPUBLISHED OPINION FILED: June 6, 2011

SCHINDLER, J. — A jury's verdict on damages will not be disturbed, and a motion for a new trial will be denied, if the verdict is within the range of the evidence. The jury in this personal injury action awarded no damages to Nelli Panitkova and Denis Panitkova and only economic damages to Nadezhda Panitkova. Because the verdict was within the range of the evidence, the superior court did not abuse its discretion in denying their motion for a new trial. Accordingly, we affirm.

FACTS

Nadezhda, Nelli, and Denis Panitkova sued Pavel Panitkov and Kim Kuhnhausen for personal injuries they allegedly suffered in a car accident. They sought damages for medical treatment expenses, including chiropractic and massage therapy treatments, and general damages, including pain and suffering. Nadezhda[1] alleged she incurred $3,889.23 in chiropractic expenses and spent $2,187.50 for massage treatments. Nelli and Denis claimed they each incurred $749.40 in medical expenses.

At trial, Nadezhda, Nelli, and Denis testified regarding their injuries, pain, and suffering. Chiropractor Alnoor Bhanji testified that, in his opinion, their injuries were caused by the accident and that their chiropractic and massage treatments were reasonable and necessary. Dr. Bhanji admitted he did not treat the plaintiffs but testified that he reviewed their medical records.

The defense called no experts but vigorously challenged the testimony and credibility of the plaintiffs' witnesses. During cross-examination, defense counsel confronted Dr. Bhanji with a questionnaire Nadezhda completed prior to her initial chiropractic examination. After indentifying her problem areas as her head, neck, low-back, arm, and leg, she denied having any "previous complaints in the now injured areas."[2] Defense counsel asked Dr. Bhanji if Nadezhda ever mentioned her pre-accident conditions, including back pain and headaches, in any of the records he had reviewed, and he said, "I didn't see it." Counsel confronted Dr. Bhanji with other pre-

[1] We refer to the parties by their first name for purposes of clarity and mean no disrespect by doing so.

[2] (Internal quotation marks omitted.)

accident medical records, including an MRI notation indicating that Nadezhda's "clinical history . . . includes severe low-back pain, left leg pain," and reports from a neurologist and treating physician reciting a recent history of headaches and chronic low-back pain.[3] When asked if Nadezhda mentioned any of these conditions in any of the records he reviewed, Dr. Bhanji again said, "I didn't see it."

Defense counsel cross-examined Nadezhda about her intake questionnaire and the preexisting conditions and treatments she failed to mention on it. Counsel also confronted her with deposition testimony in which she claimed her prior back problems had resolved by early 2006 and she had no more back pain until the accident in October 2007. This deposition testimony conflicted with medical records indicating she had back pain six months before the accident. Nadezhda conceded that the airbags in her car and Kuhnhausen's car did not deploy during the accident and that she had declined medical care for herself and her children at the accident scene. She also spent the day after the accident at a wedding.

Nelli and Denis testified that they were seeing Dr. Oleg Gordienko at the time of the accident. Although both testified they experienced pain immediately after the accident, Nadezhda did not take Nelli to Dr. Gordienko and did not mention Denis's injuries during two visits shortly after the accident. Nadezhda admitted she did not seek medical treatment for Denis or Nelli until her lawyer provided her with a list of chiropractors.

Rachelle Pederson and Kim Kuhnhausen both testified that the cars involved in

[3] (Internal quotation marks omitted.)

the accident were travelling at a very slow speed and were essentially parallel when they collided. Pederson described the accident as "very quiet" and stated that the vehicles "just kind of glided together."

The jury instructions set forth the measure of damages and directed the jury to award $4,000 in stipulated property/economic damage. Jury Instruction No. 20 states, in pertinent part:

> You must first determine the amount of money which will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the negligence of the defendant.
>
> If you find for the plaintiffs, your verdict should include the following undisputed item:
>
> - $4000 for the value of plaintiff's damaged car.
>
> In addition, you should consider the following past economic damages:
>
> - The reasonable value of necessary medical care, treatment and services received to the present time.
> - The reasonable value of expenses for travel to and from plaintiff's health care providers for examination and treatment. . . .
>
> In addition, you should consider the following noneconomic damages elements:
>
> - The nature and extent of the injuries.
> - The disability and loss of enjoyment of life experienced.
> - The pain and suffering, both mental and physical, already experienced.
>
> The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The jury awarded Nadezhda $4,300 for "Economic Damages" but nothing for noneconomic damages. Nelli and Denis received no damages.

Nadezhda, Nelli, and Denis moved for a new trial, arguing in part that the verdict

did not do substantial justice, was contrary to the evidence, and was so inadequate as to show passion or prejudice.[4] Respondents countered that damages were disputed and that the verdict was within the range of the evidence. The trial court denied the motion for a new trial. This appeal followed.

ANALYSIS

Juries have considerable latitude in assessing damages and a damage award will not be lightly overturned. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 329-30, 858 P.2d 1054 (1993); Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 176, 422 P.2d 515 (1967) (the law gives strong presumption of adequacy to the verdict). Although courts have discretion to grant a motion for a new trial if a damage award is contrary to the evidence, the motion must be denied if the verdict is within the range of the evidence. Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007); Woolridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). In reviewing a court's exercise of discretion on such motions, we view the evidence in a light most favorable to the verdict. See Palmer, 132 Wn.2d at 197-98. We also bear in mind that the trial court is in a better position than this court to determine whether a verdict is the product of passion or prejudice, or is within the range of the evidence. See Physicians Ins. Exch., 122 Wn.2d at 329-30.

Appellants contend the jury's verdict was outside the range of the evidence because "Dr. Bhanji's testimony and the plaintiffs' testimony of their injuries was

[4] See CR 59(a)(5), (7), (9).

uncontradicted." This contention ignores medical records and cross-examination undermining Dr. Bhanji's conclusions and the credibility of plaintiffs' claims. Given the evidence and testimony, the jury could have reasonably concluded that the plaintiffs largely failed to prove either the need for treatment, or compensable pain and suffering. The verdict was within the range of the evidence and the trial court did not abuse its discretion in denying a new trial.

Our conclusion is supported by Gestson v. Scott, 116 Wn. App. 616, 620-25, 67 P.3d 469 (2003). In that case, Gestson went to an emergency room following a car accident and immediately sought treatment with a chiropractor for back pain. At trial, she testified that she suffered back, leg, and neck pain, as well as headaches, following the accident. Her chiropractor testified that she reported neck pain and stiffness throughout her treatment. A witness to the accident testified that Gestson complained of neck pain immediately after the accident. Several experts testified that, more probably than not, Gestson's neck injury was caused by the accident. Gestson, 116 Wn. App. at 618-19.

The defense, however, "raised doubts as to the causal connection between the accident and Gestson's neck injury." Gestson, 116 Wn. App. at 623. They presented evidence that the accident involved a very minor impact, that Gestson did not complain of neck pain or headache in the emergency room, and that her only pain on the evening of the accident was in the same area as a preexisting back condition. When filling out a questionnaire at the chiropractor's office on the day after the accident, Gestson did not mention neck pain or stiffness or restriction of motion in her neck.

Rather, she only mentioned headaches, back pain, and stiffness. "Most significantly, she indicated that within the previous two years she had experienced headaches, numbness, neck pain or stiffness, and foot problems." Gestson, 116 Wn. App. at 623-24. Gestson conceded at trial that throughout the 1990s, she had experienced significant lower back pain, pain and numbness in her arms, and neck problems. Gestson, 116 Wn. App. at 624.

Given the evidence of preexisting conditions and a minor collision, the Gestson court held that the jury could have disregarded the opinions of Gestson's experts and that the verdict was within the range of the evidence. Gestson, 116 Wn. App. at 624-25. The same is true here. The trial court was within its discretion in denying a new trial.

Affirmed.

Schindler, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.