

No: 67951-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

Vahit Saylik
Appellant,

vs.

David Walker
and Jane Doe Walker
Husband and Wife,

Respondents.

REPLY BRIEF OF APPELLANT

Ahmet Chabuk (WSBA #22543)
Attorney for Vahit Saylik, Appellant
11663 Ivy Lane
Silverdale, WA 98383
(360) 692-0854

Appellant, (Vahit Saylik, replies to Brief of Respondents as follows:

In Reply to the PROCEDURAL HISTORY:

In his **Response, in page 1** (in Procedural History), Walker describes the accident as “a minor vehicle-bicycle collision” without stating the fact that Saylik was hit by Walker’s motor vehicle and Saylik was taken in an ambulance to an emergency room for treatment of his injuries (APPENDIX 12-13).

In his **Response, in page 2**, the implied statement that Walker was informed of Saylik’s overseas residence only by the October 30th declaration is incorrect: Almost two years earlier, on 01-08-2010, Saylik responded and notified Walker’s attorney of his plans to use the transcript of deposition under CR 32. (APPENDIX page 1, “leave of Court for use of the deposition at the trial – filed on 01-08-2010). Moreover, in his same response, Saylik asked the trial court for “Grant for leave of Court, under CR 32, for use of the deposition of the plaintiff at the trial as the plaintiff lives in Ankara, Turkey.” (The bottom of page of CP 219).

In addition, in the same “response,” (on 01-08-2010), Saylik repeated nine different times the fact that Saylik lived in Ankara, Turkey. The notice was almost two years prior to the day of the trial

and prior to the “October 30th declaration.” (APPENDIX pages 1-5; CP 219-223).

Similarly, almost two years prior to the day of the trial, in Walker’s “*Reply on Motion to Compel Deposition of Plaintiff*,” (filed on 01-11-2010), Walker’s attorney acknowledged the notice of Saylik’s intent to use the transcript pursuant to expressed their opposition to it (APPENDIX 7-8; CP 216, lines 23-25 and CP 217, lines 1-3) . However, later, Walker not only consented Saylik’s use of the transcript during the arbitration hearing but also provided a copy for Saylik’s use and the transcript was used at the arbitration in lieu of Saylik’s live testimony.

In addition, almost two years prior to the day of the trial, during his deposition, on 01-29-2010, Saylik clearly testified under oath that he was residing in Turkey (APPENDIX p. 10 and p. 15)’ -- CP 147, 155).

In his **Response, in page 2**, it is false that Saylik’s motion for discretionary review, in the Court of Appeals, was dismissed: Initially order of dismissal had been entered inadvertently but it was granted a few days later. Commissioner Neel ruled on 02-16-2012 that “Upon proof that the complaint has been dismissed, Saylik’s appeal will go forward pursuant to RAP 2.2(a)(3). (APPENDIX page 19). Yet, a

month later, on 03-16-2012, in the trial court, Walker's attorney declared to the court, under penalty of perjury, that Saylik's motion for discretionary review was dismissed in the Court of Appeals and asked the trial court for award of attorney's fees for work in the Court of Appeals. (APPENDIX 18, 17 – CP 49-50).

Similarly, in his **Response, in page 2**, in the footnote, it is incorrect that Saylik's Motion in the Merits in the Court of Appeals was denied. In fact, no action was taken on that motion because, apparently, such a motion was not allowed when a motion for discretionary review was pending.

In his **Response, in page 3**, Saylik's attorney has already admitted that, initially, on 10-15-2008, when he filed the Complaint, he had the misunderstanding that Saylik was living in Everett Washington (rather than simply visiting his adult son there for a few months). However, when more than 1 year and 2 months later, Walker requested to take a deposition of Saylik and, on 12-31-2009, filed his motion to compel (CP 224), Saylik's attorney learned of the fact that Saylik was back in Turkey where he lived and that he had been simply visiting his adult son for a few months in Everett earlier rather than living there. Saylik's attorney repeated 9 times that Saylik lived in Turkey in his response to motion to compel (on 01-08-2010 – which

was 1 year and 10 months prior to scheduled trial date of 11-08-2011 (APPENDIX 1-5 – CP 219-223).

In his **Response, in page 4**, not true that Saylik was assessed liability. It was Walker (the defendant) who was assessed liability, not Saylik, in the accident. It was Saylik, not Walker, who was taken in an ambulance to hospital emergency room (APPENDIX p. 12-13).

In his **Response, in page 4**, Walker is correct in stating the fact that, during the arbitration hearing (on 08-13-2010), Walker had no objections to Saylik's use of the transcript of his deposition in lieu of his in-person testimony. Interestingly, the transcript was provided by Walker's own attorney to Saylik's attorney for his use during the arbitration hearing. Moreover, the deposition had been taken by Walker's attorney as an adverse party.

Saylik's use of the transcript during the arbitration hearing was approximately 1 year and 3 months prior to the day of the scheduled trial date of 11-08-2011. And the deposition had been taken more than 1 year and 9 months prior to scheduled date of the trial. In his deposition, Saylik clearly testified under oath that he lived in Turkey (APPENDIX p. 10 and p. 15).

When Walker's attorney provided a copy of the transcript for Saylik's use during the arbitration, Walker's objection to its use at the

trial (more than 1 year and 3 months later) was waived and he had no basis for the objection.

Walker's attorney never expressed any need or demands for Saylik to be present during the arbitration hearing or during the trial. Having taken the deposition of Saylik, having provided a copy of the transcript to Saylik's attorney and consented to its use earlier during the arbitration hearing, Walker offered no reasons as to why he would need to have Saylik at the trial – in addition to transcript of the deposition.

Now, it is reasonable to conclude that Walker is trying to force Saylik to drop his court action against him.

In addition, after the arbitration hearing, when Saylik filed his notice for trial de novo, Walker never expressed any change of mind and an intent to object to Saylik's use of the transcript at the trial, on 11-08- 2011.

In his **Response, in page 4**, it is not true that the "communication from counsel made it unclear as to where Saylik was residing." Saylik's counsel did nothing to suggest that Saylik's residence was any different than what Saylik had testified during his deposition and also in his responses to motion to compel (APPENDIX p. 1-5 and p.10 and p.15).

Saylik's attorney had reminded Walker's attorney about Saylik's unavailability with use of his words "**as you know**" Saylik lived in Turkey, which was not a new notice.

In his **Response, in page 5**, on the issue of hardships in trying to testify over the phone from overseas, Walker's own attorney had provided an extensive arguments in their earlier opposition as to why a telephonic testimony was not acceptable to them. (CP 217 – APPENDIX p.7 and p. 8).

In his **Response, in page 6**, it cannot be true that Walker served "via fax and e-mail" because Saylik's attorney does not have a dedicated fax number, cannot receive fax and Walker's attorney nor anyone else ever faxed anything to him during the past 3 or 4 years. Saylik's attorney may be able to fax out manually, but he does not have a fax number and no means to receive a fax. The declaration of service is incorrect and Walker's motion for bond was not received by Saylik in a timely manner.

In reply to ARGUMENT

In his **Response, in page 9**, Walker's argument that the "liability is in dispute" is, in itself, frivolous and is in violation of CR 11. Defendant Walker hit Saylik with his motor vehicle as Saylik was crossing over a cross walk. During the deposition of Saylik, no

questions were asked and no attempts were made to obtain facts for even an inference that the liability may be in dispute. Moreover, a short deposition of Walker, himself, was taken immediately after Saylik's deposition was done and Walker offered no testimony to contradict Saylik. Now, the argument that the liability is in dispute is in violation of CR 11.

In his **Response, in page 9**, over the issue of **use of transcript of the deposition**; the argument that plaintiff "relocated" to Turkey is frivolous. Saylik did not re-locate. He was simply visiting his adult son in Everett for a few months and went back to Turkey, where he lives. This fact was clearly made during Saylik's web-cam deposition and also prior to the deposition almost two years earlier (APPENDIX p. 15 and p. 1-5).

The trial court may have discretion in applications of Rule CR 32(a)(3)(B) which provides that

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition.

However, discretion of the trial court comes into play when a determination of factual circumstances as to unavailability of the witness is made. The trial court would have had significant discretion

if the unavailability was questionable, where the court would have decided whether or not the witness was indeed unavailable or his unavailability was arranged by himself in bad faith. In this case at bar, no such an argument was made. During the deposition and a few weeks prior to the deposition, it was made clear that Saylik was living in Turkey and was simply visiting his adult son earlier for a few months in Everett. These facts were not disputed nor argued.

Interestingly, Walker cites *Hammond vs. Braden*, 16 Wn.App. 773, 559 P.2d 1357 (Wash.App. 1977) where, in a personal injury case, the Court of Appeals cited *Wigmore, Evidenc*, and quoted:

Where the witness, at some time since trial begun (sic) and prior to the moment when his deposition is offered, has been within reach of process, but is not at the precise moment, the deposition's admissibility would seem to depend on whether the witness' absence is due in any respect to bad faith on the proponent's part;

5 J. Wigmore, Evidence § 1415 at 240 (Chadbourn rev. 1974).

Here there is no such allegation of bad faith, and there is evidence that at the time [. . .] deposition was offered, he was out of the country. Accordingly, we find that the trial court did not abuse its discretion when it admitted the deposition. *In re Estate of Maher*, 195 Wash. 126, 79 P.2d 984 (1938); *Kellogg v. Wilcox*, 46 Wash.2d 558, 283 P.2d 677, 286 P.2d 114 (1955).

In the case at bar, there has been no allegation that Saylik made himself unavailable in bad faith. And Saylik was in Washington only for a few months while he was visiting his adult son, who worked in

Everett and he was gone back to Turkey where he lived. Therefore, the trial judge did not have an issue which needed to be decided based on discretion of the judge and the trial judge did not enter such a finding. Walker raised no issues in the trial court to question the circumstances as to why Saylik was unavailable. The fact that Saylik lives there has been known since Walker took Saylik's deposition and a few weeks prior to the deposition. Now, Walker is trying to raise issues which were not raised in the trial court.

Based on the facts of this case, if Saylik could not benefit from the language of CR 32(a)(3)(B), no one else would be able to benefit from that rule.

Rules CR43 must be read together with the other rules including CR 32(a)(3)(B). A defendant may be able to demand trial attendance of a plaintiff but the defendant in this case has already taken a deposition of the plaintiff and made no efforts to supplement his deposition if he had any additional questions. Moreover, the facts provided by Saylik are very short and basic as to how he was hit by Walker's motor vehicle as he was crossing over a crosswalk and how he was injured (APPENDIX p. 11-14). These facts are all in transcript of the deposition. Walker made no efforts to explain as to why he would need Saylik to be testifying in court in addition to use of the transcript.

The only reason can be that Walker is trying to force Saylik to abandon his complaint against him.

In his **Response, in page 13**, Walker's argument that Saylik has 'refused' a telephonic testimony cannot have been made in good faith. There has been no refusal. The technical and logistic problems of testifying from a third-world country with somewhat limited and questionable dependability of the telephone service while the jury is waiting in the courtroom, trying to listen to a phone call from overseas. These concerns would not be so critical when a deposition is taken because a deposition can be somewhat flexible. Now that the transcript is available and CR 32 provides the flexibility for its use, it does not serve justice to force Saylik to take the risks of unreliable telephonic testimony from overseas.

Ironically, prior to the webcam deposition, Walker strongly opposed to telephonic deposition as well as a telephonic testimony of Saylik (APPENDIX p. 6-8).

In his **Response, in page 14**, Saylik never argued against a party's right to ask for trial attendance of the opposing party. In this case, Walker already took a deposition of Saylik, provided the transcript to Saylik's attorney, after waiting more that a year, consented to Saylik's use of the transcript during the arbitration

hearing and, only a few days prior to the day of the trial, he changed his mind and decided that he would not consent Saylik's use of the transcript at the trial. And Saylik's knowledge of facts are so basic and so limited as provided in the transcript. Walker cannot be demanding in good faith that he needs live testimony of Saylik during Saylik's own case against Walker. Walker's demand and position is frivolous.

In his **Response, in page 15**, it is frivolous that Walker would **argue now that the liability was disputed**. During the deposition, Walker's attorney asked the right questions to Saylik and received the facts of the accident and Saylik's injuries and ambulance trip to the emergency room. During his own deposition, Walker never disputed any part of the testimony given by Saylik. Now, his argument is frivolous and made in bad faith. Walker had a direct examination and cross examination of Saylik. Walker has Saylik's deposition testimony for his use. Walker's arguments are made in bad faith.

In addition, the trial court did not make any factual findings and, therefore, did not have any issues for a discretionary ruling. Moreover, no findings of fact and conclusions of law was entered.

In his Response, in page 16, over the **issue of bond**, Walker is not being reasonable in his argument that the Supreme Court's holding in *Swift v. Stine* 3 Wash. Terr. 518 (Wash. Terr. 1888)

does not apply here with his allegation that “Walker did not learn until correspondence of October 20, 2011.” These allegations are contradicted by Saylik’s pleadings served and filed almost two years earlier and also by Saylik during his deposition almost two years earlier. (APPENDIX p. 1-8 and p. 15) and also by the fact that more than approximately 1 year and 3 months earlier Walker had provided a copy of the transcript to Saylik’s attorney and consented to its use during the arbitration hearing.

In his Response, in page 17, the argument that the declaration of service “was faxed and e-mailed two days prior to mailed copy” cannot be correct. The declaration does not claim that the alleged fax was sent to a certain fax number because Saylik’s attorney does not have a dedicated fax and a fax number. Even though he can manually send out a fax, he is not capable of receiving a fax. The declaration is incorrect. The alleged fax and the email were not received by Saylik’s attorney.

In his Response, in page 19, over the **issue of bond,** Walker’s argument is misdirected. The issue is not whether or not RCW 4.84.230 provides for a bond upon demand. The issue is whether or not it was waived when it was made almost two years after the fact of Saylik’s overseas residence was declared to Walker pursuant to the

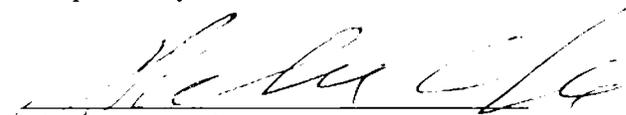
holding of the Washington Supreme Court in *Swift vs Stine*, as cited above.

In his Response, in page 19, over the issue of award of attorney's fees, after he was informed that Saylik was living in Turkey, Walker had almost two years to ask for a bond and to object to Saylik's use of the transcript. Yet he brought his request for bond and his motions only a few days before the trial and caused Saylik to file his pleadings to object, as a direct result of which, Walker demanded huge sums of attorneys's fees for work done after the arbitration. If Walker had not waited so long in bringing his motions, those late court proceedings would not have been needed and no attorney's fees would have been justified. The claim of attorneys' fees for work done so close to the date of the trial cannot be justified.

CONCLUSION

For the reasons indicated above, the Court of Appeals should reverse the trial court and award terms, sanctions, reasonable attorneys fees and costs to Vahit Saylik in this case.

Respectfully submitted on this December 14, 2012



Ahmet Chabuk (WSBA #22543)
Attorney for appellant, Vahit Saylik
11663 Ivy Lane, Silverdale, WA 98383
(360) 692-0854

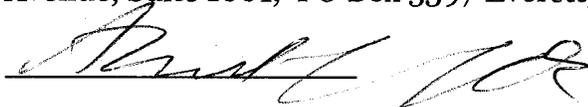
APPENDIX

(Emphasis in the appendix was added)

- Pages 1-5: “Response and Declaration in Opposition to Motion to Compel the Deposition of Plaintiff” – (CP 219-223).
- Pages 6-8: Selective pages from Reply on Motion to Compel Deposition of Plaintiff – (CP 214, 216, 217).
- Pages 8-15: Selective pages from Transcript of the deposition of Vahit Saylik, on 01-29-2010 – (CP 145, 147, 151-155).
- Pages 16-18: Selective pages from Motion for Prevailing Party Determination and Judgment on Arbitration Award for Fees and Costs – (CP 49-51).
- Page 19: Ruling by the Commissioner of the Court of Appeals, **dated February 16, 2012**: “Upon proof that the complaint has been dismissed, Saylik’s appeal will go forward pursuant to RAP 2.2(a)(3).
- Page 20-21: The court’s opinion in *Hammond v. Braden*, 16 Wn.App. 773, 559 P.2 1357 (1977).
- Pages 22-23: The court’s opinion in *Swift v. Stine* 3 Wash. Terr. 518 (Wash. Terr. 1888)

DECLARATION OF SERVICE:

I certify that on December 14, 2012, I served a copy of this document on defendant’s counsel by mailing it first class mail postage prepaid to Megan O. Masonholder, Anderson Hunter Law Firm, 2707 Colby Avenue, Suite 1001, PO Box 5397 Everett, WA 98206-5397



Hearing Date: 01/12/2010
Time: 10:30 A.M.
Court Commissioner
Civil Calender

FILED 01-08-2010

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

Vahit Saylik

Plaintiff,

NO: 08 2 08163 8

vs.

David Walker and Jane Doe Walker
Husband and Wife,

Defendants.

RESPONSE AND DECLARATION
IN OPPOSITION
TO MOTION TO COMPEL THE
DEPOSITION OF PLAINTIFF

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION TO COMPEL

1. RELIEF REQUESTED

a. Motion to strike: Vahit Saylik moves the Court to strike the **attachments** of the motion of counsel of the defendant as they contain some portions of certain settlement communications between the opposing attorneys and they were attached to defendant's motion improperly and unnecessarily;

b. Deny defendant's (David Walker's) motion for Court's leave for his own deposition to be taken only after a deposition of the plaintiff is taken;

c. Deny defendant's motion for a court order requiring deposition of all parties to be held only in Snohomish County;

d. Deny defendant's motion for award of attorneys fees;

e. Grant leave of Court for deposition of the plaintiff to be taken over telephone, under CR 30(a)(7), as the plaintiff lives in Ankara, Turkey, and he is not in good health;

f. Grant leave of Court, under CR 32, for use of the deposition of the plaintiff at

RESPONSE AND DECLARATION
IN OPPOSITION
TO MOTION TO COMPEL

AHMET CHABUK
ATTORNEY AT LAW
11663 Ivy Lane
SILVERDALE, WA 98383

1 the trial as the plaintiff lives in Ankara, Turkey, and he is not in good health;

2 g. Grant leave of Court, under CR 30(a)(7) and CR 32 for plaintiff to testify at
3 the trial over telephone as the plaintiff lives in Ankara, Turkey and he is not in good
4 health.

5 **2. STATEMENT OF GROUNDS**

6 The “facts” as submitted by the defendant’s counsel in support of their motion
7 to compel are missing significant facts which are essential for a fair decision on the
8 issues presented by the parties:

9 The relevant facts in this legal action are very basic and very short. And Mr.
10 Vahit Saylik (the plaintiff) has provided not only his written statement of facts, but
11 has always stated his willingness to cooperate for his deposition over the telephone
12 because lives in Ankara, Turkey, and he is not in good health.

13 Mr. Saylik used to spend extended periods of time in Everett with his adult
14 son, who worked there. During his stay in Everett, on July 3, 2006, the defendant
15 negligently collided with Mr. Saylik and his bicycle and caused Mr. Saylik’s injuries,
16 which required the assistance of Fire and Rescue department and ambulance services
17 to take him to the hospital for his treatment (for his injuries).

18 Mr. Saylik’s adult son had to take extended medical leave and had to spend
19 extended periods of time in Turkey. And, therefore, Mr. Saylik also had to leave for
20 Turkey. On January 2, 2009, the undersigned attorney informed defendant’s counsel
21 that Mr. Saylik was going to be back in Washington in a few weeks and asked her if
22 she needed to schedule anything. The defendant made no efforts to take his
23 deposition. For health reasons, Mr. Saylik and his adult son had to go back to Ankara,
24 Turkey. After this fact was disclosed to the defense counsel, the defendant’s counsel
25 had a special interest to take Mr. Saylik’s “in-person” deposition. The undersigned
26 attorney always expresses readiness for deposition of Mr. Saylik over telephone. But
27 the defendant’s counsel would not agree to a telephonic deposition – even though
28 virtually every detail of the accident was stated in Mr. Saylik’s statement.

Meanwhile, repeatedly the undersigned attorney asked for an agreed date for a
deposition of Mr. David Walker (the defendant, himself) in Bremerton Washington,

1 near where he practices. Yet the defendant's counsel refused to conduct the
2 defendant's deposition in Kitsap County without stating any legal basis for her
3 refusal.

4 Now, Mr. Saylik is asking for the Court's leave for his telephonic deposition
5 and use of his deposition at the trial since the issues and facts involved in this court
6 action are very basic and very short and Mr. Saylik lives in Ankara Turkey and is not
7 in good health.

8 **3. STATEMENT OF ISSUES**

9 a. Should the Court strike the defendant's attachments submitted in support of
10 his motion to compel as they contain some portions of certain settlement
11 communications between the opposing attorneys and they were attached to
12 defendant's motion improperly and unnecessarily;

13 b. Should the Court deny defendant's David Walker's motion for leave for his
14 own deposition to be taken only after a deposition of the plaintiff is taken;

15 c. Should the Court deny defendant's motion for a court order requiring
16 deposition of all parties to be held in only Snohomish County;

17 d. Should the court deny defendant's motion for award of attorneys fees;

18 e. Should the Court grant leave for deposition of the plaintiff to be taken over
19 telephone, under CR 30(a)(7), as the plaintiff lives in Ankara, Turkey and he is not in
20 good health;

21 f. Should the Court grant leave of Court, under CR 32, for use of the deposition
22 of the plaintiff at the trial instead of plaintiff's presence at the trial as the plaintiff
23 lives in Ankara, Turkey, and he is not in good health.

24 g. Should the Court grant leave of Court, under CR 30(a)(7) and CR 32 for
25 plaintiff to testify at the trial over telephone as the plaintiff lives in Ankara, Turkey
26 and he is not in good health.

27 **4. EVIDENCE RELIEF UPON**

28 The plaintiff relies on the attached Declaration of Ahmet Chabuk and the
records of this case. The plaintiff relies only for impeachment purposes on the
Attachments submitted by the defendant in support of his motion to compel.

1 **5. LEGAL AUTHORITY**

2 In support of his motion, Mr. Walker (the defendant) provides no legal
3 authorities or any compelling facts as to why this Court should order a deposition of
4 the defendant (David Walker) only after a deposition of Mr. Vahit Saylik (plaintiff) –
5 especially considering the fact that Mr. Saylik has provided a detailed statement of his
6 facts and always expressed his willingness for his telephonic deposition.

7 Similarly, in support of his motion, Mr. Walker (the defendant) provides no
8 legal authorities or any compelling facts as to why this Court should order all
9 depositions to be held in the defendant’s counsel’s law office, in Everett. On the
10 contrary, in reference to “place of deposition,” Mr. Karl Tegland, in his Washington
11 Handbook on Civil Procedure, §44.3 (2006 edition, page 292), states that the
12 “restrictions just mentioned do not apply when seeking to take the deposition of a
13 **party.**” Therefore, there is no reason why the parties should be ordered to be
14 deposed only in the law offices of the defendant’s counsel, in Snohomish County.

15 Similarly, CR 30(a)(7) provides that the Court may grant leave for deposition
16 of by telephone. And, CR 32 authorizes depositions to be used at trial under a number
17 of miscellaneous circumstances of a witness **“whether or not a party.”**

18 The Vahit Saylik lives in Ankara Turkey and he is not in good health. And the
19 facts of this case is very basic and simple. In fact, virtually all of the fact were
20 summarized in a two-page statement by Mr. Saylik and submitted to the defendant’s
21 counsel. And the amount of damages are relatively very small.

22 The defense counsel has been insisting in-person deposition of Mr. Saylik (and
23 refusing a telephonic deposition) only after it was disclosed that Mr. Saylik is overseas
24 and is not in good health.

25 Respectfully submitted on this January 7, 2010

26 

27 Ahmet Chabuk (WSBA #22543)
28 Attorney for Plaintiff
11663 Ivy Lane, Silverdale Wa 98383
(360) 692-0854

RESPONSE AND DECLARATION
IN OPPOSITION
TO MOTION TO COMPEL

AHMET CHABUK
ATTORNEY AT LAW
11663 Ivy Lane
SILVERDALE, WA 98383

1 DECLARATION OF AHMET CHABUK

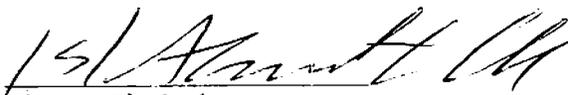
2 I am the attorney of record for Vahit Saylik (the plaintiff) in this case and I
3 make this declaration of my own personal knowledge. Mr. Saylik had to travel to
4 overseas for extended period of time and is not in good health. It is very difficult for
5 him to be in Washington for his deposition and for the trial. Mr. Saylik used to live
6 with his son in Everett Washington. And his son had to go overseas on an extended
7 medical leave from his employment in Everett. And the plaintiff Mr. Saylik had to
8 follow his son to Ankara Turkey but is not in good health now.

9 I have communicated this issue to the opposing counsel many times and
10 offered a telephonic deposition of Mr. Saylik. However, the opposing side has refused
11 and has been insisting on a "in-person" deposition of Mr. Saylik in Everett
12 Washington.

13 Meanwhile, I asked the opposing counsel for an acceptable date for a
14 deposition of the defendant in Kitsap County, where my office and court reporter is
15 located. However, the opposing counsel has been insisting that she takes Mr. Saylik's
16 deposition before I can take a deposition of the defendant and that I must take the
17 deposition in Everett, not in Kitsap County.

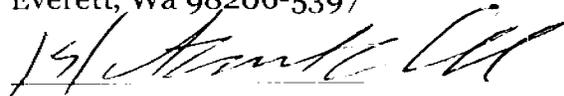
18 I certify under penalty of perjury under the laws of the State of Washington
19 that the preceding is true and correct to my best knowledge.

20 Signed and dated on this 7th day of January, 2010, in Silverdale Washington.

21
22
23 Signed: 
24 Ahmet Chabuk

25 DECLARATION OF SERVICE:

26 I, Ahmet Chabuk, certify that on 7 the day of January, 2010, I served a copy of this
27 document on defendant's counsel by mailing it first class mail postage prepaid to
28 Megan O. Masonholder, 2707 Colby Avenue, Suite 1001, PO Box 5397
Everett, Wa 98206-5397



RESPONSE AND DECLARATION
IN OPPOSITION
TO MOTION TO COMPEL

AHMET CHABUK
ATTORNEY AT LAW
11663 Ivy Lane
SILVERDALE, WA 98383

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

Vahit Saylik,	
	Plaintiff,
vs.	
David D. Walker and Jane Doe Walker, husband and wife,	
	Defendants.

No. 08-2-08163-8

REPLY ON MOTION TO COMPEL DEPOSITION OF PLAINTIFF

COMES NOW the Defendants above-named, and submits the following in reply to *Response and Declaration in Opposition to Motion to Compel the Deposition of Plaintiff*:

1. **Plaintiff's Motion to Strike.** Evidence Rule 408 excludes evidence of settlement communications only when offered "to prove liability for or invalidity of the claim or its amount." See e.g. *Bulaich v. AT&T Information Systems*, 113 Wn.2d 254, 778 P.2d 1031 (1989); *Northington v. Sivo*, 102 Wn. App. 545, 8 P.3d 1067 (2000). Defendant offered evidence of communications regarding scheduling a deposition that happened to include references to settlement communications. The settlement communications were not offered as evidence of anything; rather, the only communications offered as evidence were those relating to scheduling depositions.¹

¹ But for the completely improper nature of this motion, the defense is not opposed to striking the portions of the communications that concern settlement evidence as the documents were submitted regarding the Defendant's repeated requests to schedule the Plaintiff's deposition.

REPLY ON MOTION TO COMPEL DEPOSITION OF PLAINTIFF

OPPOSING COUNSEL

ANDERSON HUNTER LAW FIRM, P.S.
2707 COLBY AVENUE, SUITE 1001, P.O. BOX 5397
EVERETT, WASHINGTON 98206-5397
TELEPHONE (425) 252-5181
FACSIMILE (425) 258-3345

1 5. Motion for Telephonic Deposition of Plaintiff. Plaintiff's counter-motion
2 for an order allowing a telephonic deposition is not properly before the Court. It was merely
3 included as part of a response filed two court days prior to the hearing without first
4 obtaining an order shortening time. As such, the motion should be stricken.

5 Moreover, the factual assertions of counsel for Plaintiff regarding the Plaintiff's
6 location and state of health are hearsay. As such, those assertions should be stricken. If the
7 Plaintiff can make his own statement regarding his location and health under oath or
8 penalty of perjury.

9 Even if this motion were properly before the Court a telephonic deposition in this
10 case would be unduly burdensome and expensive. The Defendant would be saddled with
11 the cost of locating a certified court reporter in Ankara, Turkey. Without a court reporter
12 physically present at the deposition with the Plaintiff, there would be no way to verify
13 whether the person being deposed is in fact the Plaintiff.

14 Moreover, the Plaintiff has requested a Turkish interpreter which only increases the
15 logistical nightmare.

16 Even a video deposition would be inadequate. As the Plaintiff was on bicycle at the
17 time of the collision with the Defendant, there is no record of a driver's license or other
18 picture identification on file so as to allow for visual identification by video.

19 The Plaintiff chose to bring suit against the Defendant in Snohomish County and
20 then move halfway across the world. He should not be allowed to force the Defendant to
21 follow him, or prevent the case from being handled in the country where it was brought, in
22 order to unduly burden the defense.

23 6. Motion for Use of Plaintiff's Deposition at Trial. Again, this
24 counter-motion is not properly before the Court and relies on inadmissible hearsay
25 statements. As such, it should be stricken.

1 Even if this motion were properly before the Court, it is completely superfluous. CR
2 32 regulates the use of depositions in court proceedings; it does not provide a basis for
3 wholly excluding or including depositions.

4 7. Motion for Plaintiff to Testify Telephonically at Trial. Once again, this
5 countermotion is not properly before the Court and relies on inadmissible hearsay
6 statements. Moreover, a motion to allow telephonic testimony is not a discovery motion
7 that goes before the Court Commissioners but rather a trial motion that should be noted
8 before either the Civil Motions Judge or the Presiding Judge. Snohomish County Superior
9 Court Administrative Order 11-08; Snohomish County Superior Court Local Rule
10 7(b)(2)(I)(1). As such, it should be stricken.

11 Even if this motion were properly before the Court, it presents the same difficulties
12 as the motion for a telephonic deposition, namely undue burden and expense and logistical
13 nightmare of locating a court reporter in Ankara, Turkey, or facing the risk of receiving
14 testimony from someone whose identity cannot be verified.

15 Conclusion

16 The Plaintiff has brought several improper counter motions while at the same time
17 further avoiding a deposition. The Defendant asks that the Court order the Plaintiff to
18 provide a date when he will be returning to the United States and to compel his deposition
19 at that time in Snohomish County, to be followed by the deposition of Defendant in
20 Snohomish County. Should the Plaintiff fail to provide a date for his deposition and appear,
21 his pleadings should be deemed stricken as a sanction for failure to comply with the rules of
22 discovery.

23 ///
24 ///
25 ///
26 ///

8.

CONDENSED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

VAHIT SAYLIK,

Plaintiff,

vs.

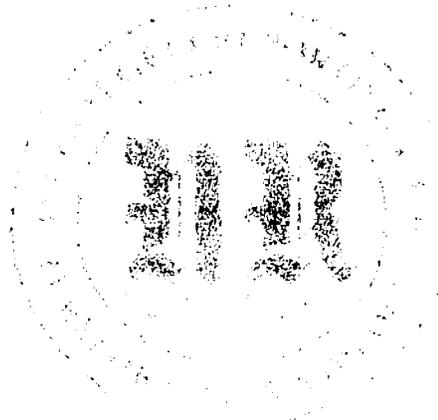
No. 08 2 08163 8

DAVID WALKER and JANE DOE WALKER,
husband and wife,

Defendants.



DEPOSITION OF VAHIT SAYLIK
(via teleconference)
Taken on behalf of the Defendants
January 29, 2010



Naegeli Reporting
"The Deposition Experts"
(800) 528-3335
NaegeliReporting.com
Serving all of Washington, Oregon, Idaho and the Nation
Selected "Best Court Reporting Firm"

Court Reporting | Videography | Copying and Scanning | Trial Presentation | Interpreters | Videoconferencing

CF 141

6

1 DEDEPOSITION OF VAHIT SAYLIK
 2 Friday, January 29, 2010
 3 10:16 a.m.
 4 VAHIT SAYLIK, having been first duly sworn, was examined and
 5 testified as follows:
 6 EXAMINATION
 7 BY MS. GUADAMUD:
 8 Q. Good morning, Mr. Saylik.
 9 A. Morning.
 10 MS. GUADAMUD: And before we get started, I just
 11 want to put on the record that our interpreter here is a
 12 registered court interpreter for the state of Washington --
 13 or if you could state your credentials.
 14 THE INTERPRETER: I'm DSHS certified for medical
 15 and social in French and in Turkish languages.
 16 BY MS. GUADAMUD:
 17 Q. Mr. Saylik, have you ever had your deposition
 18 taken before?
 19 A. No.
 20 Q. Okay. Well, basically what we're going to be
 21 doing this morning is going through a series of questions.
 22 If at any point you want to take a break, just say so. If
 23 you decide you want to take a break, that's fine, but I
 24 would ask that you answer the question that's pending if
 25 there is a question pending, and then we would take the

8

1 number there.
 2 A. 312. That will be the Area Code. The Turkey code
 3 is 90. 2800072.
 4 Q. Thank you, Mr. Saylik.
 5 Could you also please state your date of birth?
 6 A. 11/15/1949.
 7 Q. And your place of birth, please?
 8 A. Karaman Ayranci.
 9 Q. Mr. Saylik, are you married?
 10 A. Yes.
 11 Q. And do you have any children?
 12 A. Two children. One boy, one girl.
 13 Q. How old are they?
 14 A. My son is born in 1983. My daughter is born in
 15 1977.
 16 Q. What are their names?
 17 A. My son's name is Murat, M-U-R-A-T. Ferda. My
 18 daughter's name is Ferda, F-E-R-D-A.
 19 Q. And what is your wife's name?
 20 A. Fatma, F-A-T-M-A.
 21 Q. Mr. Saylik, have you ever been convicted of a
 22 crime?
 23 A. No.
 24 Q. In either Turkey nor the US?
 25 A. No, neither in Turkey nor in the United States.

7

1 break.
 2 A. Okay.
 3 Q. Your attorney is also present, and you may hear
 4 objections back and forth.
 5 A. Okay. I will have no objection. I am just
 6 waiting for the questions.
 7 Q. Okay. If your attorney makes an objection, let
 8 him state the objection and then answer the question.
 9 A. All right.
 10 Q. Okay. Mr. Saylik, could you please state your
 11 full name and address?
 12 A. Vahit Saylik. 44th Street -- you want me to give
 13 the Turkey address or another address?
 14 MR. CHABUK: I'm going to object for a second,
 15 okay? I want him to give his own address and where he
 16 resides.
 17 THE INTERPRETER: His address is that like that
 18 (indicating).
 19 BY MS. GUADAMUD:
 20 Q. You have to say it. She can only take down the
 21 spoken work.
 22 A. KC Goksu, G-O-K-S-U, Blokleri, B-L-O-K-L-A-R-I,
 23 Capital A, Capital A twice, 33 Blok, B-L-O-K. So next word
 24 Daire: D-A-I-R-E, 64, Eryaman, E-R-Y-A-M-A-N.
 25 Q. And Mr. Saylik, could you please state your phone

9

1 Okay. I am a former chief police officer.
 2 Q. Mr. Saylik, could you describe your educational
 3 history?
 4 A. Okay. I've -- after I finished high school, I
 5 went to police academy.
 6 Q. And that was in Turkey?
 7 A. Yes. Okay. They don't call it academy. They
 8 call it school. Let's change that to school, police school.
 9 Q. And I'm sorry. Did you say that that was in
 10 Turkey?
 11 A. Yes.
 12 Q. Are you currently employed?
 13 A. No. I am retired.
 14 Q. When were you last employed?
 15 A. 1995.
 16 Q. Okay. Where were you employed?
 17 A. From 1973 to 1980, I was in Izmir. From 1980 to
 18 1983, I was in Agri, A-G-R-I.
 19 Q. And then from 1983?
 20 A. From 1983 to 1995, I was in Ankara.
 21 Q. And were you employed as a police officer all that
 22 time?
 23 A. Yes.
 24 Q. Okay. You mentioned that you were a police chief,
 25 so I'm assuming you weren't a police chief that entire time.

22

1 Q. , No fancy equipment attached to it?

2 A. No.

3 Q. Okay. If you could, could you please describe how

4 the accident occurred?

5 A. So it was ten minutes after I had left home. I

6 was going on the bicycle, and the vehicle was going out from

7 the shopping center into the main road. Because the vehicle

8 was stopped there, I also stopped.

9 Q. Okay.

10 A. The driver was continually looking at the left, so

11 he was not looking neither on his right side nor to the

12 front side, he was not looking. So he was watching as soon

13 as he could see a clear so that he could immediately enter

14 the traffic.

15 Q. Okay.

16 A. So because he was stopping, I wanted to pass, and

17 it is at that moment that he moved, and he was not looking

18 at his right or to his front. He was only looking at his

19 left.

20 Q. Okay. So when you moved, how did the impact

21 occur? Did the car hit you or did you hit the car or how

22 did that happen?

23 A. It happened as followed. Because he was stopped,

24 I just wanted to pass, and I was in front of him. However,

25 he was neither looking to his right nor to his front. His

24

1 second for a clarification? He said "half-mounted,"

2 whatever that means. He said [not speaking English] –

3 THE INTERPRETER: Ok. Let me clarify that.

4 THE WITNESS: I just road on the bicycle. I was

5 riding on it. So it means that he just means that he made a

6 very little distance when he rode the bicycle.

7 BY MS. GUADAMUD:

8 Q. Okay. Did the – where did the car impact the

9 bicycle? What part of the bike was hit?

10 A. That would be to my left side, to the left side of

11 the vehicle and to my left side.

12 Q. Okay. And what part of the bike was hit? Was it

13 the back wheel, the front wheel, the body of the bike?

14 A. Exactly in the middle. He hit it in the middle

15 exactly.

16 Q. Okay. And what part of your body did the car hit?

17 A. He hit me on my left side.

18 Q. Okay. Did he hit on your leg? Did the car

19 actually touch your leg? Did it touch your shoulder? Did

20 it actually touch your body or did it just hit the bike?

21 A. He hit me from my left side. The vehicle was a

22 high one, so – a high vehicle, so he hit me and the

23 bicycle.

24 Q. Okay. But did he actually hit your body or did he

25 hit the bike or both?

23

1 head was continually turned to the left. I shouted, I

2 shouted, but he did not hear me and he hit me.

3 Q. Where did –

4 A. So if he was looking to his right or to his front,

5 he won't have hit me.

6 Q. How long were you stopped, waiting before you

7 moved in front of the car?

8 A. I waited about one and a half or two minutes, or

9 mostly one and a half minutes. And the vehicles were all

10 the time coming. I said since, he is stopped, let me pass,

11 because there is no clearance for him. So I suppose just at

12 that moment, he found out a clearance, and he moved without

13 looking to his right or left -- to his right or front.

14 Q. Okay. So when you began to move in front to pass

15 in front of the car, you were on your bike at that point?

16 You were riding the bike, you weren't walking the bike, or

17 you had dismounted? You remained on the bike?

18 A. Yes. I was riding the bicycle. I had just

19 starting to ride the bicycle.

20 Q. Okay. So did the car hit you or did it hit the

21 bike or did it happen simultaneously, do you recall?

22 A. Yeah. He hit us simultaneous, and I fell on the

23 highway. I was shouting at the man, but he was not seeing

24 me. He was just looking to his left.

25 MR. CHABUK: Can I just make an objection for a

25

1 A. He hit both of us. He hit me, and he hit the

2 bicycle, and we both fell down.

3 Q. What part of your body made contact with the car?

4 A. He hit me on the left side. He was coming, and he

5 hit me and the bicycle on the left side.

6 Q. Okay. I understand he hit you on the left side.

7 What I need to know is what part of your body, your leg?

8 your arm? your torso? And if you don't recall, that's fine,

9 but I need to know if you do recall what part of your body.

10 THE INTERPRETER: Do you mean first; he hit first

11 what part?

12 MS. GUADAMUD: If the car is hitting him, where is

13 it hitting him?

14 THE INTERPRETER: Okay.

15 THE WITNESS: I just say, he hit me on the left

16 side. He hit also the vehicle and my leg.

17 THE INTERPRETER: So apparently not a clear reply.

18 BY MS. GUADAMUD:

19 Q. Okay. Do you recall what part of the car hit? Was

20 it one of the corners? Was it on the front right along the

21 grille? Where on the front of the car?

22 A. I think it was from his middle. I think it was in

23 his middle.

24 Q. Okay. And you said then at that point, you and

25 the bike fell over?

26

1 A. Yes.

2 Q. And you fell into the road, or were you still on

3 the sidewalk portion?

4 A. Not on the sidewalk. I was just on the way where

5 the vehicles go in and out from the mall.

6 Q. Okay. So when you fell, you were on that part of

7 the exit of the mall as opposed to the street?

8 A. Yeah. Where the vehicles go out into the road, I

9 was on that spot.

10 Q. Okay. So when you went to cross in front of the

11 car, you did not leave the sidewalk?

12 A. Yes. I was on the exit lane, so that the car hit

13 me. I was on the exit lane.

14 Q. Okay.

15 A. Now, if I was on the sidewalk, how can he hit me

16 if I am on the sidewalk?

17 Q. Right. But you were in what -- you were in the

18 exit portion where the sidewalk broke, as opposed to the

19 road?

20 A. Yeah, that's correct.

21 Q. Okay. Was there any paint in the exit, any paint

22 on the concrete or on the asphalt where the exit was?

23 A. I didn't see it.

24 Q. Okay. Do you recall if there were any cars or --

25 well, if there were any vehicles behind Mr. Walker's car?

27

1 A. No. Only him.

2 Q. Okay. Were you wearing a bicycle helmet at the

3 time of the accident?

4 A. No.

5 Q. Okay. Were you wearing any kind of safety pads

6 like elbow pads or knee pads, anything like that?

7 A. No.

8 Q. Okay. And I see you're wearing glasses now. Were

9 you wearing your glasses at the time of the accident?

10 A. No. These glasses are just near glasses, reading

11 glasses, and not for far-away vision. I just put them on

12 for reading.

13 Q. So you don't require any kind of corrective lenses

14 for your long-distance vision?

15 A. No, not a doctor. I'm not using any. I don't

16 remember whether I was wearing at that moment sun glasses or

17 not. I don't remember.

18 Q. Do you recall, Mr. Saylik, if in the 24 hours

19 before the accident you had taken any kind of medications?

20 A. No, I didn't take any medication.

21 Q. Okay. Did you have anything to drink, anything

22 alcoholic to drink in the 24 hours before the accident?

23 A. No.

24 Q. Okay. Could you describe the damage that was done

25 to the bike?

28

1 A. The bike just became unusable. They put it on the

2 fire vehicle and took it to my home.

3 Q. How did it become unusable? Can you describe, was

4 something bent? Did the wheels come off? What happened to

5 it?

6 A. Okay. The wheels got bent, and also the front

7 part also bent, the part that -- the part you hold for the

8 going right and left.

9 Q. Okay.

10 A. This one also was bent, so the vehicle just could

11 not run. So my house is about ten minutes by walking to my

12 house, the place of accident, so the fire truck took it and

13 brought it to my home.

14 Q. Okay. Did you investigate having the bicycle

15 repaired?

16 A. No.

17 Q. Okay. So you did not -- you didn't get like a bid

18 or an estimate for the cost or anything?

19 A. No, I did not.

20 Q. Okay.

21 A. I'm absolutely not going to repair that truck

22 because -- that vehicle, because if I ride on it again, I

23 will -- it will leave me disabled.

24 Q. Okay. At the time the accident occurred, how old

25 was that bicycle?

29

1 A. It was an old bicycle.

2 Q. Any idea as to how old?

3 A. Five, eight or ten years, the bicycle.

4 Q. Do you recall --

5 THE INTERPRETER: My I have a sip of water,

6 please?

7 MS. GUADAMUD: Oh, sure.

8 BY MS. GUADAMUD:

9 Q. Mr. Saylik, do you recall if there were any

10 witnesses to the accident?

11 A. Okay. On the moment of the accident, there was

12 nobody except me and the driver, and the other people came

13 out after three or five minutes after the accident, they

14 came up.

15 Q. Okay. Do you recall what was done immediately

16 after the accident occurred?

17 A. Just after the accident, I was just lying there,

18 for some time, so I did not recall, and -- I mean, I don't

19 recall. I don't recall in my mind, and my left leg was

20 bleeding.

21 So I was just, you know, having pain. I was lying

22 there in pain. And then afterwards, the vehicles that were

23 coming down stopped. People come out. And also the driver

24 of the vehicle that hit me came near to me.

25 Q. Okay. When you said you were laying --

30

1 A. Okay. So they were trying to lift me up, but they
 2 could not, and I was in pain, and I was bleeding. And I
 3 suppose then somebody called the police, because then the
 4 police, the ambulance, and the fire truck came up.
 5 Q. Okay. When you say that you were laying there for
 6 a while, you mean you were laying in the exit space, the
 7 exit ramp?
 8 A. Yes. Yes. Because on that lane when the truck
 9 hit me, it stopped. So the truck stopped there, and I was
 10 on the ground.
 11 Q. Okay. But you were not on the street?
 12 A. Okay, yeah. No. I was not on the main road, I
 13 was just on the lane where the vehicle was exiting.
 14 Q. Okay. You stated that your left leg was bleeding
 15 while you were laying there. Was it bleeding from the
 16 impact with the car as opposed to your impact with the
 17 ground? Is that a fair statement?
 18 A. Okay. I am really not able to tell you whether it
 19 had been bleeding because the car hit me or because another
 20 some part of the vehicle – of the bicycle hit me or is it
 21 because of the ground. I would not be able to tell it.
 22 Q. Okay. Okay. Was the pain you were experiencing
 23 coming primarily from where your leg was bleeding or was it
 24 coming from someplace else?
 25 A. At that moment – on the heat of the hit, I'm not

31

1 – it was only the – my leg that was hurting me. And then
 2 I was taken to the hospital. And then after when I came
 3 back home, that's really when the pain started.
 4 MR. CHABUK: Can we stop for a few seconds,
 5 please?
 6 MS. GUADAMUD: We can take a break.
 7 (Pause in the proceedings.)
 8 BY MS. GUADAMUD:
 9 Q. Mr. Saylik, after the accident occurred, did you
 10 have an opportunity to speak with Mr. Walker?
 11 A. I talked with him after the police arrived, so I
 12 told him, Why are you all the time looking to your left and
 13 not you are looking ahead and you are not looking to your
 14 right? And he said, I am looking all the time to the left
 15 because all the vehicles were coming from the left.
 16 THE INTERPRETER: Okay. I could not really take
 17 it word by word, but this is what I understand. I think he
 18 said the same thing to the police there.
 19 BY MS. GUADAMUD:
 20 Q. Okay.
 21 A. it happened just because of that – should they
 22 have been looking in front of him or to his right, this
 23 accident wouldn't have happened. He was just driving into
 24 the main road while looking to his left.
 25 Q. Okay. So if I understand your testimony

32

1 correctly, you spoke to Mr. Walker after the police arrived,
 2 not before?
 3 A. I don't remember immediately because, upon the
 4 shock, I was really afraid and didn't know what to say, and
 5 even there was a woman, a lady that came to help and said,
 6 Do you have a telephone so that I can call your family. But
 7 in this fear and in this emotion, I could not even tell him
 8 that I had a phone or not.
 9 Q. And that was when you were talking to Mr. Walker,
 10 or is that when you were talking to the police?
 11 A. Okay. I didn't understand the question.
 12 Q. Maybe let's start fresh.
 13 Is that what you told Mr. Walker or is that what
 14 you told the police, or both?
 15 A. I told the police that the driver was – that's
 16 what I told the police, that the driver was continually
 17 looking to his left and not looking in front of him or to
 18 the right. So if he should have looked, this would not have
 19 happened. So I told that to the police, and then the people
 20 came up, and the place became crowded.
 21 Q. Did you provide any kind of written statement to
 22 the police?
 23 A. I didn't give any written statement. But on the
 24 spot there, the police had been writing a report.
 25 Q. Did you speak with the medics at all?

33

1 A. No.
 2 Q. Okay.
 3 A. Okay. As I said, I was really shocked. So when
 4 the medics came up, first I could not tell them whether I
 5 had a telephone or anything else. So afterwards, after some
 6 time, I found out my son's telephone in my pocket, and I
 7 gave it to the lady there. They told me whether I would
 8 like to let my family know, and I tell them yes, and they
 9 telephoned.
 10 Q. Okay. Do you remember, was that lady a police
 11 officer or was she a medic or was she just another witness
 12 who happened to be there?
 13 A. Yeah, just another citizen. Either coming out
 14 from the shopping or just walking on the road, I don't know.
 15 Q. Okay. Did you receive any treatment from the
 16 medics at the scene of the accident?
 17 A. Yes. Yes, the part that was bleeding, they
 18 immediately made a bandage on it. And they put me in the
 19 ambulance, and they put ice on it.
 20 Q. Was there any other treatment that they gave you
 21 at the accident scene or in the ambulance?
 22 THE INTERPRETER: Will you restate – repeat
 23 please?
 24 BY MS. GUADAMUD:
 25 Q. Did you receive any other treatment at the scene

34

1 of the accident or in the ambulance other than bandaging the
 2 part of your leg that was bleeding, and icing?
 3 A. No.
 4 Q. Okay, Did you get any kind of copy of the
 5 accident report, of the police report, after you left the
 6 scene of the accident in the ambulance?
 7 A. Yes. The police officer was -- yes. I took a
 8 report from the police.
 9 Q. When did you do that?
 10 A. It can be 15 or 20 days after the accident. Or I
 11 can't remember, or maybe one month. I don't exactly
 12 remember.
 13 Q. Do you recall what hospital the ambulance took you
 14 to?
 15 A. I don't remember, but the name of the hospital
 16 should be in my reports.
 17 Q. Okay. What kind of treatment did they give you at
 18 the hospital?
 19 A. They took x-rays. They checked out all my body,
 20 my arms, my shoulders, and then they renewed the bandage
 21 that had been made by the ambulance.
 22 Q. And after that, did you leave the hospital?
 23 A. Yes. My son came, and my wife came up. I stayed
 24 in the hospital up to the night, and then my son came up,
 25 and he took me out with his car to home.

36

1 Q. That's your left leg or your right leg?
 2 A. Left leg.
 3 Q. And were there any bruises anywhere else on your
 4 body from the accident?
 5 A. No.
 6 Q. Okay. Did you have any other pain aside from the
 7 bruises on your left leg between your knee and foot?
 8 A. Not so much.
 9 MR. CHABUK: I need to take just a couple minutes.
 10 MS. GUADAMUD: You would like a break?
 11 MR. CHABUK: Two or three minutes.
 12 MS. GUADAMUD: That's fine with me.
 13 We're going to take a short, two- to three- minute
 14 break.
 15 (Pause in the proceedings.)
 16 BY MS. GUADAMUD:
 17 Q. Okay, Mr. Saylik --
 18 A. Okay. Let's go.
 19 Q. Did you end up taking any kind of medication for
 20 the pain that you felt as a result of the accident?
 21 A. Yeah. I think I took Tylenol when I came back
 22 home.
 23 Q. Okay. How many days, or how long did you end up
 24 taking Tylenol?
 25 A. I think a few days.

35

1 Q. So you left the hospital the day after the
 2 accident? You actually spent the night that night?
 3 A. No. I left the same night. I came home. I
 4 didn't spend one night in the hospital.
 5 Q. Okay. Did the doctors tell you to come back for
 6 any follow-up treatment or did they tell you to go see a
 7 different physician for any follow-up treatment?
 8 A. No.
 9 Q. Did you on your own seek any other treatment with
 10 the hospital or another physician?
 11 A. No.
 12 Q. Okay. Any treatment from a masseuse or a physical
 13 therapist, chiropractor, after the accident?
 14 A. No.
 15 Q. Okay. Was there treatment that you did at home by
 16 yourself with your family?
 17 A. Yeah. So after I came back home, there was a lot
 18 of places where I was getting blue, so I put -- we put ice
 19 on it -- on them.
 20 Q. Okay. So you had multiple bruises, then, when you
 21 got home?
 22 A. It was not in so many places.
 23 Q. Okay. Was it on your legs? on your torso?
 24 A. Yeah. It was on my leg between my knee and my
 25 foot.

37

1 Q. Okay. Did the pain affect any of your daily
 2 activities?
 3 A. Anyway, I was not working, so it did not affect my
 4 work, but it affected my walking for a few days. I could
 5 not walk correctly, and then it passed.
 6 I now remember that they gave me some painkillers
 7 from the hospital, and I used them.
 8 Q. How many days did you take that pain killer?
 9 A. I think, three or four days.
 10 Q. Okay. Did you renew that prescription?
 11 A. No.
 12 Q. Did you wear any kind of braces, or was there just
 13 that bandage on your leg?
 14 A. The bandage that we had, yes, we just took it
 15 after two or three days and -- as the doctor said. We
 16 continued to put ice on it, on the blue places that were
 17 getting blue, and that's all.
 18 Q. Okay. Was there anything that the doctors
 19 indicated you should not do in the time following the
 20 accident?
 21 A. Yeah. That only one thing. One of the nurses in
 22 the hospital told me, Why didn't you put a protective helmet
 23 on your head? If you had, it would have been better.
 24 Q. Okay. Now, when you say that you weren't able to
 25 walk correctly for a few days, do you mean that you weren't

CP 13

38

1 able to walk without assistance or that you weren't able to
 2 walk without pain, or what exactly do you mean by that?
 3 A. I didn't need the help of anybody.
 4 Q. No crutches? no cane?
 5 A. No, I don't use any crutches. Only when I was
 6 stepping on my left foot, I had some pain.
 7 Q. And how long did it take for the pain to go away?
 8 A. Yeah. I would say about one week. After one
 9 week, it was gone.
 10 Q. Have you had any pain in your left foot since the
 11 accident, since the pain went away after the accident?
 12 A. No, it didn't happen.
 13 Q. Okay. And you haven't sought any medical
 14 treatment in the time since you were discharged from the
 15 hospital until now for this accident?
 16 A. No.
 17 Q. Do you have any reason to believe that the
 18 calcification in your shoulder is related to the accident?
 19 A. I don't think so.
 20 Q. Okay. Mr. Saylik, when you moved to Washington
 21 State, was it your intention to retire at that time?
 22 A. No. Because when I came here, I was not yet
 23 reached the age of retirement.
 24 Q. When did you retire?
 25 A. From where?

40

1 you mean by that?
 2 A. Yeah. They were afraid thinking, my daughter, my
 3 grandchildren or my son, whether this accident would leave
 4 my dad handicapped, or anything like that will happen. But
 5 thank God after that, nothing happened.
 6 Q. Okay. Do you or any of your family continue to
 7 fear that you're going to be disabled as a result of the
 8 accident?
 9 A. At the moment of the accident, yes, I was very
 10 frightened and even thinking will this vehicle - will this
 11 vehicle, will it run over me or not. I was afraid of that.
 12 Q. Okay. And are you fearful now?
 13 A. No, not now.
 14 I want to say something. May I say something?
 15 Q. Yes, go ahead.
 16 A. Okay. What I wanted to say, as I said, after the
 17 accident, the police and the fire vehicle took my - look my
 18 bike to my son's home, and it's just a ten-minute distance.
 19 So when they saw the state in which the bicycle was, they
 20 were very afraid, all of them - my son, my granddaughter, my
 21 wife - and then they all were thinking, will after this
 22 accident anything will happen to my dad. Will he remain
 23 handicap or not? So that was the fear we had.
 24 Q. - Okay. But that fear has passed since?
 25 A. Yeah. The fear is gone.

39

1 Q. When was the last time you worked?
 2 A. In 2006, when my son finished the university.
 3 So as follows: In 2006, my husband -- my son was
 4 appointed to come up here as an electrical engineer to
 5 Boeing. I came out with my son, my wife, and my
 6 grandchildren. We came up to Washington. We took a house
 7 I stayed a few months, and then I returned to Turkey. So we
 8 went just for a visit to my son.
 9 Q. So you did not intend to work in Washington State
 10 when you came here?
 11 A. No.
 12 Q. You were here as a visitor only?
 13 A. Yes.
 14 Q. Okay. Did you return to work sometime after the
 15 accident?
 16 A. No, I did not.
 17 Q. Okay. Has the accident had any affect on your
 18 hobbies or chores or those sorts of things that you do in
 19 your retirement now?
 20 A. No.
 21 Q. Okay. Has it affected your ability to sleep?
 22 A. No. I will say that a few days after the
 23 accident, everybody at home - my son, my grandchildren and
 24 my wife - we were all not comfortable for a few days.
 25 Q. And when you say you were uncomfortable, what do

41

1 Q. Okay. Has the accident had any affect on your
 2 ability to travel or take vacations with your family?
 3 A. No.
 4 Q. Okay.
 5 A. Yeah. But I want to say for eight or ten days
 6 after the accident, following the accident, each time I was
 7 passing by that spot, I had frights, because when I see the
 8 place. I took even my wife and showed them the place where
 9 the accident happened. I said, Here, the accident happened
 10 here.
 11 Q. Okay. Have you been able to exercise or get out
 12 and do activities that you did before the accident just the
 13 same - I'm sorry. Strike that.
 14 Have you been able to get out and exercise since
 15 the accident in the same manner that you were able to do so
 16 before the accident?
 17 A. Yes, I continue. I really don't have any problem.
 18 Q. Did you ever have to get help with chores or daily
 19 activities from your family members?
 20 A. What kind of help? What kind of help?
 21 Q. For example, did you have to get help cooking for
 22 yourself? Did you have to get help getting dressed, those
 23 sorts of things?
 24 A. No.
 25 Q. Okay. Which family members were witnesses to the

3-16-2012

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

VAHIT SAYLIK,

Plaintiff,

No. 08-2-08163-8

vs.

MOTION FOR PREVAILING PARTY DETERMINATION AND JUDGMENT ON ARBITRATION AWARD FOR FEES AND COSTS

DAVID D. WALKER and JANE DOE WALKER, husband and wife,

Defendants.

1. Relief Requested. Defendant Walker requests a determination that he is the prevailing party pursuant to MAR 7.3 due to Plaintiff Saylik's filing of a de novo review of the mandatory arbitration award and failing to improve his position at trial. Defendant Walker also requests that upon finding he is the prevailing party that judgment enter in his favor against Plaintiff Saylik for reasonable attorneys' fees and costs since the date the Request for de novo was filed by Plaintiff Saylik.

2. Statement of Grounds. On or about August 13, 2010, plaintiff filed a Request For Trial de Novo to the arbitration award that was decided in his favor. On or about March 13, 2012 the court entered an Order of Dismissal. Therefore, plaintiff, the appealing party from a mandatory arbitration, failed to do better than the arbitration award in its favor entitling the defendant to status as prevailing party and to its reasonable attorneys' fees and costs since the filing of said de novo pursuant to MAR 7.3.

MOTION FOR PREVAILING PARTY DETERMINATION AND JUDGMENT ON ARBITRATION AWARD - 1

ANDERSON HUNTER LAW FIRM, P.S.
2707 COLBY AVENUE, SUITE 1001, P.O. BOX 5397
EVERETT, WASHINGTON 98206-5397
TELEPHONE (425) 252-5161
FACSIMILE (425) 258-3345

16.

3. Statement of Issues. Whether the Court should enter a Judgment in favor of Defendant Walker for reasonable attorney's fees and costs as the prevailing party at trial because Plaintiff Saylik filed a de novo review of the mandatory arbitration decision and failed to improve his position.

4. Evidence Relied Upon. The Arbitration Award previously filed herein and the subjoined Declaration of Megan Masonholder.

5. Legal Authority. MAR 7.3 provides in part as follows:

"The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule."

SCLMAR 7.3 states: "MAR 7.3 shall apply only to costs and reasonable attorney's fees incurred after the filing of the request for a trial de novo."

6. Proposed Order and Judgment. Proposed Order provided herewith.

DATED this 15th day of March, 2012.

ANDERSON HUNTER LAW FIRM P.S.

By Megan Otis Masonholder
Megan Otis Masonholder, WSBA #29495
Attorneys for Defendants

DECLARATION OF MEGAN MASONHOLDER

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am counsel of record for defendant David Walker in the above-captioned cause and make this Declaration in support of the foregoing Motion in that capacity.

2. The plaintiff filed a de novo appeal on the Arbitration Award that was rendered in his favor in the total amount of \$1,651.00 (\$1,359.80 of which were medical specials paid prior to litigation on behalf of plaintiff) at the mandatory arbitration. (See Arbitration Award attached as Exhibit 1). Said Request for Trial De Novo was filed on or about August 13, 2010. (See attached Request for Trial De Novo attached as Exhibit 2).

3. The Complaint was dismissed pursuant to the Order of Dismissal entered on March 13, 2012 due to Plaintiff Saylik's failure to post a bond as an out of county plaintiff pursuant to RCW 4.84.210 and RCW 4.84.230.

4. Saylik filed an interlocutory appeal of the trial court's order requiring Plaintiff post a bond. This discretionary appeal was dismissed via the Appellate Court's Decision of February 8, 2012. (See attached Exhibit 3). Fees and costs related to this interlocutory appeal are included in the request and were necessary in defense of this matter.

5. Since the filing of the de novo appeal of the defendant has incurred attorney's fees in the total amount of \$10,531.00 and costs in the total amount of \$530.70, for a total judgment of \$11,061.70. (See Exhibit 4 attached hereto and incorporated herein by reference).

6. Defense counsel expended a reasonable number of hours in securing a dismissal of the action, responding to the discretionary appeal, and obtaining a dismissal for the client. No wasteful or duplicative hours were expended, nor were any hours pertaining to unsuccessful theories or claims requested. In addition, a great deal of the time spent was in response to Plaintiff's actions.

7. Defense counsel has provided for the Court's review contemporaneous records documenting the hours worked sufficient to inform the court the number of hours worked, type and category of work performed.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

February 16, 2012

Megan Otis Masonholder
Attorney at Law
2707 Colby Ave # 1001
PO Box 5397
Everett, WA, 98206-5397
mmasonholder@andersonhunterlaw.com

Ahmet Chabuk
Attorney at Law
11663 Ivy Ln NW
Silverdale, WA, 98383-8881
achabuk@gmail.com

CASE #: 67951-1-1
Vahit Saylik, Petitioner v. David Walker, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 14, 2012:

"Upon proof that the complaint has been dismissed,
Saylik's appeal will go forward pursuant to RAP 2.2(a)(3)."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

Page 1357

559 P.2d 1357 (Wash.App. Div. 2 1977)

16 Wn.App. 773

Cheryle L. HAMMOND, Respondent,

v.

Everett L. BRADEN, Appellant.

No. 1883--II.

Court of Appeals of Washington, Division 2.

January 20, 1977

Page 1358

Richard L. Prout, Henry W. Grenley, Hageman, Prout, Kirkland & Coughlin, Seattle, for appellant.

Rodger C. Gustafson, Griffin & Enslow, Tacoma, for respondent.

REED, Judge.

Plaintiff Cheryle Hammond initiated this action to recover damages for personal injuries and property

[16 Wn.App. 774] loss sustained by her in an automobile accident occurring on February 15, 1974. The record indicates that Mrs. Hammond was proceeding south from Sumner towards Puyallup on State Route 512 at an estimated speed of 50 to 55 miles per hour, when she collided with defendant Everett Braden's vehicle. Mr. Braden, who had stopped at a stop sign situated back from the roadway at the intersection of State Routes 512 and 167, apparently intended to cross plaintiff's lane of traffic and turn north on State Route 512 towards Sumner. While waiting to proceed, defendant edged forward to obtain a better view of any oncoming traffic. Although the parties disagreed as to the point of impact, the investigating state patrolman concluded that Mr. Braden had crept up onto the highway and that the point of impact had been in the outer portion of plaintiff's lane of traffic.

At trial plaintiff introduced the deposition of Dr. R. E. Graham a chiropractor, whose diagnosis was that Mrs. Hammond had a hematoma at the base of the skull and was suffering from pressure on the spinal cord at the medulla oblongata level. It was Dr. Graham's opinion that she would suffer some permanent disability and that there would be recurring weakness in her

right leg. The jury returned a verdict of \$7,500 in favor of plaintiff, and also denied defendant's counterclaim for damages to his vehicle.

On appeal defendant has assigned error to (1) the admission of Dr. Graham's deposition into evidence; (2) the trial court's failure to grant defendant's requested instruction relating to yielding the right-of-way; and (3) the trial court's allowing the jury to consider the loss of use of plaintiff's vehicle as an element of damages. For the reasons set forth below, we affirm the decision of the trial court.

The admissibility of depositions is governed by CR 32. CR 32(a)(3) [1] provides that when certain defined instances

[16 Wn.App. 775] of unavailability exist, a witness's deposition may be admitted as a substitute for his testimony. Here, when Dr. Graham indicated that he would be on vacation during the trial, his deposition was taken for the purpose of preserving his testimony. On the first day of trial and before the deposition was offered as evidence, defendant's counsel learned that Dr. Graham was in fact still in town and would not be leaving on his vacation until that evening. The following day plaintiff moved to publish Dr. Graham's deposition, and the court, over the objection of the defendant, allowed it to be read into evidence. Although Washington has not ruled directly on the question of at what point in time the deponent must be unavailable in order for his deposition to be admitted as a substitute for his testimony, it has been held that the unavailability of the deponent is to be determined at the time his deposition is offered into evidence. *E.g. Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W 2d 632 (Iowa 1969); *Mills v. Dortch*, 142 N.J. Super. 410, 361 A.2d 606 (1976); *Cf. Vannoy v. Pacific Power & Light Co.*, 59 Wash.2d 623, 369 P.2d 848 (1962). While recognizing there is not complete harmony among the decisions, Wigmore states:

Where the witness, at some time since trial begun (sic) and prior to the moment when his deposition is offered, has been within reach of process, but is not at the precise moment, the deposition's admissibility would seem to depend on whether the witness' absence is due in any respect to bad faith on the proponent's part:

5 J. Wigmore, *Evidence* § 1415 at 240 (Chadbourn rev. 1974) (citing cases in n. 3). Here there is no allegation

[16 Wn.App. 776] of bad faith, and there is evidence that at the time Dr. Graham's deposition was offered, he was out of the country. Accordingly, we find that the trial court did not abuse its discretion when it admitted the

deposition *In re Estate of Maher*, 195 Wash. 126, 79 P.2d 984 (1938); *Kellogg v. Wilcox*, 46 Wash.2d 558, 283 P.2d 677, 286 P.2d 114 (1955).

Defendant also assigns error to the failure of the trial court to give his requested instruction, which reads as follows:

The duty of a disfavored driver at a stop sign is discharged when he yields to other drivers that portion of the roadway over which they have the right to pass.

If a party's theory of the case can be argued under the instructions given when read as a whole, then a trial court's refusal to give a requested instruction is not reversible error. *E.g. Kjellman v. Richards*, 82 Wash.2d 766, 514 P.2d 134 (1973); *Balandzich v. Demeroto*, 10 Wash.App. 718, 519 P.2d 994 (1974). Here the instructions given were more than sufficient to permit

Page 1360

defendant to argue his theory of the case. [2] Additionally, we note that the requested instruction is taken from similar language in *Foster v. Bylund*, 7 Wash.App. 745, 503 P.2d 1087 (1972), but is not part of an instruction in that case. The fact that a statement is made by an appellate court does not mean it can be properly incorporated into a jury instruction. *Boley v. Lawson*, 69 Wash.2d 621, 419 P.2d 579 (1966); *Turner v. Tacoma*, 72 Wash.2d 1029, 435 P.2d 927 (1967).

Defendant's final assignment of error relates to the jury's being allowed to consider loss of use of plaintiff's totally destroyed vehicle as an element of damages. See *McCurdy v. Union Pacific R.R. Co.*, 68 Wash.2d 457, 413 P.2d 617

[16 Wn.App. 777] (1966). At trial defendant objected to the admission into evidence of a bill for a rental car used by plaintiff until she obtained a replacement vehicle. We need not reach the merits of this assignment for defendant has failed to properly preserve this alleged error. Plaintiff's husband was allowed to testify at trial without objection to the fact that it was necessary to rent an automobile after the accident and that the cost of so doing was \$262.77. The admission of the rental bill was merely cumulative and any error in its admission cannot be deemed prejudicial to the defendant. *Myers v. Harter*, 76 Wash.2d 772, 459 P.2d 25 (1969); *Bond v. Wiegardt*, 36 Wash.2d 41, 216 P.2d 196 (1950). Additionally, the court instructed the jury that the measure of damages for injury proximately caused by the defendant would include 'such sum as will reasonably compensate for any loss of use of any damaged property during the time reasonably required for its replacement.' No error was assigned to the giving of this instruction, and therefore it became the law of the case. *E.g. Ryan v. Westgard*, 12 Wash.App. 500, 530 P.2d 687 (1975); *O'Brien v. Artz*, 71 Wash.2d 558, 445 P.2d 632 (1968).

Judgment affirmed.

PETRIE, C. J., and BERTIL JOHNSON, J., pro tem., concur

Notes:

[1] CR 32(a)(3) provides:

'The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.'

[2] Instruction No. 7 reads as follows:

'As to arterial intersections as the one involved in this case, the law in the State of Washington provides that:

'Every driver approaching a stop intersection indicated by a stop sign shall stop and after having stopped shall yield the right of way to any vehicle which is approaching so closely on said arterial highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.'

21.

19 P. 63 (Wash.Terr. 1888)

3 Wash.Terr. 518

SWIFT

v.

STINE.

Supreme Court of Territory of Washington

February 1, 1888

Appeal from First district court.

Action by George Swift against William Stine. On rule for security for costs on the ground of plaintiff's non-residence, which was awarded, and failure to comply therewith, the action was dismissed. From this judgment plaintiff appeals.

TURNER, J., DISSENTING.

A. E. Isham, for appellant.

[3 Wash.Terr. 519] *B. L. & J. L. Sharpstein*, for appellee.

JONES, C.J.

This appeal was before this court, and determined at the January term, 1886, (3 Wash. T. 18, 13 P. 904.) upon motion to affirm, for the reason that no evidence had been settled or certified by the district court. This court, at that time, granted the motion upon the ground that "the cause was equitable, and the judgment of the district court was based on evidence," and that the evidence was not brought here. A rehearing being granted, the motion and the appeal are here argued together. It

[3 Wash.Terr. 520] is settled that, on an appeal taken under the act of 1883, relating to the removal of causes to this court, under its provisions, the "statement" provided for by section 3 is permissive, and need not be made and settled except at the option of the party; and, if brought here without such statement, it is not ground for dismissal, but the cause must be heard on its merits so far (and, of course, only so far) as the record sent up discloses them. The transcript here discloses the fact that the complaint was filed March 24, 1885; the summons issued the same day, and served March 25, 1885, on which day also a motion was made by defendant to strike out certain portions of the complaint; and other proceedings were had thereafter, and on May 25th an answer was filed to the complaint of plaintiff. There were

two complaints in intervention filed before this

date, and answers filed at the same time as to the complaint of plaintiff. On the next day replies were served. On May 29, 1885, the cause was sent to a referee for trial. On September 21, 1885, defendant, Stine, upon his own affidavit of the non-residence of plaintiff, moved that plaintiff be required to give security for costs, to which motion plaintiff appeared and filed a written "answer," as it is termed; stating, among other things, that the issues had been made up, the cause referred, and plaintiff and defendant had introduced testimony, and plaintiff had commenced putting in his evidence in rebuttal; and the cause still remained pending before the referee at the time this motion was set for hearing. On September 26th the court made an order requiring plaintiff to file security for costs, and staying proceedings until it was filed, or \$200 deposited in lieu thereof, to which order plaintiff excepted. This order not being complied with, the court, on November 16, 1885, dismissed the cause, and judgment was made against plaintiff for costs amounting to \$256.80. The judgment recites the "answer" aforesaid made by plaintiff to the motion for security for costs. The appeal is taken from this judgment. The

[3 Wash.Terr. 521] record does not disclose any other facts material here, and closes with the usual clerk's certificate. It is urged, in support of this judgment, that, there being no statement of facts settled and certified under the third section of the act of 1883 referred to, and as the judgment must have proceeded upon evidence, and that is not returned here, that this court must presume there was evidence to justify the judgment as made. The rule is not disputed that every intendment must be made in favor of a judgment, where the precise facts are wanting; but here there is and can be no dispute that the cause was at issue, and had been referred long before defendant made his motion, and costs had been made in a large sum.

It is true, also, that the Code provides that such a plaintiff must give security for costs, "when required to do so by defendant," and it is claimed that "when" means at any time "when required by defendant." If this claim be true, then a defendant may wait until a jury has been called and sworn, and then "require" security for costs, and obtain a stay of proceedings. It would seem, indeed, that he might interpose his request at any other stage of the trial. We cannot agree to this construction of the statute. The defendant may require security for costs of a non-resident, but he must exercise his right in time, and before answer, or at least with diligence. He cannot delay until, from the developments of the trial, he seriously apprehends defeat, and then assert it. His application then becomes dilatory, and cannot be favored. He must be

held, under such circumstances, to have waived it. It is true that, in a case where the fact came to his knowledge after answer to the merits, it would excuse his neglect, and his right would remain unimpaired; but no such showing was made here, and the application on which the judgment was granted being certified to this court, and recited in the judgment, we cannot presume it was made on other ground.

[3 Wash. Terr. 522] Upon the merits here disclosed, we cannot give our assent to the judgment made, or the order preceding it, requiring security for costs; and it is directed that said judgment and order be vacated, and the cause be remanded for further proceedings.

ALLYN, J., concurs in the result, LANGFORD, J., did not sit in this case TURNER, J., dissents.