

66839-1

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NO. 66839-1-I

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

PATRICIA STEDMAN, a married woman, individually,

Respondent,

and

DEBRA BRAXTON, a single woman,

Defendant,

vs.,

STACEY COOPER and "JOHN DOE" COOPER, husband and wife and the
marital community comprised thereof,

Appellants.

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STATE OF WASHINGTON
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APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Carol Schapira, Judge

BRIEF OF APPELLANTS

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I. NATURE OF CASE

Plaintiff and Ms. Cooper had a motor vehicle accident. Although the accident was not serious, plaintiff contended she had extensive injuries from the accident. Ms. Cooper maintained the accident was minor and could not have caused serious injury. Ms. Cooper also maintained that plaintiff was comparatively at fault for the accident because she saw Ms. Cooper's car and did not attempt to avoid the accident.

At mandatory arbitration, plaintiff was awarded \$23,300. Ms. Cooper sought a trial de novo. Plaintiff made an offer of compromise for \$23,299.99 – one penny less than the arbitration award. At the trial de novo, despite the disputed issue about the nature and extent of plaintiff's injuries from the accident, the court excluded Ms. Cooper's biomechanical expert.

The jury awarded plaintiff \$22,000. Over Ms. Cooper's objection, the trial court awarded plaintiff MAR 7.3 fees. Ms. Cooper appeals seeking reversal and remand for a new trial based on the prejudicial error in excluding her biomechanical expert. Ms. Cooper also seeks a reversal of the award of MAR 7.3 fees. She prevailed at the trial de novo when the jury awarded \$1,299.99 less than the compromise offer. Plaintiff was not entitled to an award of attorney fees.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in excluding Dr. Allan Tencer as an expert witness. (CP 290-92)

2. The superior court erred in denying Ms. Cooper's motion for reconsideration of the order excluding Dr. Tencer's testimony. (CP 469-71)

3. The superior court erred in entering judgment for plaintiff. (CP 559-61)

4. The superior court erred in denying Ms. Cooper's motion for reconsideration of the judgment awarding costs not allowed by RCW 4.84.010. (CP 601-08, 689-92)

5. The superior court erred in granting plaintiff's motion to amend the judgment and awarding fees and costs under MAR 7.3 and RCW 7.60.060. (CP 693-96)

III. STATEMENT OF ISSUES

1. In this case where the parties strongly disputed the force of the accident and the nature and extent of the plaintiff's injuries, did the superior court commit prejudicial error when it excluded Ms. Cooper's qualified biomechanical expert, Dr. Allan Tencer, who would have provided scientific testimony that the accident only had a 1.1 G force?

2. Did the superior court err in determining that Ms. Cooper had not improved her position at the trial de novo when the jury awarded plaintiff \$22,000, an amount \$1,299.99 less than plaintiff's offer of compromise?

3. Did the superior court err in awarding attorney fees and expenses to plaintiff under MAR 7.3 when Ms. Cooper improved her position at the trial de novo?

4. Did the superior court err in awarding costs to plaintiff that were beyond the costs allowed by statute?

IV. STATEMENT OF CASE

This case involves a January 12, 2006, motor vehicle accident between a vehicle driven by plaintiff, Patricia Stedman, and a vehicle driven by Stacey Cooper. (CP 4-6) Plaintiff was driving her Ford Aerostar van down a residential Seattle street. (CP 5) Ms. Cooper was parked along the side of the street and was inching her car out from the parking space. As she did so, plaintiff's van hit the front of Ms. Cooper's car. (4 RP 388)

Plaintiff and her passenger, Debra Braxton, alleged that Ms. Cooper was negligent and that they were injured as a result of the accident. (CP 5-6) They filed suit against Ms. Cooper in October 2008. (CP 4-7) Ms. Braxton's claims were later resolved and she is not a party

to this appeal.¹ Ms. Cooper asserted plaintiff was at fault and denied the nature and extent of plaintiff's injuries. (CP 8-10)

Plaintiff moved the matter into mandatory arbitration. (CP 624) The arbitrator entered an award of \$23,300.00. The arbitration award consisted of \$16,300 in medical special damages and \$7,000 in general damages. (CP 585)

Ms. Cooper requested a trial de novo. (CP 624) After the arbitration and before the trial de novo, plaintiff served Ms. Cooper with an offer to compromise the case for \$23,299.99, one penny less than the arbitration award. (CP 565)

The offer of compromise stated:

[P]laintiff Patricia Stedman does hereby offer to compromise her claim in the amount of \$23,299.99. Such compromise is intended to replace the arbitrator's award against defendant Stacey Cooper with an award of \$23,299.99, inclusive of costs, statutory attorney fees, and attorney fees and sanctions.

(CP 587)

A. ACCIDENT FACTS.

On January 12, 2006, plaintiff was traveling north on Highway 99 in Seattle and ran into a traffic jam. (1 RP 20:12-15; 21:14-17) She

¹ On December 31, 2010, Ms. Braxton accepted Ms. Cooper's CR 68 Offer of Judgment so Ms. Braxton's claims were not tried. (CP 518) Judgment in the amount of \$5,824.00 was entered on January 25, 2011, in favor of Ms. Braxton. (CP 556-57)

turned into a residential area and made her way to North 90th Street. (1 RP 22:2-15) She noticed someone getting into a parked car; she slowed and then she accelerated. (1 RP 22:21-23:1)

As plaintiff passed the car, it pulled out and the accident happened. Plaintiff described the accident as a sudden jolt being grabbed and jerked and slammed backward and thrown forward. (1 RP 24:21-25:8; 54:14)

She testified:

A So, as I was accelerating, all of a sudden there's a sudden jolt and hit to my bumper and right into my wheel

And upon the impact it -- I was hanging onto my steering wheel and was pulled forward to the right and then all of a sudden my seat belt grabbed me and slammed me back hard, and while it was doing that there was a couple of little noises down in my lower back. . . . I was jerked to the left And so then that caused me to go and -- into the windshield, and my -- side of my nose hit into that.

(1 RP 24:21-25:8) Plaintiff said she hit her head on the window so hard that her nose bled. (1 RP 55:12-15)

Ms. Cooper explained that she was parallel parked in front of her house. (4 RP 388:10-14; 389:20-22; Ex. 18) Ms. Cooper was in a Saturn SL2, a small sedan. (4 RP 403:10-11) As she slowly pulled out of the parking space, there was an accident between her car and plaintiff's van. (*Id.*; 4 RP 395:11-12; Ex. 17) Ms. Cooper emphatically denied that there was a second impact between her car and the van. (4 RP 393:11-14) She

testified that her car did scrape some part of the side of the van because the van continued to move forward. (4 RP 401:25-402:4; Ex. 16)

Plaintiff did not seem injured at all. She got out of her van, walked around to the sidewalk, and seemed very alert. (4 RP 394:1-7) After the accident, Ms. Cooper did not see any blood on plaintiff. (4 RP 393:24-25) Ms. Cooper explained: “There was no blood or visible injury on any of us.” *Id.*

B. COURT’S ORDER EXCLUDING MS. COOPER’S BIOMECHANICAL EXPERT ALLAN TENCER, PHD.

Plaintiff moved to exclude the testimony of Allan Tencer arguing there was no question of fact that plaintiff was injured in the accident. (CP 11-22) According to plaintiff,

Dr. Tencer’s testimony is no longer relevant in this case. The **likelihood** of injury of the plaintiff is no longer relevant. The issue is moot as both the doctors hired by the defense, and plaintiffs’ chiropractors, have indicated that Ms. Braxton and Ms. Stedman sustained some degree of injury.

(CP 21) (emphasis in original).

Plaintiff also argued that Dr. Tencer’s opinion did not satisfy the tests for admissibility under ER 702 and ER 703 because his testimony is not medical evidence. (CP 14-16) Plaintiff also argued that Dr. Tencer’s opinion failed to satisfy the *Frye* test for admissibility. (CP 16-21)

Ms. Cooper opposed the motion. (CP 53-74) The opposition was supported by declarations of Coreen Wilson and Allan Tencer. (CP 76-161, 162-238) Ms. Cooper pointed out that Dr. Tencer's testimony would address the severity of the impact in the accident from a biomechanical, not a medical, perspective. (CP 55-56) Ms. Cooper argued that Dr. Tencer is qualified; his opinion satisfies ER 702 and the *Frye* test; and his testimony would be helpful to the jury. (CP 53-74)

In reply, plaintiff argued that Dr. Tencer's testimony was irrelevant and cumulative. (CP 239-46) Plaintiff argued:

The relevance of Allan Tencer's testimony is extinguished by the fact that Defendant's own medical experts state that Ms. Braxton and Ms. Stedman were injured in the subject accident. Defendant seeks to introduce the testimony of Allan Tencer to talk about "insignificant forces" involved in this accident. If both sides argue that [plaintiffs] were injured, what difference does the degree of force make? The medical evidence indicates that plaintiffs were hurt. The medical experts will discuss the degree.

(CP 239-40)

The court granted plaintiff's motion to exclude Dr. Tencer's testimony. (CP 290-92) The court's October 5, 2010, order states in part:

[T]he court . . . grants the motion to exclude the testimony of Dr. Allan Tencer because **it is logically irrelevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident.** It is also cumulative of other witnesses' descriptions and opinion about the accident.

...

The court believes the testimony is valid science under the Frye test.

(CP 291) (emphasis added).

Ms. Cooper moved for reconsideration. (CP 293-99) Plaintiff opposed the motion for reconsideration. (CP 421-29) Ms. Cooper filed a reply in support of the motion for reconsideration. (CP 433-38) On December 7, 2010, the court denied defendant's motion for reconsideration. (CP 469-71)

Ms. Cooper prepared an offer of proof of Dr. Tencer's testimony. (12/28/10 RP 1-14) Dr. Tencer established his qualifications. He also explained the scientific steps he took to determine the forces involved in the accident. (12/28/10 RP 3-6) Dr. Tencer determined that the G force on the occupants of plaintiff's vehicle (the Ford Aerostar van) was 1.1 Gs, equivalent to bumping the curb when parking a car. (12/28/10 RP 7-8)

Dr. Tencer also opined that plaintiff would not have hit her head on the driver side window in this accident. (12/28/10 RP 11:10-12:11) He also explained how a spine would move in a side impact similar to this accident. (12/28/10 RP 12:12-13:6)

C. PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MOTION ON LIABILITY AND REASONABLENESS AND NECESSITY OF MEDICAL TREATMENT AND EXPENSES.

Plaintiff moved for partial summary judgment on liability, proximate causation, and the reasonableness and necessity of certain medical treatment and expenses. (CP 300-17) Ms. Cooper opposed the motion. (CP 318-30) She argued, in part, that plaintiffs' medical treatment and expenses were disputed and that an issue of fact remained whether plaintiffs were injured in the accident. (CP 319) Ms. Cooper quoted from the report of Dr. Renninger that he was not certain that Ms. Stedman was injured or that she needed medical care. (CP 322) She submitted a Declaration of Thomas Renninger, D.C., in opposition to plaintiffs' partial summary judgment motion. (CP 331-33)

Dr. Renninger's declaration states in part:

I do not conclude that either Ms. Stedman or Ms. Braxton suffered an injury as a result of the motor vehicle collision with Ms. Cooper on January 12, 2006, that required chiropractic care. I do not conclude that any treatment was necessary for either Ms. Stedman or Ms. Braxton.

(CP 332)

Plaintiffs reply argued that Dr. Renninger's report and declaration did not sufficiently dispute the fact that plaintiffs were injured in the accident. (CP 444-48) On December 3, 2010, the court entered the order

on plaintiff's motion for partial summary judgment granting in part and denying in part. (CP 466-68) The court ruled as follows:

- (1) Defendant is negligent as a matter of law;
- (2) An issue of fact exists regarding whether Plaintiff Stedman was contributorily negligent;
- (3) Plaintiff's medical expenses were customary and not excessive;
- (4) **A genuine issue of material fact exist [sic] as to whether any injuries were caused or medical treatment was necessary as a result of the accident.**

(CP 467) (emphasis added).

D. TRIAL.

Ms. Stedman's case proceeded to a jury trial. The jury heard testimony from plaintiff, her husband, and plaintiff's friend. (1 RP 19, 71; 4 RP 421) The plaintiff also presented testimony from two medical witnesses: Daniel Spanier, M.D., and David Folweiler, D.C.

Dr. Spanier is a doctor who reviewed plaintiff's medical records. (2 RP 81:11-24; 85:20-24) He did not interview or examine plaintiff. (2 RP 181:10-17) Dr. Spanier believed that plaintiff's accident related injuries included: hyperextension flexion injuries of the cervical, thoracic, and lumbar spine, SI joint dysfunction, annular tear. (2 RP 87:18-19; 110:1-7; 169:1-3) Dr. Spanier testified that plaintiff's annular tears at L5-

S1 were from the forces and impact of the accident. (2 RP 106:22-107:3; 169:2-3)

Dr. Spanier testified that the forces of the impact from the accident were strong enough to precipitate the injuries plaintiff complained of. (2 RP 160:9-13) Dr. Spanier disagreed with Dr. Brzusek's description of plaintiff's injuries as minor. (2 RP 122:16-21)

Dr. Folweiler testified that the straightening of plaintiff's spine was due to the accident. (3 RP 236:10-16) He also testified that the intrarectal treatments were needed for plaintiff's sacroiliac joint problem. (3 RP 229:22-30:22; 242:1-6)

Ms. Cooper testified and presented testimony from physician Dr. Brzusek and chiropractor Dr. Renninger. (3 RP 276-335; 4 RP 347-86) Drs. Brzusek and Renninger conducted a CR 35 examination of plaintiff. (3 RP 282:20-283:3)

Dr. Brzusek testified that plaintiff's injuries from the accident were limited to minor cervical and lumbosacral strain, bruising to the right knee, and right shoulder sprain. (3 RP 301:17-302:25) Dr. Brzusek testified the sacroiliac joint problem was not related to the accident. (3 RP 292:7-294:9)

Thomas Renninger, D.C., testified that plaintiff's chiropractic treatment was excessive. (4 RP 364:12-17) The treatment by Dr.

Folweiler was not reasonable, necessary, or related to the accident. (RP 368:7-11) The medical records did not document any visible signs of trauma. (RP 365:11-17)

Dr. Renninger testified that plaintiff's injuries from the accident were strain/sprain injuries to the cervical area of the right shoulder and the low back and sacral region. (RP 369:1-13)

E. PLAINTIFF'S CASE EMPHASIZED THE FORCE AND IMPACT OF THE ACCIDENT.

Throughout the case, plaintiff emphasized the force and impact of the accident. During opening statement, plaintiff stated:

There was an initial impact that was essentially bumper to bumper, but then there was a secondary impact. . . . the secondary impact then was to the wheel. That impact to the wheel jerked the steering wheel left and Ms. Stedman had to essentially straighten out her vehicle before both vehicles came to a stop.

(1 RP 5)

Ms. Stedman was thrown sort of forward to the right and her seat belt caught on -- across her lap tight and pulled her back into her seat and she landed straight onto her tailbone.

The secondary impact against the wheel -- now, remember, the wheel was still moving forward -- jerked the steering wheel left, and Ms. Stedman had her hands clenched on the steering wheel when this was happening, and that threw her left against her driver's side door. She received injuries to her spine, which involves her neck, her upper back, her middle back, the low back and all the way down into her tailbone. You'll hear that pri -- her primary injuries, however, were mostly to her low back, her tailbone and her

tailbone area. And she also sustained a sprain to her right shoulder due to the steering wheel jerking to the left.

(1 RP 7:8-23).

Dr. Spanier's conclusions were premised on the forces of the accident. He testified:

A . . . [T]he first factor that leads me that way would be the mechanism of injury. . . . So that's going to transmit forces through the car.

And we can draw vectors in a physics diagram, if you'd like, but those forces are ultimately imparted to the pelvis. . . .

. . . So this is clearly a -- sort of almost a repetitive kind of jarring thing, a jarring impact. And so it's not straight on. It's sort of coming from the side. So it's a perfect setup to displace that sacrum between the two halves of the pelvis.

So that would be the primary factor, which -- the mechanism of the injury.

(2 RP 91)

On cross-examination, Dr. Spanier was asked:

Q Now, you mentioned that the -- it's your opinion that the force of the impact was strong enough to precipitate the injuries that the Plaintiff has complained of; is that correct?

A That is correct.

Q Can you tell me which records you were relying on when you calculated the force of the accident?

A I did no calculations, formal calculations of the force, but in reviewing the patient's testimony in her deposition, both she and Ms. Cooper described forces . . . I don't have calculations though.

(2 RP 160)

Dr. Folweiler also premised his opinion on the forces and impact of the accident. He explained:

[A] And what I'm saying essentially is that during this accident that she had been accelerated very quickly and back and forth within her vehicle, and what had happened is that this had torn some of the soft tissues
.....

(3 RP 226:22-25) Dr. Folweiler's understanding of the accident was based on plaintiff's description of the accident. He testified:

A She did. She gave me a description of the car accident and how she felt she had moved during that car accident.

Q So what is your understanding of the mechanism of Ms. Stedman's injuries?

A So, if I can just read what she wrote to me when she filled out the paperwork. She wrote to me that during the car crash, uh, the car crash moved the steering wheel violently left to right causing me to hit the front left face against the window, my lower body being pressed hard left to right. Also, hitting the seat belt connection hard, left a bruise. And in my bottom I felt something like a small stick breaking left to right.

Q And were the symptoms that Ms. Stedman -- that she described then consistent with this mechanism of injury?

A Entirely. I believe that the mechanism of injury and the symptoms that she described to me were completely consistent.

.....

A . . . She described to me the point of impact on her vehicle and some of the damage that was caused to it. And given that information I could surmise some of

the vectors of the forces that were involved in the collision and how they may have created the injury that she had.

(3 RP 227:16-228:17)

[A] . . . severe straightening of the cervical curve is seen above C6 . . . And we find it commonly following accidents, car accidents, where someone's head and neck will have been violently shaken back and forth.

Q And would you attribute then this finding of the straightening of her cervical spine to the motor vehicle accident?

A It seems the most likely cause. . . .

(3 RP 236:1-13)

Dr. Folweiler admitted that he had not done any calculations of the forces.

Q You admit though that you didn't actually do anything to try to calculate the forces at issue here; is that correct?

A I did not do the kind of math that is necessary to calculate the forces, no. It's possible for me to do that, but I didn't do it.

(3 RP 248:22-249:2)

In closing argument, plaintiff again addressed the force and impacts from the accident. Plaintiff argued:

That just means that Ms. Stedman's vehicle struck a stationary object. That doesn't make this impact any less severe. And in fact the damage to her vehicle suggests that.

(4 RP 491:10-13)

So this was not a low-velocity impact as what the Defense would like to paint it. But nonetheless, this is not a case where we're claiming that our client had significant injuries that last a lifetime

. . . Is that consistent with the damage that was done to these two vehicles? Of course. Again, this is not -- we're not claiming that she's got debilitating injuries. Are her injuries consistent with what the photographs show? Of course they do.

(4 RP 493:19-494:6)

. . . Dr. Renninger testified today, well, you know, she walked into her chiropractor the day after the accident and complained of pain everywhere. Well, yeah, that's the day after you've been jolted around in a car.

(4 RP 495:11-15)

F. CLOSING ARGUMENT AND VERDICT.

Plaintiff asked the jury to award a total of \$57,494.94: general damages of \$20,000; medical expenses of \$35,494.94, and property damage of \$2,000. (4 RP 503:25; 506:18-24; 507:8-508:3) Ms. Cooper asked the jury to award a small amount for general damages and, if they believed plaintiff accurately reported her symptoms, medical expenses of \$17,889. (4 RP 525:12-17; 527)

On January 6, 2011, the jury reached its verdict. (CP 483-84) The jury concluded that Ms. Cooper's negligence was a proximate cause of injury to plaintiff and that plaintiff was not negligent. *Id.* The jury awarded damages of \$22,000. *Id.*

G. JUDGMENT AND STATUTORY COSTS.

Plaintiff moved for entry of the judgment on the verdict and sought statutory costs of \$1,469.83. (CP 515-17) Ms. Cooper objected to the amount of costs. (CP 527-33) Ms. Cooper maintained that plaintiff was entitled to only \$902.94 in statutory costs. *Id.*

The trial court rejected Ms. Cooper's objections and on January 25, 2011, the court entered judgment for Ms. Stedman in the principal amount of \$22,000 and for statutory costs and statutory attorney fees of \$1,469.83. (CP 559-61) The judgment total was \$23,469.83.

Ms. Cooper moved for reconsideration of the judgment and asked the court to vacate the judgment. (CP 601-08) Ms. Cooper argued that the court had ruled during trial that the medical records were not admissible on several grounds. Despite rejecting the medical records for entry as evidence, the court awarded plaintiff \$657.39 in costs associated with procuring the medical records. (CP 602) RCW 4.84.010(5) permits costs for "[r]easonable expenses . . . incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration. . . ."

Plaintiff opposed Ms. Cooper's motion for reconsideration arguing that the trial court properly awarded her costs for medical records admitted at trial and admitted at the mandatory arbitration. (609-10) The court denied the motion for reconsideration. (CP 689-92)

H. PLAINTIFF'S MOTION FOR MAR 7.3 ATTORNEY FEES AND COSTS/MOTION FOR AMENDED JUDGMENT.

After the judgment was entered, plaintiff moved to amend the judgment to add an award of attorney fees and costs pursuant to RCW 7.06.060 and MAR 7.3. (CP 562-74) Plaintiff argued that the jury verdict of \$22,000 did not improve Ms. Cooper's position on trial de novo when compared to the \$23,299.99 offer of compromise less the statutory costs of \$1,469.83. (CP 566) When the statutory costs are deducted, the offer of compromise amount is reduced to \$21,830.16. (CP 565) The amount of \$21,830.16 compared to the \$22,000 jury verdict was not an improved position. (CP 565-66) Ms. Cooper opposed the motion arguing that plaintiff was not the prevailing party because the court's judgment incorrectly included costs not permitted under RCW 4.84.010. (CP 623-33) Ms. Cooper maintained that the \$22,000 jury verdict was less than the \$23,299.99 offer of compromise. *Id.*

The court concluded that Ms. Cooper had failed to improve her position on the trial de novo. (CP 694) The court concluded the jury verdict (\$22,000.00) exceeded the offer of compromise (\$23,299.99) once the statutory costs (\$1,469.83) were deducted from the offer of compromise. *Id.* The court entered an amended judgment order for

plaintiff and awarded attorney fees of \$58,546.88 on February 17, 2011. (CP 693-96) Ms. Cooper timely filed this appeal. (CP 701-09)

V. ARGUMENT

A. STANDARD OF REVIEW.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569, *rev. denied*, 106 Wn.2d 1009 (1986). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Id.* An error is prejudicial when it affects, or presumptively affects, the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). The exclusion of biomechanical expert, Dr. Allan Tencer, was an abuse of discretion and reversible error.

This Court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999). Similarly, a review of the application of a statute is reviewed de novo. *Basin Paving Co. v. Contractors Bonding and Ins. Co.*, 123 Wn. App. 410, 414, 98 P.3d 109 (2004). The superior court committed a legal error in its interpretation and application of RCW 4.84.010, 7.06.050, and MAR 7.3.

B. EXCLUSION OF BIOMECHANICAL EXPERT DR. ALLAN TENCER WAS PREJUDICIAL ERROR.

The superior court's order excluding Dr. Tencer was based on untenable grounds. Dr. Tencer's opinion was logical. Dr. Tencer's opinion was relevant. Dr. Tencer's opinion was not cumulative. The exclusion of his opinion denied Ms. Cooper the ability to provide persuasive, scientific evidence about the forces and impacts of the accident that demonstrated plaintiff's account of the accident and her injuries were exaggerated.

The superior court's explanation for excluding Dr. Tencer is directly inconsistent with the court's ruling on plaintiff's motion for partial summary judgment. Plaintiff sought a ruling that the medical care was reasonable and related to the accident. In December 2010, the court denied plaintiff's motion in part because there were issues about whether any injuries had been caused by the accident. (CP 467) The court's order states: "A genuine issue of material fact exist [sic] as to whether any injuries were caused or medical treatment was necessary as a result of the accident." *Id.*

In October 2010, when ruling on plaintiff's motion to exclude Dr. Tencer, the court concluded that the testimony of Dr. Allan Tencer was "logically irrelevant to the issue the jury must decide: the degree to which

these particular plaintiffs were injured in this particular automobile accident.” The court also ruled Dr. Tencer’s testimony was cumulative. (CP 291)

In *Savage v. State*, 72 Wn. App. 483, 864 P.2d 1009 (1994), *rev’d in part on other grounds*, 127 Wn.2d 434, 449, 899 P.2d 1270 (1995), this Court determined the superior court abused its discretion in excluding a memorandum. *Savage* involved a suit by a rape victim against the State. She had been raped by a parolee. She sought to introduce a memorandum from the parole officer’s supervisor. The superior court had excluded the memo as, among other things, cumulative. This Court reversed and remanded. The Court explained:

We conclude that the trial court abused its discretion by excluding this document. We agree with *Savage* that the document is relevant to the State’s negligence . . . It is also not cumulative because, while there was some testimony on the subject, the jury could find the written document far more persuasive than the less-than-perfect recollections of state employees at trial.

72 Wn. App. at 496.

Similarly here, there was other evidence about the facts of the accident, the impact of the accident and the forces involved. None of the testimony was from a biomechanical, accident reconstructionist expert. As in *Savage*, the jury could find the trained, specific scientific opinion of Dr. Tencer far more persuasive testimony from the lay witnesses and the

medical witnesses about the general forces involved in the accident. The medical witnesses discussed the force of the accident based solely on plaintiff's subjective views. Dr. Tencer's opinion was based on scientific principles and calculations.

ER 403 states that relevant evidence may be excluded to avoid the "needless presentation of cumulative evidence." The commentators have aptly noted that "cumulative evidence" implies more than repetition. 22 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE, § 5220, p. 303. Cumulative and needless evidence means something is being added to the proof already offered. *Id.*

The superior court's error in excluding Dr. Tencer was prejudicial. An error is prejudicial when it affects, or presumptively affects, the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Excluding evidence that prevents a party from presenting a crucial element of their case constitutes reversible error. *Grigsby v. City of Seattle*, 12 Wn. App. 453, 457, 529 P.2d 1167, *rev. denied*, 85 Wn.2d 1012 (1975) (exclusion of plaintiff's expert on standard of care was reversible error requiring a new trial). Without Dr. Tencer, Ms. Cooper was deprived of her ability to fully present her case to the jury and rebut plaintiff's evidence emphasizing how the impact in the accident resulted in plaintiff's injuries.

Plaintiff's case emphasized her version of the force and impact of the accident. None of the witnesses provided testimony about the scientific calculations about the forces and impacts of the accident. Instead, the jury heard from plaintiff's medical experts, who relied on plaintiff's account of the accident. Ms. Cooper was not permitted to present the expert opinion of Dr. Tencer: an opinion that is relevant, would assist the jury, and was not redundant of any of the evidence presented. The superior court abused its discretion and Ms. Cooper is entitled to a new trial.

C. THE TRIAL COURT ERRED IN AWARDING MAR 7.3 FEES AND COSTS BECAUSE MS. COOPER IMPROVED HER POSITION AT THE TRIAL DE NOVO.

A party who requests trial de novo, must only pay the fees and costs of the opponent if she fails to improve her position at the trial de novo. MAR 7.3; RCW 7.06.060(1). Ms. Cooper improved her position at the trial de novo because the jury's award was less than the arbitration award and less than plaintiff's offer of compromise. The arbitration award was \$23,300. (CP 785) Plaintiff's offer of compromise was one penny less than the arbitration award: \$23,299.99. (CP 565) The jury awarded damages of \$22,000. (CP 483-84) Ms. Cooper improved her position on the trial de novo. It was error to award MAR 7.3 fees and costs.

MAR 7.3 provides in relevant part:

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.

RCW 7.06.060(1) provides

The superior court shall assess costs and reasonable attorneys' fees against a party **who appeals the award and fails to improve his or her position on the trial de novo.**

(Emphasis added.)

Washington courts "compare comparables" to determine whether a party has improved his position on the trial de novo. *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003); *see also Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 717, 815 P.2d 293 (1991), *rev. denied*, 118 Wn.2d 1013 (1992). In *Tran*, plaintiff was awarded \$14,675.00 at arbitration. Defendant requested a trial de novo. The jury's award of \$13,375.00 in economic and noneconomic damages was less than the arbitration award.

In a post-trial motion, plaintiff was awarded \$3,205.00 in attorney fees pursuant to CR 37(c) (for costs incurred in proving issues that defendant had denied in response to requests for admission) and \$955.80 in statutory costs (as the prevailing party under RCW 4.84.010). 118 Wn. App. at 610. The CR 37(c) costs and statutory costs were added to the jury's award for a total judgment of \$17,535.80. Plaintiff then argued that because the total judgment exceeded the arbitration award, she was also

entitled to attorney fees under MAR 7.3. *Id.* The trial court denied plaintiff's request for MAR 7.3 fees. *Id.* at 611.

The Court of Appeals affirmed. *Id.* at 616-17. The *Tran* court noted that plaintiff's proposal to include the costs and sanctions was inconsistent with the purpose of MAR 7.3. *Id.* at 612.

A trial is almost always more expensive than arbitration. If Tran's interpretation were accepted, a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred.

Id. The court determined that it was more appropriate to "compare comparables." *Id.*

In *Tran*, comparing comparables meant comparing the compensatory damages awarded by the arbitrator--\$14,675.00--with the compensatory damages awarded by the jury at the trial de novo--\$13,375.00. *Id.* Using this simple comparison, it was obvious that defendant had improved his position and, therefore, plaintiff was not entitled to an award of fees and costs under MAR 7.3.

The *Tran* Court explained its reasoning as follows:

In this case, the only issue at arbitration was Tran's damages. The arbitrator awarded \$14,675 in compensatory damages (\$11,000 in general damages and \$3,675 for medical bills). At the conclusion of trial, the jury's award for compensatory damages was \$13,375, \$1,300 less. Yu improved her position on that issue and under the reasoning of *Wilkerson*, *Christie-Lambert* and subsequent cases, Yu should not be liable under MAR 7.3 for attorney fees. The

total judgment after trial de novo exceeded the arbitration award on account of CR 37 sanctions and statutory costs. Neither the statutory costs nor the CR 37 sanctions were before arbitrator. These are not comparable to the compensatory damages awarded by the arbitrator and therefore should not be considered in a MAR 7.3 determination. The trial court did not err in concluding that Tran was not entitled to MAR 7.3 attorney fees.

Id. at 616-17.

Similarly here, a simple comparison of comparables shows that Ms. Cooper improved her position at the trial de novo. At plaintiff's urging, the trial court here did precisely what the *Tran* Court rejected, namely including statutory costs in the calculations in an attempt to boost the jury verdict over the threshold set at arbitration. Our case has one procedural feature that was not present in *Tran*: here plaintiff made two offers of compromise. The offer of compromise does not, however, change the result because it is merely substituted for the arbitration award.

When a party serves an offer of compromise, the compromise offer becomes the amount used to determine whether a party has improved his position on the trial de novo. RCW 7.06.050(1)(a) and (b). The statute provides as follows:

(b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has

failed to improve that party's position on the trial de novo.

(Emphasis added.)

Plaintiff's offer of compromise of \$23,299.99 "replace[d] the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo." RCW 7.06.050(1)(b). The \$23,299.99 offer of compromise was greater than the jury's \$22,000 verdict. Thus, Cooper improved his position on the trial de novo.

Although an offer of compromise serves the purpose of establishing a new threshold for determining whether the party requesting a trial de novo improves his position pursuant to RCW 7.06.050, it remains at its essence, a settlement offer. If the defendant accepts the offer, he pays the agreed amount to plaintiff. After payment of the settlement amount, plaintiff has no recourse to seek costs. Only a "prevailing party" is entitled to an award of costs. RCW 4.84.010. Where an offer of compromise is offered and accepted, both parties agree to compromise for a settlement and neither is entitled to statutory costs. Further, no judgment is entered after a settlement agreement is reached. RCW 4.84.010 is clear that certain costs "shall be allowed to the prevailing party upon the judgment" (emphasis added).

In light of these basic tenets of case settlement, plaintiff's addition of language indicating that the offer was inclusive of costs and statutory attorney fees is entirely irrelevant. Plaintiff's offer of compromise was an offer for global settlement of the case, regardless of whether she allocated certain sums under certain headings. If Ms. Cooper had accepted either offer, the case would have ended. Plaintiff would have had no recourse to seek the costs and attorney fees because under RCW 4.84.010 she was not a prevailing party. The language in the offer is superfluous and meaningless.

Just as the language is ineffectual for purposes of settlement, it also has no bearing on the sum that replaces the arbitrator's award and establishes a new threshold for the jury award. The arbitrator's award of \$23,300 consisted of \$16,300 in medical special damages and \$7,000 in general damages. (CP 585) It did not include any costs. It cannot be replaced, for purposes of MAR 7.3, with part of the amount of an offer of settlement, particularly when the alleged costs and attorney fees are not quantified. Plaintiff cannot unilaterally change the character of the arbitrator's award from one for only compensatory damages to one for compensatory damages plus an unspecified amount of costs. As the *Tran* Court discussed, only "comparables" should be compared in the MAR

system. 118 Wn. App. at 612. The trial court here failed to compare comparables.

D. THE *NICCUM V. ENQUIST* CASE DOES NOT CONTROL AND WAS WRONGLY DECIDED.

Plaintiff argued, and the superior court incorrectly accepted that *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), *rev. granted*, 168 Wn. 2d 1022 (2010), applied. In *Niccum*, Division III of the Court of Appeals endorsed the unfounded concept of segregated amounts of an offer of compromise.

In *Niccum*, plaintiff's offer of compromise was an amount less than the jury's verdict. Plaintiff's offer of compromise stated that it was inclusive of costs and attorney fees. When the jury's verdict awarded less than the offer of compromise, plaintiff argued that he was still entitled to MAR 7.3 fees because once the statutory costs from trial were deducted from the offer of compromise, the amount was less than the jury verdict. Division III stated: "We conclude that RCW 7.06.050(1)(b) should be read so that any segregated amount of an offer must replace an amount in the same category granted under the arbitrator's award." 152 Wn. App. at 500-01.

Yet, in *Niccum* as here, there was no segregated amount in the arbitrator's award. The arbitrator had awarded damages only. There was

no amount awarded for costs. Nevertheless, the *Niccum* court, as the superior court did here, created a new category and allowed the plaintiff through contrivance to change the nature of the arbitration award. The *Niccum* decision is inconsistent with *Tran v. Yu* and is wrongly decided. This Court should enforce the clear rule in Washington of comparing comparables: the jury verdict of \$22,000 should be compared to the offer of compromise of \$23,299.99. Any other outcome will create uncertainty and permit the non-de novoing party to manipulate the de novo process.

E. THE SUPERIOR COURT'S ORDER AND JUDGMENT CONFLICT WITH THE PLAIN MEANING OF THE RULE AND STATUTE.

When interpreting statutes, courts should not rewrite explicit and unequivocal language. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004). Courts must assume that the legislature meant exactly what it said and must apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, statutes should be construed to effect the legislative purpose and to avoid unlikely, strained, or absurd results. *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). A court should not construe a statute as the legislature could have but did not phrase it. *See Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999).

RCW 7.06.050 is clear that the offer of compromise “shall replace the amount of the arbitrator’s award” for determining whether a party improved his position and whether attorney fees are appropriate. RCW 7.06.050(1)(b) (emphasis added). There is no ambiguity about this language, and it should be applied as written. *See Roggenkamp*, 153 Wn.2d at 625. Plaintiff’s offer of compromise for \$23,299.99 replaced the amount of the arbitrator’s award for \$23,300. The statute provides no provision for some of the offer to replace the arbitrator’s award and for some unknown amount of costs to be adjusted out. There is no mechanism to account for plaintiff’s apparent attempt to include costs and fees in this offer of compromise.

The figure of \$23,299.99, regardless of the language in the offer, simply replaced the award of \$23,300 as the threshold amount. Plaintiff’s attempt to incorporate costs into the arbitrator’s award through her offer would require additional language to be read into RCW 7.06.050 that simply is not there. *See Hansen*, 93 Wn. App. at 929. Further, plaintiff’s approach would result in the absurd situation in which the parties would not know what amount needed to be bettered at trial by the party requesting de novo review because the amount of costs had not been set. *See Thurston County*, 151 Wn.2d at 175.

Rather than compare the jury's award with the offer of compromise, the superior court compared the jury award plus the costs awarded at trial to the offer of compromise. The superior court's acceptance of this revisionist accounting despite the fact that it is inconsistent with the plain interpretation of an unambiguous statute, the caselaw, and common sense. The amount of the costs was an unliquidated amount at the time of the offer of compromise. It was not known what amount of costs, if any, to which plaintiff would be entitled.

Under plaintiff's argument and the superior court's order, Ms. Cooper would not have known what amount she had to "beat" at trial in order to avoid MAR 7.3 attorney fees. She would not have been able to fairly assess whether she should consent to settle or pursue her jury trial. The scheme's purpose of discouraging meritless appeals would not be furthered where a party did not know exactly what amount would serve as the threshold for being meritless. Thus, the attempt to include these costs in the calculation of whether plaintiff is entitled to attorney fees is patently unfair.

Whether this situation is examined as one in which plaintiff subtracted costs from the arbitrator's award (as replaced by the offer of compromise) or one in which plaintiff added the costs to the jury award and then compared it to the arbitration award, the effect is the same. As

this Court held in *Tran*, because the statutory costs were not before the arbitrator, they cannot be considered in connection with the jury verdict to determine whether a party has or has not improved his position on the trial de novo. 118 Wn. App. at 616. The arbitrator did not award costs or statutory attorney fees to plaintiff so such costs cannot be involved in the calculation of the jury verdict or the arbitrator's award. *See Tran*, 118 Wn. App. at 616 ("Neither the statutory costs nor the CR 37 sanctions were before arbitrator. These are not comparable to the compensatory damages awarded by the arbitrator and therefore should not be considered in a MAR 7.3 determination."). In the final analysis, the jury award in this case (\$22,000) was an improvement of defendant's position from the last offer of compromise (\$23,299.99), so plaintiff was not entitled to attorney fees pursuant to MAR 7.3, RCW 7.06.050, and RCW 7.06.060. This Court should reverse and remand for entry of judgment on the jury verdict only.

F. THE SUPERIOR COURT ERRED IN AWARDING \$657.39 FOR MEDICAL RECORDS; STATUTORY COSTS FOR MEDICAL RECORDS WAS LIMITED TO \$94.50.

Plaintiff manipulated the determination of whether Ms. Cooper improved her position at the trial de novo by having the court deduct the statutory costs from the amount of the offer of compromise. Assuming for the sake of argument only that deduction of the statutory costs was proper,

Ms. Cooper still improved her position on the trial de novo because the superior court's award of statutory costs was wrong. The superior erred as a matter of law in interpreting RCW 4.84.010(5) and awarding plaintiff \$657.39 for medical records as part of the statutory costs. Plaintiff was only entitled to an award of \$94.50 for the medical records admitted at the trial. She was not entitled to costs for medical records admitted at mandatory arbitration. If the court had properly limited the medical records to \$94.50, plaintiff's statutory costs totaled \$906.94. When that amount is deducted from the amount of the offer of compromise, Ms. Cooper definitely improved her position at the trial de novo: \$22,393.05 (\$23,299.99 less \$906.94) compared to the jury verdict of \$22,000.

RCW 4.84.010 provides which costs are recoverable. RCW 4.84.010(5) states:

Reasonable expenses . . . incurred in obtaining reports and records, which are admitted into evidence at trial **or** in mandatory arbitration in superior or district court, including but not limited to medical records . . .

(Emphasis added.) Plaintiff's cost bill was not limited to the 27 pages of medical records admitted into evidence at trial. (CP 529) Plaintiff sought costs for all the medical records arguing that the entire set of records were admitted at the mandatory arbitration so she was entitled to the expense as

costs under RCW 4.84.010(5). Plaintiff argued that the statute does not say “trial or, if there is no trial, in mandatory arbitration.” (CP 541)

Admittedly, the court cannot add language to a statute. *In re Estate of Black*, 153 Wn.2d at 162. Yet, the court cannot change the meaning of the plain language of a statute. *Hansen v. City of Everett*, 93 Wn. App. at 929 (1999) (construe statute as written not as it could have been written). Here plaintiff asked the court to change the word “or” to “and.” She contended she was entitled to an award for the medical records which were admitted into evidence at trial “and” at mandatory arbitration. The word “or” does not mean “and” unless there is clear legislative intent to the contrary. *HJS Dev. Inc. v. Pierce County*, 148 Wn.2d 451, 473, n. 95, 61 P.3d 1141 (2003), *citing*, *State v. Tiffany*, 44 Wash. 602, 87 P. 923 (1906).

Plaintiff also cited to *Spurrell v. Bloch*, 40 Wn. App. 854, 871, 701 P.2d 529, *rev. denied*, 104 Wn.2d 1014 (1985), in support of her argument that costs can be recovered for evidence admitted before trial. There the superior court awarded costs for portions of depositions which were submitted on a summary judgment motion. The entire case was decided on summary judgment and there was no trial. *Spurrell* does not support plaintiff’s contention that she was entitled to costs for records admitted at the trial and at the mandatory arbitration.

The superior court erred as a matter of law in construing RCW 4.84.010(5) to permit a duplicative award of medical records costs. The court's award of statutory costs for medical records should have been limited to \$94.50. Using the correct amount of statutory costs, Ms. Cooper unquestionably improved her position on the trial de novo. This Court should reverse and remand the superior court's amended judgment and remand to enter a reduced judgment of \$22,000 plus statutory costs of \$906.94.

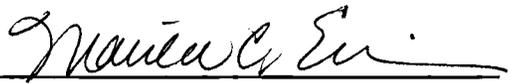
VI. CONCLUSION

The superior court abused its discretion in excluding Dr. Tencer, a qualified expert whose opinion about the forces and impact of the accident were unique and not cumulative. Dr. Tencer's opinion addressed a central issue at trial: were the forces of the accident consistent with plaintiff's description of the accident. This Court should reverse and remand for a new trial.

The superior court also erred in concluding that Ms. Cooper did not improve her position on the trial de novo. The jury's award was less than the offer of compromise. Plaintiff was not entitled to MAR 7.3 fees and expenses. This Court should reverse and vacate the amended judgment and enter judgment on the jury verdict only.

DATED this 11th day of August, 2011.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Attorneys for Appellant Stacey Cooper

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affiant deposited in the United States mail, postage prepaid, copies of the following documents:

1. Brief of Appellants; and
2. Affidavit of Service by Mail;

addressed to the following parties:

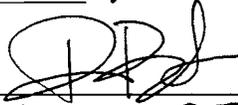
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DATED this 11th day of August, 2011.



JESSICA PITRE-WILLIAMS

SIGNED AND SWORN to (or affirmed) before me on
8-11-11 by JESSICA PITRE-WILLIAMS.



Print Name: REBECCA BARRETT
Notary Public Residing at LYNNWOOD, WA
My appointment expires 4-9-2014

