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No. 71008-7-1

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

MOGHADAM M. MOVAHEDI,

Appellant,

v.

RAYMOND THOMAS, ET UX,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Moghadam Movahedi (“Movahedi”) was injured in an auto accident involving respondent, Raymond Thomas (“Thomas”). Movahedi was diagnosed at the emergency room with cervical and left wrist sprains. Movahedi’s family doctor, Dr. Chi Gan, similarly diagnosed him with cervical, thoracic and wrist sprains as a result of the auto accident. Movahedi underwent six sessions of acupuncture with Dr. Gan, over a period of one month, and was released as fully healed three months after the accident. Six months after the accident, Movahedi saw Dr. Gan complaining of episodes of loss of consciousness and a reoccurrence of headaches, photophobia and dizziness. Dr. Gan referred Movahedi to a neurologist, who diagnosed Movahedi with epilepsy/seizure disorder. During the discovery phase of this litigation, Movahedi claimed his epilepsy was causally related to the auto accident. That claim was later dropped when Movahedi’s neurologist testified in deposition that the epilepsy was not causally related to the accident.

Dr. Mary Reif, a neurologist retained by the defense, performed a Civil Rule 35 examination of Movahedi, to determine what injuries were causally related to the auto accident. Dr. Reif specifically opined in her detailed written report that Movahedi incurred cervical, thoracic and wrist sprains as a result of the accident.

At trial, Dr. Gan testified, for the first time, that Movahedi had incurred a traumatic brain injury in the auto accident, basing his opinion on the recurrence of headaches, photophobia, and dizziness that presented in December 2011, six months after the accident. Notably, it was these symptoms, coupled with the episodes of loss of consciousness, which caused Dr. Gan to refer Movahedi to a neurologist, who diagnosed Movahedi not with a traumatic brain injury, but with epilepsy/seizure disorder, unrelated to the auto accident. Moreover, there is no evidence in any of Movahedi's medical records of a diagnosis of a traumatic brain injury. None of Movahedi's medical records following the accident, including the emergency room records, contain a diagnosis of traumatic brain injury.

Dr. Reif testified at trial for the defense. She testified consistent with her written report, explaining those diagnoses that she found causally related to the auto accident: cervical, thoracic and wrist sprains. When asked if she had diagnosed Movahedi with a traumatic brain injury, Dr. Reif replied "No."

Movahedi argues that the trial court erred in allowing Dr. Reif to answer that single question, claiming Dr. Reif was testifying to a new opinion, not previously disclosed in her written report. The argument fails. A simple reading of Dr. Reif's written report establishes the fallacy of such

an argument. Dr. Reif's report specifically states the only injuries Movahedi incurred in the accident were cervical, thoracic and wrist sprains; she did not diagnose him with a traumatic brain injury. The absence of a diagnosis of traumatic brain injury is obvious. The trial court did not err in allowing Dr. Reif to testify to the obvious fact that she did not diagnose Movahedi with a traumatic brain injury.

The jury awarded Movahedi stipulated special damages, as well as general damages. While Movahedi was unhappy with the amount of general damages awarded, the jury's award is within the range of credible evidence because the jury was not obligated to believe or accept Dr. Gan's new diagnosis of traumatic brain injury, particularly where none of his medical records indicate that he diagnosed Movahedi with a traumatic brain injury and no other doctors, including the emergency room practitioners or Movahedi's neurologists, diagnosed him with a traumatic brain injury. The trial court did not abuse its discretion in denying Movahedi's motion for a new trial.

II. STATEMENT OF THE ISSUES

- A. **The trial court properly exercised its discretion in allowing Dr. Reif to testify that she did not diagnose Movahedi with a traumatic brain injury as a result of the auto accident, because Dr. Reif's CR 35 exam written report clearly discloses the fact that she did not diagnose Movahedi with a traumatic brain injury.**

- B. The trial court properly exercised its discretion in allowing Dr. Reif to testify that she did not diagnose Mr. Movahedi with a traumatic brain injury as a result of the auto accident, because Movahedi failed to establish a willful discovery violation and failed to establish that his ability to prepare for trial was substantially prejudiced.**
- C. The trial court properly exercised its discretion in denying Movahedi's motion for new trial because the jury's verdict is within the range of credible evidence.**

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The Auto Accident, Claimed Injuries, Treatment and Dr. Gan's Trial Testimony.

The accident between Movahedi and Thomas occurred on June 29, 2011. CP 2. Following the accident, Mr. Movahedi, who was seventeen years old at the time, was treated at the Overlake Hospital Medical Center emergency department. CP 159. He was diagnosed with a cervical strain and a left wrist strain, and was prescribed Robaxin and Tylenol with Codeine. *Id.* Movahedi followed up with family practitioner, Chi Gan, MD, who diagnosed him with neck and lumbar sprain and strain, rotator cuff sprain and strain, and wrist sprain and strain as a result of the accident. CP 160-161; RP 12:12-15.¹ Movahedi also complained of headaches and dizziness which Dr. Gan determined to be most likely caused by the neck

¹ Two separate partial Report of Proceedings have been filed in this case. The Report of Proceedings filed in the Court of Appeals on May 7, 2014 will be referred to as RP. The Report of Proceedings filed on September 30, 2014 will be referred to as Supp. RP.

sprain. CP 160; RP 11:21-25. Mr. Movahedi proceeded with a course of acupuncture with Dr. Gan, for his neck, shoulders, and back, receiving a total of six acupuncture treatments in July 2011. CP 161-167. Movahedi did not seek treatment from Dr. Gan in August or September 2011. On October 4, 2011, he followed up with Dr. Gan, reporting that he was “now virtually all better after treatment.” CP 168. According to Dr. Gan, Movahedi’s headaches were gone within a month after the accident. RP 17:11-14. Dr. Gan released Movahedi on October 4, 2011, as “fully healed” and “discharged.” CP 168; Supp. RP 14:22-25; 15:1-8.

Two months later, in December 2011, Movahedi returned to Dr. Gan complaining that he was experiencing episodes of loss of consciousness. RP 17:17; Supp. RP 5:22-24; 6:1-2. Movahedi also complained of a reoccurrence of headaches, photophobia and dizziness. RP 16:24-25; Supp. RP. 15:23-25; 16:1-4. Dr. Gan testified at trial that it was at this time in December, six months after the accident, that he diagnosed Movahedi with having incurred a “traumatic brain injury” in the auto accident. RP 16:16-25; 17:1-8. Dr. Gan further testified that he referred Movahedi to a neurologist following the December 2011 visit because he (Dr. Gan) was concerned that Movahedi was experiencing post concussive symptoms and/or some sort of seizure disorder. RP 17: 9-19. However, there is no

written diagnosis or notation in Dr. Gan's records of a traumatic brain injury. *See*, CP 93; 160-168.

Dr. Gan admitted at trial that the Overlake Hospital emergency records for the day of the auto accident, did **not** diagnose Movahedi with having suffered a concussion or a traumatic brain injury in the auto accident. Supp. RP. 10:13-25; 11:1-7.² Dr. Gan also admitted that two days after the accident, when Movahedi first treated with Dr. Gan, Movahedi did not complain of any memory or concentration issues. Supp. RP 11:10-17.

The neurologists who subsequently treated Movahedi did not diagnose a traumatic brain injury, instead they diagnosed him as having an epileptic/seizure disorder. CP 172, p. 8:24 to CP 173, p. 11:22; p. 12:21-25; p. 13:1-2. The neurologists further determined that the episodes of loss of consciousness that Movahedi complained of in December 2011 were not related to the auto accident, but were causally related to his epilepsy/seizure disorder, and that Movahedi's epilepsy/seizure disorder was **not** casually related to the auto accident. *Id.*; Supp. RP 5:9-16; 6:4-20; Supp. RP 17:17-

² While Movahedi claims in his opening Appellate Brief at p. 12, that he was "diagnosed with a traumatic brain injury at the emergency room, within hours of the accident," he fails to provide any citation to the record to support the assertion in violation of RAP 10.3(a)(6). Arguments that are not supported by any reference to the record need not be considered by the Court. *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P.3d 945, 956-57 (2011), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

23. Indeed, an MRI of Movahedi's brain showed a brain lesion that had likely been present since birth and it was this lesion that may have caused the epilepsy/seizure disorder. Supp. RP 5:19-21. While Movahedi originally claimed early in this litigation that his epilepsy/seizure disorder was caused by the auto accident, after one of Movahedi's neurologists testified at his deposition shortly before trial, that the epilepsy/seizure disorder was **not** causally related to the auto accident (CP 172-173), the claim was apparently dropped and a claim of traumatic brain injury was raised for the first time. CP 114:8; 127:4-5.

2. Prior to trial, Dr. Reif performed a CR 35 exam of Mr. Movahedi and prepared a detailed written report that was provided to Movahedi's counsel in the course of discovery.

On January 25, 2013, eight months before trial, Movahedi presented to Mary Reif, MD, a board certified neurologist retained by Thomas, for a Civil Rule 35 examination. CP 84. In connection with the exam, Dr. Reif reviewed the police accident report, photographs, Movahedi's medical records between the dates of April 8, 2010 and August 2012, Movahedi's discovery responses in this litigation, and his deposition transcript. CP 84. Following the exam, Dr. Reif drafted a detailed eight page report and an eight page medical records summary. CP 84-99.

For her written report following the CR 35 examination and records review, Dr. Reif was asked to identify all of Movahedi's relevant diagnoses and their causal connection to the auto accident on a more probable than not basis. CP 88-89. Dr. Reif responded that the diagnoses of cervical, thoracic, and wrist sprains were causally related to the auto accident, as were the initial cervicogenic headaches. *Id.*

Dr. Reif was also asked to identify those injuries and/or complaints that were **not** casually related to the auto accident; she opined that Movahedi's persistent tenderness to light touch, headaches (after July 2011) and epilepsy were not causally related to the auto accident. CP 89-90. Dr. Reif explained that Movahedi's medical records indicated that he had at least one seizure in his youth, when he was seven or eight years of age. CP 88. The records further indicated that Movahedi had an abnormal brain MRI and electroencephalogram, and that the abnormality seen on the MRI was not acute and not of a pattern that would result from this auto accident. CP 88-89. Thus, Dr. Reif concluded that the MRI abnormal brain finding and Movahedi's epilepsy "are completely coincidental and unrelated to the whiplash injury." CP 89.

Dr. Reif's written report and medical records summary were provided to Movahedi's counsel during the discovery phase of the litigation. CP 121:6-7. Dr. Reif was also identified as an expert witness in Defendant's

Disclosure of Possible Primary Witnesses, timely filed on April 2, 2013. CP 20-21. The Disclosure indicated that Dr. Reif would testify as to her review of Movahedi's medical records, her findings on examination, and her opinions regarding Movahedi's medical condition. CP 126:26-27. *Id.* Movahedi's counsel chose not to depose Dr. Reif prior to trial. CP 126:26-27.

3. Dr. Reif's Trial Testimony.

Dr. Reif testified at trial consistent with her report. She provided detailed testimony regarding her neurological examination of Movahedi and her extensive review of his medical records. CP 131-136. Dr. Reif discussed the diagnosis provided by Overlake Hospital's emergency department at Movahedi's discharge – cervical and wrist sprains – noting that he was not diagnosed with a traumatic brain injury. CP 134, p. 20:9-25 to CP 135, p. 21: 1-15. Dr. Reif further testified that she reviewed all of Movahedi's medical records and none of his medical records suggested that he had incurred a traumatic brain injury as a result of the auto accident. *Id.*; CP 135, p. 21:16-25; p. 22:1-25; p. 23:1-14.

Dr. Reif also testified as to her diagnoses as a result of the accident. Just as the Overlake treating providers and Dr. Gan had, Dr. Reif diagnosed Movahedi with having incurred back, neck, and wrist sprains. CP 132, p. 12:13-25, p. 133, p. 13:1-17. Dr. Reif also opined that at the time she

evaluated Movahedi, he had fully healed from those injuries. CP 133, p. 13:6-17.

Dr. Reif discussed Movahedi's diagnosis of partial complex epilepsy, and like his neurologists, she did not attribute that disorder to the auto accident. CP 133, p. 13:18-20. Dr. Reif further testified that, in her opinion, the headaches Movahedi complained of beginning in December 2011, were not related to the auto accident, instead, they were related to his seizure disorder. CP 133, p. 14:21-25, p. 15:1.

When asked if she had diagnosed Movahedi with a traumatic brain injury as a result of the accident, Dr. Reif doctor replied "no":

Q. . . . Now, based on your experience as a neurologist and your examination, your review of the records, you're not diagnosing him with having had a traumatic brain injury correct?

A. No, I'm not diagnosing him with a TBI.

CP 133, p. 15:2-5, 8.

Before Dr. Reif testified, Movahedi's counsel made a verbal motion to prohibit Dr. Reif from testifying as to whether she had diagnosed Movahedi with a traumatic brain injury in the auto accident. RP 29:20-24.³ Movahedi's counsel argued that because Dr. Reif did not specifically state in her written report that Mr. Movahedi **had not** suffered a traumatic brain

³ Movahedi did not, at any time, file a written motion in limine to exclude or limit Dr. Reif's testimony.

injury in the accident, she should be prohibited from rendering such an opinion at trial. RP 32:11-13; 33:17-21. Defense counsel presented an offer of proof outside the presence of the jury, explaining that Dr. Reif would testify to her examination of Movahedi, her extensive review of Movahedi's medical records, and her specific diagnosis of injuries that she opined were related to the auto accident (neck, back and wrist sprains). RP 29-30; 34. Following the offer of proof, the trial court denied Movahedi's oral motion to exclude Dr. Reif's testimony. RP 35:12-19. The court explained that, based on the offer of proof, Dr. Reif was specific when identifying all diagnosis attributable to the auto accident, and as a result, the trial court determined that Dr. Reif's report made it clear that Dr. Reif had **not** diagnosed Movahedi with a traumatic brain injury as a result of the accident. RP 32:18-25; 33:1-14. The court, therefore, ruled that defense counsel could ask Dr. Reif whether or not she diagnosed Mr. Movahedi with a traumatic brain injury. RP 35:12-19. The court did, however, rule that defense counsel could not ask Dr. Reif why she had ruled out traumatic brain injury because Dr. Reif's written report did not explain her reasoning for doing so. RP 35:21-25.⁴

⁴Movahedi's counsel, however, cross-examined Dr. Reif at length regarding the basis for her statement that traumatic brain injury was not one of her diagnosis. CP 136-138.

B. Procedural Background - The Jury's Verdict and Plaintiff's Post Trial Motion For New Trial.

Liability was not at issue in the trial; Thomas admitted liability for the accident. CP 17. Thomas also stipulated that the \$6,970.00 incurred by Movahedi for medical treatment at Overlake Hospital emergency room, the imaging tests, and Dr. Gan (through October 4, 2011), were reasonable, necessary and related to the auto accident. CP 41-42. Trial commenced on September 10, 2013, and concluded in a jury verdict on September 12, 2013, in favor of Mr. Movahedi, awarding him the stipulated past economic damages of \$6,970.00, and past and future noneconomic damages in the amount of \$650.00. CP 56.

Movahedi moved for a new trial under Civil Rule 59(a), arguing that Thomas had failed to disclose Dr. Reif's opinion that she did not diagnose Movahedi with a traumatic brain injury in the accident. CP 62-72. Movahedi also argued that he was entitled to a new trial because the jury verdict was contrary to the evidence. *Id.* Thomas timely opposed the motion. CP 113-125. On October 1, 2013, the trial court denied the motion for a new trial. CP 151-152. Movahedi filed a Notice of Appeal on October 7, 2013. CP 153-156.

IV. ARGUMENT

A. Standard of Review on Appeal.

A trial court's rulings on discovery sanctions, motions in limine, or the admissibility and scope of expert testimony are reviewed for abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (discovery sanctions); *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 286, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 58, 52 P.3d 522 (2002) (motions in limine); *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994) (admissibility and scope of expert testimony). Likewise, a trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal absent a showing of a clear abuse of discretion. *Kramer v. J.J. Case Mfg. Co.*, 62 Wn. App. 544, 561, 815 P.2d 798 (1991).

A trial court abuses its discretion only when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Burnet*, 131 Wn.2d at 494. A discretionary decision is “manifestly unreasonable” if the court adopts a view that “no reasonable person would take.” *Mayre v. Sto. Indus. Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision is exercised on “untenable grounds” or for “untenable reasons” if the trial court’s decision is based on unsupported

facts. *Id.* The evidence in this case conclusively establishes that the trial court did not abuse its discretion in allowing Dr. Reif to testify that she did not diagnose Movahedi with a traumatic brain injury, nor did the trial court abuse its discretion in denying Movahedi's motion for new trial.

B. The Trial Court Properly Exercised Its Discretion In Allowing Dr. Reif To Testify That She Did Not Diagnose Movahedi As Having Incurred A Traumatic Brain Injury In The Auto Accident.

1. Dr. Reif's Written Report Following The CR 35 Exam Clearly Disclosed The Fact That Dr. Reif Did Not Diagnose Movahedi With A Traumatic Head Injury As A Result Of The Auto Accident.

Dr. Reif's written report following the CR 35 exam of Movahedi was timely served on Movahedi's counsel during the discovery phase of this litigation; Movahedi does not claim otherwise. Dr. Reif's report unquestionably details all of her findings, her opinions regarding the injuries and diagnosis she determined Movahedi sustained as a result of the auto accident, and it sets forth a detailed summary of Movahedi's medical records. CP 84-100. And, on April 2, 2013, Movahedi was timely served with Thomas' Disclosure of Possible Primary Witnesses, which identified Dr. Reif as a possible primary witness who would testify regarding her findings following the CR 35 exam, her opinions regarding his medical conditions, and her review of Movahedi's medical records. CP 20-22.

Thus, it is abundantly clear that Thomas timely provided a summary of Dr. Reif's opinions to Movahedi in this case prior to trial.

Similarly, Movahedi's argument that Thomas failed to disclose Dr. Reif's opinion that she did not diagnose him with a traumatic brain injury is baseless and is, in fact, belied by Dr. Reif's report itself. A simple reading of Dr. Reif's report establishes that Dr. Reif **did not** diagnose Movahedi with a traumatic brain injury. In her written report, Dr. Reif only diagnosed Movahedi with cervical, thoracic, and wrist sprains as being causally related to the auto accident. CP 88. Notably absent from Dr. Reif's diagnosis of injuries causally related to the accident is a diagnosis of a traumatic brain injury and therefore, by obvious implication, Dr. Reif did **not** diagnosis Movahedi with a traumatic brain injury.

Furthermore, none of Movahedi's treating providers' medical records contain a diagnosis of a traumatic brain injury. The Overlake Medical Center emergency room records diagnosed him with cervical and wrist sprains. CP 159. Dr. Gan's records establish diagnoses of neck, back, and wrist sprains, and the neck sprain was determined to be the cause of his initial headaches after the accident. CP 160-161; RP 12:12-15. The medical records also confirmed that Movahedi fully healed from these injuries after one month of acupuncture treatment. CP 161-167. Even Dr. Gan, who claimed at trial that he diagnosed Mr. Movahedi with a traumatic brain

injury in December 2011, six months after the auto accident, did not include any such diagnosis of a traumatic brain injury in his medical records. In the absence of any diagnosis or even suggestion of a traumatic brain injury in any of Movahedi's medical records, and no assertion by Movahedi that he suffered such an injury until just shortly before the September 2013 trial, after his neurologist testified that the epilepsy/seizure disorder was not related to the accident (CP 114:8; 127:4-5; 172-173), there was no reason for Dr. Reif to specifically state in her February 2013 report that Movahedi had not incurred a traumatic brain injury.

In short, the record undeniably establishes that Thomas did not fail to disclose Dr. Reif's opinions. The absence of a traumatic brain injury is evident in Dr. Reif's report. The trial court properly exercised its discretion and allowed Dr. Reif to testify at trial that she did not diagnose Movahedi with a traumatic brain injury as a result of the accident.

2. Even If Thomas Had Violated A Discovery Rule, Exclusion Of Testimony Is Not A Proper Sanction Unless The Violation Was Willful And the Moving Party Was Substantially Prejudiced.

The trial court exercises broad discretion in imposing discovery sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Mayer v. Sto. Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). If a court finds the existence of a discovery violation, any sanctions

imposed should be "proportional to the nature of the discovery violation and the surrounding circumstances" of the case. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002). Generally, courts may only impose the least severe sanction "that will be adequate to serve its purpose in issuing a sanction." *Teter v. Deck*, 174 Wn.2d 207, 216, 274 P.3d 336 (2012).

Exclusion of testimony is an extreme sanction. *In Re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1998). In fact, "it is an abuse of discretion to exclude testimony as a sanction for discovery violations absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." *Id.*, citing *Rice v. Janovich*, 109 Wn.2d 48, 56, 742 P.2d 1230 (1987). Thus, when witnesses are disclosed late, their "testimony will be admitted absent a willful violation, substantial prejudice to the non-violating party, and the insufficiency of sanctions less drastic than exclusion." *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380 (2014). Willfulness is not established by the mere fact of an alleged violation of a discovery rule, "something more is needed." *Jones*, 179 Wn.2d at 345.⁵

⁵ Movahedi's reliance on KCLR 26(k)(4) to argue that the trial court abused its discretion in admitting Dr. Reif's testimony regarding the absence of a traumatic brain injury, is misplaced. KCLR 26(k)(4) creates a presumption that late-disclosed witnesses must be excluded unless "good cause" is shown. However, the Washington Supreme Court in *Jones v. City of Seattle*, 179 Wn.2d 322, 345, 314 P.3d 380 (2014), specifically holds that

a. Movahedi has failed to show willful nondisclosure.

Movahedi has completely failed to show that Thomas engaged in intentional nondisclosure, willful violation of a court order, or other unconscionable conduct as required to support exclusion of testimony. First, Thomas did not fail to timely identify Dr. Reif as a possible witness, and Movahedi does not argue that her identity was untimely disclosed. Second, Movahedi does not assert that Thomas willfully violated any court order. Third, Movahedi does not and cannot establish that Thomas or his defense counsel engaged in any unconscionable conduct to warrant exclusion of Dr. Reif's testimony. Instead, Movahedi merely argues that Thomas failed to respond to an interrogatory seeking the opinions of experts retained by Thomas. This is both misleading and wholly insufficient for a finding of willful and intentional nondisclosure. While Thomas may not have served a pleading entitled "Supplemental Response" outlining Dr. Reif's opinions, it is undisputed that Thomas timely provided Movahedi with Dr. Reif's report, which set forth Dr. Reif's opinions in great detail.

KCLR 26(k)(4) is subordinate to Supreme Court precedent that holds that "late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion." *Jones*, 179 Wn.2d at 343, (emphasis added), citing *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688 132 P.3d 115 (2006).

Furthermore, this case is nothing like *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009), a case heavily quoted and relied upon by Movahedi. In *Magana*, the plaintiff was rendered a paraplegic when the vehicle he was riding in was involved in an accident and he was thrown out of the rear window of the vehicle. *Id.* at 576. Plaintiff filed suit against Hyundai alleging his injuries were proximately caused, in part, by a design defect in the vehicle which allowed his seat to collapse. *Id.* at 577. During discovery, plaintiffs sought information of other complaints, suits, notices, lawsuits or incidents of alleged seat back failure on Hyundai vehicles. *Id.* Hyundai failed to properly respond to the discovery, claiming no such complaints had been made.

After a verdict was rendered in plaintiff's favor, the Court of Appeals reversed for an unrelated evidentiary error, and the case was remanded for trial on the issue of liability while the jury's damages verdict would not be disturbed. *Id.* at 578-579. Thereafter, plaintiff filed a motion to compel production of the information previously sought regarding other seat backs, which was granted. *Id.* at 579. After significant delay, Hyundai finally provided the requested discovery, which included numerous documents related to other complaints of seat back failure, police reports, photographs of expert records, deposition transcripts, and records from its consumer "hotline" database. Nine different reports of seat back failure

were included in the production. *Id.* at 580. Plaintiff moved for a default judgment against Hyundai arguing that it would be impossible for him to prepare a proper case with the significantly delayed but recent production of other similar incidents. *Id.* The trial court granted the motion, finding a willful and prejudicial discovery violation. *Id.* at 581-582, 584. The entry of the order of default was upheld by the Washington Supreme Court because the record established that Hyundai had willfully sought to frustrate and undermine truthful pretrial discovery efforts, by providing false, misleading and evasive answers to discovery. *Id.* at 585-586. The facts and the Court's conclusion in *Magana* have absolutely no similarity or relevance to the facts of this case. Unlike Hyundai, Thomas did not wilfully violated any discovery rule, and did not provide false, misleading or evasive answers to discovery. Thomas timely and thoroughly disclosed Dr. Reif's opinions in her written report.

b. Movahedi has failed to establish that his ability to prepare for trial was substantially prejudiced.

A trial court abuses its discretion by excluding testimony for an alleged willful violation of discovery unless the record establishes that the willful violation substantially prejudiced the opponent's ability to prepare for trial. *In re Estate of Foster*, 55 Wn. App. 545, 549, 779 P.2d 272 (1989). Here, while Movahedi summarily claims he was prejudiced by an alleged

failure to disclose Dr. Reif's opinion that she did not diagnose him with a traumatic brain injury in the accident, Movahedi fails to cite to any evidence in the record, and fails to provide any argument or reasoned analysis, to establish substantial prejudice.⁶ Instead, he again erroneously relies on *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009), and on *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995), to summarily argue that the trial court committed reversible error. *Magana* and *Port of Seattle* share no similarities with the facts of the present case and, therefore, neither case is relevant here.

Plaintiff's ability to prepare for trial in *Magana* had been substantially prejudiced as a result of Hyundai's egregious actions in refusing to respond to discovery, because plaintiff could not have located the evidence regarding other complaints and problems with the seat backs in Hyundai's autos on his own, "as others who had accidents involving Hyundai vehicles [were] no longer living, [had] disappeared, or [had] discarded their evidence." 167 Wn.2d at 590. In addition, "evidence that could be analyzed by experts ha[d] been lost because of the time that ha[d] elapsed between when Hyundai should have disclosed the information and the time it was compelled to do so – more than five years later." *Id.*

⁶ See Brief of Appellant at pages 14-15.

In *Port of Seattle*, an eminent domain proceeding to determine the fair market value of the property owner's property, substantial prejudice to the Port was established when a mere seven days before trial, the property owner's expert witness **significantly changed** his testimony regarding the fair market value of the property. 127 Wn.2d. at 209. The expert's conclusions as to fair market value changed from \$4.3 million to \$65-\$70 million, two widely disparate conclusions. In changing his opinion on the fair market value, the expert also completely changed the database upon which he based the fair market value. The original \$4.3 million value was based on 88 comparable, while the \$65-\$70 million value was based on 237 comparable. *Id.* The Supreme Court determined that the "complete change of the database with expansion of his comparable from 88 to 237," merely a week before trial, prejudiced the Port because it "effectively deprived the Port of the opportunity to investigate [the expert's] comparable." *Id.* at 209-210. On these facts, the Supreme Court affirmed the trial court's exclusion of the expert's testimony. *Id.* at 210.

In the present case, the record is devoid of any prejudice to Movahedi's trial preparation by Dr. Reif's testimony that she did not diagnose Movahedi with a traumatic brain injury as a result of the auto accident. Dr. Reif **did not change** her testimony at any time, and she **did not change** any of her opinions from her written report. As the trial court

properly determined, the fact that Dr. Reif did not diagnose Movahedi with a traumatic brain injury, is implicit in her written report. RP 32-33. Dr. Reif's report clearly states that the only injuries and diagnosis she believed Movahedi incurred in the auto accident were cervical, thoracic, and wrist sprains, with accompanying initial headaches. Hence, it is undisputable that Dr. Reif did not diagnose Movahedi with a traumatic brain injury. There was no new testimony, there was no surprise, and there clearly was no prejudice to Movahedi.

To the extent Movahedi is arguing that he was prejudiced by the admission of Dr. Reif's opinion because without it, Dr. Gan's testimony that he diagnosed Movahedi with a brain injury would have been uncontested, that argument also fails. The credibility of witnesses and the weight to be given to the evidence are matters which rest within the province of the jury. *Burke v. Pepsi-Cola Bottling Co. of Yakima*, 64 Wn.2d 244, 246, 391 P.2d 194, 195 (1964). A jury is free to disbelieve a witness. *Morse v. Antonellis*, 149 Wn. 2d 572, 574, 70 P.3d 125, 126 (2003). Credibility determinations cannot be reviewed on appeal. *Id.*

Indeed, on cross examination, Dr. Gan admitted that his diagnosis of a traumatic brain injury was made six months after the accident, and two months after he had determined that Movahedi was completely healed from the accident. RP 16:16-20; Supp. RP 14:22-25; 15:1-16; 6:4-21; 7:9-16;

17:1-19. Dr. Gan also admitted that no other treating providers had diagnosed Movahedi with a traumatic brain disorder, including the emergency room providers on the day of the accident. Supp. RP 6:4-21; 7:9-16; 10:13-24; 11:4-7. Dr. Gan admitted, too, that the neurologist to whom he referred Movahedi, diagnosed Movahedi with epilepsy/seizure disorder, and that disorder was not related to the auto accident. Supp. RP 5:9-24; 6:1-21; 7:9-25; 17:17-23.

Thus, there was substantial testimony by Dr. Gan himself, that would allow the jury to discredit and/or disbelieve his diagnosis of traumatic brain injury. The jury could also have easily concluded based on Dr. Gan's testimony and the lack of any written diagnosis of a traumatic brain injury in any of Movahedi's medical records, that Movahedi did not incur a traumatic brain injury in the auto accident. Movahedi, therefore, has failed to satisfy his burden of proving that he was substantially prejudiced by the introduction of Dr. Reif's testimony that she, just like the emergency room providers and his neurologists, did not diagnose Movahedi with a traumatic brain injury. The trial court properly exercised its discretion in ruling that Dr. Reif could so testify and in denying Movahedi's motion for new trial. The court's ruling and order should be affirmed.

C. The Trial Court Properly Exercised Its Discretion In Denying Movahedi's Motion For New Trial On Grounds Of Inadequate Damages Because The Jury's Verdict Is Within The Range Of Credible Evidence.

The determination of the amount of damages to award lies solely within the province of the jury. *Kadmiri v. Claasen*, 103 Wn. App. 146, 150, 10 P.3d 1076 (2000). Courts are reluctant to interfere with a jury's damage award when fairly made. *Id.* The denial of a motion for new trial on grounds of inadequate damages will be reversed on appeal only where the moving party can establish that the trial court abused its discretion. *Id.*

When a verdict is within the range of credible evidence, the trial court has no discretion to find that passion or prejudice affected the verdict. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989). "The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered." *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1984), citations omitted.

Here, the jury awarded Movahedi the stipulated medical expenses of \$6,970.00, and \$650.00 in general damages. CP 56. This award is clearly within the range of credible evidence. The undisputed evidence established

that Movahedi incurred cervical and wrist sprains with headaches as a result of the accident, and that he was fully healed from those injuries after undergoing six sessions of acupuncture. CP 159; 161-167; Supp. RP 10:22-25-11:1-7; 12:2-23; 14:13-25; 15:1-8. Dr. Gan testified that he did not diagnose Movahedi with a traumatic brain injury until December 2011, six months after the accident. RP 16:16-25; 17:1-8. And on cross examination, Dr. Gan admitted that the Overlake Medical Center emergency records on the day of the accident did **not** include a diagnosis a traumatic brain injury or concussion as a result of the accident. Supp. RP 10:13-25; 11:1-7. The jury was not presented with any written confirmation in any medical records following the accident that Movahedi was diagnosed with a traumatic brain injury. The neurologists did not diagnose Movahedi with a traumatic brain injury, instead, they diagnosed him with epilepsy/seizure disorder, a disorder that undisputedly is not causally related to the auto accident. Supp. RP. 5:9-16; 6:4-20. The jury, therefore, was entitled to disregard Dr. Gan's late and unsubstantiated diagnosis of traumatic brain injury. Accordingly, the jury's \$650.00 general damage award was well within the range of credible evidence.

Movahedi's argument that the verdict is not supported by the evidence is not substantiated by the record, and in fact, Movahedi does not even cite to any portion of the record to support his argument. Instead,

Movahedi simply relies on two cases that simply have no application to the facts in this case, *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997) and *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993).

In *Palmer*, the jury awarded plaintiffs damages equal to their special damages. The plaintiffs moved for a new trial arguing the verdict was insufficient because it did not include an award of general damages. 132 Wn.2d at 196. While explaining that there is no per se rule that general damages must be awarded whenever special damages are uncontroverted, the Court noted that if a plaintiff substantiates his claim for pain and suffering with evidence, he is entitled to some amount for that pain and suffering. *Id.* at 201. But in the present case, the jury did award general damages to Movahedi, thus providing him some amount for his alleged pain and suffering. The fact that the award of general damages is not the amount Movahedi had hoped for, does nothing to establish that the jury's verdict is not supported by the evidence. In fact, based on the evidence presented, the jury reasonably could have concluded that Movahedi suffered nothing more than cervical and wrist sprains with headaches as a result of the accident, and that he was fully healed from those injuries within one month after undergoing six sessions of acupuncture, and on that basis, determined that \$650.00 was an appropriate award for his alleged pain and suffering.

Krivanek also is not applicable in this case. That case stands for the proposition that “[w]here special damages are undisputed, and the injury and its cause is clear, the court has little hesitancy in granting a new trial when the jury does not award these amounts.” 72 Wn. App. at 636. But here, Movahedi’s special damages were undisputed and the jury did award him the full amount of those damages.

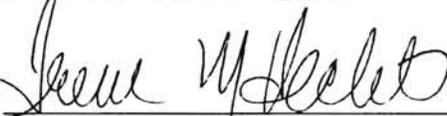
Thus, based upon the record, it is patently clear that the jury’s verdict in this case was supported by substantial evidence and, therefore, the trial court did not abuse its discretion in denying Movahedi’s motion for new trial.

V. CONCLUSION

For all the foregoing reasons, Thomas respectfully requests the Court affirm the trial court’s denial of Movahedi’s oral motion in limine regarding Dr. Reif, and affirm the trial court’s denial of his motion for new trial.

RESPECTFULLY SUBMITTED this 15th day of October, 2014.

KELLER ROHRBACK L.L.P.

By 

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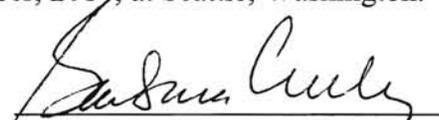
Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on October 15, 2014, I caused to be served by Legal Messenger and/or Email and U.S. Mail, a true and correct copy of this document to:

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